

Terms of Sale and Delivery for NEOMELT Feuerfesttechnik Bernd Fink e.K.

1. DEFINITIONS

In terms of these Terms of Sale and Delivery „Supplier“ means NEOMELT Feuerfesttechnik Bernd Fink e.K. „Orderer“ means the person, business firm, company or corporation placing an order; „Products“ means the Products as described by the Supplier in his confirmation of the order; „Performances“ means the Performances as described by the Supplier in his confirmation of the order. „Contract“ means the written agreement (including these Terms of Sale and Delivery) on the delivery of Products and/or the rendering of Performances between the Orderer and the Supplier; „Contract Price“ means the price to be paid by the Orderer to the Supplier for the Products and/or Performances, and „Related Companies of the Supplier“ means subcontractors of the Supplier (third parties).

2. VALIDITY AND COLLISION CLAUSE

2.1 The deliveries, services and offers of the supplier are made exclusively on the basis of these General Terms and Conditions. These are an integral part of all contracts that the supplier concludes with its customers concerning the deliveries and services it offers. They also apply to all future deliveries, services and offers to the customer, even if they are not agreed separately again. All agreements which contain an amendment, addition or specification of these contractual conditions as well as special guarantee promises and agreements must be recorded in writing. If they are declared by representatives or auxiliary personnel of the supplier, they are only binding with the supplier's written consent.

2.2 The legal relationship between the supplier and the purchaser shall be governed solely by the contract concluded in writing, including these General Terms and Conditions. This shall fully reflect all agreements between the parties to the contract regarding the subject matter of the contract. Verbal promises made by the supplier prior to the conclusion of this contract are legally non-binding and oral agreements made by the contracting parties are replaced by the written contract, unless they expressly state that they shall continue to be binding.

2.3 Amendments and modifications to the agreements made, including these General Terms and Conditions, must be made in writing to be effective. With the exception of the supplier's management, the supplier's employees are not entitled to make any verbal agreements to the contrary. Telecommunications, in particular by fax or e-mail, shall suffice to comply with the written form.

2.4 If the purchaser also uses general terms and conditions, the contract is also concluded without express agreement on the inclusion of general terms and conditions. Insofar as the various General Terms and Conditions of Business are identical in content, they shall be deemed to have been agreed. Conflicting individual provisions shall be replaced by provisions of the law on dispositive. The same applies in the event that the customer's terms and conditions contain provisions which are not contained in these terms and conditions. If these terms and conditions contain regulations which are not contained in the customer's terms and conditions, these terms and conditions shall apply.

2.5 All offers are subject to change and non-binding, unless they are expressly marked as binding or contain a certain acceptance period. All samples, samples or information (such as weights, illustrations, descriptions etc.) in sample books, price lists or other publications show the quality of the goods as good as possible. Deviations, even if they go beyond the extent of the minor, do not justify the assertion of warranty claims if they are customary in trade. Agreements on quantities or quality information are only binding once they have been confirmed in writing. The same applies to information provided by our suppliers and our employees. Cost estimates and freight information are also non-binding until they have been confirmed by us in writing.

3. THE CONTRACT

3.1 Orders shall be made in writing. They are accepted according to these Terms of Sale and Delivery. Conditions of the Orderer and warranties, undertakings and guarantees, or other representations not included in the Supplier's offer or the confirmation of the order, or not otherwise expressly agreed to in writing by the Supplier shall not be binding for the Supplier.

3.2 The Contract shall not become effective but with the day of acceptance of the Orderer's order by the Supplier's written confirmation of the order. With deviations between the Products and Performances as described in the offer of the Supplier and the Products and Performances as described in the confirmation of the order, the confirmation of the order shall prevail.

3.3 Modifications of the Contract require a written agreement between the contracting parties. The Supplier yet reserves to himself the right to make before delivery small modifications and/or improvements of the Products as far as this does not impair the function of the Products, and neither the Contractual Price nor the delivery date are affected.

3.4 Documents relevant to the Offer, such as pictures, drawings and indications of weight are only approximately authoritative, as far as they are not expressly indicated to be binding. Indications of percentage contents and mixing ratios of our Products, especially our formulations shall be considered as approximate mean values. We reserve to ourselves property rights and copyrights to estimates of cost, drawings and other documents; they may not be disclosed to third parties. Drawings and other documents pertaining to offers are to be returned to us immediately upon request if the order is not placed with us.

4. VALIDITY OF THE OFFER AND PRICES

4.1 The offer of the Supplier is valid for the period of time given in the offer or, with no such period of time being given, for thirty days from the date of the offer if it is not withdrawn before.

4.2 The Prices are fixed prices for the delivery within the period of time given in the Supplier's offer. They are (a) ex VAT and (b) any similar and other taxes, levies, fees and similar charges that accrue outside Germany in connection with the execution of the Contract.

4.3 The prices for the Products are ex works, dispatching place of the Supplier, without freight, insurance and processing, and, as far as not indicated otherwise in the Supplier's offer, without packing. With requested packing of the Products the packing material cannot be returned.

5. PAYMENT

5.1 All payments are to be made without any setoff, counterdemand, and without any retention (except as far as required by law) within thirty days on receipt of invoice to the complete amount in the currency indicated in the Supplier's offer, as far as not otherwise agreed in writing. The deduction of discount is subject to a special written agreement. The Products are invoiced at any time upon notice of the Products being ready for dispatch to the Orderer. Without prejudice to his other rights, the Supplier reserves himself (i) to charge for the period of delay default interest to the amount of 7,5% above the basic interest rate according to § 247 BGB / German Civil Code, (ii) to discontinue the performance of the Contract (including the retention of deliveries) if the Orderer does or will in the Supplier's reasonable consideration not make payments due within the scope of this Contract or other agreements, and (iii) to request under the same conditions a reasonable security for the payment.

5.2 A setoff by the Orderer admissible only with acknowledged claims or claims having become res judicata. The Orderer may exercise only such right of retention as based on the same contractual relationship.

5.3 The Orderer is entitled to the use and resell of reserved goods in the ordinary course of business. The Orderer already now assigns to us all claims arising from such resell. We hereby accept this assignment. This applies also to goods that have been processed, mixed or combined. If the Orderer includes into a current account relationship with his customer an account receivable from the resell of one of our delivery objects, the current account claim of the buyer is to its full amount assigned to us. We shall not disclose such assignment as long as the Orderer meets his financial obligations. As we may individually request, the Orderer has to disclose the names of his customers and to inform them of this assignment. The Orderer is entitled to collect himself the assigned claims under the resell, such right being subject to revocation by us at any time. The reserved goods may not be pledged or given as collateral but with our prior consent. If the goods delivered by us are processed by the Orderer, such processing is being made for us (see § 950 subpar. 1 BGB/German Civil Code). With the processing, combination and mixing of the delivered Product with other objects not in our possession, we acquire co-ownership in the new good at the ratio of the value of the purchase good (invoice sum total including VAT) to the other processed/combined/mixed objects at the time of processing, combination or mixing. The Orderer preserves the so created sole or joint property for us. If the mixing or combination is done such that the good of the Orderer has to be seen as the main good, it shall be considered as agreed that the Orderer transfers to us proration joint property, and also preserves such good for us.

6. DELIVERY TIME

6.1 As far as not otherwise provided for in the offer of the Supplier, all delivery or completion periods start with the signing of the Contract and are considered to be the expected periods without the assumption of any Contractual obligation.

6.2 In case of delay in or prevention from the performance of Contractual obligations of the Supplier by reason of act or omission by the Orderer or his mandataries (including among others failure to submit specifications and/or design drawings with complete dimension figures and/or other information the Supplier reasonably requests to efficiently perform his Contractual obligations), the delivery time/completion time as well as the Contract Price shall be adapted accordingly.

6.3 With the delivery being delayed by reason of act or omission by the Orderer, or with the Orderer rejecting delivery, or not giving reasonable dispatching instructions upon having been informed of the Products being ready for dispatch, the Supplier may in an adequate way store the Products at the Orderer's cost. With the storing of the Products delivery shall be considered as being made and the risk for the Products passes to the Orderer and the Orderer shall make the respective payment to the Supplier.

7. FORCE MAJEURE

7.1 The Contract (with the exception of the Orderer's obligation to pay the Supplier all amounts of debt under this Contract) is discontinued without liability in case of delayed or prevented performance of the Contract due to reasons beyond the reasonable power of disposal of the respective concerned party, especially force majeure, war, armed conflict or terrorist attack, riot, fire, explosion, accident, flood, sabotage, government decision or measures (especially export or reexportation prohibitions, or refusal or revocation of necessary export licenses), or work disturbances, strike, lockout, or court decree. The Supplier is not obliged to deliver Products or to render performances if within the scope of import and export control government licenses are not granted, or statutory preconditions for the exemption from the duty to obtain a license have not been complied with (especially under the regulations valid in the United States, the European Union, China, and in the jurisdiction in which the registered seat of the Supplier is located, or from which components of the products are delivered) and if the respective circumstances were not foreseeable for the Supplier and are beyond the Supplier's control. In case of granted government licenses or in case of a modification of the valid import and export control regulations in a way hindering the Supplier from the performance of the Contract, the Supplier is exempted without any liability of the same from the Contractual obligations.

7.2 In case of delayed or prevented compliance with the obligations of one party by reason of this item 6 for a period of more than 180 successive calendar days each party may without liability terminate by written notice to the other party the at the respective date non-performed part of the Contract under the condition that the Orderer is obliged to reimburse the reasonable costs and expenses for already started works and to pay all Products delivered and Performances rendered until the date of such termination.

8. INSPECTION AND TESTS

8.1 Prior dispatch the Products are being inspected by the Supplier or the manufacturer and as far as practicable subjected to the standard tests of the Supplier or the manufacturer. Additional tests or inspections (including inspections by the Orderer or his representative, or tests in the presence of the Orderer or his representative, or the granting of certificates of inspection and/or the communication of detailed test results) require the prior written consent of the Supplier, with the Supplier reserving the right to invoice the same. With the Orderer or his representative not being present at such tests and/or inspections after the readiness of the Products for these tests, inspections had been announced by giving a seven days' period, they will be carried out and shall be considered as having been carried out in the presence of the Orderer or his representative. The declaration of the Supplier that the tests and/or inspections of the Products have been successful shall be binding. **8.2** Precondition for the warranty claims of the Orderer is the correct compliance with the duty to examine and make complaint according to § 377 HGB / German Commercial Code.

9. DELIVERY, RISK AND TITLE

9.1 As far as not expressly otherwise provided for in the Contract, delivery of the Products is ex works.

9.2 Excess or short deliveries of up to 10% of the acknowledged quantity may result from Product properties respectively packing and shipping conditions and are therefore admissible.

9.3 The risk of loss or of damage of the Products passes to the Orderer on the aforesaid delivery.

9.4 Incumbent on the Orderer is the insurance of the Products after the passing of risk. As far as expressly provided for in the Contract that the Supplier is responsible for the insurance of the Products after their having been delivered into the custody of the carrier, such insurance shall be invoiced at the Supplier's usual prices. The terms „ex works“, „free carrier“, „FCA“, „carriage paid to“, „CPT“ and other delivery terms used in the Contract shall each be defined according to the latest Incoterms version.

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10. LIABILITY FOR MATERIAL DEFECTS

10.1 The Supplier guarantees the agreed condition of the Products and Performances at the passing of risk. Unless otherwise agreed, the agreed condition shall correspond to the Supplier's specifications as valid and made known with the confirmation of the order.

10.2 Any liability for damages not arisen at the object of delivery itself and/or for any other consequential damages of whatever kind is excluded. This non-liability does not apply to intent, gross negligence by executives, as well as to culpable breach of essential Contractual obligations. At culpable breach of essential Contractual obligations we are only liable for a reasonably foreseeable damage typical under the Contract. Such non-liability shall also not apply to cases of an imperative liability based on the Produkthaftungsgesetz / German Product Liability Act provisions concerning injury to life, personal injury, or injury to health, and whose contents is just the purpose to cover the Orderer against such damages.

10.3 With the Products or the Performances not being of the agreed condition at the passing of the risk, the Supplier shall by subsequent performance warrant in that way that upon his discretion he either repairs or replaces the respective parts (subsequent improvement), or replaces the Products or Performances by faultless Products or Performances (subsequent delivery).

10.4 Claims by the Orderer based on material defects are excluded for development samples, prototypes, and preproduction deliveries; for an only minor divergence from the agreed condition or the product data sheet, as well as in case of an only minor impairment of the fitness for the intended purpose insofar as the Orderer does not make a claim in respect of apparent defects within 5 work days upon delivery, and hidden defects not within 5 work days upon discovery.

10.5 The Supplier may for a defect make repeated subsequent improvements and at his discretion pass from subsequent improvement to subsequent delivery. He shall meet all the costs of the subsequent improvement, especially transportation costs, travel expenses, labor and materials costs provided that they do not accrue by the Products being brought to a place other than the place of performance.

10.6 The Orderer may grant the Supplier reasonable additional period of time of at least four weeks to effect subsequent performance and, with such subsequent performance failing during such period of time, may demand reduction upon expiration of the period of time, or, with such defect not being minor, withdraw from the Contract. Damages may only be claimed for within the scope of item 12.

10.7 The limitation period for claims and titles for defects, except in case of intent, expires twelve months upon coming into operation of the Products, yet by eighteen months upon delivery. The limitation period for claims for compensation of defects expires upon termination of the statutory period if they are based on injury to life, personal injury, or injury to health, or on gross negligence on the side of the Supplier.

10.8 The Supplier shall not be liable for usual wear and tear, materials provided by the Orderer, or processing of the Products by the Orderer, damages due to improper storage or improper installation or operation, or for lack of proper maintenance, as well as for damages due to a modification or repair without the prior written consent by the Supplier. The Supplier is further not liable for the Orderer's operating the Products under wrong operating conditions such as temperature, kind of metal, chemical attacks, mechanic damage, and similar stress. The costs incurred by the Supplier for the inspection and remedy of such defects shall upon request be payable by the Orderer. The Orderer is always solely responsible for the completeness and correctness of all the information given by him.

10.9 The suspension of the running of the limitation period during negotiations between the contracting parties on the existence of claims of the Orderer for an alleged defect is limited to the alleged defect. Negotiations with suspending effect start with the date of the Supplier having received the written description of the alleged defect. Negotiations with suspending effect terminate at the date the Supplier has made subsequent performance or such same has failed, or one of the contracting parties gives written notice of the discontinuance of the negotiations, otherwise 3 months upon receipt by one contracting party of the latest opinion on the alleged defect by the respective other contracting party.

10.10 For all Products and Performances the Supplier purchases from a third party (yet not from Related Companies of the Supplier) for the purpose of reselling them to the Supplier, the Supplier assigns all warranty claims against such third party to the Orderer. The Supplier shall further remain obliged to take over for the Orderer the warranty under the above items, yet provided that the Orderer has before tried in vain to assert the assigned warranty titles against such third party.

11. LIABILITY FOR THE INFRINGEMENT OF INDUSTRIAL PROPERTY RIGHTS

11.1 The Supplier warrants that with the passing of risk no patents or other third parties' industrial property rights are existing that may be claimed regarding the Products or the Performances within the scope of their specified use. The above items 10.2 to 10.5 and 10.7 shall apply accordingly.

11.2 The Supplier's liability is excluded if a patent or a third parties' industrial property right is infringed because the Supplier has followed a design made available by the Orderer or an instruction given by the Orderer, or because the Products are being used in a way, for a purpose, in a country, or in connection with other products, as far as this has not been notified to the Supplier prior to the signing of this Contract.

11.3 The Orderer shall be obliged to inform in writing the Supplier during the term of his warranty at the earliest possible date if regarding the Products or the Performances a third party alleges a patent or other industrial property right, or asserts claims in or out of court. Prior to acknowledging a third party claim asserted in or out of court the Orderer shall afford the Supplier the opportunity to give his opinion. Upon request the Supplier shall be given the authority to negotiate or litigate with such third party on his own account and responsibility. The Orderer shall be liable to the Supplier for any damage arising to the latter from the culpable breach of the above obligations.

11.4 The Orderer warrants that the use of a Product made available by him or the compliance with an instruction given by him does not lead to the Supplier himself infringing patents or other industrial property rights in the performance of his Contractual obligations. The Orderer shall indemnify the Supplier against all reasonable costs and damages arising to the Supplier due to the Orderer's non-compliance with this warranty.

12. DAMAGES

12.1 The Supplier shall only be liable to the Orderer for such damages caused by gross negligence or intent. In case of the breach of essential Contractual obligations the Supplier shall be liable for any damage-causing culpable practices of his cooperators (legal representatives, executives, and other persons employed in the performance of his obligations).

12.2 Except for damages caused intentionally by cooperators of the Supplier or damages caused by gross negligence by legal representatives or executives of the Supplier, the Supplier shall not be liable for any compensation of indirect damages, in particular not for the compensation of lost profit.

12.3 Except for damages caused intentionally by cooperators of the Supplier or damages caused by gross negligence by legal representatives or executives of the Supplier, the Supplier's liability shall in all cases be limited in its amount to the damage typically foreseeable at signing the Contract.

12.4 Claims for damage for injury to life, personal injury, or injury to health, for the breach of a warranty granted expressly and in writing by the Supplier, as well as such as under the Produkthaftungsgesetz / German Product Liability Act shall remain unaffected.

13. STATUTORY AND OTHER PROVISIONS

13.1 In case of an extension or qualification of the Supplier's Contractual provisions after the date of the Supplier's offer by virtue of the passing or revision of a law or an order, a regulation, or of statutes having force of law that affect the performance of the Supplier's obligations under the Contract, the Contractual Price and delivery time are adapted accordingly and/or the performance of the Contract is discontinued or, if necessary, terminated. No price adjustment is made with the delivery to be effected within four months upon The signing of the Contract.

13.2 As far as not required under the law in force, the Supplier is not responsible for the collection, treatment, regeneration or disposal (i) of the Product or any Product parts, as far as the same are "waste" in terms of the law, or (ii) of any objects for which the Products or any part of the Products are spare parts. If under the law in force according to appropriate EU member states' laws the Supplier is obliged to the disposal of Products or any Product parts as "waste", the Orderer shall - provided that the law in force does not prevent him to do so - pay the Supplier in addition to the Contract Price either (i) the regular Supplier's fee for the disposal of such Products, or (ii) with no such fee existing on the Supplier's side, the Supplier's costs (including all processing-, transportation-, and utilization costs, as well as a reasonable overheads surplus) for the disposal of such Products.

13.3 As long as they are on the Supplier's premises, the cooperators of the Orderer shall comply with the Supplier's works rules in force and with the reasonable instructions of the Supplier, in particular as regards the regulations and instructions concerning safety and electrostatic discharge.

14. OBSERVANCE OF LAWS

The Orderer confirms that the reception and use by him of Products and Performances and technology is subject to all the respective effective laws, regulations, orders, and prescriptions concerning importation, export control and sanctions, each as amended - including, but not restricted thereto, such laws, regulations, orders, and prescriptions in the United States, the European Union, China, and in that jurisdictions where the Supplier and the Orderer have their seats, or from which delivery may be made -, as well as to the conditions under all permissions, authorizations, general licenses, or license waivers related thereto. The Orderer shall in no case use, transfer, release, export, or re-export the Products or Performances in breach of those effective laws, regulations, orders, or prescriptions, or of the conditions under licenses, authorizations, license waivers related thereto. The Orderer further undertakes not to exercise any activity that would expose the Supplier or one of his Related Companies to the risk of being sentenced under the laws or the prescriptions of such jurisdiction under which improper payments including, but not restricted thereto, grafts to staff of the government, agencies, institutions or related subdivisions, to political parties or political party functionaries, or candidates for a public office, or to cooperators of customers or suppliers are prohibited. The Orderer undertakes to comply with all legal, ethical and other prescriptions in force.

15. DEFAULT, INSOLVENCY AND TERMINATION

15.1 Without prejudice to other rights he is entitled to, the Supplier is authorized to terminate in writing the Contract in whole or in part without notice to the Orderer if the Orderer is in default with the performance of his Contractual obligations and either does not take remedial action for this within thirty days upon the Supplier's written default notice, as far as such remedial action is in a reasonable way possible within the given period of time, or, with no remedial action being possible within such period of time, does not take measures to remedy such default.

15.2 If the Orderer loses his credit standing we, are entitled to at our choice demand prepayment or request securities, or to withdraw from the Contract, as well as to revoke allowed credit terms. At the Orderer's delay in payment, the initiation or application for the initiation of insolvency proceedings against the Orderer's assets the same shall apply, while at delay in payment a reasonable additional period of time shall be granted before the rescission from the Contract.

15.3 At the Orderer's delay in payment we are entitled to request the temporary return of the goods we retain title to.

16. MISCELLANEOUS

16.1 A party's waiver regarding a breach or a non-performance, or of a title or a legal remedy, as well as or a regular practice is no continuing waiver regarding a different breach or non-performance or a different title or a different legal remedy, provided that such a waiver has not been fixed in a document signed by the binding party.

16.2 The invalidity or impracticability of any item, paragraph or other provision of this Contract shall not affect the validity of any remaining provision of this Contract. The parties undertake in case of the invalidity or impracticability of a provision to replace the same by such provision as comes closest to the economic purpose intended with the invalid or impracticable provision.

16.3 The Orderer may not assign his rights and obligations under this Contract without the prior written consent of the Supplier.

16.4 The Supplier signs this Contract as the principal contracting party. The Orderer confirms to exclusively address the Supplier regarding the due performance of the Contract.

16.5 The Supplier's not exercising a right under this Contract shall not signify his waiving the future assertion of such right.

16.6 The Contract is in any regard governed by the Law of the Federal Republic of Germany under exclusion of the Vienna Convention on Contracts for the International Sale of Goods. Insofar as the Orderer is a merchant entered in the commercial register, a public law entity, or a public special fund, Kassel shall - subject to a different exclusive venue - be agreed as place of venue. Exclusive venue for all disputes under this Contract shall be Kassel. The Supplier may yet also sue the Orderer at the Orderer's seat.

16.7 The headings of the items and paragraphs of the Contract are only an orientation and are disregarded at the interpretation.

16.8 All notices and claims in connection with this Contract shall be made in writing.