

Phononic Sales Terms & Conditions

2024|Terms and Conditions



PHONONIC, INC.
SALES TERMS AND CONDITIONS
EFFECTIVE JANUARY 1, 2023

These Sales Terms and Conditions ("Agreement") apply to all sales of hardware and/or software products ("Products") and services by Phononic, Inc., a Delaware corporation ("Phononic"), to the entity purchasing or receiving Products or services ("Company"), unless authorized representatives of both Phononic and Company have executed and delivered to each other a separate written agreement governing the sale or delivery of Products and services by Phononic to Company.

1. Applicability and Scope

This Agreement is the exclusive and binding agreement between Phononic and Company governing the purchase of Products or services by Company from Phononic. Company shall be conclusively deemed to have accepted this Agreement upon any of the following by Company, its agents or representatives: (a) written or electronic acknowledgement or acceptance of this Agreement, (b) transmission to Phononic, its agents or representatives of any Order (as defined below), or (c) acceptance of, use of, or payment for any Phononic Product or services. There shall be no force or effect to any additional or different terms proposed by Company including those in Company's purchase order, request for quote, other documents or correspondence, and such terms will not apply even if signed by the parties after the date hereof or otherwise acknowledged or accepted by Phononic. Phononic's failure to specifically object to any provision contained in any communication from Company shall not be deemed a waiver of any provision of this Agreement. PHONONIC'S SALE OF ANY PRODUCTS OR SERVICES TO COMPANY IS MADE CONDITIONAL ON COMPANY'S ACCEPTANCE OF THESE TERMS TO THE EXCLUSION OF ALL OTHER TERMS.

2. Ordering and Delivery

2.1 Orders. Company shall order Products and/or services by submitting to Phononic written purchase orders (each, an "Order"), substantially in the form provided by Phononic to Company. Every Order placed by Company is subject to acceptance by Phononic. Company expressly agrees that any terms of a purchase order, requisition, work order, request for proposal, or other document or record prepared, issued, or provided by or on behalf of Company (other than the Order) will have no effect of supplementing, varying, or superseding any provision of this Agreement or any Order, will be of no force or effect, and will not be binding on Phononic, regardless of any acknowledgement thereof by Phononic.

2.2 Shipment and Delivery. Phononic will use reasonable efforts to (a) ship Products on or before Company's requested shipment dates so long as such shipment dates provide at least the stated lead time for the Products between the date Phononic receives the Order and the shipment date, and (b) perform any services agreed upon by Phononic (which may be set forth in a separate Statement of Work executed by both parties). Company shall provide Phononic with all information necessary for Phononic to ship Products and/or provide the services. Company shall notify Phononic in writing within five (5) days after delivery of any visible defects, quantity shortages or incorrect Product shipments. Failure to so notify Phononic in writing within five (5) days will be deemed Company's waiver of the right to return Products. Title and risk of loss shall pass to Company at the time of delivery in accordance with the applicable delivery terms.

2.3 Cancellation or Reschedule by Company. No cancellations or reschedules will be accepted within 90 days of the earliest requested ship date. Subject to the foregoing, Company may cancel or reschedule any Order by issuing written notice to Phononic specifying the requested change ("Change Notice").

Company must provide the Change Notice no later than 90 days prior to the earliest requested ship date. Any other cancellation or rescheduling shall be subject to a charge determined by Phononic, but not to exceed the price of the Products that are the subject of such cancellation or rescheduling. No Change Notice shall be effective without Phononic's written confirmation of receipt of such Change Notice.

2.4 Partial Shipments. Company agrees to accept partial shipments and to pay for Products comprising a partial shipment, provided, however, that Phononic shall only submit an invoice for Products that it has shipped, unless otherwise agreed to in writing by the parties.

2.5 Cancellation by Phononic. Phononic reserves the right to cancel any Orders placed by Company and accepted by Phononic, or to refuse or delay shipment thereof, if (a) Company fails to make any required payment; (b) Company fails to meet reasonable credit or financial requirements established by Phononic, including any limitations on allowable credit; or (c) Company fails to comply with the terms and conditions of this Agreement. No such cancellation, refusal or delay will be deemed a termination (unless Phononic so advises Company) or breach of this Agreement by Phononic.

2.6 Discontinuation. Phononic may in its discretion discontinue any Product upon 60 days' notice, which notice may be provided via a general posting on the Phononic website.

2.7 Modification. Phononic may in its discretion modify any Product. If, in Phononic's judgment, any such modification constitutes a material modification to the form, fit, and function of the Product, Phononic will provide Company with 60 days' notice of such modification, which notice may be provided via a general posting on the Phononic website.

3. Terms of Payment

3.1 Payment Terms. Company shall pay to Phononic the prices for the Products and/or services set forth in the applicable accepted Order, unless otherwise mutually agreed upon by the parties in writing. All payments due hereunder to Phononic shall be paid to Phononic in U.S. dollars (unless otherwise agreed in writing by an authorized representative of Phononic) not later than thirty (30) days following the date of the applicable invoice. All Products are delivered Ex Works (Incoterms) Phononic's manufacturing facility or other designated place of shipment. In addition to the price, Company will pay all charges, including without limitation transportation charges and insurance premiums, and shall be responsible for all taxes (except Phononic's U.S. income taxes), duties, costs of compliance with export and import controls and regulations, and other governmental assessments in connection herewith. When Phononic has the legal obligation to collect taxes, the appropriate amount shall be invoiced to and paid by Company unless Company provides Phononic with a valid tax exemption certificate from the appropriate taxing authority. Overdue payments shall be subject to finance charges computed at a periodic rate of 1.5% per month or the maximum amount allowable by law, whichever is less.

3.2 Security for Purchases. Company grants to Phononic a purchase money security interest in all Products sold to Company that have not yet been paid for, including without limitation goods, general intangibles, and other personal property, and a security interest in all proceeds thereof, in order to secure payment to Phononic of all of Company's indebtedness to Phononic. Company shall execute all documents deemed necessary by Phononic to evidence, perfect, refile, or renew this security interest. Payment in full of the purchase price of all Products shall release Phononic's security interest on such Products or the proceeds thereof.

4. Intellectual Property and Confidentiality

4.1 General. Nothing in this Agreement will alter or transfer either party's ownership of any intellectual property.

4.2 Software. Any software incorporated into or provided for use in or with a Product (whether initially, as part of maintenance or support or otherwise) is not sold, but rather is licensed solely for use in or with that Product strictly in accordance with the documentation and any other use restrictions applicable for that Product. Such license is nonexclusive, non-sublicensable and does not include the right to (and Company will not and will not allow any third party to) modify, reverse engineer (except to the extent applicable law prohibits reverse engineering restrictions), decompile, disassemble, incorporate or use in any other works, create derivatives of, or copy any portion of such software, or to use the software or Product other than as expressly authorized herein. If a Product is provided to any unit or agency of the United States Government (“U.S. Government”), the following provisions shall apply: All software and accompanying documentation are deemed to be “commercial computer software” and “commercial computer software documentation,” respectively, pursuant to DFAR Section 227.7202 and FAR Section 12.212, as applicable. Any use, modification, reproduction, release, performance, display or disclosure of the software and accompanying documentation by the U.S. Government shall be governed solely by the terms of this Agreement and shall be prohibited except to the extent expressly permitted by the terms herein.

4.3 Confidentiality. “Confidential Information” means any and all of Phononic’s business, technical, or financial information (including but not limited to pricing and all software and other non-public information regarding features, functionality and performance of the Products), any information marked as “confidential” or similarly, and any information that Company reasonably should know to be confidential. Company will hold all Confidential Information in confidence, will not disclose any Confidential Information except to its employees with a need to know such Confidential Information in order to use the Products, and will not use the Confidential Information except as necessary to use the Products.

5. Product Quality and Warranty

5.1 Warranty. Phononic warrants only to Company that the Products, when shipped to Company by Phononic, will conform in all material respects to the applicable specifications sheets. Such warranty does not apply to units of Product that have been damaged, mishandled, mistreated or used or maintained or stored other than in conformity with such specifications and Phononic's instructions. EXCEPT FOR BODILY INJURY, COMPANY'S SOLE AND EXCLUSIVE REMEDY FOR ANY BREACH OF THE FOREGOING WARRANTY SHALL BE THE REPAIR OR REPLACEMENT OF OR (AT PHONONIC'S OPTION OR IF REPAIR OR REPLACEMENT IS IMPRACTICAL) REFUND FOR RETURNED NONCONFORMING UNITS OF PRODUCT FOR WHICH FULL DOCUMENTATION AND PROOF OF NON-CONFORMITY IS PROVIDED TO PHONONIC (AND FOR WHICH A PHONONIC RETURN MATERIAL AUTHORIZATION HAS BEEN ISSUED) WITHIN ONE YEAR AFTER THE ORIGINAL NONCONFORMING UNITS (BUT NOT REPLACEMENTS) ARE SHIPPED BY PHONONIC. ANY AND ALL SERVICES ARE PROVIDED “AS IS” WITHOUT WARRANTY OF ANY KIND.

5.2 High-Risk Applications. Products sold by Phononic are not designed, intended, or authorized for use in life support, implantable medical devices, transportation, nuclear, safety or other equipment where malfunction of the Product can reasonably be expected to result in personal injury, death, severe property damage or severe environmental harm. Company represents and warrants that it will use appropriate safeguards to minimize potentially dangerous consequences associated with Product failure. Notwithstanding the forgoing, if Company uses or sells Products in such critical applications, it does so at Company’s own risk and Company agrees to defend, indemnify and hold harmless Phononic from any and all damages, claims, suits or expenses resulting from such use.

5.3 Disclaimer. EXCEPT FOR THE WARRANTIES IN SECTION 5.1, PHONONIC DOES NOT MAKE (AND HAS NOT AUTHORIZED ANYONE TO MAKE), AND HEREBY DISCLAIMS, ANY OTHER EXPRESS OR IMPLIED WARRANTY, INCLUDING, WITHOUT LIMITATION, ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE OR NONINFRINGEMENT.

6. LIMITATION OF LIABILITY

EXCEPT FOR BODILY INJURY, PHONONIC WILL NOT BE LIABLE WITH RESPECT TO ANY SUBJECT MATTER OF THIS AGREEMENT UNDER ANY CONTRACT, NEGLIGENCE, STRICT LIABILITY OR OTHER LEGAL OR EQUITABLE THEORY FOR (A) ANY AMOUNTS IN EXCESS IN THE AGGREGATE OF THE AMOUNTS PAID TO PHONONIC HEREUNDER DURING THE TWELVE MONTH PERIOD PRIOR TO DATE THE CAUSE OF ACTION AROSE, OR (B) ANY INCIDENTAL, INDIRECT OR CONSEQUENTIAL DAMAGES OF ANY KIND, OR (C) COST OF PROCUREMENT OF SUBSTITUTE GOODS, TECHNOLOGY OR SERVICES. PHONONIC SHALL HAVE NO LIABILITY FOR ANY FAILURE OR DELAY DUE TO MATTERS BEYOND ITS REASONABLE CONTROL OR FOR ANY ALLOCATION OF PRODUCTS BETWEEN ITS CUSTOMERS IN THE EVENT OF A SHORTAGE.

7. Export Control

Company shall comply with all export laws and restrictions and regulations of the Department of Commerce, the United States Department of Treasury Office of Foreign Assets Control (“OFAC”), or other United States or foreign agency or authority, and not export, or allow the export or re-export of any Product or related software or technical information in violation of any such restrictions, laws or regulations. Company shall obtain and bear all expenses relating to any necessary licenses and/or exemptions with respect to the export from the United States of all Products to any location and shall demonstrate to Phononic compliance with all applicable laws and regulations prior to delivery thereof by Phononic.

8. Marketing

The parties intend to engage in select marketing activities that are approved by both parties, including, without limitation, the ACTIVE/118800454.8 Page 3 of 3 issuance of a press release and/or a quote from a Company representative concerning the parties’ relationship within a reasonable time after the effective date of this Agreement.

9. Miscellaneous

9.1 The relationship between the parties hereto shall be that of independent contractors, each being in full control of their own business. Under no circumstances shall either party have the right or authority to act or make any commitment on behalf of or bind the other party or represent the other party as its agent in any way. Any notices required or permitted by this Agreement shall be in writing and shall be addressed to Company at the address Phononic has on file for Company, and to Phononic at the following address: Attn: Legal Department, Phononic, Inc., 800 Capitola Drive, Suite 7, Durham, NC 27713. Notices shall be deemed given when personally delivered, when sent by confirmed fax, or three days after being sent by prepaid certified or registered U.S. mail to the address of the party to be noticed as set forth herein or such other address as such party last provided to the other by written notice. Company shall not have any right or ability to assign, transfer, or sublicense any obligation or benefit under this Agreement and any attempt to do so shall be void. Phononic may assign this Agreement to any affiliate or any successor to all or substantially all of its assets or business. The failure of either party to enforce its rights under this

Agreement at any time for any period shall not be construed as a waiver of such rights. This Agreement supersedes all proposals, oral or written, all negotiations, conversations, or discussions between or among the parties relating to the subject matter of this Agreement and all past dealing or industry custom. No changes, modifications or waivers are to be made to this Agreement unless evidenced in writing and signed for and on behalf of both parties. In the event that any provision of this Agreement shall be determined to be illegal or unenforceable, that provision will be limited or eliminated to the minimum extent necessary so that this Agreement shall otherwise remain in full force and effect and enforceable. This Agreement shall be governed by and construed in accordance with the laws of the State of North Carolina (without regard to the conflicts of laws provisions thereof or the UN Convention on the International Sale of Goods). All disputes arising out of this Agreement shall be subject to the exclusive jurisdiction of the state and Federal courts located in Durham County, North Carolina, and the parties agree and submit to the personal and exclusive jurisdiction and venue of these courts. In any action or proceeding to enforce rights under this Agreement, the prevailing party will be entitled to recover costs and attorneys' fees. Neither party may bring any action, regardless of form, related to any Order, this Agreement, or any Product more than one (1) year after the party bringing the action knew or should have known that the cause of action accrued.

End of Terms