METAALUNIE CONDITIONS

Standard conditions of delivery and payment issued by the 'Metaalunie' , referred to as the METAALUNIE CONDITIONS and previously as the SMECOMA CONDITIONS, filed at the Registry of the District Court in Rotterdam on 1 January 2001.
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Article 1: Applicability

1.1. These conditions apply to all offers made by members of the Metaalunie and to all agreements they conclude and to all agreements that may be the result thereof. The offeror/supplier is the Metaalunie member who uses these conditions. Such member is designated in these conditions as the contractor or seller. The other party is designated as the customer or buyer.

1.2. These conditions may be used only by members of the Metaalunie.

1.3. The standard conditions of the customer shall not apply and are expressly rejected.

Article 2: Offers

2.1. All offers are made without engagement.

2.2. If the customer supplies data, drawings etc. to the contractor, the contractor may assume them to be correct and may base his offer upon them. .

2.3. The prices referred to in the offer are based on delivery ex works in accordance with Incoterms 2000. The prices are exclusive of turnover tax and packaging.

2.4. If his offer is not accepted, the contractor has the right to charge the customer for all the costs which he has had to incur in order to make his offer.

Article 3: Intellectual property rights

3.1. Unless agreed otherwise, the contractor retains the copyright and all industrial property rights in the offers made by him and in designs, illustrations, drawings, models, test models, software etc. supplied by him.

3.2. The rights to the data referred to in paragraph 1 shall remain the property of the contractor irrespective of whether costs are charged to the customer for their production. Such data may not be copied, used or shown to third parties without the express consent of the contractor. If this provision is infringed, the customer shall owe the contractor a penalty of EUR 25,000. This penalty may be claimed in addition to any compensation owed by law.

3.3. The customer must return the data supplied to him as referred to in paragraph 1 at the first request of the contractor within the period specified by the contractor. In the event of an infringement of this provision the customer shall owe the contractor a penalty of EUR 1,000 per day. This penalty may be claimed in addition to any compensation owed by law.

Article 4: Advice, designs and materials

4.1. The customer cannot derive any rights from advice and information obtained from the contractor if they do not relate directly to the order.

4.2. The customer is responsible for the drawings and calculations made by him or on his behalf and for the functional suitability of the materials prescribed by him or on his behalf.

4.3. The customer shall indemnify the contractor against any claim by its third parties relating to the use of drawings, calculations, samples, models and so forth supplied by or on behalf of the customer.

4.4. The customer may, at his own expense, examine (or arrange for the examination of) the materials which the contractor wishes to use before they are processed. If the contractor suffers damage as a result, this shall be borne by the customer.

Article 5: Delivery period

5.1. The delivery period quoted by the contractor is approximate.

5.2. In fixing the delivery period the contractor assumes that he can execute the order in the circumstances known to him at that time.

5.3. The delivery period starts when agreement has been reached on all technical details, all necessary data, final drawings etc. are in the possession of the contractor, the agreed payment or instalment has been received and the necessary conditions for execution of the order have been fulfilled.

5.4. a. If circumstances occur other than those known to the contractor when he fixed the delivery period, the contractor may extend the delivery period by the time necessary to execute the order in the circumstances. If the work cannot be fitted into the planning schedule of the contractor, it shall be completed as soon as his planning schedule permits this.
b. If there is extra work, the delivery period shall be extended by the time that is necessary to supply (or arrange for the supply of) the materials and parts for this purpose and to carry out the additional work. If the extra work cannot be fitted into the planning schedule of the contractor it shall be completed as soon as his planning schedule permits this.
c. If there is a suspension of obligations by the contractor, the delivery period shall be extended for the duration of the suspension. If continuation of the work cannot be fitted into the planning schedule of the contractor, the work shall be completed as soon as his planning schedule permits this.
d. If work is impossible owing to weather conditions, the delivery period shall be extended for the term of the delay that has occurred as a result.

5.5. If the agreed delivery period is exceeded, this shall not under any circumstances confer entitlement to compensation unless this has been agreed in writing.

Article 6: Transmission of risk

6.1. In the case of delivery ex works, in accordance with Incoterms 2000, the risk in relation to the goods shall pass at the moment when the seller makes them available to the buyer.

6.2. Irrespective of the provisions of the previous paragraph, the customer and the contractor agree that the contractor shall arrange for the carriage. The risk of storage, loading, carriage and unloading shall be borne by the customer in this case too. The customer may insure himself against these risks.

6.3. Even if the seller installs and/or assembles the goods sold, the risk in relation to the goods shall pass at the moment when the seller makes them available to the buyer at the business premises of the seller or at another agreed place.

6.4. If a purchase involves a trade-in and the buyer continues to use the goods to be traded in pending delivery of the new goods, the risk in relation to the goods to be traded in shall continue to be borne by the buyer until the moment at which he transfers them to the possession of the seller.

Article 7: Price changes

7.1. If four months have passed since the date on which the agreement was concluded and its performance has not yet been completed by the contractor, an increase in the price-determinants may be passed on to the customer.

7.2. Payment of the price increase as referred to in paragraph 1 shall take place together with payment of the principal or the last instalment.

7.3. If goods are supplied by the customer and the contractor is prepared to use them, the contractor may then charge a maximum of 20 percent of the market price of the delivered goods.

Article 8: Impossibility of performance

8.1. The contractor shall be entitled to suspend performance of his obligations if he is temporarily prevented from performing them by circumstances that could not be foreseen at the time of the conclusion of the agreement and which are beyond his control.

8.2. Circumstances which could not be foreseen by the contractor and which are beyond his control are deemed to include failure of his suppliers and/or subcontractors to fulfil their obligations or to do so in good time, weather conditions, earthquakes, fire, loss or theft of tools, loss of processed materials, road blockades, strikes or work stoppages and import or trade restrictions.

8.3. The contractor shall not be entitled to suspend performance if performance is permanently impossible or if a temporary impossibility has lasted for longer than six months. The agreement may then be terminated in respect of such part of the obligations as have not yet been performed. In that case the parties shall not be entitled to compensation for damage suffered or yet to be suffered as a result of the termination.

Article 9: Scope of the work

9.1. The contractor shall ensure that all licences, exemptions and other decisions that are necessary in order to carry out the work are obtained in good time.

9.2. The price of the work does not include:
a. the costs of groundwork, pile-driving, cutting, breaking, foundation work, bricklaying, woodwork, plastering, painting, wallpapering, repairs or other construction work;
b. the costs of gas, water or electricity connections and other infrastructure facilities;
c. the costs of preventing or mitigating damage to goods present at or near the work;
d. the costs of removing materials, building materials or refuse;
e. travelling and accommodation expenses.

Article 10: Alterations to the work

10.1. Alterations to the work shall result in any event in extra work or reduced work if:
a. there is an alteration to the design or the specifications;
b. the information provided by the customer does not correspond with the reality;
c. the quantities diverge by more than 10% from the estimates.

10.2. Extra work shall be calculated on the basis of the value of the price determinants applicable at the time when the extra work is carried out. Reduced work shall be calculated on the basis of the value of the price determinants applicable at the time when the agreement was concluded.

10.3. If the increase and decrease in the work results on balance in a decrease the contractor may charge the customer in the final invoice 10% of the difference in the balances. This provision does not apply in the case of a reduction in the work that is a result of a request of the contractor.

Article 11: Execution of the work

11.1. The customer shall ensure that the contractor can carry out his activities without interruption and at the agreed time and that in the execution of the work he has access to the requisite facilities such as:
- gas, water and electricity;
- heating;
- a lockable and dry storage room;
- facilities prescribed under the Working Conditions Act and other health and safety regulations under that Act.

11.2. The customer shall be liable for all damage as a result of the loss, theft or burning of or damage to tools, materials and other property of the contractor located at the place where the work is performed.

11.3. If the customer fails to discharge his obligations as referred to in the previous paragraphs and the work is delayed as a result, the work shall be executed as soon as the contractor's planning schedule permits this. In addition, the customer shall be liable for all loss or damage suffered by the contractor as a result.

Article 12: Completion of the work

12.1. The work shall be deemed to have been completed when:
a. the customer has approved the work;
b. the work has been used by the customer; if the customer uses only part of the work, such part shall be deemed to have been completed;
c. the contractor gives written notice to the customer that the work has been completed and the customer does not indicate in writing within 14 days of the notice whether or not the work has been approved;
d. the customer does not approve the work on account of minor defects or missing parts which can be repaired or supplied within 30 days and which do not prevent the use of the work.

12.2. If the customer does not approve the work, he shall be obliged to give written notice of this to the contractor specifying the reasons.

12.3. If the customer does not approve the work he shall give the contractor the opportunity to complete the work anew. The provisions of this article shall then apply once again.

Article 13: Liability

13.1. The contractor is liable for damage which the customer suffers and which is the direct and sole result of a failure attributable to the contractor. However, only loss or damage for which the contractor is insured or for which he should reasonably have been insured will be eligible for compensation.

13.2. The following are not eligible for compensation:
a. consequential loss or damage, including for example loss or damage due to business standstills and loss of profit;
b. damage to goods which are being worked on or to goods which are in the vicinity of the place where the work is being carried out;
c. damage caused by the intent or deliberate recklessness of auxiliaries.

13.3. The customer indemnifies the contractor against all claims of third parties on account of product liability due to a defect in a product which has been supplied by the customer to a third party and consisted wholly or partly in products and/or materials supplied by the contractor.

Article 14: Warranty

14.1. The contractor warrants the proper execution of the agreed performance for a period of six months after delivery or completion.

14.2. If the agreed performance consists in the carrying out of contracted work, the contractor warrants the soundness of the delivered construction and the materials used in the construction for the period referred to in paragraph 1, provided that he was free to choose such materials.

If it transpires that the delivered construction or the materials used are unsound, the contractor shall repair or replace them. The parts which the contractor is to repair or replace must be sent to him free of charge. The dismantling and assembly of these parts and any travelling and accommodation expenses incurred shall be borne by the customer.

14.3. If the agreed performance consists in the processing by the contractor of materials supplied by the customer, the contractor warrants the soundness of the processing for the period referred to in paragraph 1.

If it transpires that processing has not been carried out in a sound manner, the contractor shall choose whether:
- to carry out the processing anew, in which case the customer must supply new material at his own expense;
- to repair the defect, in which case the customer must return the material free of charge to the contractor;
- to provide the customer with a credit note for a proportionate part of the invoiced amount.

14.4. If the agreed performance consists in the delivery of an item of goods, the contractor shall warrant the soundness of the delivered item during the period referred to in paragraph 1.

If it transpires that the delivery has not been sound, the item of goods must be returned free of charge to the contractor. Thereafter the contractor shall choose whether:
- to repair the item of goods;
- to replace the item of goods;
- to provide the customer with a credit note for a proportionate part of the invoiced amount.

14.5. If the agreed performance consists in part or in whole of the installation and/or assembly of a delivered item of goods, the contractor warrants the soundness of the installation and/or assembly for the period referred to in paragraph 1.

If it transpires that the installation and/or assembly has not been carried out in a sound manner, the contractor shall repair it. Any travelling and accommodation expenses shall be borne by the customer.

14.6. The factory warranty shall apply to parts in respect of which this has been expressly agreed in writing by the customer and the contractor. If the customer has had the opportunity to take cognizance of the content of the factory warranty, this shall take the place of the warranty under this article.

14.7. The customer must in all cases offer the contractor the opportunity to repair the defect or to carry out the processing anew.

14.8. The customer may invoke the warranty only after he has complied with all his obligations to the contractor.

14.9. a. No warranty is given for defects that are a result of
- normal wear and tear;
- injudicious use;
- non-maintenance or defective maintenance;
- installation, assembly, modification or repair by the customer or by third parties.
b. No warranty is given for delivered items of goods that were not new at the moment of delivery.

Article 15: Claims

The customer may no longer invoke an instance of non-performance if he does not lodge a written claim with the contractor within 14 days of the date on which he discovers the defect or could reasonably be expected to discover it.

Article 16: Uncollected goods

If goods have not been collected by the time the delivery period expires, they shall continue to be held available for the customer. Uncollected goods shall be stored at the expense and risk of the customer. The contractor may always make exercise the power referred to in article 6:90 Civil Code.

Article 17: Payment

17.1. Payment shall be made at the place of business of the contractor or by remittance to an account designated by the contractor.

17.2. Unless agreed otherwise, payment shall be made as follows:
a. cash in the case of an over-the-counter sale;
b. if payment in instalments has been agreed:
- 40% of the total price at the time the order is placed;
- 50% of the total price after the material is supplied;
- 10% of the total price upon completion;
c. in all other cases: within 30 days of the date of the invoice.

17.3. Regardless of the agreed terms of payment, the customer shall be obliged, at the request of the contractor, to provide such security for the payment as the contractor deems sufficient for the payment. If the customer fails to do so within the specified period, he shall be deemed to be immediately in default. The contractor shall in that case have the right to terminate the agreement and recover his loss or damage from the customer.

17.4. The customer does not have the right to set off claims against the contractor, unless the contractor has been declared bankrupt.

17.5. The full claim for payment shall be immediately due and exigible if:
a. a payment period has been exceeded;
b. the customer has been declared bankrupt or has applied for a suspension of payments;
c. the property or accounts receivable of the customer are seized;
d. the customer (being a legal entity) is wound up or liquidated;
e. the customer (being a natural person) is made the subject of a guardianship order or dies.

17.6. If payment has not been made within the agreed period for payment, the customer shall immediately owe interest to the contractor. The interest shall be 10% per year or the statutory rate of interest, whichever is the higher. For the purpose of calculating the interest, part of a month shall be treated as a full month.

17.7. If payment has not been made within the agreed period for payment, the customer shall owe the contractor all extrajudicial costs of recovery, subject to a minimum of EUR 50.

The costs shall be calculated on the basis of the following table:

on the first EUR 3,000	15%
on any additional amount up to EUR 6,000	10%
on any additional amount up to EUR 15,000	8%
on any additional amount up to EUR 60,000	5%
on any additional amount over EUR 60,000	3%

If the extrajudicial costs actually incurred are higher than those in the above-mentioned table, the costs actually incurred shall be owed.

17.8. If the contractor is held to be in the right in legal proceedings, all costs which he has incurred in connection with the proceedings shall be borne by the customer.

Article 18: Reservation of title and right of lien

18.1. After delivery of the goods the contractor shall retain title to them as long as the customer:
a. fails or will fail to perform his obligations under this agreement or other similar agreements;
b. fails or will fail to pay for activities performed or yet to be performed under such agreements;
c. has not paid claims that result from the non-observance of the above-mentioned agreements such as damage, penalties, interest and costs.

18.2. As long as title to delivered goods is retained by the contractor, the customer may not encumber them other than in the normal course of his business.

18.3. After the contractor has invoked his reservation of title, he may retake possession of the delivered goods. The customer shall allow the contractor to enter the place where the goods are situated.

18.4. If the contractor is unable to invoke his reservation of title because the delivered goods have been mingled, distorted or changed by way of accession (*accessio*), the customer shall be obliged to grant the contractor a lien on the newly created goods.

Article 19: Termination

If the customer wishes to terminate the agreement in circumstances where the contractor is not in default and the contractor agrees to this, the agreement shall be terminated by mutual consent. The contractor shall in that case be entitled to compensation of all pecuniary damage, such as any loss suffered, loss of profit and costs incurred.

Article 20: Applicable law and choice of forum

20.1. The law of the Netherlands is applicable.

20.2. The Vienna Convention on Contracts for the International Sale of Goods (CIGS) is not applicable, nor is any other international regulation the exclusion of which is permissible.

20.3. Only the civil court that has jurisdiction in the place of establishment of the contractor may take cognizance of disputes, unless this would be contrary to peremptory law. The contractor may deviate from this rule of jurisdiction and apply the statutory rules governing jurisdiction.

20.4. The parties may agree a different form of dispute resolution such as arbitration or mediation.