

# Conditions of Sale – Excavation Safety Solutions

## 1. DEFINITION

1.1 In these terms and conditions the following words have the following meanings: – Word Meaning

"Buyer" the person(s) or company whose order for the Goods is accepted by the Company including their successors and/or personal representatives;

"Company" MGF (Trench Construction Systems) Limited and includes its successors and assigns, and the Company shall be entitled to sub-contract all or any of its rights and/or obligations hereunder.

"Consequential Loss" pure economic loss, loss of use, loss of profit, loss of production, loss of contract, any financial or economic loss, loss of business, depletion of goodwill and like loss;

"Contract" any contract between the Company and the Buyer for the sale and purchase of the Goods;

"Delivery Point" the place where delivery of the Goods is to take place under condition 4;

"Goods" any goods which the Company is to supply to the Buyer (including any of them or any part of them).

1.2 The headings in these terms and conditions are for convenience only and shall not affect their interpretation.

## 2. FORMATION AND INCORPORATION

2.1 The Buyer makes the Contract in the course of a business and has selected the Goods relying solely on his own skill and judgment.

2.2 Subject to any variation under condition 2.5, the Contract will be on these terms and conditions set out below to the exclusion of all other terms and conditions (including any terms or conditions which the Buyer purports to apply under any purchase order, confirmation of order or similar document).

2.3 Each order for Goods by the Buyer from the Company shall be deemed to be an offer by the Buyer to purchase Goods subject to these terms and conditions.

2.4 No terms or conditions endorsed upon, delivered with or contained in the Buyer's purchase order, specification or similar document will form part of the Contract simply as a result of a reference to such document being referred to in the Contract.

2.5 Any variation to these terms and conditions and any representations about the Goods shall have no effect unless expressly agreed in writing and signed by an officer of the Company.

2.6 Acceptance of delivery of the Goods shall be deemed to be conclusive evidence of the Buyer's acceptance of these terms and conditions.

2.7 The Buyer must ensure that the terms of its order and any applicable specification are complete and accurate.

2.8 Any quotation is given on the basis that no Contract will come into existence until the Company despatches an acknowledgement of order to the Buyer. Any quotation is valid for a period of 30 days only from its date provided the Company has not previously withdrawn it.

2.9 Subject to condition 4.9 no order which the Company has accepted may be cancelled by the Buyer except with the written agreement of the Company and on terms that the Buyer shall indemnify the Company in full against all losses (including loss of profit), costs, damages, charges and expenses suffered or incurred by the Company as a result of such cancellation.

## 3. DESCRIPTION, DESIGNS AND ADVICE

3.1 All drawings, descriptive matter, specifications and advertising issued by the Company and any descriptions or illustrations contained in the Company's catalogues or brochures are issued or published for the sole purpose of giving an approximate idea of the Goods described in them. They will not form part of the Contract.

3.2 The Company may make any changes to the specification, design, materials or finishes of the Goods which are required to conform with any applicable safety or other statutory requirements.

3.3 No variation in the specification or design of any Goods which, in the Company's reasonable opinion, does not adversely affect the suitability of the Goods for the particular purpose for which they are supplied by the Company will constitute a breach of contract or impose any liability upon the Company. In the event that the Company undertakes any design work in connection with any Goods supplied by the Company or in the event that the Company provides any designs, drawings, specifications, guidance or other information in connection with any such Goods, or any advice as to the use of any such Goods, (and whether such designs, drawings, specifications, guidance, information or advice are provided in the form of computer software or by the way of a manual or otherwise in writing or orally), then the Buyer acknowledges that such designs, drawings, specifications, information and/or advice are provided by the Company for guidance only and without any responsibility being accepted for the accuracy or correctness of the same, and it is for the Buyer to check and verify the accuracy and correctness of the same and to determine whether or not to rely upon the same. Any such designs, drawings, specifications, information and/or advice are provided by the Company strictly on the understanding that, subject to condition 11.3, no liability shall attach to the Company in respect thereof, and the Buyer shall fully and completely indemnify the Company against all claims by any person whatsoever for injury to person, loss or damage to property, howsoever caused, arising from the provision of such designs, drawings, specifications, information and/or advice by the Company and whether such claims arise under common law or statute or in negligence or breach of duty or other wrongful act of omission.

## 4. DELIVERY

4.1 Delivery of the Goods shall be made ex-works (Incoterms 2000).

4.2 The Buyer will take delivery of the Goods within 5 working days of the Company giving it notice that the Goods are ready for delivery and during the normal business hours of the Company.

4.3 If carriage is required in accordance with condition 4.1 the Goods shall be delivered by such means as the Company thinks fit unless the Buyer has specified in its order the details of the contract with a carrier which it reasonably requires having regard to the nature of the Goods and the other circumstances of the case.

4.4 The carrier shall be deemed to be the Buyer's agent except for the purposes of sections 44, 45 and 46 of the Sale of Goods Act 1979.

4.5 Any dates specified by the Company for delivery of the Goods are approximate only and may not be made of the essence by notice. If no dates are so specified, delivery will be within a reasonable time.

4.6 Subject to the other provisions of these terms and conditions the Company will not be liable for any loss (including without limitation Consequential Loss), costs, damages, charges or expenses caused directly or indirectly by any non-delivery or delay in the delivery of the Goods (even if caused by the Company's negligence) nor unless such delay exceeds 180 days will any delay entitle the Buyer to terminate or rescind the Contract.

4.7 The Buyer must accept delivery of the Goods and pay for them in full unless the delay in delivery exceeds 180 days. In such a case, if delay is caused by the Company's negligence, or fault and is not covered by condition 6 the Buyer may cancel this Contract to the extent it relates to the Goods which were the subject of such delivery, without further liability for such Goods.

4.8 If the Buyer fails to take delivery of any of the Goods when they are ready for delivery or to provide any instructions, documents, licences or authorisations required to enable the Goods to be delivered on time (except because of the Company's fault) risk in the Goods will pass to the Buyer (including, without limitation, for loss or damage caused by the Company's negligence); the Goods will be deemed (on written notice given by the Company) to have been delivered and the Buyer shall be bound to pay for the Goods accordingly. Without prejudice to its other rights, the Company may (but shall not be obliged to):

4.8.1 store or arrange for the storage of the Goods until actual delivery or sale and charge the Buyer for all related costs and expenses (including, without limitation, storage and insurance); and/or

4.8.2 following written notice to the Buyer, sell any of the Goods at the best price reasonably obtainable in the circumstances and charge the Buyer for any shortfall below the price under the Contract.

4.9 The Buyer will provide at its expense at the Delivery Point adequate and appropriate equipment and manual labour for loading or off-loading the Goods (as appropriate).

4.10 The Buyer will indemnify the Company against any liability and expense (whether arising under statute or common law) caused by the Buyer's failure to provide appropriate equipment and manual labour for off-loading (whether or not the off-loading is supervised by or on behalf of the Buyer) for:

4.10.1 any personal injury to or death of any of the Company's employees, agents or sub-contractors or any third party; and

4.10.2 any damage to or loss of any property of the Company, its employees, agents or sub-contractors or any third party.

## **5. NON-DELIVERY**

5.1 The quantity of any consignment of Goods as recorded by the Company upon despatch from the Company's place of business shall be conclusive evidence of the quantity received by the Buyer on delivery unless the Buyer can provide conclusive evidence proving the contrary.

5.2 The Company shall not be liable for any non-delivery of Goods (even if caused by the Company's negligence) unless written notice is given to the Company within 5 working days of the date when the Goods would in the ordinary course of events have been received.

5.3 Any liability of the Company for non-delivery of the Goods shall be limited to replacing the Goods within a reasonable time or issuing a credit note at the pro rata Contract rate against any invoice raised for such Goods.

5.4 A signature of qualified acceptance on a carrier's delivery note shall not be written notice to the Company for the purpose of these terms and conditions.

## **6. FORCE MAJEURE**

6.1 The Company shall not be liable to the Buyer in any manner or be deemed to be in breach of the Contract (subject to condition 11) because of any delay in performing or any failure to perform any of the Company's obligations under this Contract if the delay or failure due to any cause beyond the Company's reasonable control.

6.2 Without prejudice to the generality of condition 6, 1 the following shall be included as causes beyond the Company's reasonable control:

6.2.1 governmental actions, war or threat of war, national emergency, riot, civil disturbance, sabotage or requisition;

6.2.2 Act of God, fire, explosion, flood, epidemic or accident;

6.2.3 import or export regulations or embargoes;

6.2.4 labour disputes whether or not including disputes involving the Company's work-force; or

6.2.5 inability to obtain or delay in obtaining supplies of adequate or suitable material, fuel, parts, machinery or labour.

## **7. RISK/OWNERSHIP**

7.1 Subject to condition 4.8, risk of damage to or loss of Goods shall pass to the Buyer upon delivery or the circumstances referred to in condition 4.8, or deemed delivery.

7.2 Ownership of the Goods shall not pass to the Buyer until the Company has received in full (in cash or cleared funds) all sums due to it in respect of:

7.2.1 the Goods; and

7.2.2 all other sums which are or which become due to the Company from the Buyer on any account.

7.3 Until ownership of the Goods has passed to the Buyer, the Buyer must:

7.3.1 hold the Goods on a fiduciary basis as the Company's bailee;

7.3.2 store the Goods (at no cost to the Company) separately from all other goods of the Buyer or any third party in such a way that they remain readily identifiable as the Company's property and easily accessible and returnable to the Company;

7.3.3 not destroy, deface or obscure any identifying mark or packaging on or relating to the Goods;

7.3.4 maintain the Goods in satisfactory condition insured on the Company's behalf for their full price against all risks to the reasonable satisfaction of the Company and naming the Company as loss payee. On request the Buyer shall produce the policy of insurance to the Company;

7.3.5 hold the proceeds of the insurance referred to in condition 7.3.4 on trust for the Company and not mix them with any other money, nor pay the proceeds into an overdrawn bank account.

7.4 The Buyer may resell the Goods before ownership has passed to it solely on the following conditions:

7.4.1 any sale shall be effected in the ordinary course of the Buyer's business at full market value and the Buyer shall account to the Company accordingly; and

7.4.2 any such sale shall be a sale of the Company's property on the Company's behalf and the Buyer shall deal as agent when making such a sale.

7.5 Where the Company is unable to determine whether any goods are the Goods, the Company shall be deemed to have sold all goods of the kind sold by the Company to the Buyer in the order in which they were invoiced to the Buyer.

7.6 The Company shall be entitled to recover payment for the Goods notwithstanding that ownership of any of the Goods has not passed from the Company.

7.7 The Buyer grants the Company, its agents and employees an irrevocable licence at any time to enter any premises where the Goods are or may be stored in order to inspect them, or, where the Buyer's right to possession has terminated, to recover them and that all such premises are in a safe and accessible condition to enable the Company to do this.

7.8 The Buyer shall be liable for any costs, damages or expenses which either of the Buyer, the Company or any third party shall suffer by reason of the Company exercising any of its rights under clause 7.7.

#### **8. PRICE**

8.1 The price for the Goods shall be as detailed in the Company's current price list (at the date of acknowledgement of order by the Company) subject to any discounts agreed by the Company and subject to condition 2.8.

8.2 The price for the Goods is exclusive of any value added tax or any other applicable tax which the Buyer shall pay in addition when it is due to pay for the Goods.

8.3 The price for the Goods is given on an ex-works basis and where the Delivery Point is other than at the Company's premises the Buyer shall pay the Company's charges for transport, packaging, loading, unloading and insurance in addition when the Buyer is due to pay for the Goods.

#### **9. PAYMENT**

9.1 The Company may invoice the Buyer for the Goods at any time after delivery.

9.2 Time for payment shall be of the essence.

9.3 Payment of the price for the Goods is due 30 days after the date of the invoice.

9.4 No payment shall be deemed to have been received until the Company has received cleared funds.

9.5 All payments payable to the Company under the Contract shall become due immediately upon termination of the Contract despite any other provision.

9.6 The Buyer shall make all payments due under the Contract without any deduction whether by way of set-off, counterclaim or otherwise unless the Buyer has a valid court order requiring an amount equal to such deduction to be paid by the Company to the Buyer.

9.7 The Company may appropriate any payment made by the Buyer to the Company to such of the Goods as the Company thinks fit despite any purported appropriation by the Buyer.

9.8 If the Buyer fails to make any payment under the Contract on the due date then (without prejudice to its other rights and remedies) the Company may charge the Buyer interest (both before and after judgement) on the amount unpaid at 2% per month on all overdue amounts down to actual payment (a part of a month being treated as a full month for the purpose of calculating interest).

#### **10. QUALITY**

10.1 Where the Company is not the manufacturer of the Goods the Company will endeavour to transfer to the Buyer the benefit of any warranty or guarantee given to the Company.

10.2 Pursuant to Section 6(8) of the Health and Safety at Work Act 1974, the Buyer will inspect the Goods immediately on its delivery to him to ensure, so far as is reasonably practical, that the Goods will be safe and without risk to health when properly used.

10.3 The Company warrants that (subject to the other provisions of these terms and conditions) upon delivery the Goods will, and for a period of 6 months from the date of delivery, be of satisfactory quality within the meaning of the Sale of Goods Act 1979.

10.4 The Company shall not be liable for a breach of the warranty in condition 10.3 unless:

10.4.1 the Buyer gives written notice of the defect to the Company and, if the defect is as a result of damage in transit, also to the carrier within 5 working days of:

10.4.1.1 the date of delivery (where the defect would be apparent to the Buyer upon a reasonable inspection); or

10.4.1.2 the date when the Buyer knew or ought reasonably to have known of the defect (where the defect would not be apparent to the Buyer upon a reasonable inspection); and

10.4.2 the Company is given a reasonable opportunity after receiving the notice of examining such Goods and the Buyer (if asked to do so by the Company) returns such Goods to the Company's place of business at the Buyer's cost for the examination to take place there.

10.5 The Company shall not be liable for a breach of the warranty in condition 10.3 if:

10.5.1 the defect arises because the Buyer failed to follow the Company's oral or written instructions as to the storage, installation, commissioning, use or maintenance of the Goods or (if there are none) good trade practice; or

10.5.2 the Buyer alters or repairs such Goods without the written consent of the Company; or

10.5.3 the defect in such Goods arises from any design defect in any drawing, design or specification supplied or approved by the Buyer.

10.6 If the Buyer makes a valid claim against the Company based on a defect in the quality of the Goods, the Company shall at its option repair or replace such Goods (or the defective part) or refund the price of such Goods at the pro-rata Contract rate provided that, if the Company so requests, the Buyer shall, at the Buyer's expense, return the Goods or the part of such Goods which is defective to the Company.

10.7 If the Company complies with condition 10.6 it shall have no further liability for a breach of the warranty in condition 10.3 in respect of the quality such Goods.

10.8 Any Goods repaired or replaced by the Company pursuant to this condition 10 will be supplied pursuant to these terms and conditions.

#### **11. LIMITATION OF LIABILITY**

11.1 The following provisions of this condition 11 and the provisions of condition 10 set out the entire liability of the Company (including any liability for the acts or omissions of its employees, agents and subcontractors) to the Buyer in respect of:

11.1.1 any breach of these terms and conditions; and

11.1.2 any representation, statement or tortious act or omission including negligence arising under or in connection with the Contract.

11.2 All warranties, conditions and other terms implied by statute or common law (save for the conditions implied by section 12 of the Sale of Goods Act 1979) are excluded from the Contract.

11.3 Nothing in these terms and conditions excludes or limits the liability of the Company for fraudulent misrepresentation or death or personal injury caused by the Company's negligence. THE BUYER'S ATTENTION IS IN PARTICULAR DRAWN TO THE PROVISIONS OF CONDITIONS 11.4 AND 11.5

11.4 Subject to conditions 11.2 and 11.3:

11.4.1 the Company's total liability in contract, tort (including negligence or breach of statutory duty), misrepresentation or otherwise, arising in connection with the performance or contemplated performance of this Contract shall be limited to the price of the Goods; and

11.4.2 the Company shall not be liable to the Buyer by reason of any representation or any implied warranty, condition or other term or any duty at law or under the express terms of the Contract for any indirect or Consequential Loss, costs, expenses or other claims for consequential compensation whatsoever (whether caused by the negligence of the Company, its employees, agents or sub-contractors) which arise out of or in connection with the Contract.

11.5 The Buyer shall indemnify the Company and keep it indemnified in full against all liability, loss, damages, costs and expenses (including legal expenses on an indemnity basis) which the Company may suffer or incur as a result of or arising out of or in connection with: -

11.5.1 any negligence by the Buyer in connection with the Contract or breach of the Contract by the Buyer;

11.5.2 the storage, use or sale of the Goods by the Buyer or other act, omission or negligence of the Buyer in connection with the Goods (except where the Company is liable to the Buyer in accordance with these terms and conditions);

11.5.3 any claims brought or threatened against the Company by any third party in connection the Goods (except where the Company is liable in respect thereof in accordance with these terms and conditions).

## 12. TERMINATION

12.1 The Contract will terminate immediately upon the happening of any one or more of the following events; the Buyer has a bankruptcy order made against him or makes an arrangement or composition with his creditors or otherwise takes the benefit of any Act for the time being in force for the relief of insolvent debtors, or (being a body corporate) convenes a meeting of creditors (whether formal or informal) or enters into liquidation (whether voluntary or compulsory), except a solvent voluntary liquidation for the purpose only of reconstruction or amalgamation, or has a receiver, manager, administrator or administrative receiver appointed of its undertaking or any part thereof, or a resolution is passed or a petition presented to any court for the winding-up of the Buyer or for the granting of an administration order in respect of the Buyer or any proceedings are commenced relating to the insolvency or possible insolvency of the Buyer, or in the case of a partner, if the partnership shall be dissolved.

12.2 The Contract will terminate immediately upon service of written notice of termination by the Company on the Buyer on the happening of any one or more of the following: the Buyer suffers or allows any execution whether legal or equitable, or any distress or diligence to be levied on his/its property or obtained against him/it or his/its goods, or if any other legal process shall be threatened or commenced against him/it or his/its goods, or fails to observe or perform any of his/its obligations or duties under the Contract or any other contract between the Company and the Buyer or is unable to pay its debts within the meaning of section 123 of the Insolvency Act 1986 or the Buyer ceases to trade.

12.3 The Company's rights contained in condition 7 (but not the Buyer's rights) shall continue beyond the discharge of the Buyer's and the Company's primary obligations under the Contract consequent upon its termination.

12.4 The termination of the Contract howsoever arising shall be without prejudice to the rights and duties of either the Buyer or the Company accrued prior to termination.

## 13. GENERAL

13.1 Time for performance of all obligations of the Buyer is of the essence.

13.2 Each right or remedy of the Company under the Contract is without prejudice to any other right or remedy of the Company whether under the Contract or not.

13.3 Any provision of the Contract which is held by any competent authority to be invalid, void, voidable, unenforceable or unreasonable (in whole or in part) shall to the extent of such invalidity, voidness, voidability, unenforceability or unreasonableness be deemed severable and the other provisions of the Contract and the remainder of such provision shall not be affected.

13.4 Failure by the Company to enforce or partially enforce any provision of the Contract will not be construed as a waiver of any of its rights under the Contract.

13.5 Company may assign, license or sub-contract all or any part of its rights or obligations under the Contract without the Buyer's consent.

13.6 The Contract is personal to the Buyer who may not assign, license or sub-contract all or any of its rights or obligations under the Contract without the Company's prior written consent.

13.7 The formation, construction, performance, validity and all aspects of the Contract are governed by English law and the parties submit to the exclusive jurisdiction of the English Courts.

## 14. COMMUNICATION

14.1 All communications between the parties about this Contract must be in writing and delivered by hand or sent by pre-paid first class post or sent by facsimile transmission:-

14.1.1 (in case of communications to the Company) to its registered office or such changed address as shall be notified to the Buyer by the Company; or

14.1.2 (in the case of the communications to the Buyer) to the registered office of the Buyer (if it is a company) or (in any other case) to any address of the Buyer set out in any document which forms part of the Contract or such other address as shall be notified to the Company by the Buyer. 14.2 Communications shall be deemed to have been received:-

14.2.1 if sent by pre-paid first class post, 2 days (excluding Saturdays, Sundays and bank and public holidays) after posting (exclusive of the day of posting);

14.2.2 if delivered by hand, on the day of delivery;

14.2.3 if sent by facsimile transmission on a working day prior to 4.00pm, at the time of transmission and otherwise on the next working day.

14.3 Communications addressed to the Company shall be marked for the attention of the Sales Director.