



## DIRECT PURCHASING AGREEMENT

Agreement No.: \_\_\_\_\_

Effective Date: \_\_\_\_\_

This Direct Purchasing Agreement (“DPA”) governs Your purchase of Products and/or Services from Us. The online terms and conditions located at <http://www.hds.com/corporate/legal/index.html> (“Online Terms”) contain information about Our warranty and maintenance terms and software license terms form part of this DPA and are incorporated by reference.

### TERMS AND CONDITIONS:

#### 1. ORDERING DELIVERY AND INSTALLATION

##### 1.1 Ordering Process

When You send Us an Order, We may accept it by sending You an Order Confirmation, shipping the Product or starting the Services. Each Order, the Order Confirmation (if any) and this DPA form a separate agreement between Us. For an Order to be valid, it must refer to this DPA. Terms and conditions in or on the back of Your Order or any other documents that You give to Us will not form part of our agreement. Any changes to Your Order are subject to acceptance and payment of an additional processing fee. You may not cancel any Orders.

##### 1.2 Product Delivery

We will do everything reasonably possible to meet Our estimated delivery dates. You agree that where necessary We will make partial deliveries and send You a partial invoice. Delivery will be FCA (as defined in Incoterms 2000) Our Product distribution center. Title to the Equipment and risk of loss or damage to the Products passes to You upon such delivery. We will arrange shipping on Your behalf and at Your risk, and invoice You accordingly, unless You instruct Us in writing not to do so. We always retain ownership to any Software and tangible media in which it is contained. You must not do anything that affects Our ownership.

##### 1.3 Product Installation

Unless agreed otherwise, the Products will be installed by HDS or Our authorized service provider. You will prepare the installation environment at Your cost according to Our needs.

#### 2. WARRANTIES

##### 2.1 Product Warranty

Subject to sections 2.3 and 9.1, We warrant to You that, during the Warranty Period, Products will function in accordance with the Published Specifications. To make a valid warranty claim, You must submit a claim to Us under the procedures set out in the Online Terms.

##### 2.2 Service Warranty

We warrant to You that we will provide the Services in a workmanlike manner in accordance with generally accepted industry standards.

##### 2.3 Warranty Exclusions

The provision of any Warranty and Maintenance Services are subject to Our standard warranty and maintenance conditions and exclusions set out in the Online Terms. **EXCEPT AS SPECIFIED IN THE DPA AND THE ONLINE TERMS, ALL EXPRESS OR IMPLIED CONDITIONS, REPRESENTATIONS AND WARRANTIES, INCLUDING ANY IMPLIED WARRANTIES OR CONDITION OF MERCHANTABILITY, SATISFACTORY QUALITY, OR FITNESS FOR A PARTICULAR PURPOSE AND NON-INFRINGEMENT ARE EXCLUDED TO THE MAXIMUM EXTENT PERMITTED BY LAW. WE DO NOT WARRANT THAT ANY PRODUCT OR SERVICE WILL OPERATE UNINTERRUPTED OR ERROR FREE.**

#### 3.0 SERVICES

##### 3.1 Maintenance and Support Services

After the end of the Warranty Period, You will receive Maintenance and Support Services during the Initial Service Period only if You have purchased and paid for them in full. We will automatically renew these DPA\_v4\_09July09\_N America

#### CUSTOMER (“You”):

Name:

Address:

Contact Person (for Notices):

#### HDS (“We” or “Us”):

Name:

Address:

Contact Person (for Notices):

Maintenance and Support Services for successive Renewal Service Periods unless You write to Us at least 30 days before the then current Renewal Service Period expires and tell Us to stop. We will provide You with Maintenance and Support Services in accordance with the maintenance sections of the Online Terms.

#### 3.2 Professional Services

We will provide You with Professional Services under a separate Statement of Work that incorporates the terms of the DPA. The Statement of Work sets out any other terms that relate to the Professional Services.

#### 3.3 Co-operation

To assist Us to provide You Services, You must provide prompt access to Your premises, computer equipment (including remote access), adequate working space, facilities, personnel, information or materials that we may reasonably require.

#### 4. FINANCIAL TERMS

##### 4.1 Fees and Payment

You will pay the fees and charges for the supply of Products and Services set out in Our invoice within 30 days from the invoice date. We may charge interest or suspend delivery of Services if payments are overdue. You must also pay for any Taxes arising from the transaction under this DPA whether or not these taxes are included in Our invoices.

##### 4.2 Maintenance and Support Renewals

The monthly fees for Maintenance and Support Services will be payable from the date set out in Our invoice or if no such date is specified, from the expiration of the applicable Warranty Period for the Products. Our quotation of renewal fees does not obligate You to renew Maintenance and Support Services.

#### 5. INTELLECTUAL PROPERTY

##### 5.1 Ownership and Licenses

We and Our licensors own all copyright, trade marks, designs, patents, circuit layout rights, know-how, trade secrets, trade, business or company names, domain names and related registration rights and all other intellectual property rights in all items and materials that We provide to You or otherwise create pursuant to this DPA, and their modifications (“Hitachi IP”). You only get license rights in Software, Work Product and any other Hitachi IP as expressly stated in this DPA, and the Online Terms. You must not do anything to jeopardize Our or Our licensors’ rights in the Hitachi IP including to (i) copy, modify, reverse engineer (except to the extent such restrictions are prohibited by applicable law), transfer or sublicense any Hitachi IP (except as allowed by Your license or as We agree in writing); (ii) register or attempt to register any competing intellectual property rights to the Hitachi IP; (iii) delete or tamper with any proprietary notices on or in the Hitachi IP; (iv) take or use any action that diminishes the value of any trademarks included in the Hitachi IP, or (v) use the Products in violation of applicable law.

##### 5.2 Software License Grant

Subject to the terms of this DPA and the applicable licensing provisions contained in the Online Terms, we grant You a personal, non-exclusive, non-transferable (except in connection with the transfer of Equipment as permitted by this DPA and the Online Terms) license to use the Software to operate the Equipment in accordance with its Published Specifications solely for Your internal business purposes.

## 5.3 Intellectual Property Claims

Subject to section 5.1 and the exceptions in this section, if a third party makes a claim against You that any Product or Services infringes that party's patent rights or copyright ("**IP Claim**"), We provide You with the following recourse (which, to the extent permitted by applicable law, comprises Your sole and exclusive remedy against Us for IP Claims):

- (a) We will defend or settle the IP Claim at Our option and cost, and pay to You the amount of damages, losses and costs finally awarded (or settled with Our written consent), provided that You (i) promptly notify Us of the IP Claim (ii) allow Us to solely manage the defense and settlement of the IP Claim; (iii) cooperate with and assist Us as we require (we will pay Your costs of doing so); and (iv) are not in breach of this DPA or the Online terms .
- (b) We will, at Our option and cost, do any of the following in relation to a Product which is or We consider is likely to be the subject of an IP Claim: (i) secure the rights for You to continue to use the Product without infringement or (ii) modify the Product so that it is not infringing or replace it with something that has similar functionality to the Product. If neither option is reasonably possible, We will provide You with a refund, provided that You promptly return the Product to Us.

The above remedies will not apply to any (x) Third Party Products (including without limitation any Third Party Related OSS as defined in the Online Terms) or (y) otherwise to any Product that You have, or any person on Your behalf has: (i) modified or combined with any third party product not authorised or approved by Us (ii) used outside Our stated standard operating environment for the Product or for a purpose not authorised by Us (iii) failed to use a more recent version of the Product that was available to You and would have avoided the infringement or where the IP Claim arises due to any material or item that You own or have sourced from a third party Yourself.

## 6. CONFIDENTIAL INFORMATION

Each of the parties must keep any Confidential Information that we give to each other confidential by using the same degree of care that You would use to protect Your own Confidential Information. We won't disclose Your Confidential Information to anyone else, unless You allow Us to, and You must do the same with Our Confidential Information. We can, however, disclose it to Our employees and contractors who need to know the information in order to perform obligations under this DPA.

## 7. LIMITATIONS OF LIABILITY

### 7.1 Uncapped Liability

Each party acknowledges the full extent of its own liability to the other arising from: death or personal injury resulting from negligent acts or omissions; claims for non-payment; the non-excludable statutory rights of consumers (for example, under laws providing for strict product liability); breaches of any Software license; breach of any obligation of confidence; and any infringement of Hitachi IP.

### 7.2 Cap on Liability

Except for 7.1 above, the exceptions identified in the Online Terms, Our indemnity obligations in Section 5.3 above, and to the extent not prohibited by applicable law:

- (a) each party's maximum aggregate liability for all claims, whether for breach of contract, breach of warranty or in tort, including negligence, will be limited to the amount paid for the Product(s), Third Party Product(s), Third Party Software or Service(s) which is the subject matter of the claim up to a maximum of two million US dollars (\$2,000,000) per agreement; and
- (b) neither party will be liable for any indirect, punitive, special, incidental or consequential damages in connection with or arising out of the Online Terms or this DPA (including, without limitation, loss of business, revenue, profits, goodwill, use, data, electronically transmitted orders, or other economic advantage), however they arise, whether in breach of contract, breach of warranty or in tort, including negligence, and even if that party has previously been advised of the possibility of such damages. Liability for damages will be limited and excluded, even if an exclusive remedy provided for in this Agreement fails of its essential purpose.

## 8. TERM AND TERMINATION

The DPA will start on the Effective Date and continue until it is terminated by either of us by written notice to the other, if the other (i) breaches the confidentiality, intellectual property or export compliance sections of the DPA; (ii) commits a material breach of any other terms and does not remedy that breach within 30 days of written notice to do so (iii) becomes or threatens to become Insolvent. If the DPA is terminated, Your rights, licenses and privileges under it will terminate and You must comply with Our requests to either remove and destroy all Hitachi IP in Your possession or control or return such material and items to Us at Your cost. Furthermore, You will not be relieved from Your payment obligations and any money due to Us will become immediately payable. Neither of us deemed to have waived any existing rights.

## 9. GENERAL

### 9.1 Third Party Products

Except as expressly stated otherwise in this DPA, the Online Terms or a SOW: (i) We provide Third Party Products to You without warranties or maintenance of any kind and (ii) licenses, warranties and support for Third Party Products will be given by the relevant suppliers in their license agreements that We pass to You.

### 9.2 Export Compliance

You acknowledge that in various countries, laws and regulations governing the export of computer products and technology may prohibit use, sale or re-export of such products or technology if You know or have reason to know that such products and technology are for use in connection with the design, development, production, stock piling or use of nuclear, chemical or biological weapons or missiles, and in some countries (e.g., China) for certain conventional military end-uses. If You sell or transfer to another person or entity title in or right to use any part of products or other materials supplied by Us, You will ensure that all applicable export restrictions of the nature described in this section are observed.

### 9.3 Dispute Resolution

In the event of a dispute, We will use reasonable efforts to get an appropriate person from our respective management teams to meet and attempt to resolve the dispute in good faith. If they are unable to resolve the dispute within 30 days, either party may resort to alternate dispute resolution such as arbitration or otherwise seek recourse from the courts. Either party may seek injunctive or other urgent equitable relief at any time.

### 9.4 Miscellaneous

(a) Unless it is agreed in writing that the laws of another jurisdiction will apply, the laws of the jurisdiction of California, USA, without regard to its conflict of law principles, will apply to the DPA and the venue for any litigation will be the appropriate courts in Santa Clara County, California. To the extent allowed in the applicable jurisdiction, the United Nations Convention on Contracts for the International Sale of Goods and its implementing legislation will not apply to this DPA.

(b) Neither party will be responsible for any failure to meet any obligations (except payment obligations) due to matters beyond its reasonable control provided reasonable efforts have been made to perform them.

(c) You must not assign, or otherwise transfer any of Your rights under this DPA without Our prior written agreement.

(d) We may use subcontractors to perform any of Our obligations, but We will remain responsible for their performance.

(e) Notices made under the DPA must be in writing to the appropriate representative of the recipient, as identified in the DPA or otherwise to a senior executive. Notices will be deemed given: where they are hand delivered, when a duly authorised employee or representative of the recipient gives written acknowledgement of receipt; for email communication, at the time the communication enters into the information system of the recipient; for posting, three days after dispatch and for fax, on receipted transmission of the fax.

(f) Both parties are independent contractors and there is no actual or deemed partnership, franchise, joint venture, agency, employment or other fiduciary relationship between us.

(g) Rights and obligations under the DPA, which by their nature should survive the termination or expiration, will remain in effect after termination.

(h) You grant to Us the limited right to use Your name in promotional materials, including press releases, presentations and customer references regarding the sale of Products and Services. These permissions are free of charge and for worldwide use in any medium. The foregoing notwithstanding, We will obtain Your prior written approval for publicity that contains claims, quotes, endorsements or attributions by You, such approval not to be unreasonably withheld.

(i) If either party fails to promptly exercise any contractual right, this does not of itself mean that the right has been waived. For a waiver of a right to be valid, it must be written and it will not give rise to an ongoing waiver or any expectation that the right will not be enforced, unless it is expressly stated to do so.

(j) Except for the Online Terms, this DPA may not be modified except in writing signed by an authorized representative of each party. Any changes to the Online Terms will not apply retrospectively to Orders for Products or Services made prior to the date of the change. Changes to the Online Terms may apply prospectively to new Orders only if You agree.

(k) The DPA (including the Online Terms and all Orders and Order Confirmations) is the entire agreement relating to its subject matter. All other written communications, understandings, proposals, representations and warranties are by agreement, excluded and are of no force or effect (to the extent permitted at law).

(l) If there is a conflict amongst the elements the DPA, the following order of precedence will apply (in descending order): (i) this DPA; (ii) the Online Terms; (iii) an Order Confirmation; and an Order.

(m) This DPA and any Attachments may be signed in counterparts, which together will form the entire agreement, and each of which may be transmitted electronically, to be effective on the other party's receipt of the signed copy.

#### 10. DEFINITIONS AND INTERPRETATION

**Attachment:** any of the signed documents attached to this DPA that supplements or amends it.

**Confidential Information:** information that, at the time of disclosure, is clearly marked as confidential or in the circumstances would be considered to be confidential.

**Equipment:** hardware and spare parts.

**Initial Service Period:** the non-cancellable Service Period commencing immediately upon expiration of the Warranty Period.

**Insolvent:** the inability of a party to pay its debts as they fall due, the appointment of a receiver or administrator, liquidator or similar person to the party's affairs under the laws of any jurisdiction; the calling of a meeting of creditors or for any reason, ceasing to carry on business.

**Maintenance and Support Services:** the equipment maintenance and software support services described in more detail in the Online Terms;

**Order:** a written or electronic order for the purchase of Products and/or Services from Us, or a document detailing the Product, Product description and price which is submitted in accordance with Our then-current ordering requirements.

**Order Confirmation:** a written or electronic acknowledgement or invoice issued by Us in response to an Order.

**Product(s):** any Equipment or Software listed in Our standard product price lists published from time to time.

**Professional Services:** software enablement, data migration and other services.

**Published Specifications:** are the specifications for Products listed valid at the time of acceptance of the Order.

**Renewal Service Period:** the automatically renewable Service Period commencing at the end of the Initial Service Period.**Services:** Billable Services (as defined in the Online Terms), Maintenance and Support Services, Professional Services and any other services listed in Our published offerings from time to time.

**Service Period:** term during which Maintenance and Support Services are provided. The term of a particular Service Period and the applicable charges shall be as specified in an Order or Attachment. **Software:** the object code format of (i) programming firmware embedded in the Equipment to enable it to perform its basic functions (**Operating Software**) and (ii) software programs supplied by Us (**Programs**) and (iii) and any Updates (as defined in the Online Terms), related documentation and specifications.

**Statement of Work or SOW:** is a document which fully describes the Professional Services being provided by Us and sets out the services being provided, the price, estimated delivery dates, acceptance procedures and roles and responsibilities of the parties.

**Tax:** a tax, duty, fee or impost (including withholding tax and VAT).

**Third Party Products:** any Equipment or Software supplied to HDS by any party other than Hitachi Ltd. for direct or indirect distribution to end users.

**Third Party Software:** any software contained in or comprising Third Party Products. For clarification purposes, if any Third Party Software not sublicensed through the Online Terms contains Third Party Related OSS (as defined in the Online Terms), You must refer back to that applicable license for those terms.

**Use:** to use Software in live production for processing data either in operation of Products or in use of Programs.

**Warranty Period:** means the period listed in the Online Terms for a particular Product.

**Work Product:** works of authorship, program listings, tools, documentation, reports, drawings and similar works created by Us or on behalf of Us pursuant to the supply of Services.

#### EXECUTED AS AN AGREEMENT:

IN WITNESS WHEREOF, the parties have executed this Agreement by its authorized officers as of the Effective Date.

HITACHI DATA SYSTEMS CORPORATION	CUSTOMER
By	By
Name	Name
Title	Title
Company	Company
Date	Date