

**General Terms of Sale and Delivery  
of Kjellberg Finsterwalde Elektroden und Zusatzwerkstoffe GmbH (KEZ)**

valid from 01 May 2020

**I. Scope of Application**

1. These General Terms and Conditions of Sale and Delivery (hereinafter referred to as "these Terms") apply to all our business relations with our business partners and purchasers (hereinafter referred to as "Customer" or "Customers"). These Terms apply only if the Customer is an entrepreneur (§ 14 German Civil Code), a legal person under public law or a special fund under public law.
2. These Terms apply exclusively. Any conflicting, diverging or supplementary business and purchase terms of the Customer will apply only if and to the extent that we have expressly consented to their application in writing. This requirement of consent applies in any event, even if, for example, we execute an order without reservation to the Customer while being aware of the general business and purchase terms of the Customer. These Terms will be deemed accepted no later than upon acceptance of our delivery/performance.
3. These Terms also apply as a framework agreement to future business with the same Customer, even if we have not referred to them in each individual case, as long as we have not given notice of a change hereto. These Terms will be provided at any time upon request.
4. Any individual agreements made with the Customer in the particular case (including side agreements, supplements and amendments) shall have priority over these Terms in all cases. As for the content of any such agreements, a written contract or our written confirmation will be authoritative.
5. Any references to the application of statutory provisions are made for clarification purposes only. Even without such clarification, the statutory provisions will therefore apply unless directly amended or expressly excluded in these Terms.

## **II. Offer and Conclusion of Contract: Confidentiality**

1. Our offers are subject to change and are non-binding. This applies even if we have provided the Customer with catalogues, technical documentation (e.g. drawings, plans, calculations, computations, references to DIN standards), other product descriptions or documents, including in electronic form, in which we reserve rights of ownership and copyrights. This will not apply only in such a case where we expressly refer to them as binding offers for a contract.

2. All documents provided to the Customer shall be used by the Customer exclusively to fulfil their obligations under the contract made with us and must be returned to us without request after performance of the contract. Any wastepaper and interim material must be destroyed by the Customer at their cost. The documents must be kept in strict confidence vis-à-vis third parties, even after performance of the contract. The confidentiality obligation will expire only and to the extent that the knowledge contained in the documents provided has become generally known or we have given our written consent to the Customer to its disclosure.

3. Any order for the goods by the Customer will be deemed a binding offer for a contract unless provided in the order or further agreements.

4. We have the right to accept such offer for a contract within two calendar weeks after our receipt of the offer. If the offer is accepted after expiry date of that period, and if the Customer therefore considers themselves no longer bound by their offer, they must immediately notify us thereof in writing; otherwise the contract will be deemed concluded. Acceptance may be declared either in writing (e.g. by order confirmation) or by delivery of the goods to the Customer.

## **III. Prices**

1. Prices are subject to change, ex works Massen, exclusive of packaging and exclusive of the statutory VAT as applicable from time to time.

2. If we have performed the installation, assembly or putting into operation and if not otherwise agreed, the Customer shall be responsible, in addition to the agreed remuneration, for all necessary ancillary costs such as travel costs, costs for

transportation of the required tools, personal baggage as well as travel allowance and the cost of any transportation insurance as may be required by it.

3. A flat handling fee of EUR 10.00 can be charged for orders with net value below EUR 100.00.
4. We reserve the right to change our prices reasonably if, after conclusion of the contract, any cost decreases or increases take place, specifically due to any collective bargaining agreements made or to changes in material prices. We will give prove of it to the Customer upon request.

#### **IV. Payment Terms; Default**

1. Unless agreed otherwise, invoices are payable without deduction within thirty days after invoicing and delivery or acceptance of the goods. Exempted are invoices for after-sales services, which are payable immediately without deduction.
2. Upon expiry of the aforesaid payment periods, the Customer will be in default. During the period of default, the purchase price shall bear interest at the default interest rate applicable from time to time. We reserve the right to claim additional default damage. Vis-à-vis merchants, our claim to the commercial default interest (§ 353 German Commercial Code) remains unaffected.
3. The Customer shall be entitled to setoff or retention only to the extent that its counterclaim has been expressly recognized by us in writing or has been established with non-appealable effect.
4. If it becomes recognisable after conclusion of the contract that our claim to the purchase price is jeopardized by the Customer's lack of financial capacity (e.g. on account of a petition for the institution of insolvency proceedings), we will be entitled under the statutory provisions to refuse performance and, where applicable after setting a time limit, to rescind the contract (§ 312 German Civil Code). For contracts for the manufacture of non-fungible goods (individual productions), we may declare rescission immediately; the statutory provisions regarding the non-necessity of setting time limits remain unaffected.

## **V. Delivery**

1. In principle, deliveries are ex works Massen, regardless of the place of performance. The delivery dates and periods will be agreed individually or stated by us in the order acceptance.

2. Any delivery period stated by us will be binding only on the condition that all documents, permits and information to be provided by the Customer are received by us in due time and all technical issues are clarified. If such conditions are not satisfied in due time, the periods will be reasonably extended; this shall not apply if we are responsible for the delay.

3. If we are unable to meet binding delivery periods for reasons outside our sphere of responsibility (non-availability of performance; force majeure), we will inform the Customer thereof without undue delay and at the same time set a new delivery period which is reasonable given the circumstances in each case. If the performance is not available even within the new delivery period or if the hindrance lasts longer than two months, we will be entitled to rescind the contract in whole or in part; any counter-performance already made by the Customer will be reimbursed by us immediately. An event of non-availability of the performance in the sense of this clause shall mean, above all, the failure by our suppliers to supply us in due time, where we have concluded another contract for the supply of the products at stake (*kongruentes Deckungsgeschäft/ a congruent hedging transaction*). Force majeure shall include strike, lockout, military mobilisation, war, blockades, terrorist attacks, export and import bans, epidemics, closure of transport routes, official orders as well as other government intervention, no matter whether affecting us or our supplier.

4. Partial deliveries are admissible insofar as the Customer can be reasonably expected to accept them.

5. If circumstances become known which give rise to serious doubts as to the solvency or creditworthiness of the Customer, we may refuse performance and set a reasonable time limit to the Customer within which it must pay contemporaneously against delivery or provide security. In the event of the Customer's refusal or if a time limit lapses without result, we will be entitled to rescind the contract and/or claim damages.

6. If the supplier defaults on a delivery date promised with binding effect, the Customer – provided that they can prove that damage has thereby been caused to it – may demand compensation for each full week of default equal to 0.5%, however, no

more than a total of 5%, of the price for such part of the delivery that could not be put into operation due to the default. We reserve the right to prove that the Customer suffered no damage at all or a substantially less damage than the aforesaid lump-sum compensation. Any further rights of the Customer exist only in accordance with No. XI of these Terms.

7. Our statutory rights of rescission and termination, as well as the statutory provisions on performance of a contract in case of an exclusion of the obligation to perform (e.g. impossibility or unacceptability of performance and/or subsequent fulfilment), remain unaffected. The rights of rescission and termination of the Customer under No. XI. of these Terms also remain unaffected.

## **VI. Retention of Title**

1. The goods and all related documents remain our sole property up to complete discharge and satisfaction of all our claims against the Customer under the business relationship (goods subject to reservation of title).

2. Any sale, use, consumption and/or processing of the goods subject to reservation of title shall be permissible only in the normal course of business. The Customer shall not be authorised to dispose of the goods subject to the reservation of title, above all, to make or permit any pledging or transfer by way of security.

3. The Customer is obligated to inform us about any interference by third parties with our ownership rights. This applies to any execution measures both against the goods to which title is reserved and against the claims assigned in advance. Any costs arising in this connection shall be borne by the Customer.

4. The Customer is obliged to treat the goods subject to reservation of title with care. In particular, the Customer shall be obliged to adequately insure such goods at their own cost at replacement value against fire, water damage and theft.

5. The Customer hereby, by way of security, fully assigns to us in advance all claims – including all ancillary rights thereto – which are due to the Customer with respect to the goods subject to reservation of title under a resale or on any other legal grounds. We hereby accept such assignment.

6. The Customer shall be authorised to collect the claims assigned only in the ordinary course of business and only subject to revocation. We will be entitled to revocation if the Customer fails to meet their payment obligations to us, is in payment default or if a petition for the opening of insolvency proceedings is filed. In the event of revocation, the Customer will be obliged to communicate to us, on request, the amount of its claims and the names of the third-party debtors as well as to notify the third-party debtors of the assignment.

7. If the Customer combines, mixes, mingles or processes the goods to which title is reserved, we are entitled to co-ownership in the resulting new goods in the proportion the invoice value of the goods to which title is reserved bears to the invoice value of the new goods.

8. If the Customer breaches their obligations, above all, fail to pay the purchase price when due, we will be entitled in accordance with the statutory regulations, after unsuccessful lapse of a reasonable time limit set to the Customer for performance, to rescind the contract and demand return of the goods on the basis of the reservation of title and rescission of the contract; the statutory regulations regarding the non-necessity of setting a time limit remain unaffected. The Customer is obligated to surrender the goods.

9. If the value of the security provided to us exceeds the claims by a total of more than 10%, we will be obliged, upon request of the Customer, to release any excess security.

## **VII. Delivery and Passing of Risk**

1. In principle, deliveries are ex works Massen, regardless of the place of performance. Unless otherwise agreed, we are entitled to determine the mode of dispatch (in particular, carrier, shipping route, packaging).

2. Even in case of carriage paid, the risk of accidental loss or accidental deterioration of the goods shall pass as follows, however, no later than upon handover of the goods to the Customer:

a) In case of deliveries without installation or assembly: when loading, even onto our own means of transport, is completed;

b) In case of delivery with installation, assembly or putting into operation: on the day of takeover into the Customer's own operation or, if so agreed, after flawless test operation.

3. If an acceptance procedure is agreed, completion of such acceptance shall be decisive for the passing of risk. In addition, in case of an agreed acceptance procedure, the statutory regulations of the law governing contracts for works and services will also apply correspondingly.

Default in taking delivery by the Customer has the same effect as handover or acceptance.

4. If the shipment, delivery, the beginning or carrying-out of the installation, assembly or putting into operation is delayed for reasons for which the Customer is responsible or if the Customer is in default in taking delivery on any other grounds, the risk of accidental loss and accidental deterioration of the goods shall pass to the Customer.

5. If the goods are taken back for reasons for which we are not responsible, the Customer shall bear the risk of accidental loss and accidental deterioration of the goods until arrival of the goods at our shipping warehouse.

6. In addition, our carriage conditions shall apply.

### **VIII. Customer's Claims for Defects in Quality**

1. Unless provided otherwise hereinafter, the rights of the Customer for defects in quality or title (including wrong or short delivery, improper assembly or faulty assembly instructions) shall be governed by the statutory regulations.

2. To protect its warranty claims the Customer must immediately examine the goods and notify any defects immediately in writing (§§ 377, 381 German Commercial Code). Hidden defects must also be notified in writing immediately when detected. If the Customer fails to so notify any defect, our liability will be excluded for any defect not notified.

3. Our liability for defects shall be based on the agreement about the condition of the goods.

Our product descriptions specified as such which were provided to the Customer prior to their order or which have been incorporated into the contract in the same way as these Terms shall be considered to be an agreement about the condition of the goods.

4. An agreement about the condition of the goods does not mean a guarantee. We assume special guarantees only on the basis of a particular agreement regulating the terms and scope of the guarantee notwithstanding these Terms and the statutory rights of the Customer. Furthermore, any guarantee assumed by us must be specifically designated in writing as a guarantee.

5. If the condition has not been agreed, the goods will be deemed free from defects in quality if they are suitable for the use agreed in the contract. In addition, in supplementation of the statutory regulation, the goods will also be deemed free from defects in quality if they have the properties which the Customer may expect based on the product description provided by us, it being sufficient if the product description is provided to the Customer after conclusion of the contract (especially together with the goods). We assume no liability, however, for public statements made by any other manufacturers or other third parties (e.g. advertising statements).

6. If a defect was caused exclusively or very predominantly by the Customer or a third party, the Customer shall have no claims based on defects. This will be presumed, above all, where the defect is based on the following circumstances:

- faultiness or unsuitability of the instruction given by the Customer for execution of an order or of the material to be provided by it, if the defect was not recognisable for us or if the Customer rejects the concerns voiced by us;
- incorrect or negligent treatment or unsuitable or improper use of the goods after passing of the risk, faulty assembly or putting into operation; excessive strain, use of unsuitable operating material, use of other than the Kjellberg original wearing parts, non-compliance with the rules and guidelines in the operating instruction, improper maintenance, improper interference with the device/machine, especially by untrained staff or staff not trained adequately.

Our statutory rights in case of the Customer's responsibility or failure to cooperate (§§ 645; 642, 643 German Civil Code) remain unaffected. Notwithstanding the statutory provisions (§ 651 sent. 3 German Civil Code), those rights apply irrespective of whether the goods to be delivered are fungible or unfungible items (individual productions).



7. If the delivered item is defective, we may first choose whether to make subsequent performance by removal of the defect (subsequent improvement) or by delivery of a defect-free item (replacement delivery). Our right to refuse the chosen kind of subsequent performance on the conditions provided by law remains unaffected.

8. We are entitled to make the subsequent performance owed by us conditional on the Customer paying the outstanding purchase price. The Customer is entitled, however, to receive back such portion of the purchase price as is reasonable in proportion to the defect.

9. The Customer must give us the time and opportunity necessary to make the subsequent performance owed, especially to deliver the criticised goods for examination. The costs required for such subsequent performance, in particular, the costs of transportation, infrastructure, labour and material, will be borne by us. In the case of replacement delivery, the Customer must return the defective item to us in accordance with the statutory regulations.

10. In urgent cases, such as danger to the operational safety or to avert disproportionate damage, the Customer may remove the defect itself and demand from us reimbursement of the expenses objectively required therefor. Such independent removal by the Customer must be notified to us immediately, if possible in advance. The Customer will not be entitled to remove the defect itself if we were entitled to refuse subsequent performance in accordance with the statutory regulations.

11. If subsequent performance has failed or a time limit to be set by the Customer for the subsequent performance has lapsed unsuccessfully or is not necessary according to the statutory regulations, the Customer may rescind the purchase contract or reduce the purchase price. The right of rescission shall not exist, however, in the event of an insignificant defect. If the Customer declares rescission or reduction of the purchase price, his/her claim to delivery of a defect-free item will cease.

12. Claims of the Customer to damages or reimbursement of futile expenses exist only in accordance with No. XI of these Terms but shall be excluded in all other respects.

13. Claims for defects in quality will become time-barred according to the time limits stated in No. XII.

14. Parts which are replaced in the context of the removal of a defect will pass into our ownership (transferred as security).

### **IX. Customer's Claims for Defects in Title**

1. Unless agreed otherwise, we are obligated only to deliver the goods and perform other deliveries and services in the country of the place of delivery free from intellectual property rights and copyrights of third parties (the "property rights").

2. If a third party makes justified claims against the Customer on the ground of a property rights infringement on account of deliveries performed by us and used in accordance with the contract, we will be liable to the Customer as follows:

At our choice and cost, we will either obtain a right of use for the concerned deliveries or change them so that they no longer infringe the right of use or replace the concerned deliveries. If we are unable to do that on reasonable conditions, the Customer may demand reduction of the price for the defective goods or rescission of the concerned contract and claim damages or reimbursement of futile expenses. The liability for damages or reimbursement of futile expenses shall be limited, however, in accordance with No. XI. below.

3. The above obligations shall apply only to the extent that the Customer has immediately notified us about the claims made by such third party and all defense actions and settlement negotiations are reserved to us.

4. Claims of the Customer shall be excluded insofar as s/he is responsible for the property rights infringement.

5. Claims of the Customer will also be excluded if the property rights infringement is caused by special requirements of the Customer, any application not foreseeable for us or by the fact that the delivery is modified or used in combination with any products not delivered by us.

6. In case of any other defects in title, the provisions in No. VIII. shall apply correspondingly.

7. Claims due to property rights infringements or defects in title will become time-barred within the periods stated in No. XII.

## **X. Recourse to Supplier**

1. If the newly produced goods supplied by us to the Customer have been sold on to a consumer, with respect to the Customer's claims for defects, the following provisions, and apart from that the statutory provisions, shall apply in addition to Nos. VIII. and IX.
2. The Customer's rights to subsequent performance according to No. VIII. 7. apply subject to the following conditions: The Customer may demand from us the kind of subsequent performance which it owes to its customer in the particular case, taking into consideration the Customer's statutory and contractual rights of refusal; we have no option right in this respect. The Customer is entitled to assign this claim to subsequent performance to its customer, however, only on account of performance or/and by way of security, i.e. without prejudice to its own continued liability vis-à-vis the consumer. An assignment instead of performance shall be invalid. Our right to refuse such subsequent performance on the statutory preconditions remains unaffected.
3. If we have agreed with the Customer on equivalent compensation in the sense of § 478 (4) Civil Code, the claim to reimbursement for expenses the Customer had to bear in relation to their customer (§ 478 (2) Civil Code) is excluded.

## **XI. Other Liability**

1. Unless otherwise provided in these Terms including the provisions below, in case of a breach of contractual or non-contractual duties, we will be liable in accordance with the pertinent statutory provisions.
2. We will be liable for damages, no matter on what legal basis, only in case of intent or gross negligence. In addition, we will also be liable in case of simple negligence
  - for damage resulting from the violation of a person's life, body or health,
  - for damage resulting from the violation of a material contractual duty; in that case, our liability shall be limited, however, to reimbursement of the foreseeable damage typically occurring.

The aforesaid limitations on liability will not apply if we have fraudulently concealed a defect or have assumed a guarantee as to the condition of the goods. The same applies to claims of the Customer under the German Product Liability Act.

3. In case of a breach of a duty other than a defect, the Customer can rescind or terminate the contract only if we are not responsible for the breach of duty. A free right of termination of the Customer (in particular, according to §§ 651, 649 of the Civil Code) is excluded. Any rescission or termination must be declared in written form. Otherwise, the statutory requirements and legal consequences will apply.

## **XII. Limitation of Time**

1. The mutual claims of the parties will become time-barred in accordance with the statutory provisions, unless otherwise agreed hereinafter.

2. Notwithstanding § 438 (1) No. 3 of the Civil Code, the general limitation period for claims resulting from defects in quality and title shall be 12 months from putting into operation, however, no more than 15 months after dispatch of the goods from Massen. If acceptance is agreed, the limitation period will start upon such acceptance.

3. Claims based on defects in title will not become time-barred, however, as long as the third party's claim against the Customer has not become time-barred.

4. In the event of fraudulent intent (§ 438 (3) of the Civil Code), the statutory provisions remain unaffected in all cases.

5. If we owe contractual damages to the Customer according to No. XI. based on or as a result of a defect, the unabridged statutory limitation periods under the law of sales shall apply (§ 438 of the Civil Code). Those limitation periods also apply to concurrent non-contractual claims for damages unless the application of the regular statutory limitation of time (§§ 195, 199 of the Civil Code) leads to a shorter limitation period in the particular case. The limitation periods under the German Product Liability Act remain unaffected.

6. The statutory regulations regarding suspension, suspension of expiration and recommencement of limitation remain unaffected.

### **XIII. Place of Jurisdiction and Applicable Law**

1. If the Customer is a merchant in the sense of the German Commercial Code, the exclusive – also international – place of jurisdiction for all disputes arising directly or indirectly under the contractual relationship shall be our place of business in Massen. We remain entitled, however, to sue the Customer at its place of business.

2. The legal relations in connection with this contract shall be governed by the laws of the Federal Republic of Germany excluding all international and supra-national laws (of contract), in particular, the United Nations Convention on Contracts for the International Sale of Goods (“CISG”).

3. The requirements and effects of the reservation of title according to No. VI. are subject, however, to the law governing at the location of the item, insofar as, under such law, the choice of law in favour of German law is impermissible or invalid.

### **XIV. Severability**

If individual provisions of the contract are invalid, the contract remains valid in all other parts. This shall not apply if adhering to the contract would mean reasonable hardship to either side.