

Terms and Conditions of Sale and Delivery of the iwis group



These terms and conditions (the „Conditions“) apply to all deliveries and services of companies of the Joh. Winkhofer Beteiligungs GmbH & Co.KG group (the „Supplier“). These Conditions apply to companies, private and public corporations and to public separate estates only.

1. Contractual Basis and Entering into Agreements

1.1 All offers, agreements as well as all deliveries and services (collectively “deliveries” or “delivery items”) are made only subject to the following Conditions, even if no reference is made thereto in an individual case. By placing an order, the customer acknowledges the exclusive application of the Conditions even in case its own terms and conditions may deviate from these Conditions or if he has disagreed to the Supplier’s Conditions in advance. Deviating purchasing conditions of the customer will not become subject matter of an agreement, whether by acceptance of an order, by execution of an order or otherwise, even if there is no express disagreement with such purchasing conditions. Deviating agreements shall only apply, if and when expressly accepted by the Supplier in writing.

1.2 For the scope of supplies and services, the Supplier’s written confirmation of order shall be decisive. All agreements, whether they relate to the performance of main obligations, ancillary obligations or frame agreements, only oblige the Supplier subject to written confirmation. This applies especially to all statements, agreements, representations, warranties, guarantees, the assumption of the risk of procurement, or for other ancillary agreements, all communicated in oral or electronic form. In addition, the assumption of guarantees, representation and warranties or assumption of the risk of procurement, respectively, requires the express description as such. Statements in catalogues, print media or advertising brochures shall not suffice in this respect.

1.3 Sales agents are not entitled to issue binding statements for the Supplier. This shall not apply only, if at the day of entering into an agreement such statement is issued by submitting to the customer Supplier’s respective express written power of attorney. The customer shall bear the burden of proof of the submission of such power of attorney.

1.4 Delivery offers of the Supplier are based on the documentation made available by the customer to the Supplier, such offers are not binding. The same applies to cost estimates.

1.5 Documentation of the offers of the Supplier, e.g. illustrations, drawings, information relating to dimensions, weights and performances as well as all informations contained in brochures or other print media are only approximately applicable, unless otherwise expressly stated as authoritative.

1.6 With respect to his deliveries and services, the Supplier shall at any time be entitled to make changes in design or implementation that only import an immaterial deviation in quality or workmanship or represent an improvement, the remaining content of the agreement shall not be affected thereby.

2. Prices and Payment Conditions

2.1 The prices are quoted in Euro. Any applicable Value Added Tax (“VAT”) in the respective statutory amount - if any - is to be added, unless otherwise expressly shown, VAT is not included in the quoted prices. Absent specific agreement, the prices are quoted ex works (ex works pursuant to the most actual INCOTERMS) without packing.

2.2 Partial performances and deliveries are permitted. They are deemed to constitute independent legal acts that can be invoiced separately.

2.3 In case the customer does not observe an agreed payment date, the customer shall have to pay interest of 8 % above the respective applicable base interest rate even without having received a demand notice to pay. Moreover, in case of late payment, the Supplier may withhold further deliveries and services and require the delivery of adequate collaterals for its accounts receivables. The right to claim for further damages for delay remains reserved.

2.4 Price changes are permitted, if more than four months lie between the entering into an agreement and the agreed delivery date. The Supplier in this respect is entitled to adjust the prices in a way that the new price equals to the originally agreed price in a way as the price of the delivery to the price list applicable as of the day of the entering into the agreement. Regarding other deliveries and services not reflected in a price list, the Supplier shall be entitled to an adjustment which is adequate according to the circumstances. If cost, dues or fees are contained in the prices, and if such cost, dues or fees increase or newly accrue after the entering into an agreement, the Supplier is entitled pass such additional burden to the customer, if the period referred to in sentence 1 is exceeded.

2.5 The customer shall only be entitled to retain payments or to make set offs with counterclaims, if such counterclaims are undisputed or have become final and absolute.

2.6 The Supplier accepts discountable bills of exchange only, if a respective express agreement has been made and only pending full discharge of the debt. Note taxes and discount or collection charges are to be borne by the customer. Bills of exchange and checks will always be credited subject to timely encashment.

2.7 Prepayments or contractually agreed advance payments are not interest bearing, even in case of a withdrawal.

2.8 Incoming payments will always be used to settle the eldest accounts payable. In this respect, the customer waives any objections relating to the statute of limitation.

2.9 If later findings admit doubts relating to the customer’s creditworthiness, for which findings a confidential inquiry by a German bank or by a credit agency shall be sufficient, the Supplier may, under discontinuance of any payment terms and regardless of the term of any discounted bills of exchange, require sale against cash in advance or the granting of collaterals, as well as withdrawal from the agreement after having set an adequate time limit or to claim for damages for non-performance, irrespective of the right to take back, at customer’s cost, any supplied delivery items delivered under retention of title. There shall be no requirement of setting a time limit, if the customer refuses its performance.

3. Delivery, Time of Delivery and Delivery Obligation

3.1 The term for the time of delivery commences upon the delivery of the confirmation of order, however, in no case before all technical details have been resolved, all documents to be delivered by the customer have been received and agreed advance payments have been received.

3.2 Time of delivery is observed, if until the end of its term the delivery items have left the facility or if readiness for shipment has been communicated.

3.3. The time of delivery is adequately extended in case of actions relating to labour disputes, including but not limited to strike and lock out, as well as in cases of force majeure or unforeseeable hindrances beyond the Supplier’s will, to the extent such hindrances demonstrably and materially affect the completion or delivery of the delivery items. The same shall apply, if such circumstances occur at sub-suppliers. The Supplier shall likewise not be legally responsible, even if the aforementioned circumstances occur during his already existing default. In important cases, the Supplier shall communicate to the customer as soon as practical the beginning and ending of such hindrances. The customer’s rights of cancellation due to frustration of the contract or due to impossibility of performance for which the Supplier is not responsible remain unaffected.

3.4 If the Supplier fails to observe the agreed time of delivery, then this shall not constitute a default, as long as this is due to circumstances that the Supplier, by applying such degree of care that can be reasonably expected, could not foresee and prevent and could not overcome by taking reasonable actions. This includes but is not limited to cases of delayed supplies to the Supplier himself. The Supplier shall notify the customer as soon as possible of delays becoming apparent.

3.5 In case of Supplier’s non-observance of a time of delivery or a delivery guarantee, the customer shall be entitled to withdraw from the agreement, subject to having granted an adequate respite in writing of no less than two weeks, such respite including a notification that he will withdraw after expiry of such term. If the delivery items consist of several parts, the right to withdraw shall be limited to those parts that have not been delivered within the guaranteed delivery time and the respite. Further claims of the customer, including but not limited to claims for damages, and disregarding their legal basis, are excluded, unless the damage is subject to deliberation or gross negligence by Supplier or by its executive employees; in the latter case, any claims for damages shall be limited to such damages that were foreseeable on the day of the entering into the agreement.

3.6 If the delivery is delayed on demand of the customer, beginning one month from the communication of the readiness for shipment, he will be invoiced with the cost of storage, in case of storage in the Supplier’s facility, however, with no less than 0,5 % of the invoice value for each month of storage. The Supplier shall be entitled, after setting and effectless expiration of an adequate term, to otherwise dispose of the delivery items and to supply the customer within an adequately extended term.

4. Passing of the Risk, Shipment

4.1 Unless otherwise agreed to, risk shall pass latest to the customer upon putting the delivery parts at the disposal in the Supplier’s facilities, even if only partial deliveries are made or the Supplier has assumed the performance of further services, e.g. cost of shipment, or delivery and installation. Upon customer’s request and at customer’s cost, the Supplier will insure its shipments against damages through theft, breakage, transport, fire and water as well as against other insurable risks.

4.2 The selection of the packing material and the way of packing remains in the Supplier’s discretion. Pallets, containers and other reusable packings remain the property of the Supplier and are to be returned by the customer free of cost immediately and in perfect condition to the Supplier’s shipping point. Non-returnable packings will be invoiced at cost prices and will not be taken back.

4.3 If the shipment is delayed due to circumstances that are not within the responsibility of the Supplier, the risk passes to the customer from the day of communication of readiness for shipment, however, the Supplier shall upon the customer’s request and at the customer’s cost take out such insurances that are required by the customer.

4.4 The customer shall take possession of delivered items, even if they show defects. Unless otherwise agreed to, reshipments will not be accepted, any cost to the Supplier resulting from reshipments shall be borne by the customer.

4.5 If the customer does not observe payment conditions, does not timely take possession of or rejects acceptance of the delivery items or does not deliver agreed collaterals or collaterals pursuant to sections 2.3 or 2.9, or if any other behaviour occurs which is materially contrary to the contract, the Supplier may, after setting and effectless expiration of an adequate term, withdraw from the agreement and claim for damages. The Supplier may without the need for further proof claim from the customer as a minimum damage in case of serial products 25% of the contract value and in case of custom-built products 75% of the contract value. The customer shall have the right to prove that no or only a lower damage has occurred. In such case the proven damage shall be decisive.

5. Retention of Title

5.1 The Supplier retains all property rights in all delivery items until full receipt of all outstanding payments under the delivery agreement.

5.2 The Supplier is entitled to insure all delivered delivery items at the customer’s cost against theft, breakage, transport, fire and water as well as against other damages, unless the customer has demonstrably taken out own insurance coverage.

5.3 If by means of combination the delivery items become part of new objects that are owned by the customer, then it is agreed that the customer assigns to the Supplier co-ownership in such new objects and stores such objects at no cost for the Supplier. The Supplier’s share of ownership is determined by the value of the delivery item delivered under title retention in proportion to the value of the object.

Terms and Conditions of Sale and Delivery

of the iwis group



The customer herewith assigns to the Supplier all accounts receivables against customer's purchasers that may result from a resale of the objects subject to the title retention. If delivery items are resold together with other products that are not owned by the Supplier, the customer herewith assigns to the Supplier such portion of the accounts receivables resulting from the resale that equals the invoice amount of the delivered delivery items.

The customer remains revocably authorized to collect accounts receivables resulting from any resale. Upon the Supplier's request, the customer shall notify its purchasers of the assignment and shall render all information and documentation to the Supplier as is required for Supplier to assert its rights.

If delivery items are distrained or if the Supplier's rights are otherwise negatively affected by third persons, the customer shall immediately notify the Supplier thereof.

5.4 The customer may neither pledge nor transfer by way of security the delivery items. In case of distraint, confiscation or other transactions in rem by third persons, he shall immediately notify the Supplier thereof.

5.5 The Supplier is obliged to release his collaterals to the extent their value exceeds the secured accounts receivables by more than 10%.

5.6 In case customer's behaviour is contrary to contract, especially in case of default in payment, and after respective demand notice, the Supplier shall be entitled to take back delivery items and the customer shall be obliged to restore the Supplier's possession. The assertion of the title retention as well as the pledging of the delivery items by the Supplier shall not constitute a withdrawal of the contract.

5.7 To the extent retentions of title are not effective due to the Supplier's deliveries outside of Germany, but other collaterals, economically comparable to those provided for in this section 5, are available, the Supplier is entitled to such other collaterals. Upon the Supplier's request, the customer will make all statements required in this respect.

6. Warranty and Liability

6.1 Defects shall be notified in writing to the Supplier as soon as possible, however, no later than within one week from the receipt of the delivery items, and in case of hidden defects within one week after detection latest.

6.2 The Supplier warrants for defects of deliveries in a way that he will make supplementary performance with respect to such defective parts – subject to redelivery free of cost. The supplementary performance will be made by the Supplier upon his equitable discretion by means of remediation of the defects or by delivery of a delivery item that is not defect, both at no cost to the customer. In addition to that the Supplier shall only bear the direct and necessary costs of disassembly of the defective parts, however, such obligation to bear costs does not apply, if the costs are disproportionate. Disproportionality in this meaning exists as well, if the ratio between the cost of disassembly and the delivery price of the defective delivery items is inadequate. For the rest, the customer shall bear the cost.

6.3 The customer shall allow the Supplier such adequate time and opportunity for the supplementary performance that the Supplier deems necessary in its equitable discretion.

6.4 If a supplementary performance or replacement delivery is impossible, or remains unsuccessful, or if the Supplier effectlessly let pass a respite set by the customer for the remediation of a defect, for which the Supplier is responsible, the customer shall have the right to withdraw. For the rest, any liability of the Supplier, including but not limited to liability for damages - disregarding the legal basis – shall be excluded, unless the damage is subject to the deliberation or gross negligence by the Supplier or by Supplier's executive employees; in the latter case, any claims for damages shall be limited to such damages that were reasonably foreseeable on the day of the entering into the agreement.

6.5 The Supplier does not assume any liability or warranty for damages due to ordinary wear and tear, careless or faulty operation or excessive stress through chemical, mechanical or electrical factors or other detrimental circumstances that have not been notified to the Supplier in advance. Likewise, any liability of the Supplier shall terminate, as soon as the customer carries out or causes to be carried out repairs, works or modifications of whatever kind to the delivery items without the Supplier's written prior approval.

Likewise, any liability or warranty of the Supplier terminates, if the operational circumstances under which the delivery items are to operate, have not been appropriately described to him.

6.6 For the delivery of third party products or for primary materials procured from third persons, the Supplier assumes liability or warranty only to the extent of the warranty obligations assumed by its sub-suppliers.

6.7 The Supplier assumes no liability or warranty for materials that have been delivered by the customer or have been procured pursuant to customer's determined specification, he further assumes no liability or warranty for design determined by the customer.

6.8 The Supplier's liability and warranty only apply vis-à-vis to the customer. In case of resale, Supplier assumes no liability or warranty vis-à-vis to third persons.

6.9 Any claims of the customer relating to supplementary performance as well as claims, if any, for damages or reimbursement of expenses due to defects are time barred upon the expiration of one year from the delivery of the delivery items. If the receipt of the delivery items or the acceptance of the deliveries or services is delayed without fault on the part of the Supplier, then any claim shall be time barred latest upon the expiration of one year from the day of the placing at disposal. The same shall apply to supplementary performance.

The parties agree that the delivery prices contain an adequate compensation for claims of recourse pursuant to §§ 478, 479 BGB, if any. In this respect, respective claims of the customer against the Supplier are excluded.

6.10 Unless explicitly and unambiguously otherwise agreed to, warranted characteristics or guarantees are not intended to and do not cover damages that have not occurred directly to the delivery items. If due to explicit agreement warranted characteristics or guarantees encompass further damages, the Supplier shall only be liable for damages to the extent such damages were foreseeable on the day of the entering into the agreement.

6.11 For the rest, and disregarding the legal basis, the Supplier shall only be liable to the customer in case of deliberate breach of duty, in case of gross negligent breach of duties by its statutory organs or executive employees, in case of culpable violation of life, body and health, in case of defects that have been fraudulently concealed or the lack of which has been guaranteed and in case of defects of the delivery items, to the extent that liability is provided for pursuant to the German Product Liability Act (Produkthaftungsgesetz) for bodily injury or property damage to privately used items. In case of culpable breach of material contractual duties, supplier shall be liable in case of gross negligence of its non-executive employees and in case of simple negligence, in the latter case limited to the reasonably foreseeable damage, inherent to such contract.

Further damages are excluded.

7. Supplier's Software / Supplier's Properties and Rights / Third Person Intellectual Properties

7.1 To the extent the Supplier's deliveries include software, the customer shall only have a non-exclusive, non-transferrable and non-sublicenseable right, to use the software including its documentation during the limited term pursuant to the delivery agreement and only together with the respective delivery items. The customer may copy, rework, translate or transform the software from an object code into a source code only in compliance with §§ 69 ff of the German Copyright Act (Urheberrechtsgesetz). Manufacturer information and authorship notes may not be removed or amended.

7.2 The Supplier retains any and all proprietary rights, copyrights as well as all intellectual property rights relating to samples, quotations, drawings and similar information, whether tangible or intangible – including in electronic form – as well as relating to documentation and tooling made by the Supplier, including but not limited to tools, jigs and fixtures or software and its documentation. Any dissemination or transfer of such items or rights to third persons requires the Supplier's prior written consent. The customer's rights to use software and its documentation are governed by section 7.1 of these Conditions.

7.3 If the Supplier is required to perform pursuant to customer's drawings, models or samples or to use parts provided by the customer, the customer shall be liable to the Supplier that this shall not result in an infringement of intellectual property rights of third persons. The customer shall hold the Supplier harmless from third persons' claims relating to the infringement of intellectual property rights and shall indemnify the Supplier for all actual damages and reimburse to Supplier all cost and expenses. If a third person prohibits the customer to manufacture or deliver due to an intellectual property right, the Supplier may cease its works even without more close examination of the legal situation. In such case, supplier may withdraw from the agreement and claim for reimbursement of its cost and expenses.

8. Confidentiality

The customer shall keep strictly confidential all confidential information obtained from the Supplier, including but not limited to drawings, data or performance data. This obligation shall survive any termination of the delivery agreement. This confidentiality obligation shall not apply to information that has been rightfully known to the customer at the time of receipt without any confidentiality obligation or becomes later rightfully known without any confidentiality obligation or that is or comes into public domain without any breach of contract on the part of the customer.

9. Miscellaneous

9.1 Place of performance is the Supplier's domicile. The contractual relation is subject to the substantive laws of the Federal Republic of Germany without reference to its conflict of law provisions. The United Nations Convention on the International Sale of Goods (CISG) shall not apply.

9.2 Place of venue for all disputes (including legal actions based on bills of exchange or checks) with customers that are companies, that are public corporations or public separate estates, with customers that do not have a general place of venue in Germany, or that have, after the entering into an agreement, moved their residence or general domicile from Germany, or with customers, whose general domicile is unknown at the time of the commencement of the legal action, is the Supplier's domicile. However, the Supplier may initiate legal actions against the customer at the customer's place of domicile or at the place of its branch.

9.3 The assignment or transfer of claims or rights by the customer to third persons requires the Supplier's prior consent.

9.4 If any provision or any part of any provision of these Conditions is invalid, this shall not invalidate the remaining provisions or parts thereof.

9.5 The customer is herewith explicitly notified that the Supplier will record personal data and will process such data in connection with business transactions. This will be carried out in compliance with the applicable laws.

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