

GMS Mine Repair & Maintenance, Inc.

EXCLUSIVE TERMS AND CONDITIONS FOR THE SALE OF GOODS AND RELATED SERVICES

A. Offer and Acceptance

This quotation, together with any other documents that Seller has incorporated herein or attached hereto, constitutes an offer by Seller to provide Buyer with the goods and services identified. This quotation supersedes any prior oral or written communications between Seller and Buyer. BY ORDERING OR ACCEPTING THE GOODS AND/OR SERVICES, OR OTHERWISE ACCEPTING THIS OFFER, BUYER AGREES TO THE TERMS AND CONDITIONS CONTAINED HEREIN AS THE ONLY TERMS AND CONDITIONS THAT APPLY TO THIS SALE. If any term or condition in a purchase order or other memorandum of acceptance by Buyer differs from, or purports to supplement or detract from, the terms and conditions set forth herein, the parties agree that terms and conditions herein shall prevail without modification. Seller may withdraw this offer at any time prior to Buyer's acceptance. This offer will expire within 30 days of the date hereof unless Buyer accepts the offer or Seller extends the expiration date in writing.

B. Consideration – Prices are:

1. Subject to change without notice. At all times, Seller reserves the right to apply surcharges consistent with spikes in steel, fuel, and/or freight costs;
2. Exclusive of any and all taxes imposed by law upon Buyer incidental to this sale of goods and/or services;
3. Subject to an increase equal to the amount of any taxes imposed by law upon Seller incidental to this sale; and
4. Quoted F.O.B. place of manufacture.

C. Payment Terms

1. Unless otherwise agreed in writing, the terms of payment are net cash within 15 days from date of invoice.
2. If payment is not received by its due date, interest at the rate of 1.5% per month shall accrue and Buyer shall also bear any collection costs including but not limited to administrative costs, reasonable attorney's fees (i.e., equal to 25% of the past-due amount), court costs, and such pre-judgment and/or post-judgment interest as may be awarded.
3. Seller claims a purchase money security interest in goods sold under this agreement, and Buyer expressly consents to the filing of a Financing Statement in the Buyer's home state and/or any state in which the goods are situated, in accordance with applicable provisions of the Uniform Commercial Code as adopted by the state in which said Financing Statement is or may be filed.

D. Shipment. THE SHIPPING DATE SHOWN IN THE QUOTATION IS APPROXIMATE.

1. Seller will compute the shipping date when (a) Seller has received Buyer's acceptance of the offer AND (b) Seller has received from Buyer all data required to complete engineering and/or Seller's other manufacturing or acquisition requirements.
2. Any change in Buyer's requirements may result in Seller's revision of estimated shipping date.
3. Seller shall make every reasonable effort to effect shipment within the time stated, however, Seller is not liable for any delay resulting directly or indirectly from fire, embargo, strikes, acts of God, civil strife, insurrection, transportation system failure, whether at place of manufacture or elsewhere, or from delay by reason of any rule, regulation, or order of any government authority directly affecting delivery, or from any cause beyond Seller's control. In the event of such a delay, the shipping date shall be extended for a reasonable length of time at least equal to the period of such delay.
4. IN NO EVENT SHALL SELLER BE LIABLE FOR ANY INCIDENTAL, SPECIAL, DIRECT OR CONSEQUENTIAL DAMAGES OCCASIONED BY DELAYS, REGARDLESS OF WHETHER SUCH DELAYS ARE WITHIN OR BEYOND SELLER'S CONTROL.

E. Delivery. Title and risk of loss pass to Buyer upon delivery. For purposes of this agreement, the term "delivery" refers to the date and time that the goods leave the premises at the place of manufacture.

F. Installation

1. When deemed necessary by Seller, Seller or its agent shall supply a service engineer to supervise setting up and demonstrating the operation of the goods, or for the erection, installation, and/or application of the goods, as the case may be.
2. Buyer shall bear all costs incidental to the aforementioned supervision and/or the erection, installation, and/or application of goods at Buyer's place of business.
3. Additional or special services will be quoted on request.

G. Production Estimates

1. Any production estimates incorporated herein are based on Seller's analysis and understanding of the work to be performed and assume various production factors including but not limited to normal working conditions, competent operators, proper maintenance of the goods, and the use of materials which conform to (a) the specifications contained herein, (b) the specifications attached to the goods, and (c) the standards of the industry. THE PARTIES EXPRESSLY UNDERSTAND AND AGREE THAT PRODUCTION ESTIMATES ARE NOT GUARANTEED.
2. Any work tolerances to be obtained by the goods are based on Seller's assumption that the materials used have been properly processed through all previous operations.
3. Any obligation of Seller with respect to production estimates shall be fully and completely satisfied when Buyer has acknowledged that Seller has operated the goods at the estimated performance level for a period acceptable to Buyer, but in no event for more than one hour.

H. Warranty

1. If, within one year after delivery and no later, Buyer notifies Seller in writing of a specifically alleged defect in any goods identified herein, and establishes to the satisfaction of Seller that the goods have been properly installed and maintained and have been operated within the limits of rated and normal usage AND if Seller determines from Seller's own inspection that Buyer has used the goods under normal operating conditions in Buyer's place of business, and that the goods or a part thereof is defective in material or workmanship versus normal wear and tear THEN the Seller shall repair or replace the goods or, in Seller's discretion, repair or replace the defective part thereof without charge to Buyer, subject to the following limitation: if, in Seller's sole discretion, repair or replacement of defective goods or parts thereof is not feasible, Buyer's exclusive remedy shall be money damages not to exceed the purchase price of the goods.
2. Application of this warranty to electronic control units is conditioned upon Buyer's employment of qualified maintenance personnel.
3. This warranty is void and Seller shall not be liable for any breach of warranty if the goods or parts thereof have been repaired or altered by persons other than Seller, unless repair or alteration is expressly authorized by Seller in writing.
4. THE FOREGOING SELLER'S WARRANTY IS EXCLUSIVE AND IS IN LIEU OF ALL OTHER WARRANTIES BY SELLER, EXPRESS OR IMPLIED. THERE ARE NO WARRANTIES BY SELLER WHICH EXTEND BEYOND THE DESCRIPTION ON THE FACE HEREOF. ALL IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE ARE HEREBY EXPRESSLY DISCLAIMED BY SELLER AND ARE EXCLUDED FROM THIS AGREEMENT. SELLER SHALL NOT BE LIABLE FOR ANY INCIDENTAL, SPECIAL, OR CONSEQUENTIAL DAMAGES RESULTING FROM ANY BREACH OF WARRANTY.
5. The terms of this warranty do not extend to any goods purchased or manufactured which are warranted by a manufacturer or distributor other than Seller and such warranties are passed through to Buyer.

I. Limitation of Liability

1. Except as provided in the paragraph entitled *Property and Patent Rights*, Seller's liability on any claim or claims of any kind – whether based on contract, negligence, strict liability, or otherwise – for any loss or damage arising out of, connected with, or resulting from this agreement, or from the performance or breach thereof, or from the design, manufacture, sale, services rendered, delivery, resale, installation, technical direction of installation, inspection, repair, operation, or use of any goods covered by or furnished under this agreement shall in no case exceed the purchase price allocable to the goods.

2. IN NO EVENT SHALL SELLER, NOR ITS AFFILIATED BUSINESSES, NOR THE OFFICERS, DIRECTORS, AGENTS AND EMPLOYEES OF THE FOREGOING, BE LIABLE TO BUYER, OR ANY PERSON OR ENTITY, IN ANY ACTION OR CLAIM FOR DIRECT, CONSEQUENTIAL, SPECIAL, OR INCIDENTAL DAMAGES, OR FOR LOSS OF PROFITS, LOSS OF OPPORTUNITY, LOSS OF PRODUCT, OR LOSS OF USE, WHETHER THE ACTION IN WHICH RECOVERY OF DAMAGES IS SOUGHT IS BASED ON CONTRACT, TORT (INCLUDING PRODUCT LIABILITY, SOLE, CONCURRENT OR OTHER NEGLIGENCE, AND STRICT LIABILITY), STATUTE, OR OTHERWISE. TO THE EXTENT PERMITTED BY LAW, BUYER WAIVES ANY STATUTORY REMEDIES WHICH ARE INCONSISTENT WITH THIS AGREEMENT.

J. Property and Patent Rights

1. Seller retains for itself any and all United States, Canadian, and international property rights in and to all designs, inventions and improvements pertaining to any goods designed in connection with the quotation and to all patents, trademarks, copyrights and related intellectual property rights arising out of the work done in connection therewith. Buyer expressly agrees that it shall not assert any intellectual property rights retained herein by Seller.

2. Except as set forth in the following subparagraph J.3., Seller shall indemnify and hold Buyer harmless from any suit or proceeding against Buyer based on a claim that any goods, or part thereof, furnished under this agreement constitutes an infringement of the patent laws covering a new machine or any new and useful improvement thereof PROVIDED that Buyer has promptly notified Seller in writing of any such suit or proceeding and has given Seller authority, information, and all necessary assistance for the defense of same.

3. The preceding subparagraph J.2. does not apply to any goods, or part thereof, manufactured to Buyer's design specifications. As to such goods, Seller assumes no liability whatsoever for patent infringement and Buyer shall indemnify and hold Seller harmless from any liability arising out of the infringement of any patent in the manufacture, sale, or use of any goods described in Buyer's specifications.

K. Reservation of Right in Respect to Seller's Other Products

Seller reserves the right to improve or change the design of its goods without any obligation to make such improvements or changes to the goods that are the subject of this agreement or to goods previously manufactured and sold by Seller.

L. Limitation of Actions

Any statute or law to the contrary notwithstanding, any action to recover for any loss or damage arising out of or connected with, or resulting from this agreement, or from the performance or breach thereof must be commenced within a one year period after the cause of action accrues to Buyer, unless otherwise extended by Seller in writing. The parties expressly agree that there are no warranties of future performance pertaining to the goods that are the subject of this agreement which would extend such one year period of limitation.

M. Cancellation

1. If Buyer requests that Seller stop work or cancel the order or any part thereof, Buyer shall pay cancellation charges to Seller as follows: **(a)** Seller shall invoice and Buyer shall pay in full for any and all work that is complete or scheduled for completion within thirty (30) days of the date of Buyer's written notification to stop work or to cancel; and **(b)** for work in process but not by item (a), and for any materials and supplies procured or for which Seller has made definite commitments in connection with Buyer's order, Buyer shall pay Seller the actual costs and overhead expenses determined in accordance with generally accepted accounting practices; and **(c)** Buyer shall pay Seller an additional amount as compensation for business irretrievably lost, said amount being equal to fifteen percent of the difference between the full purchase price and the charge calculated under item (b) of this subparagraph.

2. Buyer shall promptly instruct Seller as to the disposition of the goods and Seller may, if requested in a writing signed by Buyer, hold the goods for Buyer's account. Buyer shall bear all costs of storage, insurance, handling, boxing or other costs in connection therewith.

N. Applicable Law

This agreement and the rights and obligations of the parties shall be construed in accordance with the laws of the place of manufacture without regard to conflict of law principles. Any disputes arising from this agreement shall be resolved by binding arbitration applying generally accepted arbitration rules. No arbiter may expand upon or restrict any of the parties' respective rights or obligations set forth in this agreement. For mutual convenience and mutual cost-effectiveness, this paragraph, however, shall not be construed as prohibiting the parties from agreeing to submit any given dispute to an agreed upon independent mediator.

O. Waiver of Terms and Conditions

Failure or delay by Seller to insist upon strict performance of any of the terms and conditions of this agreement or to exercise any rights or remedies provided herein or by law, shall not release Buyer from any of the obligations of this agreement and shall not be deemed a waiver of any right of Seller to insist upon strict performance hereof or any rights or remedy of Seller as to any prior or subsequent default hereunder.

P. Indemnification by Buyer

To the full extent allowed by law, Buyer shall indemnify, defend, save and hold Seller, its affiliated businesses (and the directors, officers, employees, agents of the same) and any person acting for or on its behalf, harmless from and against any and all liability, damage, loss, claims, demands, judgments, and actions of any nature whatsoever which are claimed to arise out of, to result from, or to be connected with (a) engineering specifications, data, or criteria furnished by Buyer to Seller and used by Seller to manufacture the goods covered by this agreement; or (b) changes in criteria made by Buyer; or (c) Buyer's negligence, errors or omissions in Buyer's performance or non-performance or its obligations under this agreement; or (d) the failure by Buyer, its agents, employees or anyone acting through or on its behalf, to properly operate the goods in accordance with manuals, directions or other operating specifications furnished by Seller to Buyer.

Q. Headings The headings used herein are for convenience only and shall be given no legal effect.

R. Savings Clause To the extent, if any, that any provision of this agreement is deemed by a court of competent jurisdiction to be inconsistent with applicable law, the spirit and intent of the challenged provision shall nevertheless control any reformation of said provision and all other provisions of this agreement shall remain in full force and effect.