

## **METAALUNIE CONDITIONS**

General delivery and payment conditions of Koninklijke Metaalunie (the Dutch organisation for small and medium-sized enterprises in the metal industry), referred to as 'the METAALUNIE CONDITIONS', formerly referred to as 'the SMECOMA CONDITIONS',

filed with the Court Registry in Rotterdam on 1 January 2008.

Published by Koninklijke Metaalunie, PO Box 2600, 3430 GA Nieuwegein, the Netherlands.

©Koninklijke Metaalunie

### **Article 1: Applicability**

- 1.1. These Terms & Conditions apply to all tenders issued by members of Koninklijke Metaalunie, to all agreements concluded by those members and to all agreements that may result therefrom.
- 1.2. The tendering party/supplier is the Metaalunie member applying these Terms & Conditions, and is referred to as 'the Supplier'. The counterparty is referred to as 'the Client'.
- 1.3. In the event of any conflicts between the substance of the agreement concluded between the Client and the Supplier on the one hand and these Terms & Conditions on the other, the provisions set out in the agreement have precedence.
- 1.4. These Terms & Conditions may only be used by members of Koninklijke Metaalunie.

### **Article 2: Tenders**

- 2.1. No obligations are attached to any tenders.
- 2.2. If the Client supplies the Supplier with data, drawings etc., the Supplier may rely on their accuracy and shall base the tender on that information.
- 2.3. All prices specified in the tender are based on delivery ex works, in accordance with the Incoterms 2000. Prices are stated exclusive of VAT and packing materials.
- 2.4. If the tender is not accepted, the Supplier is entitled to charge the Client for all costs incurred in order to submit the tender.

### **Article 3: Intellectual property rights**

- 3.1. Unless agreed otherwise in writing, the Supplier retains the copyrights and all industrial property rights to all tenders, designed submitted, illustrations, drawings, trial models, programs, etc.
- 3.2. The rights listed in Article 3.1 remain the property of the Supplier, regardless of whether costs have been charged to the Client for their production. The relevant information may not be copied, used or shown to third parties without the Supplier's explicit prior consent. The Client will be liable to pay the Supplier a penalty for each instance of violation of this provision, to the amount of €25,000. This penalty may be demanded in addition to any compensation damages awarded by law.
- 3.3. The Client must return all data provided as meant in Article 3.1 on demand, within the period specified by the Supplier. If this provision is violated, the Client is liable to pay the Supplier a penalty of €1,000 per day. This penalty may be demanded in addition to any compensation damages awarded by law.

### **Article 4: Advice, designs and materials**

- 4.1. The Client cannot derive any rights from advice or information provided by the Supplier that has no direct bearing on the engagement.
- 4.2. The Client is responsible for all drawings, calculations and designs made by or on behalf of the Client, and for the functional suitability of all materials prescribed by or on behalf of the Client.

- 4.3. The Client indemnifies the Supplier for any claims from third parties arising in connection with the use of the drawings, calculations, designs, materials, samples, models, etc. provided by or on behalf of the Client.
- 4.4. The Client may examine (or arrange for the examination of) the materials that the Supplier intends to use before they are processed, at the Client's own expense. Any damages incurred by the Supplier as a result are for the Client's expense.

#### **Article 5: Delivery times**

- 5.1. The delivery deadline and/or work period stated by the Supplier are estimates.
- 5.2. In determining delivery deadlines and/or work periods, the Supplier assumes that the engagement can be carried out under the circumstances as they are known to the Supplier at that moment.
- 5.3. Delivery deadlines and/or work periods do not commence until the Parties have agreed on all commercial and technical details, all necessary data, final and approved drawings, etc. are in the Supplier's possession, the payment or instalment agreed has been received *and* the conditions necessary for the performance of the engagement have been met.
- 5.4.
  - a. In the event of circumstances that are different to those known to the Supplier when the delivery deadline and/or work period were determined, the Supplier may extend the delivery deadline and/or work period by the time that is required in order to perform the engagement under those circumstances. If the work cannot be fitted into the Supplier's work schedule, it will be carried out as soon as the Supplier's schedule permits.
  - b. In the event of contract extras, the delivery deadline and/or work period will be extended by the time required to supply (or arrange for the supply of) the materials and parts necessary for those contract extras and to carry out the contract extras. If the contract extras cannot be fitted into the Supplier's work schedule, they will be carried out as soon as the Supplier's schedule permits.
  - c. In the event that the Supplier's obligations are suspended, the delivery deadline and/or work period will be extended by the duration that the obligations are suspended. If resumption of the work cannot be fitted into the Supplier's work schedule, the work will be carried out as soon as the Supplier's schedule permits.
  - d. In the event of weather conditions that prevent work being carried out, the delivery deadline and/or work period will be extended by the resulting delay.
- 5.5. If the delivery deadline and/or work period agreed is exceeded, that circumstance does not in any instance entitle the Client to compensation for damages, unless agreed in writing.

#### **Article 6: Transfer of risk**

- 6.1. Deliveries are made ex works, in accordance with the Incoterms 2000; the risks attached to the object are transferred at the moment that the Supplier makes the object available to the Client.
- 6.2. The provisions of Article 6.1 notwithstanding, the Client and the Supplier may agree that the Supplier will arrange transport. The risks attached to the storage, loading, transport and unloading remain with the Client in such instances. The Client may take out insurance to cover those risks.
- 6.3. In the event that objects are to be exchanged and the Client continues to use the exchangeable object while awaiting delivery of the new object, the risks attached to the exchangeable object remain with the Client until the moment that possession of the object has been relinquished to the Supplier.

#### **Article 7: Price changes**

- 7.1. The Supplier may charge any increases in cost-determining factors that arise after the agreement is concluded to the Client if the performance of the agreement has not been completed at the moment of the increase.

- 7.2. The Client is obliged to pay the price increases as meant in Article 7.1 at the same time as the principal sum or the next instalment is paid.
- 7.3. If the Client provides goods and the Supplier is prepared to use those goods, the Supplier may charge up to 20% of the market price of the goods provided.

#### **Article 8: Impracticability of the engagement**

- 8.1. The Supplier is entitled to suspend the fulfilment of any obligations if any circumstances that could not be foreseen when the agreement was concluded and that are beyond the Supplier's influence temporarily prevent the fulfilment of those obligations.
- 8.2. Circumstances that the Supplier could not foresee and that are beyond the Supplier's influence are understood to include (but are not limited to) the circumstance that the Supplier's own suppliers and/or subcontractors fail to meet their obligations, or fail to do so in time, the weather, earthquakes, fire, loss or theft of tools, the destruction of materials to be processed, road blocks, strikes or work stoppages and restrictions on import or trade.
- 8.3. The Supplier is no longer entitled to suspend the fulfilment of any obligations when the temporary impossibility of performance has lasted for more than six months. The agreement may not be dissolved until that term has lapsed, and only in respect of those obligations that have not been fulfilled. In that event, the Parties are not entitled to any compensation for damages incurred as a result of that dissolution.

#### **Article 9: Scope of the work**

- 9.1. The Client is responsible for ensuring that all licences, permits, dispensations and other administrative decisions that are needed to carry out the work are obtained in time.
- 9.2. The price for the work does not include the following:
  - a. the costs of earthwork, pile driving, demolition, foundation work, cementing, carpentry, plastering, painting, wallpapering, repairs or other construction work;
  - b. the costs of connecting gas, water, electricity or other infrastructural facilities;
  - c. the costs of preventing or limiting damages to any objects situated on or near the work site;
  - d. the costs of disposing of materials, building materials or waste products;
  - e. hotel and travelling expenses.

#### **Article 10: Changes to the work**

- 10.1. Any changes to the work will result in contract variations in at least the following instances:
  - a. if the design or the specifications change;
  - b. if the information provided by the Client does not match the actual situation;
  - c. in the event of deviation from estimated quantities by more than 10%.
- 10.2. Contract extras will be charged based on the value of the cost-determining factors as at the moment that the contract extra is performed.  
  
Contract deductions will be settled based on the value of the cost-determining factors as at the moment that the agreement was concluded.
- 10.3. If the value of the contract deductions exceeds that of the contract extras, the Supplier is entitled to charge the Client for 10% of the difference upon final settlement. This provision does not apply to any contract deductions based on requests from the Supplier.

## **Article 11: Performance of the work**

- 11.1. The Client is responsible for ensuring that the Supplier can carry out the activities without interruption and at the times agreed, and that the Supplier has access to the necessary facilities when carrying out the activities, such as:
- gas, water and electricity;
  - heating;
  - lockable and dry storage space;
  - all facilities required by the laws and regulations governing working conditions.
- 11.2. The Client is liable for all damages, including those resulting from loss, theft, burning or harm, to objects belonging to the Supplier, the Client and/or any third parties, such as tools and materials intended for use in the work that are located on the site where the activities are carried out or at another agreed location.
- 11.3. If the Client fails to fulfil the obligations as set out in Article 11.1 and 11.2, and that failure causes delays in the performance of the activities, the activities will be carried out as soon as the Client as yet fulfils those obligations and when the Supplier's schedule permits. The Client is liable for all damages that the Supplier incurs as a result of the delay.

## **Article 12: Completion of the work**

- 12.1. The project will be deemed to have been completed when:
- a. the Client has approved the work;
  - b. the Client has put the work into use. If the Client puts part of the work into use, that part will be deemed to have been completed;
  - c. the Supplier has notified the Client in writing that the work is finished and the Client has not communicated, within 14 days after than notification, whether or not the work has been approved;
  - d. the Client does not approve the work on grounds of minor defects or missing parts that can be repaired or provided within 30 days and that do not prevent the work from being put into use.
- 12.2. If the Client does not approve the work, the grounds on which the approval is withheld must be communicated to the Supplier in writing.
- 12.3. If the Client does not approve the work, the Supplier must be given another opportunity to complete the work. The provisions set out in this Article apply anew.
- 12.4. The Client indemnifies the Supplier against all claims from third parties for damages to parts of the work that have not yet been completed that are caused by use of parts of the work that have already been completed.

## **Article 13: Liability**

- 13.1. The Supplier is liable for all damages that the Client incurs that stem directly and exclusively from a shortcoming attributable to the Supplier. However, only those damages for which the Supplier is insured, or should within reason have been insured, qualify for compensation.
- 13.2. If, when the agreement is concluded, it is impossible for the Supplier to take out insurance as meant in Article 13.1, or impossible to do so at reasonable conditions, or if it is subsequently impossible to renew the insurance policy at reasonable conditions, the maximum compensation payable for damages is the amount that the Supplier charged for the agreement in question (exclusive of VAT).
- 13.3. The following damages do not qualify for compensation:
- a. trading losses, including losses caused by delays and loss of profits. The Client should take out insurance to cover such damages, if such is deemed desirable;
  - b. supervision damages, which are understood to include damages caused, during or as a result of the performance of the work, to objects on which work is being carried out to objects situated in the

vicinity of the work site. The Client should take out insurance to cover such damages, if such is deemed desirable;

- c. damages caused by intent or gross negligence on the part of helpers or non-management employees of the Supplier.

13.4. The Supplier is not liable for damages to materials provided by or on behalf of the Client that result from improper processing. At the Client's request, the Supplier will repeat the process, using materials provided by the Client, at the Client's expense.

13.5. The Client indemnifies the Supplier against all claims from third parties for product liability stemming from defects in products provided by the Client to third parties that consisted of or included products and/or materials provided by the Supplier.

#### **Article 14: Guarantees**

14.1. The Supplier guarantees the proper performance of the product or service stipulated for a period of six months after delivery or completion.

14.2. If the product or service stipulated consists of contract work, the Supplier guarantees the soundness of the construction delivered and the materials used, if the Supplier was at liberty to choose those materials, for the period specified in Article 14.1.

If the construction delivered and/or the materials used prove to be unsound, the Supplier will make the necessary repairs or replacement. Those parts that are to be repaired at the Supplier's place of business or are to be replaced by the Supplier must be sent to the Supplier carriage paid. Disassembly and assembly of those parts, plus any hotel and travelling expenses, are for the Client's account.

14.3. If the product or service stipulated (partly) consists of the processing of materials provided by the Client, the Supplier guarantees proper processing for the period specified in Article 14.1.

If any processing proves to have been performed improperly, the Supplier will do one of the following, at the Supplier's discretion:

- repeat the process, in which case the Client must provide new materials, at the Client's own expense;
- repair the shortcoming, in which case the Client must return the materials to the Supplier carriage paid;
- credit the Client for a proportionate part of the invoice.

14.4. If the product or service stipulated consists of the delivery of an object, the Supplier guarantees the soundness of the object delivered for the period specified in Article 14.1.

If the delivery proves to have been defective, the object must be returned to the Supplier carriage paid. The Supplier will then elect either:

- to repair the object;
- to replace the object;
- to credit the Client for a proportionate part of the invoice.

14.5. If the product or service stipulated (partly) consists of the fitting and/or assembling of a delivered object, the Supplier guarantees the soundness of the fitting and/or assembly for the period specified in Article 14.1.

If the fitting and/or assembly prove to be defective, the Supplier will repair the fault. Any hotel and travelling expenses are for the Client's account.

14.6. Factory guarantees apply to those parts for which the Client and the Supplier agree such explicitly and in writing. If the Client has had the opportunity to examine the substance of the factory guarantee, that factory guarantee will replace the guarantees specified in this Article.

- 14.7. In all situations, the Client must allow the Supplier the opportunity to repair any shortcomings and/or repeat the processing.
- 14.8. The Client may only invoke guarantees after all obligations in respect of the Supplier have been fulfilled.
- 14.9. a. No guarantee is given when defects are the result of:
- normal wear and tear;
  - improper use;
  - lack of proper maintenance;
  - fitting, assembly, alterations or repairs by the Client or by third parties.
- b. No guarantee is given for delivered objects that were not new when they were delivered or for objects whose use the Client prescribed or that were provided by or on behalf of the Client.
- c. No guarantee is given on inspections of and/or repairs to objects belonging to the Client.

### **Article 15: Complaints**

The Client may not invoke defects in the product or service unless a written complaint has been submitted to the Supplier within fourteen days after the defect was detected or should, within reason, have been detected.

### **Article 16: Failure to take delivery**

In the event that the Client has not taken delivery of any object after the delivery deadline has passed, those objects will remain available to the Client. Any objects of which the Client has not taken delivery will be stored for the Client's account and risk. The Supplier may at any time invoke the powers granted by Article 6:90 of the Dutch Civil Code.

### **Article 17: Payment**

- 17.1. Payment must be made at the Supplier's place of business or to an account specified by the Supplier.
- 17.2. Unless agreed otherwise, payment must be made using one of the following methods:
- a. for counter sales: cash;
  - b. for payment in instalments:
    - 40% of the total price when the engagement is granted;
    - 50% of the total price when the materials have been delivered or, if the engagement does not include delivery of the materials, upon commencement of the activities;
    - 10% of the total price upon completion;
  - c. in all other instances: within thirty days after the date on the invoice.
- 17.3. The payment conditions specified notwithstanding, the Client is obliged, at the Supplier's request, to provide security for payment, to the Client's satisfaction. Failure on the Client's part to provide such security for payment within the period specified will immediately constitute default. In that event, the Supplier is entitled to dissolve the agreement and recover any damages from the Client.
- 17.4. The Client's right to offset any claims on the Supplier is excluded, except in the event of the Supplier's bankruptcy or if judicial debt rescheduling is applied in respect of the Supplier.
- 17.5. The full claim for payment is payable on demand in the following instances:
- a. if any payment deadline has been exceeded;
  - b. if the Client has been declared bankrupt or requests suspension of payments;
  - c. if any of the Client's assets or claims are seized;
  - d. if the Client (if a company) is dissolved or wound up;
  - e. if the Client (if a natural person) makes a request for judicial debt rescheduling, is placed under guardianship or dies.
- 17.6. If payment has not been made by the payment deadline specified, the Client is immediately liable to pay the Supplier interest. That interest is payable at a rate of 12% per year, or at the statutory rate if that is higher. For the purposes of calculating the interest, partial months are counted as full months.

17.7. If payment has not been made by the payment deadline specified, the Client is immediately liable to pay the Supplier all extrajudicial costs, to a minimum of €75.

The costs are calculated in accordance with the following table:

over the first €3,000	15%
over the excess up to €6,000	10%
over the excess up to €15,000	8%
over the excess up to €60,000	5%
over the excess from €60,000	3%

If the actual extrajudicial costs exceed those based on this formula, the Client is liable to pay the actual costs.

17.8. If judicial proceedings are decided in the Supplier's favour, all costs incurred by the Supplier in connection with those proceedings are for the Client's account.

### **Article 18: Retention of ownership and pledging**

- 18.1. After delivery, the Supplier remains the owner of the objects delivered for as long as:
- the Client fails or will fail in the fulfilment of the obligations stemming from this agreement or any similar agreements;
  - the Client fails or will fail to pay for any work performed or to be performed under such agreements;
  - the Client has not paid any claims arising from non-fulfilment of those agreements, such as compensation for damages, penalties, interest and costs.
- 18.2. As long as any objects are subject to retention of ownership, the Client may not encumber those objects in any way that exceeds the scope of the Client's ordinary activities.
- 18.3. Having invoked retention of ownership, the Supplier may retrieve the objects delivered. The Client must allow the Supplier to enter the place where those objects are located.
- 18.4. If the Supplier cannot invoke retention of ownership because the objects delivered have been subject to confusion, deformation or accession, the Client is obliged to give the newly formed objects in pledge to the Supplier.

### **Article 19: Termination**

If the Client wishes to dissolve the agreement without the Supplier having failed in the performance thereof and if the Supplier so agrees, the agreement will be terminated by mutual consent. In that event, the Supplier is entitled to reimbursement for all financial losses incurred, such as damages, loss of profits and costs.

### **Article 20: Applicable law and competent court**

- 20.1. These Terms & Conditions are governed by the laws of the Netherlands.
- 20.2. The Vienna Sales Convention (C.I.S.G.) does not apply to these Terms & Conditions, nor do any other international regulations whose exclusion is permitted.
- 20.3. Only the Dutch civil court within whose jurisdiction the Supplier's place of business is situated is competent to pass judgment on disputes, unless such is at odds with any mandatory rules of law. The Supplier is entitled to deviate from this jurisdiction clause and apply the statutory rules for jurisdiction.
- 20.4. The Parties may agree on another form of dispute settlement, such as arbitration or mediation.

These conditions are a full translation of the Dutch version of the 'METAALUNIEVOORWAARDEN' as deposited with the Registry of the District Court in Rotterdam on 1 January 2008. Explanation and interpretation of the text of these Conditions shall be based on the Dutch text.