

# DIPERK POWER SOLUTIONS: STANDARD CONDITIONS OF SALE & SUPPLY

Version: November 2009

## Definitions

1. In these Conditions:

- i) "the Company" means DiPerk Power Solutions, a trading division of Finning (UK) Ltd. (Company No. 367090, Registered Office: Watling Street, Cannock, Staffordshire, WS11 8LL);
- ii) "the Conditions" means the Standard Conditions of Sale & Supply set out in this document;
- iii) "the Customer" means the person, firm or corporation who is entering into this contract for the supply of Goods;
- iv) "the Goods" means the Goods and/or services (including any instalment of the goods and/or services or any parts for them) which the company is to supply;
- v) "Order" means an order from the Customer to the Company for the supply of Goods;
- vi) "the Specification" means the specification for the goods contained in the manufacturer's technical literature relating to the goods;
- vii) "Notice" shall mean notice in writing;
- viii) "Labour" means the workmanship supplied by the Company in the course of repair and/or service work carried out by the Company.

## General Provisions

- 2. These Conditions supersede all previously issued Standard Conditions of Sale & Supply.
- 3. No variation of these revised Conditions is to have any effect unless confirmed in writing by the Head of Commercial Operations, Dealer Principal or Director of the Company.
- 4. These Conditions shall also apply to service and/or repair contracts in so far as they are applicable to such contracts. Any spare parts and/or labour provided pursuant to such service and/or repair contracts shall be deemed to be "Goods" for the purpose of these Conditions. For the avoidance of doubt clauses 9 to 15 (inclusive) and 19 to 21 (inclusive) shall not apply to such contracts.

## Health and Safety

- 5. The Goods are sold subject to the condition that the directions, warnings and advice given by the Company in the instruction manual supplied with the Goods or which are subsequently notified by the Company as a safety re-work notice to the customer in writing are strictly observed and that their contents are specifically drawn to the attention of the Customer's employees and own customers.
- 6. The Customer shall be solely responsible for providing at its own cost all such safety equipment and for fully equipping the goods to meet the standards for the time being imposed pursuant to the Health and Safety at Work, etc. Act 1974 in the light of the Customer's own particular working conditions, location of equipment and requirements; and ensuring that all and any appropriate safety procedures are implemented, documented and communicated to the Customer's employees and own customers.

## Warranty

- 7. Any certificate of warranty which may be supplied with the Goods is given in addition to and not in substitution for the contractual rights of the customer.

## Specification

- 8.
  - i) Subject to clause 9 the Company warrants that the Goods will comply with the Specification;
  - ii) Subject to the provisions of clause 8 i) hereof it is the Customer's responsibility to ensure that the Goods are fit for the Customer's purpose and the Company shall have no responsibility whatsoever to the Customer for any damage costs claims or expenses suffered by the Customer or any third party arising as a result of the failure of the Goods to be fit for the Customer's purpose.
- 9. The company shall have the right to alter the specification of the Goods without prior reference to the Customer provided that any such alteration does not in the reasonable opinion of the Company materially alter the quality or performance of the Goods.
- 10. All drawing dimensions and weights provided by the Company are approximate only and the Company does not warrant or represent them to be correct.
- 11.
  - i) In the case of damaged Goods or shortage of delivery or nonconformity with order, notice must be given by the Customer to the Head of Commercial Operations, Dealer Principal or Legal Manager of the

Company within fourteen days of delivery, stating the Customer's contact number and specifying in reasonable detail the circumstances giving rise to the claim;

ii) Where Goods are accepted from the carrier concerned without being checked, the delivery document must be signed "not examined";

iii) In the case of loss of Goods notice in writing must be given to the carrier and to the Company within fourteen days of the date of consignment;

iv) (Parts supply only) Where the Customer can reasonably demonstrate to the Company that the Goods (or some of them) are surplus to requirements within 14 days of delivery then the Company will permit the Customer to return the relevant Goods within strictly 28 days (at the Customer's cost and risk) and will raise a credit in respect of the returned Goods. (Please refer to Clause 22 iii))

v) In default of compliance with the foregoing provisions of this clause the Customer shall not be entitled to refuse to take the delivery of the Goods or any part of them.

12. Where the contract is for delivery in instalments, defects in quality in any delivery shall not be a ground for the cancellation of the remainder of the contract.

#### **Time for Delivery**

13. Where a period is named for delivery and is not extended by mutual agreement in writing, then the Company reserves the right to require the Customer to take delivery within that period.

14. The Company reserves the right to make partial deliveries.

15. Although the Company will use its best endeavours to deliver the Goods at the rate and at the time quoted for delivery, it shall not be liable for any loss or damage arising from its failure to do so and time of delivery shall not be of the essence of this contract.

16. Deliveries may be wholly or partially suspended and the time of such suspension added to the original contract period in the event of a stoppage, delay or interruption of work in the establishment of either the Company or the manufacturer or the Customer during the delivery period as a result of strikes, lock-outs, trade disputes, breakdown, accident or any cause whatsoever beyond the control of the Company, manufacturer or the Customer respectively.

#### **Liability and Indemnity**

17. The Company shall not be liable to the Customer and the Customer shall indemnify the Company from and against all actions, costs, claims and demands of whatever nature made against the Company for any loss and damage including consequential loss or damage caused: -

i) By the failure of the Customer or its employees, servants or agents to observe the directions and advice given by the Company in the instruction manual supplied with the Goods, or to comply with the terms of any safety re-work notice, or to implement any appropriate safety procedures;

ii) By any defect arising out of the use of or in the quality of the Goods supplied or in the Goods not being fit for any purpose unless such use, quality or fitness for purpose was indicated in the Specification for Goods or their description;

iii) By any failure of the Goods supplied to accord with any recommendation of the Company made in good faith but not contained in the specification;

iv) By any defect or deficiency in the Goods where the failure of the Customer to comply with the conditions for acceptance and delivery contained in clause 11 hereof has prevented a proper verification and proof of such defect or deficiency;

v) By the use of any Goods otherwise than within the stated capacity of the same as stated in the Specification or by the failure of the customer to maintain the Goods in accordance with the maintenance schedule contained in the manual supplied with the Goods or the failure to provide safety equipment in accordance with clause 6;

vi) By any defect arising from fair wear and tear, wilful damage, abnormal working conditions or alteration, adjustment, adaptation or repair by a party other than the Company.

18. The liability of the Company hereunder shall further be limited to the cost of repair or rectification or (at the option of the Company) the replacement of any Goods found to be defective under the warranty referred to in clause 7. The Company shall not be liable to the customer for any incidental or consequential damages or loss arising from a defect in the Goods other than consequential loss following directly from death or personal injury arising as a result of the negligence of the Company or its employees or sub-contractors.

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19. The Customer warrants to the Company that the Goods are intended for use by the Customer within Great Britain or Isle of Man or Channel Islands.

## **Passing of Risk**

20.

- i) In the event that the Customer is to collect the Goods risk shall pass upon collection of the Goods from the Company's premises, whether by the Customer itself or by a carrier nominated by the Customer;
- ii) In the event that the Company is to effect delivery of the Goods, risk shall pass on delivery of the Goods to the Customer's premises or to premises nominated by the Customer ready for unloading.

## **Passing of Property**

21.

- i) Property in the Goods shall not pass to the Customer and the full legal and beneficial ownership of the Goods shall remain with the Company unless and until the Company has received payment in full for the Goods and for all other goods agreed to be sold by the Company to the Customer for which payment is then due;
- ii) Until property in the Goods has passed to the Customer in accordance with the preceding sub-clause and without prejudice to the Company's rights:
  - a) the Customer shall insure the Goods which are on or at the Customer's premises or have been delivered elsewhere on the instructions of the Customer against all risk and shall if required to do so in writing by the Company, prove to the Company that such insurance has been effected;
  - b) the Customer shall not remove any nameplates, markings or signs affixed to the Goods by the manufacturer or by the Company and shall keep the Goods marked and apart from all other goods so as to distinguish and separate the Goods from other goods;
  - c) the Customer shall retain the Goods in a fiduciary capacity as bailee for the Company and shall not without the prior written consent of the Company sell the Goods or any part of them;
  - d) the Company shall be entitled to immediate re-delivery of the Goods and to re-sell the Goods at any time after the due date for payment or before such date in the case of the occurrence of any of the events referred to in clauses 23 or 29 hereof and for the purpose of such recovery and/or re-sale of the Goods the Company shall be entitled and the Customer hereby grants to the Company its officers, servants and agents a licence (or, in Scotland, the power) to enter upon the premises or property of the Customer during normal business hours and to remove the Goods (including dismantling and/or separation from other goods to which the Goods are attached and/or severance from the realty or, in Scotland, separation from heritable property when necessary);
- iii) The exercise by the Company of its rights against the Customer under this clause shall be without prejudice to any rights to the Company to claim against the Customer for additional losses suffered by the Company as a result of the Customer's breach of contract and this clause shall not prejudice or affect the rights of the Company to claim from the Customer the price of the Goods.

## **Terms of Payment**

22.

- i) Unless otherwise stated on the Company's confirmation of order, payment shall be made by the Customer by the end of the calendar month following the date of invoice;
- ii) If the Customer cannot accept delivery when the Goods are completed and ready for delivery, then the time when the Goods are ready shall count as the delivery date and payment shall be made accordingly unless otherwise agreed in writing by the Company;
- iii) The Company reserves the right to charge a fee in respect of any cancelled Order. Such fee shall be calculated at 15% of the value of the cancelled Order. The parties acknowledge that such fee is a fair and reasonable estimate of the likely administrative, storage and remarketing costs to be incurred by the Company as a result of the cancellation.
- iv) The Company reserves the right to charge a handling fee in respect of any goods returned by the Customer as surplus to requirement. Such fee shall be calculated as 30% of the invoice value of the

returned Goods;

v) The Company shall be entitled to charge interest on overdue accounts at 4% above Lloyds Bank plc base lending rate for the time being in force calculated at monthly rates. The right of the Company to charge interest on overdue accounts shall in no way prejudice its right to recover any monies (including accrued interest) due to it by legal proceedings at such times as the Company thinks fit and the Company shall be under no obligation to allow overdue accounts to remain outstanding on payment of interest thereon.

23. If before delivery is effected there arise reasonable grounds for the Company to believe that the Customer will not be able to fulfil its payments obligations, the Company shall have the right to demand from the Customer security for the payment. From the date of demand for security until the date of satisfactory provision of the same, the Company shall be under no obligation to do any act or thing to implement any part of the Contract. If security acceptable to the Company is not offered within such reasonable period as may be specified by the Company, the Company may terminate the contract without further liability on its part but the Customer shall be liable to the Company in respect of any losses (including loss of profits) incurred by the Company as a consequence of such determination.

24. The Company shall have a general lien on all goods and property of the Customer in the possession of the Company in respect in all sums due from the Customer to the Company but unpaid and the Company shall be entitled on giving fourteen days notice in writing to the Customer to dispose of such goods or property and to apply the proceeds thereof towards the reduction of such debt.

25. The Customer hereby waives any right which it may have against the Company to set off any sums which may be due to it for whatever reason and undertakes to pay the Company for the Goods in accordance with the terms of payment set out under clause 22.

#### **Price**

26.

i) All prices are subject to alteration by the Company without notice and the contract price will be that ruling at the date of delivery.

ii) All prices are exclusive of V.A.T..

iii) The company reserves the right to charge the Customer a minimum of £25 plus V.A.T. in respect of any order. The Company will notify the Customer in advance of any such minimum charge and the Customer may elect not to proceed with the order.

#### **Proper Law of Contract**

27. These Conditions and any contract made in accordance with them will be subject to and constructed in accordance with English Law and the Customer hereby submits to the non-exclusive jurisdiction of the English courts.

#### **Severability of Provisions**

28. Any provision of any clause or sub-clause of these Conditions which is prohibited or unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective to the extent of such prohibition or unenforceability without invalidating the remaining provisions of the remaining clause or sub-clause hereof or affecting the validity or enforceability of such provision in any other jurisdiction.

#### **Termination of Contract**

29. In the event that: -

i) The customer commits any breach of these Conditions; or

ii) An incumbrancer takes possession or a receiver is appointed over any of the assets of the Customer; or

iii) The Customer makes any voluntary arrangement with its creditors or becomes subject to an administration order; or

iv) The Customer goes into liquidation; or

v) A winding up petition or bankruptcy petition against the Customer; or

vi) Execution is levied against the property or assets of the Customer; or

vii) (In Scotland) The Customer apparently becomes insolvent or inhibition arrestment poiding or other process is levied upon the property or assets of the Customer; or

viii) Anything analogous to the foregoing under the law of any jurisdiction occurs in relation to the Customer

then in any such case the Company shall have right forthwith to terminate any contract then subsisting, upon written notice of such termination being posted to the Customer's registered office or (being an individual) his last known address in the United Kingdom and the Contract shall be deemed to have been determined without any prejudice to claim or right the Company may otherwise make or exercise.

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### **Rework**

30 The Customer may request the Company to carry out an inspection of Customer owned goods at the Company's premises in order to provide fault diagnosis and a repair cost estimate. Once the Company has provided such information to the Customer in writing, the Customer shall have 7 days within which either to authorise the Company to commence repair work or to collect the goods, failing which the Company reserves the right to commence charging a storage fee. Such fee shall be set at the Company's prevailing storage rate from time to time in force.

31 For the avoidance of doubt, in circumstances where any Order requires the Company to carry out repair work to Customer goods, and the Customer supplies the parts for the job, any warranty which the Company agrees in writing to provide shall be in respect of labour only.