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## **EMSA GmbH General Terms and Conditions of Sale, Delivery and Payment [GTCs Version: (01.11.2014)**

### **1. Scope of terms and conditions**

The deliveries, services and offers of EMSA GmbH (hereinafter referred to as „EMSA“) are only made to entrepreneurs, legal persons under public law and special funds under public law solely on the basis of these GTCs. They shall also apply to all future business relations without repeated explicit reference. These terms and conditions shall be deemed to have been accepted upon receipt of the goods/services at the latest. Any differing terms and conditions of the Buyer expressly do not apply.

### **2. Offer and conclusion of contract**

2.1 All offers are subject to change. The Buyer remains bound to his orders for two weeks. A contract shall only be formed with our written confirmation of order within the above period or alternatively, by execution of the order within the same period. Verbal supplementary agreements, assurances etc. made by our employees shall only become binding with our written confirmation, which may be effectively given by fax or e-mail. Business post printed using data processing equipment shall be legally binding even without our signature, as will e-mails.

2.2 Offers only apply to deliveries in the country where the Buyer is based in accordance with the information provided in the order (hereinafter referred to as the export country). The Buyer must assume responsibility for all the disadvantages and liabilities incurred from using the goods outside the export country.

2.3 Images, dimensions, weights, brochure information and/or other documents part of the offer such as drawings, technical data, references to standards, advertising statements etc. do not imply any quality statements. This does not include assurances of characteristics or guarantees unless they are expressly agreed separately in writing.

2.4 EMSA reserves ownership right and copyrights to images, presentation items, drawings, calculations, data and other documents; unless we expressly state otherwise, we only guarantee the validity of our property rights within the Federal Republic



of Germany. Our documents and information may not be made accessible to third parties without our prior written consent. In particular, this applies for information, including written documents, which are marked as confidential.

2.5 We reserve the condition of availability of supplies and raw materials. We shall inform the Buyer immediately of any non-availability of a delivery and in the event of a withdrawal, will immediately refund the respective consideration to the Buyer.

### 3. Prices and Payments

3.1 Our prices are net ex works Emsdetten (Incoterms 2010 EXW) including standard transportation packaging plus transportation costs, unless specified otherwise in our order confirmation.

3.2 The prices shown in EMSA's latest price lists apply, plus the relevant statutory value added tax. Additional deliveries and services shall be charged separately.

3.3 If the delivery is only made four months after confirmation of order, we reserve the right to increase prices should the cost factors governing the contract, such as salaries, packaging materials, freight, energy costs, raw materials, taxes etc., change significantly. The price increase shall then correspond to the increase in costs in comparison to the agreed price upon conclusion of the contract.

3.4 Customs duties, consular charges and taxes, duties, fees raised according to provisions outside of the Federal Republic of Germany, as well as of any other costs in this connection shall be borne by the Buyer. For deliveries including customs and other duties, the price quoted shall be based on the rate in force at the time of the offer. The actual costs and, if liable, value added tax shall be charged.

3.5 In the absence of defects, the invoice amount shall be payable upon delivery and invoicing without any deduction. We expressly reject any discount or other deduction not agreed in our confirmation of order. If, contrary to agreement, orders are not duly called in the event of call orders, we shall be entitled to charge them as having been delivered plus storage costs after an appropriate grace period has passed. Transportation and storage shall then take place at the expense and risk of the Buyer.

3.6 Interest on arrears on payment claims must be paid by the Buyer at a rate of 9% above the base lending rate of the European Central Bank. These shall be paid at a higher rate if EMSA proves it has incurred higher losses.

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3.7 The Buyer shall only have set-off rights if his counterclaims have been established as final and absolute, are undisputed and have been acknowledged by EMSA or otherwise only as part of the reciprocity of contractual claims. Also, the Buyer may only exercise a right of retention to the extent that his counterclaim relates to the same contractual relationship.

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3.8 If EMSA becomes aware of circumstances that bring the creditworthiness of the Buyer into question, EMSA shall be entitled to demand advance payments or securities without prejudice to any further legal claims. If the Buyer fails to provide advance payment or securities, EMSA shall be entitled to a right of retention. Alternatively, EMSA may withdraw from the contract after notice has been given to make an advance payment or provide securities without result. EMSA may then claim compensation.

3.9 Cheques and bills of exchange, which EMSA reserves the right to accept, shall only constitute payments once cleared. Any discount and bank fees shall be borne by the Buyer.

#### **4. Transfer of risk, packaging**

4.1 Goods shall be shipped at the risk and expense of the Buyer (Incoterms 2010, FCA Emsdetten). The risk shall always pass to the Buyer from the place of loading at the Emsdetten plant, i.e. in principle and in the absence of a written agreement to the contrary, upon loading of the delivery, including if partial deliveries are made or if we have undertaken to carry out additional services. We shall select the shipping method and means.

4.2 If delivery is not possible without EMSA being at fault, the risk shall pass to the Buyer upon notification that the goods are ready for dispatch.

4.3 If the Buyer wishes, EMSA shall insure the delivery under a transportation insurance policy at the expense of the Buyer.

4.4 Transportation and all other packaging shall not be returned subject to requirements of the German Packaging Ordinance. This does not apply to reusable transportation materials such as pallets, pallet cages, etc. The Buyer must take responsibility for disposing of non-returnable packaging at its own expense. Reusable transportation materials shall be provided to the Buyer only on a lending basis; the Buyer shall be obliged to return them in proper condition, empty and undamaged, at its own expense and in compliance with the legal provisions of the German Packaging Ordinance. For damaged or contaminated transportation materials, the Buyer shall bear the repair costs, or, where repair is impossible, pay EMSA compensation for the value. EMSA is entitled to charge any resulting costs directly with its own payment claims.



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## 5. Delivery and schedule, delay

5.1. The deadlines and periods stated by EMSA are subject to change, unless expressly agreed otherwise in writing. In principle, EMSA shall not accept any procurement risks.

5.2. Compliance with the delivery deadline is subject to the Buyer fulfilling its contractual obligations. Delivery periods commence no earlier than upon conclusion of the contract, but not before full provision of all documents, approvals, technical clarifications etc. to be provided by the Buyer. Deadlines shall be deemed met if the delivery item has left our plant upon expiry of such deadline, or where the goods are not dispatched in time without any fault on our part, when it has been notified as ready for dispatch. Should unforeseen events and/or force majeure occur, including for upstream suppliers, the delivery period shall also be extended accordingly. In such cases of hindrance to performance due to force majeure of more than six months, both parties are entitled to withdraw from the contract without compensation with regard to the outstanding delivery.

5.3 For call orders, we are entitled to produce the entire order quantity as a closed quantity. Change requests may not be taken into consideration after placing the order, unless this has been expressly agreed in writing.

5.4 If EMSA fails to perform a due service as agreed under the contract and the failure by EMSA is only of minor significance, the Buyer may not withdraw from the contract, claim compensation in lieu of the entire service or claim compensation for unnecessary expenses.

5.5 EMSA shall only be in default if notice to perform has been issued, unless provided for otherwise by law or by contract. Notices to perform and grace periods of the Buyer must be given in writing to be effective.

5.6 EMSA is entitled to make partial deliveries and render partial services at any time.

5.7 If EMSA fails to provide a due performance, or fails to do so in compliance with the contract but the service has already partially been rendered, the Buyer is only entitled to claim compensation in lieu of the full service if his interest in the full service so requires. Withdrawal from the entire contract in this case is only possible if the Buyer can prove it has no interest in a partial service.

5.8 Should EMSA default for reasons for which EMSA is responsible, liability for compensation in the event of simple negligence is excluded. The above limitation of liability shall not apply where the default relates to EMSA culpably violating an essential contractual obligation. In all liability cases, the liability of EMSA is limited to foreseeable damage typical of the contract. In the event of a default on delivery for which we are responsible, the Buyer may, following a written notice to perform, grant



us a grace period with the indication that he shall not accept the contractual item after expiry of the deadline. Only once the grace period has expired and all other legal conditions are met shall the Buyer be permitted to withdraw from the contract by written declaration. The customer may not, however, claim compensation on the grounds of non-fulfilment in the event of a withdrawal.

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## 6. Warranty / compensation

6.1 The Buyer's warranty rights require him to duly meet his duties to inspect and notify defects immediately and in writing as imposed by section 377 of the German Commercial Code.

6.2 The Buyer shall only have statutory rights of recourse against EMSA if the Buyer has not entered into an agreement with its customer that extends beyond the statutory defect claims.

6.3.1 If the purchase item has a defect for which EMSA is responsible, EMSA must always be given an initial opportunity for subsequent performance within a reasonable period. EMSA may remedy the defect or make a replacement delivery, at its discretion.

6.3.2 If the subsequent performance fails, the Buyer may, following expiry of a grace period and subject to the legal conditions, withdraw from the remainder of the contract or reduce the purchase price. Additional compensation claims are excluded. Buyer's claims for expenses necessitated by the subsequent performance, in particular transportation, travel, labour and material costs, are excluded if the expenses increase because the object of delivery was subsequently relocated to a location other than the place of performance, unless the movement corresponds with its intended use.

6.3.3 Claims do not apply if there is only a minor deviation from the agreed nature of the goods or only a minor impairment of usability, natural wear and/or in case of damage arising after the passing of the risk through incorrect and/or negligent handling, overload, the use of unsuitable production equipment and/or because of special outside influences and/or in case of conditions not specified in the contract.

6.4. If EMSA and/or the manufacturer's operating instructions are not followed, if impermissible modifications are made to the products, if parts are changed and/or spare parts and/or fillers that do not fulfil the original specifications and/or guidelines are used, EMSA shall not accept liability for defects caused as a result / or to which this has contributed, unless the warranty case can be proven not to be attributable to one of the above grounds for exclusion.



6.5 In the event of slightly negligent violations, our liability is excluded. In the event of gross negligence or wilful intent, our liability is limited to the foreseeable damage typical of the contract, and the same shall apply to violations of essential contractual obligations. This limitation of liability does not apply to death or personal injury,

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6.6 Defect claims shall expire in 12 months, unless provided for otherwise by law; this period shall commence upon transfer of risk. We expressly reject any recommencement of the period of limitation in warranty cases where we immediately declare our willingness to render subsequent performance upon discovery of the defect and do so within a reasonable time. The warranty shall be extended by the duration of the subsequent performance from the notification of defect until subsequent performance, if it concerns essential or significant defects or defects affecting usability. The warranty shall never be less than 1 year. The provisions concerning the period of limitation, its interruption and recommencement also concern all other claims oriented to the same interest.

6.7 A notice of defect shall expressly not interrupt the period of limitation for warranty claims if after examining the cause of the defect, we find that we are not responsible for the defect.

6.8. We shall not be liable for damage caused by unsuitable or improper use, for incorrect handling by the Buyer or a third party, natural wear or negligent handling, unsuitable cleaning and care, chemical and/or mechanical influences etc., if these are not attributable to our fault, or if the Buyer does not use our Products as intended or does not follow our operating instructions / terms of use and this causes or contributes to the damage. In the event of slightly negligent violations, liability is excluded. In the event of a gross violation, our liability is limited to the foreseeable damage typical of the contract, and the same shall apply to violations of essential contractual obligations. In all other respects, we shall be liable, in accordance with the German Product Liability Act, for death or personal injury or for culpable violation of essential contractual obligations.

6.9 We reject any customer requests to conduct quality audits.

6.10 Compensation claims must be asserted in court within 3 months of our written refusal to accept liability.



## 7. Retention of title

7.1 Until full payment of all payables in the business relationship between EMSA and the Buyer, the goods delivered shall remain the property of EMSA. The addition of individual items to an open account and the acknowledgement of the balance do not affect the retention of title. Payment shall only be deemed effected on receipt of the amount by EMSA

7.2 If the buyer acts in violation of the contract, in particular default in payment, EMSA shall be entitled to take the purchase item back. EMSA taking the purchase item back does not constitute a withdrawal from the contract unless EMSA has expressly declared this in writing.

7.3 Where EMSA seizes the purchase item, this shall always constitute a withdrawal from the contract. After taking the purchase item back, EMSA shall be entitled to dispose of it. The proceeds from such disposal shall be set off against the Buyer's account payable, less administration costs.

7.4 The Buyer is obliged to handle the purchase item with care; he is, in particular, obliged to adequately insure it at its own expense against fire, water and theft damage at the original value. If maintenance and inspection work is required, the Buyer must conduct this promptly at its own expense.

7.5 In the event of seizures or other third party interventions, EMSA must be informed of this in writing immediately. EMSA shall be entitled but not obliged to institute proceedings in accordance with section 771 of the German Code of Civil Procedure. There shall only be such obligation when the Buyer pre-finances the proceedings and bears the risk of litigation costs. If the third party is not able to reimburse EMSA the legal and extra-judicial costs of proceedings in accordance with section 771 of the German Code of Civil Procedure, the Buyer shall be liable for the resulting loss incurred.

7.6 The Buyer has the right to resell the goods subject to the retention of title in the ordinary course of business; he shall, however, herewith assign EMSA all claims to the amount of the final invoice amount (including value added tax) of the claims due to EMSA resulting from the resale to its customers or third parties, regardless of whether the purchase item is resold with or without processing. EMSA herewith accepts the assignment. If the assigned claim against the purchaser of the goods subject to retention of title is included in an open account (current account), the assignment shall pertain to the acknowledged balance and, in the event of the bankruptcy of the purchaser, to the „causal“ balance which then exists. The Buyer shall retain the right of recovery of the debt even after he has assigned the claim to us. EMSA's authority to recover the claim itself remains unaffected. However, EMSA undertakes not to recover the claim as long as the Buyer meets his payment obligations from the revenues earned, is not in default on payment and in particular has not filed a petition for the

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opening of insolvency proceedings and payments have not been suspended. If this is the case, however, EMSA may request that the Buyer informs EMSA about the claims assigned and their debtors, that he discloses all information required to recover these, turns over all corresponding documents and informs the defaulters (third parties) of the assignment.

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7.7 The goods subject to retention of title shall always be processed or transformed by the Buyer on behalf of EMSA. If the goods subject to retention of title are processed with other items to which EMSA has no ownership rights, EMSA shall acquire co-ownership of the new article at the proportionate value of the goods subject to retention of title (final invoice amount including VAT) in relation to the other processed objects at the point of processing. In all other respects, the same shall apply to the articles resulting from processing as to the goods supplied subject to retention of title.

7.8 If the goods subject to retention of title are irreversibly incorporated with other items to which EMSA has no ownership rights, EMSA shall acquire co-ownership of the new article at the proportionate value of the goods subject to retention of title (final invoice amount including VAT) in relation to the other incorporated objects at the point of incorporation. Should the items be incorporated in such a way that the Buyer's article is considered to be the main article, it is agreed that the Buyer shall transfer proportionate co-ownership to EMSA. The Buyer shall hold the sole ownership or co-ownership on EMSA's behalf.

7.9 The goods are delivered under retention of title in accordance with these terms and conditions (section 7). If EMSA agrees with the Buyer that payment of the purchase price is to be made on the basis of a cheque/bill of exchange procedure, the retention of title shall extend to the time when the bill of exchange accepted by EMSA has been cashed by the Buyer and does not expire as a result of the crediting of the received cheque by EMSA.

7.10 EMSA undertakes to release the securities due to it at the Buyer's request to the extent that the recoverable value of EMSA's securities exceeds the value of the receivables by more than 10%; the securities released shall be at EMSA's discretion.

## **8. Place of performance / legal venue / applicable law / performance conditions / embargo clause**

8.1 The place of performance is at the business headquarters of EMSA, Emsdetten.

8.2 The District Court of Rheine or the Regional Court of Münster shall have sole competence for all disputes arising from the business relationship, including bill or cheque claims. The same legal venue shall apply if the Buyer has not general legal venue in Germany, relocates its place of residence or usual abode abroad after the



conclusion of the contract or where his place of residence or usual abode at the time the complaint is filed is unknown.

8.3 These terms and conditions and all legal relationships between EMSA and the Buyer shall be governed solely 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 II, 1699) is excluded.

8.4 Our fulfilment of the contract is subject to the proviso that the fulfilment not prevented by any impediments arising out of national and international foreign trade and customs requirements or any embargos and/or other sanctions. The Buyer also undertakes to refrain from all transactions (a) with persons, entities or bodies subject to sanctions in accordance with EU regulations or US export regulations, (b) with any countries subject to embargos, (c) for which the necessary approval does not exist or does not apply, (d) that could follow military theft in connection with nuclear, biological and chemical weapons.

8.5 The Buyer undertakes to inform us immediately in writing without being requested to do so if he intends to supply products or services acquired from us in areas subject to such provisions, or to employ/use them there. He shall indemnify us from all legal consequences resulting from the violation of such provisions, and shall compensate us to the extent of the loss we incur as a result.

9. 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.

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