

General Sales Terms and Delivery Conditions of Wirthwein Medical GmbH & Co. KG

Last updated: July 2020

Area of application

The following Terms and Conditions shall only apply to contractors, legal entities under public law or with public special funds.

I. Validity of these conditions

1. Subject to deviating agreements in the individual case the conclusion of contracts with us is governed exclusively by the following Terms and Conditions; when placing an order the Customer thereby accepts our Terms and Conditions.
2. Contradicting or deviating Terms and Conditions of the Customer shall only be binding for us if we have expressly agreed on their applicability in writing. Our Terms and Conditions also apply when we provide our delivery or service without reservation upon knowledge of the Customer's adverse or deviating Terms and Conditions.
3. These General Terms and Conditions shall apply for all our deliveries and services and for all of the duties that might result from any relationship with the Customer under the law of obligations.
4. For entrepreneurs and legal entities incorporated under public law our Terms and Conditions apply also for all future business relations.

II. Offers/amendments

1. Our offers are non-binding unless expressly stated otherwise.
2. A contract shall only be deemed concluded with us when the Customer accepts our offer without reservation or when he receives our written confirmation of his order or when we commence with the delivery or rendering of services.
3. If we issue a written order confirmation, it shall be binding for content and scope of the contract unless expressly agreed otherwise.
4. Amendments, collateral agreements and further amendments as well as any respective quality agreements or the issuance of guarantees shall require an explicit agreement in writing to take effect.

III. Prices

1. The prices specified by us shall apply plus the relevant statutory value added tax if due. Unless otherwise agreed, together with the agreed payment we shall be entitled to reimbursement of incurred expenses.
2. The prices are quoted ex works, excluding freight, customs, subsidiary import charges, and packaging, plus the legally provided value added tax.
3. Should the price be agreed on the basis of component weight, the final price shall be based on the weight of the outturn samples provided.
4. No obligation to previous price agreements shall exist for new orders (follow-up orders).

IV. Order execution

1. Unless explicitly agreed upon otherwise, the object of goods and services only shall have the properties, technical characteristics, etc. as expressly stipulated by contract; our contractual obligation are guaranties in a legal sense only if we accept liability without fault or if we explicitly state them to be such guaranties; any guaranty must be made in writing to take effect.
2. We reserve the right to make technical and design changes to the descriptions and specifications in our prospectus, catalogues or similar sales documents in the same or better quality and we may exchange parts and components against such of same or better technical standards without the Customer being entitled to derive any rights against us herefrom. Neither these descriptions nor such statements nor any advertisements (also those made by the manufacturer) shall comprise a declaration of guaranty. Unless the statutory provisions specify otherwise, we shall only owe advice if we have assumed it as a primary contractual obligation.

3. The Customer has to fully inform us of all facts relevant to the execution of our delivery and/or service. We shall not be obliged to check data, information or other service on correctness and completeness insofar as the respective circumstances of the individual case do not provide any reason to do so or the duty to carry out checks has not been expressly assumed as a contractual obligation.
4. Insofar as work is performed on the Customer's premises, the Customer shall provide our employees with the workstations and resources necessary free of charge.
5. If we perform our services outside of our company premises, the Customer shall be obliged to take all necessary measures in order to comply with existing traffic safety measures unless otherwise determined either by the nature of the business or by agreement with the Customer. We shall be entitled to refuse execution of the delivery of our goods and/or rendering of our services as long as the necessary measures have not been taken.
6. Regardless of our continued responsibility for the fulfilment of contractual services, we shall be fully entitled to engage third parties for the contractual performance. In case workers whose service has been contractually agreed are unavailable which we cannot be made responsible for, we may replace them by other suitable workers.

V. Delivery-/Purchase obligation

1. Delivery periods start upon reception of all documents required for execution of the order, down payment and the timely provision of material if agreed upon.
2. Appropriate partial deliveries as well as tolerable quantity variances up to 10 % of the agreed scope are admissible; in this case the Customer shall owe us the remuneration for the actually delivered quantity. This also applies to quantity variations of up to -10 % of the agreed scope.
3. For call orders without agreements on duration, production batch sizes and acceptance date we may request a written confirmation hereof three months after order confirmation at the latest. If the Customer does not respond to this request within three weeks, we shall have the right to specify an extension of two weeks after which we may withdraw from the contract and/or claim damages.
4. If the Customer fails to meet his acceptance obligation, irrespective of other rights we are no longer committed to the provisions on self-help sale, i.e. we are free to privately sell the goods upon prior notification of the Customer.

VI. Force majeure

1. In cases of force majeure the affected contracting party shall be exempted from the obligation to deliver or accept for the duration and the scope of the effect. Force majeure shall include any event beyond the sphere of influence of the respective contractual partner which prevent him to meet his obligations in whole or in part, including fire damages, floodings, legal lockouts as well as operational disruptions not caused by him or official decrees. Difficulties of supply and other service disruptions on part of the Vendor's Pre-suppliers shall only be considered as force majeure if the Pre-Supplier on his part was impeded to provide service due to an incident according to clause 1.
2. The affected contractual partner shall immediately notify the other contractual partner of the occurrence of a force majeure and its elimination and try to the best of his ability to remove the force majeure and limit its effects as much as possible.
3. In the case of a force majeure, the contractual partners shall agree upon the further action and determine whether goods that had not been delivered during this period should be delivered subsequently. Notwithstanding the above, each contractual partner shall be entitled to withdraw from the orders concerned hereof if the force majeure lasts more than 8 weeks beyond the agreed delivery date.

VII. Packaging, dispatch, transfer of risk and default of acceptance

1. Unless agreed otherwise, we shall choose packaging, shipping method and transport route.

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2. Even in the case of freight-paid shipments, the risk shall be borne by the Customer after the goods have left the supplier plant. In the case of shipment delays caused by the Customer the risk already passes to the Customer upon notification of readiness for shipment.
3. Upon the Customer's written request the goods shall be insured against the risks specified by the Customer at his expense.

VIII. Retention of title

1. We shall retain the title of goods delivered by us until the fulfillment of any of our claims against the Customer, even if the purchase price for especially designated claims has already been paid. In the case of current account the title of ownership to the deliveries (goods subject to retention of title) shall be retained as security against the balance due. If, in connection with the payment of the purchase price, a mutual liability is substantiated by us, the reservation of title will not expire before the redemption of the draft by the Customer as the drawee.
2. Treatment or processing by the Customer is effected under exclusion of acquisition of ownership according to § 950 German Civil Code upon our order; we shall become co-owner of the goods thus produced in function of the ratio of the invoiced net amount of our goods to the invoiced net amount of the goods to be treated or processed which, being reserved goods, serve as security for our claims according to paragraph 1.
3. In the event of the reserved goods being processed (combined/mixed) by the Customer with other goods not owned by us, the stipulations of §§ 947, 948 of the German Civil Code shall apply with the result that our co-ownership in the new object henceforth becomes reserved property as defined by these Terms and Conditions.
4. The Customer shall only be permitted to resell goods to which retention of title applies in the normal course of business and under the condition that he likewise agrees upon an appropriate retention of title with his customers as defined in paragraphs 1 to 3. The Customer shall not be entitled to other dispositions of reserved property, in particular not pledging and transfer of ownership by way of security.
5. In the event of resale the Customer shall hereby assign to us the claims arising from the resale and any claims against his customers with all ancillary rights up to the fulfillment of all our claims in the amount of the invoiced final amount (including value added tax). Upon our request the Customer should be obliged to deliver all information and documents required for the assertion of our claims against the Customer's contractual partner.
6. If the Customer resells the reserved property together with other goods not belonging to us after processing according to paragraph 2 and/or 3, the assignment of the purchase price claim according to paragraph 5 shall be limited to the invoice amount of our reserved property.
7. Should the value of the securities provided for us exceed our total claims by more than 10 %, we shall be obliged to release securities at our discretion upon the Customer's request.
8. We shall be immediately informed of any pledging or confiscation of reserved property by third parties to file suit in pursuance of § 771 German Civil Procedure Code. As far as the third party is unable to reimburse the judicial and extrajudicial charges of a claim according to §771 German Civil Procedure Code to us, the Customer shall be made liable for the loss occurred.
9. If pursuant to the provisions above we make use of our reservation of title by taking back the reserved property, we shall be entitled to resell or auction the goods off. The assertion of the reservation of title and particularly the claim for restitution shall be regarded as withdrawal from the contract. The reserved property shall be redeemed at the amount of proceeds, yet not exceeding the delivery prices agreed upon. Any further claims for compensation, in particular for loss of profit, are reserved.

IX. Liability for material defects

1. Decisive for product quality and style are the type samples which we shall submit to the Customer for evaluation upon request. A reference to technical standards serves as specification of services and must not be interpreted as quality warranty.
2. If we have advised the Customer beyond his contractual service, we shall be liable for functioning and suitability of the delivery item only upon prior express warranty.

3. Notice of defects has to be claimed in writing without delay. In the event of hidden effects the notice of defects has to be given immediately upon detection. Unless otherwise agreed, all claims for defects shall lapse twelve months after the transfer of risk. The statutory limitation periods for the right of recourse according to §§ 478, 479 German Civil Code remain unaffected insofar as the law prescribes longer time limits pursuant to § 438 paragraph 1 No. 2 or § 634a paragraph. 1 No. 2 of the German Civil Code, in the case of a deliberate or grossly negligent breach of duty on our part, in the case of a fraudulent concealment of a defect as well as in the cases of injury to life, body or health as well as claims of the product liability law.
4. Upon substantiated notice of defect we shall be obliged to supplementary performance at our discretion, whereas the type samples released by the Customer determine the expected quality and finish. If we fail to meet this obligation within a reasonable period of time or if subsequent correction fails despite repeated attempts, the Customer shall be entitled to reduce the purchase price or to withdraw from the contract. Further claims, particularly claims for reimbursement of expenses or damages due to damage or consequential damage, only exist within the framework of the provisions at number X. Replaced parts shall be returned to us unpaid on demand.
5. Arbitrary reworking and improper handling shall involve the loss of any claims for defects. Only in order to avoid unreasonably major damages or in the case of delay of the rectification of defects on our part shall the Customer be entitled to mend the defect and to claim compensation for reasonable costs upon prior agreement.
6. Warranty claims shall not be admitted for normal wear and tear due to contractual use.
7. Recourse claims according to §§ 478, 479 German Civil Code shall only exist to the extent that the claim by the Customer was justified and only to the statutory extent but not for goodwill regulations agreed with us, and shall presuppose compliance with own duties of the party entitled to recourse, in particular compliance with the notification duties.

X. General limitation of liability

We shall be liable to the Customer from contractual, quasi contractual and statutory, also tortious claims for damages and expenses as follows:

1. We shall have unlimited liability for any legal ground
 - in case of intent or gross negligence,
 - in case of intentional or negligent injury to life, body or health,
 - in case of guarantee commitment, unless otherwise agreed in this regard,
 - in case of statutory liability pursuant to the German Product Liability Law.
2. In case we negligently breach an essential contractual obligation, the liability shall be limited to the contractual foreseeable damage, unless we have unlimited liability according to the previous clause. Essential contractual obligations shall be understood as obligations which the contract imposes on us according to its contents to attain the contract purpose the fulfillment of which provides for a proper contract execution in the first place and the compliance of which the Customer may regularly rely on.
3. Otherwise our liability shall be excluded.
4. The aforementioned liability provisions shall also apply with regard to our liability for our vicarious agents and legal representatives.

XI. Terms of payment

1. Payment shall be made in € (EURO) exclusively to us.
2. Unless otherwise stipulated, the purchase price for deliveries or other services shall be paid with a 2 percent cash discount within 14 days or without deduction within 30 days from the date of invoice. A granting discount shall require the payment of all indisputable invoices due at an earlier date. A cash discount shall not be granted for potential note payments.
3. In the event of late payment, the legal interest rate of 9 % shall be invoiced according to the respective base interest rate of the ECB.

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4. We shall reserve the right to refuse checks or notes. Checks and rediscountable bills are only accepted on account of performance; all costs involved are at the Customer's expense.
5. The Customer shall only have the right to set off or assert a right of retention if his claims are undisputed or legally established or in a close mutuality- or exchange relationship with our claims.
6. Any claims shall become due immediately in case of a persistent non-observance of terms of payment or circumstances which give reason to serious doubts as to the creditworthiness of the Customer. In this case we shall also be entitled to claim payment in advance for outstanding deliveries and to withdraw from a contract upon unsuccessful expiration of a reasonable deadline.

XII. Molds

1. The prices for molds also include costs for single sampling yet not costs for test- and processing devices as well as alterations initiated by the Customer. Costs for further samplings caused by us shall be at our expense.
2. Unless otherwise agreed, we shall be and remain the owner of the molds produced by ourselves or by an entrusted third party for the Customer. Molds shall only be used for orders of the Customer as long as the Customer meets his obligation to pay and accept. We shall only be obliged to replace these molds free of charge if they are required to provide an output quantity warranted to the Customer. Our obligation to store the molds shall expire two years following the last part delivery of the molds and upon prior notification to the Customer.
3. If, according to the agreement, the Customer shall become the owner of the molds, the property shall pass into the ownership of the Customer upon complete settlement of the purchase price for the molds. The delivery of the molds to the Customer shall be replaced by our obligation to store the molds. Irrespective of the statutory claim for restitution and of the service life of the molds, we shall be entitled to sole possession up to the termination of contract. We shall label the molds as third party property and shall insure them upon request and to the expense of the Customer. In case of customer-owned molds according to section 3 and/or molds provided by the Customer by way of loan, our liability for storage and care shall be limited to the care as if it was our own property.
4. The Customer shall bear the costs for maintenance and insurance. These obligations shall expire if the Customer does not pick up the molds within a reasonable period upon settlement of the order and corresponding request. As long as the Customer has not met his contractual obligations to the full extent, we shall be entitled to the right of retention of the molds in any case.

XIII. Provision of material

1. If materials are delivered by the Customer, they are to be delivered in a timely manner and in accordance with the agreed specifications at the cost and risk of the Customer with a reasonable quantity surcharge of at least 5 %.
2. If these requirements are not met, the delivery period shall be extended accordingly. Except in cases of force majeure, the Customer shall bear the additional cost also for process interruptions provided the Customer is responsible for them.

XIV. Industrial property rights and defects of title

1. If we deliver according to drawings, models, samples or with the use of parts provided by the Customer, the Customer shall take responsibility for third-party property rights not being hereby infringed in the country of destination of the goods. We shall inform the Customer of rights known to him. The Customer shall indemnify us from any third-party claims and shall pay compensation for any loss incurred. Should a third party forbid us production or delivery on the claim of property rights belonging to him, we shall be entitled to discontinue with the manufacturing process – without examination of the legal situation – until the legal situation is clarified by the Customer and the third party. If we cannot reasonably be expected to continue with the order, we shall be entitled to withdraw from the contract.
2. Drawings and samples which had been handed over to us yet did not lead to an order shall be returned on request; otherwise we shall be entitled to destroy them three months after submission of the offer. This shall apply accordingly to the Customer. The party entitled to destruction has to inform the contractual partner about the intention of doing so in due time.
3. We are entitled to all copyrights and where applicable industrial property rights, in particular utilization- and property rights in regard to models, forms and appliances, designs and drawings created by us or third parties on our behalf.
4. In the event of other defects of title, the provisions in accordance with clause X shall apply analogously.

XV. Place of performance and place of jurisdiction

1. The place of performance shall be the place of the supplying plant.
2. The exclusive place of jurisdiction - also for bills of exchange, promissory notes and checks – shall be our headquarters if the contracting partners are businessmen or juristic persons under public law or special funds governed by public law or if at least one of the contracting partners does not have a place of general jurisdiction in the Federal Republic of Germany. We shall in addition have the option to sue the Customer at his registered office.
3. The German law shall exclusively apply, under exclusion of the private international law and the UN sales law.