

GEA 2H Terms for Export (TfE) 07/2009

(only applicable to contracts with Customers having its registered offices outside Germany)

Preamble

1. The terms and conditions set forth below express the complete and entire agreement between Supplier (GEA 2H Water Technologies GmbH) and Customer. Except for the herein. None of the terms and conditions contained herein may be amended, supplemented, modified, superseded or otherwise explicit terms and conditions set forth in written online agreements, no prior agreements, negotiations or representations made by Supplier or any authorized representative of Supplier shall be deemed to affect, alter, modify, amend or supplement the terms and conditions altered without the prior written consent of Supplier (or an authorized representative of Supplier). This Agreement and Supplier's liability hereunder are expressly conditioned upon Customer's assent to the terms and conditions hereof. Supplier hereby objects to and rejects any and all additional or different terms proposed by Customer, whether contained in Customer's request for quotation, purchase order, purchasing or shipping release forms or in any other oral or written offer. The object(s) to be supplied under these General Conditions is (are) hereinafter referred to as the Product. Wherever these General Conditions use the term in writing, this shall mean by document signed by the parties, or by letter, fax, electronic mail and by such other means as are agreed by the parties.

Product information

2. All information and data contained in general product documentation, leaflets and price lists, whether in electronic or any other form, are binding only to the extent that they are by reference expressly included in the contract. Any binding performance data of the Product given by the Supplier including but not limited to heat transmission, efficiency grades, pressure drop and face velocities was determined in a pilot plant on a reduced scale. As performance data are dependent on multiple factors which are different in every application and which therefore may differ from said pilot plant conditions, Customer shall evaluate at its own risk whether the Product in these respects is fit for the intended purpose.

Drawings and Design

3. All drawings and technical documents relating to the Product or its manufacture submitted by one party to the other, prior or subsequent to the formation of the contract, shall remain the property of the submitting party. Drawings, technical documents or other technical information received by one party shall not, without the consent of the other party, be used for any other purpose than that for which they were provided. They may not, without the consent of the submitting party, otherwise be used or copied, reproduced, transmitted or communicated to a third party.
4. Customer shall hold Supplier harmless from any third party claim (including but not limited to any action for alleged infringement of industrial property rights) resulting from a design stipulated or specified by the Customer.

Acceptance tests

5. Acceptance tests explicitly provided for in the contract shall, unless otherwise agreed, be carried out at the place of manufacture during normal working hours.
If the contract does not specify the technical requirements; the tests shall be carried out in accordance with general practice in the appropriate branch of industry concerned in the country of manufacture.
6. The Supplier shall notify the Customer in writing of the acceptance tests in sufficient time to permit the Customer to be represented at the tests. If the Customer is not represented, the test report shall be sent to the Customer and shall be accepted as accurate.
7. If the acceptance tests show the Product not to be in accordance with the contract, the Supplier shall without delay remedy any deficiencies in order to ensure that the Product complies with the contract. New tests shall then be carried out at the Customer's request, unless the deficiency was insignificant.
8. The Supplier shall bear all costs for acceptance tests carried out at the place of manufacture. The Customer shall however bear all travelling and living expenses for his representatives in connection with such tests.

Delivery, Passing of Risk

9. Any agreed trade term shall be construed in accordance with the INCOTERMS in force at the formation of the contract.
If no trade term is specifically agreed, the delivery shall be Ex works (EXW).
If, in the case of delivery Ex works, the Supplier, at the request of the Customer, undertakes to send the Product to its destination, the risk will pass not later than when the Product is handed over to the first carrier.
Partial shipment shall be permitted unless otherwise agreed.

Time for delivery, Delay

10. If the parties, instead of specifying the date for delivery, have specified a period of time on the expiry of which delivery shall take place, such period shall start to run as soon as the contract is entered into, all official formalities have been completed, payments due at the formation of the contract have been made, any agreed securities have been given and any other preconditions have been fulfilled.
11. If the Supplier anticipates that he will not be able to deliver the Product at the time for delivery, he shall forthwith notify the Customer thereof in writing, stating the reason, and, if possible, the time when delivery can be expected. If the Supplier fails to give such notice, the Customer shall be entitled to compensation for any additional costs which he incurs and which he could have avoided had he received such notice.
12. Delay in delivery is caused by any of the circumstances mentioned in Clause 39 or by an act or mission on the part of the Customer, including suspension under Clauses 20 or 42, the time for delivery shall be extended by a period which is reasonable having regard to all the circumstances in Ute case. This provision applies regardless of whether the reason for the delay occurs before or after the agreed time for delivery.
13. If the Product is not delivered at the time for delivery (as defined in Clauses 10 and 12), the Customer is entitled to liquidated damages from the date on which delivery should have taken place.
The liquidated damages shall be payable at a rate of 0.5 per cent of the purchase price for each completed week of delay. The liquidated damages shall not exceed 7.5 per cent of the purchase price.
If only part of the Product is delayed, the liquidated damages shall be calculated on that part of the purchase price which is attributable to such part of the Product as cannot in consequence of lie delay be used as intended by the parties.
The liquidated damages become due at the Customer's demand in writing but not before delivery has been completed or the contract is terminated under Clause 14.
The Customer shall forfeit his right to liquidated damages if he has not lodged a claim in writing for such damages within two weeks after the time when delivery should have taken place.
14. If the delay in delivery is such that the Customer is entitled to maximum liquidated damages under Clause 13 and if the Product is still not delivered, the Customer may in writing demand delivery within a final reasonable period which shall not be less than one week.
If the Supplier does not deliver within such final period and this is not due to any circumstance for which the Customer is responsible, then the Customer may by notice in writing to the Supplier terminate the contract in respect of such part of the Product as cannot in consequence of the Supplier's failure to deliver be used as intended by the parties. If the Customer terminates the contract he shall be entitled to compensation for the loss he has suffered as a result of the Supplier's delay. The total compensation, including the liquidated damages which are payable under Clause 13, shall not exceed 15 per cent of that part of the purchase price which is attributable to the part of the Product in respect of which the contract is terminated.
The Customer shall also have the right to terminate the contract by notice in writing to the Supplier, if it is clear from the circumstances that there will occur a delay in delivery which, under Clause 13 would entitle the Customer to maximum liquidated damages.
In case of termination on this ground, the Customer shall be entitled to maximum liquidated damages and compensation under sentence 3 and 4 of this Clause 14.
15. Liquidated damages under Clause 13 and termination of the contract with limited compensation under Clause 14 are the only remedies available to the Customer in case of delay on the part of the Supplier. All other claims against the Supplier based on such delay shall be excluded, except where the Supplier has been guilty of gross negligence.
16. If the Customer anticipates that he will be unable to accept delivery of the Product at the delivery time, he shall forthwith notify the Supplier in writing thereof, stating the reason and, if possible, the time when he will be able to accept delivery.
If the Customer fails to accept delivery at the delivery time, he shall nevertheless pay any part of the purchase price which becomes due on delivery, as if delivery had taken place. The Supplier shall arrange for storage of the Product at the risk and expense of the Customer. The Supplier shall also, if the Customer so requires, insure the Product at the Customer's expense.
17. Unless the Customer's failure to accept delivery is due to any such circumstance as mentioned in Clause 39, the Supplier may by notice in writing require the Customer to accept delivery within a final reasonable period.
If, for any reason for which the Supplier is not responsible, the Customer fails to accept delivery within such period, the Supplier may by notice in writing terminate the contract in whole or in part. The Supplier shall then be entitled to compensation for the loss he has suffered by reason of the Customer's default. The compensation shall not exceed the purchase price.

Payment

18. Unless otherwise agreed, the purchase price shall be paid with one third at the formation of the contract and one third when the Supplier notifies the Customer that the Product or the essential part of it is ready for delivery. Final payment shall be made upon delivery. Any right to retain due payments or to set-off counterclaims shall be excluded unless any such claim or counterclaim of the Customer is undisputed or has been determined by a final judgment of the competent court or arbitration court.
19. Whatever the means of payment used, payment shall not be deemed to have been effected before the Supplier's account has been fully and irrevocably credited.
20. If the Customer fails to pay by the stipulated date, the Supplier shall be entitled to interest from the day on which payment was due. The rate of interest shall be as agreed between the parties. If the parties fail to agree on the rate of interest, it shall be 8 percentage points above the rate of the main refinancing facility of the European Central Bank in force on the due date of payment.

In case of late payment the Supplier may suspend his performance of any contract until he receives payment. If the Customer has not paid the amount due within three months the Supplier shall be entitled to terminate the contract by notice in writing to the Customer and to claim compensation for the losses and damages he has incurred.

Retention of title

21. The Product shall remain the property of the Supplier until paid for in Full to the extent that such retention of title is valid under the applicable law (lex situs).
The Customer shall at the request of the Supplier assist him in taking any measures necessary to protect the Supplier's Product in the country concerned.
The retention of title shall not affect the passing of risk under Clause 9.

Liability for defects

22. Pursuant to the provisions of Clauses 23 – 36 inclusive, the Supplier shall remedy any defect which was attributable caused by him.
23. Any claim whether founded on contract, tort or otherwise due to any defect is subject to a limitation period of one year. Said period of limitation shall commence upon delivery. In case of any failure of the Customer under Clause 16 to accept the delivery at the delivery time, delivery shall be deemed to have taken place for the purpose of this clause 23.
24. When a defect in a part of the Product has been remedied, the Supplier shall be liable for defects in the repaired or replaced part under the same terms and conditions as those applicable to the original Product for a period of one year.
25. The Customer shall promptly notify the Supplier in writing of any defect which appears. The notice shall contain a detailed description of the defect.
If the Customer fails to notify the Supplier in writing of a defect within the time limits set forth in the first sentence of this Clause, he loses any right resulting from said defect.
Where the defect is such that it may cause damage, the Customer shall immediately inform the Supplier in writing.
The Customer shall bear the risk of damage resulting from his failure so to notify.
26. On receipt of the notice under Clause 25 the Supplier shall remedy the defect without undue delay and at his own cost as stipulated in Clause 22 - 36 inclusive.
Repair shall be carried out at the place where the Product is located unless the Supplier deems it appropriate that the defective part or the Product is returned to him for repair or replacement.
27. If the Customer has given such notice as mentioned in Clause 25 and no defect is found for which the Supplier is liable, the Supplier shall be entitled to compensation for the costs he has incurred as a result of the notice.
28. The Customer shall at his own expense arrange for any dismantling and reassembly of equipment other than the Product, to the extent that this is necessary to remedy the defect.
29. Unless otherwise agreed, necessary transport of the Product and / or Parts thereof to and from the Supplier in connection with the remedying of defects for which the Supplier is liable shall be at the expense of the Supplier. The Customer shall follow the Supplier's instruction regarding such transport.
30. Unless otherwise agreed, the Customer shall bear any additional costs which the Supplier incurs for repair, dismantling, installation and transport as a result of the Product being located in a place other than the destination stated in the contract or - if no destination is stated - the place of delivery.
31. Supplier warrants that the Products are free from industrial property rights of third parties under German law, provided that the design of the Products was not stipulated or specified by the Customer. Supplier further warrants, that to his knowledge the Products are free from industrial property rights under the law of the foreign State where the Products will be sold, resold or otherwise used provided that it was contemplated at the line of the conclusion of the contract that the Products would be resold or otherwise used in that State. Any claim due to defects in title (including but not limited to breach of third party industrial property rights) shall become barred by limitation one year after delivery.
32. If, within a reasonable time, the Supplier does not fulfill his obligations under Clause 26, the Customer may by notice in writing fix a final time for completion of the Supplier's obligations.
If the Supplier fails to fulfill his obligations within such final time, the Customer may himself undertake or employ a third party to undertake necessary remedial works at the risk and expense of the Supplier.
Where successful remedial works have been undertaken by the Customer or a third party, reimbursement by the Supplier of reasonable costs incurred by the Customer shall be in full settlement of the Supplier's liabilities for the said defect.
33. Where the defect has not been successfully remedied, as stipulated under Clause 32:
a) the Customer is entitled to a reduction of the purchase price in proportion to the reduced value of the Product, provided that under no circumstances shall such reduction exceed 15 per cent of the contract price, or
b) where the defect is so substantial as to significantly deprive the Customer of the benefit of the contract, the Customer may terminate the contract by notice in writing to the Supplier. The Customer is then entitled to compensation for the loss he has suffered up to a maximum of 15 per cent of the purchase price.
34. The Supplier is not liable for defects arising out of materials provided, or a design stipulated or specified by the Customer.
35. The Supplier is liable only for defects which appear under the conditions of operation provided for in the contract and under proper use of the Product.
The Supplier's liability is subject to the condition that the defect was not caused by misuse including but not limited to faulty maintenance, incorrect installation or faulty repair by the Customer or by alterations carried out without the Supplier's consent in writing or by normal wear and tear or deterioration.
36. Save as stipulated in Clauses 22 - 35, the Supplier shall not be liable for defects. This applies to any loss the defect may cause including loss of production, loss of profit and other indirect loss. These limitations of the Supplier's liability shall not apply if he has been guilty of gross negligence.
37. Any right of the Customer to cancel the contract due to errors pursuant to Art. 23 - 27 OR shall be excluded.

Allocation of liability for damage caused by the product

38. The Supplier shall not be liable for any damage to property caused by the Product after it has been delivered and whilst it is in the possession of the Customer. Nor shall the Supplier be liable for any damage to products manufactured by the Customer, or to products of which the Customer's products form a part.
If the Supplier incurs liability towards any third party for such damage to property as described in the preceding paragraph, the Customer shall indemnify, defend and hold the Supplier harmless.
A claim for damage as described in this Clause is lodged by a third party against one of the parties, the latter party shall forthwith inform the other party thereof in writing.
The limitation of the Supplier's liability in the first paragraph of this Clause shall not apply where the Supplier has been guilty of gross negligence.

Force majeure

39. Either party shall be entitled to suspend performance of his obligations under the contract to the extent that such performance is impeded or made unreasonably onerous by any of the following circumstances: industrial disputes and any other circumstance beyond the control of the parties such as fire, war, extensive military mobilization, insurrection, requisition, seizure, embargo, restrictions in the use of power and defects or delays in deliveries by subcontractors caused by any such circumstance referred to in this Clause.
A circumstance referred to in this Clause whether occurring prior to or after the formation of the contract shall give a right to suspension only if its effect on the performance of the contract could not be foreseen at the time of the formation of the contract.
40. The party claiming to be affected by Force Majeure shall notify the other party in writing without delay on the intervention and on the cessation of such circumstance.
If Force Majeure prevents the Customer from fulfilling his obligations, he shall compensate the Supplier for expenses incurred in securing and protecting the Product.
41. Regardless of what might otherwise follow from these General Conditions, either party shall be entitled to terminate the contract by notice in writing to the other party if performance of the contract is suspended under Clause 39 for more than six months.

Anticipated non-performance

42. Notwithstanding other provisions in these General Conditions regarding suspension, each party shall be entitled to suspend the performance of his obligations under the contract, where it is clear from the circumstance that the other party will not be able to perform his obligations. A party suspending his performance of the contract shall forthwith notify the other party thereof in writing.

Consequential losses / Limitation of Liability

43. Save as otherwise stated in these General Conditions Supplier shall not be liable for any loss of production, loss of profit, loss of use, loss of contracts or punitive damages or for any other consequential or indirect loss. Except for personal injuries negligently caused by Seller and for willful misconduct, Seller's aggregated liability under this contract or otherwise shall be limited to the purchase price.

Choice of Law, Arbitration

44. The contract shall be governed by and construed in accordance with substantive Swiss law without any reference to the United Nation's Convention at the International Sale of Goods.
Any dispute, controversy or claim arising out of or in relation to this contract, including the validity, invalidity, breach or termination thereof, shall be finally resolved by arbitration under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules. For claims in excess of 100,000.00 Euro the number of arbitrators shall be three; for claims up to 100,090.00 Euro the number of arbitrators shall be one. The seat of the arbitration shall be Zurich (Switzerland). The arbitral proceedings shall be conducted in English. The costs of the arbitration including reasonable attorney fees of the other party shall be borne by the unsuccessful party.
The Supplier shall however have the right in lieu of arbitration to bring action in any ordinary court having jurisdiction.