

TECTRION GmbH General Terms and Conditions of Business Conducted under Purchase Agreements, Performance Contracts and Agreements to Provide Services

1. General Remarks

1. The following General Terms and Conditions of Business Conducted under Purchase Agreements, Performance Contracts and Agreements to Provide Services of TECTRION GmbH (hereinafter the “Contractor”), as amended from time to time, shall apply to all offers, contractual relationships, deliveries and other work and services, present and future, provided by the Contractor to the Customer, insofar as the Customer is a business owner, legal entity under public law or special fund under public law, and shall be deemed an integral part of all purchase agreements, performance contracts and agreements to provide services, or hybrid forms thereof, executed with the Customer and other contracts with elements of purchase agreements, performance contracts and agreements to provide service (hereinafter “Contract”).
2. Unless the Contractor explicitly states otherwise in writing on a case-by-case basis, any conflicting or deviating terms on the part of the Customer shall not be recognized, even when the Contractor fulfills a Contract without explicitly rejecting such deviating terms.

2. Offers, Contract Execution

1. Unless an offer is, with reasonable certainty, explicitly labeled as binding or contains a deadline for acceptance, all of the Contractor’s offers are non-binding. Irrespective of whether or not an offer is binding, technical specifications (e.g. concerning dimensions, weight, quantity, type, etc.), proposed timeframes for completing a job and offer-related documents (e.g. illustrations and drawings) constitute approximations only
2. The Contractor has three weeks’ time in which to accept orders or jobs from the Customer.
3. The parties are first considered to have entered into a Contract when the Customer provides its written acceptance of the Contractor’s binding offer by the deadline or when the Contractor accepts and provides written acknowledgment of its acceptance of the Customer’s order or job by the deadline. The Contractor is not required to provide such a written acknowledgment when it is not expected under the circumstances or when the Customer waives it.
4. Amendments and additions to the provisions of a Contract made orally or over the telephone, as well as any side agreements, explicitly require the Contractor’s written acknowledgment in order to be valid.
5. Arrangements and agreements made prior to Contract execution are valid only when the Contract makes explicit written reference to them

3. Customer's Obligations

1. The Customer is obligated to provide the Contractor, on an unsolicited basis and in a timely manner, with all of the documents (e.g. plans, calculations, test sheets, etc.), data, figures and other information the latter needs to carry out the job. Absent an explicit written agreement to check these materials, the Contractor is entitled to presume that they are accurate and complete when fulfilling the Contract
2. When a mobile crane or other transport vehicle is used, the Customer's obligation as described in Section 3.1 above includes, without limitation, notifying the Contractor of any buried cable ducts, utility lines, other underground pipes or underground cavities that could impair the load-bearing capacity of the ground at the site of deployment or on the access roads as well as notifying the Contractor of the existence and location of any above-ground or overhead lines, buried cables, shafts or other underground cavities or any other hidden obstacles that could impair the stability or operational safety of vehicles at the site as well as of any particular hazards that could occur during performance of the work or services because of the nature of the goods being transported and the local conditions (e.g., hazardous materials, contamination, etc.). In all other respects, the Customer is responsible for ensuring that the soil conditions, available space and other conditions at the site of deployment and on the access roads – with the exception of public streets, roads and open areas – allow the proper and safe performance of the Contract and that the soil conditions at the site of loading and unloading and/or crane setup as well as on the access roads are such that the ground can withstand the pressure and other loads placed on it

4. Scope of Work

The Contractor agrees to perform the work or services agreed upon in accordance with generally accepted engineering standards and its own know-how and experience. The Contractor shall notify the Customer immediately if it becomes apparent that, for reasons beyond the Contractor's control, the work or services cannot be performed or the technological, manpower and/or other time-related and financial requirements for execution will be considerably different than originally anticipated. The parties shall decide together whether to continue the job and, if so, on what scale and at what cost. If they cannot reach an agreement in this regard, either of them may terminate the Contract upon written notice, and the Contractor may demand a portion of the remuneration commensurate with the work or services performed and reimbursement of expenses not included in the remuneration.

5. Transport Services

If the Contractor agrees to transport or ship goods, such transport shall be subject to the German Freight Forwarders' Standard Terms and Conditions (ADSp), as amended from time to time. These General Terms and Conditions of Business Conducted under Purchase Agreements, Performance Contracts and Agreements to Provide Services shall apply only insofar as the ADSp are silent or contain no conflicting provisions. Section 23 of the ADSp contains provisions on liability which are different from the standard liability under statute.

6. Inspection and Acceptance, Remuneration

1. The Contractor can request partial inspection and acceptance by the Customer if the Contractor has performed self-contained units of a project in such a manner that such units are capable of and ready for inspection and acceptance. Upon partial inspection and acceptance, the Contractor is entitled to invoice that portion of the total remuneration that is attributable to the work or services already inspected and accepted.
2. The Contractor is entitled pursuant to § 632a of the German Civil Code to request installment payments for work actually performed as contractually agreed
3. The remuneration shall be calculated according to the written agreements between the parties. The Contractor's prices are plus the statutory value-added tax

7. Invoicing, Payment

1. Invoices are due upon receipt and payable in full eight days from the date of the invoice. Invoices are deemed received no later than three days following the date of the invoice at the last billing address provided by the Customer.
2. In the event the Customer is late in paying, the Contractor reserves the right to charge late interest in the amount provided by law.
3. The Contractor reserves the right to apply payments towards the oldest invoices first plus the late interest accumulated on those invoices and the costs of collection. Payments shall be applied to these items in the following order: costs, interest, principal.
4. The only claims the Customer may offset against invoice amounts are undisputed claims or legally enforceable claims.

8. Force Majeure, Impediments to Performance

Force majeure of any kind, unforeseeable production, traffic or shipping disturbances, fire, explosion, natural disasters, flooding or low water levels, unforeseeable labor, energy, raw material and supply shortages, strikes, lockouts, war, political unrest, acts of terrorism, official decrees or any other hindrances beyond the Contractor's control which delay or prevent the provision of work or services, the shipment or the acceptance or make the same unreasonable shall release the Contractor from its obligation to perform for the duration and extent to which the hindrance prevails. If the Parties mutually accept as certain that binding deadlines will be exceeded by more than four weeks due to the hindrance, either party shall be entitled to withdraw from the agreement, in whole or in part, upon the occurrence of a more than insignificant disruption. If the Contractor has already completed part of the work or services, the Customer may withdraw from the Contract only if it has no interest in the work or services already completed.

9. Place of Performance/Shipping

Contracted work and services shall be provided "ex works" (Incoterms 2000) unless explicitly stated otherwise in writing.

10. Retention of Title

1. If an item for delivery (reserved item) is owed by the Contractor, title thereto shall not pass to the Customer until the latter has paid the Contractor the full amount agreed upon for the delivery, including all additional costs for freight, etc. If the reserved item is intended for commercial resale by the Customer, the Customer is entitled to sell the item to its customer as part of its ordinary course of business. With respect to such a resale, the Customer hereby assigns to the Contractor, and the Contractor hereby accepts, as security all of the future claims, including subsidiary claims, the Customer will have against its customer in consideration for the resale of the reserved item. If the Customer is late in making its payment for the reserved item, the Contractor is entitled to collect on the claims so assigned on its own behalf.
2. If the reserved item is not resold, the Customer is obligated to hold the reserved item in safe-keeping for the Contractor, to service and repair the item as needed at its own expense, as well as to pay to insure the item against loss and damage at a level of coverage expected of a prudent businessman, for as long as title is retained. In the event the reserved item is lost or damaged, the Customer agrees to assign its insurance claims to the Contractor.
3. Any processing of the reserved item within the meaning of § 950 of the German Civil Code shall inure to the benefit of the Contractor.
4. If the reserved item is combined or inseparably mixed within the meaning of § 947 or § 948 of the German Civil Code with other items not belonging to the Contractor in such a way that one of the other items becomes the main item, the parties are deemed to have agreed that the Customer shall transfer to and maintain for the Contractor a co-ownership interest in the new item that is in keeping with the value of the reserved item relative to the other items that were combined or mixed. The Parties hereby consent now to the passing of title that would accompany such a combination or mixture.
5. Should the Contractor, by virtue of the security governed by this Section 10, find itself in a position of being more than 10% over-collateralized with respect to the Customer's total liabilities towards it, the Contractor is required, at the request and discretion of the Customer, to release security up to the amount by which the threshold of 110% of the total secured liability has been exceeded.

11. Time Limit for Claims

1. Absent a formal acceptance, patent defects in the work and items provided under purchase agreements and performance contracts must be reported to the Contractor, in text form, immediately, at the latest, however, within 10 working days after the work or item is rendered. Notices of defects must include an exact description of the defect. Latent defects are to be reported, in text form, as soon as they are discovered, at the latest, however, within the limitation periods governing warranty claims. If the Customer fails to report a defect within the timeframe stipulated, the work or item shall be deemed approved.
2. In the case of services rendered under an agreement to provide services, the rule presented in Section 11.1 above for latent defects shall apply accordingly with respect to the time limit for claims relating to poor workmanship or deficient performance.

12. Warranty and Liability for Defects and Poor Workmanship or Deficient Performance

1. When defects are discovered in the work and items provided under purchase agreements and performance contracts, the Contractor must first be given the opportunity to cure the defects. The Customer is entitled to demand reimbursement from the Contractor in accordance with the statutory provisions for any necessary expenses this costs the Customer. If the attempt to cure fails, the Customer can, in accordance with the statutory provisions, choose to reduce the remuneration for the defective work or item, withdraw from the agreement regarding the work or item, as long as the subject of the warranty for defects is not construction work, or remedy the defect itself and request reimbursement of the necessary expenses pursuant to § 637 of the German Civil Code for work or services provided under a performance contract. The Customer is not entitled to claim damages in place of the work or item when defects are present. In all other respects Section 13 shall apply.
2. In the case of services rendered under an agreement to provide services, the merits of the Client's contractual claims for poor workmanship or deficient performance shall be determined in accordance with the statutory provisions. Any other claims for poor workmanship or deficient performance are excluded, regardless of the form of action or claim. In all other respects Section 13 shall apply.

13. Other Exclusions of and Limits on Liability

1. The Contractor is not liable for loss or damage (including expenses) suffered by the Customer as a result of the Contractor's slight negligence or the slight negligence of its legal representatives, employees, workers, agents or vicarious agents. The foregoing shall not apply to claims relating to death, personal injury or impaired health, claims arising under the German Product Liability Act (Produkthaftungsgesetz) or to breaches of cardinal duties, cardinal duties being material contractual obligations whose fulfillment is a necessary condition for proper performance of the Contract and on whose fulfillment the Customer, therefore, may routinely rely
2. In the event of a breach of cardinal duties caused by the slight negligence of the Contractor, its legal representatives, employees, workers, agents or vicarious agents, the Contractor's liability for all damages and reimbursements, whether in contract, not in contract or otherwise and regardless of their legal status, shall be limited to the foreseeable damages typical of the respective Contract, which damages may not exceed the sum of €2,000,000.00 (in words: two million euro) per incident and the sum of €6,000,000.00 (in words: six million euro) per calendar year per Customer
3. The Contractor cannot be held responsible for loss or damage attributable to any of the circumstances identified in Section 3.2 and/or Section 8 of these General Terms and Conditions of Business.
4. Any exclusion of or limit on liability inuring to the benefit of the Contractor under this Section 13 shall also inure to the benefit of the Contractor's legal representatives, employees, workers, agents and vicarious agents in the event the Customer asserts claims against them under the same cause of action.

14. Grace Periods

The Customer shall establish a reasonable grace period of typically not more than four weeks in the event such a grace period is necessary because of a default in performance. If applicable, the grace period shall be extended by the amount of time required for the Contractor to procure third-party goods and services it needs to complete the work or services.

15. Guaranty

Agreements concerning guaranties must be set forth in writing and must include sufficient information on the substance of the guaranty as well as its duration and the territory in which it applies.

16. Limitation Periods

1. Claims against the Contractor for defects, poor workmanship or deficient performance (see Section 12) shall be time-barred one year after the statutory limitation period begins. Notwithstanding the foregoing, claims for defects asserted on the basis of § 438 (1) No. 2 or § 634a (1) No. 2 of the German Civil Code shall not be subject to this shorter limitation period, unless the Contract under which the claim is made incorporates all of Part B of the German Award Rules for Building Works (Teil B der Verdingungsordnung für Bauleistungen) into it by reference. For these claims, the statutory limitation period applies.
2. The regular limitation period (§ 195 of the German Civil Code) for claims against the Contractor that are other than claims for defects, poor workmanship or deficient performance (see Section 12) shall be time-barred two instead of three years after the statutory limitation period begins
3. The reduced limitation periods described above shall not apply to claims relating to willful misconduct or gross negligence, claims arising under the German Product Liability Act, claims relating to death, personal injury or impaired health, or to breaches of cardinal duties as defined at the end of Section 13.1 Sentence 2. In these cases the statutory limitation periods apply
4. Any reduced limitation period provided under this Section 16 for claims against the Contractor shall also inure to the benefit of the Contractor's legal representatives, employees, workers, agents and vicarious agents in the event the Customer asserts claims against them under the same cause of action

17. Confidentiality; Ownership of Contractor's Documentation

1. Except as otherwise provided in writing, the Customer agrees to maintain the confidentiality of all information, documentation (including calculations, designs, drawings, etc.) and experiences shared by the Contractor, and not to reproduce the same, give third parties access thereto or use the same for commercial purposes, both during and after the Contract's term. This obligation does not apply to information, documentation and experiences that provably and in their entirety
 - a) were already common knowledge when disclosed to the Customer or became common knowledge thereafter through no fault of the Customer
 - b) were already known to the Customer when disclosed or
 - c) were made accessible to the Customer by a third party after disclosure

This duty of non-disclosure shall not prevent a disclosure of the information, documentation and experiences to any attorney, tax advisor or auditor who has been bound to secrecy or to a court of law for legitimate reasons.

2. The foregoing Section 17.1 shall also apply to binding and non-binding offers from the Contractor (including calculations, designs, drawings, etc.). Any and all documentation or information represented in other forms that the Contractor provides to the Customer shall remain the property of the Contractor and may not be used to replicate the same or similar products. The same shall be returned to the Contractor upon request should an offer not materialize into a Contract.

18. Proprietary Rights

1. The Customer shall be liable for ensuring that the Contractor does not infringe on any third party's proprietary rights as a result of its receipt and use of Customer materials, e.g. documents the Customer provides for completion of the job, and shall indemnify the Contractor against any and all such claims. The Customer shall bear any royalties or fees that are owed in order to avoid such an infringement
2. Any proprietary rights that arise in the course of fulfilling a Contract shall be transferred from the Customer to the Contractor upon the Contractor's request, to the extent permitted by law. In the event such rights cannot be transferred in full, the Customer shall grant the Contractor upon the Contractor's request an exclusive, comprehensive license, unlimited in territory and time, or, if this, too, is not possible, a simple license. Mandatory provisions of law, including those which entitle the Customer to a reasonable consideration for transferring the rights, shall not be affected thereby. Under no circumstances does the Customer have a right to transfer proprietary rights to the Contractor

19. Choice of Law, Venue

1. German law shall apply. The application of the United Nations Convention on Contracts for the International Sale of Goods (CISG) is excluded
2. The venue for both parties is Cologne. However, the Contractor can choose to assert its claims in a court of law that has general jurisdiction over the Customer.