

# GENERAL TERMS AND CONDITIONS OF PURCHASE OF JOHANN BORGERS GmbH & Co. KG (December 2010)

## 1 INTERPRETATION

1.1 In these Conditions the following words shall have the following meanings:

**"the Company"** Borgers Limited a company registered in England and Wales with company number 2149178 whose registered office is at 30 Hortonwood, Telford, Shropshire TF1 7LJ and/or any affiliate of Johann Borgers GmbH & Co.KG.

**"the Contract"** the Order and the Supplier's acceptance of the Order.

**"Goods"** any goods, equipment or raw materials (if any) agreed in the Contract to be purchased by the Company from the Supplier (including any part or parts of them).

**"Materials"** construction documents and/or specifications provided by the Company to the Supplier for use in the manufacture of Goods, or the provision of Services.

**"Order"** the Company's written instruction to supply the Goods or Services incorporating these Conditions.

**"Services"** the services (if any) agreed in the Contract to be purchased by the Company from the Supplier.

**"Supplier"** the person, firm or company who accepts the Company's Order.

**"Working Day"** any day except Saturday, Sunday or English public or bank holidays.

1.2 References to any statute or statutory provision shall, unless the context otherwise requires, be construed as a reference to that statute or provision as from time to time amended, consolidated, modified, extended, re-enacted or replaced.

1.3 Words in the singular include the plural and in the plural include the singular.

1.4 Headings do not affect the interpretation of these Conditions.

## 2 APPLICATION OF CONDITIONS

2.1 Subject to any variation under Condition 2.3, these Conditions are the only Conditions upon which the Company is prepared to deal with the Supplier and they shall govern the Contract to the entire exclusion of all other terms or conditions.

2.2 No terms or conditions endorsed upon, delivered with or contained in the Supplier's quotation, acknowledgement or acceptance of order, specification or similar document will form part of the Contract and the Supplier waives any right which it otherwise might have to rely on such terms and conditions.

2.3 These Conditions apply to all the Company's purchases and any variation to these Conditions shall have no effect unless expressly agreed in writing and signed by a duly authorised representative of the Company.

2.4 **The Supplier's attention is specifically drawn to the subsection of the Terms and Conditions section of the Company's website at [www.borgers-group.com](http://www.borgers-group.com) entitled "Purchase contract amendment" which shall apply to any Contract.**

## 3 OFFER, ORDER

3.1 The Company will only make Orders in writing. The Company will not be bound by any orders given verbally or by email which are not subsequently confirmed in writing.

3.2 If an Order has not been fulfilled within a period of 2 weeks from the date of the Order, the Company will cease to be bound by it unless a different period of time for fulfilment of the Order has been expressly agreed in writing by the Company.

## 4 PRICES, DISCOUNTS, PAYMENT TERMS

4.1 The price of the Goods or Services shall be as stated in the Order and unless otherwise agreed in writing by the Company shall be exclusive of Value Added Tax but inclusive of delivery, packaging, packing, shipping, carriage, insurance and all other charges.

4.2 No variation in the price or extra charges will be accepted by the Company.

4.3 The price of after sales parts for the Goods shall not exceed the serial production piece price.

4.4 Invoices must be issued in the currency stated in the Order and all invoices must be submitted on or after the date of delivery of the Goods or Services.

4.5 The Company shall pay the price of the Goods or Services on the 25<sup>th</sup> day of the month following receipt of the Supplier's invoice, or the next Working Day if the 25<sup>th</sup> is a Saturday, Sunday, bank or English public holiday, but time for payment shall not be of the essence of the Contract.

4.6 The Company shall receive a discount of 2% of the price of the Goods on all invoices paid in accordance with Condition 4.5. If a payment is made

later than the 25<sup>th</sup> day of the month following receipt of the Supplier's invoice, no discount shall apply.

4.7 Without prejudice to any other right or remedy, the Company reserves the right to set-off any amount owing at any time from the Supplier to the Company against any amount payable by the Company to the Supplier under the Contract.

4.8 If the Supplier requires advance payment the Company will require a standby letter of credit issued by a major European bank.

4.9 The Supplier is not entitled to suspend deliveries of the goods as a result of any sums being outstanding.

4.10 There is and shall be no minimum purchase obligation on the Company in relation to Goods or Services.

4.11 The Supplier confirms that all Goods will be available for a minimum period of 15 years after the date on which serial production of the Goods ends.

## 5 DELIVERY DATE AND CONTRACT DISRUPTIONS

5.1 The Goods should be delivered, carriage paid, to the Company's place of business unless delivery ex works has been agreed by the Company in the Order.

5.2 The date and time (if applicable) for delivery of the Goods shall be as specified in the Order, or if no such date is specified then delivery shall take place within 14 days of the Order.

5.3 The Supplier shall ensure that each delivery is accompanied by two copies of a dispatch note which show, inter alia, the Order number, date of Order, whether any packaging material is to be returned to the Supplier, the number of packages and contents, and the weight of Goods supplied (if appropriate).

5.4 Time for delivery of the Goods or performance of the Services shall be of the essence.

5.5 All consignments of Goods shall display all such notices as to their contents as are required to comply with any law or statutory provision.

5.6 If the Goods are not delivered on the due date, or the performance of the Services is not completed on the due date then, without prejudice to any other rights which it may have, the Company reserves the right to:

5.6.1 cancel the Contract in whole or in part;

5.6.2 refuse to accept any subsequent delivery of the Goods or performance of the Services;

5.6.3 recover from the Supplier any expenditure reasonably incurred by the Company in obtaining the Goods or Services in substitution from another supplier; and

5.6.4 claim damages for any additional costs, loss or expenses incurred by the Company which are in any way attributable to the Supplier's failure to deliver the Goods on the due date or perform the Services by the due date.

5.7 If the Goods are delivered to the Company in excess of the quantities ordered the Company shall not be bound to pay for the excess and any excess will be and will remain at the Supplier's risk and will be returnable at the Supplier's expense.

5.8 The Company reserves the right to defer the date of delivery or payment or to cancel the Contract or reduce the volume of the Goods ordered or suspend the performance of the Services if it is prevented from or delayed in the carrying on of its business due to circumstances beyond the reasonable control of the Company including, without limitation, acts of God, governmental actions, war or national emergency, acts of terrorism, protests, riot, civil commotion, fire, explosion, flood, epidemic, lock-outs, strikes or other labour disputes (whether or not relating to either party's workforce), or restraints or delays affecting carriers or inability or delay in obtaining supplies of adequate or suitable materials.

## 6 PERMISSIBLE STOCK OF GOODS FOR VOLUME PRODUCTION ORDERS

6.1 As far as orders of the Company take place by means of a basic agreement and subsequent delivery requests (in particular components for the automotive industry) the Supplier shall be aware that number and volume of the delivery requests may vary and may as well be reduced to zero at any time and without prior notice.

6.2 Nevertheless to sustain security of supplies Supplier shall hold ready finished products in the extent of the anticipated delivery requests for the following month as well as raw materials in the extent of the anticipated delivery requests of the next two following months.

6.3 Company is obliged to purchase these products and raw materials from Supplier at the current market rate even in case of termination of the delivery requests. This purchase commitment by the Company does only apply if the Company stops issuing delivery requests to Supplier for reasons other than good cause.

## 7 TRANSFER OF RISK

7.1 The Goods shall remain at the risk of the Supplier until delivery to the Company is complete (including off-loading and stacking).

7.2 In the case of Goods comprising machines or technical installations they will remain at the risk of the Supplier until satisfactory completion of installation and acceptance tests performed by the Company.

7.3 Title to the Goods passes to the Company on delivery or on payment in full whichever is the earlier.

## 8 QUALITY AND WARRANTIES

8.1 The Goods shall be of the best available design, of the best quality, material and workmanship, be without fault and conform in all respects with the Order and specification and/or patterns supplied or advised by the Company to the Supplier, and any standards and/or regulations (if any) governing the Goods as shall be in force at the date of delivery or performance. The Company operates a system known as the BSQS (Borgers supplier quality system) for assessing the quality of Goods and determining the Supplier's responsibilities if non-conforming Goods are supplied, full details of which will be provided to the Supplier upon request. The BSQS shall apply to any Contract.

8.2 The Services shall be performed by appropriately qualified and trained personnel, with due care and diligence and to such standard of quality as may be required by any standard and/or regulations (if any) governing the provision of the Services and as it is reasonable for the Company to expect in all the circumstances.

8.3 The Company's rights under these Conditions are in addition to the statutory conditions implied in favour of the Company by the Sale of Goods Act 1979 and the Supply of Goods and Services Act 1982.

8.4 The Company shall not be deemed to have accepted the Goods until it has had 12 Working Days to inspect them following delivery or, in the case of Goods in respect of which performance tests are carried out, on successful completion of such performance tests. The Company may also reject the Goods as though they had not been accepted for a period of up to and including 60 days after any latent defect in the Goods has become apparent.

8.5 The Company carries out performance tests on the Goods. The Company reserves a test period of 30 days for systems and equipment with versatile and complicated programmes. If the Company does not carry out performance tests itself due to technical or organisational reasons, it reserves all rights in case the performance tests carried out by its partners give cause for complaint.

8.6 If the tests have not been successfully completed within 30 days after delivery the Company shall have the same rights as it would have had if the Supplier had not performed its obligations under Condition 5.6.

8.7 Notwithstanding any such inspection or testing, the Supplier shall remain fully responsible for the Goods and any such inspection or testing shall not diminish or otherwise affect the Supplier's obligations under the Contract.

8.8 If any of the Goods or Services fail to comply with the provisions set out in Condition 7.1 the Company shall be entitled to avail itself of any one or more remedies listed in Condition 15.

## 9 CONTRACT TRANSFER

9.1 The Supplier shall not be entitled to assign the Contract or any part of it without the prior written consent of the Company.

9.2 The Company may assign the Contract or any part of it to any person, firm or company.

## 10 INTELLECTUAL PROPERTY

The Supplier warrants that no third parties' intellectual property rights have been or will be infringed by the manufacture, use or supply of the Goods or the use or supply of the Services. In the event of any breach of this warranty the provisions of Condition 10 shall apply.

## 11 LIABILITY AND INDEMNITY

11.1 The Supplier shall keep the Company indemnified in full against all direct, indirect or consequential liabilities (all three of which terms include, without limitation, loss of profit, loss of business, depletion of goodwill and like loss), loss, damages, injury, costs and expenses (including legal and other professional fees and expenses) awarded against or incurred or paid by the Company as a result of or in connection with:

11.1.1 defective workmanship, quality or materials;

11.1.2 an infringement or alleged infringement of any intellectual property rights caused by the use, manufacture or supply of the Goods or the performance of the Services;

11.1.3 any claim made against the Company in respect of any liability, loss, damage, injury, cost or expense sustained by the Company's employees or agents or by any customer or third party to the extent that such liability, loss, damage, injury, cost or expense was caused by, relates to or arises from the Goods or Services as a consequence of a direct or indirect breach or negligent performance or failure or delay in performance of the terms of the Contract by the Supplier.

## 12 CONSTRUCTION DOCUMENTS, SPECIFICATIONS

12.1 Material supplied by the Company to the Supplier for the manufacture of Goods or the provision of the Services shall at all times be and remain the exclusive property of the Company but shall be held by the Supplier in safe custody at its own risk and may not be copied, loaned out to third parties or used otherwise than as authorised by the Company in writing.

12.2 Any tools, equipment, dies or moulds used in the manufacture of Goods shall become the property of the Company on payment of the relevant price provided that the same shall be held by the Supplier in safe custody at its own risk until release to the Company at the written request of the Company. The Supplier undertakes not to dispose of any tools used in connection with the manufacture of the Goods without prior written agreement from the Company.

12.3 If requested to do so the Supplier will submit to the Company for approval, plans, construction drawings, technical calculations etc in respect of the Goods, and after verification deliver up the database and all master prints to the extent that the Company requires these documents for normal use or repair work. Furthermore, the Supplier will supply to the Company drawings for the essential spare parts with sufficient details for the procurement for spare parts if required.

12.4 The approval by the Company of such plans, constructions, drawings, calculations, etc shall not affect the Supplier's warranty.

## 13 PRODUCT AND/OR PROCEDURE CHANGES

Suppliers with whom the Company is in an ongoing business relationship are obliged to notify the Company in writing if they intend to make product and/or procedure changes as well as modifications to the analysis method with regard to products obtained from the Company.

## 14 FACTORY RULES, ENVIRONMENT PROTECTION, HEALTH AND SAFETY, ACCIDENT PREVENTION AND SAFETY, HUMAN RIGHTS

14.1 When working at one of the Company's factories, the Supplier is obligated to supply the Company before the start of work with the names of its workers, whose qualifications must be verified according to the Company's accident prevention regulations, to be perused at [www.borgers-group.com](http://www.borgers-group.com), and to familiarise them with the Company rules as well as Company policy.

14.2 For invoices based on hourly timesheets the Company's corresponding forms must be used.

14.3 Resources and tools supplied by the Company are used at the Supplier's own risk.

14.4 For the delivery and installation of machines and equipment all relevant legal regulations as well as the Company's specifications, in particular the Company's accident prevention regulations, must be observed. The Supplier is liable for damages resulting from non observance.

14.5 The Supplier is obligated to:

14.5.1 observe relevant legal provisions and standards relating to environment protection, health and safety, accident prevention, transport and plant safety;

14.5.2 to maintain an effective management system in the areas mentioned in this Condition 14 and to provide the Company with appropriate evidence and or allow inspections;

14.5.3 to declare any hazardous materials.

14.6 Supplier respects, supports and complies to the internationally recognised human rights, in particular the regulations of the United Nations on human rights and children's rights. If national regulations concerning child labour or human rights provide for stricter measures, these shall have precedence. Supplier ensures that within the production of his supplies there will be no form of forced labour.

14.7 Supplier commits, within the scope of prevailing laws and statutes, to opposing all forms of discrimination and ensures that there will be no discrimination within the production of his supplies. This applies in particular to unfair treatment on the basis of gender, race, disability, ethnic or cultural origin, religion or world view, age or sexual identity or orientation.

## 15 TERMINATION

15.1 The Company shall have the right at any time and for any reason to terminate the Contract in whole or in part by giving the Supplier written notice whereupon all work on the Contract shall be discontinued and the Company shall pay to the Supplier fair and reasonable compensation for work-in-progress at the time of termination, loss of anticipated profits, loss of anticipated business, depletion of goodwill or any other consequential loss.

15.2 The Company shall have the right at any time by giving notice in writing to the Supplier to terminate the Contract forthwith if:

15.2.1 the Supplier commits a material breach of any of the terms and conditions of the Contract;

15.2.2 any distress, execution or other process is levied upon any of the assets of the Supplier;

15.2.3 the Supplier has a bankruptcy order made against him or makes an arrangement or composition with his creditors, or otherwise takes the benefit of any statutory provision for the time being in force for the relief of insolvent debtors, or (being a body corporate) convenes a meeting of

creditors (whether formal or informal), or enters into liquidation (whether voluntary or compulsory) except a solvent voluntary liquidation for the purpose only of reconstruction or amalgamation, or has a receiver and/or manager, administrator or administrative receiver appointed of its undertaking or any part thereof, or documents are filed with the court for the appointment of an administrator of the Supplier or notice of intention to appoint an administrator is given by the Supplier or its directors or by a qualifying floating charge holder (as defined in paragraph 14 of Schedule B1 to the Insolvency Act 1986), or a resolution is passed or a petition presented to any court for the winding up of the Supplier or for the granting of an administration order in respect of the Supplier, or any proceedings are commenced relating to the insolvency or possible insolvency of the Supplier;

15.2.4 the Supplier ceases or threatens to cease to carry on its business; or

15.2.5 the financial position of the Supplier deteriorates to such an extent that in the opinion of the Company the capability of the Supplier adequately to fulfil its obligations under the Contract has been placed in jeopardy.

15.3 On termination or cancellation of the Contract for any reason:

15.3.1 The Supplier shall reimburse to the Company within 14 days of the said cancellation or termination a sum equal to the value of any Materials on which work has been commenced but not been completed;

15.3.2 The Supplier shall immediately, at its expense, return all unused Materials to the Company; and

15.3.3 The Supplier shall immediately, at its expense, return to the Company all property in its possession belonging to the Company.

15.3.4 The termination of the Contract, however arising, will be without prejudice to the rights and duties of the Company accrued prior to termination. The conditions which expressly or impliedly have effect after termination will continue to be enforceable notwithstanding termination.

## 16 REMEDIES

16.1 Without prejudice to any other right or remedy which the Company may have, if any Goods are not supplied in accordance with, or any Services are not provided in accordance with, or the Supplier fails to comply with, any of the terms of this Contract the Company shall be entitled to avail itself of any one or more of the following remedies at its discretion, whether or not any part of the Goods or Services have been accepted by the Company:

16.1.1 to rescind the Order;

16.1.2 to reject the Goods (in whole or in part) notwithstanding the fact that the Goods have been utilised by the Company and return them to the Supplier at the risk and cost of the Supplier on the basis that a full refund for the Goods so returned together with reimbursement of the costs of any Materials used in the manufacture of such Goods shall be paid forthwith by the Supplier;

16.1.3 at the Company's option to give the Supplier the opportunity at the Supplier's expense either to remedy any defect in the Goods or to supply replacement Goods and carry out any other necessary work to ensure that the terms of the Contract are fulfilled;

16.1.4 to refuse to accept any further deliveries of the Goods but without any liability to the Supplier;

16.1.5 to refuse to accept any further performance of the Services but without any liability to the Seller;

16.1.6 to carry out at the Supplier's expense any work necessary to make the Goods comply with the Contract;

16.1.7 to engage another supplier at the Supplier's expense to perform the Services; and

16.1.8 to claim such damages as may have been sustained in consequence of the Supplier's breach or breaches of the Contract, (including but not limited to) consequential loss, delay, loss of production, loss of profit, loss of time and charges or liability to third parties as a result of the failure of the Company to meet its obligations to its own customers.

## 17 SEVERABILITY

If any provision of the Contract is found by any court, tribunal or administrative body of competent jurisdiction to be wholly or partly illegal, invalid, void, voidable, unenforceable or unreasonable it shall, to the extent of such illegality, invalidity, voidness, voidability, unenforceability or unreasonableness, be deemed severable and the remaining provisions of the Contract and the remainder of such provision shall continue in full force and effect.

## 18 APPLICABLE LAW AND COURT OF JURISDICTION

The formation, existence, construction, performance, validity in all aspects of the Contract shall be governed by the laws of the Federal Republic of Germany excluding the CISG. Exclusive place of jurisdiction shall be Düsseldorf, Germany. The Company shall be entitled to sue the Supplier at the Supplier's domicile as well.