



## **ASA/Racklive Terms and Conditions of Sale**

These Terms and Conditions of Sale, together with any Racklive Attachment to Terms and Conditions of Sale (collectively, these "Terms") constitute the terms and conditions that apply as between ASA/Racklive ("ASA/Racklive") and You (the "Customer") regarding any equipment, features, upgrades, other items (collectively, the "Products") and related services (the "Services") that are sold, licensed, rendered or otherwise provided by ASA/Racklive to Customer from time to time. Customer's placement of an order with ASA/Racklive constitutes acceptance of these Terms. ASA/Racklive performance of Customer's order is expressly conditioned upon Customer's acceptance of these Terms and Customer's agreement that these Terms will supersede and take priority over any additional or inconsistent terms and conditions in any existing or future purchase order, confirmation or other similar document from Customer. Without limiting the generality of the foregoing, nothing contained in any purchase order, confirmation or other similar document will in any way modify or add to these Terms, and any terms or conditions contained in a purchase order, confirmation, or other similar document from Customer that are in any way inconsistent with or additional to these Terms are hereby rejected.

### **1. ORDERS AND PAYMENT TERMS**

- a.** All prices quoted are on a per occurrence basis, unique to a specific proposal, and are subject to change without notice. All quotes are subject to termination by ASA/Racklive at any time prior to receipt and acceptance of Customer's purchase order.
  
- b.** An accepted order can be canceled only with ASA/Racklive written consent, and only on terms that will indemnify ASA/Racklive against resulting losses (including, but not limited to, any costs already incurred by ASA/Racklive in performing the order). In no event will a cancellation be allowed after Products have shipped. A cancellation charge may be assessed to Customer in accordance with ASA/Racklive then-current cancellation charges. ASA/Racklive grants to Customer the right to cancel the outstanding portion of an accepted purchase order if ASA/Racklive fails to ship the product within thirty (30) days after the scheduled ship date provided the delay in shipment is not due to credit issues or other actions taken by Customer.
  
- c.** Customer shall pay all invoices in cash. If ASA/Racklive has, in its sole discretion, agreed to extend credit to Customer sufficient to cover the applicable invoice (and all other outstanding invoices), then Customer shall make payment within thirty (30) days from the date of invoice. Otherwise such invoice shall be payable immediately upon receipt or, if required by ASA/Racklive in advance of shipment. ASA/Racklive may issue partial invoices for partial shipments. ASA/Racklive reserves the right to establish, terminate or alter credit limits and terms, to delay shipment of orders, to require full or partial prepayment or to require alternate terms and conditions based upon Customer's payment history, financial condition or any other matter that in ASA/Racklive determination adversely affects the likelihood that Customer will make timely payment in full. Without limiting the generality of the foregoing, if Customer fails to timely pay any invoice, or if its financial condition becomes impaired or unsatisfactory to ASA/Racklive may require Customer to provide satisfactory security and may withhold further deliveries until such security is received. Any amount payable by Customer that remains unpaid after the applicable payment due date will be subject to a late charge equal to the lesser of one and one-half percent (1.5%) per month or the maximum rate allowable by law from the due date until such

amount is paid. Customer shall reimburse ASA/Racklive for reasonable attorneys' fees and any other costs associated with collecting delinquent payments. All payments will be made in U.S. dollars unless otherwise agreed by ASA/Racklive in writing on a case by case basis.

**d.** Customer hereby grants, and agrees to grant, to ASA/Racklive a continuing security interest, and a purchase money security interest, in all the Products and the proceeds thereof, to secure payment of the amounts set forth in the invoices issued by ASA/Racklive to Customer. These security interests will be satisfied upon payment in full of all invoices. Customer authorizes ASA/Racklive to file a copy of the invoice and/or a financing statement with appropriate government authorities at any time in order to perfect the foregoing security interests. On the request of ASA/Racklive Customer will execute financing statements and other instruments ASA/Racklive requires to perfect its security interests.

## **2. TAXES, DUTIES AND CUSTOMS**

All prices quoted and payable for Products and Services are exclusive of all taxes (including, but not limited to, withholding taxes), duties, broker charges and customs requirements in each case imposed now or in the future by any governmental authority on the transactions or amounts payable hereunder. Unless Customer submits satisfactory tax-exemption documentation to ASA/Racklive Customer shall pay all import duties, customs fees, sales and use taxes, broker charges, value added taxes, and all other taxes except taxes on ASA/Racklive income. ASA/Racklive may, in its discretion, either pay such taxes, duties and charges directly for Customer's benefit and include such amounts in an invoice, or else require Customer to pay such taxes, duties and charges directly to the appropriate authorities. All special export packaging costs will be invoiced to Customer. Export of certain Products may be subject to government restrictions. ASA/Racklive shall not be responsible for delays caused by third parties, including, but not limited to, customs, strike, brokerage or other delays.

## **3. DELIVERY, SETUP AND INSTALLATION**

**a.** All deliveries shall be: for deliveries within the United States F.O.B. Origin; for those outside of the United States Supplier's Dock (FCA: Supplier's Dock, Incoterms 2000). Title and risk of loss will pass to Customer on delivery of the Products to a common carrier. Customer shall be solely responsible for obtaining appropriate insurance coverage for such shipments, unless insurance is included in a written quotation provided by ASA/Racklive and accepted by Customer. Unless otherwise agreed by the parties, ASA/Racklive shall arrange shipping on Customer's behalf to the destination specified by Customer in its order. Customer will be responsible and will reimburse ASA/Racklive for any shipping charges incurred by ASA/Racklive including, but not limited to, transportation charges and all taxes, V.A.T, duties, and any other governmental assessment applicable to any shipment.

**b.** Delivery and shipping dates are approximate only, and ASA/Racklive will not be liable for any damage, loss or expense incurred by Customer if ASA/Racklive fails to meet the specified shipping dates. All goods will be packaged in the manner determined by ASA/Racklive unless otherwise requested by Customer and agreed to in writing by ASA/Racklive. ASA/Racklive reserves the right to make partial shipments. In the event of any default by Customer, ASA/Racklive may decline to make further shipments without in any way affecting ASA/Racklive rights under these Terms.

**c.** Subject to the licensing requirements set forth below in subparagraph (d), at the Customer's request, ASA/Racklive may perform additional Services after delivery of the Products. These Services may include: (i) loading a disk image approved and provided by the Customer, (ii) cabling and labeling servers within the rack (iii) configuring basic network settings on each machine per Customer's reasonable written instructions; (iv) configuring serial concentrators per Customer's reasonable written instructions. Customer shall pay ASA/Racklive for the time spent in performing any such tasks at ASA/Racklive then-current standard hourly rates, plus reasonable travel and other out of pocket expenses. If billable, the specifics of Services to be

performed and rates applicable to such Services shall be laid out in an appropriate Statement of Work signed by the parties. ASA/Racklive then-current standard hourly rates for setup and installation Services are available upon request. Customer may request estimates of cost for such Services provided, however, that Customer understands that all such estimates are not binding on ASA/Racklive.

d. If Customer requests that ASA/Racklive perform any setup, installation or other Service, Customer shall ensure that any software duplication through the loading of disk images is legal, that it has obtained the applicable licenses for ASA/Racklive to load and execute such disk images and software and information contained therein onto Customer's servers, and that each copy of software and information embodied in such disk image(s) is legally licensed for Customer's actual and contemplated uses. Customer indemnifies and holds ASA/Racklive harmless from and against any and all third party allegations, claims, damages, assertions, losses and liabilities of any kind or nature arising from or based in whole or in part upon ASA/Racklive's performance of Services for Customer. ASA/Racklive reserves the right to request written proof that the foregoing license rights for ASA/Racklive have been obtained, and if ASA/Racklive determines that such license rights have not been obtained, Customer shall be responsible for all non-hardware setup tasks.

#### **4. WARRANTY**

ASA/Racklive's standard warranty ("Limited Warranty Statement"), which can be viewed at [Warranty Terms](#), is hereby incorporated as though fully set forth herein.

#### **5. LIMITATIONS OF LIABILITY**

IN NO EVENT SHALL ASA/Racklive BE LIABLE FOR ANY INCIDENTAL, SPECIAL, PUNITIVE, CONSEQUENTIAL OR INDIRECT DAMAGES, OR FOR ANY LOSS OF BUSINESS, SALES OR PROFITS, WHETHER SOUNDING IN CONTRACT, TORT, STRICT LIABILITY OR OTHER LEGAL THEORY, EVEN IF ADVISED OF THE POSSIBILITY OF SUCH DAMAGES OR LOSS. IN ADDITION, IN NO EVENT WILL ASA/Racklive's TOTAL CUMULATIVE LIABILITY ARISING FROM OR RELATED TO THE PRODUCTS OR SERVICES, THESE TERMS OR THE SUBJECT MATTER HEREOF, WHETHER IN CONTRACT, TORT OR ANY OTHER LEGAL THEORY, EXCEED THE AMOUNTS RECEIVED BY ASA/Racklive FROM CUSTOMER FOR THE PRODUCTS AND SERVICES THAT ARE THE BASIS FOR THE LIABILITY.

Customer acknowledges that ASA/Racklive has set its prices and entered into these Terms in reliance upon the limitations of liability and the disclaimers of warranties and damages set forth herein, and that the same form an essential basis of the bargain between the parties. Customer agrees that the limitations and exclusions of liability and disclaimers specified in these Terms will survive and apply even if found to have failed of their essential purpose.

#### **6. NOTICES**

Any notice required to be given hereunder shall be in writing and shall be deemed to have been delivered when deposited in the United States mail as registered or certified mail with a return receipt requested, with adequate postage affixed and addressed to ASA/Racklive to the attention of ASA/Racklive CFO, 645 National Ave, Mountain View, CA 94043 (or such future address as ASA/Racklive may specify in writing), or if to Customer at the address set forth on Customer's purchase order or any address at which the Products have been delivered (unless a different notice address has been provided in writing by Customer).

#### **7. FORCE MAJEURE**

Neither party will incur any liability to the other party for any loss or damages resulting from any delay or failure to perform its obligations (other than the obligation to pay money due and owing) under these Terms if such failure is caused by events beyond its reasonable control (a "Force Majeure Event"), provided however if the Force Majeure Event continues for a period of 30 days or longer, either party may terminate these Terms upon written notice to the other party. Inability to timely make payment shall not in any event be deemed a Force Majeure Event.

## **8. PUBLICITY**

Neither party shall disclose any of the terms and conditions of these Terms without the prior written consent of the other except to (a) its attorneys, accountants, and other professional advisors under a duty of confidentiality, (b) as required by law, or (c) in connection with a proposed merger, financing, or sale of such party's business provided that any third party to whom the terms of this Agreement are to be disclosed is under a duty of confidentiality. Customer grants to ASA/Racklive the right to use Customer's name and logo on ASA/Racklive promotional materials (including, without limitation, on ASA/Racklive's web site) for the sole purpose of identifying Customer as one of ASA/Racklive's customers.

## **9. APPLICABLE LAW; VENUE**

These Terms are deemed to be entered into in the State of California, U.S.A. The parties agree that these Terms shall be governed by and construed in accordance with the laws of the State of California, U.S.A. without regard to any conflict of laws rules that would require the laws of another jurisdiction to apply. The U.N. Convention on the International Sale of Goods shall not apply to the sale of Products hereunder or otherwise to these Terms. Customer consents to the jurisdiction of, and venue in, the state court of Santa Clara County, California, U.S.A., or the federal court of the Northern District of California, U.S.A.

## **10. NO WAIVER**

The failure of either party at any time to require performance by the other party of any provision hereof will not affect, in any way, the full rights to require such performance at any time thereafter, nor will the waiver by either party of a breach of any provision hereof be taken or held to be a waiver of the provision itself.

## **11. EXPORT AND IMPORTANT REGULATION**

Customer will comply fully with all relevant export laws and regulations of the United States, including without limitation the U.S. Export Administration Regulations (collectively "Export Controls"). Without limiting the generality of the foregoing, Customer will not and shall require its representatives not to, export, direct, or transfer Products, or any direct product thereof, to any destination, person, or entity restricted or prohibited by the Export Controls. Customer shall promptly provide all information and certifications reasonably requested by ASA/Racklive (including without limitation certification of end-user identity and associated information) as may be necessary or desirable for ASA/Racklive to fulfill its obligations under the Export Controls.

Customer shall comply fully with all relevant import laws and regulations of the country or countries to which Products are delivered, and shall provide all necessary information concerning actions that ASA/Racklive must take in order to comply with such foreign laws and regulations to ASA/Racklive prior to ASA/Racklive acceptance of any order.

## **12. ASSIGNMENT**

Customer may not assign, delegate, or transfer these Terms or any right or obligation hereunder without the prior written consent of ASA/Racklive and any attempt by Customer to assign these Terms without such consent will be null and void. Subject to the preceding sentence, these Terms will bind each party and its permitted successors and assigns. ASA/Racklive may assign any of its rights or obligations under these Terms without the consent of Customer.

## **13. LICENSES; NO IMPLIED RIGHTS**

Software programs and other information embodied in the Products are licensed, not sold, for Customer's limited use as specified in the applicable license agreement. The applicable license agreements will be provided with the Products at delivery, and are also available from ASA/Racklive upon request. Customer shall comply with all such license agreements, and any breach by Customer of any such license agreements shall be deemed a breach of these Terms. Nothing in these Terms or the sale of the Products shall imply any other license or other rights with respect to any intellectual property rights of ASA/Racklive or its suppliers except as may be set forth in a written license agreement supplied by ASA/Racklive or its suppliers as applicable, and ASA/Racklive reserves all rights in the Products.

#### **14. PRODUCT CHANGES & DISCONTINUATION**

ASA/Racklive reserves the right, from time to time and in its discretion, to modify, alter, change, improve or discontinue Products.

#### **15. TECHNICAL DATA**

Customer shall not, without ASA/Racklive prior written consent, use, duplicate, or disclose any technical data or information, or any information related to the functionality, performance, or construction of the Products delivered or disclosed by ASA/Racklive to Customer, for any purposes other than for the purposes of installation, operation or maintenance of Products by persons who have agreed to preserve the confidentiality of such technical data and information. All such technical data and information shall remain the confidential information and sole property of ASA/Racklive.

#### **16. ACTIONS**

Any action resulting from any alleged breach by ASA/Racklive must be commenced within one (1) year after the cause of action has accrued. The prevailing party in any action to enforce these Terms shall be entitled to recover its attorneys' fees, court costs, and other collection expenses, in addition to any other relief it may receive.

#### **17. NO THIRD PARTY BENEFICIARIES**

There are no third party beneficiaries to these Terms, and these Terms do not provide a third party with any remedy, claim, liability, reimbursement, cause of action or other right or privilege.

#### **18. ENTIRE TERMS**

These Terms, the ASA/Racklive's Sales Order Acknowledgment, and any applicable software license agreements, constitute the complete agreement between the parties and supersede all prior or contemporaneous agreements or representations, written or oral, concerning the subject matter of these Terms. In the event of any conflict, ambiguity, or inconsistency between these Terms and the terms contained in the other documents referenced herein, the terms contained in the ASA/Racklive ' Sales Order Acknowledgment or the applicable software license agreement, as the case may be, shall control with respect to the subject matter referenced on ASA/Racklive Sales Order Acknowledgment or the applicable software license agreement.

#### **19. AUTHORITY; EXECUTION AND MODIFICATION**

The only persons authorized to amend or modify these Terms on behalf of ASA/Racklive are the President, Chief Financial Officer, Controller or General Counsel of ASA/Racklive and any such amendment or modification must be in writing signed by one of such officers of ASA/Racklive and Customer; the signature of any other officer, employee or agent below shall not bind ASA/ Racklive. No signature, promise, act, document, usage, or custom will be deemed to amend or modify these Terms except as expressly provided above.