



**GENERAL COMMERCIAL CONDITIONS  
for the purchase of plants,  
plant components and services**

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**EXTERNAL DOCUMENT**

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## 1. DEFINITIONS

1.1. *In terms of the General Commercial Conditions the following definitions shall be applicable:*

<b>PC (Purchaser)</b>	= legal entity concluding the Contract (placing the Order) with the CO.
<b>CO (Contractor)</b>	= legal entity under obligation to perform the Supplies and Services according to the Contract.
<b>FC (Final Customer)</b>	= the PC's customer to whom the PC has to supply the Plant.
<b>Plant</b>	= the technical or contractual complex to be supplied to the FC into which the Supplies and Services of the CO are to be integrated.
<b>Final Customer Contract</b>	= the contract between the FC and the PC for the supply of the Plant.
<b>Order = Contract</b>	= the contract between the PC and the CO for the Supplies and Services to be performed by the CO.
<b>Supplies/Services</b>	= all supplies and services to be performed by the CO according to the Contract. The terms on their own are also to be understood to have the same meaning.

1.2. *With reference to step-by-step take over of a plant or parts thereof, the following definitions shall apply:*

<b>Technical Examination</b>	Certain parts of the Plant are examined technically in respect of their accordance with the agreement by the PC or by the PC together with the FC in the CO's plant/factory.
<b>Manual Operation</b>	Production of the first components with original equipment. The quality requirements and the completeness of the Plant are in accordance with the customer specification's requirements. The place of performance follows the FC.
<b>Automation System</b>	The Automation System is the automatic processing of product parts within the production line or within individual trades of the production line. The quality requirements, completeness and interfaces to other trades or to the Plant's extraction technology depend on precise project or customer specifications. The Plant has to be fully assembled. The safety installations must be active and inspected. Initial cycle times have to be started.

## **Interlinked Automatic Operation / Production Tests / Performance test**

The Plant as a whole operates already in form of interlinked automatic operation. Depending on the project or the customer's specifications according to the Final Customer Contract, there are staged goal criteria concerning quality, cycle times, availability and automatic mode. The testing activities according to customer specifications begin at the time of the start of automatic operation.

**Start of Production (SOP)** All functions including all special functions and safety requirements, and all quality requirements, performance data and cycle times must be implemented.

**FAC – Final Acceptance** Final acceptance requires complete and proper service provision, 100 % function and performance according to the Order and handing over of the documentation according to customer requirements.

## **2. GENERAL**

### *2.1. Significance of CO's Supplies and Services*

The Supplies and Services of the CO will become part of a complex plant to be erected. Difficulties with individual Supplies/Services could cause disturbance to the organisation of the whole project which normally results in additional cost, e.g. in connection with delays affecting the project schedule, claims of third parties, disturbance of logistics, delayed acceptance of the Plant by the FC, idle time, etc.

The financial consequences would be particularly serious with plants to be erected overseas. The CO shall therefore exert its utmost care in the fulfillment of its Contract. This includes but is not limited to the responsibility for collecting all the information required to ensure due completion of the Order, in particular with regard to transport and conditions at site and to the integration of its Supplies and Services into the Plant.

### *2.2. Quality Management (QM)*

The CO undertakes to apply the principles of quality management as per ISO-standards 9001:2008 for the execution of its scope of Supplies and Services and to impose the same obligation on its Subcontractors. The PC and the FC shall be entitled to audit the CO's and its Subcontractor's QM-systems, the QM-regulations and the QM-plans at any time. A certification of the CO has to be striven for the QM-system to ISO 9001:2008.

### *2.3. Validity of the General Commercial Conditions*

These General Commercial Conditions ("GCC") shall govern the relationship between the CO and the PC unless a deviation from these conditions is specifically stated in the individual Order. In case of agreement on these conditions the purchasing conditions printed on the back of the purchase-order form shall be null and void.

The CO's conditions (offers, sales conditions) shall only apply if explicitly accepted by the PC and confirmed in writing. In any Order placed by the PC, references to quotations shall under no circumstances imply the PC's acceptance of the CO's conditions. These General Commercial Conditions shall be considered accepted with the commencement of the execution of the Order by the CO.

#### 2.4. *Validity of statements*

Any statement on behalf of the PC regarding Orders or amendments or additions thereto shall only be legally binding on the PC if they have been issued in writing, by telefax or by e-mail by the purchasing department in charge. Statements of other persons are valid only if the purchasing department in charge has been advised immediately and has confirmed the matter. The only exceptions are:

- The taking up of options concerning packing and transport by issuing definite shipping instructions.
- Specific calls on general orders.

#### 2.5. *Clarification of inconsistencies*

In the event of any inconsistency in the terms of the Contract between the CO and the PC, the following order of precedence shall apply:

- the written order (in form of a letter, telefax or Email);
- the annexes mentioned in the written order, particularly the Minutes of Meetings;
- these General Commercial Conditions including the Annexes thereto;
- other documents.

If this order of precedence does not give clarification, best suitability of the CO's Supplies and Services for the particular purpose intended shall be decisive as far as the scope of Supplies and Services is concerned.

Should the CO not be clear about the scope of its commitments, the CO shall immediately contact the PC for clarification. The CO undertakes to immediately inform the PC of any inconsistencies in the specification.

Headings serve for guidance only and shall have no bearing on the interpretation of the respective clause.

#### 2.6. *Rights and remedies under law*

Nothing contained in these GCC shall diminish the PC's rights and remedies under law.

### **3. PRICES**

#### 3.1. *Definition of prices*

Prices given in the order are fixed prices which cover all the CO's expenditure related to its Supplies and Services. This includes particularly all cost for transport, insurance, packing, taxes, customs fees and other dues in connection with the fulfillment of the Supplies and Services in the countries where these are actually carried out. Prices are exclusive of VALUE ADDED TAX.

The PC shall only be held liable for such cost arising from the execution of an order which is clearly specified in the order as being the PC's liability. For possible amendments, additions to orders and orders for spare and wear parts the conditions of the main order shall apply.

#### 3.2. *Basis of prices*

Unless stipulated otherwise in the order, the prices shall be quoted Free Carrier (FCA) named place according to INCOTERMS 2010. Such price shall be inclusive of all costs for related documentation, technical inspection, painting, corrosion protection, marking, etc. For supplies to foreign countries, export customs clearance (with CO's own documentation) shall also be the CO's responsibility, and at its own expense.

### 3.3. EURO

In the event that the currency in which payments have to be made hereunder shall be replaced (either fully or as a parallel currency) by the single currency according to European Community Law (Euro), such payments shall be exclusively owed in Euro calculated at the conversion rate fixed according to European Community Law. This conversion shall by no means be a reason for the termination or variation of any of the terms and conditions of this Contract.

## 4. TERMS OF PAYMENT

### 4.1. Accounting

Invoices shall be submitted to the PC together with all necessary information for identification, such as Order No., item No. etc. in 1 copy. COs from a member state of the EU shall indicate in the invoices all information asked by law concerning tax relief and the movement of the goods (invoice address see Annex 1).

All invoices shall comply with the minimum contents governed by the applicable Austrian law and/or with the laws applicable at site.

### 4.2. Tax

In the event the Supplies and Services are performed at different sites the CO is obliged to comply with the applicable tax provisions in each case. It is the CO's responsibility to comply with the applicable tax provisions in each case.

The CO is obliged to follow the PC' instructions in connection with the compliance of the tax obligations without delay (such as the submission of a certificate of exemption or a certificate of residence). In the event the PC has any damages due to any failure of the CO in connection with the compliance of the tax obligations, the CO is obliged to fully indemnify the PC for all consequences which may arise there from.

### 4.3. Payment

Payment of instalments agreed upon shall be made according to the agreed payment terms after receipt of an auditable invoice and after all requirements set out in the order, including but not limited to due delivery of documentation, have been met.

Payment shall not be deemed to imply any acceptance of CO's Supplies and Services, nor shall it be construed as a waiver by the PC of any right to claim for the proper fulfillment of the Contract and/or warranties, nor of any right to claim damages, penalties, etc. In the event of any caused warranty claims or any other claims the PC has the right to retain any payments or rather to up-count against counterclaims of the CO. The CO does not have the right to retain payments or to up-count in the event of outstanding claims by TMS.

### 4.4. Retention

The PC shall be entitled to retain agreed retention monies as a non-interest bearing security to cover any claims for the proper fulfillment of the Contract, guarantee or warranty claims, or claims for damages, up to 45 days after the termination of the guarantee period. The same shall apply in case of bankruptcy or other insolvency proceedings against the CO.

### 4.5. Final invoice

The last payment shall not be effected prior to the CO's presentation of a final invoice concerning all the Supplies and Services performed by the CO and all claims possibly connected therewith. By presenting the

final invoice the CO declares that any and all claims in connection with the respective contract have been put forward thereby and that no further claims will be raised.

#### *4.6. Offset*

The PC shall be entitled to set off from any claims to the CO any claims of the PC and/ or any claims of direct or indirect controlled group companies of the PC in particular with group companies of VALIANT Holdings GmbH.

### **5. SUBCONTRACTS, COUNTERTRADES**

#### *5.1. Approval*

The CO shall give timely information to the PC of any planned subcontracting, and seek its prior written approval thereto. On request, the CO shall supply the PC with a copy of the respective subcontract order.

In case of failure to do so, the CO shall fully indemnify the PC for all consequences which may arise there from. Such consequences may in particular arise from the following criteria:

- quality
- time schedule
- compensation requirements
- technical cross-standardization
- subcontracting requirements set by the FC
- customs regulations concerning temporary admission, transit, import and transportation

Where a subcontract has not been approved by the PC, the PC shall, irrespective of any other rights be entitled to terminate the Contract in whole or in part.

Approval by the PC of any subcontracting shall in no way limit CO's obligations. Also in case of subcontracting the CO shall remain fully liable towards the PC for the fulfillment of the entire Contract. The CO shall be liable for the acts and omissions of its subcontractors as if they were the acts or omissions of the CO.

#### *5.2. Origin of Supplies/Services*

The minimum value of Supplies/Services from a certain country and the relevant regulations pertaining to certificates of origin required under the regulations of the Österreichische Kontrollbank (ÖKB) or other financing or insurance institutions, as stated in the Order, is to be strictly adhered to and to be proven to the PC.

The PC, ÖKB or the respective financing or insurance institution shall be entitled to request verification thereof from the CO, which shall be provided free of charge.

Besides the transfer of the exporter's liability to the CO by way of a back-guarantee to the PC (if agreed), the latter shall in case of a breach of above obligation be fully indemnified by the CO with respect to

- additional cost caused by loss of a government backed export credit for the whole financing period and
- the consequences arising in connection with the withdrawal of the insurance cover for the commercial or political non-payment risk.

### 5.3. *Inquiries*

The CO and its subcontractors shall send enquiries for items contained in the production program of the companies of the VALIANT group to the relevant companies. Fulfilment of time schedules or any other conditions of the Order must not be affected thereby.

In the event of any planned sub-tender the CO is obliged to send enquiries for the respective items to the directly or indirectly controlled group companies of the PC in particular to group companies of VALIANT Holdings GmbH, and to grant to them the right to step in if and to the extent the enquired Services are contained in their product range.

## 6. DOCUMENTATION

### 6.1. *Definition*

Documentation is the total of written, drawn or other documents related to the CO's Supplies and Services and serving to assist the CO and the PC in fulfilling their obligations vis-à-vis their contracting partners, and the authorities involved in due time and in the most economical way. Such documentation may be related to manufacture, quality control, potential risks, safety instructions, dispatch, transport, export, transit, import, customs clearance, excise, identification of parts, logistics, storing, erection, commissioning, training, accounting, invoicing, operation, repair, maintenance, procurement of spare parts, etc. The documentation shall form an essential part of the CO's Supplies and Services.

The PC shall be granted the right to use the documentation and, *inter alia*, shall be entitled to pass on any documentation received from the CO or its subcontractors to other contracting partners of the PC and/or to the FC.

### 6.2. *Scope*

The documentation is to be submitted to the PC as specified in the order. If not specified in detail, the documentation shall be adequate for the respective case regarding volume, standard and due availability. All documentation is to be in the German language unless otherwise specified by the PC. All documentation shall be "delivered duty paid" (DDP) to the PC according to INCOTERMS 2010, unless otherwise agreed.

### 6.3. *Shipping documents*

Shipping documents are to be in accordance with the PC's shipping and packing instructions. The documents must clearly state the correct and complete order number, identification number, position and item No. as well as the designation of the goods for clear identification of the applicable tariff. The designation of an item is to be maintained throughout all documents. In particular, the designations used in the drawings, part lists, packing lists and shipping documents shall be exactly the same.

### 6.4. *Documentation of origin*

The CO shall enclose, free of charge, a valid evidence of entitlement to preferential tariff treatment (movement certificate, preferential certificate of origin, certificate of origin, confirmation of origin, declaration of origin, etc.) with the goods supplied across frontiers, as necessary for preferential clearance for import in the country of destination of the goods.

That certificate shall include in particular also the order number and project number of the PC. The value of goods must not be indicated.

Unless agreed otherwise, the country of the CO shall be deemed the country of origin.



#### Certificate of origin:

At the PC 's request the CO shall provide at its cost a certificate of origin certified by the competent chamber of commerce and the competent consulate or embassy respectively.

#### Confirmation of origin:

In case the certificate of origin will be made out by the PC, the CO shall provide at the request of the PC a confirmation of origin for each single part of its Supplies, specifying the manufacturer (including exact address) and/or the country of origin. All fees, duties and extra charges resulting from failure to submit such documents, or from incorrect statements, shall be borne by the CO.

#### 6.5. *Inspection documents*

As far as required in each individual case the inspection documents to be provided by the CO shall consist of reports on quality control, test certificates, etc. as well as of time schedules and progress reports.

#### 6.6. *Erection documents*

To ensure orderly and economical erection the required documents are to be provided in accordance with the time schedule and the actual progress of the erection work.

#### 6.7. *CE – sign*

For Supplies and Services required to be marked with the CE-sign and/or for which a Declaration of Conformity is required or permitted the CO shall affix the CE-sign and submit to the PC all necessary Declarations of Conformity in the language prescribed for the Documentation.

### **7. INSPECTION, TESTS, EXPEDITING**

#### 7.1. *General*

The CO shall allow personnel authorized by the PC, the FC and the competent authorities to carry out inspections on items/activities connected with the order, at any time.

This includes inspection of planning and production insofar as quality and time schedule are concerned (including, in particular a review of compliance with the national, EU and international standards relevant to the order), taking of samples, checking packing regarding its quality and conformity of the packing list with the contents of the various packages, loading, etc. For this purpose the CO shall admit representatives of the PC, the FC and the competent authorities to offices and workshops of the CO and its subcontractors, make available all records in connection with the Contract and keep the PC informed about the progress of the work. Possible changes in the time schedule are to be advised immediately.

The CO shall carry out a complete inspection programme on its own and make available a detailed list of test results (test certificates, dimensional check reports, etc.) before final inspection by the PC's inspection team. On PC's request the CO shall be present at that final inspection.

The CO shall provide free of charge services, material, labour, interpreters, energy, suitable test equipment, testing media, skilled and unskilled workers for moving packages, opening and closing of cases/crates, etc. to ensure an orderly and efficient inspection.

The CO shall ensure that all equipment/components thereof are easily accessible, and shall take adequate safety precautions. Equipment/components thereof presented for inspection shall be unpainted and preassembled, unless specifically requested otherwise.

An inspection, whether carried out or waived by the PC, shall not limit the CO's obligations and shall in no event be construed as a waiver of any of the PC's rights, including but not limited to penalties, damages, guarantees/warranties, etc. even if a respective reservation has not been raised. In the event an inspection or test indicates that Supplies or Services are defective or fail to meet the requirements of the Contract the CO shall immediately rectify the failure at its own cost.

### *7.2. Documentation*

For inspection the required inspection documents and for inspection of packing the relevant packing lists, shall be provided by the CO. Incomplete or incorrect documents may necessitate a second inspection.

All inspection documents are to be handed over to the PC's inspector in the data form which was specified by the PC in advance and/or sent within an agreed period in the number of copies requested. When an inspection is waived, all documents are to be sent to the PC immediately or within the agreed time limit or at the latest before dispatch of the equipment/ components thereof.

The inspection documents shall be split up in accordance with position numbers by using a clear and logical order, it shall contain an index and be compiled in one or various data forms which were specified by the PC in advance.

### *7.3. Costs*

The CO and the PC/FC shall each bear the respective cost for their own personnel and inspection teams.

In case an inspection is not satisfactorily completed for reasons within the CO's responsibility, the CO shall bear all cost resulting from a repeated inspection.

## **8. DISPATCH**

### *8.1. Shipping instructions / Transfer of risk*

In case of delivery with erection the risk transfers upon acceptance whereas in case of delivery without erection the risk transfers upon receipt at the place of use. This transfer of risk clause shall be applicable irrespective of any other concluded trade term (Incoterm).

The CO shall adhere to the PC's shipping and packing instructions.

All instructions given by the PC in connection with the mode of transport, forwarding agent, forwarding instructions have to be observed. If the PC has not given any instructions regarding the delivery planning or rather the delivery conditions the CO shall select a method of shipment which is the most favourable to the PC in terms of date and costs. In the event of a deadline-critical shipment the CO shall obtain the agreement of the PC before undertaking any special shipment (such as airfreight or express service) The PC shall be free to revise the shipping instructions if found necessary during implementation of the project. All cost arising from non-observance of the PC's instructions or from delays, e.g. cost for special transport, airfreight, extra packing, etc. shall be entirely borne by the CO, however, a minimum of EUR 1.000,- for each individual case.

Unless otherwise specified in the order, the following terms of shipment shall be applicable:

Domestic: DDP named place of destination as per INCOTERMS 2010  
International: FCA named place of departure as per INCOTERMS 2010.

Furthermore, in the event of foreign deliveries a commercial invoice (twice) as well as a valid preference document (see 6.4) has to be attached or rather be attached to the shipping documents. Immediately after shipment the dispatched note (delivery note, delivery report, packing slip, customized collation lists, original bill of loading) shall be sent to the address named in the order text as well as shall be attached to

the consignment note (excluding bulk commodity). In the event of freight delivery or mail the aforesaid documents shall be attached to the delivery without any declaration of value and in the event of a forwarding delivery the aforesaid documents shall be handed over to the forwarder with the note "affected to recipient". The complete order number as well as the named unloading area shall be expressly indicated in the consignment notes, the delivery documents and on the colli itself (lettering, sticker). The total weight (gross-net weight) shall be indicated in all delivery documents, invoices etc. In the event that an order number is indicated in the Order that number has also to be indicated in all delivery documents. If the requested delivery documents are not delivered together with the delivery itself or if the above stated information is not indicated in the delivery documents the goods will be stored upon the risk of the CO until the delivery documents have been delivered or rather until all information has been indicated.

#### *8.2. Clearance on exportation*

Clearance on exportation shall be carried out by the CO with its own documents. The costs and duties resulting there from shall be borne by the CO.

### **9. TIME SCHEDULE**

#### *9.1. Date of Delivery*

For documentation the Date of Delivery shall be the date shown by the "received" stamp of the PC or the date of an individual receipt if all documents have been completely and correctly presented in accordance with the Contract.

For Supplies and Services the Date of Delivery shall be the date when all of the CO's respective obligations under the Contract (including those regarding documentation) have been fulfilled completely and free of defects.

#### *9.2. Delays, substitute performance*

The CO shall immediately advise the PC as soon as it realizes that the agreed dates or periods may not or cannot be met. A full report of the reasons and extent of such delays must be immediately sent to the PC in writing. Where a Contract requires the PC to take a form of action by a certain date to enable a delivery date to be achieved, the CO shall notify the PC in due time. If the CO fails to do so, it may not refer to a default of the PC when its own Supplies/Services are delayed. Should the CO be hindered in duly fulfilling its commitments under the Contract because of the PC's late delivery despite due notification, the agreed dates and periods shall be extended by not more than the number of days of delay caused by the PC. The PC shall not be liable for any additional cost.

The original contractual dates/periods extended by such delays shall be the new due dates e.g. for calculation of penalties, etc.

In the event of possible or actual delays the CO is required to minimize such delays by taking all constructive measures, regardless of the causes of such delays. If there is a imminent or instituted threat that the FC would be entitled to claims and/or any rights against the PC due to CO's failure to properly fulfil its contractual obligations, the PC is entitled to undertake all reasonable actions and measures (substitute performances), upon CO's expenses, in order to prevent the accrument of such claims and/or rights. A substitute performance, which could also be obtained through a third person, may only be initiated after the expiration of a grace period which has to be granted to the CO by written notice, unless CO would not be able to catch up to the delay which would prevent PC from such damage.

### 9.3. Storage

In case delivery dates set out in the Contract have to be changed or are changed for any reason outside the CO's responsibility, the CO shall arrange an adequate storage of the goods at its own risk and costs, for a period of up to 3 months.

Due payments affected by such storage may be released against warehouse certificate or certificate of transfer of property and/or bank guarantee, etc. In case of storage, shipments in whole or in part shall only be carried out if the release has been confirmed by the PC.

### 9.4. Premature fulfilment

Deliveries/Services before the due date shall only be accepted if agreed in writing by the PC and shall not advance agreed payment dates

## 10. CO'S LIABILITY, BANK GURANTEE

### 10.1. Penalties for delay

In case the CO does not meet the periods, intermediate or final dates set out in the executed Contract, the following penalties, in each case to be calculated from the total Contract value, shall apply for the period until the actual Date of Delivery. Such penalties may also be deducted from the CO's accounts receivable or open invoices if any.

- Delay of Supplies and Services:  
1 % for each week or part-week of delay, up to a maximum of 10 % of the total Contract value.
- Delay of documentation:  
0.5 % for each week or part-week of delay, up to a maximum of 5% of the total Contract value.

Penalties to the PC shall become due with the occurrence of the delay without proof of damage by the PC. Acceptance by the PC of a delayed delivery or performance without immediate notification to the CO of a penalty claim shall not prejudice the PC's right to claim a penalty at a later date in respect of that delivery. Payment of penalties does not release the CO from its obligation to fulfil the Contract nor from any related liabilities. The PC is entitled to claim additional damages to an already paid penalty by the CO in connection with this provision.

In particular please refer to:

Article 5 Subcontracts, Countertrades  
Article 9 Time schedule  
Article 10 COs Liability, Bank Guarantee  
Article 11 Guarantee  
Article 16 Termination

### 10.2. Completeness; Liability, Substitute Performances

The CO and its subcontractor are obliged to fully perform all Supplies and Services/ documentation on time regardless of whether all necessary Supplies and Services are indicated in the technical specifications, so as to guarantee a correct erection and satisfying operation. The payment of any penalties shall not release the CO from its liability.

Completeness shall mean that the operation under the envisaged purpose as regards the operating conditions, influences, safety instructions, applicable laws, authority guidelines etc. at site is guaranteed. Notwithstanding the aforesaid, all eventualities/ remedies of price reduction and conversion shall remain in the PC's discretion.

The CO shall – without delay and without costs for the PC – cure defects that are under its liability. The PC is entitled to decide whether the CO shall cure the defects by improvement, exchange and/or subsequent supply and by observance of the product-specified situation and the periods, intermediate or final dates set out in the executed Contract. The PC reserves the right of reduction of price and/or redhibition.

The contractual obligations shall only be deemed as fulfilled when all defects are corrected as well as upon any possible acceptance and upon expiration of the concluded guarantee period.

The CO shall be liable for all defects or rather bears all costs for any defects which arise in connection with delivery documents, package, out of wrong delivery planning, loading, corrosion protection wrong or missing component description and lettering (spares shall be lettered and packed separately) as well as failures in connection with the procurement of permits or any other regulatory approvals etc.

In connection with the applicable Product Liability Act the CO shall be unrestricted liable.

### *10.3. Claims against the CO and liability of the subcontractor*

Hereby the CO transfers its entire guarantee and damage claims which may arise out of the enforcement of this contract against its subcontractors or suppliers. The PC accepts the assignment.

The CO is liable and the PC authorizes the CO for the time being to exercise all claims due against its subcontractors or suppliers.

The subcontractors' or suppliers' liability for defects remains unaffected by this assignment. If the CO is claimed it is entitled to demand that the transferred and assigned claims against its subcontractors or suppliers are retransferred and reassigned to the CO.

In case of any claim of a third party against the PC in connection with any violation by the CO or in connection with a delay caused by CO, the CO shall indemnify and hold the PC harmless.

### *10.4. Banking guarantee*

In case the CO – out of or in connection with this Contract - hands over a bank guarantee or a similar abstract guarantee (letter of warranty, advanced payment guarantee, etc) of a third party to the PC, this guarantee shall also apply out of or in connection with all non-performances and/or defaults resulting out of this Contract.

## **11. GUARANTEE**

### *11.1. General*

The CO is liable that its Supplies and Services are performed as ordered and covers the suitability for the operation in the Plant; further it is liable that the construction, the advisability, the manufacturing engineering as well as the intended purpose complies with the state of the art technology in the time of the Order, are produced in conformity with all standards and regulations applicable at site (such as labour law), the use of new material of first class and sufficient quality as well as that the ordered object is free from any defects.

A change in construction may only be undertaken if the PC has agreed in writing. Furthermore, the CO is liable that its Supplies and Services are performed in conformity with all standards and regulations applicable at site as well as the Supplies and Services are built upon the metric system if, however, it has not been agreed otherwise. If such standards and regulations, however, do not exist the CO shall apply to similar standards and regulations, whereas law regulations from German-speaking-areas would be preferable.

The CO shall give immediate notice to the PC if it gets to know technological innovations. The lack of information is not to be considered as approved special arrangement.

Each interruption – in whole or in part – of the satisfying operation exceeding the permitted downtimes which has been caused by the CO leads to an extension of the guarantee period by the extent of the interruption.

In case of smaller defects (individual size of approx. EUR 10,000,--) or such defects that have to be cured promptly the PC is entitled to cure the defects or let the defects be cured by a third party for account of the CO even without prior notification of the CO. The PC reserves other claims under guarantee. The aforesaid shall apply as well in case the CO does not cure the defects despite request (with short but appropriate time-limit) (Article 9.2. GCC).

The CO shall inform the PC after curing the defects ad hoc.

#### *11.2. Guarantee period, removal of defects*

Unless otherwise agreed the guarantee period shall expire 24 months after the date of Acceptance of the whole Plant, however at latest 48 months from the date of final delivery according to the Contract, if the CO is not liable for a delayed acceptance.

The guarantee period shall be extended by any period of standstill caused by defects. The CO guarantees regardless the fact that the defects which the CO or its subcontractor is liable could have been noticed at a sooner moment in time or not. The CO waives any objection due to delayed notice of defects. All defects shall be cured by the CO within appropriate time, defined by the PC, upon first request of the PC by improvement and/or exchange. All those costs shall be beard by the CO.

In case of improvement and/or exchange of parts the guarantee period for those parts ends after 24 months after the relevant plant section/machine has gone successfully into service.

Unless otherwise agreed, normal wear is excluded from guarantee.

#### *11.3. Performance guarantee*

The CO guarantees that all agreed activity values will be reached and reliably kept in accordance with the latest ordering documentation and in accordance with further parts of the Contract.

Therefore the CO guarantees that it takes all necessary additional deliverable and performance within adequate time at its own expense, accomplishes improvements (reparation), adjustments, additions, installation works, and takes all arrangements in order to reach and keep all specified data. Additional personnel costs for the evaluation of the acceptance test shall be carried by the CO.

After further tests that have to be permitted and fixed with regard to deadlines by the PC are carried out the PC is – in case the guaranteed data (values) are not reached – entitled to make use of the applying legal remedies such as withdrawal from contract, reduction of price and claim for damages. Further contractual penalties may be laid down in the order.

#### *11.4. Guarantee for engineering, documentation, consultancy services*

The CO guarantees that all its engineering, documentation and consultancy services are correct and complete and – in case of personal secondment – that all oral and written directives and acts are correct.

The CO is liable for all consequences resulting out of or in connection with the defects in engineering, documentation and consultancy services.

#### *11.5. Guarantee for spare-, wear- and exchange parts*

The guarantee period for spare-, wear- and exchange parts shall begin with the fixture and fitting or with the bringing into service of each part.

## **12. ACCEPTANCE**

Generally the Supplies/Services shall be tested as to their conformity with the Contract in the Performance Test of the Plant. However, the PC shall be entitled to additional specific tests in order to examine the Supplies/Services.

The Acceptance completed upon fulfillment of the following conditions:

- contractual fulfillment of all Supplies and Services
- duly and entire delivery of the documentation
- existence of a report signed by both parties due to which the trial operation including the proof of performance for the plant in whole has been performed successfully.

If the PC accepts the Supplies and Services although the concluded performance indicators etc. as indicated in the performance record have not been performed accordingly, an acceptance report stating the outstanding amendments has to be issued.

The PC shall only be bound by determinations regarding price reduction or penalties in this connection if they are gathered by PC's purchase.

## **13. EXPORT LICENCE**

The CO shall obtain at its own expense all export licences required for the export of the Supplies and Services, in particular for the export to the FC's country.

The CO guarantees that, at the time the order is placed, the complete performance of all Supplies and Services is ensured and not inhibited by any administrative or other restrictions. The CO shall indemnify the PC and/or the FC against any damage or loss resulting from any such inhibition or restriction.

After the order is placed, the CO shall inform the PC as soon as possible of any new export restrictions which may arise and submit details of alternative solutions free of charge.

For any export permit applied for by the PC, the CO shall provide all information required.

## **14. INDUSTRIAL PROPERTY RIGHTS**

### *14.1. Third parties' rights*

The CO shall ensure that the use of its Supplies and Services of plants and plant components as well as all technical method and Know-how is not affected in any way by claims of third parties regarding trademarks, copyrights, patents, protected territories, etc. and that no boycott clauses, black lists, etc. are violated. The CO shall immediately inform the PC of any infringement of third parties' rights or any violation of boycott clauses or black lists, etc. In case of any such infringement or violation, the CO shall fully indemnify and hold the PC and the FC harmless against any claims of third parties, and guarantee the PC and the FC the unlimited use of the Supplies and Services, or shall provide other acceptable alternatives free of charge to the PC/FC.



#### 14.2. Secrecy, Advertising

The CO and the PC hereby undertake mutually that they shall treat all such business confidences and internal company information regarding the other party as comes to their knowledge as confidential, and shall not make it available to third parties where the information is not publicly known or where it was not already known to the recipient without this involving a duty of confidentiality, or where a third party has communicated it or provided it to the recipient without this involving a duty of confidentiality, or where the information must be disclosed as a result of the *res judicata* decision of the public authority or

The CO may not publish or use the content of the order or any of the information received from the PC or the FC for advertising or any other purpose. In particular, the CO must keep the papers and documentation provided by the PC confidential and use them solely for purposes of performing the order in question.

A corresponding duty of confidentiality must be imposed on persons with knowledge of the information and papers of the PC (in particular: members of the PC's staff). In the event of a breach of the present duty of confidentiality, the CO shall indemnify and hold the PC harmless, including against third-party claims. This duty of confidentiality shall continue in force even after the order has been completed. The PC's express written consent shall be required for identification of the PC and of its customers in connection with the CO (information brochure, list of references etc.).

The CO shall impose a duty of confidentiality corresponding to the framework conditions set out above on the staff members and/or subcontractors employed by it to perform the contract.

#### 14.3. Copyright

The property and the exclusive right of use of all drawings, information and know-how made available by the PC to the CO remains with the PC. The CO acknowledges the PC's exclusive copyright thereof.

#### 14.4. Inventions and improvements

The CO hereby confirms expressly and irrevocably (i) on its own behalf and on behalf of its respective successors-at-law, in a binding manner and on (ii) its staff members and their successors-at-law and on behalf of (iii) its subcontractors, all of the staff members or subcontractors engaged in connection with performance of the order (contract performance) that, with respect to work product and original work directly or indirectly created or created in future, including in particular all works as defined under the Copyright Act (such as software, programs, texts, graphics, graphic and conceptual designs (Designs), databases, images, layouts, ideas, concepts, plans, logos, sketches, etc.) and the rights which may potentially arise in respect thereof, including but not limited to the right to use the work, ancillary copyright, rights to concepts, ideas and inventions as well as other rights not protected by separate legal provisions (all of the foregoing referred to hereinafter in the aggregate as the "IP Rights"), it hereby waives the IP Rights in their entirety and exclusively in favour of the PC and hereby irrevocably assigns those rights to the PC.

The PC shall be exclusively entitled with respect to the IP Rights to apply for and register IP rights such as patents, utility models and industrial designs, trademarks and the like, and to use such rights without limitation. The CO and its staff members and/or subcontractors shall support the PC in respect thereof to the best of their abilities and shall in particular (where necessary) furnish (including repeatedly) all such declarations (including in notarial form) to third parties as may be required, which shall be unlimited in time.

The CO and its staff members and/or subcontractors hereby expressly and irrevocably waive (which waiver shall also be binding on their respective successors at law) any compensation in respect of the conveyance, use and/or exploitation of the IP rights to which they may be entitled against the PC, (ii)



waive any right to challenge this undertaking for mistake or *laesio enormis* and (iii) the right to assert any claims for damages whatsoever and/or claims for unjust enrichment.

In addition, in respect of employee inventions (sec 7 (3) Patent Act ("PatG")) the following specific rules shall also apply: The CO (or its staff members and/or subcontractors' staff members, as the case may be) shall immediately report to the PC all inventions made in the course of performing the order (contract performance). The CO hereby undertakes that it shall effectively claim any such employee invention, as a result of which the employee invention is deemed to subsequently pass to the PC's ownership on an unlimited basis and without any need for compensation; in any event, the PC shall be granted an unlimited licence/right of use in respect of the employee invention. Upon payment of the compensation agreed for the order, full and final compensation shall be deemed to have been paid for the conveyance of the invention made by the CO or its employees and/or subcontractors to TMS or, in any event, for the grant of an (exclusive) licence/right of use.

In the event that any invention or novelty created by a staff member of the CO or its subcontractor should be deemed not to constitute an employee invention within the meaning of secs. 6 et seq. PatG, the CO undertakes that it shall ensure that the employee immediately reports any such invention or novelty to the PC and that the employee shall assign any such invention or novelty to the PC without delay, on an unlimited basis and without any claim for compensation.

The CO is obliged to ensure and hereby warrants that the provisions set forth in sec. 14.4 of these GCCs are valid and effective and may be enforced against its employees and subcontractors and their employees at the CO's expense. The CO shall, in addition, ensure that its subcontractors assume an obligation of the same kind in favour of the PC. In the event that the provisions set forth in sec. 14.2 of these GCCs cannot be validly enforced, the CO shall indemnify and hold the PC harmless and shall in such case bear a duty to compensate the PC for lost profits.

#### *14.5. Follow-up orders*

In order to protect the know-how obtained by the CO from the PC in connection with the Contract and to ensure an optimum operation of the whole Plant also after expiration of the guarantee period, the CO shall not conduct any direct business with the FC or its representatives regarding any follow-up orders in connection with the Plant. The CO shall not submit direct nor indirect offers to the FC concerning spare and wear parts, without agreement of the PC as marketing partner. This obligation shall cover a period of 3 years from the date of final delivery.

### **15. FORCE MAJEURE**

The CO shall be wholly or partly discharged from the due performance of the Contract if prevented by events of force majeure. Events of force majeure are limited to fire, floods, Acts of God, war and riot. If the CO considers it is impeded by an event of force majeure, it shall only be entitled to claim force majeure if it submits to the PC immediately, or within 5 days at the latest, by registered mail a certificate issued by the authorities or the chamber of commerce of the CO's country, confirming the reasons, the commencement date and the expected duration and consequences of that event.

If an event of force majeure occurs the CO shall make every effort to minimize the effects and damages resulting there from and shall keep the PC fully informed of its activities in this respect. Dates and terms which cannot be kept due to a force majeure event shall be postponed/extended by the duration of the effects of force majeure.

If an event of force majeure exceeds 4 weeks, the PC shall have the right to terminate the Contract in whole or in part. The PC shall not be liable towards the CO for the consequences arising from any hindrance to the implementation of the Contract due to force majeure.

## 16. TERMINATION

### 16.1. Breach of contract

In case the CO does not meet its essential contractual obligations under the Contract in whole or in part (such as in case of delay of intermediate due dates of the delivery and production process, delay of submitting the delivery and production plan), after granting a reasonable grace period, the PC shall have the right to terminate the whole or parts of the Contract. The PC 's right in accordance with Article 10 "CO's Liability" shall not be effected hereof.

The PC shall be entitled to terminate the Contract without granting a grace period

- if the CO, after having received several reminders calling for the proper fulfillment of its contractual obligations, had - in fact - a reasonable grace period, even if that reminder did not expressly set a grace period or threaten with termination; or
- if the PC already before the respective due date of the Supplies and Services has reason to assume that the CO is not or will not be willing or able to fulfill essential contractual obligations on time (for instance in case the CO is not able to submit a comprehensive delivery and production plan to the PC before the concluded performance date has become due).

In any case delays or imminent delays with respect to final or other contractual dates or defects which could jeopardize the fulfillment of the PC's obligations vis-à-vis its contracting partners shall be considered as a serious breach of Contract.

In such cases the PC shall be entitled to carry out the defective and/or insufficient Supplies and Services of the CO or let those Supplies and Services be carried out by third parties ("execution by substitution") at the CO's expense. The CO shall provide the PC with all rights, documentation (e.g. workshop drawings, calculations, etc.) and other information as well as with all equipment and materials in CO's or its subcontractor's possession required therefor.

The costs resulting therefrom shall be either directly invoiced by the PC under a payment term of 45 days from the invoice date, or be deducted from payments due to be made to the CO by the PC.

The CO shall reimburse the amounts already paid by the PC for Supplies and/or Services not performed including all related financing costs incurred by the PC.

If the exercise of the liberty for execution by substitution requires the release of equipment or material, etc. situated by the CO or its subcontractor, the CO shall release those equipment or material, etc. to the PC. If the exercise of the liberty for execution by substitution requires the access to any property right, to documentation (such as workshop drawing, calculations, etc.) or other information the CO shall provide the required rights, documentation and information unrestrictedly to the PC.

Right of use:

Regardless of a termination or cancellation of the Contract in whole or in part the CO grants the unrestricted right for the PC to use all Supplies and Services of the CO that are already delivered and assembled free of charge until acceptance of an alternative solution.

### 16.2. Insolvency / Change of Terms of Payment in the event of – threatening – insolvency

In case of bankruptcy or other insolvency proceedings imminent or instituted against the CO or its subcontractors, or in the event of changes to the status of ownership of the CO, the PC shall be fully informed without delay. In such cases the PC shall be entitled to immediately take over the Supplies and/or Services including all concerning documents which are in the possession of the CO or its subcontractors, and/or to immediately terminate the Contract in whole or in part.

In case of bankruptcy or other insolvency proceedings imminent or instituted against the CO or its subcontractors, or in the event of refusal of the latter, the agreed terms of payment shall be amended as follows:

All payments (in whole or in instalments) which have to be made by the PC to the CO before acceptance become due once the plant or parts thereof have been accepted by the FC. The time allowed for payment agreed by the Parties following the accounting shall be applicable in this case as well.

#### *16.3.Cancellation*

The PC shall have the right at any time to partly or wholly cancel the Contract even though the CO is not in default of its obligations.

In this case the PC shall pay the CO that portion of the contract value which corresponds to the Supplies and Services already delivered, plus verified direct cost related to work in progress, and compensation payable to its subcontractors.

After the CO has been notified of a cancellation, it shall make every effort to minimize all cost and compensation arising there from.

#### *16.4.Suspension*

The PC shall have the right to call for a suspension of the work at any time. In such case the CO shall specify in detail to the PC all the consequences resulting therefrom and suggest the best possible and most economical alternatives available for the further implementation of the project. For suspensions not exceeding 3 (three) months the PC shall not be liable to the CO for any compensation.

### **17. OTHER TERMS AND CONDITIONS**

#### *17.1.Transfer of risk*

For transfer of risk the regulations of INCOTERMS 2010 shall apply. However, in the event the erection of the Supplies is included in the scope of work of the CO the risk shall transfer to PC upon Acceptance.

#### *17.2.Transfer of property*

The transfer of property shall take place together with the transfer of risk.

#### *17.3.Erection equipment*

Equipment for erection and commissioning, etc. which is required for temporary use at site, shall remain the property of the CO and under its full responsibility. The CO shall indemnify the PC against any claim which may arise in connection with such equipment, including any cost to the PC arising from the export and import of such equipment. For activities performed at site PC's conditions for execution of erection work shall apply additionally.

#### *17.4.Provision of personnel*

Besides, the term and conditions of assembly in Annex 2 specifically apply to activities performed at the construction sites.

#### *17.5. Insurance*

Unless otherwise agreed, the CO shall be responsible for obtaining all the insurance cover which it considers necessary. Such insurances obtained by the CO shall contain a waiver of subrogation in favour of the PC and the FC.

If the CO is coinsured or otherwise covered by an insurance taken out by the PC, the CO accepts the respective insurance conditions as binding for himself. The PC will therefore also adhere to all respective obligations, such as giving all required information, complying with instructions etc.

#### *17.6. Authority*

Persons giving statements vis-a-vis the PC on behalf of the CO shall be deemed fully empowered to do so.

#### *17.7. Liability towards CO*

The PC shall not be liable for losses or damages caused by the FC or any third party.

#### *17.8. Third parties' claims*

The CO shall fully indemnify the PC for all claims of third parties caused by defects in, or improper execution of, the CO's Supplies and Services.

#### *17.9. Assignment*

Any assignment of rights by the CO shall be valid only upon the PC's written consent.

#### *17.10. Changes*

The CO shall notify the PC of any possible improvement to the Supplies and Services and offer such improvements to the PC. However, any changes/amendments to the Supplies and/or Services under the Contract shall require an additional order.

#### *17.11. Liens*

CO shall not create or do anything which would result in the creation of any lien, encumbrance, right of retention or any other kind of security on the free issue parts provided by the PC or on the Supplies/Services or any part thereof.

CO shall ensure that a similar provision is included in each of its subcontracts.

#### *17.12. Partial invalidity*

In the event that any provision in the General Commercial Conditions shall prove to be invalid, illegal, void or unenforceable, such provision(s) shall be deemed to be separable from the other provisions which shall remain binding.

The Parties shall replace the invalid, illegal, void or unenforceable provision(s) by new but valid, legally permitted and enforceable provision(s) which come as close as possible to the economic purpose of the replaced provision(s).

#### *17.13. Non-solicitation agreement and contractual penalty*

The CO undertakes not to contact, headhunt or collaborate occupationally in any way with the PC's employees for the period of contract and one year after expiration of contract respectively. In case of failure to comply with the objective non-solicitation agreement the CO is obliged to pay a contractual penalty of EUR 20.000,-- (Euro twenty thousand) regardless of culpability. The contractual penalty is irrespective of an actual occurrence of damage and can be claimed besides contractual performance and further titles.

#### *17.14. Customer protection agreement and contractual penalty*

The CO undertakes not to establish business relationships with any of the PC's customers and particularly not to alienate any of the PC's customers for the period of one year after expiration of contract. In case of failure to comply with the objective customer protection agreement the CO is obliged to pay a contractual penalty of EUR 20.000,-- (Euro twenty thousand). The contractual penalty requires that the CO is responsible for the incident that constitutes the obligation to pay the contractual penalty.

#### *17.15. Reorganization*

The Constructor has to inform the PC immediately about any initiation, revocation or abatement of reorganization proceedings in accordance with the Unternehmensreorganisationsgesetz (Company Reorganization Act) and has to report the PC monthly about the state of procedure.

#### *17.16. Partial invalidity / Severability clause*

In the event of any provisions of these General Commercial Conditions being or becoming ineffective, illicit or unenforceable, the remaining provisions of these General Commercial Conditions shall not be affected by that. The Parties undertake to replace the ineffective, illicit or unenforceable provision(s) by new but valid, legally permitted and enforceable provision(s) which come as close as possible to the economic purpose of the replaced provision(s).

#### *17.17. Annexes*

All relevant Annexes to these General Commercial Conditions form an integral part of these General Commercial Conditions.

**18. LANGUAGE, APPLICABLE LAW AND JURISDICTION**

*18.1. Language of contract and correspondence*

The contractual language as well as the language used in correspondence shall be English.

*18.2. Jurisdiction and applicable law*

All disputes arising from and in connection with this contract shall exclusively be referred to the courts having jurisdiction for Linz, Upper Austria. These Terms and Conditions shall be exclusively governed by and construed in accordance with Austrian law, to the exclusion of the Austrian conflict of law rules, if any, and the UN Sales Convention.

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....., the .....

\_\_\_\_\_  
For the Purchaser

\_\_\_\_\_  
For the Contractor

## ANNEX 1

### 19. COMPANY AND PROJECT SPECIFIC DATA

ad 1.1

Purchaser = TMS Turnkey Manufacturing Solutions GmbH  
Gaisbergerstraße 50  
A-4031 Linz, Austria

ad 4.1

**Accounting**

TMS Turnkey Manufacturing Solutions GmbH  
(Gaisbergerstraße 50)  
p.A. Business Center 281  
A-4000 Linz, Austria