

# TRAQUAIR DATA SYSTEMS, INC. TERMS & CONDITIONS OF SALE

(THREE PAGE DOCUMENT)

July 1993

## 1. GENERAL

All orders are accepted and Goods supplied subject to the following express terms and conditions (the "Seller's standard conditions of sale") and, save to the extent that the exclusion or restriction of liability may be prohibited by statute, all other conditions, warranties and representations, expressed or implied and statutory or otherwise, except as to title, are hereby excluded. Any order placed by a Buyer shall constitute an offer to contract upon these terms and conditions and no addition thereto or variation therefrom, whether contained in the Buyer's order or otherwise, shall apply unless expressly agreed in writing by Seller. Buyer agrees to execute and return to Seller any Software License Agreement or License Agreements provided by Seller which may be necessary prior to the use of any or all software products ordered.

## 2. DEFINITIONS

"**The Goods**" means the article or things or any of them or any part or parts of them supplied or to be supplied by the Seller to the Buyer under and in accordance with the Seller's standard conditions of sale. "**The Manufacturer**" means the person, persons, partnership, or incorporated body by whom the Goods were manufactured or produced. "**The Supplier**" means the Manufacturer or (as the case may require) the person, persons, partnership, or incorporated body by whom the Goods were supplied to the Seller.

## 3. ORDERS

All orders are subject to availability of goods and to written acceptance by the Seller. Any prior confirmation by the Seller by telephone, or otherwise shall be deemed to be provisional only.

## 4. PRICES

All prices are based, in part, in the applicability of the Seller's standard conditions of sale. Seller reserves the right to increase its prices should additional terms and conditions be required. Seller reserves the right to increase the selling price of any or all Goods ordered by Buyer which have not been shipped from Seller's place of business prior to an increase in Seller's cost of such goods. Seller's prices do not include sales, use, excise or similar taxes. Accordingly, the Buyer shall, in addition to prices specified by the Seller, pay any sales, use or similar tax attributable to the sales of the goods covered hereby or in lieu thereof provide the Seller with tax exemption certificates acceptable to the taxing authorities. Catalogues, price lists and other advertising literature or material as used by the Seller are intended to provide an indication only as to price and range of goods offered and no prices, descriptions or other particulars contained therein shall be binding on the Seller.

## 5. SOFTWARE PRODUCTS

It is the practice of Suppliers of Goods consisting of or including computer software or copies thereof ("proprietary software") to retain title to any copyright or other intellectual property rights therein ("the rights"). The Seller only transfers to the Buyer such title in the Goods as the Seller may have and, save as herein provided for, no warranty is given in the respect of the exercise by any third party of such rights against the Buyer. Subject to any express license in writing entered into by the Buyer with the Seller or with the owner of such rights, the limit of the right or interest in any such proprietary software which the Buyer shall receive shall be such right or license to use or enjoy such proprietary software as may be permitted or conferred by the Seller or, other, by the owner of the rights, and which is either manifest from the proprietary software concerned (or any document attached to or accompanying such proprietary software) or which has otherwise been notified by the Seller to the Buyer in writing.

## 6. CARRIAGE AND DELIVERY

Unless otherwise specifically agreed, prices do not include delivery charges to the Buyer and the Seller reserves the right to levy a charge for delivery to any destination advised by the Buyer. Specific requests for more than one delivery shall be subject to agreement by the Seller, and the Seller reserves the right to levy additional charges therefor. Where the Seller agrees to make delivery by installments, every installment shall be deemed to be the subject matter of a separate contract.

## 7. PASSING OF RISK AND TITLE

Risk in the Goods shall pass to the Buyer on delivery. Title in the Goods shall remain in the Seller until payment in full therefor has been made by the Buyer. If payment in full is not made in accordance with the Seller's standard conditions of sale the Seller may require the Buyer to return the Goods forthwith and, if the requirement is not immediately complied with, the Seller shall be entitled at any time and without notice to retake possession of the Goods (and for that purpose to enter the premises occupied by the Buyer and sever the Goods from anything they

are attached to, without being responsible for any damage thereby caused), without prejudice to any other remedy that may be available to the Seller.

#### **8. DEFECTS AND RETURNS PROCEDURE**

(a) Written notice of any claimed defect within the warranty period must be presented to the Seller immediately upon Buyer's discovery of the defect. Seller shall have the option to inspect any Goods claimed to be defective, either at the Seller's place of business or at the Buyer's place of business, while the Goods are in the claimed defective condition. Operation of the Goods must be suspended until written clearance is issued for continued operation, provided that Seller, upon receipt of written notice of a claimed defect, will proceed without unreasonable delay to remedy any defect coming within the warranty which is found to exist.

(b) **NO RETURN OF GOODS SHALL BE ACCEPTED BY SELLER UNLESS SELLER HAS HAD AN OPPORTUNITY TO INSPECT THE GOODS OR HAS EXPRESSLY AUTHORIZED THE RETURN OF THE GOODS TO THE SELLER.** Cost of transportation and insurance of Goods being returned to Seller will be the responsibility of the Buyer. Replacement or repaired Goods being returned to the Buyer will be shipped F.O.B. Point of Origin.

#### **9. PAYMENT**

Save as herein expressly provided, unless otherwise specifically negotiated and agreed, all accounts are: (a) Payable cash on delivery or against proforma invoice, and (b) payable net, not later than thirty (30) days from the date of the invoice. (c) Failure to pay within the specified period may invalidate warranty. (d) The Seller reserves the right to charge the Buyer one and one half percent (1.5%) per month (maximum eighteen percent (18%) APR) for all invoices outstanding for more than thirty (30) days. The Seller also reserves the right to charge the Buyer any such reasonable costs that are incurred in collection of the overdue account and any legal fees that are incurred thereby.

#### **10. DELIVERY**

Any times quoted for delivery are to be treated as estimates only and without prejudice, although every endeavor will be made by the Seller to adhere to them. Quotations or offers of Goods ex. stock are subject to the Goods being unsold at the time of receipt of the Buyer's written order. All delivery dates are calculated from the date of acceptance of the Buyer's written order or from the date when all outstanding technical details have been resolved, whichever is later.

#### **11. BUYER'S DEFAULT, CANCELLATIONS, AND RE-SCHEDULING**

(a) Buyer shall be considered in default in the event that Buyer (i) fails to make any payment due hereunder or under any other agreement with Seller, (ii) fails to perform or improperly performs any of its other obligations with Seller, (iii) commits an act of bankruptcy, becomes subject to any proceeding under the Bankruptcy Code, becomes insolvent, or has any substantial part of its assets subject to levy, seizure, assignment or sale for and by any creditor or government agency, or (iv) ceases business.

(b) Requests by a Buyer for cancellation of any order or for re-scheduling of deliveries will only be considered by the Seller if made in writing, and shall be subject to the written acceptance of the Seller in accordance with sub-clause 11(a) as aforesaid, or if cancellation or re-scheduled at the request of the Buyer as aforesaid then the Buyer shall indemnify the Seller against all loss, cost (including the cost of labor and materials used and overheads incurred), damages, charges, and expenses arising out of the order and the cancellation or re-scheduling thereof.

#### **12. INSPECTION AND ACCEPTANCE OF GOODS**

Final inspection and acceptance of Goods shall be at the Buyers facility. Buyer shall be responsible for conducting the final acceptance tests, if necessary. These tests shall be completed promptly and in no event later than thirty (30) days after delivery, at which time Buyer must either accept or reject goods in accordance with paragraph 8. If Seller does not receive notification of acceptance or rejection of the Goods within the thirty (30) days of delivery, the Goods shall be deemed to have been accepted. Any discrepancy in shipment quantity must be reported within five (5) working days of delivery of Goods.

#### **13. FORCE MAJEURE**

The Seller shall not be liable for the cancellation by it of any order or any unfulfilled part thereof or for effecting partial delivery or performance if performance by the Seller is prevented or delayed, whether directly or indirectly, by any cause whatsoever beyond the reasonable control of the Seller, whether such cause existed or was foreseeable at the date of acceptance of the Buyer's order by the Seller or not and, without prejudice to the generality of the foregoing, any cause shall be deemed to prevent, hinder or delay the Seller if the Seller is thereby prevented, hindered or delayed from fulfilling other commitments, whether to the Buyer or to third parties.

#### **14. WARRANTY, DISCLAIMER, LIMITATION OF LIABILITY AND REMEDY**

(a) The Seller warrants to the original Buyer that subject to the exceptions contained herein, Goods sold directly by the Seller or through an authorized representative are in accordance with their Manufacturers specifications and will be free from defects which are not commercially acceptable in material and workmanship for a period of twelve (12) months, or in the case of storage media for computer software, for a period of ninety (90) days, from date of

delivery when used by the original Buyer within limits of rated and normal usage. **SELLER DOES NOT WARRANT THAT ANY COMPUTER SOFTWARE GOODS WILL BE FREE FROM ERROR OR WILL MEET THE SPECIFICATION REQUIREMENTS OF THE BUYER.** During the warranty period, Seller will either repair, replace, or refund the purchase price of Goods found to be defective by Seller's inspection, in the manner provided herein.

(b) Seller's obligation and liability with respect to goods not manufactured by the Seller shall be limited to the extent of express warranties received by Seller from Manufacturer or Supplier. The Seller will not consider any claim for compensation, indemnity, or refund until liability (if any) has been established or agreed with the Manufacturer or Supplier and, where applicable, any relevant insurance company and under no circumstances shall the invoiced costs of the Goods be deducted or set off by the Buyer until the Seller has passed a corresponding credit note, and in the case of defects or faulty workmanship in the Goods, the Buyer shall not be entitled to receive any compensation, credit or refund in excess of that received by the Seller under any guarantee or warranty given to it by the Manufacturer or Supplier.

(c) This warranty is void and of no effect, and Seller shall not be liable for any breach of warranty, express or implied, if the Goods shall have been repaired or altered by persons other than Seller, unless expressly authorized in writing by Seller, or if the Goods are operated or installed contrary to Seller's instruction or subject to misuse, negligence or accident.

(d) The Buyer shall defend and indemnify the Seller against all claims made against the Seller by any third party in respect thereof.

(e) **THERE ARE NO OTHER WARRANTIES THAT EXTEND BEYOND THE WARRANTY HEREIN CONTAINED. THE WARRANTY STATED HEREIN IS IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, AND IS IN LIEU OF ANY AND ALL OTHER OBLIGATIONS OR LIABILITIES ON SELLER'S PART.** No statement, oral or written, inconsistent with this warranty is binding on the seller. No agent, employee or representative of the Seller, other than an officer duly authorized, has any authority to bind the Seller to any confirmation, representation or warranty concerning the Seller's product beyond that specifically included in the warranty contained herein. **UNDER NO CIRCUMSTANCES WILL THE SELLER BE LIABLE FOR ANY INCIDENTAL OR CONSEQUENTIAL DAMAGE OR EXPENSE OF ANY KIND, INCLUDING, BUT NOT LIMITED TO, PERSONAL INJURIES AND LOSS OF PROFITS ARISING IN CONNECTION WITH ANY CONTRACT OR WITH THE USE, ABUSE, UNSAFE USE OR INABILITY TO USE SELLER'S GOODS.** Seller's maximum liability shall not exceed, and Buyer's remedy is limited to, either (i) repair or replacement of the defective part or product, or, at the Seller's option, (ii) return of the product and refund of the purchase price, and such remedy shall be the Buyer's entire and exclusive remedy.

(f) The sole purpose of the stipulated exclusive remedy shall be to provide the Buyer with free repair or replacement of defective Goods, or refund of the purchase price, in the manner provided herein. This exclusive remedy shall not be deemed to have failed of its essential purpose so long as Seller is willing and able to repair or replace defective Goods, or to refund the purchase price, in the prescribed manner.

#### **15. US GOVERNMENT REQUIREMENTS**

The Buyer is advised that the Goods may be subject to US Government export regulations. Where these apply, it is the Buyer's sole responsibility to obtain authorization from the US Government before re-exporting the Goods from the country of purchase.

#### **16. SEVERABILITY**

If and to the extent that any provision or any part of a provision of the Seller's standard conditions of sale is illegal, void or unenforceable for any reason, then such provision or part thereof (as the case may be) shall be deemed to be severable from the remaining provisions or parts of the relevant provisions (as the case may be) all of which remaining provisions shall remain in full force and effect.

#### **17. GOVERNING LAW**

This agreement and performance by the parties hereunder shall be construed in accordance with the laws of the state of New York.

#### **18. DISPUTES**

All disputes under any contract concerning the Goods not otherwise resolved between Seller and Buyer shall be resolved in a court of competent jurisdiction for the location of the Seller's place of business filing the order, and in no other place, provided, however, that in Seller's sole discretion such action may be heard in some other place designated by Seller (If necessary to acquire jurisdiction over third person), so that the dispute can be resolved in one action. Buyer agrees to appear in any such action and hereby consent to the jurisdiction of such court. No action, regardless of form arising out of, or in any way connected with the Goods furnished or services rendered by Seller, may be brought by Buyer more than one (1) year after the cause of the action has accrued.