

# GEA Refrigeration Netherlands N.V. ("GEA")

## GENERAL CONDITIONS for the Sale of Goods and Provision of Services

### 1 Applicability

- 1.1 These conditions shall apply to all offers made by, and all contracts entered into with, GEA for the sale of goods ("Goods") or the provision of services ("Services") with any buyer ("Buyer").
- 1.2 The applicability of any general conditions of Buyer for purchase, procurement, leasing or any related activity is hereby expressly excluded.

### 2 Offer, Acceptance and Formation of Contract

- 2.1 A Contract between GEA and Buyer shall come into existence if, and only if, an Order ("Order") placed with GEA by Buyer is confirmed by GEA in an Order Confirmation ("Order Confirmation"). The signature of a single contract form by both GEA and Buyer shall be deemed in accordance with this procedure.
- 2.2 Unless expressly agreed otherwise by GEA in writing, any Offer ("Offer") made by GEA is budgetary, non-binding, without engagement and revocable.
- 2.3 Promises, undertakings or representations made orally by GEA personnel before or after Order Confirmation shall be binding only if confirmed by GEA in writing.
- 2.5 Any deviation from the terms of the Contract is subject to the provisions of §10, *Change*.
- 2.6 Each of the following documents shall be an integral part of the Contract. In the event of a contradiction between documents, the documents shall have precedence in the listed order:
  - a. The signed contract form (if any);
  - b. The Order Confirmation signed by GEA;
  - c. These General Conditions;
  - d. The Offer made by GEA to Buyer (if any); and
  - e. The Order.

### 3 Scope

- 3.1 GEA shall exclusively supply the Goods and/or provide the Services expressly specified in the Order Confirmation (collectively "Scope").
- 3.2 Additional Goods or Services required for the correct functioning of Goods so specified may be charged separately by GEA as an addition to the agreed contract price ("Price").
- 3.3 Any specification of or representation as to dimensions, weights, capacity, power consumption and other data ("Specification") in any technical document, catalogue, picture, drawing or otherwise shall be binding on GEA only if such Specification is expressly stated in the Contract. Such Specification shall be deemed fully complied with on condition that measurements taken by GEA are within  $\pm 5\%$  of the figure specified.
- 3.4 GEA may at any time without prior notice make minor changes to any Specification provided that such changes do not materially affect the mechanical performance of Goods supplied by GEA.
- 3.5 In the event that GEA is responsible for installation or commissioning of any equipment or for any supervision of these activities, it shall perform only such duties as are expressly stated in §11, *Installation and Commissioning* or in §12, *Supervision* below

### 4 Delivery of Goods and Provision of Services

- 4.1 Unless expressly agreed otherwise in the Contract, the date of delivery of Goods or provision of Services is an estimate only and no delay damages are payable for failure to meet such date.
- 4.2 Delivery shall be made EXW (unpackaged) at a location nominated by GEA in accordance with *Incoterms 2010*. In the event of a contradiction between *Incoterms 2010* and the Contract, the Contract shall prevail. Risk shall pass to Buyer on delivery. Where GEA is to provide installation, commissioning or supervision services, the provisions on delivery and transfer of risk of §11, *Installation and Commissioning* and §12, *Supervision* shall apply.
- 4.2 GEA may at its discretion make delivery in parts.
- 4.3 On duly tendered delivery of any Goods, risk for such Goods shall pass to Buyer and all payments to be made on delivery shall become due. If duly tendered delivery is not accepted by Buyer, deliverable Goods may be stored by GEA in a third-party warehouse at the risk and cost of Buyer.
- 4.4 Where GEA is to provide Services, the Parties shall agree upon a date and/or schedule for the provision of such Services. If the Parties fail to agree such date and/or schedule, GEA shall reasonably decide all necessary particulars.
- 4.5 If a firm date for delivery of Goods or provision of Services is agreed in the Contract, and if GEA accepts responsibility for any delay, GEA shall pay as liquidated damages and not as a penalty 0,25% per week of the price of the Goods delivered or Services provided late, up to a maximum of 5% of such price. One single such payment shall be the sole and exclusive compensation paid to Buyer in the event of any late delivery or any late completion of Services.
- 4.6 Where GEA is acting as subcontractor to a main, prime or general contractor, such contractor may not claim liquidated or other damages on account of delay caused by GEA unless (a) such contractor is required to pay liquidated damages for delay under his own contract and (b) such contractor's delay is directly attributable to delay caused exclusively by GEA.

### 5 Price and Payment

- 5.1 The Price shall be as stated in the Order Confirmation.
- 5.2 The Buyer shall compensate and hold harmless GEA from all taxes, VAT, customs duties or other imposts levied against either party in Buyer's country and arising from the Contract.
- 5.3 Payment of any invoice submitted by GEA, including an invoice for advance payment, shall be made in the agreed currency within 30 days of the date of invoice without discount or set-off.
- 5.4 In the event of late payment, Buyer shall be in default without notice of default being required. Late payment shall be subject to interest at a rate 5% above the discount rate in the Netherlands. A delay in any payment of more than eight weeks may be treated by GEA as breach of contract by the Buyer. For the avoidance of doubt, late payment may not be excused by reason of Force Majeure.
- 5.5 Buyer shall provide a form of security for payment in accordance with the requirements of the Order Confirmation. Failure of Buyer to provide such security, including any agreed advance payment, shall constitute breach of contract by Buyer. In the event of such breach, GEA may suspend or terminate the Contract, seek damages or enforcement of any other right it may have under the Contract or otherwise.
- 5.6 In the event that GEA has at any time reasonable grounds to doubt Buyer's ability to make any payment, GEA may require Buyer to provide additional security for payment subject to the provisions of §5.5 above.

5.7 As far as the law allows, GEA shall retain title to all Goods delivered and/or to be delivered and to the results of any Services provided until Buyer has paid in full all amounts due to GEA under this Contract or otherwise.

## 6 Intellectual Property

- 6.1 All intellectual property in Goods delivered or Services provided by GEA shall remain with GEA. Any grant or transfer of any intellectual property right, if agreed, shall be the subject of a separate intellectual property licence.
- 6.2 GEA warrants that Goods delivered and Services provided under the Contract do not infringe the intellectual property rights of any third party. If, however, such infringement is proved, GEA may at its discretion replace or modify infringing Goods or Services or take back infringing Goods and reduce the Price accordingly.
- 6.3 For a period of three years after the date of delivery, GEA shall indemnify Buyer against any loss, claim or award of damages resulting from delivery of Goods or provision of Services by GEA that infringe the intellectual property rights of any third party. Such indemnification may be claimed by Buyer only if:
- The fact of GEA's infringement is agreed by GEA or is proved to the satisfaction of a competent court of law or arbitral tribunal; and
  - Buyer has notified GEA within two weeks of the commencement of any legal action or proceedings against it on the grounds of such infringement; and
  - Buyer has fully co-operated with GEA in defending their joint and/or several interests in any such action or proceedings; and
  - The action or proceedings do not result from any modification by Buyer of any Goods supplied by GEA or from any goods, information, data or permission supplied by Buyer to GEA under the Contract or otherwise.

## 7 Defects Liability

- 7.1 If during a period of twelve months after delivery, a defect in material, workmanship or design provably present at the date of delivery in any Goods of GEA's supply comes to light ("Defect"), then GEA shall without undue delay and at its sole discretion repair, replace or otherwise make good such Defect.
- 7.2 Where GEA supplies and installs Goods without delivery, the defects liability period shall begin with taking-over. In this event, the defects liability period shall expire fifteen months from delivery or twelve months from taking-over, whichever is the earlier.  
Where GEA acts as supplier to a main, prime or general contractor, the defects liability period shall expire fifteen months from delivery or twelve months from taking-over of the completed works by the end-user, whichever is the earlier.
- 7.3 For Goods which are not manufactured by GEA, GEA is liable for Defects only to the extent that the manufacturer of such Goods is liable for defects to GEA.
- 7.4 Buyer shall inspect the Goods at the earliest reasonable opportunity after delivery and shall notify GEA immediately of any evident or patent Defect that is discovered. Failure to conduct such inspection or give such notification shall release GEA from any duty to make good such evident or patent Defect.
- 7.5 GEA's liability for Defects is subject to the correct installation, use and maintenance of Goods by Buyer. GEA has no liability for normal wear and tear. If GEA has provided a list of wear-and-tear parts, GEA's liability shall be limited to the period and to the extent indicated in this list.
- 7.6 GEA accepts no liability for any Defects (a) in Goods repaired by Buyer without prior written permission from

- GEA, or (b) in Goods maintained by Buyer with replacement parts not procured directly from GEA.
- 7.7 Any Defect shall be notified in writing to GEA as soon as Buyer discovers or should have discovered it. Improper notification releases GEA from all liability for any Defect so notified.
- 7.8 Unless GEA decides that the alleged Defect shall be examined and/or made good *in situ*, Buyer shall return to GEA any Goods alleged to be defective, carriage and insurance paid. No Goods may be returned unless GEA has expressly agreed such return. In the event of examination *in situ*, if GEA rejects its liability for an alleged Defect, GEA may charge Buyer all costs arising from the examination including but not limited to travel, transport and accommodation costs.
- 7.9 If continued operation of Goods found, or alleged to be, defective would cause damage to any installation or equipment, GEA may order the immediate, orderly shut-down of such Goods.
- 7.10 GEA's making good of any Defect shall not extend the original defects liability period on the Goods, and GEA's liability for any replacement part shall expire at the same date as the original defects liability period.
- 7.11 GEA's liability for Defects extends only to the original Buyer and may not be transferred to any third party.
- 7.12 The liability stipulated in this Article is GEA's sole liability for Defects. As far as the law allows, it replaces any liability for Defects or non-conformity or any other undertaking arising from the applicable law, from the custom of the trade or from the practice of the parties, including but not limited to any warranty of merchantability or fitness for particular purpose.

## 8 Liability

- 8.1 As far as the law allows, GEA's aggregate liability to Buyer under the Contract for any act, omission or failure however arising shall be limited to 50% the Price or to EUR 500,000, whichever is the lower.
- 8.2 GEA shall not be liable for indirect or consequential loss or damage, including but not limited to loss of refrigerant, loss of product including any item subject to refrigeration, loss of feedstock, loss of profit or other financial loss, damage to any item of equipment or any works not supplied by GEA, environmental damage suffered due to any Defect in any Goods or to any other act, omission or failure on the part of GEA.
- 8.3 Buyer shall compensate GEA for, and hold it harmless against, the financial result, including but not limited to costs, legal costs and/or award of damages, of any claim or legal action brought by any third party and arising either directly or indirectly from the use, storage or disposal of Goods and/or implementation of Services supplied by GEA.

## 9 Approval of Documentation

- 9.1 GEA shall promptly submit to Buyer for its approval all documentation requiring approval under the terms of the Order Confirmation. Buyer shall approve or disapprove such documentation and return it to GEA within ten days of submission. Any documentation not returned within the required period shall be deemed approved. Buyer may disapprove any documentation only on the grounds that it contains an error or omission, does not comply with the Contract or is manifestly contrary to good engineering practice. Where Buyer disapproves any documentation, GEA shall resubmit appropriately revised documentation. If such revised documentation is not disapproved within 10 working days of resubmission, it shall be deemed to be approved by Buyer. Approval by Buyer of any documentation shall not relieve GEA of its obligations under the Contract.



- 9.2 If Buyer requires any change in any documentation on any grounds other than disapproval under §9.1, the provisions of §10, *Change* shall apply.
- 9.3 Buyer shall be responsible for the accuracy and completeness of any design, documentation or other information ("Data") supplied to GEA by or on behalf of Buyer. Additional cost and/or delay resulting from any error or omission in such Data shall be subject to the provisions of §10, *Change*.
- 10 Change**
- 10.1 Any deviation from any provision of the Contract requires express, written approval by GEA.
- 10.2 Subject to the procedure stipulated in §10.3, Buyer may at any time issue a change order ("Change Order") requiring additions, omissions or alterations to GEA's Scope, and GEA shall perform such changes. GEA may at any time propose an addition, omission or alteration to its Scope but shall not put such change into effect without a Change Order.
- 10.3 If Buyer is to issue a Change Order, it shall first request from GEA a proposal detailing all measures necessary to make such change ("Proposal"). The Proposal shall specify all changes to GEA's Scope, the schedule, the Price, and to any other matter. If Buyer accepts such Proposal, or any agreed modification of such Proposal, Buyer shall issue a Change Order to that effect to be signed by both Parties. Until such signature, GEA shall have no obligation to begin work on any proposed change. If, however, prior to such signature GEA begins work on any change with the knowledge and consent of Buyer, then Buyer shall be deemed to have issued a Change Order on the terms and at the date of GEA's Proposal.
- 10.4 Unless otherwise agreed, GEA may invoice Buyer for any work performed under any Change Order immediately after such work is completed, and Buyer shall pay such invoice within 30 days of receipt without set-off.
- 10.5 If GEA suffers delay and/or incurs additional cost as a result of any circumstance including but not limited to those listed below, GEA shall be entitled (a) to an appropriate extension of time and (b) to an appropriate addition to the Price. Any such addition to the Price shall include all additional related cost incurred by GEA plus an agreed margin. If no margin is agreed, such margin shall be 15%.
- Any delay, defect, inaccuracy and/or incompleteness in any Data and/or materials or services supplied to GEA by or on behalf of Buyer.
  - Any supply/provision by GEA of additional Goods/Services for any other reason than GEA's default, where such supply/provision is made without a Change Order but with the agreement or on the instruction of Buyer in writing or otherwise.
  - Exceptionally inclement weather.
  - Site conditions that could not be reasonably foreseen by GEA on the basis of information made available to GEA before the date of the Order Confirmation.
  - Unforeseeable shortages in the availability of goods or personnel.
  - Failure by Buyer to perform of any of its obligations under the Contract.
- 10.6 GEA shall give notice to Buyer of any event giving rise to a claim within 28 days of such event becoming known to GEA. The notice shall be followed as soon as possible by a complete claim containing full and detailed particulars.
- 11 Installation and Commissioning**
- 11.1 This Article is additionally applicable where GEA is responsible for complete installation or for erection or commissioning.
- 11.2 GEA shall execute all installation work ("Works") in accordance with the schedule, procedures and protocols stipulated in the Order Confirmation or, in their absence, in accordance with good engineering practice.
- 11.3 Buyer shall give access to the site on the date stated in the Order Confirmation, or if no date is stated then on a reasonable date. Buyer shall ensure that GEA's staff can perform the Works without disturbance.
- 11.4 Buyer shall make available to GEA on site free of charge and at appropriate times:
- A dry storage room properly locked and lighted.
  - All assistants, equipment, materials, scaffolding, lighting, electricity, water, fuel, oils, fats, welding gases, nitrogen, cleaning materials, detergents, and all other necessary and/or customary items. All items shall be of an appropriate quality.
  - Suitable facilities for GEA's staff, including dining, medical, washing and toilet facilities and anything else required for adequate and safe working conditions during an eight-hour working day and a five-day working week.
  - Such other items, and/or at such other times, as GEA may reasonably require.
- 11.5 If overtime and/or shift work is required, it shall be invoiced separately to Buyer at GEA's standard rates as an addition to the Price.
- 11.6 If prior to installation, civil engineering or other works must be performed by Buyer and if any such work is in delay, installation shall begin only after such work is satisfactorily completed, and appropriate adjustments to Price and schedule shall be made.
- 11.7 Any work performed by GEA but not expressly included in its Scope, including but not limited to excavation, construction of foundations, provision of attachment points for pipe hangers, execution of masonry, carpentry, painting, cutting or concrete work, provision of scaffolding and any further construction, fitting or manufacturing operations, shall be deemed a change under the provisions of §10, *Change*.
- 11.8 As soon as is the Works are completed, the tests on completion ("Tests") as specified in the Order Confirmation shall be performed. If no such Tests are specified, then GEA shall at its sole discretion determine appropriate Tests.
- 11.9 If during Tests discrepancies with the Specification are discovered which have no material effect on the functioning of the Works for their intended purpose, such discrepancies shall be remedied during the defects liability period and shall not constitute a reason to refuse or delay taking-over.
- 11.10 As soon as Tests are satisfactorily completed, Buyer shall immediately issue a signed certificate of taking-over, attaching if appropriate a list of non-material discrepancies for correction during the defects liability period. If Buyer fails to issue such certificate then it shall be deemed to be issued seven days after satisfactory completion of Tests.
- 11.11 If Buyer takes the Works into beneficial or commercial use, such taking into use shall be deemed acceptance and taking-over of the Works.
- 12. Supervision**
- 12.1 This Article is additionally applicable where GEA is responsible for supervision of installation or of other works.
- 12.2 Unless otherwise expressly agreed, the sole responsibility of any supervisor appointed by GEA ("Supervisor") shall be the provision of correct, timely and adequate instruction to such staff as may be performing installation or other agreed works ("Staff"). GEA accepts no liability whatsoever for any delay in completion or for any work incorrectly performed during installation. The Supervisor shall act exclusively as consulting engineer and not as

superintendent of any Staff. The Supervisor shall bear no responsibility for the quantity or quality of Staff employed.

- 12.3 For the avoidance of doubt, where GEA supervises installation, the provisions of §7, *Defects Liability* shall apply to any claim for Defects or non-conformity to the exclusion of any other right, however arising.
- 12.4 Buyer shall give the Supervisor necessary access to the site to and shall support him in his activities with all necessary facilities including but not limited to dining, washing, medical and toilet facilities together with such other accommodation, transport and communication facilities as GEA may reasonably require.
- 12.5 Where the Supervisor gives any instruction with regard to goods not in GEA's Scope, such instruction shall not imply any liability on GEA's part for the reliability, suitability or operability of any such goods or equipment.
- 12.5 The Supervisor shall report to Buyer or any duly appointed representative at a reasonable time and a level of detail any Defects, shortcomings or failures in the work supervised by him.
- 12.6 Unless local regulations expressly state otherwise, the Supervisor shall not be responsible for implementation of local health, safety or working practice regulations.
- 12.7 Buyer shall provide sufficient skilled labour for the purpose of recording under instruction of the Supervisor technical data obtained during all supervised activities. If Buyer cannot make such labour available, GEA may provide such labour subject to the provisions of §10, *Change*.

### 13 Insurance

Where GEA provides installation, commissioning or supervision Services, Buyer shall take out a contractor's all risks insurance policy to cover all GEA's activities on site. Such policy shall name GEA as co-insured but allow the insurer no recourse against GEA. Prior to the commencement of such Services, Buyer shall furnish GEA with a copy of this policy and evidence that it is current.

### 14 Force Majeure

- 14.1 GEA may seek relief from its duty to perform any obligation under the Contract if performance is hindered by an event:
- Beyond its reasonable control; and
  - Unforeseeable at the time the Contract came into force; and
  - The effects of which GEA could not reasonably have avoided.

Any such event shall constitute Force Majeure. Force Majeure events include but are not limited to war, terrorist act or a justified fear of such act, strike or lock-out, sabotage, import or export restriction, imposition by Netherlands Ministry of Foreign Affairs of travel restrictions or advice against travel, transport damage, radiation, any act or failure to act on the part of any local, state or national government authority, any natural disaster, fire explosion or other accident, or any shortage or late supply of plant, labour, materials or utilities where caused by circumstances that are themselves Force Majeure.

- 14.2 If a Force Majeure event delays delivery or taking-over, then the delivery date or date of taking-over shall be extended by an appropriate period.
- 14.3 If Force Majeure prevents performance of duties under the Contract for a period of six months or longer then GEA may terminate the Contract.
- 14.4 If damage to the Works or termination of the Contract results from a Force Majeure event, Buyer shall pay GEA the full value of Goods already delivered and Services already provided.

### 15 Changes in Law

If any change in any law or regulation having the force of law, including any change in the interpretation or application of such law or regulation, requires a modification of GEA's Scope, then such modification shall be subject to the provisions of §10, *Change*.

### 16 Termination

- 16.1 GEA may terminate the Contract in whole or in part with immediate effect by written notification, without requirement for any notice of default or other legal action if:
- Buyer fails to fulfil one or more of its duties under the Contract or arising from the law;
  - Buyer takes any step leading to or implying an intention to go into liquidation;
  - Buyer is declared bankrupt or seeks composition with its creditors; or
  - Control over Buyer's business is fundamentally changed.
- 16.2 GEA shall be entitled to immediate payment of all sums outstanding at the date of termination. Further GEA may claim full compensation for additional costs arising from or in connection with the termination.
- 16.3 Any rights and duties under the Contract which by their nature are intended to survive termination of the Contract shall survive termination under this Article.

### 17 Status of Contract, Applicable Law and Settlement of Disputes

- 17.1 If any provision of these General Conditions or of the Contract is or becomes invalid, this shall have no effect on the remaining provisions. The Parties shall immediately replace such invalid provision with a new, valid provision having as nearly as possible the intention of the provision replaced.
- 17.2 The Contract and all questions as to its formation, validity or performance are governed exclusively by the law of the Netherlands to the exclusion of the United Nations Convention on Contracts for the International Sale of Goods, 1980.
- 17.3 Any dispute which arises from or in connection with the Contract shall be settled amicably. Failing amicable settlement, where both Parties have their registered office in the Netherlands, such dispute shall be submitted for final and binding resolution to the court of competent jurisdiction in 's Hertogenbosch, Netherlands. Where, however, the Parties have their registered office in different countries, such dispute shall be submitted for final and binding resolution to arbitration by an arbitral tribunal consisting of three members and appointed in accordance with the Rules of Conciliation and Arbitration of the Arbitration Council for the Metal Industry and Trade in The Hague. Arbitration proceedings shall be held in the Netherlands in the English language.

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