

Photonic Optische Geräte Ges.m.b.H. & Co.KG

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General terms and conditions Photonic Optische Geräte GmbH & CoKG

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1. Scope

- (1) These provisions are part of all our offers, services, deliveries, contracts and sales with our contractual parties ("Purchasers"). General terms of contract and buying conditions of purchasers do not apply, they are expressly contradicted herewith.
- (2) Deviating, contradictory or complementary general terms and conditions of our purchasers – even if known – do not become part of the contract, unless expressly approved by us in writing.
- (3) All services and objects of purchase, these are devices, soft- and hardware, are hereinafter called the contract products.

2. Offers, order acceptance

- (1) Offers generally are subject to change, also if this is not remarked expressly on the offer.
- (2) Our offers are binding for 4 weeks as of the date of issue of such offers.
- (3) Binding offers may be accepted by the purchaser only by written notice issued to us within the term of acceptance of 4 weeks.
- (4) Orders without prior binding offers from us must be placed in writing and are binding only upon written declaration of acceptance by us or upon delivery of goods. Transmitting the order or certification electronically or by facsimile fulfills the requirement of written form. If the purchaser places an order electronically we will immediately confirm receipt of the order. The confirmation of receipt does not constitute a notice of acceptance, it may however be connected therewith.
- (5) By placing an order the purchaser officially states that he wants to buy the contract product.
- (6) Upon contract conclusion any former binding agreements and warranties become invalid unless they were expressly confirmed by us in writing. Individual agreements are valid only, if expressly agreed in writing.
- (7) We are entitled to change design and form in favour of technical progress or to a reasonable extent.

3. Prices

- (1) Quotation of prices is ex works plus packaging as well as statutory VAT. The purchaser shall bear public charges in connection with the import of the contract products into the contract territory, such as tariffs.
- (2) In single cases we reserve the right to deliver upon cash on delivery or upon prepayment only.

4. Delivery and transfer of risk

- (1) Terms of delivery are binding only, if agreed as such in the order confirmation.
- (2) The term of delivery is observed, if the supply is forwarded within the period mentioned in the order confirmation or the readiness to deliver was notified.
- (3) If delivery is delayed for reasons beyond our control, in particular due to force majeure, malfunction, labour disputes the agreed date of delivery is tacitly extended by the period required for the elimination of such cause. The purchaser will be informed immediately on begin and end of such delays.
- (4) Shipping takes place at the own risk and costs of the purchaser. Conclusion of a transport or other insurance has to be requested separately and is at the costs of the purchaser.
- (5) We are entitled to make partial deliveries, if this was not expressly excluded in writing.
- (6) With regard to payment obligations, warranty obligations and the transfer of risk partial deliveries shall be deemed as independent deliveries.
- (7) Upon delivery of the contract products the risk passes to the purchaser.

5. Terms of payment

- (1) The purchaser undertakes to pay the purchase price without deductions within 14 days of the invoice date. After expiry of this term the purchaser is in default of payment.
- (2) Payment obligations are only fulfilled in time, if we can dispose of the amount of payment within the period stated under (1), which means such amount has been credited completely to one of our accounts.
- (3) If payments are not made within due time the purchaser shall pay default interests to the amount of statutory interests stated in § 1333 par.2 of the Austrian General Civil Code. The purchaser in default of payment has to pay all costs for reminders and all legal costs for mandating a claim agent.
- (4) If payments are not made in due time we reserve the right to cancel subsequent orders, not to deliver them respectively not to perform.
- (5) If we get to know about the risk of poor performance of the purchaser after conclusion of the purchase contract we are entitled to deliver outstanding supplies against prepayment or financial guarantee only; if prepayment or financial guarantee is not provided after expiry of a reasonable respite period we may notwithstanding other rights totally or partly withdraw from the respective contract of purchase.

6. Reservation of title

- (1) Until complete payment of the purchase price of the contract products all contract products remain our property, they may neither be pledged nor used as security.

General terms and conditions

- (2) The purchaser is obliged to treat the contract products delivered by us or on our behalf carefully. If maintenance or inspection works are required the purchaser shall have such works carried out regularly at his own costs.
- (3) In case of seizure or claims by third parties the purchaser is obliged to assert our proprietary right. Furthermore the purchaser is obliged to immediately inform us on access by third parties to the contract products, e.g. by seizure, as well as possible damage or destruction of the products, if such products are still under reservation of title. The purchaser shall also immediately inform us on any change of possession of the contract products as well as of any change of his place of residence, if he possesses contract products which are subject to reservation of title.
- (4) Retailers are entitled to resell our contract products in the course of their usual business activities subject to reservation of title. Claims arising in this connection to the invoiced amount shall be assigned to us in advance on account of payment, the retailer however directly remains fully committed. There exists no other right to transfer of ownership or to pledge the contract products. If composition or bankruptcy proceedings are opened with regard to the property of the retailer or if the retailer becomes insolvent he is no longer entitled to resell our contract products.
- (5) In case of breach of contract of the purchaser in particular in case of delayed payment or any infringement of an obligation according to (2) through (4) of this provision we are entitled to withdraw from the contract and to request that the delivered contract products are returned.
- (6) Paragraph (1) shall apply accordingly also with regard to mixing with or processing of products of third parties, in such case however, if the right of ownership continues we become joint owners of the new product in proportion with the invoice value of our contract products to the others.
- (7) Basically all our contract products are protected by copyright, the exploitation rights remain exclusively with us.

7. Warranty, defects, exclusions

- (1) Advisory service and information regarding suitability and application of proposed development services are provided to the best of our knowledge and belief, but this does not however make the purchaser exempt from the obligation to review, if necessary by his own examinations.
- (2) Immediately after delivery the purchaser shall check the contract goods for defects of quality, extent and characteristics, if necessary by testing.
- (3) The purchaser shall claim defects in writing no later than within 10 days after discovery thereof, otherwise the product shall be deemed as accepted free of defects.
- (4) For damage resulting from operating errors, improper handling, unintended use by the purchaser, which were caused negligently or intentionally by the purchaser warranty shall be excluded. Warranty shall also be excluded for wear and tear which is unavoidable in the course of intended and proper use (normal wear and tear), this shall in particular apply to all rotating parts in devices, such as ventilators, drives, hard disks etc.
- (5) The obligation to warrant shall be restricted to improvement, exchange, conversion or price reduction, at our option.
- (6) If rejected goods are sent back without our approval, costs and risk shall be borne by the purchaser.
- (7) The warranty period is 6 months from delivery of the contract products. After that, the burden of proof lies with the transferee.
- (8) Warranty for guaranteed performance shall remain unaffected.
- (9) Warranty for software shall be granted subject to the fact that the current technical status cannot guarantee software which is completely free from defects. The warranty shall exclude software defects which do not substantially influence the agreed performance and function of programmes respectively are not unreasonable or which can otherwise be reasonably circumvented.
- (10) If the customer due to a legal or material defect after failure of improvement (supplementary performance) chooses to withdraw from the contract, he shall not be entitled to any claim for damages additionally.
- (11) If the purchaser receives any inadequate instructions for use we are only obliged to deliver instructions for use free of defects and this also only if the defect of the instructions for use prevents proper installation or proper operation of the delivered goods.
- (12) The purchaser does not get guarantees in the legal sense. Manufacturer's warranties remain unaffected.
- (13) If the contract products are used as part of an overall system or if they are used with goods produced by third parties we warrant for the contract product only up to the interface delivered by us.
- (14) We wish to point out that according to the current state of the art it is not possible to produce software in a manner that it works without errors in all applications. For those functional parts of the contract product, which we bought from suppliers we warrant only within the scope of the warranty claims we are entitled to against the suppliers.
- (15) We do not warrant that the contract product can be used for any other purposes than those provided in the contract. In particular we neither warrant the expandability nor the usability of the contract product with different hardware or the possibility of the use of additional software, in particular if it did not exist when the contract was concluded or its use with the contract product was not foreseeable for us.
- (16) We wish to expressly inform purchasers that no alterations of the contract product may be carried out. We exclude any warranty for contract products with regard to which alterations of the delivery status have been made.
- (17) The technical data and descriptions in the product information do not guarantee any certain performance by us. A guarantee of performance in the legal sense is granted only, if the respective statements are confirmed to the purchaser by us in writing.

8. Liability

- (1) We shall be liable to the purchaser only for damage caused by us or our agents intentionally or due to gross negligence. Any liability for slight negligence shall be excluded.
- (2) Possible claims for damages from this legal relationship, where legally permissible and irrespective of the legal basis on which they arise, shall be limited to the invoice value of the contract product involved in causing the damage. None of the contractual partners shall be liable for any direct or indirect subsequent damage.
- (3) No liability is assumed for products manufactured by third parties.

9. Development- and research services

- (1) Development- and research services mostly are new and not fully tested solutions. The purchaser is aware that start-up defects may arise to the usual extent and are reasonable.
- (2) The purchaser of new scientific technical solutions expressly declares that he will comprehensively and in due time fulfil his obligation to inform at the use of the new solution and if improvement is necessary to provide sufficient assistance.

10. Technological progress

General terms and conditions

We are entitled to continually develop our contract products further. Minor deviations of the ordered contract products shall be admissible, if they are a qualitative further development of the contract products or an adjustment to technical innovations, or are required for the function or if they meet the intended purpose.

11. Copyright, data protection

(1) All contract products, programmes and other documents, catalogue texts, photographs, product designations and – names, as well as designs from us include development activities, know-how and ideas of Photonic and are protected by copyright. Granting any right to use or utilize, in particular passing on to third parties, even if only in extracts require our express written approval. This in particular applies to reproductions of any kind, translations, microfilming and saving and processing in electronic systems. On no account is it permissible to make copies not exclusively serving the purpose of a backup copy or to allow third parties to make copies.

(2) We reserve the right of ownership and possibly existing copyright in drawings or other documents, including quotations and papers for price calculation, concepts and discussed approaches. These documents must not be copied and made available to third parties and have to be returned upon request, as far as they are not part of legally prescribed accompanying documents for contract products.

(3) Upon transfer of the right of use of one of our software products such use must not be made available to any third parties and the right to use applies exclusively only to the number of entitled users stated in the purchase contract. Persons at workstations, where the person and the workstation are agents respectively property of the purchaser, shall not be deemed as third parties.

(4) Licence terms of producers of software products which are to be delivered to the purchaser according to the contract are part of these general terms and conditions. A copy thereof will be handed over to the purchaser upon request.

(5) If claims are raised or threaten to be raised against the purchaser for infringement of intellectual property rights due to the use of contract products or of parts thereof, the purchaser shall immediately, no later than within 10 days after such claims of third parties have been raised, inform Photonic, in order to allow Photonic to comprehensively and decisively participate in all defence measures against such claim as well as possible out of court settlements and to join the purchaser as intervenient. Any possible liability on our side is limited to the invoiced amount of the contract product concerned. If the contract product was designed by the purchaser liability shall be excluded. Another prerequisite apart from informing in due time about the assertion of a claim is that the maintained infringement of intellectual property rights was caused exclusively by our contract products, without such products having been connected with or used together with other products or services.

(6) We are entitled to free ourselves from the obligations undertaken according to paragraph 1, by either

- obtaining the necessary licences, or

- providing a product respectively parts to the purchaser, which if exchanged against the infringed contract product respectively part thereof remove the charge of infringement of intellectual property rights.

(7) We use only such personal data which are required for implementing orders, for shipping and for invoicing: names of the purchaser, the customer number, the e-mail address, the address for dispatch and the telephone and the facsimile number for possible queries, as well as the account number and the bank identification number for establishing an automatic debit transfer system.

12. Contract products for the medical field

(1) Our contract products, intended to be used in the medical field among others are subject to the provisions of the federal law regarding medical products (Medical product law – MPG) and the ordinance of the federal minister for social security and generations regarding the basic requirements for medical products (VO-MP). The testing of medical products provided for in the MPG shall be carried out also with regard to our contract products and alterations made with regard to them. We are entitled to keep a copy of the software status of the product upon delivery for the purpose of evidence pursuant to MPG and VO-MP.

(2) If the purchaser in the course of ordinary business passes on contract products to third parties the purchaser shall be obliged to inform such third parties on the effects of MPG and VO-MP and to oblige such third parties not to carry out or have alterations of the product carried out, which are not made by particularly trained personnel.

13. Venue, performance

Austrian law shall apply. The provisions of CISG are excluded. For delivery and payment the seat of our company shall be the place of performance, also if hand over of the contract products or performance of services by us take place somewhere else. The venue for any disputes arising from the contract shall be the court at the seat of our company having material jurisdiction over the matter or at our option the court having material jurisdiction over the matter where the purchaser has his registered seat, a subsidiary or property.

14. Final provisions

(1) Assignment of rights or transfer of obligations due to the contract shall be subject to our prior express written approval.

(2) Amendments or additions to this contract shall be in writing in order to take effect.

15. Severability clause

Should one or several provisions of these terms and conditions contradict uncontested order- or purchase conditions, statutory provisions shall apply. Should one or several provisions of these terms and conditions be invalid this does not affect the validity of the other provisions. These provisions shall automatically be substituted by valid enforceable provisions, meeting the purpose as good as possible. On no account the effectiveness of a main contract shall be affected by the invalidity of provisions of these terms and conditions.