

General Conditions of Maintenance and Repair (Swissmem 2017)

1. Scope

These Conditions apply to the performance of maintenance, repair, modification and recommissioning works (hereafter referred to as «Services») within the commercial and industrial sector.

2. Scope of Services

The scope of the Services shall be indicated in the Order Confirmation provided by the Contractor or in the contract relating to the Services (both referred to hereafter as the «Contract»).

3. General

3.1 The Contract shall be concluded upon receipt of written confirmation from the Contractor of its acceptance of the order (Order Confirmation) or by virtue of acceptance of the Services.

3.2 These Conditions shall be binding if declared to be applicable in the offer or in the Order Confirmation. Any conditions of the Customer which are in contradiction to these Conditions shall only be valid if expressly accepted in writing by the Contractor.

3.3 All agreements and legally relevant declarations of the contracting parties must be in writing in order to be valid.

3.4 Should any Clause contained in these Conditions prove to be invalid in full or in part, the contracting parties shall replace this Clause by a new stipulation that is as close as possible to the legal and economic effect of the invalid Clause.

4. Information relating to the Services

Each contracting party retains all rights to the information that is used in relation to the Services, such as plans, technical documentation, software etc.

5. Rights and obligations of the Customer

5.1 The Customer shall inform the Contractor of any irregularities, damage or defects affecting the object to which the Services relate.

5.2 The Customer shall provide the Contractor with the technical documentation that is necessary for or conducive to the provision of the Services. If the Contractor requests additional technical documentation, the Customer shall procure it.

5.3 If the Services are performed on the premises of the Customer, the Customer shall provide the personnel of the Contractor with safe and suitable workshops and, if necessary, ensure the availability of a specialist free of charge and guarantee safe access to the object to which the Services relate (including the necessary rights of way).

5.4 If the Services are performed on the premises of the Contractor, the Customer shall arrange disassembly and assembly in addition to transportation in accordance with the instructions of the Contractor.

5.5 The Customer shall procure spare parts in a timely manner and make them available to the personnel of the Contractor, unless the Contractor is obliged to deliver spare parts according to the Order Confirmation.

5.6 The Customer shall inform the Contractor in writing of any provisions or standards that must be complied with regarding object to which the Services relate as well as any circumstances that require special consideration to be given to it or to third parties. Unless otherwise agreed, the Services shall be compliant with the provisions and standards applicable at the registered office of the Contractor.

5.7 The Customer shall, at the latest when placing the order, inform the Contractor in writing of any provisions or standards that are applicable to the Services and to preventing of disease and accidents. The Customer shall take suitable measures to ensure health and safety at work, shall provide reasonable support in the event of accident or illness affecting personnel and shall document any safety instructions issued.

6. Rights and obligations of the Contractor

6.1 The Contractor shall provide the Services in a professional manner by qualified personnel or third parties as subcontractors.

6.2 The Contractor shall inspect the object to which the Services relate (inspection) in order to determine the cost in terms of time and materials. Any services ascertained that extend beyond the agreed Services shall be performed by the Contractor subject to agreement with the Customer.

6.3 The Contractor shall perform the Services at its choice on the premises of the Customer or in its own workshops.

6.4 The Contractor shall be entitled to carry out a risk assessment and a safety control prior to the commencement of the Services and to refuse or suspend the Services at any time in the event that the safety of personnel is not guaranteed or the Customer does not comply with its obligations.

6.5 The Contractor shall present a service report to the Customer concerning the Services performed.

7. Reservation Notice

Inspections and notices by the Contractor to the Customer or its representative concerning the condition, operational readiness, safety, serviceability etc. of the object to which the Services relate and the expression of any opinions that are at odds with the instructions, measures etc. by the Customer are deemed to be reservation notices and shall release the Contractor from its liability.

8. Completion period

8.1 Unless otherwise agreed, all statements relating to completion periods shall be based on estimates and shall be non-binding. Any agreement to a binding completion period is conditional upon full information concerning the scope of the Services.

8.2 Any binding completion period shall be reasonably extended:

- if the information required by the Contractor for the performance of the Services is not received in time, or if the Customer subsequently changes it; or
- if the Customer fails to comply with its obligations under the Contract, or fails to do so in time, including in particular the obligations set forth in Clause 5 or the payment obligations under Clause 10; or
- if hindrances occur that the Contractor cannot prevent despite exercising the required care, regardless of whether they affect the Contractor, the Customer or a third party. Such hindrances include, but shall not be limited to, epidemics, mobilisation, war, civil war, acts of terrorism, riots, political unrest, revolutions, sabotage, serious breakdown in the works, accidents, labour conflicts, late or deficient delivery by subcontractors of materials required, actions or omissions by any authorities, governmental or supranational bodies, travel advices of authorities, embargos, unforeseeable transport problems, fire, explosion or natural catastrophes.

8.3 In the event that the Contractor fails to comply with a binding completion period due to reasons for which it is at fault and loss is caused to the Customer, the Customer may claim liquidated damages of 0.5% for each full week of delay, up to a maximum of 5%. Liquidated damages for delayed performance shall be calculated on the basis of the price of the Services pertaining to the part of the plant that cannot be promptly placed into service as a result of the delay. Further claims or rights on account of the delay, including in particular the right to claim additional damages, shall be excluded.

After the maximum amount of liquidated damages has been reached, the Customer shall set a reasonable grace period for the Contractor in writing. If the Contractor fails to comply with this grace period due to reasons for which it is at fault, the Customer may refuse to accept the delayed element of the Services, terminate the Contract in respect thereof and claim back any payments already made in relation to the Services concerned prior to termination.

8.4 A binding completion period shall be deemed to have been complied with in the event that, notwithstanding the absence of parts or the need for additional work, proper operation is possible or is not impaired.

8.5 If a specific completion date is agreed instead of a completion period, this date shall correspond to the last day of a completion period. Clauses 8.1 to 8.5 apply by analogy.

8.6 The Customer shall have no further rights or claims in respect of any delay in performance of the Services other than those expressly specified in this Clause. This limitation does not apply to unlawful intent or gross negligence on the part of the Contractor.

9. Prices

9.1 Unless otherwise agreed, the Services shall be invoiced on a time and materials basis according to the rates charged by the Contractor. This shall apply in particular also to technical documentation, reports, expert appraisals, evaluations of measurements and examinations that are to be carried out in relation to the Contract. Material costs shall also include the costs for the usage of special tools and equipment along with consumable and incidental material.

Travelling time, a reasonable period of time for preparation and follow-up time shall also be regarded as working time. The Customer shall sign the service report in accordance with Clause 6.5. If the Customer fails to sign the service report without reason or does not do so in time, the records kept by the Contractor's personnel shall be used as a basis for invoicing.

9.2 Unless otherwise agreed, transportation, disassembly, assembly, installation and the like shall be carried out at the cost and risk of the Customer.

9.3 The Contractor shall invoice the Customer for travelling, transportation, accommodation (daily allowance) and other costs at cost.

9.4 Unless otherwise agreed, all prices shall be net prices in freely available Swiss francs without any deductions.

Any and all additional costs, such as, but not limited to, for freight, insurance, export, transit, import and other permits and certification shall be borne by the Customer. Likewise, the Customer shall bear all taxes, levies, fees, customs duties and similar costs along with the related administrative costs which are levied in relation to the Contract or its fulfilment. If such costs are charged to the Contractor or its auxiliary agents, they shall be reimbursed by the Customer upon presentation of receipts.

9.5 The Contractor shall inform the Customer of the result of the inspection prior to the commencement of the Services. The Contractor does not provide any warranty as to the level of costs that may be expected. If the Customer dispenses with the completion of the Services after the inspection, the Contractor shall invoice the costs of the inspection to it along with those of dismantling and assembly.

10. Payment terms

10.1 Unless otherwise agreed, the Contractor shall invoice the price and the costs in accordance with Clause 9 each month. The payment is due within 30 days of the date of the invoice. The Contractor shall be authorised to request an advance payment of 20% of the expected cost in terms of time and materials.

The Customer shall make payments at the domicile of the Contractor without any deductions (e.g. discount, taxes, duties and the like). The payment is deemed to be effected if – unless otherwise agreed – Swiss francs are made freely available to the Contractor at the domicile of the Contractor.

10.2 The Customer may not withhold or reduce payments on account of complaints, claims or counterclaims that have not been recognised by the Contractor. Payments shall also be made in the event that the Services are delayed or rendered impossible for reasons outside the control of the Contractor.

10.3 If the Customer fails to comply with the agreed payment terms, it shall pay default interest of 5% per year without any requirement for a reminder from the agreed due date. The foregoing shall be without prejudice to the right to claim damages. Payment of default interest shall not imply a release from the contractual payment obligation.

11. Ownership, transfer of risk and insurance

- 11.1 Unless otherwise agreed, any parts that are replaced shall remain the property of the Customer.
- 11.2 Unless otherwise agreed, the Customer shall bear the risk relating to damage to or the loss of the object to be processed to which the Services relate, any part thereof or the materials, spare parts and auxiliary materials provided by the Customer during performance of the Services, even if these are performed on the premises of the Contractor or during any transportation or storage that may prove to be necessary.
- 11.3 The Customer shall be responsible for taking out insurance against damage of any kind.
- 11.4 The Customer shall be responsible for the disposal of replaced parts or consumable materials relating to the Services (oils, gases, dust etc.).

12. Warranty, liability for defects

- 12.1 The Contractor warrants the professional and careful performance of the Services for a period of 12 months after completion of the Services pursuant to the following conditions.
If the Services are suspended for any of the reasons indicated in Clause 8.3, the warranty period for the Services that were completed prior to the suspension shall commence no later than 30 days after the start of the suspension.
- 12.2 If the object to which the Services relate, parts thereof or spare parts supplied prove to be defective during the warranty period and if this is demonstrably attributable to the failure to perform the Services in a professional or careful manner or to the material supplied by the Contractor in relation to the Contract, the Contractor shall remedy the defect within a reasonable period at Contractor's choice either by the repair or replacement of the defective parts. This shall be conditional upon the written notice of the defect by the Customer to the Contractor during the warranty period, promptly after discovery.
- 12.3 The Contractor shall provide the same warranty in respect of remedial work as for the original Services.
- 12.4 The warranty period shall expire under all circumstances two years after conclusion of the Contract.
- 12.5 The Contractor shall only be liable for work carried out by the personnel of the Customer in the event of gross negligence with regard to instruction or supervision.
- 12.6 No warranty is provided if the Customer or a third party carries out alterations or repairs without the written approval of the Contractor or if, in the event that a defect is discovered, the Customer fails to take all appropriate measures promptly in order to mitigate the damage or does not allow the Contractor any opportunity to rectify the defect.
- 12.7 Defects resulting from circumstances outside the control of the Contractor, e.g. natural wear and tear, improper usage or maintenance, the failure to comply with operating instructions, excessive strain, improper measures to mitigate losses, unsuitable operating materials, chemical or electrolytic influences or construction or assembly work that was not carried out by the Contractor are excluded from the Contractor's warranty and liability for defects.
- 12.8 Any further claims and rights in relation to defects other than those expressly specified under Clause 12.1 to 12.5 are excluded.

13. Non-performance, bad performance and their consequences

- 13.1 In all cases of bad performance or non-performance not expressly regulated under these Conditions, in particular if the Contractor, without valid reasons, starts to provide the Services so late that punctual completion can no longer be expected, if it is clearly foreseeable that completion will occur in breach of the Contract due to the fault of the Contractor, or if the Services are performed in breach of the Contract due to the fault of the Contractor, the Customer shall be entitled to grant a reasonable grace period for the Contractor in respect of the Services in question by simultaneously warning to terminate the Contract in the event of non-compliance. If the Contractor culpably fails to act within this grace period, the Customer may terminate the Contract in respect of the Services that were provided in breach of the Contract or that it is clearly expected will be provided in breach of the Contract and to claim back the part of any payments already made in relation to them.
- 13.2 In such a case, the provisions of Clause 18 shall apply in respect of any damages claims brought by the Customer and the exclusion of further liability. Entitlement to claim damages shall be limited to 10% of the price for the Services affected by termination.

14. Adjustment and termination of the Contract

- 14.1 The Contract shall be adjusted appropriately by the parties if unforeseen events considerably change the economic effect or content of the Contract or have a significant impact on the Contractor's Services, or if performance subsequently becomes impossible.
- 14.2 If and insofar as performance has become economically unreasonable for the Contractor due to reasons that were unforeseeable, it shall be entitled to terminate the Contract or the elements of the Contract in question as soon as it has informed the Customer of this fact, which must occur promptly after it became aware of the circumstances. Should this occur, the Contractor shall be entitled to remuneration for the Services that have already been provided. Claims for damages on the part of the Customer because of such termination are excluded.

15. Export controls

The Customer recognises that the Services may be subject to Swiss and/or foreign legal provisions and regulations on export control, that they may be subject to official licensing requirements and that an end-use declaration may be necessary. This may entail that, if no export or re-export licence is obtained from the competent authorities, goods, software, technologies (technical data) etc. may not be exported or used for any other purpose than that agreed. The Customer undertakes to comply with such provisions and regulations.

16. Data protection

The Contractor is entitled to process the personal data of the Customer for the purpose of completion of the Contract. The Customer accepts in particular that the Contractor may disclose such data in this regard also to third parties in Switzerland and abroad.

17. Additional devices, technical data and software

The Contractor shall be entitled in relation to the provision of the Services to install additional devices and/or software on the object to which the Services relate enabling in particular the downloading and collection of technical data and usage and location data, the use and updating of such data, the procurement of interface information, the access to protocols and tests and to connect these devices and/or this software with the services devices and/or data processing platforms of the Contractor. Additional devices and/or additional software – where provided by the Contractor – and under all circumstances intellectual property rights therein, shall remain the property of the Contractor and may be deactivated or removed following termination of the Contract or in the event of a breach of the applicable terms and conditions of usage and/or licensing. The Contractor shall be entitled to use the data of the Customer that are collected in relation to the performance of the Contract for the purpose of the provision of the service to the Customer, for statistical purposes, for internal data analysis, for the protection of devices and/or software and in order to improve and develop the products and services of the Contractor, and to have such data edited by third parties. The Customer accepts in particular that the Contractor may transfer such data abroad.

Unless otherwise agreed, the Customer is granted a non-exclusive right to use the software exclusively along with the object to which the Services relate. The Customer is not entitled to make copies or to develop the software. In particular, the Customer may not disassemble, decompile, decrypt or reverse engineer the software without the prior written consent of the Contractor. The Contractor may revoke the right of usage in the event of a breach.

For third party software, the terms and conditions of use of the licensor apply and the licensor as well as the Contractor may assert a claim in the event of a breach.

18. Exclusion of further liability on the Contractor's part

All cases of breach of contract and their legal consequences as well as all rights and claims on the part of the Customer, irrespective on what legal ground they are based, are exhaustively covered by these Conditions. In the event that claims of the Customer in relation to or in connection with the Contract or the breach thereof should exist, the total amount of such claims is limited to the price paid by the Customer. However, any claims not expressly mentioned are excluded. This in particular refers, but shall not be limited, to the right to claim damages on the grounds of loss of production, loss of use, loss of orders, recall costs, loss of profit and any other direct or indirect or consequential damage, as well as the rights to reduce the price, rescind or terminate the Contract.

In addition, liability to compensate third party claims brought against the Customer in relation to the infringement of intellectual property rights is excluded.

This exclusion of further liability on the part of the Contractor does not apply to unlawful intent or gross negligence on the part of the Contractor or as far as it is contrary to mandatory law.

19. Right of recourse

If personal injury or damage to the property of third parties occurs through actions or omissions of the Customer or of persons employed or appointed by him to perform any of his obligations, and if a claim is made against the Contractor, then the latter shall be entitled to take recourse against the Customer.

20. Contractual term

With the exception of individual orders and unless otherwise agreed, the Contract shall have an initial term of one year after its conclusion. It shall be renewed automatically by a further year unless it is terminated in writing at the end of any calendar month, subject to a notice period of 3 months.

21. Jurisdiction and applicable law

The place of jurisdiction for both the Customer and the Contractor shall be at the registered office of the Contractor. The Contractor shall, however, be entitled to sue the Customer at the latter's registered address.

The Contract shall be governed by Swiss substantive law. The provisions of the United Nations Convention of 11 April 1980 on Contracts for the International Sale of Goods shall not apply.