

1. **Agreement.** These Service Authorization Terms and Conditions and the Service Authorization, including all documents, exhibits, schedules, and addendums attached thereto or specifically incorporated by the Service Authorization by reference, constitute the sole and entire agreement ("**Agreement**") between Hawthorne Machinery Co., Hawthorne Machinery Co. dba Hawthorne Power Systems, or Hawthorne Pacific Corp. (as specified in the signature line of the Service Authorization) ("**Hawthorne**") and the purchasing customer ("**Customer**") (together with Hawthorne, the "**Parties**," and each a "**Party**") with respect to the goods or services to be provided by Hawthorne ("**Services**") on behalf of Customer. This Agreement supersedes all prior and contemporaneous understandings and agreements, both written and oral regarding the Services. No purchase order issued in connection with the Services shall be binding on Hawthorne unless accepted by Hawthorne in writing. The provision of the Services to Customer shall not constitute acceptance of any terms and conditions contained in any request for proposal, purchase order, statement of work, or other similar document, nor does it serve to modify or amend this Agreement. Any such document shall create a separate contract consisting of the terms of this Agreement and any additional terms proposed by such document to the extent they do not conflict with the terms of the Agreement. Should the terms of any proposal, purchase order, or statement of work issued by Customer or a third party conflict with the terms and conditions of this Agreement, the terms of this Agreement shall control. The Parties agree that the Services will be governed by the following documents in this order of precedence: Service Authorization, Service Authorization Terms and Conditions, other writings signed by the Parties, other documents issued by the Parties relating to the Services.

2. **Timing.** Hawthorne shall use reasonable efforts to meet any performance dates specified in the Agreement. Customer agrees that any such dates shall be estimates only.

3. **Partial Information.** Customer understands and acknowledges that Hawthorne has quoted the Services relying on representations made by Customer regarding the cleanliness, functionality, operational status, contents, and nature of the equipment or machinery that will be the subject of the Services. Should any of the representations on which Hawthorne relied in preparing or pricing the Services be false or incomplete, or if Hawthorne shall reasonably determine in the course of performing the Services that additional repair, maintenance, or improvement services are necessary to satisfy its obligations hereunder ("**Additional Work**"), Hawthorne shall promptly provide to Customer an estimated cost of the additional work necessary. If Customer fails to agree to the Additional Work within thirty (30) days of receipt from Hawthorne, Hawthorne may terminate this Agreement in accordance with [Section 28](#).

4. **Change in Scope of Work.** Subject to [Section 3](#) above, if either Party wishes to change the scope or performance of the Services, it shall submit details of the requested change to the other Party in writing. Promptly after receipt of any proposed change, the Parties shall negotiate and agree in a writing signed by all parties on the terms of such change. Notwithstanding the above, Hawthorne may from time to time change the Services without the consent of Customer provided that such changes do not materially affect the nature or scope of the Services, the fees, or any performance dates set forth in the Agreement.

5. **Customer Warranties.** Customer warrants that (i) if an entity, it is duly organized and validly existing in good standing; (ii) it is duly authorized to execute, deliver, and perform its obligations under this Agreement; (iii) when duly executed and delivered by each Party, the Agreement will constitute Customer's legal, valid, and binding obligation, enforceable against it in accordance with its terms; (iv) it is not insolvent and is paying all of its debts as they become due; (v) any payments made pursuant to the Agreement are intended by it to be a substantially contemporaneous exchange for new value given to it; (vi) each payment made of a debt incurred by it under this Agreement is or was in the ordinary course of its business or financial affairs, (vii) all information supplied by Customer is complete and accurate, and (viii) the performance of the Services does not require Hawthorne to remove, replace, or alter any part of a building or structure.

6. **Customer Obligations.** Customer shall pay or reimburse all prices, fees, expenses, or charges related to the Services when they become due, cooperate with Hawthorne in all matters relating to the Services, and provide such access to Customer's premises and facilities as may reasonably be requested by Hawthorne for the purposes of performing the Services. Customer shall provide direction, information, approvals, authorizations, decisions or materials that are reasonably necessary for Hawthorne to perform the Services. Customer shall maintain the premises on and around which the Services will be performed in a reasonably safe condition and shall notify Hawthorne in advance of any hazards, dangerous conditions and defects. Failure to comply with any portion of this section will constitute a material breach ("**Material Breach**") of the Agreement, alleviate Hawthorne of any responsibility to perform the Services, and enable Hawthorne to terminate the Agreement.

7. **Compliance with Law.** Each Party agrees to comply fully, at its sole cost, with all applicable federal, state and local laws, rules and regulations.

8. **Customer's Acts or Omissions.** If Hawthorne's performance under the Agreement is prevented or delayed by any act or omission of Customer or its agents, subcontractors, consultants, or employees, Hawthorne shall not be deemed in breach of its obligations under the Agreement or otherwise liable for any costs, charges, or losses sustained or incurred by Customer to the extent arising directly or indirectly from such prevention or delay.

9. **Cancellations / Partial Work.** Hawthorne reserves the right to charge for any cancellation by Customer of scheduled Services. In addition to the items set forth in [Section 27](#), Customer shall pay for partially completed work based on time and materials at Hawthorne's prevailing rates. Additional handling and storage fees may apply to partially completed work.

10. **Fees and Expenses.** Customer shall (i) reimburse Hawthorne for all reasonable costs and expenses incurred in connection with the Services or in collecting any late payments and (ii) pay all other amounts due within thirty (30) days of receipt of an invoice from Hawthorne unless specified otherwise in the Service Authorization, in which case the terms of payment specified in the Service Authorization will control. Failure to notify Hawthorne in writing of any dispute regarding an invoice within sixty (60) days of receipt of said invoice waives Customer's right to dispute such invoice. Customer's obligation to pay amounts invoiced

shall be absolute and unconditional and shall not be subject to any delay, reduction, set-off, defense, or counter-claim. Unless specified otherwise, Customer shall pay all costs of transportation, which include but are not limited to government duties, local taxes, customs fees, and shipping costs regardless of whether they arise before, during, or after performance of the Services.

11. **Late Payments.** All late payments shall bear interest at the lesser of the rate of 1.5% per month (18% per annum) and the highest rate permitted under applicable law, calculated daily and compounded monthly, from the date such payment was due until the date paid in full. In addition to all other remedies available to it (which Hawthorne does not waive by the exercise of any rights hereunder), Hawthorne shall be entitled to suspend the provision of any Services if Customer fails to pay any amounts due. If Customer fails to pay any amounts when due, all unpaid sums shall become immediately due and payable within ten (10) days. Additionally, Hawthorne shall have the right, but not the obligation, to apply any funds paid by Customer to Hawthorne at any time to satisfy unpaid amounts.

12. **Taxes.** Customer shall be responsible for all sales, use, and excise taxes, and any other similar taxes, duties, and charges of any kind imposed by any federal, state or local governmental entity on any amounts payable by Customer hereunder, excluding any taxes imposed on, or with respect to, Hawthorne's income, revenues, gross receipts, personnel or real or personal property or other assets unless otherwise specified.

13. **Hours of Operation.** Unless specified otherwise in writing, the Services shall be performed during Hawthorne's publicized business hours. Services performed outside of such hours will be billed at applicable overtime or double-time rates.

14. **Ancillary Systems.** Hawthorne may deactivate or interrupt mechanical and electrical systems (including fire suppression systems) to perform the Services. Customer shall be responsible for reactivating such systems after completion of the Services. Hawthorne shall have no responsibility for reactivating, testing, or operating any such system.

15. **Limited Warranty.** Hawthorne warrants to Customer that it shall perform the Services using personnel of required skill, experience, and qualifications and in a professional and workmanlike manner in accordance with generally recognized industry standards for similar services. Hawthorne warrants its service labor to be free from defect in workmanship for five hundred (500) service meter hours, 12,500 highway miles (where applicable), or ninety (90) calendar days, whichever occurs first. All warranties on products or equipment sold are limited to the warranty provided by the manufacturer of said products and equipment. Hawthorne does not provide a warranty in addition to that provided by the manufacturer of a product. Customer understands that warranties for equipment and parts are limited in time and scope and can vary according to the source from which they were obtained.

16. **Exclusions from Limited Warranty.** Any limited warranty offered by Hawthorne does not cover (i) defects, error, or damage to Customer's equipment due to accident, abuse, misuse, negligent use, failure to follow proper maintenance procedures, and any use other than use in a normal and customary manner, (ii) defects, errors, or nonconformities due to modifications, alterations, additions or changes to Customer's equipment not made or authorized by Hawthorne, (iii) normal wear and tear, or (iv) damage caused by force of nature or by an act of any third party. Hawthorne's warranty shall be null and void and have no legal effect in the event Customer has failed to pay for the service or parts at issue or failed to bring its account current. All remedies under Hawthorne's warranty are expressly limited to replacing parts or making repairs as specified in this section during the applicable warranty period. Claims for losses arising out of any failure of repaired equipment to operate for the warranty period or for loss due to, or in connection with, the failure of the repaired equipment, including any and all claims for indirect and consequential damages, are excluded from this limited warranty.

17. **Limited Warranty Procedure.** Hawthorne's warranty obligations set forth above do not arise unless Customer gives written notice that reasonably describes any defective Services to Hawthorne within thirty (30) days of discovery of the alleged defect and any applicable warranty period has not expired. If, in its sole discretion, Hawthorne determines there to be a defect in service or materials provided, which defect is directly attributable to Hawthorne, Hawthorne may, in its sole discretion, either (i) use commercially reasonable efforts to cure any defect, or (ii) credit or refund the price of any defective Services, less a deduction equal to a pro-rata share of the Services used. THE REMEDIES SET FORTH ABOVE SHALL BE CUSTOMER'S SOLE AND EXCLUSIVE REMEDY FOR ANY BREACH OF THE LIMITED WARRANTY ABOVE.

18. **Disclaimer of Warranties.** EXCEPT FOR THE LIMITED WARRANTY ABOVE, HAWTHORNE MAKES NO WARRANTY WHATSOEVER WITH RESPECT TO THE SERVICES, 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. HAWTHORNE IS NEITHER A MANUFACTURER OF ANY PARTS USED IN THE SERVICES NOR AN AGENT THEREOF. ALTHOUGH HAWTHORNE MAY ADMINISTER WARRANTIES ISSUED BY A MANUFACTURER, CUSTOMER ACKNOWLEDGES AND AGREES THAT: (1) ANY EXPRESS WARRANTIES BY SUCH MANUFACTURER ARE NOT THE RESPONSIBILITY OF HAWTHORNE; (2) SUCH MANUFACTURER'S WARRANTY MAY CONTAIN LIMITATIONS; AND (3) CUSTOMER MAY INCUR CERTAIN REPAIR, TRANSPORTATION OR OTHER CHARGES WHICH ARE NOT COVERED BY SUCH MANUFACTURER'S WARRANTY.

19. **Limitation of Liability.** IN NO EVENT SHALL HAWTHORNE BE LIABLE TO CUSTOMER OR ANY THIRD PARTY FOR ANY LOSS OF USE, REVENUE OR PROFIT OR LOSS OF DATA OR DIMINUTION IN VALUE, OR FOR ANY CONSEQUENTIAL, INDIRECT, INCIDENTAL, SPECIAL, EXEMPLARY OR PUNITIVE DAMAGES (INCLUDING ATTORNEYS' FEES AND COSTS AND EXPERT-WITNESS FEES AND COSTS) OF ANY NATURE WHATSOEVER WHETHER ARISING OUT OF

**A LARGER FONT COPY OF THESE TERMS AND CONDITIONS IS AVAILABLE UPON REQUEST.**

BREACH OF CONTRACT, TORT (INCLUDING NEGLIGENCE) OR OTHERWISE, REGARDLESS OF WHETHER SUCH DAMAGES WERE FORESEEABLE AND WHETHER OR NOT CUSTOMER HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. WITH THE EXCEPTION OF ANY INDEMNITY OBLIGATIONS, IN NO EVENT SHALL HAWTHORNE'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 LESSER OF (i) THE FEES PAID TO HAWTHORNE PURSUANT TO THE AGREEMENT IN THE ONE-YEAR PERIOD PRECEDING THE EVENT GIVING RISE TO THE CLAIM AND (ii) \$25,000.

**20. Mutual Indemnification.** SUBJECT TO THE TERMS AND CONDITIONS SET FORTH IN SECTION 22, EACH PARTY (AN "INDEMNIFYING PARTY") SHALL INDEMNIFY, HOLD HARMLESS, AND DEFEND THE OTHER PARTY, ITS AFFILIATES AND THEIR RESPECTIVE OWNERS, OFFICERS, DIRECTORS, EMPLOYEES, AGENTS, SUCCESSORS AND PERMITTED ASSIGNS (COLLECTIVELY, "INDEMNIFIED PARTY") FROM AND AGAINST ANY AND ALL CLAIMS, LOSSES, DEFICIENCIES, JUDGMENTS, SETTLEMENTS, INTEREST, AWARDS, FINES, CAUSES OF ACTION, DAMAGES, LIABILITIES, COSTS, PENALTIES, TAXES, ASSESSMENTS, CHARGES, PUNITIVE DAMAGES AND EXPENSES OF WHATEVER KIND, INCLUDING REASONABLE ATTORNEYS' FEES, THAT ARE INCURRED BY INDEMNIFIED PARTY (COLLECTIVELY, "LOSSES") AS A RESULT OF ANY (i) BREACH OR NON-FULFILLMENT OF ANY REPRESENTATION, WARRANTY OR COVENANT UNDER THE AGREEMENT BY INDEMNIFYING PARTY; (ii) NEGLIGENCE OR MORE CULPABLE ACT OR OMISSION OF INDEMNIFYING PARTY (INCLUDING ANY RECKLESS OR WILLFUL MISCONDUCT) IN PERFORMING ITS OBLIGATIONS UNDER THE AGREEMENT; (iii) BODILY INJURY, DEATH OF ANY PERSON OR DAMAGE TO REAL OR TANGIBLE PERSONAL PROPERTY CAUSED BY THE NEGLIGENCE OR MORE CULPABLE ACTS OR OMISSIONS OF INDEMNIFYING PARTY (INCLUDING ANY RECKLESS OR WILLFUL MISCONDUCT); OR (iv) FAILURE BY INDEMNIFYING PARTY TO COMPLY WITH ANY APPLICABLE FEDERAL, STATE OR LOCAL LAWS, REGULATIONS OR CODES IN THE PERFORMANCE OF ITS OBLIGATIONS UNDER THE AGREEMENT.

**21. Indemnification Procedure.** The Indemnified Party shall (i) provide prompt written notice of any claim to the Indemnifying Party; (ii) cooperate with all reasonable requests of the Indemnifying Party; and (iii) surrender exclusive control of the defense and settlement of any third party claim to the Indemnifying Party (with the exception of the choice of counsel used for the Indemnified Party's defense) provided that the Indemnifying Party will obtain the Indemnified Party's written consent prior to agreeing to any settlement or agreement that requires the Indemnified Party to make any admission of fault or to pay any amounts in connection with such settlement or agreement. The Indemnified Party shall not unreasonably withhold or delay any consent required under this section. The Indemnified Party shall not withhold any sums from payment for any costs or liabilities incurred or anticipated to be incurred pursuant to an indemnity obligation.

**22. Exceptions and Limitations to Indemnification.** Notwithstanding anything to the contrary, Indemnifying Party shall not be obligated to indemnify, hold harmless, or defend Indemnified Party for any Losses which result from, in whole or in part, Indemnified Party's (i) negligence or more culpable act or omission (including recklessness or willful misconduct); (ii) bad faith failure to comply with any of its obligations set forth in the Agreement; or (iii) use of the Services or serviced equipment in any manner that does not materially conform with the usage specifications provided by Hawthorne or the equipment manufacturer, as applicable.

**23. Insurance.** During the term of the Agreement, each Party shall, at its own expense, maintain and carry insurance in full force and effect which includes, but is not limited to, (i) commercial general liability in occurrence form with a minimum limit of \$1,000,000 per occurrence, plus a minimum \$2,000,000 general aggregate limit; (ii) workers' compensation in an amount no less than the minimum required by law and employers' liability in a sum no less than \$1,000,000; and (iii) any additional insurance Hawthorne may reasonably require, in each case with financially sound and reputable insurers. Upon either Party's request, the other Party shall provide the requesting Party with a certificate of insurance from such Party's insurer evidencing the insurance coverage specified above. The certificate of insurance shall name the requesting Party as an additional insured. The insured Party shall provide the requesting Party with thirty (30) days' advance written notice in the event of a cancellation or material change in the insured Party's insurance policy. Except where prohibited by law, the insured Party shall require its insurer to waive all rights of subrogation against the requesting Party and the requesting Party's insurers.

**24. Intellectual Property.** All intellectual property rights, including copyrights, patents, patent disclosures and inventions (whether patentable or not), trademarks, service marks, trade secrets, know-how and other confidential information, trade dress, trade names, logos, corporate names and domain names, together with all of the goodwill associated therewith, derivative works and all other rights (collectively, "Intellectual Property Rights") in and to all documents, work product and other materials that are delivered to Customer under this Agreement or prepared by or on behalf of the Hawthorne in the course of performing the Services (collectively, the "Deliverables") shall be owned by Hawthorne. Hawthorne hereby grants Customer a license to use all Intellectual Property Rights in the Deliverables free of additional charge and on a non-exclusive, worldwide, non-transferable, non-sublicenseable, fully paid-up, royalty-free and perpetual basis to the extent necessary to enable Customer to make reasonable use of the Deliverables and the Services.

**25. Confidentiality.** From time to time during the term of the Agreement, either Party (as "Disclosing Party") may disclose or make available to the other Party (as "Receiving Party") non-public proprietary and confidential information that, if disclosed in writing or other tangible form is clearly labeled as "confidential," or if disclosed orally, is identified as

confidential when disclosed and promptly thereafter is summarized in writing and confirmed as confidential ("Confidential Information"); provided, however, that Confidential Information does not include any information that (i) is or becomes generally available to the public other than as a result of Receiving Party's breach of this section; (ii) is or becomes available to Receiving Party on a non-confidential basis from a third party source, provided that such third party is not and was not prohibited from disclosing such Confidential Information; (iii) was in Receiving Party's possession prior to Disclosing Party's disclosure hereunder; (iv) was or is independently developed by Receiving Party without using any Confidential Information; or (v) is disclosed to a third person by Disclosing Party without similar restrictions. Except as otherwise specified in these Service Terms and Conditions, the Receiving Party shall (x) protect and safeguard the confidentiality of Disclosing Party's Confidential Information with at least the same degree of care as Receiving Party would protect its own Confidential Information, but in no event with less than a commercially reasonable degree of care, (y) not use Disclosing Party's Confidential Information, or permit it to be accessed or used, for any purpose other than to exercise its rights or perform its obligations, and (z) not disclose any such Confidential Information to any person or entity, except to Receiving Party's representatives who need to know the Confidential Information to assist Receiving Party, or act on its behalf, to exercise its rights or perform its obligations. If Receiving Party is required by applicable law or legal process to disclose any Confidential Information, it shall, prior to making such disclosure, use commercially reasonable efforts to notify Disclosing Party of such requirements to afford Disclosing Party the opportunity to seek, at Disclosing Party's sole cost and expense, a protective order or other remedy. Each Party shall be entitled to injunctive relief for any violation of this Section.

**26. Term.** This Agreement shall commence as of the date of the last signature of the Parties on the Service Authorization and shall continue until the completion of the Services unless sooner terminated pursuant to this Agreement, or, if a term is specified on the Service Authorization, the Agreement will automatically terminate on the date specified for the end of the specified term.

**27. Termination by Customer.** Customer may terminate this agreement for any reason following forty-five (45) days' written notice sent to Hawthorne in accordance with the terms of this Agreement. Customer may terminate this Agreement following thirty (30) days' written notice if Hawthorne breaches a material obligation under this Agreement and fails to cure said breach within thirty (30) days after receipt of notice from Customer of said breach. Such notice shall specifically describe the breach and specify the date such breach first occurred. On termination of this Agreement, Customer will remain liable for payment of any charges that become due for payment before or after termination, actual costs for all worked performed through the date of termination, and all direct and indirect costs associated with winding down the Agreement, which include but are not limited to costs for parts ordered, service, labor, and non-cancelable commitments made by Hawthorne prior to termination in anticipation of performing the Services. Should the Agreement consist of a specified term, upon termination by Customer all amounts to be paid pursuant to or under the Agreement for the term will be become immediately due and payable without notice.

**28. Termination by Hawthorne.** Hawthorne may terminate this Agreement for any reason upon giving Customer forty-five (45) days' prior written notice. Hawthorne may terminate this Agreement following thirty (30) days' written notice to Customer upon the occurrence of a Material Breach as defined in these Terms and Conditions, or if Customer becomes insolvent, files a petition for bankruptcy, commences or has commenced against it proceedings relating to bankruptcy, receivership, reorganization or assignment for the benefit of creditors, or otherwise breaches this Agreement.

**29. Force Majeure.** Hawthorne shall not be liable, nor be deemed to have defaulted or breached this Agreement, for any failure or delay caused by or resulting from acts or circumstances beyond Hawthorne's reasonable control including, without limitation, acts of God, flood, fire, earthquake, explosion, governmental actions, war, invasion or hostilities (whether war is declared or not), terrorist threats or acts, riot or other civil unrest, national emergency, revolution, insurrection, epidemic, lock-outs, strikes or other labor disputes (whether or not relating to either Party's workforce), restraints or delays affecting carriers, an inability or delay in obtaining supplies of adequate or suitable materials, telecommunication breakdown or power outage.

**30. Communications.** All notices, requests, consents, claims, demands, waivers and other communications (each, a "Communication") must be in writing and addressed to the other Party at the address provided in the Service Authorization, or such other address that the receiving Party has designated in accordance with this Section. Unless otherwise agreed to in writing, all Communications must be delivered by facsimile, e-mail, personal delivery, courier or certified or registered mail (return receipt requested, postage prepaid). A Communication is effective only on receipt by the receiving Party if the Party giving the Communication has complied with the requirements of this Section. Communications shall be deemed received (i) if given by facsimile or e-mail, on the date of transmission if sent prior to 3:00 p.m. (PST) on a business day and otherwise on the following business day, (ii) if by courier or personal delivery, on the date of delivery, and (iii) if by mail, two (2) days after the date of mailing.

**31. Applicable Law/Venue.** This Agreement (and all matters arising out of or relating to it) will be governed in all respects by the laws of the State of California without regard to any choice or conflict of law provisions. When applicable, each Party hereby irrevocably submits to the exclusive jurisdiction of the courts situated in San Diego County in the State of California and waives all claims that such venue is in an inconvenient forum.

**32. Waiver of Jury Trial.** EACH PARTY KNOWINGLY, VOLUNTARILY, IRREVOCABLY AND UNCONDITIONALLY WAIVES ITS RIGHT TO A JURY TRIAL OF ANY CLAIM OR CAUSE OF ACTION BASED ON OR ARISING OUT OF THIS AGREEMENT OR THE SUBJECT MATTER HEREOF (INCLUDING, WITHOUT LIMITATION, CONTRACT, TORT, BREACH OF DUTY, AND ALL OTHER COMMON LAW AND STATUTORY CLAIMS), AND WILL NOT BE SUBJECT TO ANY EXCEPTIONS. EACH PARTY (i) UNDERSTANDS THAT THIS IS A WAIVER OF IMPORTANT LEGAL RIGHTS AND (ii) ACKNOWLEDGES HAVING HAD A

REASONABLE OPPORTUNITY TO DISCUSS THIS WAIVER AND ITS EFFECTS WITH LEGAL COUNSEL.

**33. Dispute Resolution.** Any dispute or controversy arising under or in connection with this Agreement shall first be resolved by informal discussion between senior management of the Parties. If informal discussion fails to produce a resolution, the Parties must then attend non-binding mediation in the San Diego County, California with a mutually agreeable mediator. If mediation fails to produce a resolution, or if the Parties cannot agree on a mediator, any dispute or controversy arising out of or relating to this Agreement shall be settled by binding arbitration. Either Party may initiate arbitration, which shall be conducted in San Diego, California in accordance with the commercial arbitration rules of the American Arbitration Association. Each Party shall share equally the cost of the arbitration and shall bear its own attorneys' fees, unless the arbitrator awards such fees and costs to a Party. The arbitrator shall not have the power to award any punitive damages.

**34. Enforcement.** Subject to [Section 33](#), Customer shall pay all costs Hawthorne may incur in enforcing or exercising its rights under this Agreement, whether or not suit is filed.

**35. Severability.** If any provision of this Agreement shall be deemed invalid, illegal, or unenforceable by any court of competent jurisdiction, such provision shall be automatically modified to the minimum extent necessary to render the same valid and enforceable, giving due consideration to the purpose and economic substance of this Agreement, or if no such modification shall be possible, deleted, and the remainder of this Agreement will remain valid and enforceable.

**36. Amendments.** This Agreement shall only be modified or amended by an instrument in writing signed by the Parties. Any changes, additions, stipulations or deletions, by Customer, shall not be deemed to be agreed to or binding upon Hawthorne unless agreed to in writing in the form of an amendment signed by Hawthorne and Customer.

**37. No Waiver.** No exercise, nor any failure or delay by either Party in the exercise of, any right or remedy available hereunder, at law or in equity will be deemed an election of remedies or a waiver of any such rights and/or remedies. Remedies hereunder shall not be exclusive, but shall be cumulative and in addition to all other remedies existing at law or in equity. The receipt, acceptance and/or negotiation of, or any endorsement on, any check or draft received from one Party will not operate to waive or release, in whole or in part, any claim of the other Party arising hereunder or in connection herewith (except as to the portion thereof actually received by the other Party in cash or other good funds)

**38. Assignment.** Hawthorne shall not assign any of its rights or obligations under the Agreement without the prior written consent of Customer, which consent will not be unreasonably withheld. If an assignee agrees to assume the obligations of Hawthorne, Customer agrees that Hawthorne shall be released from all further liability hereunder. Customer shall not assign any of its rights or delegate any of its obligations under this Agreement without the prior written consent of Hawthorne. Any purported assignment or delegation in violation of this Section shall be null and void. No assignment or delegation shall relieve Customer of any of its obligations under this Agreement.

**39. No Third Party Beneficiaries.** This Agreement benefits solely the Parties and their respective permitted successors and assigns. Nothing in this Agreement, whether 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.

**40. Headings.** Headings are for reference and do not affect the interpretation of the Agreement.

**41. Time to Bring Claim.** No claim which concerns a dispute arising under this Agreement may be commenced by Customer more than one year after the Services are performed.

**42. Equipment Management Electronic Data Sharing Product Link™ and Vision Link® User Agreement/Privacy Notice.** For machines equipped with Product Link™ and VisionLink®, Customer understands that data concerning the machine, its condition, and operation will be transmitted to Caterpillar Inc. and/or its dealers to better serve Customer and improve upon Caterpillar Inc. products and services. The information transmitted may include but is not limited to machine serial number, machine location, operational data, fault codes, emissions data, fuel usage, service meter hours, software and hardware version numbers, and installed attachments. Caterpillar Inc. recognizes and respects customer privacy. Caterpillar Inc. and/or its dealers will not sell or rent collected information to any third party and will exercise all reasonable efforts to keep the information secure. Customer, by executing the Agreement, understands the disclosures in this Section and grants permission to allow the referenced data to be accessed by Caterpillar Inc., and/or its dealers.

**43. Parts Cores.** Customer agrees that the purchase price of all parts cores ("Cores") not paid in full at the time of delivery is provided to Customer on credit, which purchase price may be redeemed in part or in full by Customer by returning Cores in a condition that meets Hawthorne's inspection criteria. Customer agrees that it will be liable for and shall pay the full purchase price of any Cores not returned to Hawthorne. Customer also agrees that the portion of the purchase price that Customer may redeem is dependent on the condition of the Cores returned to Hawthorne, which will be determined by Hawthorne in its sole discretion.

**44. Title to Goods.** Hawthorne retains title to goods until Customer performs all of its obligations under the Agreement. In order to secure payment and performance of the obligations, Customer hereby grants to Hawthorne a security interest in the purchased goods and all proceeds thereof described in this agreement to secure the performance of all of Customer's obligations under this Agreement.

**45. Equipment.** Should the Agreement include the purchase of machines or equipment from Hawthorne, when the machines necessary for the Agreement have been identified and appropriated, Customer agrees on demand to execute and deliver to Hawthorne all notes, contracts, security agreements, and financing statements required by Hawthorne to evidence the transaction. In the event Customer fails to execute and deliver said notes, contracts, security agreements and financing statements to Hawthorne, the entire balance of the purchase price of the equipment shall, at Hawthorne's option, become immediately due and payable.

**46. Transportation.** Customer understands and consents to Hawthorne's use of third party vendors to provide transportation services ("Transportation Company"). Customer also

agrees that Hawthorne's responsibility for shipment of any goods ceases upon delivery of said goods to a Transportation Company, and any claims for shortages, delays or damages occurring thereafter shall be made timely by Customer directly to the Transportation Company.

**47. Nonconforming Goods.** Should the Agreement include Customer purchasing machines or equipment from Hawthorne, Customer shall have the right to reject nonconforming goods, or a nonconforming tender only if such nonconformity impairs the value of the goods by more than ten percent (10%) of the contract price. Customer's failure to give notice of any claim within ten (10) days from the date of delivery shall constitute an unqualified acceptance of the goods and a waiver by Customer of all claims with respect to the goods. Hawthorne shall have the right to cure nonconformities in the goods or in their tender, provided that Customer notifies Hawthorne within ten (10) days of notification of the nonconformity of its intent to cure. Any such cure must occur within fourteen (14) days of the notification of the nonconformity.

**48. Used Goods.** Should the Agreement include the purchase of used machinery, parts, or equipment, said used machinery, parts, and equipment are sold "AS IS" AND "WITH ALL FAULTS". HAWTHORNE MAKES NO WARRANTY RELATED TO THE TITLE OF THE GOODS FOR SALE UNDER THIS AGREEMENT, NOR TO THE RIGHTFUL TRANSFER OF THE GOODS, NOR TO THE EXISTENCE OF SECURITY INTERESTS, LIENS, OR OTHER ENCUMBRANCES AGAINST THE GOODS. HOWEVER, HAWTHORNE WARRANTS THAT, AT THE TIME OF SALE, HAWTHORNE DID NOT KNOW OF ANY HOSTILE CLAIM OF TITLE OR ANY ENCUMBRANCES AGAINST THE GOODS FOR SALE UNDER THIS AGREEMENT.

**49. Assumption of Risk.** Customer hereby acknowledges and understands that there are risks associated with the service and testing of its equipment, which include but are not limited to damage to Customer's equipment during routine testing. Customer agrees to assume these risks and waives any and all rights to seek compensation, restitution, or indemnification for any injuries, claims, or damages that might arise from said damage. Customer also agrees and understands that during the testing and/or servicing of Customer's equipment, the equipment will not be available for use. Customer hereby agrees to assume this risk and waives any and all rights to seek compensation, restitution, or indemnification for any injuries, claims, or damages that might arise from these circumstances. Hawthorne and Customer agree that Hawthorne will not be liable for any damage caused to Customer's equipment during the rendering of any part of the Services that requires Hawthorne to test the Customer's equipment.

**50. Storage.** Should Hawthorne be in possession of equipment, parts, or merchandise related to the Services beyond any delivery date contemplated by the Agreement, Customer agrees to pay Hawthorne a monthly storage fee in an amount to be determined by Hawthorne taking into account the size and nature of the equipment or merchandise stored on Customer's behalf. Customer is entitled to possession of said equipment at any time upon first giving Hawthorne reasonable notice of not less than five (5) business days. Customer agrees that Customer bears all risk of loss or damage to its equipment while stored by Hawthorne. Customer agrees to cover its equipment under its own property damage insurance policy and to name Hawthorne as an additional insured.

**51. Survival.** Provisions of this Agreement that by their nature should apply beyond their terms will remain in force after any termination or expiration of this Agreement including, but not limited to, [Section 18 \(Disclaimer of Warranties\)](#), [Section 19 \(Limitation of Liability\)](#), [Section 20 \(Mutual Indemnification\)](#), [Section 21 \(Indemnification Procedure\)](#), [Section 22 \(Exceptions and Limitations on Indemnification\)](#), [Section 23 \(Insurance\)](#), [Section 25 \(Confidentiality\)](#), [Section 31 \(Applicable Law/Venue\)](#), [Section 32 \(Waiver of Jury Trial\)](#), [Section 33 \(Dispute Resolution\)](#), [Section 34 \(Enforcement\)](#), and [Section 51 \(Survival\)](#).

**52. Consent to Share Customer Data.** By signing the Agreement, Customer consents to Hawthorne sharing information relating to or generated pursuant to this Agreement or the Services with Caterpillar, Inc, its affiliates, and its vendors hired for the purpose of aggregation of data and analysis.