

# General Terms of Supply

Microtherm GmbH  
Status as of June 2009



**This is a translation of the original text in German and is therefore not legally binding at any time. The German original text alone is legally binding.**

## Section 1 Application of the General Terms of Supply

1. In supplementation of the other contractual provisions, solely these General Terms of Supply shall apply to all business transactions between MICROTHERM GmbH and the purchaser, principal or customer, hereinafter called the Principal.

We do not recognise any other terms – even if performance has been rendered or payment accepted without reservation - unless we have expressly agreed to their application in writing.

2. These General Terms of Supply also apply to all future business relations without being incorporated again. They will apply until we issue new General Terms of Supply.

## Section 2 Advice

We will only give the Principal advice at the latter's express request. A failure to provide information is not considered to constitute advice.

Our advisory services are based solely on empirical values obtained from our own company and embrace the current state of the art without any binding effect.

Our advice extends only to the qualities of our own products and not to their use by the Principal or the latter's customers; any advice that is nevertheless given relating to application for the Principal shall be without obligation,

Our advice is product- and service-related and extends solely to the products we manufacture and services we render – contract-related advice.

It does not include contract-unrelated advice, i.e. statements made without any performance being rendered by us.

## Section 3 Contract

1. Our offers are without commitment and are considered to be a request to submit an offer. Information in brochures, catalogues and technical documents is not binding and does not release the Principal from an obligation to make his own investigations.

2. The order placed by the Principal shall always constitute the offer on which the contract is based.

The order shall include all the information for performance. This applies to all our deliveries, services and works. Such information shall include in particular, but shall not be restricted to, data on the name of the article, quantity, measurements, material and norms and on all other technical parameters and physical characteristics.

Missing, defective or incomplete data is deemed expressly not agreed and does not create any obligations on our part, either in relation to performance and warranty claims or in relation to damages claims.

If the order placed by the Principal differs from our offer, said Principal will mark such differences clearly.

3. We have the right to obtain further information that will help with due performance of the order.

4. Orders should be placed in writing; orders placed by telephone or by other electronic means will be performed at the Principal's risk.

5. If the Principal withdraws an order that has been placed, we can charge 10% of the price of supplies or services for the costs incurred for processing the order and for loss of profit, without prejudice to a possible claim for higher damages actually incurred. The Principal has the right to provide evidence of lower damages.

6. The order should be accepted within 10 working days of receipt of the same insofar as a longer period has not been agreed for acceptance of the order.

7. The scope of our performance is specified in the confirmation of order.

## Section 4 Order Amendments

1. If the Principal requires amendments to the item scheduled for supply or to the scheduled service after the contract has been made, a separate contractual agreement will be required.

2. If information is not provided or is defective, we reserve the right to amend the item scheduled for supply or the scheduled service accordingly. Any losses resulting from lack of information or defective information, in particular additional costs or damages, shall be the responsibility of the Principal.

3. The right is reserved to make technical amendments to the item scheduled for supply or the scheduled service if the contractual target is not jeopardised thereby.

## Section 5 Supply Period

1. If a period for supply or for completion of the service has been agreed, it shall begin on dispatch of the confirmation of order but not before full clarification of all particulars of the order and due performance of all the Principal's co-operation obligations; the same applies accordingly to set dates for supply or for completion of services.

If the subject of the order is amended by mutual agreement, new periods and dates for supply or for completion of services must be agreed.

This also applies if there was renegotiation of the subject of the order after the contract had been made, without any amendments being made to the subject of the order.

2. Periods and dates for supply or for completion of services are subject to non-defective and on-time supply by sub-contractors and to unforeseeable disruptions of production.

3. The period for supply or completion of services is considered to have been observed if the item scheduled for supply or the scheduled service has left our works or we have given notification of readiness for collection before said period expires.

4. If supply or performance of a service is delayed by the Principal, we can charge storage costs amounting to 1.0% of the price of the item or the service, but no more than a total of 5%, for each month or part of a month.

The contracting parties have the right to provide evidence of higher or lower storage costs.

We are authorised to specify a suitable place of storage and to insure the item or service at the expense and risk of the Principal.

5. We have the right to provide the agreed item or service before the agreed time.

6. Partial deliveries or services are permitted and can be invoiced separately.

## Section 6 Force Majeure

In cases of force majeure, our periods for supply or completion of services will be extended by the length of the disruption occurring.

Such force majeure includes, but is not restricted to, operational interruptions, strikes, lock-outs, traffic disruptions and orders of higher authorities applying to us or our sub-suppliers.

This shall apply even if we were already in default when such circumstances occurred.

We will notify the Principal immediately of the beginning and end of such hindrances.

If supply or completion of services is delayed by more than six weeks, both the Principal and we ourselves have the right to rescind the contract in relation to the scope of performance affected by the disruption.

## Section 7 Prices, Payment

1. If nothing has been agreed to the contrary, the agreed prices apply in euros "ex works" plus value-added tax and the costs of customs, freight, packaging and transportation insurance.

The goods scheduled to be shipped will only be insured by us at the request and expense of the Principal.

2. We have the right to amend the agreed price accordingly if cost increases occur after the contract has been made, in particular as a result of collective wage agreements or changes in prices for materials or energy.

3. We have the right to amend the agreed price accordingly if amendments are necessary either before or during performance of the order because information and written material provided by the Principal were defective or the customer requires amendments in some other way.

4. We have the right to request a reasonable advance payment when the contract is made. No interest will be paid on the same.

5. Invoices are payable within 10 days of receipt of the invoice by the Principal with a 2 % discount or after 30 days without any deductions.

If the Principal fails to make payment, he will be in default when payment is due without any reminder being required.

6. We expressly reserve the right to decide on acceptance of bills of exchange or cheques. Subject to our approval, bills of exchange or cheques will only be accepted on account of performance and are not considered payment until they have been credited without reservations.

7. If we have several outstanding claims against the Principal and payments made by the Principal are not attributed to one particular claim, we have the right to decide the outstanding claim to which the payment is to be attributed.

8. In the event of a delay in payment, deferral of payment or partial payment, we have the right to charge default interest at a rate of 8% p.a. above the relevant basic interest rate and to withhold further performance until all due invoices have been paid. The right to provide evidence of higher damages is reserved.

9. If we have justified doubts about the solvency or financial standing of the Principal, we have the right to require advance payment or suitable security for the payment to be made by the Principal.

If the Principal is not willing to make advance payment or furnish security, we have the right to rescind these contracts after granting a reasonable period of grace and require compensation for reason of non-fulfilment.

10. Agreed payment targets shall cease to apply and outstanding claims shall become payable immediately if an application is made for the instigation of insolvency proceedings relating to the Principal's assets or if the Principal has provided incorrect information about his financial standing or if there are other justified doubts about the solvency or financial standing of the Principal.

11. The Principal only has the right to offset a counter-claim against our claims if such a counter-claim has been recognised or has been finally established by a court of law.

Any assignment of claims against us is subject to our consent.

12. The Principal only has a right to withhold payment if his counter-claim is based on the same contractual relationship and has been recognised or finally established by a court of law or if we have committed a major breach of our obligations under the same contractual relationship despite receiving a written caution and have not offered any reasonable security.

If our performance is undisputedly defective, the Principal only has the right to withhold payment in reasonable proportion to the defects and the anticipated costs of remedying them.

13. The dates for payment shall continue to apply even if there are delays in supply for which we are not responsible.

### **Section 8 Place of Performance, Acceptance, Passage of Risk, Packaging**

1. The place of performance for the services under the order is our plant in Pforzheim. Insofar as nothing has been agreed to the contrary, the Principal will collect the goods there after receipt of notification of completion.

2. The Principal must perform acceptance procedures for the goods or services as soon as he receives notification of completion of the order.

If the Principal fails to perform acceptance procedures for the goods or services within 2 weeks of notification, acceptance procedures will be considered performed.

3. The risk of destruction, loss or damaging of the goods passes to the Principal upon notification of completion of the goods.

If shipment has been agreed, the risk shall pass on dispatch of the goods or hand-over to the commissioned forwarding company.

4. If no other agreement has been made, we will specify the type and size of packaging. Non-returnable packaging will be disposed of by the Principal.

5. If goods are shipped in returnable packaging, said packaging must be returned carriage paid within 30 days of receipt of the shipment. The Principal is responsible for any loss of or damage to returnable packaging.

Returnable packaging is not to be used for other purposes or for other items. It is solely intended for transportation of the goods supplied. No labelling is to be removed.

6. If the goods are damaged or lost during shipment, a status record must be drawn up immediately and notification sent to us. Claims for any transportation damage must be submitted to the carrier by the Principal immediately.

### **Section 9 Inspection Obligation and Obligation to Submit Notice of Defects**

1. Shipments must be inspected immediately and a notice of defects submitted immediately if a defect is found. The regulations in Section 377 of the German Commercial Code (HGB) and comparable foreign regulations shall apply. The regulation in Section 377 of the German Commercial Code applies accordingly to services and works. Notices of defects must be submitted in writing.

2. Defective supplies or services must not be used. If it was not possible to discover a defect on receipt of goods or completion of services, all further use of the supplied item or service must be discontinued immediately upon discovery.

3. The Principal will give us the goods about which the notice of defects has been submitted and grant us the necessary time to examine the relevant defect. If complaints are unjustified, we reserve the right to charge the Principal for the expenses incurred for examining the alleged defects.

4. A notice of defects does not release the Principal from compliance with his payment obligations.

### **Section 10 Warranty**

1. If there is a defect in the supplied items or services, we have the right, at our discretion, to remedy the defect, supply a substitute or enter a credit.

2. Provided that we are consulted in advance, the reworking can also be performed by the Principal. The Principal cannot submit any claims for expenses necessarily incurred for subsequent performance, in particular costs of transportation, travel, labour or materials, to the extent that such expenses are higher because the goods were subsequently taken to a place other than that of the Principal's seat of business.

### **Section 11 Legal Defects, Property Rights**

1. Orders based on drawings, sketches or other data provided to us will be performed at the risk of the Principal. If we breach outside property rights by performing such orders, the Principal will hold us harmless in relation to any claims made by the holders of these property rights. Any further damages shall be the responsibility of the Principal.

2. We shall not be liable for any breaches of property rights associated with the application of the supplied items or services or with the combination or use of the supplied items or services with other products.

3. In the event of legal defects, we have the right, at our discretion:

- to obtain the necessary licences for the breached property rights
- or to remedy the defects in the supplied items or services by providing items or services amended to an extent which the Principal can be reasonably expected to accept.

4. Our liability for the breaching of outside property rights only extends to such property rights registered and published in Germany.

### **Section 12 Liability**

1. In the event of ordinary negligence, we shall only be liable if we breach a major contractual obligation. In the event of gross negligence, we will also be liable if we breach minor contractual obligations.

In the above cases, liability is limited to the foreseeable damage typical of the contract.

2. Damages claims for reason of intentional breaching of contractual obligations by us, claims for reason of bodily injury and claims based on the Product Liability Act are governed by the statutory regulations.

3. For tortious claims, we are liable in compliance with contractual liability.

4. No liability for damages going beyond that provided by the above rulings will be assumed.

5. The Principal shall only hold recourse claims against us to the extent that he has not made an agreement with his customer going beyond statutory claims for defects and damages.
6. Liability on our part is ruled out if the Principal has effectively limited his liability to his customer.
7. Insofar as our liability is ruled out or limited, this shall also apply to the personal liability of our salaried staff, wage earners, freelance workers, representatives and vicarious agents.
8. Insofar as liability is ruled out or limited by the above, the Principal must also hold us harmless in relation to claims by third parties upon first request.
9. Apart from the above, statutory provisions shall apply.
10. The Principal must notify us immediately in writing of any claims made by third parties and permit us to take all defence measures and conduct settlement negotiations.

### **Section 13 Limitation**

1. The limitation period for claims and rights for reason of defects in our products, services and works and resulting losses is 1 year. The beginning of the limitation period is based on statutory regulations. This does not apply insofar as law specifies longer periods in cases as per Sections 438 para. 1 no. 2, 479 and 634 a para. 1 no. 2 of the German Civil Code (BGB).
2. The limitation period under no. 1 above does not apply in cases of intent or if we have concealed the defect with intent to deceive or in the event of damages claims for reason of bodily injury or a person's liberty or claims based on the Product Liability Act or a grossly negligent breach of an obligation.
3. Measures taken as part of subsequent performance neither suspend the limitation period applying to original performance nor do they cause the limitation to start anew.

### **Section 14 Acquisition and Reservation of Title, Lien**

1. We reserve the title to all contractual items until full settlement of all claims which we hold as a result of the business relationship with the Principal.  
We reserve all ownership rights and copyrights to the illustrations, drawings, calculations and other (technical) documents provided.
2. If items belonging to us are processed, combined or mixed with third-party property, we acquire a title to the new item in compliance with Section 947 of the German Civil Code (BGB).
3. If processing, combination or mixing is done in a way that means that the third-party item is to be regarded as the primary item, we will acquire a title in the ratio of the value of our work to the third-party work at the time of processing, combination or mixing.
4. Insofar as we acquire a title to an item through our work, we will retain the title to this item until settlement of all existing claims resulting from the business relationship with the Principal.
5. The Principal must keep the goods subject to reservation of title with due care and, if necessary, perform maintenance and repair work in due time and at his expense. The Principal must insure the goods subject to reservation of title against loss and damage at his own expense. Any security claims arising in the event of a loss are to be assigned to us.
6. The Principal has the right to resell the item to which we hold (co-)ownership rights, provided that this is in the course of due business and that he meets his obligations to us resulting from the business relationship. In such a case, the claim resulting from sale is deemed assigned to us in the ratio of the value of the work secured by our reservation of title to the total value of the goods sold. The Principal remains entitled to collect this claim even after it has been assigned. Our authorisation to collect this claim ourselves is not affected thereby.
7. The Principal's right to dispose of the goods subject to our reservation of title and to collect the claim assigned to us shall be forfeited as soon as he fails to meet his payment obligations and/or an application is made for instigation of insolvency proceedings. In the cases described above and in the event of other action in breach of contract by the Principal, we have the right to take possession of the goods supplied under reservation of title, without there being any requirement to issue a caution.

8. The Principal will notify us immediately if the items subject to our reservation of ownership are at risk, in particular in the event of insolvency, inability to pay and compulsory enforcement measures. At our request, the Principal must provide all the necessary information about the status of the goods subject to our (co-) ownership rights and the claims assigned to us and must notify his customers of assignment. The Principal will support us with all measures necessary to protect our (co-)ownership rights and pay the costs thus incurred.
9. In relation to all claims under the contract, we hold a lien to the Principal's items which we have in our possession on the basis of the contract. This lien can also be exercised in relation to claims resulting from previous supplied items or services, provided that they are connected with the item or service supplied.  
The lien will apply to other claims resulting from the business relationship if they have been recognised or have been finally established by a court of law. Sections 1204 ff. of the German Civil Code (BGB) and Section 50 para. 1 of the German Solvency Code shall apply accordingly.
10. If the realisable value of securities exceeds our claims by more than 10 %, we will release securities to this value at our discretion at the request of the Principal.

### **Section 15 Confidentiality**

1. The Principal undertakes to treat as confidential all protectable aspects of the business relationship. In particular, he will treat as business secrets all non-apparent commercial and technical details of which he learns through the business relationship. The obligation to maintain confidentiality does not include any information or aspects of the business relationship which were already publicly known at the time of disclosure or any information or aspects of the business relationship which can be proved to have already been known to the contracting partner before being disclosed by us.  
The Principal must ensure that his employees also respect our justified interests in maintaining confidentiality.
2. Reproduction of the written material supplied to the Principal is only permitted as required for business purposes and in compliance with copyright law.
3. No written material is to be made available to third parties, either in whole or in part, without our written consent nor is it to be used for purposes other than those for which it was supplied to the Principal.
4. Any disclosure – even if only partial - to third parties of the business relationship with us is subject to our prior written consent; the Principal must also make a similar agreement with the third parties, placing them under an obligation to maintain confidentiality.  
The Principal may only use our business relationship for advertising purposes subject to our prior written consent.
5. The Principal remains under an obligation to maintain confidentiality even after termination of the business relationship.
6. The Principal undertakes not to handle business transactions relating to the subject of the order either directly or indirectly with our customers.

### **Section 16 Governing Law**

1. At our discretion, the legal venue is either the court having jurisdiction for our seat of business or the Principal's legal venue.
2. The place of performance for the payments to be made to us resulting from the business relationship is our seat of business.
3. Solely the law of the Federal Republic of Germany shall govern the business relations with the Principal. Application of the CISG – "Vienna Sales Law" – is ruled out.
4. If any parts of these General Terms of Supply are ineffective, the effectiveness of the other provisions will not be affected thereby. The contracting partners will make every effort to replace the ineffective clause by a clause approaching as closely as possible the business purpose and legal intent of the original wording.