

# PHILIPPI-HAGENBUCH, INC.

## CONTRACT FABRICATION TERMS AND CONDITIONS

These Terms and Conditions (“**Terms**” or “**Agreement**”) govern the fabrication of Philippi-Hagenbuch, Inc. (“**PHIL**”) products by individuals or entities (“**Fabricator**”) who fabricate Goods and Services (defined below) pursuant to a Purchase Order (defined below). By fabricating any Goods for PHIL, Fabricator accepts these Terms (whether on behalf of person placing the order or a legal entity such person represents).

We may revise these Terms or any additional terms and conditions that are relevant to a particular Goods from time to time to reflect changes in the law or to the Goods. We will post the revised terms on this site with a “last updated” date. PLEASE REVIEW THE SITE ON A REGULAR BASIS TO OBTAIN TIMELY NOTICE OF ANY REVISIONS. IF YOU CONTINUE TO ACCEPT PURCHASE ORDERS FOR GOODS AND/OR SERVICES AFTER THE REVISIONS TAKE EFFECT, YOU AGREE TO BE BOUND BY THE REVISED TERMS. You agree that we shall not be liable to you or to any third party for any modification of these Terms.

In consideration of the mutual covenants and agreements hereinafter set forth and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

**1. Fabrication of Goods (“Services”).** PHIL shall contract with Fabricator for fabrication Services set forth in the applicable ordering document which has been expressly accepted and agreed to by an authorized representative of PHIL (“Purchase Order”) in the quantities and at the Prices as defined the Purchase Order and upon the terms and conditions set forth in this Agreement.

**2. Fabrication Standards.** Fabricator agrees to perform the fabrication services according to Engineering Prints, Specifications and Standards as set exclusively by PHIL. If Fabricator wishes to deviate from PHIL Fabrication Standards, the Fabricator must do so in writing, with receipt of agreement in writing by authorized PHIL personnel.

The following Fabrication Standards are to be strictly adhered to:

(a) All Components supplied by PHIL will be cut to size and where bent/formed, formed to print. If any Furnished Parts are found or thought to be not to print, Philippi-Hagenbuch, Inc. must be notified prior to any corrective action taken by Fabricator.

(b) All Components provided by Fabricator must adhere to PHIL’s standards and sizes, including material cut to size and where bent/formed, formed to print. When in doubt, please contact PHIL for clarity.

(c) All consumables, including steel, welding wire, welding gas mixtures, paint, etc. must adhere to PHIL’s standards and not deviate. Any deviation from PHIL’s standards must be agreed to in writing by an authorized PHIL Associate.

**3. PHIL to Supply to Fabricator:** Materials, assemblies and consumables supplied by PHIL to Fabricator will vary by job. Please consult your Purchase Order for the items PHIL will supply on a per-project basis. Any items not expressly indicated on the Purchase Order that will be supplied by PHIL are expected to be supplied by the Fabricator regardless of mention in Purchase Order or Fabricator Quotation.

(a) Confidential PDF Drawings & 3D STEP files for the project

(b) Body steel plate components, cut & formed ready for welding with some small assemblies possibly finish welded.

#### **4. Fabricator to Supply to PHIL "Delivery":**

(a) Fabricator should create a schedule of the Services and adhere to such schedule. Fabricator should communicate with PHIL immediately upon learning that the timeline of a schedule is not going to be met. The Services will be delivered within a reasonable time after the date of this Agreement, subject to availability of finished Goods and date mutually agreed upon by PHIL and Fabricator.

(b) Fabricator to complete "Daily Fabrication Production Status Report" and fax or scan and email to PHIL at [info@philsystems.com](mailto:info@philsystems.com) on a daily basis.

(b) PHIL shall deliver the raw material, cut and formed material, and/or assemblies as set out in the Purchase Order using PHIL's standard methods for packaging and shipping such Components. Fabricator shall take delivery of the Goods as expressly set forth in an Purchase Order, all shipments are EXW Delivery Point, Incoterms® 2010.

(c) PHIL may, in its sole discretion, without liability or penalty, make partial shipments of Goods to Fabricator.

(d) PHIL may, from time to time, request Fabricator to provide the raw material for such jobs. Any request must be provided and agreed to in writing in the form of a Purchase Order.

**5. Non-Delivery.** The quantity of any installment of Goods as recorded by PHIL on dispatch from PHIL's place of business is conclusive evidence of the quantity received by Fabricator on delivery unless Fabricator can provide conclusive evidence proving the contrary. PHIL shall not be liable for any non-delivery of Goods unless Fabricator gives written notice to PHIL of the non-delivery within 7 days of the date when the Components would in the ordinary course of events have been received. Any liability of PHIL for non-delivery of the Components shall be limited to the replacement of lost Components.

**6. Title and Risk of Loss.** Title of components and final goods resides with PHIL. Risk of loss passes to Fabricator upon delivery of the Goods at the Delivery Point.

#### **7. Inspection and Rejection of Nonconforming Services.**

(a) PHIL shall have the opportunity to inspect the Goods and Services throughout the fabrication process ("**Inspection Period**"). PHIL will be deemed to have accepted the Goods and/or Services unless it notifies Fabricator in writing of any Nonconforming Services during the Inspection Period and furnishes such written evidence or other documentation as reasonably required by Fabricator. "**Nonconforming Services**" means only the following: (i) quality of fabrication services is different than identified in this Agreement; or (ii) quality of fabrication services is different than identified in the Project Scope of Work; or (iii) fabrication services is different than .

(b) If PHIL timely notifies Fabricator of any Nonconforming Services, Fabricator shall, in its sole discretion, (i) repair such Nonconforming Services with conforming Services, or (ii) credit or refund the Cost for PHIL to have the

Nonconforming Services repaired. Fabricator shall ship, at its expense and risk of loss, the component that includes the Nonconforming Service to PHIL's facility located at 7424 W Plank Rd., Peoria, IL 61604.

(c) Fabricator acknowledges and agrees that the remedies set forth in Section 5(b) are PHIL's exclusive remedies for the delivery of Nonconforming Services.

**8. No Setoff.** Fabricator shall not, and acknowledges that it will have no right, under this Agreement, any other agreement, document, or law, to withhold, offset, recoup, or debit any amounts owed (or to become due and owing) to PHIL or any of its affiliates, whether under this Agreement or otherwise, against any other amount owed (or to become due and owing) to it by PHIL or its affiliates, whether relating to PHIL's or its affiliates' breach or non-performance of this Agreement or any other agreement between Fabricator or any of its affiliates, and PHIL or any of its affiliates, or otherwise.

### **9. Warranties.**

(a) PHIL warrants to Fabricator that for a period of 1 year from the date of shipment of the Goods ("**Warranty Period**"), such Goods will materially conform to the specifications set forth in the Purchase Order and PHIL's published specifications in effect as of the date of this Agreement and will be free from material defects in material and workmanship.

**(b) EXCEPT FOR THE WARRANTY SET FORTH IN SECTION 9(a), PHIL MAKES NO WARRANTY WHATSOEVER WITH RESPECT TO THE GOODS, INCLUDING ANY (i) WARRANTY OF MERCHANTABILITY; (ii) WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE; (iii) WARRANTY OF TITLE; OR (iv) WARRANTY AGAINST INFRINGEMENT OF INTELLECTUAL PROPERTY RIGHTS OF A THIRD PARTY; WHETHER EXPRESS OR IMPLIED BY LAW, COURSE OF DEALING, COURSE OF PERFORMANCE, USAGE OF TRADE, OR OTHERWISE. PHIL IS FABRICATING THE GOODS BASED ON THE SPECIFICATIONS PROVIDED BY FABRICATOR AND IS NOT PROVIDING SERVICES AND SHALL HAVE NO LIABILITY IN RELATION TO THE DESIGN OR ANY OTHER SERVICES TO FABRICATOR.**

(c) Products manufactured by a third party ("**Third-Party Product**") may constitute, contain, be contained in, incorporated into, attached to, or packaged together with, the Goods. Third-Party Products are not covered by the warranty in Section 9(a). For the avoidance of doubt, **PHIL MAKES NO REPRESENTATIONS OR WARRANTIES WITH RESPECT TO ANY THIRD-PARTY PRODUCT, INCLUDING ANY (i) WARRANTY OF MERCHANTABILITY; (ii) WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE; (iii) WARRANTY OF TITLE; OR (iv) WARRANTY AGAINST INFRINGEMENT OF INTELLECTUAL PROPERTY RIGHTS OF A THIRD PARTY; WHETHER EXPRESS OR IMPLIED BY LAW, COURSE OF DEALING, COURSE OF PERFORMANCE, USAGE OF TRADE, OR OTHERWISE.**

(d) PHIL shall not be liable for a breach of the warranty set forth in Section 9(a) unless: (i) Fabricator gives written notice of the defect, reasonably described, to PHIL within 7 days of the time when Fabricator discovers or ought to have discovered the defect; (ii) PHIL is given a reasonable opportunity after receiving the notice to examine such Goods and Fabricator (if requested to do so by PHIL) returns such Goods to PHIL's place of business at PHIL's cost for the examination to take place there; and (iii) PHIL reasonably verifies Fabricator's claim that the Goods are defective.

(e) PHIL shall not be liable for a breach of the warranty set forth in Section 9(a) if: (i) Fabricator makes any further use of such Goods after giving such notice; (ii) the defect arises because Fabricator failed to follow PHIL's oral or written instructions as to the storage, installation, commissioning, use, or maintenance of the Goods; or (iii) Fabricator alters or repairs such Goods without the prior written consent of PHIL.

(f) Subject to Section 9(d) and Section 9(e) above, with respect to any such Goods during the Warranty Period, PHIL shall, in its sole discretion, either: (i) repair or replace such Goods (or the defective part(s)) or (ii) credit or refund the Price of such Goods at the pro rata contract rate, provided that if PHIL so requests, Fabricator shall, at PHIL's expense, return such Goods to PHIL.

**(g) THE REMEDIES SET FORTH IN SECTION 9(f) SHALL BE THE FABRICATOR'S SOLE AND EXCLUSIVE REMEDY AND PHIL'S ENTIRE LIABILITY FOR ANY BREACH OF THE LIMITED WARRANTY SET FORTH IN SECTION 9(a).**

#### **10. Limitation of Liability.**

**(a) IN NO EVENT SHALL PHIL BE LIABLE FOR ANY CONSEQUENTIAL, INDIRECT, INCIDENTAL, SPECIAL, EXEMPLARY, PUNITIVE, OR ENHANCED DAMAGES, LOST PROFITS OR REVENUES, OR DIMINUTION IN VALUE, ARISING OUT OF, OR RELATING TO, OR IN CONNECTION WITH ANY BREACH OF THIS AGREEMENT, REGARDLESS OF (i) WHETHER SUCH DAMAGES WERE FORESEEABLE, (ii) WHETHER OR NOT PHIL WAS ADVISED OF THE POSSIBILITY OF SUCH DAMAGES, (iii) THE LEGAL OR EQUITABLE THEORY (CONTRACT, TORT, OR OTHERWISE) UPON WHICH THE CLAIM IS BASED, AND (iv) THE FAILURE OF ANY AGREED OR OTHER REMEDY OF ITS ESSENTIAL PURPOSE.**

**(b) IN NO EVENT SHALL PHIL'S AGGREGATE LIABILITY ARISING OUT OF OR RELATED TO THIS AGREEMENT, WHETHER ARISING OUT OF OR RELATED TO BREACH OF CONTRACT, TORT (INCLUDING NEGLIGENCE), OR OTHERWISE, EXCEED THE TOTAL OF THE AMOUNTS PAID TO FABRICATOR FOR THE SERVICES PROVIDED HEREUNDER, or \$5,000.00 WHICHEVER IS LESS.**

**11. Compliance with Law.** Fabricator is in compliance with and shall comply with all applicable laws, regulations, and ordinances. Fabricator has and shall maintain in effect all the licenses, permissions, authorizations, consents, and permits that it needs to carry out its obligations under this Agreement.

**12. Indemnification.** Fabricator shall indemnify, defend, and hold harmless PHIL and its officers, directors, managers, shareholders, members, partners, employees, agents, affiliates, successors, and permitted assigns (collectively, "**Indemnified Party**") against any and all losses, damages, liabilities, deficiencies, claims, actions, judgments, settlements, interest, awards, penalties, fines, costs, or expenses of whatever kind, including reasonable attorneys' fees, fees and the costs of enforcing any right to indemnification under this Agreement, and the cost of pursuing any insurance providers, relating to any claim of a third party or PHIL arising out of or occurring in connection with the services purchased by PHIL or Fabricator's negligence, willful misconduct, or breach of this Agreement. Fabricator shall not enter into any settlement without PHIL's or Indemnified Party's prior written consent.

**12. Insurance.** During the term of this Agreement, Fabricator shall, at its own expense, maintain and carry insurance in full force and effect which includes, but is not limited to, commercial general liability in a sum no less than \$1,000,000.00 with financially sound and reputable insurers. Upon PHIL's request, Fabricator shall provide PHIL with a certificate of insurance from Fabricator's insurer evidencing the insurance coverage specified in this Agreement. The certificate of insurance shall name PHIL as an additional insured. Fabricator shall provide PHIL with 10 days' advance written notice in the event of a cancellation or material change in Fabricator's insurance policy. Except where prohibited by law, Fabricator shall require its insurer to waive all rights of subrogation against PHIL's insurers and PHIL.

**13. Termination.** In addition to any remedies that may be provided in this Agreement, PHIL may terminate this Agreement with immediate effect upon written notice to Fabricator, if Fabricator: (a) fails to provide Goods and/or Services when due under this Agreement; (b) has not otherwise performed or complied with any of the terms of this Agreement, in whole or in part; or (c) becomes insolvent, files a petition for bankruptcy, or commences or has commenced against it proceedings relating to bankruptcy, receivership, reorganization or assignment for the benefit of creditors; or (d) ownership of Fabricator changes.

**14. Confidential Information.** All non-public, confidential, or proprietary information of PHIL, including, but not limited to, trade secrets, specifications, samples, patterns, designs, plans, drawings, documents, data, business operations, customer lists, pricing, discounts, or rebates, disclosed by PHIL to Fabricator, whether disclosed orally or disclosed or accessed in written, electronic, or other form or media, and whether or not marked, designated, or otherwise identified as "confidential," in connection with this Agreement is confidential, solely for the use of performing this Agreement and may not be disclosed or copied unless authorized by PHIL in writing. Upon PHIL's request, Fabricator shall promptly return all documents and other materials received from PHIL. PHIL shall be entitled to injunctive relief for any violation of this Section. This Section shall not apply to information that is: (a) in the public domain; (b) known to the Fabricator at the time of disclosure; or (c) rightfully obtained by the Fabricator on a non-confidential basis from a third party.

**15. Entire Agreement.** This Agreement, including and together with any related exhibits, schedules, attachments, and appendices, constitutes the sole and entire agreement of the Parties with respect to the subject matter contained herein, and supersedes all prior and contemporaneous understandings, agreements, representations and warranties, both written and oral, regarding such subject matter.

**16. Survival.** Subject to the limitations and other provisions of this Agreement: (a) the representations and warranties of the Parties contained herein shall survive the expiration or earlier termination of this Agreement; and (b) With respect to confidential information that constitutes a trade secret under applicable law, the rights and obligations set forth shall survive the expiration or earlier termination of this Agreement until, if ever, such confidential information loses its trade secret protection other than due to an act or omission of Fabricator. All other provisions of this Agreement shall not survive the expiration or earlier termination of this Agreement.

**17. Notices.** All notices, requests, consents, claims, demands, waivers, and other communications under this Agreement must be in writing and addressed to the other Party at its address set forth in the Purchase Order (or to such other address that the receiving Party may designate from time to time in accordance with this Section). Unless otherwise agreed herein, all notices must be delivered by personal delivery, nationally recognized overnight courier, or certified or registered mail (in each case, return receipt requested, postage prepaid). Except as otherwise

provided in this Agreement, a notice is effective only (a) on receipt by the receiving Party, and (b) if the Party giving the Notice has complied with the requirements of this Section.

**18. Severability.** If any term or provision of this Agreement is invalid, illegal, or unenforceable in any jurisdiction, such invalidity, illegality, or unenforceability shall not affect any other term or provision of this Agreement or invalidate or render unenforceable such term or provision in any other jurisdiction; provided, however, that if any fundamental term or provision of this Agreement, is invalid, illegal, or unenforceable, the remainder of this Agreement shall be unenforceable. Upon a determination that any term or provision is invalid, illegal, or unenforceable, the court may, modify this Agreement to effect the original intent of the Parties as closely as possible in order that the transactions contemplated hereby be consummated as originally contemplated to the greatest extent possible.

**19. Amendments.** No amendment to or modification of or rescission, termination, or discharge of this Agreement is effective unless it is in writing, identified as an amendment to or rescission, termination or discharge of this Agreement and signed by an authorized representative of each Party.

**20. Waiver.** No waiver by any party of any of the provisions of this Agreement shall be effective unless explicitly set forth in writing and signed by the party so waiving. Except as otherwise set forth in this Agreement, no failure to exercise, or delay in exercising, any rights, remedy, power, or privilege arising from this Agreement shall operate or be construed as a waiver thereof, nor shall any single or partial exercise of any right, remedy, power, or privilege hereunder preclude any other or further exercise thereof or the exercise of any other right, remedy, power, or privilege.

**21. Cumulative Remedies.** All rights and remedies provided in this Agreement are cumulative and not exclusive, and the exercise by either Party of any right or remedy does not preclude the exercise of any other rights or remedies that may now or subsequently be available at law, in equity, by statute, in any other agreement between the Parties, or otherwise.

**22. Assignment.** Fabricator shall not assign, transfer, delegate, or subcontract any of its rights or obligations under this Agreement without the prior written consent of PHIL. Any purported assignment, transfer, delegation, or subcontract in violation of this Section shall be null and void. No assignment, transfer, delegation, or subcontract shall relieve Fabricator of any of its obligations hereunder. PHIL may at any time assign, transfer, delegate, or subcontract any or all of its rights or obligations under this Agreement without Fabricator's prior written consent.

**23. Successors and Assigns.** This Agreement is binding on and inures to the benefit of the Parties to this Agreement and their respective permitted successors and permitted assigns.

**24. No Third-Party Beneficiaries.** This Agreement benefits solely the Parties to this Agreement and their respective permitted successors and assigns and nothing in this Agreement, express or implied, confers on any other Person any legal or equitable right, benefit, or remedy of any nature whatsoever under or by reason of this Agreement.

**25. Choice of Law.** This Agreement and all related documents including all exhibits attached hereto, and all matters arising out of or relating to this Agreement, whether sounding in contract, tort, or statute are governed by, and

construed in accordance with and enforced under the laws of the State of Illinois, United States of America (including its statutes of limitations), without giving effect to the conflict of laws provisions thereof to the extent such principles or rules would require or permit the application of the laws of any jurisdiction other than those of the State of Illinois.

**26. Choice of Forum.** Each Party irrevocably and unconditionally agrees that it will not commence any action, litigation, or proceeding of any kind whatsoever against the other Party in any way arising from or relating to this Agreement, including all exhibits, schedules, attachments, and appendices attached to this Agreement, and all contemplated transactions, including, but not limited to, contract, equity, tort, fraud, and statutory claims, in any forum other than the US District Court for the Central District of Illinois or, if such court does not have subject matter jurisdiction, the courts of the State of Illinois sitting in Peoria County, and any appellate court from any thereof. Each Party irrevocably and unconditionally submits to the exclusive jurisdiction of such courts and agrees to bring any such action, litigation, or proceeding only in the US District Court for the Central District of Illinois or, if such court does not have subject matter jurisdiction, the courts of the State of Illinois sitting in Peoria County. Each Party agrees that a final judgment in any such action, litigation, or proceeding is conclusive and may be enforced in other jurisdictions by suit on the judgment or in any other manner provided by law.

**27. WAIVER OF JURY TRIAL. EACH PARTY ACKNOWLEDGES AND AGREES THAT ANY CONTROVERSY THAT MAY ARISE UNDER THIS AGREEMENT, INCLUDING EXHIBITS, SCHEDULES, ATTACHMENTS AND APPENDICES ATTACHED TO THIS AGREEMENT, IS LIKELY TO INVOLVE COMPLICATED AND DIFFICULT ISSUES AND, THEREFORE, EACH SUCH PARTY IRREVOCABLY AND UNCONDITIONALLY WAIVES ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY LEGAL ACTION ARISING OUT OF OR RELATING TO THIS AGREEMENT, INCLUDING ANY EXHIBITS, SCHEDULES, ATTACHMENTS OR APPENDICES ATTACHED TO THIS AGREEMENT, OR THE TRANSACTIONS CONTEMPLATED HEREBY.**

**28. Counterparts.** This Agreement may be executed in counterparts, each of which is deemed an original, but all of which together are deemed to be one and the same agreement.

**29. Relationship of the Parties.** The relationship between the Parties is that of independent contractors. Nothing contained in this Agreement shall be construed as creating any agency, partnership, franchise, business opportunity, joint venture or other form of joint enterprise, employment, or fiduciary relationship between the Parties, and neither Party shall have authority to contract for or bind the other Party in any manner whatsoever. No relationship of exclusivity shall be construed from this Agreement.

A copy of these Terms & Conditions can be found at <https://www.philsystems.com>  
Questions? Please call +1 (309) 697-9200