



EMSA GmbH  
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## **General Terms and Conditions of Purchase of EMSA GmbH Version 01.11.2014**

### **1. General information - scope of application**

Our terms and conditions of purchase apply to the exclusion of all others, and shall apply to entrepreneurs, legal persons under public law and special funds under public law, including for all future transactions without repeated explicit reference, even if the delivery has been accepted without reservation. We do not accept any terms and conditions of the Supplier which conflict with or differ from our terms and conditions of purchase unless we provide our express written consent to their validity. Our terms and conditions of purchase shall also apply where we accept the Supplier's delivery without reservation in the knowledge of the existence of the Supplier's terms and conditions which conflict with or differ from our terms and conditions of purchase.

### **2. Offer - offer documents - conclusion of contract**

2.1. Our orders are always subject to change. Immediately upon receiving an order, the Supplier is required to submit a written and legally binding offer in conformity with and with the same content as the purchase order. A contract shall only be formed once we confirm this purchase in writing (order confirmation) within 14 days of receiving the offer.

2.2. We may only request changes to the delivery item after conclusion of the contract if this is reasonable for the Supplier. In the event of such contractual changes, due account of the impact on both parties, in particular with regard to additional or reduced costs, product quality and delivery times, must be taken.

2.3. Verbal arrangements, even with our employees, shall only be valid if confirmed in writing by us.

2.4. Emsa shall retain ownership rights and copyrights as well as all filing rights for special rights over images, drawings, calculations, implementation instructions, product descriptions and other documents submitted by Emsa or developed



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jointly. They are subject to the confidentiality obligation under this contract. The Supplier undertakes to use all the information and documents received only for the performance of this contract and only for Emsa, and not to use them for his own or other purposes and not to disclose them to third parties unless we consent to this in writing. The same applies to substances and materials as well as to tools, templates, models and other objects which we provide to the Supplier for the production of contractual products. Such items must be stored separately at the Supplier's expense and must be adequately insured against destruction and loss at the replacement value, and where an insured event occurs the claims are herewith assigned to us.

2.5. The Supplier shall ensure that the goods delivered are in accordance with the sample and that they correspond exactly to the contractual agreements / specifications such as images, colour specifications, dimensions, weights, brochure details and other technical data, and that they are suitable for their intended use. The qualities and other specifications contained in the order confirmation constitute express warranties. Partial deliveries and services are only permitted subject to a written agreement to that effect.

2.6. Full performance of the contract includes the submission of long-term Suppliers' declarations, certificates of origin, operating instructions, maintenance instructions and other technical documentation. Where a manufacturer's declaration or declaration of conformity (CE) is required, the Supplier must issue these and provide these immediately upon request at his own expense.

2.7. The Supplier shall ensure that all deliveries represent the current state of the art and comply with the legal provisions applicable in the delivery area and with the regulations and directives of authorities, employer's liability insurance associations and professional associations, in particular the applicable health and food law provisions. During the supply contract, the Supplier must continuously acquire the necessary knowledge to fulfil this obligation and, if required, adapt the contractual products to current provisions in agreement with us.

2.8. If the Supplier receives indications in relation to the goods, regardless of the reason, which raise doubts as to the marketability of the goods, then he must immediately inform us in full. If the Supplier is not the manufacturer, he guarantees that this obligation shall be passed on to and complied with by his upstream Suppliers up to the manufacturer.

2.9. We expressly reject any reservation on the availability of supplies and raw



materials made by the Supplier, including in recurring orders. The Supplier shall bear the procurement risk for his services and the risk of accidental loss, destruction or deterioration until we accept the delivery.

2.10. The delivery goods shall be transferred to us unconditionally and without consideration of the payment of the purchase price. We are entitled to further process and resell and use/operate the contractual item without the right to retention of title.

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### **3. Prices - payment terms / declarations on origin**

3.1. The price shown in the order confirmation is binding. In the absence of a written agreement to the contrary, the price includes carriage paid delivery, including all ancillary costs such as customs duties, additional customs costs, transportation insurance etc. and packaging. In all other respects, Incoterms 2010 shall apply. In the absence of an agreement to the contrary, DDP plus transportation insurance costs is agreed.

3.2. Statutory value added tax shall be shown separately where this is applicable.

3.3. We can only process invoices if, in accordance with the instructions in our order and order confirmation, contain the order number listed therein. The Supplier shall be responsible for all consequences of non-compliance with this obligation, unless he proves he was not responsible.

3.4. Unless agreed otherwise in writing, we shall pay the full purchase price within 30 days of receiving the invoice, with a 3% discount on condition that the delivery is made in accordance with the contract.

3.5. In the event of continuous obligations, we expressly reject any price increase claims of the Supplier, including when the period between the conclusion of the contract and delivery is longer than 4 months.

3.6. We may also exercise offsetting and retention rights against disputed claims.

3.7. The Supplier undertakes to allow the customs authorities to examine the proof of origin and to provide the necessary information as well as any certificates required, at his own expense.



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#### 4. Delivery time

4.1. The delivery time stated in the order confirmation shall always be binding and must be met precisely. A delivery time marked as fixed shall constitute a fixed date as defined under commercial law. Delivery times / deadlines shall only be met if the contractual delivery arrives and is delivered in full at the destination agreed in the contract.

4.2. The Supplier is obliged to immediately inform us in writing should circumstances occur or become known to him which mean that the delivery time cannot be adhered to.

4.3. In the event of a default on delivery, we shall be entitled to full legal claims. We shall in particular be entitled, should a reasonable period have expired without result, to demand compensation in lieu of performance and cancellation. In the event that we claim compensation the Supplier may establish that he is not responsible for the breach of contract.

4.4. Notwithstanding the legal rights and claims in the event of default on delivery, Emsa shall be entitled to claim, in addition to performance, a contractual penalty of 1.5% of the order value per commenced calendar week from the time of default, but no more than 10% of the gross total order value of the delivery/service as a minimum amount of compensation. We may claim the contractual penalty until the time of final payment.

4.5. Should our production be restricted or suspended or should our operational procedures be disrupted due to unforeseeable events such as a strike, lockout, business disruptions etc., we shall be entitled to extend the period of acceptance accordingly, free of charge.

4.6. We expressly reject any limitation of compensation claims, regardless of whether the Supplier is responsible for the breach of duty or not. This objection extends to any liability disclaimer / liability restriction of the Supplier for all possible breaches of duty.

4.7. If the Supplier is not able to deliver/perform due to force majeure and therefore does not meet the contractually agreed delivery/commissioning/acceptance date or the delivery time set following a warning, we shall in such cases of hindrances to performance be entitled to withdraw from the contract entirely or partially without compensation, if and to the extent that a replacement purchase is necessary due to time constraints or the failure to meet the deadline leads to a full or partial lapse of the purchasing requirement.



4.8. We reject all liability disclaimers or liability restrictions, such as in the form of an embargo clause for hindrances to performance.

4.9. The Supplier may only make use of a right of retention over deliveries or services when the claim is undisputed, has been upheld by judgement or entails the reciprocity of the contractual claims.

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## **5. Transfer of risk - documentation**

5.1. The risk associated with the delivery shall only be transferred to us upon delivery to the destination agreed by contract and after unloading of the goods. In the absence of an agreement to the contrary, the place of delivery shall always be the place of performance, see section 12.2.

5.2. The Supplier is obliged to state our order number and our identifier exactly on all shipping documents and delivery notes; if he fails to do so, we shall not be responsible for any processing delays.

5.3. The Supplier must insure the contractual goods for transportation in our favour and where an insured event occurs the insurance claim is herewith irrevocably assigned to us.

5.4. Our packaging regulations must be complied with; a single package may not exceed 25kg. The stacking height for Euro pallets may not exceed 1.07 m. Goods with a danger classification must be marked. A dispatch advice must be sent to us by fax at least 24 hours before dispatch of every consignment.

5.5. Unless agreed otherwise, we shall assume responsibility for the disposal of transportation packaging for the Supplier, whereby the Supplier shall reimburse us the disposal costs. When we return the reusable packaging to the Supplier freight paid, we may claim a refund of the value of the packaging. We are entitled to offset this refund claim against outstanding payment claims.

## **6. Inspection - liability for defects - limitation period**

6.1. In order to comply with the agreed quality, we shall be entitled to visit the production site of the Supplier during regular working hours following advance notification of the intended visit, in order to conduct a corresponding quality audit. In other respects and at any time in the event of a new product launch, we may exercise this right when there are justified doubts as to the compliance with the necessary quality assu-



rance measures, in particular if defects / deviations occur. If the Supplier has himself acquired the defective goods or parts thereof from a third party, he must designate the upstream Supplier to us and herewith assigns us the corresponding rights of recourse as a precautionary measure. We shall not, however, be obliged to take recourse.

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6.2. The duty to notify defects defined under commercial law is expressly waived as the Supplier is bound to a 100% outgoing inspection. Our obligation only extends to notifying visible transportation damage to packaged goods within 14 days of delivery.

6.3. We also retain full statutory rights in case of defects; we are nevertheless entitled to claim the remedy of defects or a replacement delivery, at our discretion. In this case, the Supplier shall be obliged to bear all the necessary expenses for the purposes of remedying the defect or delivering a new item. We expressly reserve our right to compensation, in particular to compensation in lieu of performance.

6.4. The limitation period for all warranty rights is 36 months starting from the transfer of risk / commissioning / acceptance. For parts that have been improved or delivered new as part of a subsequent delivery, the period of limitation shall recommence where it concerns significant defects, but shall not run longer than 42 months. For insignificant defects that are easily repairable, the warranty period shall be extended by the duration of improvement works from the notification of the defect until the defect is remedied, plus a period of 3 months.

## **7. Product liability - indemnification - liability insurance cover**

7.1. Insofar as the Supplier is responsible for damage to a product, he shall be obliged to indemnify use from third party compensation claims on first demand as though the cause of such damage lies within the Supplier's control and organisation and provided that he is liable himself in relation to third parties. The Supplier must reimburse us any expenses associated with defending such claims.

7.2. Within the scope of his liability for losses as defined by section 7.1, the Supplier is also obliged to reimburse any expenses pursuant to sections 683 and 670 of the German Civil Code or pursuant to sections 830, 840 and 426 of the German Civil Code, which result in connection with a product recall conducted by us. We shall inform the Supplier, as far as possible and reasonable, on the content and scope of the product recall to be conducted and shall give him the opportunity to comment. Other statutory claims remain unaffected.



7.3. The Supplier undertakes to maintain a product liability insurance policy with adequate coverage per personal injury/material damage lump sum; if we are entitled to further compensation claims, these shall remain unaffected. We are entitled to refuse to accept the delivery if the Supplier does not disclose corresponding proof of insurance upon timely request.

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## **8. Intellectual property rights**

8.1. The Supplier shall ensure that no third-party rights in Germany or abroad are violated in connection with his deliveries and services.

8.2. Should he violate this obligation and third-party claims are made against us in this respect, the Supplier shall be obliged to indemnify us against these claims upon first demand; we are not entitled without the consent of the Supplier to enter into any agreement with the third party or in particular to enter into a settlement.

8.3. The Supplier's obligation to indemnify shall apply to all expenses that we are obliged to incur as a result of or in connection with the third-party claim.

8.4. The period of limitation of these claims is 3 years commencing from the time a third-party claim is made against us within the period of limitation on the grounds of such violations.

## **9. Retention of title - provision - tools - confidentiality**

9.1. Title to all deliveries and services of the Supplier shall pass to us upon receipt/acceptance. The Supplier guarantees that as the owner he has full disposal rights over his goods including packaging.

9.2. Insofar as we provide parts to the Supplier, we reserve title thereto. Processing or transformation by the Supplier shall be done on our behalf. If our goods subject to retention of title are processed with other items to which we have no ownership rights, we shall acquire (co-)ownership of the new article at the proportionate value of our article (purchase price plus VAT) in relation to the other processed objects at the point of processing.

9.3. If the article we provide is irreversibly incorporated with other items to which we have no ownership rights, we acquire co-ownership of the new article at the proportionate value of the articles falling under the retention of title (purchase price plus VAT)



in relation to the other incorporated objects at the point of incorporation. Should the items be incorporated in such a way that the Supplier's article is considered to be the main article, it is agreed that the Supplier shall transfer proportionate co-ownership to us; the Supplier shall hold the sole ownership or co-ownership on our behalf.

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9.4. We reserve ownership of tools, and the Supplier shall use such tools exclusively for manufacturing the goods we have ordered. The Supplier is obliged to insure our tools at replacement value at his own expense against all risks, particularly against damage caused by fire, water and theft. The Supplier herewith assigns all compensation claims from said insurance to us; we herewith accept the assignment. The Supplier is obliged to perform any required service and inspection work on our tools as well as all maintenance and repair work at his own expense and at the appropriate time. The Supplier must inform us of all malfunctions in writing; if the Supplier culpably neglects to do so, compensation claims shall remain unaffected. The Supplier must return the tool to us immediately upon first request without any right of retention.

9.5. The manufacture of the tool by the Supplier or on his behalf shall always be done on our behalf. The Supplier shall therefore transfer ownership, co-ownership and entitlement rights as well as any other rights to the tools to us. We shall acquire any rights created at a later time from the time of their origination. All the above transfers of rights shall take place without further action and without requiring any additional deed of transfer. The transfer of ownership shall be substituted by the Supplier holding the tool on our behalf carefully and without charge.

9.6. The Supplier is obliged to keep all images, drawings, calculations and other documents and information, both in connection with tools provided, with tools manufactured by him on our behalf and with the products to be produced, strictly confidential. These may only be disclosed to third parties with our express written consent. The confidentiality obligation shall continue to apply after implementation of this contract; it shall expire when and to the extent that the manufacturing know-how contained in the images, drawings, calculations and other documents has become public knowledge. In cases where the Supplier manufactures tools according to our technical specifications on the basis of our own, not publicly known know-how and uses these to produce and supply us with parts, the Supplier expressly undertakes to refrain from competing with us by manufacturing products with the same and/or similar benefits, or by having these manufactured or contributing to such parts being manufactured. For every infringement, a contractual penalty amounting to the annual net income that is generated or that could be generated using the anti-competition practices.



9.7. To the extent our security rights as defined in section 9.1 and/or 9.2 exceed the purchase price of all our goods subject to retention of title not yet paid for by more than 10%, we shall be obliged, at the Supplier's request, to release these security rights at our discretion.

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## **10. Special termination rights**

We are entitled to terminate, in whole or in part, the contracts with the Supplier without notice for due cause or to withdraw from all contracts with the Supplier for due cause, including if the Supplier's economic circumstances worsen significantly after conclusion of a contract, particularly if the Supplier's assets are seized or subject to other enforcement measures, as a result of which our claims are jeopardised. The same shall apply in the event that the Supplier files a petition for institution of insolvency proceedings or similar proceedings against his assets or if such proceedings are instituted against his assets or the institution is rejected for insufficiency of assets or if the ownership structure of the Supplier's company changes in such a way that a new owner acquired majority control over him (change of control). In the latter case of a change of control, the termination may be made with immediate effect from knowledge of the change and up to 8 weeks thereafter.

## **11. Assignment**

11.1. The assignment of the Supplier's claims against us to third parties is not permitted without our written consent.

11.2. We expressly reject any prohibition on the assignment of all our claims to our disadvantage.

## **12. Legal venue - place of performance**

12.1. Insofar as the Supplier is a merchant, the legal venue for all disputes including currency and cheque claims shall be at our registered office. We are nevertheless entitled to sue the Supplier at his place of domicile.

12.2. Unless stated otherwise in the other, our registered office at „Emsdetten“ is the place of performance.



12.3. These business relationships and all legal relationships between us and the Supplier shall be governed by the laws of the Federal Republic of Germany. The application of the UN Sales Convention (United Nations Convention on Contracts for the International Sale of Goods of 11.04.1980, BGBl 1989 II, p. 588, ber 1990, 1699) is excluded.

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### 13. Severability Clause

Should a provision of these terms and conditions of business be or become ineffective, then this shall not affect the effectiveness of the remaining provisions. In such a case, the parties undertake to agree to replace the ineffective clause with an effective one which most closely approximates the economic intent of the original clause.