

**Appendix D**  
**Flair Data Systems Equipment and Services Agreement**  
**DIR-TSO-4354**

Customer Name:	
Customer Contact Name:	
Customer Address:	
Customer Phone:	

This **Equipment and Services Agreement** ("Agreement") between Porter Burgess Company d/b/a Flair Data Systems (or "we"/"us") and Customer (or "you"/"your") along with DIR Contract No. DIR-TSO-4354 governs our sale and your purchase of the Equipment and Services described in this Agreement and any Orders issued pursuant to this Agreement, as well as any additions to and accessories and replacements of Equipment and Services. In case of conflict between these documents, DIR Contract No. DIR-TSO-4354 shall prevail. This Agreement is effective after execution by both parties and remains in full force and effect until terminated in accordance with Appendix A, Section 11.B of the DIR Contract No. DIR-TSO-4354.

**1. Definitions**

"Equipment" means the equipment and Software.

"Order" means any purchase order issued by you for Equipment or Services that is signed by your authorized representative, and is accepted by Flair Data Systems.

"Premises" mean your facility or location specified in an Order where the Equipment will be installed or Services performed.

"Services" mean the services and work scheduled to be provided by us.

"Software" means the computer programs supplied by us, including any hardwired logic instructions, micro code and other computer instructions that are provided with the Equipment or separately.

**2. Items to be Furnished by Flair Data Systems**

We will sell and you will purchase from us the Equipment and Services specified in any Order issued under this Agreement.

**3. Delivery and Installation by Flair Data Systems**

We will deliver the Equipment, FOB Destination. Title to the Equipment and all risk of loss to the Equipment shall pass to you at the time of acceptance. If any Equipment arrives at your destination in a damaged condition or should any shortage exist, you shall immediately notify the carrier and us. Shipping dates will be established by us as accurately as conditions will permit.

At the Premises, we will, when so requested by you, install Equipment in accordance with the Order agreed to by the parties, and referenced in an Order. We will maintain all work areas at the Premises in a neat and orderly condition.

**4. Items to be Furnished by Customer**

In connection with the installation of the Equipment at the Premises, you will furnish any conduit, holes, wireways, wiring, plans, equipment, space, temporary and permanent power and other utilities, and all other items and services reasonably required for the Equipment's installation/integration in accordance with the Order. We will rely on all information provided by you and will not be responsible or held liable for any damages or costs that result from errors or omissions in such information. You will provide a suitable and safe environment. We have not included in our charges any expense for dealing with or removing any potentially hazardous substances, such as asbestos. You are responsible for handling such materials, at your cost, and for any additional costs incurred by Flair Data Systems. You also will obtain, at your expense, any necessary licenses, permits and consents (including landlord's or mortgagee's consents) in connection with the installation.

Notwithstanding any other part of this Agreement: (a) We shall have the right to suspend performance or to pursue any other remedies provided for under this Agreement where you delay or fail to comply with this provision; and (b) where any of the measures described above are unreasonably expensive, you may request that we suspend our performance until such time as an alternative remedy or course of performance is secured or agreed upon;

provided, however, that we may terminate this Agreement or an Order where any such suspension lasts longer than thirty (30) days.

**5. Invoicing and Payment Terms**

Invoicing shall be in accordance with DIR Contract, DIR-TSO-4354, Appendix A, Section 8.J. Payment shall be in accordance with DIR Contract, DIR-TSO-4354, Appendix A, Section 8.K.

**6. Limited Warranty, Limitation of Liability and Limitation of Remedy**

Flair Data Systems warrants it has good title to the Equipment, free of any claims, liens, encumbrances or security interest of any other part. Flair Data Systems will transfer all manufacturers warranties at transfer of Title. In addition, for THIRTY (30) days after delivery (or installation, if installation was included), We will promptly repair or replace (at our option and expense) any failure of the Equipment to conform to or perform according to the manufacturer's specifications or any electrical or mechanical defects in materials or workmanship with (at our option) new or used replacement parts. We will pass all manufacturers' warranties to you after delivery (or installation, if included). If we are unable to repair the Equipment to conform to the warranty after a reasonable number of attempts, we will (at our option) either provide you with replacement Equipment or fully refund your payments upon return of the Equipment. This states the entire liability of Flair Data Systems with respect to the infringement of patents, copyrights and trademarks by the equipment provided under this agreement.

THE FOREGOING WARRANTIES ARE EXCLUSIVE AND IN LIEU OF, AND FLAIR DATA SYSTEMS DISCLAIMS, ALL OTHER EXPRESS OR IMPLIED WARRANTIES, OBLIGATIONS OR LIABILITIES, INCLUDING BUT NOT LIMITED TO THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR PARTICULAR PURPOSE. EXCEPT FOR THE LIMITED WARRANTIES SET FORTH HEREIN, THE EQUIPMENT (INCLUDING SOFTWARE) IS PROVIDED "AS IS" WITHOUT WARRANTY OF ANY KIND, EITHER EXPRESS OR IMPLIED. FLAIR DATA SYSTEMS DOES NOT WARRANT THAT THE EQUIPMENT (INCLUDING SOFTWARE AND SECURITY SOFTWARE) WILL BE UNINTERRUPTED OR ERROR FREE IN ITS OPERATION OR PREVENT THIRD PARTY HACKING OR ACCESS TO CUSTOMER'S NETWORKS.

CUSTOMER'S SOLE AND EXCLUSIVE REMEDIES AGAINST FLAIR DATA SYSTEMS, ITS AFFILIATES, AND THEIR DIRECTORS, OFFICERS AND EMPLOYEES FOR ANY LOSSES, COSTS OR DAMAGES CAUSED BY OR ARISING FROM ANY EQUIPMENT, SOFTWARE OR SERVICE PROVIDED BY FLAIR DATA SYSTEMS IN CONNECTION WITH THIS AGREEMENT, WHETHER IN CONTRACT OR IN TORT, SHALL BE CUSTOMER'S RIGHT TO RECEIVE REPAIR OR REPLACEMENT OF THE EQUIPMENT OR THE SERVICES FOR THIRTY DAYS SPECIFIED ABOVE. FLAIR DATA SYSTEMS ITS AFFILIATES, DIRECTORS, OFFICERS AND EMPLOYEES SHALL NOT BE LIABLE FOR ANY INDIRECT, INCIDENTAL, PUNITIVE, SPECIAL OR CONSEQUENTIAL DAMAGES (INCLUDING BUT NOT LIMITED TO LOST PROFITS AND LOSS OF DATA) SUSTAINED OR INCURRED IN CONNECTION WITH THE PERFORMANCE OR NONPERFORMANCE OF WORK UNDER THIS AGREEMENT OR THE USE OR OPERATION OF THE EQUIPMENT, SOFTWARE AND SERVICES PROVIDED OR SOLD OR LICENSED UNDER THIS AGREEMENT, OR FOR ANY DAMAGES DUE TO CAUSES BEYOND THE REASONABLE CONTROL OF FLAIR DATA SYSTEMS OR ATTRIBUTABLE TO ANY SERVICE, PRODUCTS, OR ACTIONS OF ANY PERSON OTHER THAN FLAIR DATA SYSTEMS, ITS AFFILIATES, DIRECTORS, OFFICERS, EMPLOYEES, OR AGENTS REGARDLESS OF THE FORM OF ACTION.

You will be subrogated to any claims or rights we may have against the manufacturer of the Equipment for breach of any manufacturer warranties or representations and, upon your written request, we will take all reasonable actions to enforce on your behalf any such express or implied warranties or representations applicable to the Equipment.

**7. Indemnifications**

Indemnification shall be in accordance with Appendix A, Section 10. A of the DIR contract, DIR-TSO-4354

## 8. Force Majeure

Force Majeure shall be in accordance with Appendix A, Section 11.C of the DIR Contract, DIR-TSO-4354.

## 9. Taxes

Taxes shall be in accordance with Appendix A, Section 8. E of the DIR Contract, DIR-TSO-4354.

## 10. Assignments and Subcontracts

Assignment shall be in accordance with Appendix A, Section 4.D of the DIR contract, DIR-TSO-4354

## 11. Notices; Representatives of Parties

Notices shall be in accordance with Appendix A, Section 12.A of the DIR Contract, DIR-TSO-4354.

## 12. Confidentiality and Proprietary Information

To the extent allowable under the Texas Public Information Act, Flair Data Systems and Customer acknowledge that in the course of performing duties under this Agreement, each party may obtain proprietary information from the other party that is of a proprietary or confidential nature. Such proprietary information may include, but is not limited to trade secrets, new product information, technical data and know-how, instructional and operating manuals, financial information, marketing and sales data and plans, and other documents. Proprietary information may be disclosed in writing, in other tangible form, orally or visually. When disclosed in writing or other tangible form, the proprietary information will be identified and labeled as confidential belonging to the disclosing party. When disclosed orally or visually, such proprietary information will first be identified as confidential at the time of the oral or visual disclosure, with subsequent confirmation in writing within fifteen (15) days after disclosure.

Neither party shall at any time during the Agreement and for a period of one (1) year after its expiration, publish, disclose or otherwise divulge any of the other party's proprietary information to any third party without the prior written consent of the other party. Neither party will use the other party's proprietary information except in the course of its duties under this Agreement. However, we may disclose your proprietary information to subcontractors, regulatory authorities, and others, as necessary to meet our obligations under this Agreement.

The proprietary information restrictions will not apply to information which (a) is already known to the receiving party, (b) is or becomes publicly known through no wrongful act of the receiving party, (c) is independently developed by the receiving party without benefit of the disclosing party's proprietary information, (d) is received from a third party without similar restriction and without breach of this Agreement, or (e) is disclosed by disclosing party to a third party without an obligation of confidentiality.

## 13. Storage of Equipment

We and/or our designated subcontractors may store a reasonable amount of Equipment, materials, tools and other items necessary for the performance of an Order on the Premises or in such other secure location(s) as you may designate, at no charge. You will take reasonable precautions to protect and maintain the integrity of any such items and will accept delivery of any such items delivered to your facilities when our personnel are not available to accept delivery and place or direct the placement of such items on the Premises or other secure location(s). In the event you accept delivery of any items under this Agreement, you will promptly notify us of the delivery and location of the items delivered.

## 14. Amendments; Termination

Termination shall be in accordance with Appendix A, Section 11.B of the DIR Contract, DIR-TSO-4354.

## 15. Miscellaneous Provisions

Upon mutual written agreement between Porter Burgess Company and Customer, we are entitled to increased compensation and/or time for completion where we encounter concealed physical conditions which differ materially from those indicated in any documents provided under this Agreement or otherwise represented by you, or latent physical conditions which differ materially from those ordinarily found to exist and generally recognized as inherent in the installation and/or maintenance activities contemplated by this Agreement, where such conditions would materially interfere with, delay or increase cost of performance under this Agreement.

Porter Burgess Company Inc. is a Texas corporation. "Flair Data Systems Inc.," is a d/b/a name registered to Porter Burgess Company

This Agreement shall be governed by the laws of the state of Texas.

If any provision of this Agreement or any remedy provided in it is declared invalid under any applicable law, such provision shall be modified to the extent necessary to make it valid and enforceable. The remaining provisions of this Agreement shall continue in full force and effect.

Export of Equipment is subject to the Export Control Laws of the United States. You agree not to export the Equipment in violation of those laws.

Any obligation arising under this Agreement or any Order, which by its nature continues beyond termination or expiration, such as Limitation of Warranties, Limitation of Liabilities and Limitation of Remedies, shall survive termination or expiration of this Agreement.

The DIR Contract, DIR-TSO-4354 and this Agreement, all exhibits attached and all Orders issued under this Agreement, represent the entire agreement between Customer and Flair Data Systems concerning the Equipment and Services, and supersedes all prior negotiations, representations, and agreements, either written or oral, concerning the Equipment and Services. In the event of a conflict between the contract documents, the DIR Contract, DIR-TSO-4354 shall take precedence.

## SO AGREED:

### Company Name

By: \_\_\_\_\_

Title: \_\_\_\_\_

Address: \_\_\_\_\_

Phone: \_\_\_\_\_

Fax: \_\_\_\_\_

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

### Porter Burgess Company d.b.a.Flair Data Systems

By: \_\_\_\_\_

Title: \_\_\_\_\_

Phone: \_\_\_\_\_

Fax: \_\_\_\_\_

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