

Terms and Conditions of Order

1. DEFINITIONS

- a. The term "Buyer" shall mean Gemco Rail Pty Ltd and include any representative authorized by the Buyer to act on its behalf.
- b. The term "Purchase Order" shall mean Buyers Purchase Order which specifies that these conditions applies to it.
- c. The term "Seller" shall mean the person, Firm or Company to whom the purchase order is issued.
- d. The word "goods" includes all goods covered by the Purchase Order whether raw materials, processed materials or fabricated products.

2. QUALITY AND PACKAGING

- a. All goods supplied shall be of the quality and sort described and equal in all respects to such specifications, plans, drawings, patterns or sample as shall form part of the contract.
- b. The seller shall be held responsible that the goods are packed so as to ensure that they reach their destination intact and undamaged.

3. PRICES

All prices shown on the purchase order are fixed and firm and include all extras (such as, but without limitation, freight, cartage, insurance, packing, use or supply of pallets and containers etc.) unless otherwise shown on the purchase order and no increase in prices will be allowed unless approved by the buyer in writing.

- a. Subject to paragraph b., in the event that the price on the purchase order does not include GST and delivery of the item on or after 1 July 2000, the following provisions shall apply:
 - i. The Seller shall be entitled to recover an additional amount equal to any GST on the supply of the Goods which additional amount will be payable by the Buyer at the same time and subject to the same conditions as the price; and
 - ii. If the total amount of GST on the supply of the Goods differs from the amount paid to the Seller in respect of GST (whether because of an adjustment event within the meaning of the GST Legislation, an error in calculation or for any other reason), the Seller shall refund the difference to the Buyer or the Buyer shall pay an additional amount to the Seller, as the case requires, to ensure that the total amount paid to the Seller in respect of GST corresponds to the total GST liability in respect of the supply of the Goods.
- b. The Seller shall not be entitled to recover any amount in respect of GST (whether as part of the price on the face hereof or pursuant to paragraph a. above) unless and until it has provided a tax invoice (within the meaning of the GST legislation) to the Buyer. The Buyer shall be entitled to reduce any payment in respect of GST by the amount of any cost savings which the Seller is obliged to pass on pursuant to the following paragraph and shall also be entitled to withhold payment of any amount in respect of GST until it is satisfied (acting reasonably) that any such cost savings have been correctly calculated and passed on in the prices payable by the Buyer.
- c. The Seller acknowledges that the costs of production are expected to fall as a result of tax changes to accompany the introduction of GST such as the abolition of sales tax and changes to the taxation of fuel. In relation to the supply of the Goods on or after 1 July 2000, the Seller shall provide details in writing to the Buyer of how the Seller has adjusted prices to take account of cost savings from such tax changes. The price on the purchase order shall be deemed not to take account of any such cost savings unless the Seller has shown the Buyer (to its reasonable satisfaction) that such cost savings have been reflected in the price on the purchase order. If the Seller is not able to show the Buyer (to its reasonable satisfaction) that such cost savings have been reflected in the price on the purchase order, the Seller agrees to adjust the price on the purchase order by the amount of any reductions in its costs of supplying the Goods as a result of such tax charges. Such tax charges shall include changes in taxes payable by the Seller and changes in tax payable by others who's prices directly or indirectly affect the costs of the Seller. In determining whether there have been any reductions in costs, the Seller shall be deemed to incur costs in amount equal to the actual costs less any Input GST in respect of such costs.
- d. The price shall also be reduced by the amount of any other reductions in the Sellers costs of supplying the Goods which result from a reduction in the cost of freight, customs duty, sales tax, foreign currency exchange or any other duty or tax from those in force at the date of the purchase order.
- e. In the event that the Buyer is entitled to recover any part of the price from the Seller or is entitled to damages or other compensation for any act or omission relating to the supply of goods, it shall also be entitled to recover from the Seller an amount in respect of any GST that arises in relation to such recoveries.
- f. In these Conditions:
"GST" means tax payable on taxable supplies under GST legislation.
"GST Legislation" means A New Tax System (Goods and Services Tax) Act 1999 and any related act imposing such tax or legislation that is enacted to validate, recapture, or recoup such tax.
"Input GST" means, in relation to costs incurred by a person by acquiring goods, services and other supplies, the amount of GST on those supplies.

4. DELIVERY

- a. All Invoices, packing slips, delivery dockets and correspondence must show the order number endorsed on the purchase order.
- b. The Goods the subject of the Order shall be delivered free at the destination indicated on the purchase order unless otherwise specified.
- c. If the Seller shall fail to deliver all or any of the Goods specified on the purchase order at the time or times specified in accordance with any delivery schedule mutually agreed upon then the Buyer at its option and without notice to the Seller treats the order as having been repudiated by the Seller and Buyer shall then be entitled to recover as liquidated damages the loss of profit in addition to any expenses it shall have incurred or may thereafter incur by reason of such repudiation. Time shall be of the essence of the order.
- d. The Buyer reserves the right to refuse to accept liability for the Goods delivered in excess of the quantity ordered or delivered in excess of the quantity agreed in any delivery schedule approved by the parties.
- e. Receipt of the Goods must be acknowledged in writing by an authorized representative of the Buyer.

- f. The Seller of the Goods is entirely responsible for controlling the quality of the Goods and shall only offer to the Buyer those which conform to the requirements of the order. The Seller shall make inspection and test records available to the Buyer upon request and shall forward a Certificate of compliance with the goods stating that the requirements of the order have been satisfied.
- g. The Goods delivered to the Buyer are subject to the Buyers inspection, and the signing of a delivery docket does not constitute acceptance of the Goods.
- h. The Goods shall notwithstanding acceptance of delivery be subject to rejection by the Buyer and may be rejected by the Buyer after inspection if they do not comply with the provisions of the purchase order.
- i. Goods returned as faulty to the Seller by the Buyer for rework, replacement or credit will be at the risk of the Seller and all handling and transportation costs both ways will be borne by the Seller.

5. **TERMS OF PAYMENT**

Unless otherwise stated in the Agreed Terms of Credit, payment will be made within 30 days of receipt and agreement of an invoice.

6. **LOSS OR DAMAGE IN TRANSIT**

- a. The Buyer shall advise the Seller in writing, otherwise than by a qualified signature on any delivery note, of any loss or damage within the following limits:
 - i. Partial loss, damage, defects or non delivery of any separate part of a consignment shall be advised within 60 days if date of delivery on the consignment or part consignment.
 - ii. Non delivery of whole consignment shall be advised within 30 days of notice of dispatch.
- b. The seller shall make good free of charge to the Buyer any loss of or damage to or defect in the goods where notice is given by the Buyer in compliance with this condition provided that the Buyer shall not in any event claim damages in respect of loss or profits.

7. **ACCEPTANCE**

In the case of goods delivered by the Seller not conforming with the Contract whether by reason of being of quality or quantity measurement not stipulated or being unfit for the purpose for which they are required where such purpose has been made known in writing to the Seller, the Buyer shall have the right to reject such goods within a reasonable time of their delivery and to purchase elsewhere as near as practicable to the same contract specifications and conditions as circumstances shall permit, but without prejudice to any other right which the Buyer may have against the Seller. The making of payment shall not prejudice the Buyers right of rejection. Before exercising the said right to purchase elsewhere the Buyer shall give the Seller reasonable opportunity to replace rejected goods with goods that conform to the Contract.

8. **VARIATIONS**

The Seller shall not alter any of the Goods, accept as directed by the Buyer in writing, but the buyer shall have the right, from time to time during the execution of the Contract, by notice in writing to direct the Seller to add or to omit, or otherwise vary the Goods, and the Seller shall carry out such variations and be bound by the same conditions, so far as applicable, as though the said variations were stated in the contract.

Where the Seller receives any such direction from the Buyer which would occasion an amendment to the Contract Price the Seller shall, with all possible speed, advise the Buyer in writing to that effect giving the amount of any such amendment ascertained and determined at the same level of pricing as that contained in the Sellers tender. If in the opinion of the Seller, any such direction is likely to prevent the Seller from fulfilling any of their obligations under the Contract they shall so notify the Buyer and the Buyer shall decide with all possible speed whether or not the same shall be carried out and shall confirm their instruction in writing and notify the said obligations to such an extent as may be justified, until the Buyer so confirms their instructions they shall be deemed not to have been given.

9. **PROGRESS AND INSPECTION**

The Buyers representatives shall have the right to progress and inspect all goods at the Sellers facility at all reasonable times and to reject goods that do not comply with the terms of the Contract. Any inspection, checking, approval or acceptance given on behalf of the Buyer shall not relieve the Seller from any obligations under the Contract.

10. **CORROSION PREVENTION**

Except where stated otherwise in the Buyers purchase order, the Seller shall protect and item or part, that might deteriorate through corrosion during transportation or storage.

11. **HAZARDOUS GOODS**

- a. Hazardous goods must be marked by the Seller with International danger symbols and display the name of the material in English. Transport and other documents must include declaration of the hazard and the name of the material in English. Goods must be accompanied with emergency information in English in the form of written instructions, labels or markings. The Seller shall observe the requirements of Australian and International Agreements relating to the packing, labeling, and carriage of hazardous goods.
- b. All information held by, or reasonably available to the Seller regarding any potential hazards known or believed to exist in the transport, handling, or use of the goods supplied shall be promptly communicated to the Buyer.

12. **WARRANTY**

The Seller shall as soon as reasonably practicable, repair or replace all Goods which are or become defective during a 12 month period from putting into service or 18 months from delivers, whichever shall be shorter, where such defects occur under proper usage and are due to fault design, the Sellers erroneous instructions as to use or erroneous use data, or inadequate or fault materials or workmanship, or any other breach of the Sellers warranties, express or implied.

Repair and replacement shall themselves be subject to the foregoing obligations for a period of 12 months from the date of delivery, reinstalled or passing tests (if any) whichever is appropriate after repair or replacement the Seller shall further be liable in damage (if any) in respect of each purchase order provided that the Buyer shall not in any event claim damages in respect to loss of profits. Transportation charges in respect to goods under warranty repair or replacement shall be borne by the Seller.

The Foregoing state the entire liability in Contract and negligence if the Seller in respect of goods which are defective, other than liability arising under Clause 6. (Loss or Damage in Transit), and the Seller shall not, save as expressly provided herein, be liable for any other claim in regard to defects in the goods.

13. **INTELLECTUAL PROPERTY**

- a. All drawings, blueprints, sketches and copies supplied by the Buyer remain the property of the Buyer, may not be copied or used by the Seller for any purpose other than the execution of the Order, and are to be returned to the Buyer with the Goods unless otherwise agreed.

- b. All patent, design rights, trade marks, Copyright, original works and other intellectual property in any design, specification, process, method of working or other information relating to the Goods (other than that provided by the Seller to the Buyer) supplied by the Buyer for the purpose of executing the Order shall vest for all time with the Buyer.

14. **CANCELLATION OF ORDER**

- a. The Order may be cancelled by the Buyer in whole or in part in the event of the Seller:

- i. at any time failing or being unable or unwilling to comply with any of the Conditions of warranties herein contained.
- ii. committing any act of bankruptcy or being a company having a receiver appointed or proceedings or a resolution for winding up of the Seller instituted or passed; or
- iii. fails to deliver the Goods within the time specified herein or in accordance with any delivery schedule agreed upon by the parties.

- b. The Seller shall not be entitled to any compensation in respect of or arising from any such cancellation.

15. **NON-DISCLOSURE OF SPECIFICATIONS AND INFORMATION**

The Seller undertakes that it will not now or in the future reproduce for or sell to any person or company other than the Buyer the Goods (inclusive of raw or half finished Goods) manufactured by the Seller to specifications provided by the Buyer or related companies, nor will the Seller divulge to any other person any information with regard to such specifications, drawings or intellectual property received from or provided by the Buyer or its related companies without the prior written consent of the Buyer.

16. **PATENTS ON MATERIALS USED**

By its acceptance of the Order, the Seller agrees to and shall indemnify and hold harmless and protect the Buyer, its successors and assigns at all times after such acceptance from and against all costs including solicitors fees on a solicitor/client basis, loss, damages, liability, claims, demands and suits at law or in equity for or in respect of the actual or alleged infringement of any patent, trade mark, or corresponding intellectual property right to or in respect of materials used by the Seller in the execution of the Order.

17. **NON-ASSIGNMENT**

The Seller shall not delegate, subcontract or assign any duties, performance of work or claims under the contract for sale constituted by their acceptance of the Order without the prior written consent of the Buyer.

18. **INJURIES TO PERSONS AND PROPERTY**

The Seller shall be liable for and will by their acceptance of the Order agree to indemnify and will indemnify the Buyer at all times after such acceptance from and against all or any costs, including solicitors fees on a solicitor/client basis, loss, damage, liability, claims or proceedings whatsoever of or in respect of personal injuries to or the death of any person and damage to any property arising out of or in the course of or caused by or resulting from the Sellers manufacture and supply of the Goods to the Buyer.

19. **PERFORMANCE OF WORK ON BUYERS PREMISES**

If any work necessary for the purpose of the Order is performed on the Buyers premises, the Seller by his acceptance of the Order agrees to indemnify and will indemnify the Buyer at all times hereafter from and against all costs, including Solicitors fees on a solicitor/client basis, loss, liability, damage, claim or proceedings whatsoever arising out of the performance of such work for injury to or the death of any person and damage to any property and any other loss, liability, damage, claim or proceedings to which the Seller, its employees or subcontractors are liable and prior to commencement of any such work the Seller shall furnish to the Buyer satisfactory evidence that the Seller and its subcontractors have proper, adequate and current public liability and worker's compensation insurance.

20. **LIQUIDATION DAMAGES**

Failure to deliver all or any of the goods within the date or dates specified in the Contract for any reason, will result for the Seller a deduction from the Contract price, as and for liquidated damages and not as a penalty of a sum to be calculated at the rate of one half of one percent (0.5%) per week on the value of such goods as are subject to the delay for each week or part of a week which may elapse between the date or dates of delivery specified in the contract and the actual date of delivery of the sum up to a maximum of ten percent (10%) of the goods so delayed.

21. **QUALITY MANAGEMENT SYSTEMS**

The Seller shall operate and maintain an effective quality management system appropriate to the type of goods and services offered and/or in accordance with that specified in the Order. The Seller shall provide the Buyer and its principal, access to the applicable premises or working area for the purpose of quality surveillance and audit.

22. **HEALTH AND SAFETY REQUIREMENTS**

The Goods supplied herein must comply with the relevant State Health and Safety Acts and Regulations and meet the appropriate Australian or International Standards.

23. **ENVIRONMENTAL REQUIREMENTS**

The Goods supplied herein must comply with the relevant Environmental Acts and Regulations and meet the appropriate Australian or International Standards.

24. **GENERAL CONDITIONS IN THE TENDER**

No condition submitted or referred to by the Seller when tendering shall form part of the Contract unless otherwise agreed to in writing by the Buyer.

25. **ARBITRATION**

The construction, validity and performance hereof shall be governed by the Laws of Western Australia and all disputes which may arise under, or out of or in relation to the purchase order shall be settled by arbitration in accordance with the provisions of the Arbitration Law 1988 (WA) or any statutory modification or reenactment thereof for the time being in force and all decisions made therein shall be final and binding upon the parties hereto.