

General Terms and Conditions of Sale and Delivery of Swecon Baumaschinen GmbH

Section 1 Scope

1. All of our business relationships with entrepreneurs in the meaning of Section 14 of the German Commercial Code (Bürgerliches Gesetzbuch – BGB) (referred to in the following as “Customer”) shall be made exclusively on the basis of these General Terms and Conditions of Sale and Delivery (referred to in the following as “GTCSO”). These GTCSO shall apply for all agreements, deliveries, services and quotations to Customers that relate to the sale and/or delivery of movable objects by us, regardless of whether we manufacture these ourselves or purchase them from suppliers (Sections 433, 651 BGB). These GTCSO shall not apply to consumers in the meaning of Section 13 BGB.
2. Our GTCSO shall apply exclusively. Terms and conditions of the Customer that contradict or deviate from or supplement our GTCSO shall not apply, unless we explicitly agree to their application in writing. This requirement of consent shall apply in all cases, including, if we make the delivery to the Customer without reservation, in knowledge of contradictory or deviating or supplementary terms and conditions of the Customer.
3. The legal relations between us and the Customer shall be subject exclusively to the purchase contract concluded in writing, on the basis of a binding order from the Customer and our order confirmation including the GTCSO. This shall reflect in full all agreements reached between the contracting parties in relation to the subject matter of the contract. Verbal commitments made by us before the conclusion of the contract shall be legally non-binding. Verbal agreements between the contracting parties shall be replaced by the written contract, unless they explicitly entail that they shall continue to apply as binding.
4. Supplements and amendments of the agreements made, including these GTCSO, shall require the written form to be effective. Subject to proof of the contrary, the content of such agreement shall be governed by a written contract or our written confirmation. Telecommunication shall be sufficient for purposes of maintaining the written form, and in particular fax or email, provided that the copy of the signed statement is transmitted.
5. Unless otherwise agreed, the GTCSO shall apply in the version valid at the time of conclusion of the contract and the GTCSO (in their respectively applicable version) shall apply to all future contracts of sale and contracts for labour and materials with the Customer, without us having to refer to them again in each individual case and even if these are not again explicitly agreed; we shall inform the Customer immediately about any amendments of the GTCSO.

Section 2 Subject matter of performance

1. The subject matter of performance shall be the machinery, equipment and/or their spare parts or accessories, as described in detail in the order and in the related order confirmation, and the respective operating instructions required (referred to in the following as “Goods”).
2. We hereby retain the title and copyrights to all quotations and cost estimates, images, drawings and calculations, brochures, models and other documents submitted by us. This shall also apply to any written documents that are marked “confidential”. Without explicit approval by ourselves the Customer shall not be permitted to make either the abovementioned documents received themselves or their contents accessible to third parties, to publish them, to use or duplicate them, or to permit third parties to do the same.
3. The specifications contained in the catalogues, brochures, newsletters, advertisements, images and price lists regarding weights, dimensions, technical data, performance and the like shall only be non-binding approximate values as customary in the industry, unless explicitly described in the order confirmation as binding, or where precise compliance with these values is a prerequisite of use for the contractually agreed purpose. They are not guaranteed characteristics, but descriptions or markings of the Goods. Deviations customary in the industry and deviations which occur due to legal relations or represent technical improvements, as well as the replacement of components by equivalent parts, are permissible provided that they do not impair the usability for the contractually intended purpose. Likewise, the design and shape of the Goods shall remain subject to modifications based on technical developments, provided that the modifications do not impair the use of the Goods.

Section 3 Conclusion of Contract

1. All of our specifications shall be subject to alteration and non-binding, unless they are explicitly identified as binding or contain a specific acceptance deadline.
2. The Customer's order is considered a binding offer. We shall be entitled to accept this offer within 2 weeks by sending an order confirmation, or to send the Customer the Goods ordered within this period, with the result that the contract is concluded in accordance with the terms and conditions of the order.
3. We shall not be responsible for the correctness of the specifications made by the Customer in the order, particularly as regards the number, types, dimensions and colours. If deviations result in an increase in price, this shall be borne by the Customer.

Section 4 Transfer of risk, delivery dates and periods, default

1. Place of performance of our obligations arising from the contractual relationship with the Customer, including any subsequent rework obligations shall be our registered office. The Goods shall be delivered ex works. At Customer's request and expense the Goods will be shipped to another destination. Unless otherwise agreed, we shall be entitled to determine the type of dispatch (in particular transport company, dispatch route, packaging) ourselves.
2. The risk of an accidental loss or accidental damage of the Goods shall pass to the Customer at the latest upon handover. In the case of sale by delivery to destination, however, the risk of accidental loss and accidental damage of the Goods as well as the risk of delay shall pass to Customer upon delivery of the Goods to the forwarding agent, the carrier or any other person or institution designated to carry out the shipment. If acceptance has been agreed in an individual case, this shall be decisive for the transfer of risk. The statutory provisions of the law in contracts for work and labour shall apply mutatis mutandis in other respects to an agreed acceptance. Handover or acceptance shall be deemed to have taken place if Customer is in default of acceptance.
3. Periods and dates proposed by us for deliveries and services shall only be considered approximate, unless a fixed period or fixed date is explicitly confirmed or agreed. If only dispatch was agreed, the delivery periods and delivery dates shall refer only to the time of handover to the shipping company, freight carrier, or other third party assigned to perform the transportation.
4. Start of the delivery period specified by us, and compliance with the delivery obligation, shall be conditional on the clarification and communication by the Customer of all technical requirements that come from the Customer's side and are necessary for the proper implementation of the contract (e.g. compatibility of the equipment ordered with equipment owned by the Customer, the provision of the documents to be procured by the Customer, the communication of information required for the performance, and clarification of technical issues).
5. If Customer defaults on acceptance, or violates other obligations of cooperation, we shall be entitled to demand compensation of the losses we incur as a result, including any additional expenses. Further statutory claims shall be reserved.
6. Our delivery obligation shall be conditional on us receiving correct and punctual deliveries from our own suppliers. We shall be entitled to withdraw from the contract if, despite previously concluding a covering transaction and through no fault of our own, we do not receive the Goods permanently. We shall inform the Customer immediately if Goods are not available punctually and, if we intend to withdraw, shall exercise the right to withdraw immediately. In the event of withdrawal, we shall immediately reimburse the Customer for the corresponding payments, where these have already been made.
7. We shall not be liable for impossibility of delivery or for delays in deliveries or performance resulting from force majeure and other events not foreseeable at the time of conclusion of the contract. These include in particular operational disruptions of all kinds, strikes, legal lockout, administrative orders or difficulties in obtaining necessary official permits or official measures, transport delays, shortages of labour, energy or raw materials. Insofar as such events substantially impede or render impossible our delivery or performance and the obstacle is not only a temporary nature, we shall be entitled to withdraw from the contract. In the event of obstacles or a temporary nature, the delivery or performance deadlines shall be extended or the delivery or performance dates postponed by the period of obstacle plus a reasonable start up period. If as a result of the delay the Customer cannot reasonably be expected to accept the delivery or performance, it may withdraw from the contract by immediate written declaration to us.

Section 5 Transport

1. The costs for transport shall be borne by the Customer.
2. In accordance with the German Packaging Ordinance, returned transport packaging and other packaging shall not be accepted, with the exception of pallets. The Customer shall be obliged to ensure the disposal of the packaging at its own expense.
3. We shall only cover the delivery of Goods with transport insurance upon explicit request from the Customer; any costs thus incurred shall be borne by the Customer.

Section 6 Invoices, prices, payments, right of retention, offsetting

1. The prices shall apply to the scope of service and delivery listed in the order confirmation or – insofar if the order confirmation refers to this – in the order. Additional or special services which the Customer subsequently requests shall be invoiced separately. Unless otherwise specified in the order confirmation, our prices shall apply ex works, plus packaging, which shall be invoiced separately, plus statutory value-added tax, plus customs duties, fees and other public charges in the case of export deliveries.
2. Amounts invoiced shall be payable within 10 days. The decisive factor for the date of payment shall be the receipt of any such payment in our business account. The deduction of discounts shall require a specific written agreement.
3. If Customer defaults on payment, interest shall be charged on the agreed price at the applicable statutory German default interest rate. Furthermore, we shall reserve the right to assert claims for higher interest and additional compensation for the default. Our claim to commercial due interest (Section 353 of the German Commercial Code – Handelsgesetzbuch- HGB) remain unaffected.
4. If Customer is culpably in default of payment with two payment instalments for Goods that have already been delivered, all payment obligations relating to the business relationship shall immediately become due and payable. In this case, and irrespective of more extensive statutory rights, we shall likewise be entitled to only perform outstanding deliveries upon advance payment, or to demand corresponding securities.
5. The Customer shall only be entitled to offset against our claim for payment where its opposing claim is undisputed or legally established as final, or recognised by us. The Customer shall have rights of retention, provided that the underlying claims are undisputed, legally established as final, or based on the same contractual relationship. In the event of defects with the delivery, the opposing rights of the Customer shall be unaffected.

6. We shall be entitled to perform deliveries or services only upon advance payment or provision of securities, where after conclusion of the contract circumstances become known to us that significantly reduce the apparent creditworthiness of the Customer, and which jeopardise the payment of our outstanding receivables by the Customer in relation to this contractual relationship (including from other individual orders subject to the same framework contract). The right to refuse performance shall lapse when its consideration or security is provided for it.

Section 7 Warranty

1. The statutory provisions shall apply to the rights of the Customer in the event of material defects and defects of title (including incorrect and short delivery as well as improper assembly/installation or defective instructions), unless otherwise specified below. In all cases, the statutory provisions on the sale of consumer goods (§§ 474 ff. BGB) and the rights of the Buyer arising from separately issued guarantees, in particular on the part of the manufacturer, shall remain unaffected.
2. In the case of goods with digital elements or other digital content, we only owe the provision and, if applicable, updating of the digital content insofar as this expressly results from a quality agreement. In this respect, we assume no liability for public statements made by the manufacturer and other third parties.
3. In principle, we shall not be liable for defects which the Customer is aware of or is grossly negligent in not being aware of when the contract is concluded (Section 442 BGB). The Goods delivered must be examined carefully by the Customer immediately after delivery to the Customer (Sections 377, 381 HGB) or to the third party designated by the Customer. As regards obvious defects or other defects that would have been identifiable in the event of an immediate, careful examination, the Goods shall be considered approved by the Customer if we do not receive a written notification of defects within 2 working days after delivery. As regards other defects, the Goods shall be considered approved by the Customer if we do not receive a notification of defects within 7 working days after the defect becomes apparent; if the defect was already identifiable to the Customer at an earlier stage in the course of normal use, however, that specific point in time shall be decisive for the start of the period for notification of defects. If the Customer fails to properly inspect the Goods and/or to give notice of defect, our liability for the defect not reported or not reported in a timely manner or not properly shall be excluded in accordance with the statutory provisions.
4. In the event of any material defects with the Goods, we shall be obliged and entitled at our discretion either to rework or replace the defective Goods within a reasonable period. In the event of failure of the reworking or replacement, i.e. if it is impossible, unreasonable, refused, or inappropriately delayed, the Customer shall be entitled to withdraw from the contract or reduce the price appropriately. If the defect is based on our fault, the Customer may claim damages under the terms and conditions specified in Section 8 of the GTCSO.
5. We shall bear the expenses necessary for the purpose of subsequent performance. We shall not bear such additional costs that arise from the fact that the Goods have been taken by the Customer after delivery to a place other than his place of business or a place of delivery deviating from that agreed with us, unless the transfer corresponds to the intended use of the Goods. The export from the Federal Republic of Germany is not an intended use.
6. Claims by the Customer for reimbursement of expenses pursuant to Section 445a (1) BGB are excluded unless the last contract in the supply chain is a consumer goods purchase (Sections 478, 474 BGB) or a consumer contract for the provision of digital products (Sections 445c sentence 2, 327 (5), 327u BGB).
7. In the event of delivery of used Goods any warranty for material defects shall be excluded unless we fraudulently conceal the defect or have guaranteed the quality of the Goods delivered.
8. Claims of the Customer regarding defects shall be subject to statutory limitation of one year after delivery or – where an acceptance is required – after the acceptance.
9. The above limitation of liability shall not apply to claims arising from culpable injury to life, limb or health, from fraudulent concealment of defects on our part, from intentional or grossly negligent conduct on the part of us, our legal representatives or vicarious agents, from the acceptance of a guarantee or a procurement risk, or under the German Product Liability Act, or to claims arising from culpable violation of a major contractual obligation.
10. The warranty shall lapse if the Customer modifies the Goods without our approval, or has them modified by third parties, and where the elimination of the defect is thereby rendered impossible or unreasonable. In any case, the Customer shall bear the additional costs for the elimination of the defect that are incurred as a result of the modification.

Section 8 Liability for compensation on grounds of negligence

1. We shall be liable for compensation without restriction – irrespective of legal grounds – in the event of intent or gross negligence, and for claims under the German Product Liability Act, or where we fraudulently conceal a defect, or where we have accepted a guarantee for the quality of the Goods or accepted a procurement risk, or for culpable injury to life, limb or health.
2. In the case of simple negligence – and unless one of the aforementioned exceptions (para. 1) applies – we shall be liable only for losses resulting from the culpable violation of a major contractual obligation (an obligation, the fulfilment of which is required to make the proper implementation of the contract possible, and which the contracting partner can and should be entitled to expect); in this case, our liability shall however be limited to compensating the foreseeable, typical loss.
3. Indirect damage and consequential damage resulting from defect in the Goods shall also only be compensated if such damage can typically be expected when the Goods are used as intended, unless one of the aforementioned exception (para. 1) applies.

Section 9 Retention of title

1. We shall retain the title to the Goods to secure all existing and future receivables from the purchase contract and the ongoing business relationship with the Customer.
2. Customer shall be entitled to sell on the Goods in the course of ordinary business transactions; however, Customer hereby assigns to us all receivables in the amount of the final invoice total of our claim (including value-added tax- VAT), to which the Customer shall be entitled as a result of further sale to buyers or third parties, irrespective of whether the Goods have been sold on without or after further processing. The same applies to other claims that replace the Goods or otherwise arise with regard to the Goods (e.g. insurance claims or claims arising from tort in the event of destruction). We hereby accept the assignment. We shall be entitled to revoke this collection authorisation in the event of realisation. The Customer shall remain authorised to collect these receivables, even after the assignment. Our authorisation to collect the receivables ourselves shall remain unaffected by this. We hereby undertake not to collect the receivables, however, provided that the Customer fulfils its payment obligations, does not default on payments, and in particular does not apply for the opening of insolvency proceedings or suspension of payments. If this occurs, we shall be entitled to demand that the Customer discloses to us the assigned claims and the debtors, provides all information necessary for collection, hands over the associated documents, and informs the debtors (third parties) of the assignment.
3. The processing or transformation by the Customer of the Goods shall always be performed on our name and in our account. If the Goods are processed together with other items that do not belong to us, we shall receive joint title to the new product in proportion to the value of the Goods (final invoice total including VAT) relative to the other items processed at the time of processing. The product resulting from the processing shall otherwise be subject to the same conditions as the Goods under retention of title. In the event that we should not acquire a title in this way, the Customer hereby assigns his future title of ownership or – in the above-mentioned proportion – a title of co-ownership of the new product to us as security. We accept this assignment. If the items purchased are inseparably mixed with other items that do not belong to us, we shall receive joint title to the new product in proportion to the value of the items purchased (final invoice total including VAT) relative to the other items mixed at the time of mixing. If the mixing process takes place in such a manner that the items of the Customer must be viewed as the main item, it shall be considered agreed that the Customer shall assign us a pro rata title. The Customer shall thus hold the sole title or joint title in safekeeping for us.
4. We hereby undertake upon request from the Customer to release the securities assigned to us, where the realisable value of our securities exceeds the value of the claims secured by more than 10 %; the selection of the securities to be released shall be at our discretion.
5. The Customer shall be obliged to treat the items purchased carefully and exercising due commercial care until the purchase price has been paid in full; the Customer shall in particular be obliged to adequately insure these items at its own expense against loss by fire, water and theft. Where maintenance and inspection work is required, the Customer shall be obliged to perform this work punctually and at its own expense.
6. In the event of seizure or other interference by third parties, the Customer shall be obliged immediately to inform us in writing, at the latest within three working days. Furthermore, the Customer shall immediately inform the third parties of our title. Where the third party is not capable of reimbursing legal costs and out-of-court costs in this context of regaining our property, the Customer shall be liable to the loss that we incur.
7. Insofar as we withdraw from the contract in the event of culpable breach of contract by the Customer – in particular default in payment – (case of realisation), we shall be entitled to demand the return of the Goods delivered subject to reservation of title.

Section 10 Resell by the Customer

In the event of resale of the Goods by the Customer to third parties, Customer shall observe the applicable foreign trade law restrictions and prohibitions of deliveries to foreign countries in accordance with the requirements and supervision of the Federal Office of Economics and Export Control.

Section 11 Closing provisions

1. Place of jurisdiction for any and all disputes arising from or in relation to the business relationship between us and the Customer shall be our registered office. We shall however be entitled to file a case against the Customer at the domicile of the latter. Mandatory statutory provisions regarding exclusive jurisdictions shall remain unaffected.
2. The law of the Federal Republic of Germany shall apply exclusively excluding its Conflict of Law rules.
3. This English version of the GTCSO is only a translation of the German General Terms and Conditions of Sale and Delivery (Allgemeine Verkaufs- und Lieferbedingungen). In case of any deviations from or discrepancies with the German version, the German version shall prevail.