

# TERMS AND CONDITIONS OF SALE – XYLEM\*

\*Applicable in the Americas and Oceania



(V3 – Effective April 6, 2018)

**1. Agreement, Integration and Conflict of Terms.** These terms and conditions, together with any special conditions expressly incorporated in the quotation or sales form, are to govern any sale between the Seller and Buyer. The Seller shall mean the applicable affiliate of Xylem Inc. that is party to the Agreement (“Seller”). The Buyer shall mean the entity that is party to the Agreement with Seller. This document is an offer or counteroffer by Seller to sell the goods and/or services set forth on the quotation or sales form subject to these terms and conditions and is expressly made conditional on Buyer’s assent to these terms and conditions. Acceptance by Buyer is expressly limited to these terms and conditions. Any additional or different terms and conditions contained in Buyer’s purchase order or other communication shall not be effective or binding upon Seller unless specifically agreed to in writing by Seller; Seller hereby objects to any such conditions, and the failure of Seller to object to specific provisions contained in any purchase order or other communication from Buyer shall not be construed as a waiver of these terms and conditions nor an acceptance of any such provisions. Neither Seller’s commencement of performance nor delivery shall be deemed or construed as acceptance of Buyer’s additional or different terms and conditions. Buyer agrees and consents that these terms and conditions, together with any accompanying quotation and any special conditions or limited process guarantees or documents referred to or included within the quotation and expressly made a part of this agreement is the complete and final agreement between Buyer and the Seller (“Agreement”). In the case of any conflict among the foregoing documents, these terms shall take precedence with the exception of price and delivery which shall be governed by the order acknowledgment (if any) and invoice, and the warranty which shall be governed by Seller’s product documentation. This Agreement supersedes all prior negotiations, representations, or agreements, either written or oral, between the parties and, further, can only be altered, modified or amended with the express written consent of Seller.

**2. Quotation, Withdrawal, Expiration.** Quotes are valid for thirty (30) calendar days from the date of issuance unless otherwise provided therein. Seller reserves the right to cancel or withdraw the quotation at any time with or without notice or cause prior to acceptance by Buyer. There is no Agreement if any conditions specified within the quotation *or* sales form are not completed by Buyer to Seller’s satisfaction within thirty (30) calendar days of Seller’s acknowledgement in writing of an order. Seller nevertheless reserves its right to accept any contractual documents received from Buyer after this 30-day period.

**3. Prices.** Prices apply to the specific quantities stated on the quotation or sales form. Prices include standard packing according to Seller’s specifications for delivery. All costs and taxes for special packing requested by Buyer, including packing for exports, shall be paid by Buyer as an additional charge. To the extent allowed under law, prices are subject to change without notice. The price for the goods does not include any applicable sales, use, excise, Goods and Services Tax, Value Added Tax, or similar tax, duties or levies. Buyer shall have the responsibility for the payment of such taxes if applicable.

**4. Payment Terms.** Seller reserves the right to require payment in advance or C.O.D. and otherwise modify credit terms should Buyer’s credit standing not meet Seller’s acceptance. Unless different payment terms are expressly set forth in the applicable quotation or sales form or order acknowledgment or Sales Policy Manual, goods will be invoiced upon shipment. Payment shall be made in the local currency where Seller’s office is located and to which the order has been submitted. Payment in full is due within thirty (30) days from the invoice date unless otherwise stated in Seller’s documentation. In the event payment is not made when due, Buyer agrees to pay Seller a service or finance charge of the lesser of (i) one and one-half percent (1.5%) per month (18% per annum), or (ii) the highest rate permitted by applicable law, on the unpaid balance of the invoice from and after the invoice due date. Buyer is responsible for all costs and expenses associated with any checks returned due to insufficient funds. All credit sales are subject to prior approval of Seller’s credit department. Export shipments will require payment prior to shipment or an appropriate Letter of Credit. If, during the performance of the contract with Buyer, the financial responsibility or condition of Buyer is such that Seller in good faith deems itself insecure, or

if Buyer becomes insolvent, or if a material change in the ownership of Buyer occurs, or if Buyer fails to make any payments in accordance with the terms of the Agreement with Seller, then, in any such event, Seller is not obligated to continue performance under the Agreement and may stop goods in transit and defer or decline to make delivery of goods, except upon receipt of satisfactory security or cash payments in advance, or Seller may terminate the order upon written notice to Buyer without further obligation to Buyer whatsoever. If Buyer fails to make payments or fails to furnish security satisfactory to Seller, then Seller shall also have the right to enforce payment to the full contract price of the work completed and in process. Upon default by Buyer in payment when due, Buyer must immediately and without demand pay to Seller the entire unpaid amounts for any and all shipments made to Buyer irrespective of the terms of said shipment and whether said shipments are made pursuant to the Agreement or any other contract of sale between Seller and Buyer as a debt due to Seller, and Seller may withhold all subsequent shipments until the full amount is settled. Acceptance by Seller of less than full payment shall not be a waiver of any of its rights hereunder. Buyer shall not assign or transfer this Agreement or any interest in it, or monies payable under it, without the written consent of Seller and any assignment made without such consent shall be null and void.

**5. Title, Delivery, Risk of Loss.** Delivery dates are estimates, and time is not of the essence. Unless otherwise specified by Seller, delivery and transfer of risk of loss for shipments to Buyers that are not Related Party Buyers will be made Incoterms 2010 Ex Works (Seller’s plant or Distribution Center). Title shall pass when risk of loss transfers. Seller shall not be responsible to Buyer for any loss, whether direct, indirect, incidental or consequential in nature, including without limitation loss of profits or liquidated damages, arising out of or relating to any failure of the goods to be delivered by the specified delivery date. In the absence of specific instructions, Seller will select the carrier. Buyer shall reimburse Seller for the additional cost of its performance resulting from inaccurate or lack of delivery instructions, or by any act or omission on Buyer’s part. Any such additional cost may include, but is not limited to, storage, insurance, protection, re-inspection and delivery expenses. Buyer further agrees that any payment due on delivery shall be made on delivery into storage as though goods had been delivered in accordance with the order.

Related Party Buyers are defined as Buyers, directly or indirectly, owned more than 50% by Xylem Inc. or under significant or joint control by Xylem Inc. For export shipments from the USA to Related Party Buyers, title and risk of loss for the material shall pass to the Related Party Buyer at the port of destination. Incoterm 2010 shall be DAP (Destination). Related Party Buyer shall be importer of record for any customs clearance. For shipments to Related Party Buyers that are not export shipments from the USA, delivery and transfer of risk of loss shall be Incoterm 2010 FCA (Seller’s plant or Distribution Center) unless otherwise specified. Title shall pass when the risk of loss passes to Buyer.

Buyer grants to Seller a continuing security interest in and a lien upon the products supplied by Seller under this Agreement and the proceeds thereof (including insurance proceeds), as security for the payment of all such amounts and the performance by Buyer of all of its obligations to Seller pursuant to this Agreement and all such other sales, and Buyer shall have no right to sell, encumber or dispose of the products. Buyer shall execute any and all financing statements and other documents and instruments and do and perform any and all other acts and things which Seller may consider necessary, desirable or appropriate to establish, perfect or protect Seller’s title, security interest and lien. In addition, Buyer authorizes Seller and its agents and employees to execute any and all such documents and instruments and do and perform any and all such acts and things, at Buyer’s expense, in Buyer’s name and on its behalf. Such documents and instruments may also be filed without the signature of Buyer to the extent permitted by law.

**6. Warranty.** For sales in Australia only, if Buyer acquires goods from the Seller as a “Consumer” (as defined under section 3 of the Australian Consumer Law) and the Australia Consumer Law applies to that acquisition (in which case that person is referred to as a “Consumer” in this document), Seller warrants the goods supplied to Buyer on the terms of Seller’s limited warranty available on Seller’s website and this clause 6 does not apply.

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Except as provided above, for goods sold by Seller to Buyer(s) that are used by Buyer for personal, family or household purposes, Seller warrants the goods to Buyer on the terms of Seller's limited warranty available on Seller's website. For any other purpose Seller warrants that the goods sold to Buyer hereunder (with the exception of membranes, seals, gaskets, elastomer materials, coatings and other "wear parts" or consumables all of which are not warranted except as otherwise provided in the quotation or sales form) will be (i) be built in accordance with the specifications referred to in the quotation or sales form, if such specifications are expressly made a part of this Agreement, and (ii) free from defects in material and workmanship for a period of one (1) year from the date of installation or eighteen (18) months from the date of shipment (which date of shipment shall not be greater than thirty (30) days after receipt of notice that the goods are ready to ship), whichever shall occur first, unless a longer period is provided by law or is specified in the product documentation (the "Warranty"). For services, the warranty period shall be three (3) months from the date of invoice unless otherwise expressly set forth in the quotation or sales form or order acknowledgment.

Except as otherwise provided by law, Seller shall, at its option and at no cost to Buyer, either repair or replace any product which fails to conform with the Warranty; provided, however, that under either option, Seller shall not be obligated to remove the defective product or install the replaced or repaired product and Buyer shall be responsible for all other costs, including, but not limited to, service costs, shipping fees and expenses. Seller shall have complete discretion as to the method or means of repair or replacement. Buyer's failure to comply with Seller's repair or replacement directions shall constitute a waiver of its rights and render all warranties void. Any parts repaired or replaced by Seller under the Warranty are warranted only for the balance of the warranty period on the parts that were repaired or replaced. The Warranty is conditioned on Buyer giving written notice to Seller of any defects in material or workmanship of warranted goods within ten (10) days of the date when any defects are first manifest. Seller shall have no warranty obligations to Buyer with respect to any product or parts of a product that: (a) have been repaired by third parties other than Seller or without Seller's written approval; (b) have been subject to misuse, misapplication, neglect, alteration, accident, or physical damage; (c) have been used in a manner contrary to Seller's instructions for installation, operation and maintenance; (d) have been damaged from ordinary wear and tear, corrosion, or chemical attack; (e) have been damaged due to abnormal conditions, vibration, failure to properly prime, or operation without flow; (f) have been damaged due to a defective power supply or improper electrical protection; or (g) have been damaged resulting from the use of accessory equipment not sold by Seller or not approved by Seller in connection with products supplied by Seller hereunder. In any case of products not manufactured by Seller, there is no warranty from Seller; however, Seller will extend to Buyer any warranty received from Seller's supplier of such products.

**THE FOREGOING WARRANTY IS EXCLUSIVE AND IN LIEU OF ANY AND ALL OTHER EXPRESS OR IMPLIED WARRANTIES, GUARANTEES, CONDITIONS OR TERMS OF WHATEVER NATURE RELATING TO THE GOODS PROVIDED HEREUNDER, INCLUDING WITHOUT LIMITATION ANY IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE, WHICH ARE HEREBY EXPRESSLY DISCLAIMED AND EXCLUDED. EXCEPT AS OTHERWISE PROVIDED BY LAW, BUYER'S EXCLUSIVE REMEDY AND SELLER'S AGGREGATE LIABILITY FOR BREACH OF ANY OF THE FOREGOING WARRANTIES ARE LIMITED TO REPAIRING OR REPLACING THE PRODUCT AND SHALL IN ALL CASES BE LIMITED TO THE AMOUNT PAID BY THE BUYER HEREUNDER. IN NO EVENT IS SELLER LIABLE FOR ANY OTHER FORM OF DAMAGES FOR BREACH OF WARRANTY, WHETHER DIRECT, INDIRECT, LIQUIDATED, INCIDENTAL, CONSEQUENTIAL, PUNITIVE, EXEMPLARY OR SPECIAL DAMAGES, INCLUDING BUT NOT LIMITED TO LOSS OF PROFIT, LOSS OF ANTICIPATED SAVINGS OR REVENUE, LOSS OF INCOME, LOSS OF BUSINESS, LOSS OF PRODUCTION, LOSS OF OPPORTUNITY OR LOSS OF REPUTATION.**

**7. Inspection.** Buyer shall have the right to inspect the goods upon their receipt. When delivery is to Buyer's site or to a project site ("Site"), Buyer shall notify Seller in writing of any nonconformity of the goods with this Agreement within three (3) days from receipt by Buyer, unless a shorter period is required in Seller's quotation. For all other deliveries, Buyer shall notify Seller in writing of any nonconformity with this Agreement within fourteen (14) days from receipt by Buyer. Failure to give such applicable notice shall constitute a waiver of Buyer's right to inspect and/or reject the goods for nonconformity and shall be equivalent to an irrevocable acceptance of the goods by Buyer. Claims for loss of or damage to goods in transit must be made to the carrier, and not to Seller.

**8. Seller's Limitation of Liability. EXCEPT AS OTHERWISE PROVIDED BY LAW, IN NO EVENT SHALL SELLER'S LIABILITY UNDER THIS AGREEMENT EXCEED THE AMOUNT PAID BY BUYER UNDER THIS AGREEMENT. SELLER SHALL HAVE NO LIABILITY FOR LOSS OF PROFIT, LOSS OF ANTICIPATED SAVINGS OR REVENUE, LOSS OF INCOME, LOSS OF BUSINESS, LOSS OF PRODUCTION, LOSS OF OPPORTUNITY, LOSS OF REPUTATION, LIQUIDATED, INDIRECT, CONSEQUENTIAL, INCIDENTAL, PUNITIVE OR EXEMPLARY DAMAGES. THE FOREGOING LIMITATIONS OF LIABILITY SHALL BE EFFECTIVE WITHOUT REGARD TO SELLER'S ACTS OR OMISSIONS OR NEGLIGENCE OR STRICT LIABILITY IN PERFORMANCE OR NON-PERFORMANCE HEREUNDER.**

Notwithstanding the above, certain legislation, including the Australian Consumer Law, may imply warranties or conditions or impose guarantees or obligations on the Seller which cannot be excluded, restricted or modified or cannot be excluded, restricted or modified except to a limited extent. This clause must be read subject to these statutory provisions. If these statutory provisions apply, to the extent to which the Seller is entitled to do so, the Seller limits its liability in respect of any claim under those provisions to (a) in the case of goods, at the Seller's option, the replacement of the goods or the supply of equivalent goods; the repair of the goods; the payment of the cost of replacing the goods or of acquiring equivalent goods; or the payment of the cost of having the goods repaired; and (b) in the case of services, at the Seller's option, the supplying of the services again; or the payment of the cost of having the services supplied again.

**9. USED EQUIPMENT. NOTWITHSTANDING ANYTHING TO THE CONTRARY HEREIN, USED EQUIPMENT IS SOLD IN AN AS IS, WHERE IS CONDITION. SELLER MAKES NO REPRESENTATIONS OR WARRANTIES OF ANY KIND, EXPRESS OR IMPLIED, AS TO THE NATURE, QUALITY OR CONDITION OF THE EQUIPMENT, OR ITS SUITABILITY FOR ANY USE, INCLUDING WITHOUT LIMITATION ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, UNLESS EXPRESSLY AGREED UPON IN WRITING BETWEEN THE PARTIES. SELLER SHALL HAVE NO LIABILITY TO BUYER HEREUNDER OR IN CONNECTION WITH THE EQUIPMENT, INCLUDING WITHOUT LIMITATION, FOR LOSS OF PROFIT, LOSS OF INCOME, LOSS OF PRODUCTION, LOSS OF OPPORTUNITY, INDIRECT, CONSEQUENTIAL, INCIDENTAL, PUNITIVE OR EXEMPLARY DAMAGES.**

**10. Force Majeure.** Seller may cancel or suspend this Agreement and Seller shall have no liability for any failure to deliver or perform, or for any delay in delivering or performing any obligations, due to acts or omissions of Buyer and/or its contractors, or due to circumstances beyond Seller's reasonable control, including but not limited to acts of God, fire, flood or other natural disasters, war and civil disturbance, riot, acts of governments, terrorism, disease, currency restrictions, labor shortages or disputes, unavailability of materials, fuel, power, energy or transportation facilities, failures of suppliers or subcontractors to effect deliveries, in which case the time for performance shall be extended in an amount equal to the excused period, provided that Seller shall have, as soon as reasonably practicable after it has actual knowledge of the beginning of any excusable delay, notified Buyer of such delay, of the reason therefor and of the probable duration and consequence thereof. Seller shall use its best efforts to eliminate the cause of the delay, interruption or cessation and to resume performance of its obligations hereunder with the least possible delay.

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**11. Cancellation.** Except as otherwise provided in this Agreement, no order may be cancelled on special or made-to-order goods or unless otherwise requested in writing by either party and accepted in writing by the other. In the event of a cancellation by Buyer, Buyer shall, within thirty (30) days of such cancellation, pay Seller a cancellation fee, which shall include all costs and expenses incurred by Seller prior to the receipt of the request for cancellation including, but not limited to, all commitments to its suppliers, subcontractors and others, all fully burdened labor and overhead expended by Seller, plus a reasonable profit charge. Return of goods shall be in accordance with Seller's most current Return Materials Authorization and subject to a minimum fifteen percent (15%) restocking fee, unless otherwise specified.

Notwithstanding anything to the contrary herein, in the event of the commencement by or against Buyer of any voluntary or involuntary proceedings in bankruptcy or insolvency, or in the event Buyer shall be adjusted bankrupt, make a general assignment for the benefit of its creditors, or if a receiver shall be appointed on account of Buyer's insolvency, or if Buyer fails to make payment when due under this Agreement, or in the event Buyer does not correct or, if immediate correction is not possible, commence and diligently continue action to correct any default of Buyer to comply with any of the provisions or requirements of this Agreement within ten (10) calendar days after being notified in writing of such default by Seller, Seller may, by written notice to Buyer, without prejudice to any other rights or remedies which Seller may have, terminate its further performance of this Agreement. In the event of such termination, Seller shall be entitled to receive payment as if Buyer has cancelled the Agreement as per the preceding paragraph immediately and without notice as a debt due. Seller may nevertheless elect to complete its performance of this Agreement by any means it chooses. Buyer agrees to be responsible for any additional costs incurred by Seller in so doing. Upon termination of this Agreement, the rights, obligations and liabilities of the parties which shall have arisen or been incurred under this Agreement prior to its termination shall survive such termination.

**12. Drawings.** All drawings are the property of Seller. Seller does not supply detailed or shop working drawings of the goods; however, Seller will supply necessary installation drawings. The drawings and bulletin illustrations submitted with Seller's quotation show general type, arrangement and approximate dimensions of the goods to be furnished for Buyer's information only and Seller makes no representation or warranty regarding their accuracy. Unless expressly stated to the contrary within the quotation or sales form, all drawings, illustrations, specifications or diagrams form no part of this Agreement. Seller reserves the right to alter such details in design or arrangement of its goods which, in its judgment, constitute an improvement in construction, application or operation. After Buyer's acceptance of this Agreement, any changes in the type of goods, the arrangement of the goods, or application of the goods requested by Buyer will be made at Buyer's expense.

**13. Confidential Information.** Seller's designs, illustrations, drawings, specifications, technical data, catalogues, "know-how", economic or other business or manufacturing information (collectively "Confidential Information") disclosed to Buyer shall be deemed proprietary and confidential to Seller. Buyer agrees not to disclose, use, or reproduce any Confidential Information without first having obtained Seller's express written consent. Buyer's agreement to refrain from disclosing, using or reproducing Proprietary Information shall survive completion of the work under this Agreement. Buyer acknowledges that its improper disclosure of Confidential Information to any third party will result in Seller's suffering irreparable harm. Seller may seek injunctive or equitable relief to prevent Buyer's unauthorized disclosure.

**14. Installation and Start-up.** Unless otherwise agreed to in writing by Seller, installation shall be the sole responsibility of Buyer. Where start-up service is required with respect to the goods purchased hereunder, it must be performed by Seller's authorized personnel or agents; otherwise, the Warranty is void. In the event Buyer has engaged Seller to provide an engineer for start-up supervision, such engineer will function in a supervisory capacity only and

Seller shall have no responsibility for the quality of workmanship of the installation. In any event, Buyer understands and agrees that it shall furnish, at Buyer's expense, all necessary foundations, supplies, labor and facilities that might be required to install and operate the goods.

**15. Specifications; Back-charges.** Changes in specifications requested by Buyer are subject to approval in writing by Seller. In the event such changes are approved, the price for the goods and the delivery schedule shall be changed to reflect such changes. Buyer shall not make purchases nor shall Buyer incur any labor that would result in a back charge to Seller without prior written consent of an authorized employee of Seller.

**16. Buyer Warranty.** Buyer warrants the accuracy of any and all information relating to the details of its operating conditions, including temperatures, pressures, and where applicable, the nature of all hazardous materials. Seller can justifiably rely upon the accuracy of Buyer's information in its performance. Should Buyer's information prove inaccurate, Buyer agrees to reimburse Seller for any losses, liabilities, damages and expenses that Seller may have incurred as a result of any inaccurate information provided by Buyer to Seller.

**17. Product Recalls.** In cases where Buyer purchases for resale, Buyer shall take all reasonable steps (including, without limitation, those measures prescribed by the seller): (a) to ensure that all customers of the Buyer and authorized repairers who own or use affected products are advised of every applicable recall campaign of which the Buyer is notified by the Seller; (b) to ensure that modifications notified to Buyer by Seller by means of service campaigns, recall campaigns, service programs or otherwise are made with respect to any products sold or serviced by Buyer to its customers or authorized repairers. Should Buyer fail to perform any of the actions required under this section, Seller shall have the right to obtain names and address of the Buyer's customers and shall be entitled to get into direct contact with such customers.

**18. GOVERNING LAW.** THE TERMS OF THIS AGREEMENT AND ALL RIGHTS AND OBLIGATIONS HEREUNDER SHALL BE GOVERNED BY THE LAWS OF THE JURISDICTION WHERE SELLER'S OFFICE IS LOCATED TO WHICH THIS ORDER HAS BEEN SUBMITTED (WITHOUT REFERENCE TO PRINCIPLES OF CONFLICTS OF LAWS). THE RIGHTS AND OBLIGATIONS OF THE PARTIES HEREUNDER SHALL NOT BE GOVERNED BY THE 1980 U.N. CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS.

**19. Export Regulation.** Seller's products, including any software, documentation and any related technical data included with, or contained in, or utilized by such products or deliverables, may be subject to applicable export laws and regulations, including United States Export Administration Regulations and Buyer shall comply with all such applicable laws and regulations. In particular, the Buyer shall not, and shall not permit any third parties to, directly or indirectly, export, re-export or release any product to any jurisdiction or country to which, or any party to whom, the export, re-export or release of any product is prohibited by applicable law, regulation or rule. The Buyer shall be responsible for any breach of this Section.

**20. Privacy.** Buyer acknowledges that Xylem may collect and process personal data for the purposes outlined in the contract. Xylem's data privacy policy is available at <https://www.xylem.com/en-us/support/privacy/>. Further, Buyer acknowledges that it has read and understood Xylem's privacy policy and agrees to the use of personal data outlined herein. The collection and use of personal data by Buyer is Buyer's responsibility.

**21. Titles; Waiver; Severability.** The section titles are for reference only, and shall not limit or restrict the interpretation or construction of this Agreement. Seller's failure to insist, in any one or more instances, upon Buyer's performance of this Agreement, or to exercise any rights conferred, shall not constitute a waiver or relinquishment of any such right or right to insist upon Buyer's performance in any other regard. The partial or complete invalidity of any one or more provisions of this Agreement shall not affect the validity or continuing force and effect of any other provision.