

# General conditions of contract for the supply of plant and machinery 2016

AGFAR AG's terms of delivery correspond to SWISSMEM's "General conditions of contract for the supply of plant and machinery 2016" with the exception of point 8.4, which has been completely removed.

## 1. General

- 1.1 The contract shall be deemed to have been entered into upon receipt of the supplier's written acknowledgement stating acceptance of the order. Tenders which do not stipulate an acceptance period shall not be binding.
- 1.2 These general conditions of supply shall be binding if declared applicable in the tender or in the order acknowledgement. Any conditions stipulated by the customer which are in contradiction to these general conditions of supply shall only be valid if expressly acknowledged by the supplier in writing.
- 1.3 All agreements and legally relevant declarations of the contracting parties must be in writing in order to be valid. Declarations in text form which are transmitted by or recorded on electronic media will be equated with written declarations when specifically so agreed by the parties.
- 1.4 Should a provision of these general conditions of supply prove to be wholly or partly invalid, the parties shall jointly seek an arrangement which has a legal and economic effect as similar as possible to the invalid provision.

## 2. Scope of supplies and services

The supplies and services are exhaustively specified in the order acknowledgement and in appendices thereto. The supplier shall be entitled to make any changes which lead to improvements provided such changes do not result in a price increase.

## 3. Plans and technical documents

- 3.1 Unless otherwise agreed, brochures and catalogues are not binding. Data in technical documents are only binding if they have been expressly stipulated as such.
- 3.2 Each party retains all rights to plans and technical documents provided to the other. The party receiving such documents recognises these rights and shall – without previous written consent of the other party – not make these documents available to any third party, either in whole or in part, nor use them for purposes other than those for which they were handed over.

## 4. Regulations in force in the country of destination and safety devices

- 4.1 The customer shall, at the latest when placing the order, draw the attention of the supplier to the standards and regulations applicable to the execution of the supplies and services, to the operation of the plant as well as to the health and safety of personnel.
- 4.2 Unless otherwise agreed in accordance with Clause 4.1, the supplies and services shall comply with the regulations and standards at the supplier's place of business. Additional or other safety devices shall be supplied to the extent as having been expressly agreed upon.

## 5. Prices

- 5.1 Unless otherwise agreed, all prices shall be deemed to be net ex works, excluding packing, in freely available Swiss francs without any deductions whatsoever.

Any and all additional charges, such as, but not limited to, freight charges, insurance premiums, fees for export, transit, import and other permits, as well as for certifications, shall be borne by the customer. Likewise, the customer shall bear any and all taxes, fees, levies, customs duties and the like as well as the related administrative costs which are levied out of or in connection with the contract or its fulfilment. If such costs, taxes etc. are charged to the supplier or to persons employed or appointed by the supplier to perform any of his obligations, they shall be refunded by the customer upon presentation of the receipts.

- 5.2 The supplier reserves the right to adjust the prices in case the wage rates or the raw material prices vary between the submission of the tender and the contractually agreed performance. In such case the adjustment shall be made according to the attached price adjustment clause.

In addition, an appropriate price adjustment shall apply in case

- the delivery time has been subsequently extended due to any reason stated in Clause 8.3, or
- the nature or the scope of the agreed supplies or services has changed, or
- the material or the execution has undergone changes because any documents furnished by the customer were not in conformity with the actual circumstances, or were incomplete, or
- an amendment has been made to laws, regulations or the principles of interpretation or application.

## 6. Terms of payment

6.1 Payments shall be made by the customer at the supplier's domicile according to the agreed terms of payment, without any deduction for cash discount, expenses, taxes, levies, fees, duties, and the like.

Unless otherwise agreed, the price shall be paid in the following instalments:

- one third as advance payment within one month after receipt of the order acknowledgement by the customer,
- one third on expiry of two thirds of the agreed delivery time,
- the remainder within one month after supplier's advice that the supplies are ready for dispatch.

Payment shall be deemed to be effected when Swiss francs have been made freely available to the supplier at the supplier's domicile. If payment by bills of exchange or Letter of Credit is agreed, the customer shall pay the cost of discounting such bills, bill of exchange taxes and collection charges and the cost of issuing, notifying and confirming the Letter of Credit.

6.2 The dates of payment shall also be observed if transport, delivery, installation, commissioning or taking over of the supplies or services is delayed or prevented due to reasons beyond supplier's control, or if unimportant parts are missing, or if post-delivery work is to be carried out which does not prevent the supplies from being used.

6.3 If the advance payment or the contractually agreed securities are not provided in accordance with the terms of the contract, the supplier shall be entitled to adhere to or to terminate the contract, and shall in both cases be entitled to claim damages.

If the customer, for any reason whatsoever, is in delay with a further payment, or if the supplier is seriously concerned that he will not receive payments in total or in due time because of circumstances having taken place since entering into the contract, the supplier, without being limited in his rights provided for by law, shall be entitled to refuse further performance of the contract and to retain the supplies ready for dispatch until new terms of payment and delivery will have been agreed and until the supplier will have received satisfactory securities. If such an agreement cannot be reached within a reasonable time, or if the supplier does not receive adequate securities, the supplier shall be entitled to terminate the contract and to claim damages.

6.4 If the customer does not adhere to the agreed terms of payment, he shall be liable, without reminder, for interest with effect from the agreed date on which the payment was due at a rate depending on the terms prevailing at the customer's domicile, but not less than 4 per cent over the current 3-month CHF-LIBOR target. The right to claim further damages is reserved.

## 7. Reservation of title

The supplier shall remain the owner of all supplies until he has received the full payments in accordance with the contract.

The customer shall cooperate in any measures necessary for the protection of the supplier's title. In particular, upon entering into the contract he authorises the supplier to enter or notify the reservation of title in the required form in public registers, books or similar records, all in accordance with the relevant national laws, and to fulfil all corresponding formalities, at the customer's expense.

During the period of the reservation of title, the customer shall, at his own cost, maintain the supplies and insure them for the benefit of the supplier against theft, breakdown, fire, water and other risks. He shall further take all measures to ensure that the supplier's title is in no way compromised or rescinded.

## 8. Delivery time

8.1 The delivery time shall start as soon as the contract is entered into, all official formalities such as, but not limited to, import, export, transit and payment permits have been completed, payments due with the order have been made, any agreed securities given and the main technical points settled. The delivery time shall be deemed to be observed if by that time the supplier has sent a notice to the customer informing him that the supplies are ready for dispatch.

8.2 Compliance with the delivery time is conditional upon the customer's fulfilment of his contractual obligations.

8.3 The delivery time shall be reasonably extended:

- a) if the information required by the supplier for the performance of the contract is not received in time, or if the customer subsequently changes it thereby causing a delay in the delivery of the supplies or services;
- b) if hindrances occur which the supplier cannot prevent despite exercising the required care, regardless of whether they affect the supplier, the customer or a third party. Such hindrances include, but shall not be limited to, epidemics, mobilisation, war, civil war, acts of terrorism, riots, political unrest, revolutions, sabotage, serious breakdown in the works, accidents, labour conflicts, late or deficient delivery by subcontractors of raw materials, semifinished or finished

products, the need to scrap important work pieces, actions or omissions by any authorities or state or supranational bodies, embargoes, unforeseeable transport problems, fire, explosion, natural catastrophes;

- c) if the customer or a third party is behind schedule with work he has to execute, or with the performance of his contractual obligations, in particular if the customer fails to observe the terms of payment.

8.4 In case a specific date is fixed instead of a delivery period, this date shall correspond to the last day of a delivery period; Clauses 8.1 to 8.3 apply by analogy.

8.5 Any delay of the supplies or services does not entitle the customer to any rights and claims other than those expressly stipulated in this Clause 8. This limitation does, however, not apply to unlawful intent or gross negligence on the part of the supplier, but does apply to persons employed or appointed by the supplier to perform any of his obligations.

## **9. Packing**

Packing shall be charged for separately by the supplier and shall not be returnable. However, if it is declared as the supplier's property, it shall be returned by the customer, carriage paid, to the place of dispatch.

## **10. Passing of benefit and risk**

10.1 The benefit and the risk of the supplies shall pass to the customer by the date of their leaving the works at the latest.

10.2 If dispatch is delayed at the request of the customer or due to reasons beyond supplier's control, the risk of the supplies shall pass to the customer at the time originally foreseen for their leaving the works. From this moment on, the supplies shall be stored and insured on the account and at the risk of the customer.

## **11. Forwarding, transport and insurance**

11.1 The supplier shall be notified in good time of any special requirements regarding forwarding, transport and insurance. Transportation shall be at the customer's expense and risk.

11.2 Objections regarding forwarding or transport shall be immediately submitted by the customer to the last carrier upon receipt of the supplies or of the shipping documents.

11.3 The customer shall be responsible for taking out insurance against damage of any kind.

## **12. Inspection and taking-over of the supplies and services**

12.1 As far as being normal practice, the supplier shall inspect the supplies and services before dispatch. If the customer requests further testing, this has to be specially agreed upon and paid for by the customer.

12.2 The customer shall inspect the supplies and services within a reasonable period of time and shall immediately notify the supplier in writing of any deficiencies. If the customer fails to do so, the supplies and services shall be deemed to have been taken over.

12.3 If the supplier has been notified of deficiencies in accordance with Clause 12.2, he shall remedy them as soon as possible, and the customer shall give the supplier the possibility to do so. After remedy of such deficiencies, a taking-over test in accordance with Clause 12.4 will be carried out at the request of the customer or the supplier.

12.4 Subject to Clause 12.3, the execution of a taking-over test as well as the stipulation of the conditions related thereto require a special agreement. In the absence of such an agreement the following shall apply:

- The supplier shall advise the customer of the execution of the taking-over test in good time so that the customer or his representative can attend.
- A taking-over report shall be prepared which shall be signed by both the customer and the supplier or by their representatives. Such report shall either state that the taking-over has taken place, or that it has taken place under reservations, or that the customer has refused it. In the last two cases, the deficiencies shall be listed individually in the report.
- In case of insignificant deficiencies, in particular those which do not substantially hinder the efficient functioning of the supplies or services, the customer shall not be entitled to refuse taking-over of the supplies or services and refuse to sign the taking-over report. The supplier shall remedy such deficiencies without delay.
- In case of significant deviations from the contract or serious deficiencies, the customer shall give the supplier the possibility to remedy these within a reasonable time. Thereafter, a further taking-over test shall take place.

If during this test significant deviations from the contract or serious deficiencies appear again, the customer shall be entitled to claim either a price reduction or an indemnity or other compensation from the supplier, provided this has been agreed beforehand. If, however, the deviations and deficiencies which appear during the test are of such significance that they cannot be remedied within a reasonable time and provided the supplies and services cannot be used for their specified purpose, or such use is considerably impaired, then the customer shall be entitled to refuse taking-over of the defective part or, if partial taking-over is economically not justified, to terminate the contract. In this case, the supplier can only be held liable for reimbursing the sums which have been paid to him for the parts affected by the termination.

12.5 Taking-over shall also be deemed completed

- if the customer does not participate in the taking-over despite being requested in advance to do so;
- if the taking-over test cannot be carried out on the date provided for due to reasons beyond supplier's control;
- if the customer refuses the taking-over without being entitled to do so;
- if the customer refuses to sign the taking-over report prepared in accordance with Clause 12.4;
- as soon as the customer uses the supplies or services.

12.6 Deficiencies of any kind in supplies or services shall not entitle the customer to any rights and claims other than those expressly stipulated in Clauses 12.4 and 13 (guarantee, liability for defects).

**13. Guarantee, liability for defects**

13.1 Guarantee period

The guarantee period is 12 months, or 6 months in case of a multi-shift system. It starts when the supplies leave the works or at the taking-over of the supplies and services should such taking-over have been agreed upon beforehand, or, if the supplier undertakes the installation, upon completion thereof. If dispatch, taking-over or installation are delayed due to reasons beyond supplier's control, the guarantee period shall end not later than 18 months after supplier's notification that the supplies are ready for dispatch.

For replaced or repaired parts the guarantee period starts anew and lasts 6 months from the replacement or completion of the repair or taking-over, but not longer than the expiry of a period double the guarantee period stipulated in the preceding paragraph.

The guarantee expires prematurely if the customer or a third party undertakes modifications or repairs or if the customer, in case of a defect, does not immediately take all appropriate steps to mitigate the damage and give the supplier the possibility to remedy the defect.

13.2 Liability for defects in material, design and workmanship

Upon the written request of the customer, the supplier may choose to repair or replace as quickly as possible any parts of the supplies which, before the expiry of the guarantee period, are proven to be defective due to bad material, faulty design or poor workmanship. Replaced parts shall become the supplier's property if he does not explicitly renounce this. Under restriction of proportionality, the supplier shall bear the costs of remedying the defective parts provided that they do not exceed the customary costs of transport, personnel, travelling, accommodation, dismantling and reassembly of the defective parts.

13.3 Liability for express warranties

Express warranties are only those which have been expressly specified as such in the order acknowledgment or in the specifications. An express warranty is valid until the expiry of the guarantee period at the latest. If a taking-over test has been agreed, the warranty shall be deemed to have been fulfilled as soon as the test results prove the relevant characteristics.

If the express warranties are not or only partially achieved, the customer may first of all require the supplier to carry out the improvements immediately. The customer shall give the supplier the necessary time and possibility to do so.

If these improvements fail completely or in part, the customer may claim compensation as agreed beforehand for such case, or, if such an agreement has not been made, a reasonable reduction of price. If, however, the defects are of such significance that they cannot be remedied within a reasonable time and provided that the supplies and services cannot be used for their specified purpose, or if such use is considerably impaired, then the customer shall be entitled to refuse acceptance of the defective part or, if partial acceptance is economically not justified for him and he communicates this immediately, to terminate the contract. In this case the supplier can only be held liable for reimbursing the sums which have been paid to him for the parts affected by the termination.

13.4 Exclusions from the liability for defects

All deficiencies which cannot be proven to have their origin in bad material, faulty design or poor workmanship, e.g. those resulting from normal wear, improper maintenance, failure to observe the operating instructions, excessive loading, use of any unsuitable material, influence of chemical or electrolytic action, building or installation work not undertaken by the supplier, or resulting from other reasons beyond supplier's control are excluded from the supplier's guarantee and liability for defects.

#### 13.5 Supplies and services of subcontractors

For supplies and services of subcontractors requested by the customer, the supplier assumes the guarantee and liability for defects, only to the extent of the subcontractors' guarantee and liability obligations.

#### 13.6 Exclusivity of guarantee claims

With respect to any defective material, design or workmanship as well as to any failure to fulfil express warranties, the customer shall not be entitled to any rights and claims other than those expressly stipulated in Clauses 13.1 to 13.5.

If the customer reports a defect and no defect is found for which the supplier is liable, the customer is responsible for compensating the supplier for the work undertaken and other expenses and costs.

#### 13.7 Liability for additional obligations

The supplier is only liable for unlawful intent or gross negligence for claims arising out of inadequate advice and the like or out of breach of any additional obligations.

### 14. Non-performance, bad performance and their consequences

14.1 In all cases of bad performance or non-performance not expressly covered by these general conditions of supply, in particular if the supplier, without valid reasons, starts the execution of the supplies and services so late that punctual completion is unlikely to be foreseen, or if execution contrary to the terms of the contract can be clearly foreseen due to supplier's fault, or if the supplies and services have been executed contrary to the terms of the contract due to supplier's fault, then the customer shall be entitled to grant a reasonable additional period for the supplies or services affected thereby by simultaneously warning to terminate the contract in case of non-compliance. If such additional period lapses due to supplier's fault, the customer shall be entitled to terminate the contract with respect to the supplies or services executed, or certain to be executed, contrary to the terms of the contract, and to claim a refund of the payments already made for such supplies or services.

14.2 In such case, Clause 19 shall apply with regard to any claims for damages on the part of the customer and with regard to the exclusion of any further liability, and any claim for damages shall be limited to 10 per cent of the contract price for the supplies and services affected by the termination.

### 15. Termination of the contract by the supplier

The contract shall be adapted appropriately, if unforeseen events considerably change the economic effect or the content of the supplies or services or considerably affect the activities of the supplier, or if performance subsequently becomes impossible. If such an adaptation is economically not justifiable, the supplier shall be entitled to terminate the contract or the parts affected thereby.

If the supplier wishes to terminate the contract he shall – after having recognised the consequences of the event – immediately inform the customer; this applies even if an extension of the delivery time has been agreed beforehand. In case of termination of the contract, the supplier shall be entitled to payment of those parts of the supplies and services which have already been carried out. Claims for damages on the part of the customer because of such termination are excluded.

### 16. Export control

The customer recognises that the supplies may be subject to Swiss and/or foreign legal provisions and regulations on export control and are not allowed to be sold, leased or otherwise transferred or used for a purpose other than the agreed without an export or reexport permit of the competent authority. The customer undertakes to comply with such provisions and regulations. He is aware that these may change and that they apply to the contract in the current valid wording.

### 17. Data protection

The supplier is entitled to process the personal data of the customer in order to perform the contract. Furthermore, the customer consents in particular to the supplier transmitting such data to third parties in Switzerland and abroad for the purpose of performing and maintaining the business relationships between the parties.

## **18. Software**

If the supplies and services delivered by the supplier include software, the customer is granted a non-exclusive right of use of the software together with the delivery item, unless otherwise agreed. The customer is not entitled to copy (except for archival purposes, troubleshooting or to replace faulty data carriers) or to edit the software. In particular, the customer may not disassemble, decompile, decrypt or reverse engineer the software without the prior written consent of the supplier. In case of infringement, the supplier may withdraw the right of use. For third-party software, the conditions of use of the licensor apply, and the licensor, as well as the supplier, may also assert a claim in the event of infringement.

## **19. Exclusion of further liability on the supplier's part**

All cases of breach of contract and the relevant consequences as well as all rights and claims on the part of the customer, irrespective on what ground they are based, are exhaustively covered by these general conditions of supply. In the event that claims of the customer in relation to or in connection with the contract or the breach thereof should exist, the total amount of such claims is restricted to the price paid by the customer. In particular, any claims not expressly mentioned for damages, reduction of price, termination of or withdrawal from the contract are excluded. In no case whatsoever shall the customer be entitled to claim damages other than compensation for the costs of remedying defects in the supplies. This in particular refers, but shall not be limited, to loss of production, loss of use, loss of orders, recall costs, loss of profit and other direct or indirect or consequential damage. Liability is also excluded for compensation claims from third parties against the customer for infringements of intellectual property rights.

This exclusion of further liability on the supplier's part does not apply to unlawful intent or gross negligence on the part of the supplier, but does apply to persons employed or appointed by the supplier to perform any of his obligations. This exclusion of liability does not apply as far as it is contrary to compulsory law.

## **20. Right of recourse of the supplier**

If personal injury or damage to the property of third parties occurs through actions or omissions of the customer or of persons employed or appointed by him to perform any of his obligations, and if a claim is made against the supplier, then the latter shall be entitled to take recourse against the customer.

## **21. Installation**

If the supplier undertakes installation or supervision of the installation, the General Conditions of Installation of Swissmem shall apply.

## **22. Jurisdiction and applicable law**

### **22.1 The place of jurisdiction for both the customer and the supplier shall be at the registered office of the supplier.**

The supplier shall, however, be entitled to sue the customer at the latter's registered address.

### **22.2 The contract shall be governed by Swiss substantive law.**

# Price Adjustment Formula

issued by Swissmem

$$P = P_0 \left( a + b \frac{Lm}{Lo} + c \frac{Mm}{Mo} \right)$$

P = \_\_\_\_\_ Selling price on date of delivery

P<sub>0</sub> = \_\_\_\_\_ Selling price by tender

a = \_\_\_\_\_ Coefficient of fixed part of costs (e.g. = 0.1)<sup>1</sup>

b = \_\_\_\_\_ Coefficient of part varying with wage index (e.g. = 0.6)<sup>1</sup>

c = \_\_\_\_\_ Coefficient of part varying with material index (e.g. = 0.3)<sup>1</sup>

Lo = \_\_\_\_\_ Wage index<sup>2</sup> of Swissmem, Zurich, on date of tender

Lm = \_\_\_\_\_ Average of all wage indices<sup>2</sup>

- from date of order acknowledgement to completion in accordance with contract\*

or

- during period of manufacture, i.e. from \_\_\_\_\_ to \_\_\_\_\_\*

Mo = \_\_\_\_\_ Mean of price indices<sup>3</sup> of principal material in category «metals and metal products» required for manufacture, related to their proportion of value of supplies on date of tender

Mm = \_\_\_\_\_ Average of mean values of all price indices<sup>3</sup> of principal materials in category «metals and metal products» required for manufacture, related to their proportion of value of supplies at time of delivery

- from date of order acknowledgement to completion in accordance with contract\* or

- from date of order acknowledgement to date by which supplier had obtained most of these materials, i.e. from \_\_\_\_\_\*

<sup>1</sup> a + b + c must always total 1.

<sup>2</sup> Since the wage index is only issued by Swissmem quarterly, the index for the past quarter shall be inserted in each case.

<sup>3</sup> Fractions of the official producer price index calculated and published monthly. (If the year serving as a basis for de-termination of the index is changed by the authority concerned, the supplier is entitled to re-calculate the changes in prices in accordance with the new index values.)

\* Delete where inapplicable.