



# Diamond Gear

CORPORATE HEADQUARTERS

13750 Hollister Road, Houston, Texas 77088

Phone: 713.590.0270 / Toll Free 1.877.811.4258 / Fax: 713.590.0278

## GENERAL TERMS AND CONDITIONS FOR THE SALE OF PRODUCTS OR SERVICES

**NOTICE:** Sale of any Products or Services is expressly conditioned on Buyer's assent to these Terms and Conditions. Any acceptance of Seller's offer is expressly limited to acceptance of these Terms and Conditions and Seller expressly objects to any additional or different terms proposed by Buyer. No Buyer form shall modify these Terms and Conditions even if signed by a representative of Seller. Any order to purchase products or receive services shall constitute Buyer's assent to these Terms and Conditions. Unless otherwise specified in the quotation, Seller's quotation shall expire 30 days from its date and may be modified or withdrawn by Seller before receipt of Buyer's conforming acceptance.

### 1. Definitions.

"**Buyer**" means the entity to which Seller is providing Products or Services under the Contract.

"**Contract**" means either the contract agreement signed by both parties, or the purchase order signed by Buyer and accepted by Seller in writing, for the sale of Products or Services, together with these Terms and Conditions, Seller's final quotation, the agreed scope(s) of work, and Seller's order acknowledgement. In the event of any conflict, the Terms and Conditions shall take precedence over other documents included in the Contract.

"**Contract Price**" means the agreed price stated in the Contract for the sale of Products and Services, including adjustments (if any) in accordance with the Contract.

"**Products**" means the equipment, parts, materials, supplies, and other goods Seller has agreed to supply to Buyer under the Contract.

"**Seller**" means the entity providing Products or performing Services under the Contract.

"**Services**" means the services Seller has agreed to perform for Buyer under the Contract.

"**Terms and Conditions**" means these "General Terms and Conditions for the Sale of Products or Services", together with any modifications or additional provisions specifically stated in Seller's final quotation or specifically agreed upon by Seller in writing.

### 2. Delivery and Shipping Terms.

(a) Seller shall deliver Products to Buyer EXW Seller's facility or warehouse (Incoterms 2010). Buyer shall pay all delivery costs and charges. Partial deliveries are permitted. Seller may deliver Products in advance of the delivery schedule. Delivery times are approximate and are dependent upon prompt receipt by Seller of all information necessary to proceed with the work without interruption. If Products delivered do not correspond in quantity, type or price to those itemized in the shipping invoice or documentation, Buyer shall so notify Seller within ten (10) days after receipt.

(b) For shipments that do not involve export, title to Products shall pass to Buyer upon delivery in accordance with Section 2(a). For export shipments from a Seller facility or warehouse outside the U.S., title shall pass to Buyer upon delivery in accordance with Section 2(a). For shipments from the U.S. to another country, title shall pass to Buyer immediately after each item departs from the territorial land, seas and overlying airspace of the U.S. The 1982 United Nations Convention of the Law of the Sea shall apply to determine the U.S. territorial seas. For all other shipments, title to Products shall pass to Buyer the earlier of (i) the port of export immediately after Products have been cleared for export or (ii) immediately after each item departs from the territorial land, seas and overlying airspace of the sending country. When Buyer arranges the export or intercommunity shipment, Buyer will provide Seller evidence of exportation or intercommunity shipment acceptable to the relevant tax and custom authorities. Notwithstanding the foregoing, title to any leased equipment remains with Seller.

(c) Risk of loss shall pass to Buyer upon delivery pursuant to Section 2(a), except that for export shipments from the U.S., risk of loss shall transfer to Buyer upon title passage.

(d) If any Products to be delivered under this Contract cannot be shipped to or received by Buyer when ready due to any cause attributable to Buyer, Seller may ship the Products to a storage facility, including storage at the place of manufacture or



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repair, or to an agreed freight forwarder. If Seller places Products into storage, the following apply: (i) title and risk of loss immediately pass to Buyer, if they have not already passed, and delivery shall be deemed to have occurred; (ii) any amounts otherwise payable to Seller upon delivery or shipment shall be due; (iii) a fee of two percent (2%) of the value of the Products will be charged to Buyer; and (iv) when conditions permit and upon payment of all amounts due, Seller shall make Products and repaired equipment available to Buyer for delivery.

(e) Any liability of Seller for non-delivery of the Products shall be limited to replacing the Products within a reasonable time or adjusting the invoice respecting such Products to reflect the actual quantity delivered.

(f) Claims for products damaged or lost in transit should be made with the carrier, as Seller's responsibility ceases, and title passes, on delivery to the carrier. All stock material offered is always subject to prior sale.

3. Cancellation of Purchase Order. After acceptance by Seller, Buyer cannot cancel any purchase order for special, or non-standard Products, and shall be responsible for full payment for the Products. After Seller accepts Buyer's Purchase Order for standard designed Products if Buyer cancels such Purchase Order, Buyer will be charged for all costs incurred prior to such cancellation and for work performed based on the following schedule:

<u>Order Termination Date</u>	<u>Termination Charge</u>
Less than 7 days after order acceptance:	No charge
7-14 days after order acceptance:	5% of order price
15-21 days after order acceptance:	20% of order price
3 to 12 weeks after order acceptance:	75% of order price
More than 12 weeks after order acceptance:	100% of order price

4. Returns. Issuance of credit for any Product return is in Seller's sole discretion. Seller cannot accept return of any Product unless Seller previously has authorized in writing such return. Any return of standard stock Products shall be subject to a minimum 35% restocking fee, unless otherwise agreed in writing by Seller, and must be returned prepaid to the delivery point shown on the Return Authorization Form. Returns may be requested within 60 days from date of invoice and must be in new condition with supporting documentation (including Return authorization number, MSDS sheet, and Safety Assurance Certificate). Any non-standard, non-stock, specialty, custom, used, damaged, machined or modified Product is non-returnable, non-cancelable. Credits issued for accepted Product returns shall subject to the following deductions: (i) the costs to return the Product to saleable condition, and (ii) transportation charges, if not prepaid.

5. Title and Risk of Loss. Title and risk of loss passes to Buyer pursuant to the terms of Article 2. As collateral security for the full payment of the purchase price of the Products, Buyer hereby grants to Seller a lien on and security interest in and to all of the right, title and interest of Buyer in, to and under the Products, wherever located, and whether now existing or hereafter arising or acquired from time to time, and in all accessions thereto and replacements or modifications thereof, as well as all proceeds (including insurance proceeds) of the foregoing. The security interest granted under this provision constitutes a purchase money security interest under the Texas Uniform Commercial Code. Seller shall have the right to file any and all documents and take any action it deems necessary to fully establish protection of its security interest in the Products; however, the failure of Seller to file any such document shall not in any way act as a waiver of Seller's right to such security interest.

6. Errors & Omissions. Seller reserves the right to correct any error or omission of clerical or technical nature on Orders, Invoices, Quotations, Price Schedules, Acknowledgements, or any other document by said Company.

7. Assembly/Installation Work. In the event Buyer desires for Seller to perform any assembly/installation work, said work will be performed pursuant to a separate agreement to be entered into in writing by both Buyer and Seller detailing the terms of said work.

8. Contract Price.

(a) Prices are subject to change without notice. All pricing offered is Ex Works Seller's Facility (Incoterms 2010), unless otherwise stated in formal quotation.

(b) Buyer shall purchase the Products and, if applicable, shall pay for the services provided, from Seller at the Contract Price. Prices are subject to change without prior notice and Seller shall thereafter notify Buyer of any price increases. In the



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event of a price increase, Buyer may cancel any undelivered portion of any order by written notice to Seller, provided such notice is received by Seller not more than 10 days after Buyer's receipt of Seller's notice of price increase. Upon cancellation, Buyer shall pay Seller: (1) the Contract Price for all Products which have been completed or are in the process of completion, (2) components or goods secured by Seller from outside sources for the performance of the Contract, and (3) special tooling and equipment procured for the performance of the Contract. All prices shall be confidential and Buyer shall not disclose such prices to any unrelated party.

(c) All taxes, duties and charges of any kind imposed by any governmental authority on the sale or purchase of Products or Services or on any amounts payable by Buyer shall be the responsibility of and paid by Buyer. Seller may include on any invoice a line item for taxes, which Buyer shall pay unless Buyer provides Seller with an exemption certificate acceptable to the taxing authorities.

### 9. Payment Terms.

(a) Terms of payment are net cash thirty (30) days following the date of invoice, or by letter of credit paid upon submittal of shipping documents, all payable in U.S. currency to Seller.

(b) Buyer shall pay interest on all late payments at the lesser of the rate of 1.5% per month or the highest rate permissible under applicable law, calculated daily and compounded monthly. Buyer shall reimburse Seller for all costs incurred in collecting any late payments, including, without limitation, attorneys' fees and court costs. In addition to all other remedies available under these Terms and Conditions or at law (which Seller does not waive by the exercise of any rights hereunder), Seller shall be entitled to suspend the delivery of any Products if Buyer fails to pay any amounts when due hereunder and such failure continues for 30 days following written notice thereof.

(c) Buyer shall not withhold payment of any amounts due and payable by reason of any set-off of any claim or dispute with Seller, whether relating to Seller's breach, bankruptcy or otherwise.

(d) If Buyer disputes any invoice or portion thereof, it shall notify Seller in writing within thirty (30) days of receipt of said invoice. All charges not timely disputed in writing shall be deemed to be undisputed and shall be due and payable as set forth above.

### 10. Limited Warranty.

(a) Seller warrants that Products shall be delivered free from defects in material, workmanship and title and that Services shall be performed in a competent, diligent manner in accordance with any mutually agreed specifications.

(b) The warranty for Products shall expire one (1) year from installation or eighteen (18) months from shipment, whichever occurs first. The warranty for Services shall expire one (1) year after performance of the Service.

(c) If Products or Services do not meet the above warranties, Buyer shall promptly notify Seller in writing prior to expiration of the warranty period. Seller shall (i) at its option, repair or replace defective Products and, if applicable, (ii) re-perform defective Services. If despite Seller's reasonable efforts, a non-conforming Product cannot be repaired or replaced or non-conforming Services cannot be re-performed, Seller shall refund or credit monies paid by Buyer for such non-conforming Products and/or Services. Warranty repair, replacement or re-performance by Seller shall not extend or renew the applicable warranty period. Buyer shall obtain Seller's agreement on the specifications of any tests it plans to conduct to determine whether a non-conformance exists.

(d) Buyer shall bear the costs of access for Seller's remedial warranty efforts (including removal and replacement of systems, structures or other parts of Buyer's facility), de-installation, decontamination, re-installation and transportation of defective Products to Seller and back to Buyer. No allowance will be made for labor or costs incurred in connection with repairing or replacing defective products or workmanship or damage resulting from the same. Products of other manufacturers are sold only with such warranty as may be extended by the manufacturer of the product.

(e) Where engineering design or fabrication work is supplied, Buyer's acceptance of Seller's design or of delivery of work shall relieve Seller of all further obligation, other than expressed in Seller's product warranty. This warranty shall not apply to any Products or components thereof which (i) have been repaired or altered outside of Seller's factory, in any manner; (ii) have been subjected to misuse, negligence or accidents; (ii) have been used in a manner contrary to Seller's instructions or recommendations. Seller shall not be responsible for design errors due to inaccurate or incomplete information supplied by Buyer or its representatives.



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(f) The warranties and remedies are conditioned upon (a) proper storage, installation, use, operation, and maintenance of Products, and (b) modification or repair of Products or Services only as authorized by Seller in writing. Failure to meet any such conditions renders the warranty null and void. Seller is not responsible for normal wear and tear.

(g) This Article 8 provides the exclusive remedies for all claims based on failure of or defect in Products or Services, regardless of when the failure or defect arises, and whether a claim, however described, is based on contract, warranty, indemnity, tort/extra-contractual liability (including negligence), strict liability or otherwise. The warranties provided in this Article 8 are exclusive and are in lieu of all other warranties, conditions and guarantees whether written, oral, implied or statutory. NO IMPLIED OR STATUTORY WARRANTY, OR WARRANTY OR CONDITION OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE APPLIES.

(h) **Any inspection services provided by Seller at Buyer's request shall be provided as a customer service only and shall not be deemed to act as a warranty or approval of Buyer's installation, use, or maintenance of the Products, nor shall Seller be liable for failure to detect improper use, installation or maintenance of the Products by Buyer.**

### 11. Limitation of Liability.

(a) **IN NO EVENT SHALL SELLER BE LIABLE TO BUYER OR ANY THIRD PARTY FOR ANY LOSS OF USE, REVENUE OR PROFIT OR DIMINUTION IN VALUE, OR FOR ANY CONSEQUENTIAL, INDIRECT, INCIDENTAL, SPECIAL, EXEMPLARY, OR PUNITIVE DAMAGES WHETHER ARISING OUT OF BREACH OF CONTRACT, TORT (INCLUDING NEGLIGENCE) OR OTHERWISE, REGARDLESS OF WHETHER SUCH DAMAGES WERE FORESEEABLE AND WHETHER OR NOT SELLER HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES, AND NOTWITHSTANDING THE FAILURE OF ANY AGREED OR OTHER REMEDY OF ITS ESSENTIAL PURPOSE.**

(b) **IN NO EVENT SHALL SELLER'S AGGREGATE LIABILITY ARISING OUT OF OR RELATED TO THIS CONTRACT, WHETHER ARISING OUT OF OR RELATED TO BREACH OF CONTRACT, TORT (INCLUDING NEGLIGENCE) OR OTHERWISE, EXCEED THE TOTAL OF THE AMOUNTS PAID TO SELLER FOR THE PRODUCTS SOLD HEREUNDER OR, AS TO SERVICES, FOR THE AMOUNTS PAID TO SELLER FOR SERVICES PERFORMED HEREUNDER.**

12. Insurance. During the term of the Contract, Seller shall maintain for its protection the following insurance coverage: (i) Worker's Compensation, Employer's Liability and other statutory insurance required by law with respect to work related injuries or disease of employees of Seller in such form(s) and amount(s) as required by applicable laws; (ii) Automobile Liability insurance with a combined single limit of \$1,000,000; and (iii) Commercial General Liability or Public Liability insurance for bodily injury and property damage with a combined single limit of \$1,000,000. If required in the Contract, Seller shall provide a certificate of insurance reflecting such coverage.

13. Indemnification. Subject to Article 9 hereof, each of Buyer and Seller (as an "**Indemnifying Party**") shall indemnify the other party (as an "**Indemnified Party**") from and against claims brought by a third party, on account of personal injury or damage to the third party's tangible property, to the extent caused by the negligence of the Indemnifying Party in connection with this Contract. In the event the injury or damage is caused by joint or concurrent negligence of Buyer and Seller, the loss or expense shall be borne by each party in proportion to its degree of negligence. For purposes of Seller's indemnity obligation, no part of the Products is considered third party property.

14. Adequate Assurance. Seller reserves the right by written notice to cancel any order or require full or partial payment or adequate assurance of performance from Buyer without liability to Seller in the event of: (i) Buyer's insolvency, (ii) Buyer's filing of a voluntary petition in bankruptcy, (iii) the appointment of a receiver or trustee for Buyer or (iv) the execution by Buyer of an assignment for the benefit of creditors. Seller reserves its right to suspend its performance until payment or adequate assurance of performance is received and also reserves its right to cancel Buyer's credit at any time for any reason.

### 15. Intellectual Property Rights.

(a) Seller is unable to guarantee that no patent rights, copyrights, trademarks, (user) rights, trade models or any other rights of third-parties are infringed by goods received from suppliers and/or buyers via Seller or third-parties via them, including but not limited to goods, models and drawings for the manufacture and/or delivery of certain Products.

(b) In the absence of written agreement to the contrary, Seller holds the copyrights and all rights of (industrial) property to the offers it has made and the designs, images, drawings (test) models, software, templates and other goods that it has issued.

16. Nuclear Plants. Where the Products and Services are supplied in connection with nuclear plant applications, Buyer agrees to take all necessary steps to add Seller as an insured under Buyer's American Nuclear Insurers' (ANI) pool and under the



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Mutual Atomic Energy Reinsurance Pool (MAERP) coverage for personal injury and property damage liability. Buyer shall defend, indemnify, and hold Seller harmless against all claims, costs, losses and liability ("**Losses**") for which Buyer self-insures or that would have been, subject to ANI or MAERP coverage had Seller been added as an insured under such policies, even if the cause of such Losses include personal injury, death or property damage arising from defective design, material, or workmanship furnished by Seller. Buyer further agrees to waive subrogation by its carriers of such insurance against Seller, and as to nuclear hazards for which Buyer cannot obtain insurance coverage, the liability of Seller for any personal injury (or death), property damage or other loss caused by defective Products or Services furnished by Seller shall not exceed the value of the Products or Services furnished by Seller at the time of the loss occurrence.

17. Compliance with Laws.

(a) Seller shall comply with laws applicable to the sale of the Products and its performance of any services provided hereunder. Buyer shall comply with all applicable laws, regulations and ordinances. Seller may terminate this Contract if any governmental authority imposes antidumping or countervailing duties or any other penalties on Products.

(b) The products, items, technology or software covered by a quotation/order may be subject to various laws including U.S. and foreign export controls. Seller is committed to complying with all relevant export laws. If these items are of United States origin and are being exported from the United States, the following statement applies, "These commodities, technology or software were exported from the United States in accordance with the Export Administration Regulations. Diversion contrary to U.S. law is prohibited." Buyer is responsible for applying for export licenses, if required, based on end user or country of ultimate destination. Seller's obligations are conditioned upon Buyer's compliance with all U.S. and other applicable trade control laws and regulations. Buyer shall not trans-ship, re-export, divert or direct Products other than in and to the ultimate country of destination declared by Buyer and specified as the country of ultimate destination on Seller's invoice.

18. Termination. In addition to any remedies that may be provided under these Terms and Conditions, Seller may terminate this Contract with immediate effect upon written notice to Buyer, if Buyer: (i) fails to pay any amount when due under this Contract and such failure continues for 30 days after Buyer's receipt of written notice of nonpayment; (ii) has not otherwise performed or complied with any of these Terms and Conditions, in whole or in part; or (iii) becomes insolvent, files a petition for bankruptcy or commences or has commenced against it proceedings relating to bankruptcy, receivership, reorganization or assignment for the benefit of creditors.

19. Amendment and Modification. These Terms and Conditions may only be amended or modified in a writing which specifically states that it amends these Terms and Conditions and is signed by an authorized representative of each party.

20. Waiver. No waiver by Seller of any of the provisions of this Contract is effective unless explicitly set forth in writing and signed by Seller. No failure to exercise, or delay in exercising, any right, remedy, power or privilege arising from this Contract operates, or may be construed, as a waiver thereof. No single or partial exercise of any right, remedy, power or privilege hereunder precludes any other or further exercise thereof or the exercise of any other right, remedy, power or privilege.

21. Confidential Information. All non-public, confidential or proprietary information of Seller, including but not limited to specifications, samples, patterns, designs, plans, drawings, documents, data, business operations, customer lists, pricing, discounts or rebates, disclosed by Seller to Buyer, whether disclosed orally or disclosed or accessed in written, electronic or other form or media, and whether or not marked, designated or otherwise identified as "confidential" in connection with this Contract is confidential, solely for the use of performing this Contract and may not be disclosed or copied unless authorized in advance by Seller in writing. Upon Seller's request, Buyer shall promptly return all documents and other materials received from Seller. Seller shall be entitled to injunctive relief for any violation of this Section. This Section does not apply to information that is: (a) in the public domain; (b) known to Buyer at the time of disclosure; or (c) rightfully obtained by Buyer on a non-confidential basis from a third party.

22. Force Majeure. Seller assumes no responsibility, liability, or back charge, nor shall Seller be liable or responsible to Buyer, or be deemed to have defaulted or breached this Contract, for any failure or delay in fulfilling or performing any term of this Contract when and to the extent such failure or delay is caused by or results from acts or circumstances beyond the reasonable control of Seller including, without limitation, acts of God, flood, fire, earthquake, explosion, governmental actions, war, invasion or hostilities (whether war is declared or not), terrorist threats or acts, riot, or other civil unrest, national emergency, revolution, insurrection, epidemic, lockouts, strikes or other labor disputes (whether or not relating to either party's workforce), restraints or delays affecting carriers or inability or delay in obtaining supplies of adequate or suitable materials, telecommunication breakdown or power outage, or delays of carriers, by contractors or sub-suppliers, inability to obtain materials, shortages of fuel and energy, or any other causes of any kind beyond the control of Seller. Seller may terminate any contract of sale of its products without liability of any nature, by written



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notice to Buyer, in the event that the delay in delivery or performance resulting from any of the aforesaid causes shall continue for a period of sixty (60) days. Under no circumstances shall Seller be liable for any special or consequential damages or for loss, damage, or expense (whether based on negligence or not) directly or indirectly arising from delays or failure to give notice of delay or any force majeure event.

23. Assignment. Buyer shall not assign any of its rights or delegate any of its obligations under this Contract without the prior written consent of Seller. Any purported assignment or delegation in violation of this Section is null and void. No assignment or delegation relieves Buyer of any of its obligations under this Contract.

24. Relationship of the Parties. The relationship between the parties is that of independent contractors. Nothing contained in this Contract shall be construed as creating any agency, partnership, joint venture or other form of joint enterprise, employment or fiduciary relationship between the parties, and neither party shall have authority to contract for or bind the other party in any manner whatsoever.

25. Governing Law. All matters arising out of or relating to this Contract are governed by and construed in accordance with the internal laws of the State of Texas without giving effect to any choice or conflict of law provision or rule (whether of the State of Texas or any other jurisdiction) that would cause the application of the laws of any jurisdiction other than those of the State of Texas.

26. Submission to Jurisdiction. Any legal suit, action or proceeding arising out of or relating to this Contract shall be instituted in the federal courts of the United States of America or the courts of the State of Texas in each case located in the City of Dallas, Dallas County, Texas and each party irrevocably submits to the exclusive jurisdiction of such courts in any such suit, action or proceeding.

27. Notices. All notices, requests, consents, claims, demands, waivers and other communications hereunder (each, a "Notice") shall be in writing and addressed to the parties at the addresses set forth on the face of the Contract or to such other address that may be designated by the receiving party in writing. All Notices shall be delivered by personal delivery, nationally recognized overnight courier (with all fees pre-paid), facsimile (with confirmation of transmission) or certified or registered mail (in each case, return receipt requested, postage prepaid). Except as otherwise provided in this Contract, a Notice is effective only (a) upon receipt of the receiving party, and (b) if the party giving the Notice has complied with the requirements of this Section.

28. Severability. If any term or provision of this Contract is invalid, illegal or unenforceable in any jurisdiction, such invalidity, illegality or unenforceability shall not affect any other term or provision of this Contract or invalidate or render unenforceable such term or provision in any other jurisdiction.

29. Survival. Provisions of these Terms and Conditions which by their nature should apply beyond their terms will remain in force after any termination or expiration of these Terms and Conditions including, but not limited to, the following provisions: Insurance, Compliance with Laws, Confidential Information, Governing Law, Indemnification, Submission to Jurisdiction/Arbitration and Survival.