



DSI TERMS AND CONDITIONS OF SALE AND SERVICE v.17/2012

DEFINITIONS:

"Buyer" - the party who will purchase Material and/or Services from DSI;
"Conditions" - these Terms and Conditions of Sale and Service;
"Contract" - means the contract between Buyer and DSI for the supply of Material and/or Services which shall comprise these Conditions and the Order;
"DSI" - either DSI Underground Systems, INC. or Dywidag Systems International Canada LTD.
"Material" - goods of any description to be supplied to Buyer by DSI;
"Order" - means i) Buyer's instruction to supply the Goods and/or Services (or Buyer's acceptance of DSI's offer to supply the same) whether made in writing (by letter, email or fax or other electronic means) or orally or by conduct or ii) the written document to which the Conditions are attached or in which they are referred to or iii) any other document in writing evidencing the terms for the supply by DSI of Goods and/or Services;
"Price" - the price of the Goods and/or Services as set out in the Order;
"Services" - services or work of any kind to be performed for Buyer by DSI;

ENTIRE CONTRACT:

These Conditions are exclusive and in lieu of all other terms and conditions appearing on Buyer's purchase order or elsewhere and apply to all supplies of Material and/or Services by DSI. Any other terms, whether in a purchase order or other document issued by or referred to by Buyer, irrespective of their materiality, which are either different or additional to the Conditions are objected to by DSI and excluded unless expressly and clearly agreed to in writing by DSI. Supply of Material or Services by DSI shall constitute Buyer acceptance to the Conditions. There are no understandings, representations or warranties of any kind not expressly set forth herein.

TERMS OF PAYMENT:

Terms of payment shall be the terms set out on the face of this Contract as supplemented by the terms of this paragraph. If not otherwise stated on the face of this Contract, DSI shall be entitled to invoice Buyer periodically as Material and/or Services are provided and payment shall be due and payable within 30 days after the date of each invoice. A service charge, computed on all payments past due and owed by Buyer under this Contract at an annual percentage rate of 18% shall be added to the Price; however, if such rate is prohibited under applicable law, then such service charge shall be computed at such lower rate as is the maximum rate permitted by law. Buyer also shall be liable for all legal fees and reasonable expenses incurred by DSI in the collection of past due accounts. DSI, upon notice to Buyer, may decline to make deliveries under this Contract, except for cash sales, whenever DSI for any reason doubts Buyer's ability to make payments as agreed under the Contract. Buyer shall not be entitled to set off any amounts owing or purported to be owing by DSI to Buyer or any 3rd party against amounts owing to DSI by Buyer.

DELIVERY/RISK OF LOSS/TITLE:

Unless otherwise indicated on this Contract, delivery of Materials shall be Ex Works DSI's Facility (Incoterms 2010). Delivery dates will be confirmed upon receipt of a binding order from Buyer. Risk of loss or damage to, and responsibility for, the Material shall pass to Buyer upon delivery to carrier at shipping point. No shipment shall be diverted or reconsigned without DSI's prior written consent. Unless otherwise agreed, DSI shall select means of transportation and routing. Title and right to possession of any Material covered by this Contract shall remain with DSI until the purchase price is paid in full or until DSI's lien rights cease.

ACCEPTANCE OF MATERIAL:

Upon tender of delivery of any Material to Buyer, Buyer shall immediately inspect the Material and shall give written notice to DSI of any shortages and of any Material rejected as damaged or otherwise nonconforming. Where delivery is made by common carrier, such notice shall be accompanied by the original freight bill with a notation thereon by the carrier confirming the shortage, damage or nonconformity. Any Material not so reported by Buyer to DSI as rejected shall be deemed to be irrevocably accepted. If Buyer so notifies DSI of any shortage or rejected Material, DSI may if it reasonably notifies Buyer have a further reasonable time to tender substitute Material.

WARRANTIES:

Materials - DSI warrants to Buyer only that the Materials delivered hereunder will conform to their specifications (either as agreed in writing with Buyer or DSI's standard specifications as set out in its product literature in force at the date of delivery) at the time of shipment and shall be free from defects in material and workmanship. Any recommendations or technical advice provided by DSI is believed reliable, but DSI makes no warranty of results to be obtained or fitness for Buyer's purpose and Buyer accepts such recommendations or advice at Buyer's risk.

DSI also warrants that the Material furnished hereunder will not, in the form in which furnished, infringe any valid United States patent which claims the Material itself, but DSI does not warrant against infringement by reason of Buyer's use thereof in combination with other materials or in the operation of any process. This warranty is conditioned upon Buyer's prompt notification in writing to DSI of any claim made against Buyer for such patent infringement, and upon Buyer's authorization of DSI to assume full and exclusive control of the defense or settlement of such claim or any legal action based thereon.

DSI MAKES NO OTHER EXPRESS OR IMPLIED WARRANTY, STATUTORY OR OTHERWISE, CONCERNING THE MATERIALS INCLUDING, WITHOUT LIMITATION, A WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE OR A WARRANTY OF MERCHANTABILITY. THE WARRANTIES GIVEN UNDER THIS SECTION ARE EXPRESSLY IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED.

Services Warranty - DSI warrants that the Services will be performed in a good and workmanlike manner. Buyer's sole and exclusive remedy and DSI's entire liability with respect to this warranty will be, at the sole option of DSI, to either (a) use its reasonable commercial efforts to reperform or cause to be reperformed any Services not in substantial compliance with this warranty or (b) refund amounts paid by Buyer related to the portion of the Services not in substantial compliance; provided, in each case, Buyer notifies DSI in writing within 30 days after performance of the applicable Services. EXCEPT AS SET FORTH HEREIN OR IN ANY STATEMENT OF WORK THAT EXPRESSLY AMENDS DSI'S WARRANTY, DSI EXPRESSLY DISCLAIMS ALL OTHER WARRANTIES, REPRESENTATIONS, CONDITIONS OR COVENANTS, EITHER EXPRESS OR IMPLIED (INCLUDING WITHOUT LIMITATION, ANY EXPRESS OR IMPLIED WARRANTIES OR CONDITIONS OF FITNESS FOR A PARTICULAR PURPOSE, MERCHANTABILITY, DURABILITY, TITLE, ACCURACY OR NON-INFRINGEMENT) ARISING OUT OF OR RELATED TO THE PERFORMANCE OR NON-PERFORMANCE OF THE SERVICES.

LIMITATIONS ON DSI'S LIABILITY:

DSI's total aggregate liability under this Contract and for any damages in any action or claim based upon contract or tort (including negligence) or breach of statutory duty or for any other reason and which arises out of or in connection with this Contract or the supply of Materials and/or Services shall in no event exceed 100% of the total amount paid to DSI by Buyer under this Contract. However, nothing excludes or limits DSI's liability for (i) death or personal injury resulting from its sole negligence, or (ii) any claim against Buyer relating to DSI infringing a third party's intellectual property.

In no event shall DSI be liable for i) any liquidated or delay damages or for any costs related to delays or the avoidance of delays ii) any consequential, special or incidental damages or indirect losses, (including without limitation fines, punitive damages, loss of profit, business or contract, pure economic loss, depletion of goodwill incurred or suffered by Buyer).

CLAIMS:

All claims, except for the infringement of patents, must be made in writing strictly within 30 days after delivery of the Materials or completion of Services hereunder, and failure so to do shall constitute a waiver by Buyer of any such claims. Buyer shall use all reasonable efforts to minimize such claims or sums and to mitigate its losses. No claim of any kind shall be greater in amount than the paid purchase price of the Material or Services for which a claim is made. Any claim that is not asserted as a claim, counterclaim, defense or set off in a judicial proceeding instituted within one (1) year after the date on which the Materials were delivered to Buyer or Services performed, whichever date is earlier, shall be forever waived, barred and released. Time is of the essence for all Buyer notifications to DSI.

If Buyer notifies DSI in writing of any defect in Material within 30 days after the date of last delivery of Material and such material breaches the relevant warranty above, then Buyer's sole and exclusive remedy shall be to cause DSI, at DSI's option to either replace such nonconforming Material or reimburse Buyer for the price paid for such nonconforming Material provided by DSI.

Buyer shall indemnify, hold harmless and defend DSI from and against any and all claims, actions, suits, proceedings, costs, expenses, damages and liabilities, including actual legal fees and expenses, attributable or alleged to be attributable in whole or in part to Buyer's breach of the Contract, its negligence or other fault arising out of or pertaining to the use, performance, non-performance or misuse of the Material or Services supplied by DSI hereunder.

FORCE MAJEURE:

DSI shall not be liable for any breach of its contractual obligations if performance of its obligations is suspended, delayed or interrupted or rendered impossible or impractical for reasons of Force Majeure. If an event of Force Majeure negatively impacts DSI, it shall be entitled to an extension of time in which to perform its contractual obligations and DSI and Buyer shall negotiate any change to the Contract including time periods and Price in good faith. Force Majeure means events outside or beyond DSI's reasonable control including without limitation Acts of God, flood, earthquake, or other natural disaster; epidemic or pandemic; war, threat of or preparation for war, armed conflict, imposition of sanctions, embargo, breaking off of diplomatic relations or similar actions; terrorist attack, civil war, civil commotion or riots; nuclear, chemical or biological contamination or sonic boom; any law or government order, rule, regulation or direction, or any action taken by a government or public authority, including but not limited to imposing an embargo, export or import restriction, quota or other restriction or prohibition, or failing to grant a necessary license or consent; fire, explosion or accidental damage by a third party; loss during transportation; adverse weather conditions; interruption or failure of utility service, including but not limited to electric power, gas or water; any labor dispute, including but not limited to walkouts, strikes, industrial action or lockouts (other than by DSI's employees); non-performance by DSI's suppliers, inability to obtain raw materials; and unexpected failure of plant machinery, machinery, computers or vehicles. If an event of Force Majeure lasts more than 3 months or immediately renders DSI's performance impossible or impractical, DSI shall be entitled to terminate its Contractual obligations by notice to Buyer and without penalty and shall be entitled to payment by Buyer of a pro-rata sum of the Price to reflect goods and/or Services delivered by DSI up to the date on which it terminated its Contractual obligations. DSI reserves the right to allocate its available supply of Materials among any or all purchasers, as well as departments and divisions of DSI on such basis as it may deem reasonable, fair and practical, without liability for any failure of performance relating to this Contract.

TAXES:

Any tax, excise, fee or other charge or any increase thereof now or hereafter imposed by law upon the production, storage, withdrawal, sale, transportation, use or delivery of the Material sold or Services provided hereunder, shall be in addition to the price quoted and shall be paid by Buyer.

ASSIGNMENT:

No right or interest under this Contract shall be assigned and no obligation under this Contract shall be delegated by Buyer without the prior written approval of DSI. Any attempted assignment or delegation without such approval shall be wholly void and totally ineffective for all purposes.

APPLICABLE LAW/FORUM:

This Contract shall be governed by the laws effective and in force on the date hereof in the state or province in which DSI's office indicated on the face sheet of this Contract is located. Any action arising out of or related to this Contract shall and may be brought only in the court of appropriate jurisdiction of the state and county or province of the pertinent DSI location; provided, however, that DSI, at its option, may bring an action in any jurisdiction where the Material and/or Services provided hereunder are located, or where Buyer maintains an office or other facility, or as permitted by any bond.

COMPLIANCE:

DSI agrees that the Materials shipped hereunder will be produced in compliance with the Fair Labor Standards Act of 1938, as amended, and when applicable, the Equal Opportunity Clause of Executive Order 11246, as amended, and other applicable federal, state or local laws. Buyer agrees that the Materials purchased hereunder will be used in compliance with all applicable laws.

SPECIAL MATERIALS:

If this Contract covers Materials which are manufactured especially for Buyer and the Contract is terminated or an order thereunder cancelled, Buyer will take delivery of and make payment for such Material as has been manufactured and such as is in the process of being manufactured on the date notice of such termination or cancellation is received by DSI.

CHANGE ORDERS:

Buyer may order, without invalidating this Contract, changes in the work within the general scope of this Contract consisting of additions, deletions or other revisions. Before DSI shall be required to proceed with such change order, the parties must agree in writing as to the adjustment to the Contract price and delivery terms for such changed work.