

FAM Magdeburger Förderanlagen und Baumaschinen GmbH

General Terms and Conditions of Sale and Delivery

I. Scope

These General Terms and Conditions of Sale and Delivery of FAM Magdeburger Förderanlagen und Baumaschinen GmbH and its affiliated companies (hereinafter referred to as "Supplier") shall apply to all business relations with our customers (hereinafter referred to as "Buyer"). The General Terms and Conditions shall not apply if Buyer is a consumer.

II. General

1. All contracts between the Supplier and the Buyer regarding sales and / or deliveries as well as services performed by the Supplier (hereinafter referred to as "delivery items") shall be subject to these General Terms and Conditions of Sale and Delivery. Unless expressly recognized by Supplier, any deviating, conflicting or additional general terms and conditions of business of Buyer - even if known - shall not be considered part of the contract and shall therefore not apply.

All settlements and agreements shall become binding for Supplier only after Supplier has confirmed them in writing ("Textform" according to Art. 126b of the German Civil Code), for example, by a confirmation order. To become valid, any deviations from these General Terms and Conditions shall require Supplier's express written confirmation.

Any objections in regards to Supplier's confirmation order must be lodged within one (1) week after receipt. After one (1) week Supplier's confirmation order is deemed to be accepted by Buyer.

Offers by Supplier shall be considered non-binding (invitatio ad offerendum). Dimensions, weight and performance data as well as figures and sketches shall be understood as non-binding approximates, unless these data have been expressly agreed between the parties. Orders by the Buyer shall be deemed a binding offer to enter into a contract which Supplier may accept within a reasonable time of four (4) weeks by sending Supplier's confirmation order.

2. The delivery items are listed exhaustively in Supplier's confirmation order and – if applicable – any amendments thereto. Technical changes or improvements of the delivery items by Supplier are permissible if they are reasonable.
3. Unless explicitly agreed in Supplier's confirmation order, Supplier does not assume any guarantees whatsoever.
4. Supplier reserves its rights of title and copyrights to samples, quotations, drawings and any similar information in physical and intangible form, including electronic form. These must not be reproduced or made accessible to any third party without explicit prior written approval of Supplier.

III. Prices and Terms of Payment

1. Unless otherwise agreed, all prices shall be "ex works" (EXW Incoterms 2010), including loading at Supplier's premises as specified in Supplier's confirmation order, however,

excluding packaging and unloading. Unless agreed otherwise the prices are net prices in EURO as agreed in Supplier's confirmation order or as stipulated in Supplier's latest price lists. Value-added tax at the relevant statutory percentage on due date of the invoice will be added.

2. If "carriage paid" (CPT Incoterms 2010) is agreed the prices refer to regular and unobstructed transport on railway lines, roads or waterways. Supplier decides on the shipping conditions, in particular but not limited to the carrier, the transport route and the packaging. If free delivery has been agreed, Buyer shall prepay the freight. Crediting shall be made after receipt of the consignment note. Follow-up charges and other shipping expenses shall be borne by Buyer, in particular dead-freight expenses, tolls or other charges to be paid to the state etc., as far as Supplier is charged with such expenses.
3. Prices do not include insurance, installation / implementation and introduction of the delivery items.
4. Unless otherwise agreed, payment is to be made without any deduction by bank transfer to the account of Supplier, except for the freight charges specified in Clause III.2 in case of a free delivery. Payment shall be made as follows: 1/3 down payment no later than eight (8) days after receipt of Supplier's confirmation order; 1/3 as soon as Buyer has been notified that the main parts are ready for dispatch; the remaining balance within one (1) month after transfer of risk., or, in case that Supplier has to accept the delivery items, one (1) month after acceptance, Bills of exchange and cheques shall only be accepted on the basis of special agreements and only on account of payment.
5. Buyer shall only be entitled to the right to withhold payment to the extent that his counterclaims are undisputed or result from final and legally binding judicial decision of a court.
6. Buyer shall only be entitled to the right to set off claims with counterclaims resulting from other legal relationships if such counterclaims are undisputed or result from final and legally binding decision of a court.
7. It is considered a default in payment if Buyer does not pay fourteen (14) days after receipt of invoice. An additional reminder is not required.
8. In the case of default in payment Supplier shall be entitled to charge the Buyer interest and commission according to the relevant applicable bank rates for short-term loans, however, at least damages in the amount of nine (9) percentage points above the base interest rate (according to Art. 288 BGB, German Civil Code).

IV. Time of delivery and default in delivery

1. The time of delivery shall be set forth in the agreements entered between the contracting parties, for example in Supplier's confirmation order. Unless expressly agreed otherwise, any delivery dates are non-binding.
2. Observance of the delivery time by Supplier presumes that all commercial and technical issues between the contracting parties are clarified and that Buyer has fulfilled all obligations to cooperate with Supplier, in particular by providing all necessary official certifications or permits or by making a down payment. If this is not the case, the time of delivery shall be extended accordingly. This Clause IV.2 shall not apply as far as Supplier is responsible for said delay.
3. Any binding and non-binding delivery dates are subject to appropriate and timely delivery by Supplier's subcontractors and suppliers. Supplier shall inform Buyer of any anticipated delays as soon as possible. Supplier shall not be liable for any delays caused by its subcontractors or suppliers. Release from the obligation to observe the delivery time shall not be granted if Supplier has culpably caused his own non-delivery.
4. The delivery time shall be deemed observed if the delivery item has left the works of Supplier or its readiness for shipment has been notified prior to the expiry of the agreed delivery time. Insofar as delivery item(s) are required to undergo acceptance by Buyer, the agreed date of acceptance shall be decisive - except in cases of justified refusal of acceptance - or, alternatively, notification of readiness for acceptance.
5. In case delivery or acceptance are delayed for reasons that are due to Buyer, the costs and damages caused by such delay (including costs for appropriate storage of the delivery items of at least 0.5% of the outstanding price) shall be billed to Buyer, beginning one (1) month after (i) notification of readiness for shipment or (ii) acceptance / notification of readiness of acceptance. Supplier may, after setting an appropriate period, dispose of the delivery items.

6. In the event that non-observance of the delivery time is due to force majeure, industrial action or other events that are beyond Supplier's control (hereinafter "disruption of operations without fault"), the time of delivery shall be extended accordingly. Supplier shall inform Buyer of the beginning and the end of such event as soon as possible. Supplier is not liable for any delays caused by a disruption of operations without fault, even if such a disruption appears at a time when Supplier is already (culpably) in default.
7. In case of a disruption of operations without fault, which makes an amendment of the underlying agreement(s) necessary, Supplier shall have the right to rescind the contract if the parties were not able to agree on such an amendment within a reasonable time.
8. In case of Supplier's inability to perform Buyer shall remain obliged to pay if such impossibility or inability to perform occurs during a default on acceptance or Buyer is solely or predominantly responsible for such circumstances. In the event that Supplier is culpably in default and such delay causes damage to Buyer, the latter shall be entitled to claim compensation under the conditions laid down in Section X.2.

V. Transfer of risk, acceptance

1. The risk shall transfer to Buyer once the delivery item has left Supplier's works, even if partial deliveries are made in regard to the respective delivery items, or if Supplier has taken on additional services, e.g. freight costs or delivery and installation/erection.
2. In the event that shipment is delayed or not performed due to circumstances beyond the responsibility of Supplier, the risk will transfer to Buyer from the date of notification of readiness for shipment. Notwithstanding Clause VII.2, Supplier undertakes to take out insurance coverage for the item(s) as requested by Buyer at the latter's expense.
3. To the extent that the delivery items are subject to acceptance (Art. 640 of the German Civil Code), acceptance has to be performed immediately after delivery but not before Buyer has had reasonable time to examine the delivery items. Buyer shall not be entitled to reject acceptance in case of a minor/non-substantial defect. In case that Buyer refuses delivery the delivery items are deemed to be accepted one (1) week after notification of readiness of acceptance. In case that Buyer refuses acceptance (also in case Buyer neither accepts nor objects to the delivery items), the delivery items are deemed to be accepted one (1) week after delivery.
4. Partial deliveries shall be allowed, provided they are reasonable.
5. The Buyer is responsible for compliance with any regulations concerning import, transport, storage and use of the goods. Corresponding documents and information as well as any necessary permits must be made available to Supplier in good time before shipment.

VI. Lack of adequate financial capacity

If it becomes apparent after conclusion of the contract that the claim to the purchase price is in jeopardy due to Buyer's lack of adequate financial means (e.g. due to an application to open insolvency proceedings or if Buyer does not meet agreed payment due dates), Supplier may hold back the delivery items until full payment is made or until Buyer has supplied sufficient security. Further, Supplier shall be entitled to refuse performance based on the statutory regulations and, if applicable, to rescind the contract after having set a deadline. The statutory regulations relating to the lack of necessity to set a deadline shall remain unaffected.

VII. Retention of title

1. Supplier reserves his property right(s) on all delivery items, especially supplied products and equipment, including equipment parts, until (i) receipt of the full payment of the invoiced amount and other ancillary costs, if any, resulting from the contract and until (ii) any and all of Supplier's claims resulting from any other business relation with Buyer or Buyer's affiliates have been fulfilled.
2. If Buyer processes or reshapes the delivery items (hereinafter "processed item"), this is always done for the Supplier as manufacturer. In this case, the buyer's expectant right continues with the processed item. If the (co-)ownership of Supplier ceases to exist, the Buyer's ownership of the processed item shall pass to Supplier in proportion of the value of

Supplier's entire claim as specified in Clause VII.1 Sentence 1 to the value of the processed item. The Buyer stores the property of Supplier free of charge.

3. Buyer shall not be entitled to sell nor pledge nor assign the delivery item(s) as security.

In case the parties agreed on an extended retention of title, this applies under the following conditions:

- Buyer is entitled to sell the delivery items in the normal course of business only and only if Buyer is not in default of payment.
 - Buyer hereby assigns any claims arising from the resale of the delivery items to Supplier up to the amount of the final invoice agreed with Supplier (including value added tax). This assignment applies regardless of whether the delivery item was processed before resale.
 - Buyer shall be authorised to collect the claim for the Supplier. Supplier's right to collect the claim remains unaffected. However, Supplier will not collect the claim as long as Buyer meets his payment obligations, in particular as long as Buyer is not in default of payment and no application for opening insolvency proceedings has been filed.
4. If retention of title is not permitted by the law of the state in which the delivery item is located, Supplier shall be entitled to any equivalent right of the respective state to secure its ownership of the delivery items. Buyer shall assist Supplier to take all necessary measures to secure its ownership or equivalent rights (such as liens).
 5. Upon requests of Buyer, Supplier shall be obliged to release securities insofar as their value exceeds the value of Supplier's outstanding claims against Buyer by more than 10 %, whereby Supplier may select the securities to be released.
 6. Until title has passed to Buyer, Buyer is obliged to handle the delivery items with good care. Supplier shall be entitled to insure the delivery item(s) at Buyer's expense against theft, breakage, fire, water and other damage, unless Buyer has provided proof that Buyer has insured the delivery items accordingly. If maintenance and inspection work has to be carried out, Buyer has to carry it out in good time at his own expense. In case of seizure, confiscation or other dispositions or interventions by third parties, Buyer shall notify Supplier immediately in writing or via e-mail. Buyer shall indemnify Supplier from any costs arising from such seizure or intervention, in particular costs resulting from a claim under Art. 771 of the German Code of Civil Procedure.
 7. In the event of any violation of the contract by Buyer, in particular of this Clause VII or in case of a delayed payment, Supplier shall, subsequent to submitting a reminder, be entitled to take back the delivery item(s) and Buyer shall surrender it. Any shipping costs (including packaging and insurance) have to be borne by Buyer.
 8. Notwithstanding Clause VII.7, based on the retention of title, Supplier may only claim possession of the delivery item(s) after Supplier has rescinded the contract.
 9. The application to open insolvency proceedings (or any other comparable applications or the opening of comparable proceedings) in respect of the Buyer's assets shall entitle Supplier to rescind the contract and demand the immediate return of the delivery item(s).

VIII. Warranty claims

Notwithstanding the limitation of liability in Clause X., Supplier shall be liable for defects of quality and deficiencies in title only as follows:

Defects of quality

1. At Supplier's option all parts that are found defective due to circumstances that occurred before transfer of risk shall be repaired or replaced free from defects. Supplier shall be immediately informed in writing upon detection of such defects. Replaced parts shall become the property of Supplier.
2. After coordination with Supplier, Buyer shall allow for sufficient time and opportunity for Supplier to perform the repair and deliver replacement(s) as deemed necessary; otherwise Supplier shall be exempted from liability for any resulting consequences.

3. Supplier reserves the right to rectify at least two (2) times. If rectification fails, Buyer is entitled to rescind or to reduce the price. Rescission is not permitted in case of a minor defect.
4. Only in urgent cases of potential hazards to operational safety or to avert disproportionate damage of which Supplier shall be advised immediately, Buyer shall be entitled to remedy the defect on his own or have such defect remedied by third parties and claim from Supplier reimbursement of the reasonable expenses incurred.
5. Provided such a complaint is justified, Supplier shall bear the costs incurred for repair or delivery of replacement(s), including the cost of shipment. In addition, Supplier shall bear the expenses incurred for the subsequent performance of the contract, in particular costs of transportation, travel expenses, labour and material costs, provided this will not cause disproportional costs.
6. Within the scope of statutory regulations, Buyer shall have the right to rescind the contract if in the case of a material deficiency Supplier - taking into account exceptional cases as defined by law - let pass a reasonable respite granted to Supplier for repair or substitute delivery without taking any action. In case of minor defects, Buyer shall only be entitled to reduce the contract price. Any further claims shall be subject to the conditions laid down in Section X.2 of these Terms and Conditions.

Deficiencies in title

9. If the use of the delivery item(s) results in a violation of industrial property rights or copyrights in Germany, and therefore is impaired or prohibited by a final and binding decision of a court, Supplier shall - at his expense - essentially procure for Buyer the right to continue using the delivery item(s) or modify it in a reasonable manner for Buyer so that the violation of an industrial property right is remedied.
If this is impossible under economically reasonable conditions or within a reasonable period of time, Buyer shall be entitled to rescind the contract. Under these conditions Supplier shall also be entitled to rescind the contract.
Furthermore, Supplier shall indemnify Buyer against all undisputed claims by the relevant holders of the property rights or claims resulting from final and absolute findings of a court.
10. The obligations of Supplier defined in Section VIII. 9 shall be deemed final in cases of infringement of property rights or copyrights - subject to Section X.2.
Such obligations shall exist only if
 - o Buyer informs Supplier immediately of any asserted violations of property rights or copyrights in writing;
 - o Buyer does not recognize alleged violations;
 - o Buyer assists Supplier in a reasonable manner in averting any asserted claims or enables Supplier to perform modification measures pursuant to Section VIII.9;
 - o Buyer does not enter into court proceedings, settlements and alike singlehandedly – all defence measures, including out-of-court settlements, are reserved to Supplier;
 - o Buyer suspends the use of the delivery items for reasons of mitigation or other severe reasons, without informing the third party that the cessation of use does not entail an acknowledgment of the infringement of property rights;
 - o the deficiency in title is not due to an instruction given by Buyer and
 - o the infringement of rights has not been caused by the fact that Buyer has carried out an unauthorized modification to the delivery item(s) or has used it in a manner not in accordance with the contract.

IX. Buyer's complaints

1. To preserve any claims for defects, Buyer shall be obliged to carefully examine the delivery item(s) immediately after receipt. If a defect is discovered during inspection or at a later time, Supplier shall be notified immediately in writing. A notification shall be deemed to have been made immediately, if it is made within a period of two (2) weeks after discovery.
2. Irrespective of these duties of inspection and lodging complaints, Buyer must notify Supplier in writing of any obvious defects (including false and short delivery) within two (2) weeks after delivery.
3. If Buyer does not notify Supplier in due time and form, the delivery item is deemed accepted and any claims for defects expire. Incomplete or too general reports will not be accepted to the extent that, if Supplier does not have complete documentation at the expiry of the limitation

period, any claims for defects will expire. The timeliness of the notification depends on the time of receipt with Supplier.

X. Supplier's liability, Disclaimer of liability

1. No liability is accepted in the following cases:
 - Unsuitable or improper use, incorrect assembly or start-up by Buyer or third parties, normal wear and tear, faulty or negligent handling, improper maintenance, unsuitable operating materials, unsuitable base/subsoil, chemical, electrochemical or electrical influences - unless these are the fault of Supplier.
 - If and insofar as the delivery item cannot be imported into the country of destination or operated there due to legal or official regulations (it is the Buyer's obligation to check whether the delivery items can be imported into the country of his choice and be operated there).
 - When Buyer or a third party performs inappropriate repair measures, Supplier shall not be liable for any consequences resulting therefrom. The same shall apply to modifications of the delivery item(s) performed without prior written approval by Supplier.
2. Notwithstanding Clause X.1 and unless otherwise specified in these General Terms and Conditions of Sale and Delivery, Supplier shall be liable as follows (Clause X.3 to X.6):
3. Supplier shall be liable for any damage - on whatever legal basis - in the case of intent and gross negligence. In case of minor negligence, the Supplier shall only be liable for:
 - a) Injury to life and limb, physical injury or damage to health;
 - b) Damage resulting from any infringement of an essential contractual duty (obligation whose fulfilment is a precondition for the proper performance of the contract and that the contractual partner can normally trust and expect to be complied with). However, in this case liability shall be limited to compensation for the foreseeable damage that typically occurs.
4. The limitations of liability resulting from X.3 shall not apply if Supplier has maliciously concealed a defect. The same shall apply to Buyer's claims according to the Product Liability Act.
5. Any further claims of Buyer, e.g. for loss of production or loss of expected profit, shall be excluded.
6. Buyer may only rescind or terminate the contract in case of an infringement of duties for which Supplier is responsible.

XI. Period of limitation

1. The general period of limitation for claims arising from defects of quality and deficiencies in title shall expire twelve (12) months from the date of delivery. If acceptance has been agreed, limitation commences upon acceptance.
2. However, provided the subject matter of the contract is a building structure or a delivery item which has been used - according to its customary usage (building material) - for such structure and has caused the building's defectiveness, the statutory period of limitation shall be five (5) years from delivery. This shall not affect the statutory special regulation in case of malicious intent.
3. The periods of limitation under the German Product Liability Act shall remain unaffected.
4. The limitation period is not renewed or extended if Supplier remedies a defect. In this case the period of limitation for claims for defects for spare parts expires twelve (12) months after transfer of risk.

XII. Software use

Provided software is included in the scope of delivery (hereinafter "Software"), Buyer shall be granted a non-exclusive and non-transferable right of use to the supplied Software including the pertaining documentation. Such Software shall be permitted for use in the defined delivery item(s) only. Use of such Software in more than one (1) system shall not be allowed.

Buyer may transfer the right to use the Software only in case of an legitimate interest, in particular if

Buyer resells the respective delivery items to a third party. In such case Buyer has to ensure that the third party complies with this Clause XII. Buyer undertakes not to remove any manufacturer's data - in particular copyright notices - or modify such information without Supplier's express prior approval. All other rights to the Software and the pertaining documentation, including copies, shall remain with Supplier or the Software supplier. Granting of sublicenses is not permitted. Supplier is not liable for any damages that occur because Buyer fails to update the Software.

XIII. Confidentiality

1. The contracting parties undertake to keep confidential information of the other contracting party secret.
2. Confidential information is information that is either expressly designated as such or where the circumstances indicate that it is confidential information.
3. Supplier may disclose confidential information to third parties insofar as this is necessary in connection with the performance of the contract. In this case, Supplier will oblige the third party to secrecy in accordance with its own obligation.
4. Neither party will make the received confidential information subject of patent applications, nor use them against any application for industrial property rights by the other party.
5. The confidentiality requirement shall not apply to such "confidential" information (i) that is generally known, (ii) that demonstrably has been known to the receiving party beforehand, (iii) that demonstrably has been independently developed or lawfully obtained by the other party, (iv) that became publicly available without a breach of either party's duty of confidentiality, or (v) that has to be disclosed because of an order of a court or another relevant authorities or because disclosure is required by law. Any obligation of confidentiality expires three years after completion of the contract.

XIV. Compliance

Buyer takes all necessary and appropriate measures to guarantee compliance with all applicable laws, regulations and rules, including (but not limited to) all child protection and anti-corruption laws and regulations. Buyer, its board members, employees, and/or agents have not, and will not directly or indirectly engage in any prohibited activity in connection with any agreements made between Supplier and Buyer. Prohibited activities include in particular: (i) making contributions or giving benefits or advantages to Supplier, its board members, employees, and/or agents (e.g. money, gifts, invitations of a predominantly non-operational nature, such as sporting events, concerts, cultural events), as well as (ii) receiving such contributions, benefits or advantages. Any violation of this Clause XIV. entitles Supplier to rescind or terminate the contract without notice.

XV. Applicable law, Arbitration

1. All legal relations between Supplier and Buyer shall be governed by the law of the Federal Republic of Germany whereby the United Nations Convention on Contracts for the International Sale of Goods (CISG) is expressly and entirely excluded.
2. All disputes arising out of or in connection with the contract between Supplier and Buyer, or its validity shall be finally settled in accordance with the Arbitration Rules of the German Arbitration Institute (DIS) without recourse to the ordinary courts of law.
3. The arbitral tribunal shall be comprised of three members.
4. The seat of the arbitration is Leipzig, Germany.
5. The language of the arbitration shall be English, whereby exhibits may also be presented in German without translation, in case all arbitrators are capable of the German language.

XVI. Severability clause

If any provision of these General Terms and Conditions of Sale and Delivery is or becomes invalid in full or in part, this shall not affect the validity or enforceability of the remaining provisions.