Terms and Conditions of Sale

v2024-01-01

1. Entirety of the Agreement.
   (a) By engaging in conduct relating to the purchase of goods from Seller, including, but not limited to, the ordering and/or shipment of any goods, Buyer acknowledges and agrees, at minimum, to these *Terms and Conditions of Sale* and any agreement incorporating these *Terms and Conditions of Sale* (hereinafter, collectively, "Agreement").
   (b) Seller objects to and will not be bound by any additional, different, or inconsistent terms or conditions in Buyer's purchase order or other documents from Buyer, and shipment pursuant to a purchase order of Buyer that contains additional, different, or inconsistent terms does not constitute acceptance of such terms.
   (c) If the provisions of the Agreement and any written agreement, signed by an officer of Seller and an authorized representative of Buyer, pertaining to the same goods directly conflict, then the provisions of such written agreement signed by an officer of Seller and an authorized representative of Buyer will prevail.
   (d) No conditions, understandings, or agreements purporting to amend, waive, modify, extend, or vary any terms of the Agreement will be binding or of any force or effect unless hereafter made in writing and signed by an officer of Seller and an authorized representative of Buyer.
   (e) In the absence of a written agreement signed by an officer of Seller and an authorized representative of Buyer and pertaining to the same goods, the Agreement is intended as the final expression of Seller and Buyer and there are no oral representations, stipulations, warranties, agreements, or understandings with respect to the subject matter of the Agreement that are not fully expressed therein.
   (f) Neither the Agreement nor its execution has been induced by any representation, stipulation, warranty, agreement, or understanding of any kind other than those expressed in writing.
   (g) No prior course of dealing or performance or usage of trade not expressly set forth in the Agreement will be admissible to explain, supplement, modify, or contradict any terms or conditions of the Agreement.

2. Delivery.
   (a) All prices are effective Seller's shipping point and unless Seller specifically agrees to pay all or some part thereof, Buyer will pay all freight, delivery charges, inspection fees, and other charges, if any, levied or imposed on the goods per delivery; if Seller prepays such charges at Buyer's request or on behalf of Buyer, then Buyer will reimburse Seller therefor.
   (b) A surcharge may be imposed by Seller to each shipment to reflect increases in transportation costs.
   (c) Seller will deliver the goods to Buyer's destination as soon as reasonably practicable; provided, however, Buyer acknowledges and agrees that shipment dates are based on Seller's reasonable judgment and are subject to production limitations and factory schedules, and that delivery dates are not guaranteed.
   (d) If for any reason shortages occur in the supply of Seller's goods, then Seller may allocate such goods, in which case Seller will prorate the supply in a manner that in Seller's sole judgment is fair, taking into account factors Seller determines are relevant; such factors may include, but are not limited to, Seller's shipments to all buyers during the past year, the percentage of each buyer's requirements which such shipments represent (if known and disclosable), and each buyer's needs at the time of shortage.
   (e) Buyer acknowledges and agrees to delivery of the goods in ratable amounts over the life of the Agreement.
   (f) If Buyer is using a railcar, Truck (as defined herein), or other conveyance owned or chartered by Seller, then each such railcar, Truck, or other conveyance in which Seller ships goods to Buyer's destination is automatically subject to the following provisions, from the time such railcar, Truck, or other conveyance is delivered to a railroad or other carrier for transportation to Buyer until it is redelivered by Buyer to a railroad or other carrier in accordance with Seller's routing instructions.
      (1) For purposes of the Agreement, "Truck" or "Trucks" means a motor vehicle capable of taking receipt of, and making delivery of, the goods sold pursuant to the Agreement, including, but not limited to, tank trucks, bulk trucks, and/or trucks with trailers, including, but not limited to, trailers used with intermodal containers.
      (2) A railcar, Truck, or other conveyance will be deemed in Buyer's possession from the time such railcar, Truck, or other conveyance constructively or actually arrives at Buyer's destination, whichever is first.
         (A) For purposes of the Agreement, "constructive" when used with respect to arrival of a railcar, Truck, or other conveyance means upon notification by the railroad or other carrier that such railcar, Truck, or other conveyance is available for receipt and/or placement.
         (B) In the event of railcar delivery, upon actual or constructive arrival at Buyer's destination, whichever is first, Buyer will unload the railcars used to transport the goods as soon as reasonably practicable; provided, however, upon the expiration of seven (7) days from the date of actual or constructive arrival at Buyer's destination, whichever is first, holding charges will commence and Buyer will be liable for a holding charge of one hundred fifty U.S. dollars ($150.00) per day per railcar for each full or fractional day thereafter (hereinafter "Railcar Holding Charge").
         (C) In the event of Truck delivery, upon actual arrival at Buyer's destination, Buyer will unload the Trucks used to transport the goods as soon as reasonably practicable; provided, however, upon the expiration of two (2) hours from the time of actual or constructive arrival at Buyer's destination, whichever is first, holding charges will commence and Buyer will be liable for a holding charge of one hundred fifty U.S. dollars ($150.00) per hour per Truck for each full or fractional hour thereafter (hereinafter "Truck Holding Charge").
         (D) Seller may increase the Railcar Holding Charge or Truck Holding Charge at its sole discretion.
      (3) Buyer will return all railcars, Trucks, and other conveyances in the same condition as when received, excluding ordinary wear and tear; provided, however, if a railcar, Truck, or other conveyance arrives at Buyer's destination in damaged condition, then Buyer will immediately notify the railroad or other carrier of such damage and will also make an immediate report thereof to Seller.
      (4) Repairs to any damaged railcar, Truck, or other conveyance will be made only at the express direction of Seller.
      (5) Buyer will use each railcar, Truck, or other conveyance only for the transportation of the goods from Seller's point of shipment to Buyer's destination and for temporary storage of such goods at Buyer's destination.
      (6) Buyer will unload and return any railcar, Truck, or other conveyance to the railroad or other carrier within the tariff or contracted period free of demurrage and/or detention charges; **Buyer will indemnify Seller from and against all demurrage and/or detention charges resulting from the use of railcars, Trucks, or other conveyances by Buyer**.
      (7) As soon as each railcar, Truck, or other conveyance is unloaded, Buyer will surrender possession of or release same, and, unless otherwise directed by Seller, will return railcars, in particular, to Seller at a point of shipment in accordance with routing instructions issued by Seller on the Bill of Lading or otherwise.
      (8) Buyer will cause no liens of any kind, including tax liens, to be imposed on the railcars, Trucks, or other conveyances.
      (9) Buyer will immediately notify Seller whenever personal injury occurs to Buyer or its employees or agents while a railcar, Truck, or other conveyance is in Buyer's possession or under Buyer's control or stewardship; **Buyer will release and defend, indemnify, and save harmless Seller, its affiliates under common ownership, and its and their officers, employees, and agents from and against all suits, actions, losses, damages, claims, or liability**

of any character, type, or description, including, without limiting the generality of the foregoing, all expenses of litigation, court costs, and attorneys' fees, for injury or death to any person, or injury to any property, received or sustained by any person or persons or property, arising out of, or occasioned by, Buyer's use of the railcars, Trucks, or other conveyances while same are in Buyer's possession or under Buyer's control or stewardship, except to the extent adjudicated as caused by the gross negligence or willful misconduct of Seller.

3. Title and Risk of Loss.
   (a) Title with respect to the goods will transfer to Buyer, as applicable, (i) when such goods are transported via Seller's (or its supplier's) delivery system, or (ii) when such goods are loaded into the railcar, Truck, or other conveyance at Seller's shipping point.
   (b) Risk of loss with respect to the goods will transfer to Buyer, as applicable, (i) when such goods pass the last flange connection of Seller's (or its supplier's) delivery system, or, (ii) (a) if Buyer is using a railcar, Truck, or other conveyance owned or chartered by Seller, then upon actual or constructive arrival of such railcar, Truck, or other conveyance at Buyer's destination, or, (b) if Buyer is using a railcar, Truck, or other conveyance owned or chartered by Buyer, then when such goods are loaded into the railcar, Truck, or other conveyance at Seller's shipping point.
   (c) Section 3(b) herein notwithstanding, for deliveries to Mexico, risk of loss with respect to the goods will transfer to Buyer as follows: (i) if Buyer is using a Truck owned or chartered by Seller, then upon actual or constructive arrival of the Truck at Buyer's destination; or (ii) if Buyer is using a railcar or other conveyance owned or chartered by Seller, or if Buyer is using a railcar, Truck, or other conveyance owned or chartered by Buyer, then when such goods are loaded into the railcar, Truck, or other conveyance at Seller's shipping point.
   (d) Seller reserves a security interest in goods for which payment has not been received and Seller may file financing statements and appropriate notices to competing secured parties to protect its interests therein.

4. Weights and Measures.
   (a) Seller's (or its carrier's or supplier's weights), or Seller's measurements for goods sold by volume, taken at Seller's shipping point, will control unless proven to be in error.
   (b) The parties hereto acknowledge and agree claims for shortages or overages of 0.5% or less of the quantity to be delivered are disallowed.

5. Taxes.
   (a) Any tax, duty, or other governmental charge on the manufacture, sale, and/or shipment of the goods, or any component thereof, imposed by federal, state, provincial, or local authorities, will be added to the price of the goods and paid in its entirety by Buyer, without setoff for any early pay discount, credit, or rebate, if applicable, under the Agreement.
   (b) While the *Superfund Tax* under 26 U.S.C. § 4661 and 26 U.S.C. § 4671, as applicable, is not a tax or charge the government requires Seller to collect from its customers, Buyer acknowledges and agrees that in accordance with Section 5(a) herein, the *Superfund Surcharge* assessed by Seller and paid by Buyer is intended to approximate and recover the costs incurred to collect and pay the *Superfund Tax*.
   (c) If Buyer desires the sale to be tax exempt or zero rated, then upon Seller's request, Buyer will provide Seller with exemption certificates or proof of qualifying export in a form acceptable to the appropriate taxing authority.
   (d) For any personal property taxes assessed against the goods, the party hereto having title to the goods at the time such tax liability accrues will be responsible for payment of such taxes.

6. Price and Payment.
   (a) All orders will be priced in accordance with Seller's price quotation in effect on the date of shipment.
   (b) Payment will be made against Seller's invoice via electronic funds transfer such that funds are available to Seller no later than fifteen (15) calendar days from date of invoice, terms net cash, regardless of whether such day is a business day; Buyer will pay a finance charge of 1.5% per month or the maximum rate allowed by law, whichever is less, on any past due amounts.
   (c) If Buyer has a *bona fide* dispute concerning any portion of an invoice, then Buyer will pay the undisputed portion of such invoice and must promptly notify Seller in writing of such disputed item(s).
      (1) Upon receipt of requisite notice concerning any disputed invoice item(s), the parties hereto will work together, in good faith, to promptly resolve the disputed amount and to mutually agree on which portions, if any, of the amount are rightly owed Seller.
      (2) Upon determination that any of the disputed and unpaid amounts are rightly owed Seller, Buyer will promptly remit same.
   (d) Buyer will implement the necessary security controls and precaution to protect any payment from Buyer against theft or misappropriation.
   (e) Buyer will provide current financials upon request; additionally, if at any time, in Seller's opinion, the financial responsibility of Buyer becomes impaired or unsatisfactory, or inadequate to meet the obligations under the Agreement, then terms of payment may, at Seller's option, be revised or withdrawn, and Seller may require cash or other satisfactory security before making further shipments to Buyer, and the parties hereto acknowledge and agree any such change in credit terms is ordinary course and customary within the industry.
   (f) In addition to any other legal remedy, if Buyer fails to fulfill the terms of payment or is in default with respect to any other terms or conditions of the Agreement, then Seller may defer further shipment of goods under the Agreement or cancel the Agreement.
   (g) Buyer will pay all costs and expenses, including reasonable attorneys' fees, incurred by Seller in the collection of any amount payable by Buyer under the Agreement.

7. Warranties.
   (a) Seller warrants (i) that the goods sold pursuant to the Agreement will conform to Seller's written specifications in effect on the date of shipment and applicable to such goods, and (ii) that Seller will have good title to and the right to transfer such goods.
   (b) **Seller makes no other express or implied warranty, statutory or otherwise, concerning the goods, including, but not limited to, any warranty of fitness for particular purpose or merchantability.**

8. Remedies of Buyer.
   (a) Buyer's sole and exclusive remedy in the event of delivery of nonconforming goods is expressly limited, at Seller's option, to replacement of the nonconforming goods or repayment of the purchase price paid by Buyer, upon credit or return of the nonconforming goods, and Seller will be responsible for Buyer's reasonable freight and other external costs directly related to replacement and/or return or disposal of such nonconforming goods.
   (b) Upon delivery, Buyer will promptly notify Seller in writing of any and all claims, including, but not limited to, alleged defective goods, shortage, breach of warranty, or otherwise, and unless objection thereto is made in writing and received by Seller within thirty (30) days from the date of delivery, Buyer's receipt of Seller's goods will be deemed unqualified acceptance.

(c) Subject to the limitations in Sections 21 and 22 herein, any claim under the Agreement not asserted as a claim, counterclaim, defense, or setoff in a legal proceeding instituted before a court of competent jurisdiction within two (2) years from accrual of the claim will be forever waived, released, and barred.

9. Notice.
   (a) Notices and other communications required or permitted under the Agreement will be in writing and addressed to the addressee(s) set forth in the Agreement, or at such other address as a party hereto may designate in writing from time to time; such notices and other communications will be deemed given only if (i) delivered personally, (ii) sent by courier service, (iii) sent via electronic means expressly stipulated in the Agreement, or (iv) sent via such other means as may be specified in writing and signed by an authorized representative of each party hereto.
   (b) Notices and other communications required or permitted under the Agreement will be deemed received on the business day on which such notice or communication was received; provided, however, any notice or communication received on a non-business day or after 5:00 P.M. local time will be deemed received the next business day.

10. Indemnification.
   (a) **Buyer will release and defend, indemnify, and save harmless Seller, its affiliates under common ownership, and its and their officers, employees, and agents from and against all suits, actions, losses, liabilities, damages, and claims of any character, type, or description (whether for personal injury, death, disease, property damage, including, but not limited to, environmental contamination, or otherwise), including, without limiting the generality of the foregoing, all expenses of litigation, court costs, and attorneys' fees, arising out of, or occasioned by, the transportation, delivery, storage, handling, or use, singly or in combination with other substances, of the goods *after* risk of loss transfers to Buyer, except to the extent adjudicated as caused by the gross negligence or willful misconduct of Seller.**
   (b) **Seller will release and defend, indemnify, and save harmless Buyer, its affiliates under common ownership, and its and their officers, employees, and agents from and against all suits, actions, losses, liabilities, damages, and claims of any character, type, or description (whether for personal injury, death, disease, property damage, including, but not limited to, environmental contamination, or otherwise), including, without limiting the generality of the foregoing, all expenses of litigation, court costs, and attorneys' fees, arising out of, or occasioned by, the transportation, delivery, storage, handling, or use, singly or in combination with other substances, of the goods *prior to* risk of loss transferring to Buyer.**
   (c) **To effectuate the indemnity obligations in Sections 2(f)(9), 10(a), and 10(b) herein, the indemnitee must (i) provide the indemnitor prompt written notice of the claim, (ii) accede control and direction of the investigation, preparation, defense, and settlement of such claim to the indemnitor, and (iii) reasonably cooperate with the indemnitor in such defense and settlement of such claim.**
   (d) **Section 10(c) herein notwithstanding, (i) an indemnitee may participate, at its sole cost and expense, in the defense of any indemnified claim and (ii) the indemnitor will not settle any indemnified claim that would not result in a complete and final release of the indemnitee or would require the indemnitee to admit fault or liability or be subject to any equitable remedy, without the prior written consent of the indemnitee.**

11. Limitation of Liability.
   (a) **Excluding Sections 8(a), 10(a), and 10(b) herein, the total liability of Seller with respect to the goods sold to Buyer pursuant to the Agreement, or otherwise arising in connection with the Agreement, whether such liability is based on contract, warranty, negligence, strict liability, or otherwise, will not exceed the purchase price of the goods in respect of which the claim is made.**
   (b) **In no event will a party hereto be liable to the other party hereto for lost profits of any nature or for any consequential, incidental, indirect, special, exemplary, or punitive damages arising out of, or related to, the Agreement, whether based on contract, warranty, negligence, strict liability, or otherwise.**

12. Force Majeure.
   (a) For purposes of the Agreement, "Force Majeure" means any cause not within the reasonable control of the party hereto claiming suspension of performance and which by the exercise of due diligence such party could not have prevented, including, but not limited to, physical events such as acts of God, landslides, lightning, earthquakes, fires, storms or storm warnings, such as hurricanes resulting in evacuation, floods, washouts, explosions, machinery malfunctions or breakdowns, inability to obtain fuel, power, or materials necessary for production, deficient transportation or delivery, power outages, strikes, lockouts, or other industrial disturbances, pandemics or epidemics, acts of a public enemy, sabotage, vandalism and/or malicious mischief, wars, embargoes, insurrections, riots, acts of terror, and compliance with any law, order, rule, or regulation of any governmental authority.
   (b) A party hereto will not be liable to the other party hereto if rendered unable by an event of Force Majeure to perform in whole or in part any obligation or condition of the Agreement for so long as the event of Force Majeure exists and to the extent performance is delayed or prevented by the event of Force Majeure; provided, however, the party hereto unable to perform will use commercially reasonable efforts to avoid or remove the event of Force Majeure.
   (c) When performance has been prevented or delayed by an event of Force Majeure, the quantity of goods affected will be deducted from the amount required to be supplied or purchased under the Agreement, as the case may be, with no obligation to make up such goods.
   (d) During the period a party's performance has been suspended in whole or part by reason of an event of Force Majeure, the other party hereto may likewise suspend the performance of all or part of its obligations to the extent such suspension is commercially reasonable, except for any payment and indemnification obligations.
   (e) The party hereto rendered unable to perform will provide notice to the other party hereto within a reasonable time after learning of the occurrence of a Force Majeure event; such notice will state the nature and extent of the Force Majeure condition claimed, the expected duration of the Force Majeure event, and the quantity of goods affected.
   (f) The suspension of performance afforded by this Section 12 (i) will not apply until requisite notice in accordance with Section 12(e) herein is given, (ii) will not be available to a party hereto failing to use reasonable diligence to remedy the situation and remove the cause in an adequate manner and with reasonable dispatch, and (iii) will not relieve Buyer of the obligation to pay for goods, title to which has transferred to Buyer.
   (g) The requirement that any Force Majeure be remedied with reasonable dispatch will not require the settlement of strikes or labor controversies by acceding to the demands of the opposing party or parties.
   (h) The party hereto rendered unable to perform will apportion its available supply or its purchases, as the case may be, fairly, including among its affiliates under common ownership and own units, departments, and divisions under common ownership, without incurring liability for failure to perform.
   (i) The parties hereto acknowledge and agree that Seller will supply the goods sold pursuant to the Agreement from its own production and that in the event of Force Majeure, Seller will not be required to acquire, by purchase or otherwise, additional quantities of goods from other suppliers or otherwise supplement its available supply of goods.

13. Technical Information and Safety.

(a) Seller may discontinue shipment of any goods, the manufacture, sale, or use of which in its opinion may involve patent or other intellectual property infringement.
(b) Any technical advice given by Seller in reference to the use of the goods is provided *gratis* and without any warranty whatsoever as to advice given or results obtained.
(c) **Buyer acknowledges and agrees it has been adequately warned by Seller of the risks associated with transporting, storing, handling, using, and disposing of the goods and is familiar with the goods and acknowledges receipt of Seller's current Safety Data Sheet (SDS) concerning the goods; Buyer further acknowledges and agrees it assumes such risks and has separate and independent knowledge of such risks, which risks are known in Buyer's industry.**
(d) **Each party hereto will maintain compliance with all applicable safety and health related governmental requirements concerning the goods and will take all steps required by applicable law to inform, warn, and familiarize its employees, agents, contractors, and customers concerning all hazards associated with the goods, including transportation, storage, handling, use, and disposal thereof.**

14. Survivability. **The provisions of the Agreement which, by the nature of their content, are intended, expressly or impliedly, to continue and have effect regardless of the termination of the Agreement whether by default or otherwise, will survive and continue to bind the parties hereto, including, but not limited to, Sections 2(f)(6), 2(f)(9), 8(c), 10, and 11 herein.**

15. Assignment. The Agreement will not be assignable or transferable by Buyer without the prior written consent of Seller and any attempted assignment or transfer without such consent will be void.

16. No Third-party Beneficiaries. The Agreement is intended solely for the benefit of the parties hereto and their permitted assigns and will not impart rights enforceable by any other person or entity.

17. Non-waiver.
(a) No waiver by either party hereto of one or more defaults by the other party hereto in the performance of any provisions of the Agreement will operate or be construed as a waiver of any other or further default or defaults, whether of a like or different character.
(b) No indulgence, leniency, or extension of time granted by either party hereto to the other party hereto will operate or be construed as an estoppel against the party so granting.

18. Severability. The invalidity or unenforceability of any particular provision of the Agreement will not affect the other provisions hereof, and the Agreement will be construed in all respects as if such invalid or unenforceable provision was omitted.

19. Headings. The titles and headings in the Agreement have been included solely for ease of reference and will not be considered in the interpretation or construction of the Agreement.

20. Compliance. The parties hereto acknowledge and agree (i) that each will maintain a *Code of Conduct* or similar policy, (ii) that in the performance of the Agreement, each will comply with the Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1, et seq., and all other applicable law concerning anti-bribery and anti-corruption, (iii) that each will not engage in any direct or indirect sales to any *Specially Designated National* (SDN) or prohibited country or regime identified by the Office of Foreign Assets Control, U.S. Department of the Treasury, in violation of U.S. law, and (iv) that the Agreement neither contemplates nor involves the sale or purchase of tin, tantalum, tungsten, or gold (hereinafter "Conflict Minerals") or products containing Conflict Minerals.

21. Jurisdiction; Venue.
(a) All provisions of the Agreement will be governed by and construed in accordance with the laws of the State of Texas, excluding any choice of law rules that may direct the application of the laws of any other jurisdiction.
(b) The rights and obligations of the parties hereto arising from the Agreement will not be governed by the provisions of the United Nations Convention on Contracts for the International Sale of Goods, application of which is expressly excluded pursuant to Article 6 thereof.
(c) Any suit, action, or proceeding relating to or arising from the Agreement must be brought exclusively in the state or federal courts of Harris County, Texas, and each party hereto waives, to the fullest extent permitted by applicable law, any objection that it may now or hereafter have to the laying of venue of such suit, action, or proceeding in such court or that any such suit, action, or proceeding which is brought in such court has been brought in an inconvenient forum.
(d) **Each party hereto waives, to the fullest extent permitted by applicable law, any right it may have to a trial by jury with respect to any action, claim, or proceeding arising out of or in any way relating to the Agreement or the transactions contemplated thereunder.**

22. Dispute Resolution.
(a) With respect to any claims, counterclaims, demands, causes of action, disputes, controversies, and other matters in question involving the parties hereto and arising out of or relating to the Agreement, including any questions concerning its existence, validity, or termination, any provision hereof, the alleged breach thereof, or in any way relating to the subject matter of the Agreement or the relationship between the parties hereto created by the Agreement, and not resolved in the ordinary course of business (hereinafter, collectively, "Dispute"), a party hereto must initiate the dispute resolution procedures set forth in this Section 22.
(1) A party hereto desiring to initiate dispute resolution must provide written notice of the Dispute to the other party hereto (hereinafter "Dispute Notice").
(2) The Dispute Notice will include (i) a statement of the issuing party's position and a summary of arguments supporting that position, and (ii) the name(s) and title(s) of the executive(s) who will represent such party in the negotiations and of any other person who will accompany such executive(s).
(3) Executives appointed to represent the parties hereto pursuant to any Dispute Notice must have the authority to settle the controversy and must be of a level of management higher than those directly involved in the Dispute.
(4) If one party hereto has issued a Dispute Notice, then the other party hereto will likewise promptly issue (i) a statement of its position and a summary of arguments supporting that position, and (ii) the name(s) and title(s) of the executive(s) who will represent such party in the negotiations and of any other person who will accompany such executive(s); thereafter, the parties hereto will promptly attempt in good faith to resolve the Dispute by negotiations between the executives so appointed.
(b) Should a Dispute fail to be resolved pursuant to Section 22(a) herein within thirty (30) days of receipt of the Dispute Notice, either party hereto may seek whatever remedies available at law or in equity subject to the limitations in Section 21 herein and in the event of litigation, the prevailing party hereto will be entitled to all costs and expenses associated therewith, including attorneys' fees and expenses.