

# General Conditions for the Supply of Plant and Machinery for Export

Orientated on the Recommendation issued by the United Nations Economic Commission for Europe of 1953

## 1. Preamble

1.1 These Standard Terms and Conditions shall apply, save as varied by express agreement in writing by both parties. They shall also apply to future contracts between the parties. All agreements between the parties must be in writing in order to be valid.

1.2 With respect to the applicability of these Standard Terms and Conditions, a contract for work and materials shall be deemed to be equal to a purchase contract.

1.3 If the Vendor is responsible for the installation of the object to be supplied (the "Plant"), such installation shall be subject to separate contractual agreements.

1.4 The Contract shall be exclusively subject to our General Terms and Conditions; any other provision shall not become part of the Contract, even if we do not expressly object to such provision.

## 2. Formation of Contract

2.1 The Contract shall be deemed to have been entered into when, upon receipt of an order, the Vendor has sent an acceptance in writing within the time limit (if any) fixed by the Purchaser.

2.2 If the Vendor, in drawing up his tender in writing, has fixed a time limit for acceptance, the Contract shall be deemed to have been entered into when the Purchaser has sent an acceptance in writing before the expiration of such time limit, provided, however, the Vendor receives such acceptance not later than one week after the expiration of such time limit.

2.3 If the Vendor's acceptance contains extensions, restrictions or other modifications of the order, the Purchaser shall be deemed to have consented if he does not object within an appropriate period of time.

2.4 If the parties agree to amendments after the formation of the Contract, the Vendor may invoice the Purchaser for the additional costs resulting there from, even if this is not expressly agreed at the time of agreeing such amendments.

## 3. Drawings and Descriptive Documents

3.1 The weights, dimensions, capacities, prices, performance ratings and other data included in catalogues, prospectuses, circulars, advertisements, illustrated matter and price lists constitute an approximate guide. These data shall not be binding save to the extent that they are by reference expressly included in the Contract.

The Vendor may deviate from the service agreed to the extent that this is reasonable for the Purchaser, taking into account the interests of the Vendor.

3.2 Any drawings or technical documents intended for use in the construction of the Plant or parts thereof and submitted to the Purchaser prior or subsequent to the formation of the Contract remain the exclusive property of the Vendor. They may not, without the Vendor's consent, be utilized by the Purchaser or copied, reproduced, transmitted or communicated to a third party. This shall not apply, if such plans or documents are generally known or otherwise legitimately known to the Purchaser. The said plans and documents shall become the property of the Purchaser. If

a) it is expressly so agreed in the Contract; or

b) if they are referable to a separate preliminary contract entered into prior to the formation of this Contract, under which no actual construction was to be performed and in which the property of the Vendor in the said plans and documents was not reserved.

3.3 Any drawings or technical documents intended for use in the construction of the Plant or parts thereof and submitted to the Vendor by the Purchaser prior or subsequent to the formation of the Contract remain the exclusive property of the Purchaser. They may not, without the Purchaser's consent, be utilized by the Vendor or copied, reproduced, transmitted or communicated to a third party; this shall not apply, if such plans or documents are generally known or otherwise legitimately known to the Vendor.

3.4 The Vendor shall, upon the Purchaser's request, furnish free of charge to the Purchaser at the commencement of the Guarantee Period, as defined in Clause 9, instructions/information and drawings - other

than manufacturing drawings of the Plant- in sufficient detail to enable the Purchaser to carry out the erection, commissioning and operation of the Plant as well as the maintenance (including running repairs) of all parts of the Plant. Such instructions/information and drawings shall become the property of the Purchaser, and the restrictions and their use set out in Clause 3.2 hereof shall not apply thereto. However, if the Vendor so stipulates, they shall remain confidential.

#### **4. Packing**

**4.1** Unless otherwise specified,

**a)** prices shown in price lists and catalogues shall be deemed to apply to unpacked Plant;

**b)** prices quoted in tenders and in the Contract shall include the cost of packing or protection required under normal transport conditions to prevent damage to or deterioration of the Plant before it reaches its destination as stated in the Contract.

#### **5. Inspection and Tests**

**5.1** If such right is expressly agreed in the Contract, the Purchaser shall be entitled to have the quality of the materials used and the parts of the Plant, both during manufacture and when complete, inspected and checked by his authorized representatives. Such inspection and checking shall be carried out at the place of the manufacture during normal working hours after agreement with the Vendor as to date and time.

**5.2** If as a result of such inspection and checking the Purchaser shall be of the opinion that any materials or parts of the Plant are defective or not in accordance with the Contract, he shall state in writing his objections and the reasons therefore.

**5.3** If the Purchaser fails to carry out an acceptance test or fails to attend an agreed acceptance test, then the Vendor may carry out such acceptance test on his own and send to the Purchaser the test report, the correctness of which the Purchaser may not dispute; in such case, the Plant shall be deemed to be accepted. This paragraph does not apply if the Purchaser fails to attend the agreed acceptance test inculpably.

**5.4** Unless otherwise agreed, acceptance tests will be carried out at the Vendor's works and during normal working hours. If the technical requirements of the tests are not specified in the Contract, the tests will be carried out in accordance with the general practice prevailing in the appropriate branch of industry in the country where the Plant is manufactured.

**5.5** The Vendor shall give to the Purchaser sufficient notice of the tests to permit the Purchaser's representatives to attend.

**5.6** If on any test (other than a test on site, where tests on site are provided for in the Contract), the Plant shall be found to be defective or not in accordance with the Contract, the Vendor shall with all speed remedy the defect or ensure that the Plant complies with the Contract. Thereafter, if the Purchaser so requires, the test shall be repeated.

**5.7** Unless otherwise agreed, the Vendor shall bear all the expenses of tests carried out in his works, except the personal expenses of the Purchaser's representatives.

**5.8** If the Contract provides for tests on site, the terms and conditions governing such tests shall be such as may be specially agreed between the parties.

#### **6. Passing of Risk**

**6.1** Save as provided in Clause 7.5, the time at which the risk shall pass shall be fixed in accordance with the International Rules for the Interpretation of Trade Terms (Incoterms) of the International Chamber of Commerce in force at the date of the formation of the Contract.

Where no indication is given in the Contract of the form of sale, the Plant shall be deemed to be sold "ex works".

**6.2** In the case of a sale "ex works", the Vendor must give notice in writing to the Purchaser of the date and which the Purchaser must take delivery of the Plant. The notice of the Vendor must be given in sufficient time to allow the Purchaser to take such measures as normally necessary for the purpose of taking delivery.

**6.3** If, upon the Purchaser's request, the Vendor undertakes the dispatch in the case of a sale "ex works", the risk shall pass to the Purchaser upon delivery of the Plant into the custody of the first carrier, to the extent that this point in time is earlier than that specified in Clause 6.2.

## **7. Delivery Period**

**7.1** Unless otherwise agreed, the delivery period shall run from the latest of the following dates:

- a)** the date of the formation of the Contract, as defined in Clause 2;
- b)** the date at which the Vendor receives notice of the issue of a valid import license where such is necessary for the execution of the Contract;
- c)** the date of receipt by the Vendor of such payment in advance of manufacture as is stipulated in the Contract;
- d)** the date at which agreement has been reached on all technical issues which the parties had made subject to subsequent negotiations at the time of formation of the Contract;
- e)** the date of issue of an official license, where such is necessary for the fulfillment of the Vendor's obligations.

**7.2** Should delay of delivery be caused by any of the circumstances mentioned in Clause 10 or by an act or omission of the Purchaser, then the delivery period shall be extended by the period for which such hindrance exists. This shall also apply - except for the case stipulated in Clause 7.3 -, if the cause of such delay occurs after the delivery period stipulated in the Contract.

**7.3** If the Vendor is in default of delivery, the Purchaser shall be entitled, after the expiry of a reasonable extension granted, either to claim compensation for the damage caused by the delay or to rescind the Contract, provided he gave notice of his intention to refuse acceptance of the contractual service when setting the time limit for the extension; however, the claim for compensation of the damage caused by the delay shall be subject to the restrictions set out in Clause 9.16. The right of rescission of the Vendor pursuant to Clause 10.3 shall remain unaffected hereby.

**7.4** If the time for delivery mentioned in the Contract is an estimate only, either party may after the expiration of two thirds of such estimated time require the other party in writing to agree to a fixed time. Where no time for delivery is mentioned in the Contract, this course shall be open to either party after the expiration of six months from the formation of the Contract.

If in either case the parties fail to agree, either party may have recourse to arbitration in accordance with the provisions of Clause 12, to determine a reasonable time for delivery, and the time so determined shall be deemed to be the fixed time for delivery provided for in the Contract; the provisions of Clause 7.3 shall apply accordingly.

**7.5** If the Purchaser is in default to accept delivery on due date, he shall nevertheless make any payment conditional on delivery as if the Plant had been delivered, and the Vendor shall be liable for the storage of the Plant at the risk and cost of the Purchaser. If required by the Purchaser, the Vendor shall insure the Plant at the cost of the Purchaser. However, if the delay in accepting delivery is due to one of the circumstances mentioned in Clause 10 and the Vendor is in a position to store it on his premises without prejudice to his business, the cost of storing the Plant shall not be borne by the Purchaser.

**7.6** Unless Purchaser's delay of acceptance is due to any of the circumstances mentioned in Clause 10, the Vendor may require the Purchaser by notice in writing to accept delivery within a reasonable time. If the Purchaser fails for any reason whatever to do so within such time limit, the Vendor shall be entitled by notice in writing to the Purchaser and without requiring the consent of any court, to terminate the Contract in respect of such portion of the Plant for which delivery has not been taken and thereupon to recover from the Purchaser any loss suffered by reason of such failure, provided, however, the Purchaser did not fail to observe this time limit inculpably. The amount of damage to be paid shall not exceed 25 % of that part of the price payable under the Contract which is properly attributable to such portion of the Plant.

## **8. Payment**

**8.1** Payment shall be made in the manner and at the time or times agreed by the parties. Unless otherwise agreed, payment shall be made in cash without any discount free place of payment of the Vendor, whereby one third shall be due as an advance upon receipt of the order confirmation, one third as soon as the Purchaser has been informed that the main parts of the Plant are ready for dispatch, and the remaining amount within one month thereafter.

**8.2** Any advance payments made by the Purchaser are payments on account and do not constitute a deposit, the abandonment of which would entitle either party to terminate the Contract.

**8.3** If delivery has been made before payment of the whole sum payable under the Contract, the Plant delivered

shall, to the extent permitted by the law of the country where the Plant is situated after delivery, remain the property of the Vendor until such payment has been effected. If such law does not permit the Vendor to retain the property in the Plant, the Vendor shall be entitled to the benefit of such other rights in respect thereof as such law permits him to retain. The Purchaser shall give the Vendor every assistance in taking any measures required to protect the Vendor's right of property or such other rights as aforesaid.

In the case of a right of property/reservation of title or other right of the Vendor as aforesaid, the Purchaser is under an obligation to store the Plant with proper care and to insure it against loss or damage at his own cost; the Purchaser hereby assigns to the Vendor any current or future claims under such insurance policies. The Purchaser shall not be permitted to dispose of the Plant in any way, in particular, to pledge or to transfer it by way of security. Without explicit prior consent of Vendor, Purchaser may not impair Vendor's right of property/reservation of title until Vendor received all payments on the supply agreement, especially may not sale or process the Plant or commingle or connect it with other objects. If the Purchaser is in default of fulfilling his obligations towards the Vendor, the Vendor, after giving notice to the Purchaser, shall be entitled to request that the Plant be returned to him, notwithstanding any other rights of the Vendor. The assertion of the right of property or other right and the pledging of the Plant by the Vendor shall not be deemed to be a rescission of the Contract.

If Purchaser nevertheless processes the Plant, the right of property/reservation of title includes the new created object. In case that the Plant is processed, commingled or connected with other objects, the Vendor acquires a joint right of property/joint reservation of title on the new created object in proportion of the value of the Plant to the value of the other processed or commingled objects at the time of procession or commingling. In course of the procession, the Purchaser is active for the Vendor without acquiring any claims against the Vendor with regard to the procession.

**8.4** A payment conditional on the fulfillment of an obligation by the Vendor shall not be due until such obligation has been fulfilled, unless the failure of the Vendor is due to a culpable act or omission of the Purchaser.

**8.5** If the Purchaser is in default in payment, the Vendor may postpone the fulfillment of his own obligations until such payment is made, unless the default of the Purchaser is due to a culpable act or omission of the Vendor.

If the financial position of the Purchaser deteriorates materially or circumstances become known to the Vendor which endanger the Vendor's claim for payment, the Vendor may refuse to render the contractual service until payment is made or a security in relation thereto has been provided. After expiry of a reasonable extension of the payment period, the Vendor shall be entitled to rescind the Contract.

**8.6** If delay by the Purchaser in making any payment is due to one of the circumstances mentioned in Clause 10, the Vendor shall not be entitled to any default interest on the sum due.

**8.7** If the Purchaser is in default in payment, the Vendor shall be entitled to the payment of default interest (2 percent above the applicable discount rate (*Diskontsatz*) of the Deutsche Bundesbank, however, not less than 5% ) on the sum due; in addition, the Vendor shall be entitled to assert claims for compensation for the damage caused by the default. In the event of a default in payment, the Vendor may in addition grant the Purchaser a reasonable extension; after expiry of this extension, the Vendor shall be entitled either to claim damages for nonperformance of the Contract or to rescind the Contract. provided he gave notice of his intention to refuse acceptance of the contractual service when setting the time limit for the extension.

## **9. Guarantee and Liability**

**9.1** Pursuant to the provisions set out below, the Vendor shall be entitled and obligated to remedy any defect which impairs the function ability of the Plant and which is attributable to a defect in the design, material or construction of the Plant.

The Purchaser shall inform the Vendor what protective devices he requires against dangers originating from the use of the Plant. Such devices shall be delivered at the Purchaser's own expense if both Parties have agreed on the kind and the scope of the protective devices to be delivered; the failure to deliver other protective devices beyond this obligation shall not be deemed to be a defect.

**9.2** The guarantee period shall be 6 months from delivery of the Plant, provided that no other guarantee period has expressly been agreed upon in the Contract.

**9.3** If the Purchaser fails to give notice of a defect at the time of the acceptance test, the Vendor shall only be liable to remedy such defect if it was impossible for the Purchaser to have detected the defect even with the most careful acceptance test and examination of the Plant.

**9.4** In relation to individual parts of the Plant expressly set out in the Contract, irrespective of whether such parts were manufactured by the Vendor or not, separate guarantee periods may be stipulated in the Contract.

**9.5** Unless otherwise contractually agreed, the daily use of the Plant is fixed at 8 hours; if the Plant is used more intensively, the guarantee period shall be reduced accordingly.

**9.6** The same terms and conditions of warranty as those applicable to the original Plant shall apply to parts supplied in replacement of defective parts or to parts renewed in pursuance of this Clause 9. This provision shall not apply to the remaining parts of the Plant, the guarantee period of which shall be extended only by a period equal to the period during which the Plant is out of action as a result of a defect covered by this Clause 9 or is inspected or repaired by the Vendor.

**9.7** In order to be able to avail himself of his rights under this Clause, the Purchaser shall notify the Vendor in writing without delay of any defects that have appeared and shall give him every opportunity of inspecting and remedying them.

**9.8** Upon receipt of such notification, the Vendor shall remedy the defect forthwith and, save as mentioned in Clause 9.9, at his own expense. Save where the nature of the defect is such that it is appropriate to effect repairs on site, the Purchaser shall return to the Vendor any part in which a defect covered by this Clause has appeared, for, at Vendor's choice, repair or replacement by the Vendor, and in such case the delivery to the Purchaser of such part properly repaired or a part in replacement thereof shall be deemed to be a fulfillment by the Vendor of his obligations under this Clause 9.8 in respect of such defective part.

**9.9** Unless otherwise agreed, the Purchaser shall at his own cost and risk arrange for the transport of the defective parts and of the repaired parts or the parts supplied in replacement of such defective parts between the place where the Plant is situated and one of the following points:

- a) the Vendor's works if the Contract is "ex works" or F.O.R.;
- b) the port from which the Vendor dispatched the Plant if the Contract is FOB, FAS, CIF order C&F. ,
- c) in all other cases the frontier of the country from which the Vendor dispatched the Plant.

**9.10** Where, in pursuance of Clause 9.8, repairs are required to be effected on site, the conditions concerning the attendance of the Vendor's representatives on site shall be such as may be specially agreed between the parties.

**9.11** Defective parts replaced in accordance with this Clause 9 shall be placed at the disposal of the Vendor.

**9.12** If the Vendor culpably refuses to fulfill his obligations under this Clause 9 or culpably fails to proceed with due diligence after being required so to do, the Purchaser may proceed to do the necessary work at the Vendor's risk and expense, provided that he does so in a reasonable manner.

**9.13** The Vendor's liability does not apply to defects arising out of materials or manufactured goods provided by the Purchaser, or out of a design stipulated by the Purchaser.

**9.14** The Vendor's liability shall apply only to defects that appear under the conditions of operation provided for by the Contract and under proper use. It does not cover defects due to causes arising after the risk in the Plant has passed in accordance with Clause 6. In particular, it does not cover defects arising from the Purchaser's faulty maintenance or erection, or from alterations carried out without the Vendor's consent in writing, or from repairs carried out improperly by the Purchaser, nor does it cover normal deterioration.

**9.15** If the remedy of defects according to Clause 9 fails, the Purchaser shall be entitled to re scission or reduction of payment, at his choice.

**9.16** Claims for damages made by the Purchaser, in particular claims for damages as a result of breach of contract, tort, product liability, wrong advice, positive breach of contract (*Positive Vertragsverletzung*) and future negligence in contractual negotiations (*culpa in contrahendo*), shall be excluded to the extent that the Vendor is not liable by mandatory law for damage caused intentionally or by gross negligence . This exclusion of claims for damages shall not apply to damages which are suffered as a result of the Vendor breaching material contractual obligations and which, in addition, were foreseeable by the Vendor. Such restriction on liability shall also not apply to strict liability, in particular, it does not apply to the absence of warranted characteristics and to product defects pursuant to the Product Liability Act.

**9.17** "Gross negligence". does not comprise any and every lack of proper care or skill, but means an act or omission on the part of the Vendor implying either a failure to pay due regard to serious consequences which a conscientious Contractor would normally foresee as likely to ensue, or a deliberate disregard of any consequences of such act or omission.

**9.18** The party making a claim for damages shall be under an obligation to take all measures necessary to mitigate the damage incurred, provided such party is not burdened by unreasonable expenses or disadvantages thereby. Otherwise, the party responsible for the no fulfillment of the Contract shall be entitled to claim a reduction of the amount of damage by reason of the other party's failure to take said measures.

## **10. Reliefs**

**10.1** The following shall be considered as cases of relief if they intervene after the formation of the Contract and impede its performance and the party claiming such relief is not responsible for them by reason of negligence or intent: exceeding of delivery periods or failure to deliver on the part of the Vendor's suppliers, restrictions in the use of power, shortage of materials or manpower, labour strikes, lockouts, seizures, embargoes, prohibition of currency transfer, riots or other cases of force majeure .

**10.2** The party wishing to claim relief by reason of any of the said circumstances shall notify the other party in writing without delay on the intervention and on the cessation thereof.

**10.3** The effects of the said circumstances, so far as they affect the timely performance of their obligations by the parties, are defined in Clauses 7 and 8. Save as provided in Clauses 7.3, 7.6 and 8.7, if, by reason of any of the said circumstances, the performance of the Contract within a reasonable time becomes impossible, either party shall be entitled to terminate the Contract by notice in writing to the other party without requiring the consent of any court. However, this shall not apply to strikes or lockouts.

**10.4** If the Contract is terminated in accordance with Clause 10.3, the division of the expenses incurred in respect of the Contract shall be determined by agreement between the parties. Any other claims of the parties against each other shall be excluded.

**10.5** In default of agreement, it shall be determined by the arbitrator which party has been prevented from performing its obligations, and that party shall bear the whole of the said expenses. Where the Purchaser is required to bear the whole of the expenses and has before termination of the Contract paid to the Vendor more than the amount of the Vendor's expenses, the Purchaser shall be entitled to recover the excess.

If the arbitrator determines that both parties have been prevented from performing their obligations, he shall apportion the said expenses between the parties in such manner as to him seems fair and reasonable, having regard to all the circumstances of the case.

**10.6** For the purposes of this Clause 10, "expenses" means actual out-of-pocket expenses reasonably incurred, after both parties shall have mitigated their losses as far as possible. Provided, however, that a delivery has been made to the Purchaser, the Vendor's expenses shall be deemed to be that part of the price payable under the Contract which is properly attributable thereto.

## **11. Termination of the Contract**

**11.1** Termination of the Contract, from whatever cause arising, shall be without prejudice rights of the parties accrued under the Contract up to the time of termination.

## **12. Jurisdiction**

For each and any dispute arising from the contract, if the person ordering is a merchant who has been entered in the commercial register, a legal person under public law or a separate fund under public law, legal action shall be brought before the court which is competent for the supplier's head office or the supplier's branch office which is executing the supply. The supplier is also entitled to bring an action before the courts at the orderer's head office.