

General Sales and Delivery Terms and Conditions



Winkelmann MSR Technology GmbH + Co. KG
Gersteinstraße 15 | 59227 Ahlen | Germany
Phone +49 (0) 23 82 - 8 56 - 0
Fax +49 (0) 23 82 - 8 56 - 92 89
www.winkelmann-flowforming.de
info@winkelmann-flowforming.de

These General Terms and Conditions for the Sale and Delivery of Goods shall only apply to natural persons or entities, or the partnerships with legal personality acting in their commercial or self-employed capacity (entrepreneurs) at the time the contract is concluded and shall exclusively apply. The following Terms and Conditions apply to all our sales and deliveries unless otherwise agreed in writing:

I. General

1. These Terms and Conditions shall exclusively apply to our sales and deliveries; any conflicting or different terms or conditions of the Buyer which are not expressly acknowledged by us in writing are void and not binding for us, even if we have not expressly objected to them or if we have delivered partly or entirely without express objection.
2. All agreements between us and the Buyer and/or Recipient concerning the sale, delivery or any other part of the transaction have to be in writing. Any agreement with us or promise, statement, declaration or explanation by us which has been concluded or made orally, by phone, telegraph, fax or e-mail must be confirmed in writing to become valid.
3. These Terms and Conditions also apply to all future sales and deliveries to the Buyer and to any single call or installment in the course of a framework contract, a contract for delivery in installments or any other apportioned contract.
4. The Buyer is entitled to terminate any contract or order confirmed by us only for good cause; the Buyer's statutory right to rescind the contract shall not be restricted. The aforesaid right of termination of contract shall apply particularly but without limitation to framework contracts, contracts for delivery in installments or any other apportioned contracts.
5. Our offer is free. The order of the Buyer is understood to be binding. Any contract is concluded either upon receipt of our written confirmation of the order within 10 days after receipt of the Buyer's order or upon delivery of the ordered goods within the aforementioned period (acceptance). In the course of a framework contract, a contract for delivery in installments or any other apportioned contract the Buyer must take the entire delivery within 10 months after conclusion of the contract; the Buyer must call for delivery adequately in time but at least 16 weeks in advance before delivery.
6. The Buyer's rights under this agreement, statutory and stipulated, are not transferable. The provision of § 354a HGB (German Commercial Code) remains unaffected.
7. If any term or condition of this agreement or of these Terms and Conditions is or becomes void entirely or partly, the validity of the agreement and the other terms and conditions shall not be affected.
8. This agreement and the legal relationship between us and the Buyer and/or Recipient shall exclusively be governed by and construed under German Law; the United Nations Convention on Contracts for the International Sale of Goods (CISG) of April 4, 1980 shall not apply.

II. Intellectual Property Rights in documents, drawings etc. / Liability of Buyer

1. We remain owner of all title and all proprietary and protective rights in all drawings, models, samples, calculations and other materials provided by us; no third party shall be granted access to these materials. The aforesaid applies particularly but without limitation to materials marked as „confidential“; the Buyer needs our express approval in writing before passing such material forward to any third party.
2. As far as we have to supply goods according to drawings, models, samples or from tools provided to us by the Buyer, the Buyer assumes the liability towards us for not infringing third parties' proprietary or protective rights. In such case, it is not our but the Buyer's exclusive duty to check whether tools and resulting parts ordered from us infringe or collide with any national or international protective rights of any third party.
3. In the event that any third party, based on the allegation of protective or proprietary rights, prohibits us from producing or supplying goods following the drawings, models, samples, calculations, pictures or made with tools provided by the Buyer, we are entitled to stop the production and the delivery as well as to claim compensation for our damages, our losses and lost profit, unless the Buyer is not at fault. We are not obliged to examine the legal situation and the third party's allegations, neither factually nor legally. We are not liable for any damages or losses sustained by the Buyer due to any stop or delay of production or delivery for reasons set forth in this clause.

4. The Buyer engages to immediately hold us harmless of any claims for damages from third parties. He has to provide us with appropriate advances of funds for all direct and indirect damages resulting from the alleged infringement and enforcement of potential protective or proprietary rights, including but not limited to expenses for judicial and extra judicial legal costs.
5. We will return models, samples and drawings provided by the Buyer only upon express request. If the Buyer does not place an order for supply, we are entitled to destroy and/or dispose of models, samples and/or drawings after a period of three months after our offer.

III. Prices and Payment

1. Our prices are „ex works“, freight and packaging exclusive, unless we have confirmed expressly otherwise. Freightage and packaging will be charged for separately. In the event of any return of reusable boxes and/or packaging freight paid, we credit 2/3 of the charged costs. Rent for railway-boxes is at the Buyer's charge.
2. V.A.T. is not included in our prices and will be added if and in the amount legally required on the day of the invoice. V.A.T. will be shown separately in the invoice.
3. Piece Prices for prototypes and their tooling do not include costs caused by testing, further development and adjustment to new know-how gained by the testing. Such costs have to be reimbursed separately.
4. In contracts with continuing obligations prices are subject to alteration. The prices are calculated on the basis of the project-related price and savings plans agreed with the buyer unless we have declared otherwise in writing. In the event of increases of labor and/or material costs arising at least four months after the date of our order confirmation, we are entitled to increase our prices adequately for these cost increases if they are not compensated by decreases of other costs reflected in the price structure. Accordingly we will pass on to the customer decreased expenses for wages and/or material.. We are also entitled to increase prices and additional charges for tools if, in the course of executing the order, we realize the necessity of further substantial processes of work or additional tools which according to generally accepted codes of practice were not foreseeable and therefore not calculated and not included in the negotiations as apparent to the customer. The increases of prices and additional charges for tools pursuant to sentences 2 and/or 3 are governed by §§ 315, 316 of the German Civil Code (BGB). The customer in such a case has an extraordinary termination right with regard to work not yet performed. Work performed has to be reimbursed.
5. Unless otherwise agreed, payment has to be made by bank transfer without any deduction, to ourselves. Any time allowed for payment, orders to pay, bills, promissory notes or checks will be accepted only if agreed in writing and solely on account of payment; discounting charges and any collecting costs will be charged to the Buyer. We are not liable for any delay in the submittal and/or protest of any such order, bill, note or check. Charges forward (COD) are paid by the Buyer.
6. If we have granted any discount in writing, the discount refers to the price for the goods excluding ancillary costs.
7. In case of several outstanding invoices, we are entitled to determine the order of the discharge of liabilities.
8. Payments for tools are due net cash within 10 days after release of the reference sample. The release cannot be withheld if the reference sample submitted for release is of average kind and quality. Payment for the tools or for the share of costs for tools becomes due upon submission and presentation of such reference sample.
9. Unless otherwise confirmed in writing, all other payments are due net cash upon delivery of the invoice.
10. We are entitled to interest upon defaults in payment at the relevant Basis Interest Rate plus 8 % p.a. (§ 247 German Civil Code, BGB). Notwithstanding the aforesaid and without prejudice to indemnification of any other damage, we are entitled to claim reimbursement of any further losses of interest. In the event of a default in payment, the need to collect payment, or suspension of payments, all granted discounts or price reductions become forfeited.
11. All payments have to be made in Euro to ourselves, not to our business agents.
12. The Buyer is allowed to offset only such of his claims against our claims on him which are either non-controversial, acknowledged by us in writing, or have become res judicata. He is entitled to exercise a right of retention only if the counterclaim results from the same contractual relationship.

IV. Period of delivery

1. Any periods of delivery declared by us do not begin before
 - a) receipt of all required drawings, materials, calculations and such packaging (e.g. pallets, interlayers etc.) and components which shall be supplied by the Buyer or on his behalf and
 - b) clarification of all technical issues with Buyer and
 - c) receipt of all installments due, if such installments are expressly agreed upon.If we have to submit reference samples, any period of delivery of series parts begins upon release of such reference sample and receipt of all installments due according to lit. c. unless otherwise agreed in writing.
2. Periods of delivery are only binding if expressly indicated as binding by ourselves in writing.
3. In the event of our default in delivery which we are liable for, the Buyer is entitled to a flat rate of 3 % of the delivery value per entire week of default, but in sum not more than 10 % of the delivery value. For any other defective performance we are liable only according to Section. VII.
4. The Buyer is entitled to revoke the contract only in case and to the extent we are in default with performance of our obligations.. In this event the Buyer has to indemnify us for our costs for tools and materials against delivery of these tools and materials. The Buyer is only entitled to reimbursement of damages for non-performance, if the default is caused intentionally, grossly negligently or by breach of an essential duty; in any other case we are liable only according Section VII.
5. The limitation of liability pursuant to clauses 3. and 4. above does not apply if the parties agreed to a commercial transaction for delivery at a fixed date, or if the Buyer proves that he reasonably lost his interest in the fulfillment of the contract due to our default in delivery.
6. The Buyer's due and timely performance of his obligations is of the essence and constitutes a condition precedent for our obligations to perform becoming due.
7. In case of the Buyer's default in accepting delivery, or if the Buyer has breached any other duty to cooperate, we are entitled to reimbursement of any damages, lost profit, losses and/or additional costs sustained. The risk of accidental loss or deterioration of the goods sold passes to the Buyer when his default or breach of duty occurs.
8. If it is agreed that the Buyer collects or sends for the goods, and if the collection does not occur within a week after the notice of completion, we have the right to deliver the goods to the Buyer at his expenses and the Buyer is obliged to accept the delivery. At the latest if and when the Buyer refuses to accept the goods delivered according to sentence 1, this constitutes his default in acceptance (section 7).
9. In the event of Force Majeure preventing us from performance, we are released from performance for the duration of that obstacle. If Force Majeure lasts for longer than 6 months, both parties have the right to revoke the contract. Any accidents or causes non-foreseeable or avoidable by us which result in a delay of the start of production or a complete or partial disruption of work, e.g. lack of materials or operating supplies, difficulties and obstacles in transportation or energy supply, interference with our processes or with a supplier's process and any delays in the supply with raw materials, tools, and machinery required for the ordered goods, shall be considered as events of Force Majeure.

V. Passing of risk, Delivery

1. All deliveries of our goods are „ex works“ unless otherwise provided in our order confirmation. All shipments are for the account and at the risk of the Buyer, including shipments delivered free to destination and also including transportation with our vehicles.
2. Packaging and shipment are at our discretion; our liability for any damages or losses is governed by section IX.
3. We will obtain insurance for the goods and/or transit in accordance with and at the account of the Buyer. It is the Buyer's business and not our obligation to settle damages to and/or losses of goods in transit.
4. We reserve the right to deliver plus or minus 10 % of the ordered quantity.

5. Delivery in installments is allowed to an extent which is reasonable for customer unless we have confirmed otherwise. In case of a partial delivery contrary to the contract, a right to cancel the agreement shall only exist after the expiration of an appropriate period for performance or subsequent fulfillment and only as far as customer makes clear not to have any interest in a partial performance.

VI. Components supplied by or on behalf of the Buyer

1. If the Buyer is obliged to supply components and/or packaging for the manufacturing and delivery of the goods ordered, he must deliver these components plus a 5 to 10 % additional quantity for scrap or increased production in perfect condition and in volumes allowing process continuity, free delivered to our factory, in time for the manufacturing process.
2. In case of delayed or deficient delivery or defective quality of such components/packaging, the Buyer must indemnify us for our additional costs and expenses as well as damages and losses incurred by such delay, deficiency or defectiveness. In these events, we are entitled at our discretion either to interrupt the manufacturing process and to resume it at a later time or to obtain the required components from other suppliers at the account of the Buyer; however, before the latter, we have to notify the Buyer in time. In addition, all periods of delivery are cancelled in these cases.

VII. Warranties

1. The manufacturing and delivery of prototypes is done according to customer's drawings, if not agreed otherwise. Insignificant or normal deviations from the drawings acc. to acknowledged state of the art are not regarded as defects.
2. The standard for the quality and the finish of all goods (with exception of prototypes) is set by the average reference sample submitted to the Buyer by us before the start of serial supplies; for recurring deliveries, the standard for quality and the finish of goods is determined by the quality and the finish of the goods which have been delivered before without objection from the Buyer or the Recipient.
3. The responsibility for the technically correct design, the functionality and the usability of the goods is with the Buyer solely, even if we provided technical advice in the course of development, unless we have given express warranty for any such property.
4. For any warranty claims of the Buyer, it is a prerequisite that he obey his statutory duties (§ 377 German Commercial Code) to examine the goods and to give notice of any defects and/or short deliveries immediately. The Buyer shall give notice of obvious defects in writing exactly specifying the defects within (7) seven days after delivery of the goods or passing of risk (Section V.). Other defects shall be noticed immediately after their detection, at the longest 12 months after risk passing (Section V.). Any representatives charged with examining defects are not entitled to acknowledge defects, obligations etc. with binding effect on behalf of us.
5. If a complaint proves to be justified, we have the right at our discretion either to rework the defective parts, to replace them free of charge or to reduce the price; if the business relationship with the Buyer is a long-term one, we are allowed to credit the reduction in price to the Buyer's customer account with us. In cases of reworking of defects or replacements of defective goods, we bear and reimburse all costs and charges adequately incurred by such removal or replacement, e.g. carriage charges, toll, labor and material costs, except for cost increases from the fact that the goods have been moved to a place differing from the place of delivery.
6. If we fail to repair the defects or to replace the defective goods by appropriate goods, the Buyer has the right to demand at his discretion either rescission of the contract or adequate reduction of the price.
7. We are liable according to statutory rules, if the Buyer raises claims against us based on missing characteristics that were guaranteed. Such guarantees shall only be valid and binding, if they are granted in express writing and termed as "Warranty" ("Garantie"). For any other lack of quality we are liable according to Section IX.
8. Goods we have acknowledged as defective have to be returned upon our request.
9. In case of defective deliveries, the Buyer has to make full payment including carrier charges, packaging and V.A.T. for those goods delivered free from defects.

10. Claims relating to defects shall become statute-barred within 12 months after transfer of risk. The statutory limitation periods shall apply in cases where we can be charged with malice or intent or damages to life, limb or health. The limitation period in the cases of delivery regress according to §§ 478, 479 German Civil Code remains unaffected.

VIII. Warranty for defects in title

1. With exception of situations described in section II.2 and 3, in case the use of delivered goods infringes industrial or intellectual property rights of third parties in the agreed country of destination of the goods we shall at our own costs and upon our discretion provide the Buyer with the right to use the delivered goods or to modify such goods to the extent reasonable for the Buyer with the purpose of remedying such infringement. In case we are not able to remedy such infringement within six (6) weeks from receipt of a respective written notice by the Buyer, the Buyer may withdraw from the respective order. We shall have the same right to withdraw from the respective order under the conditions described before or in case the infringement of third party rights cannot be remedied on commercially reasonable terms.

Furthermore, we will indemnify the Buyer and keep him harmless of third party's claims in respect of the above mentioned infringements if undisputed by us or established by final judgment.

2. Subject to the provisions under section IX. (Total Liability), our obligations in case of any infringement of third parties' intellectual or industrial property rights as per section 1. above shall be exhaustive.

They shall only apply in case:

- The Buyer notified us of any asserted intellectual or industrial property infringement claims without undue delay;
- if the Buyer reasonably assists us in defending the claims asserted by third parties and enables us to undertake the modification of the delivered goods in accordance with this section 1. respectively;
- any action of defence including extra-judicial arrangements shall be subject to our prior written consent;
- the infringement is not due to the Buyer's direction or specification; and
- the infringement has not been caused by an amendment of the delivered goods by the Buyer without our consent or the use of the delivered goods not in compliance with the respective contract.

3. The limitation period shall be determined according to section VII.11.

IX. Total liability

1. We are liable for damages only in case of and to the extent to which we are responsible for defective performance.
We are responsible for
 - a) any infringement of material obligations (infringement endangers the achievement of the contract purpose) caused by at least ordinary negligence or
 - b) any infringement of non-material obligations caused intentionally or grossly negligently.
 - c) the culpable violation of life, body and health,
 - d) defects which have maliciously been concealed by us or which we have guaranteed not to exist,
 - e) defects of the object of the delivery, as far as liability is assumed pursuant to the law of product liability for personal injuries or property damages of objects which are used for private purposes.
2. In case of lack of gross negligence of any of our directors or officers our liability is limited in situations according to section IX.1a-b to the foreseeable and typical damages considering the particular type of contract. Any damage is deemed to be unforeseeable if it exceeds the invoice value of the particular order, respectively the invoice value of the relevant installment in the course of a framework contract. The aforesaid limitation of liability does not apply to tortious liability.
3. The Buyer is only entitled to reimbursement of damages for non-performance, in case of lapse of a reasonable extension for performance granted to ourselves. The granted extension shall be at least 4 weeks. The aforementioned applies as well on revocation of the contract.
4. As far as our liability is excluded or limited, this exclusion or limitation also applies to the personal liability of our employees, officers, representatives and agents.

5. All contractual claims for damages shall become statute-barred within twelve months as from the passing of risk. The statutory limitation periods shall apply in cases where we can be charged with malice or intent or damages to life, limb or health. The limitation period in the cases of delivery regress according to §§ 478, 479 German Civil Code remains unaffected.

X. Tools

1. The tooling costs displayed in our quotation resp. order confirmation constitute only part of the actual material, labor and reference sample costs and are to be considered as mere guiding prices. Therefore, by payment of these partial tooling costs the Buyer does not acquire property or title in these tools; we keep all property and possessory title in these tools.
2. The tools are used only for the manufacturing of the goods ordered by the Buyer.
3. If the price of the order or the total price of the goods manufactured with the tools within one year from the first delivery does not amount to at least the equivalent of 7,5 times the partial tooling costs, we are entitled to payment of the differential amount to the total tooling costs.
4. We maintain and, if necessary, repair and store the tools free of charge. We have the right to release tools which have not been used for production for 2 years for scrapping to our benefit.
5. Even if we keep property and possession of the tools produced for a preceding order, we are neither obliged to accept follow-up orders nor bound to the prices agreed to for a previous order.
6. In case the Buyer does not pay on or before due date, we are free to use all tools stored for this Buyer at our discretion for the period of the Buyer's default with payment.

XI. Reservation of title and security interests

1. We retain title in the goods delivered until full payment of all claims we have against the Buyer from the business relationship, now or in future.
2. In case of any breach of contract by the Buyer, including but not limited to default in payment, we have the right to reclaim and take back the goods. Taking back the goods shall not be regarded as a rescission of contract unless we have otherwise expressly declared in writing, while any seizure of goods by or on behalf of ourselves shall always be deemed a rescission of contract. Having taken back the goods, we are entitled to realize the goods; the proceeds of such realization, deducting the adequate costs of realization, must be set off against the debts of the Buyer.
3. The Buyer is obliged to handle the goods and to effect appropriate fire, water and theft insurance for the goods at replacement value at his expense.
4. The Buyer has the right to sell and transfer or install the goods in the ordinary course of business.
5. Without regard to any processing or amendment of the goods by the Buyer, he hereby assigns us all claims against his customers or third parties arising from the resale, transfer or installation according to section 4 in the agreed amount of the final invoice including V.A.T. where applicable. Notwithstanding our right to recover the assigned debts, the Buyer remains entitled to collect payment from his debtors. We are obliged to refrain from any collection of payment as long as the Buyer is not in default in payment on our claims, as long as petition in the Buyer's bankruptcy has not been filed and as long as the Buyer has not suspended payments. In any of the aforesaid events, the Buyer must inform us about the assigned debts and his debtors upon our request; he must also provide us with all information and documents necessary for the recovery of the debts, and he must notify his debtors of the assignment.
6. Any processing and modification of the goods by the Buyer occurs on our behalf; in particular, we are deemed manufacturer according to § 950 of the German Civil Code. The Buyer's inchoate title in the goods continues in the new or modified goods. If the goods are combined or processed with other goods not belonging to us, we acquire co-ownership of the new or processed goods. The share of our co-ownership is equivalent to the proportion of the value of our goods to the value of all materials required for the new goods at the time of process. The clauses above concerning our retention of title shall correspondingly apply to the new goods.

7. If the goods become inseparably mixed with other goods, we acquire co-ownership of the new or processed goods with a share proportionate to the value of our goods in relation to the value of the other goods at the time of mixture. If the mixture results in the Buyer's goods becoming the main goods, it is agreed that hereby the Buyer transfers proportionate co-ownership to us. The share of our co-ownership is equivalent to the proportion of the value of our goods to the value of all materials required for the new goods at the time of mixture. The Buyer keeps the new goods in custody on our behalf.
8. For security of his debts accruing from our business relationship, the Buyer hereby assigns the debts of third parties arising from installation of goods in real estate or premises.
9. If and in the amount the Buyer becomes entitled to benefits due to deterioration, deficiencies, losses of collateral or other claims for compensation with respect to the collateral against insurance companies or others, the Buyer hereby assigns all such claims for benefits and/or compensation to us.
10. In case of seizures or other interference by any third party, the Buyer is obliged to give us written notice immediately, so that we are able to protect and enforce our rights, e.g. to file third party proceedings to prevent execution of judgment according to § 771 of the German Code on Civil Procedure (CCP). If and as far as the third party is unable to reimburse our judicial and extra-judicial costs and expenditures for our legal actions and defenses, e.g. a law suit according to § 771 CCP, the Buyer assumes the liability for our indemnification for these costs and expenses.
11. We commit ourselves to release our collateral upon the Buyer's request if and in the amount by which the value of the collateral in the course of realization exceeds either the secured debts by more than 20 % or the nominal value of the collateral by more than 50 %. We select the collateral to be released at our discretion.
12. In jurisdictions under which a retention of title extended and expanded according to the clauses in this section is not available or does not correspond to the regulations set forth above, the Buyer - either hereby or, if required by applicable law, by separate action
- transfers corresponding security interests to the extent available under that jurisdiction; he will cooperate and execute all documents required to establish validly such security interests under that jurisdiction.

XII. Places of Jurisdiction and Performance

1. Exclusive place for jurisdiction is before the courts competent at our principal place of business. We also have the right to bring a claim before a court at the Buyer's principal place of business or at our discretion.
2. Place of performance is our place of business unless otherwise provided in our order confirmation.

Ahlen/Germany, June 07, 20013