

Oerlikon AM general terms and conditions of sale (Germany, Export)

1. General

1.1. Definitions

“**BUYER**” means the party which signs the CONTRACT documents as counterpart to OERLIKON AM.

“**COATING AND MACHINING SERVICES**” means services on goods provided by BUYER.

“**CONTRACT**” means the PURCHASE ORDER plus all documents referred to therein.

“**ENGINEERING SERVICES**” means engineering work not making part of a CONTRACT for the delivery of a SYSTEM.

“**EX WORKS**” means Ex Works according to Incoterms 2000 or, after replacement of the Incoterms 2000, the then effective Incoterms.

“**FINAL ACCEPTANCE**” means the document issued by the BUYER or the end-user at the beginning of the warranty period or, if no FINAL ACCEPTANCE document is foreseen in the CONTRACT, the document evidencing shipment of the goods or completion of the services. For consignment goods, FINAL ACCEPTANCE will take place at the date of transfer of ownership, usually at the point of consumption.

“**GENERAL TERMS**” means these General Terms and Conditions of Sale of OERLIKON AM.

“**COMPONENTS/S**” means goods not being a SYSTEM or SPAREPARTS.

“**MAINTENANCE / REPAIR / INSTALLATION SERVICES**” means services not connected to the delivery of a SYSTEM and not falling under COATING AND MACHINING SERVICES.

“**MATERIALS**” means any consumables (e.g. powders, wires) used in the coating process with the exception of SPAREPARTS.

“**ORDER CONFIRMATION**” means the document provided by OERLIKON AM to BUYER as a response to BUYER'S purchase order documents either by e-mail, facsimile or as a hardcopy.

“**PURCHASE ORDER**” means the purchase order documents issued by BUYER in the version confirmed by OERLIKON AM in the ORDER CONFIRMATION. In case of deviations between said purchase order documents and the ORDER CONFIRMATION, the version of the ORDER CONFIRMATION shall become the binding PURCHASE ORDER unless BUYER expresses its dissent by e-mail, facsimile or hard copy within three (3) working days after receipt of the ORDER CONFIRMATION.

“**SCOPE OF SUPPLY**” means the goods and/or services, including but not limited to COATING AND MACHINING SERVICES, ENGINEERING SERVICES, COMPONENTS, MATERIALS,

SPAREPARTS, SYSTEMS and TRAININGS and the pertaining documentation to be delivered under the PURCHASE ORDER as explicitly specified and agreed upon by both parties.

“**SPAREPARTS**” means wear and tear goods.

“**OERLIKON AM**” means the company pertaining to the Oerlikon AM Business Unit which accepted the PURCHASE ORDER.

“**SYSTEM**” means a coating system or a part of a coating system including engineering work, delivered with or without installation or commissioning work.

“**TRAINING**” means educational support provided by or on behalf of OERLIKON AM.

1.2. These GENERAL TERMS apply to all deliveries made by OERLIKON AM. Deviations from these GENERAL TERMS have to be agreed upon in a mutually signed document.

1.3. The delivery encompasses the SCOPE OF SUPPLY and will be made EX WORKS.

1.4. In case of contradiction between CONTRACT documents, the following order of precedence shall apply:

- a) PURCHASE ORDER or other negotiated, agreed and mutually signed document, including all documents made a part thereof
- b) OERLIKON AM'S offer
- c) These GENERAL TERMS
- d) BUYER'S request for an offer
- e) BUYER'S Purchase Terms and Conditions

1.5. All documents making part of the CONTRACT can be changed only in a written, duly signed document.

1.6. OERLIKON AM'S sales and service personnel are not authorized to enter into any indemnity or hold harmless agreements on behalf of OERLIKON AM.

1.7. All information and data contained in brochures and price lists are binding only to the extent that they are by reference expressly included in the CONTRACT.

2. Delivery date

2.1. OERLIKON AM shall deliver the SCOPE OF SUPPLY at the dates specified in the PURCHASE ORDER as confirmed in the ORDER CONFIRMATION. The delivery period shall commence at the date of coming into force of the PURCHASE ORDER, or, if an initial down-payment has been agreed upon, five days after date of receipt of such down-payment.

2.2. In case of late delivery for reasons for which OERLIKON AM or its sub-suppliers are directly responsible, BUYER shall be entitled to require OERLIKON AM to pay liquidated damages as follows: For each full calendar week of delay exceeding a grace period of two (2) calendar weeks, the CONTRACT price for the goods or services delayed will, at BUYER'S written request to be made before payment of the respective invoice, be reduced by 0.5% of the said CONTRACT price, up to a maximum of five percent (5 %) thereof. These liquidated damages shall be the sole and exclusive remedy of BUYER for late delivery.

2.3. For MATERIAL deliveries, Article 2.2 shall not apply, and OERLIKON AM shall not assume responsibility for late delivery related thereto.

2.4. If in exceptional cases BUYER requests to return MATERIALS, the MATERIALS should be in their original packaging, sealed and unopened. Original invoices and lot numbers should match. A restocking fee amounting to fifteen percent (15%) of the value of the returned MATERIALS will be charged. The acceptance of such returns will be at the sole discretion of OERLIKON AM. Returns of other SCOPE OF SUPPLY than MATERIALS will not be accepted.

1. Price and Payment

3.1. The prices for the SCOPE OF SUPPLY are those stated in the PURCHASE ORDER. For work carried out on a time basis, the prices shall be determined in accordance with the hourly rates specified in the PURCHASE ORDER. If no agreement on hourly rates has been made, the hourly rate applied by OERLIKON AM for other customers and comparable work shall apply. All prices are exclusive of sales, excise duties, VAT, sales taxes or similar taxes and duties. Unless a lower price has been offered by OERLIKON AM in writing, OERLIKON AM shall be entitled to charge a minimal invoice amount of € 150 plus VAT.

3.2. a) Payment terms for SYSTEMS: 30 % at PURCHASE ORDER date, 30 % after 2 months after PURCHASE ORDER date, 30 % before shipment, 10 % after FINAL ACCEPTANCE but not later than 90 days after announcement of readiness for shipment. Above payments shall be made within thirty (30) days after invoice date.

b) Payment terms for all other SCOPES OF SUPPLY: 100 % within thirty (30) days after invoice date.

3.3. Payments for prices calculated on a time basis shall be invoiced on a monthly basis or after completion of the work, whichever occurs first. Payment shall be made within thirty (30) calendar days from invoice date.

3.4. If the BUYER should not comply with the agreed dates of payment, BUYER shall be liable, without reminder, for interest with effect from the agreed date on which payment was due, at a rate depending on the normal interest conditions at the BUYER'S domicile, but not less than five percentage points (5 %) above the three months' LIBOR (London Interbank Offered Rate) applicable at the due date of the delayed payment.

3.5. All payments shall be made without any deductions in the currency stated in the CONTRACT.

3.6. In case of late payment, OERLIKON AM may after having notified the BUYER in writing, suspend its performance of the SCOPE OF SUPPLY until the open and due invoices have been paid.

3.7. If BUYER and OERLIKON AM agreed on issuing a Letter of Credit by BUYER in favor of OERLIKON AM, such Letter of Credit shall be irrevocable, extendable, and confirmed by a first class worldwide active bank. Withdrawal of the money shall be against invoice and bill of lading or warehouse receipt.

4. Intellectual Property

- 4.1. BUYER shall provide the technical documentation (e.g. up-to-date drawings, descriptions, charts, instructions) which is necessary for the delivery of the SCOPE OF SUPPLY and is specified in the CONTRACT. BUYER confirms that BUYER is fully authorized to use (or have used) the technical documentation provided to OERLIKON AM for the performance of the SCOPE OF SUPPLY by OERLIKON AM or its sub-suppliers, respectively. In case BUYER would not be authorized to order said performance from OERLIKON AM without violation of intellectual property rights of third parties, or if such right should be challenged, BUYER shall inform OERLIKON AM without any delay. In this case, OERLIKON AM shall stop the work until the approvals needed for the performance have been obtained.
- 4.2. OERLIKON AM shall not use technical documentation received from BUYER for any purpose other than to fulfill the CONTRACT.
- 4.3. Any know-how, inventions, patents or copyrights or the like belonging to or provided by OERLIKON AM and used for or developed in the course of the fulfillment of the CONTRACT by OERLIKON AM shall remain OERLIKON AM'S property, and no ownership shall be transferred to BUYER with respect to such know-how, inventions, patents and copyrights, independent of the hardware on which such knowhow, inventions, patents or copyrights is made available (machinery, paper, electronic medium, etc.). However, BUYER shall be granted a limited right to use such know-how, invention, patents, copyright or the like for the operation, maintenance and repair of the SCOPE OF SUPPLY on a non-exclusive basis, which right shall **not** include the use of the said intellectual property for the reproduction of the SCOPE OF SUPPLY or parts thereof. If the SCOPE OF SUPPLY consists of ENGINEERING SERVICES, BUYER shall be permitted to use, on a non-exclusive basis, the documentation received for the purpose described in the PURCHASE ORDER. In case of doubt, ENGINEERING SERVICES provided for the development of a SYSTEM or COATING AND MACHINING SERVICES shall be deemed to be made available for the procurement of such goods or services from OERLIKON AM.
- 4.4. a) OERLIKON AM warrants that the SCOPE OF SUPPLY and any part thereof, in the particular form sold by OERLIKON AM, shall not infringe any intellectual property rights of third parties. In the event of any patent infringement relating to the said SCOPE OF SUPPLY, OERLIKON AM may, in its sole discretion, procure the right to use the SCOPE OF SUPPLY without impairing its suitability, or modify or replace it so that it is rendered non-infringing. The obligations of OERLIKON AM set forth herein are contingent upon (i) OERLIKON AM receiving prompt written notice from BUYER of such infringement; (ii) OERLIKON AM receiving assistance from BUYER in the defense; and (iii) the right of OERLIKON AM to settle or defend.
- b) This obligation of OERLIKON AM shall not apply to (i) the SCOPE OF SUPPLY or part thereof which has been manufactured according to BUYER'S design, (ii) services performed by using BUYER'S documentation, (iii) the use of the SCOPE OF SUPPLY or any part thereof in conjunction with any other product in a combination not furnished by OERLIKON AM as part of the SCOPE OF SUPPLY, (iv) products fabricated by using the SCOPE OF SUPPLY. As to any such equipment, service, product, part or use in such combination, OERLIKON AM assumes no liability whatsoever for infringement of intellectual property rights of third parties, and BUYER shall indemnify OERLIKON AM against any respective infringement claims. OERLIKON AM shall cooperate with BUYER in the same manner as required by OERLIKON AM under 4.4 a) (i) to (iii) herein above.
- 4.5. OERLIKON AM'S copyrighted material shall not be copied by BUYER except for archiving purposes or to replace a defective copy. BUYER'S copyrighted material shall not be copied by OERLIKON AM except for archiving purposes or to replace a defective copy.

2. Installation and site Preparation

- 5.1. If installation services are a part of the SCOPE OF SUPPLY, it is the responsibility of the BUYER to prepare the site environmentally and to provide the required services, electrical wiring and conduit, dry compressed air and piping, gas supply and piping, tools for installation, water drain, permits, including work permits, licenses, approvals, etc. as well as whatever is required to uncrate and move the equipment into its location.
- 5.2. BUYER also undertakes to maintain the facilities, upon which OERLIKON AM'S personnel maybe required to enter, in a safe condition, and to comply with all applicable laws, statutes and regulations governing workplace health and safety, and to give OERLIKON AM'S personnel all instructions necessary. OERLIKON AM shall make sure that its personnel will follow all instructions

reasonably made by BUYER. The same applies vice versa in case BUYER'S personnel have to enter upon OERLIKON AM'S facilities.

- 5.3. BUYER'S failure to comply with the obligations stated in Articles 5.1 and 5.2 above shall entitle OERLIKON AM to either stop rendering its services, and/or postpone the delivery terms, and/or ask for additional charges for the lost time of its service personnel, such time to be calculated and charged in accordance with Articles 3.1 and 3.3 herein above.

3. Warranty

Articles 6.1 through 6.7 contain specific warranties referring to various SCOPE OF SUPPLY. Only the warranty provision(s) referring to a specific SCOPE OF SUPPLY shall apply.

6.1. SYSTEMS and COMPONENTS

OERLIKON AM shall remedy any defect resulting from faulty materials or faulty workmanship. To the extent OERLIKON AM is responsible for the design the same obligation applies to defects resulting from faulty design. If requested to do so by BUYER in writing, and as BUYER'S sole and exclusive remedy, OERLIKON AM agrees to, at its sole option, either repair or replace the faulty parts of the SCOPE OF SUPPLY, or supply BUYER with non-defective SCOPE OF SUPPLY or part thereof. These remedies shall be provided for the defects notified to OERLIKON AM during the warranty period under the conditions defined in Article 6.9 herein below and are granted for twelve (12) months.

6.2. MATERIALS

OERLIKON AM warrants that when dispatched from OERLIKON AM'S factory, all MATERIALS meet the specifications described in the respective product data sheet. If requested to do so by BUYER in writing, and as BUYER'S sole and exclusive remedy, OERLIKON AM agrees to replace, at OERLIKON AM'S own cost, any MATERIALS which do not meet the specifications described in the said product data sheet or which have been specifically agreed upon in the CONTRACT. These remedies shall be provided for the defects notified to OERLIKON AM during the warranty period under the conditions defined in Article 6.9 herein below and are granted for two (2) months.

6.3. COATING AND MACHINING SERVICES

OERLIKON AM shall remedy any defect resulting from not using the materials specified, or from faulty workmanship. OERLIKON AM assumes no warranty or representation regarding the fitness of the coating or machining applied for the purpose for which the coated goods are intended to be used. If requested to do so by BUYER in writing, and as BUYER'S sole and exclusive remedy, OERLIKON AM shall at its sole option repair the defective coating or machining or remove and reprocess it. These remedies shall be provided for the defects notified to OERLIKON AM during the warranty period under the conditions defined in Article 6.9 herein below and are granted for six (6) months.

6.4. MAINTENANCE ! REPAIR ! INSTALLATION SERVICES

OERLIKON AM'S obligations consist of using proper care and skill in performing the work described in the CONTRACT and, if parts (SPAREPARTS or other parts) are supplied by OERLIKON AM in connection with such SERVICES, to deliver parts, which are free of defects. If requested to do so by BUYER in writing, and as BUYER'S sole and exclusive remedy, OERLIKON AM shall re-do any faulty service work at its own cost. Defects resulting from insufficient or inappropriate documentation delivered by BUYER shall be remedied at BUYER'S cost. These remedies shall be provided for the defects notified to OERLIKON AM during the warranty period under the conditions defined in Article 6.9 herein below and are granted for six (6) months.

6.5. SPAREPARTS

OERLIKON AM shall remedy any defect resulting from faulty materials or faulty workmanship. If requested to do so by BUYER in writing, and as BUYER'S sole and exclusive remedy, OERLIKON AM agrees to, at its sole option, either repair or replace the faulty SPAREPARTS, or supply BUYER with nondefective SPAREPARTS. These remedies shall be provided for the defects notified to OERLIKON AM during the warranty period under the conditions defined in Article 6.9 herein below and are granted for twelve (12) months except as otherwise agreed upon in the CONTRACT or as can normally be expected for such types of SPAREPARTS and the specific use, whichever time period is the shortest.

6.6. ENGINEERING SERVICES

OERLIKON AM'S obligations consist of using proper care and skill in performing the work described in the CONTRACT. However, OERLIKON AM does not provide any warranty for successful achievement of the results envisaged in the CONTRACT. If requested to do so by BUYER in writing, and as BUYER'S sole and exclusive remedy, OERLIKON AM shall re-do any faulty service work at its own cost. These remedies shall be provided for the faults notified to OERLIKON

AM during the warranty period under the conditions defined in Article 6.9 herein below and are granted for six (6) months.

6.7. TRAINING

OERLIKON AM'S obligations consist of using proper care and skill in performing the training. OERLIKON AM shall assume liability regarding correctness of the content communicated, orally or in writing, only to the extent that damages resulting from TRAINING are based on OERLIKON AM'S gross negligence or willful misconduct.

6.8. Performance Guarantee

Unless explicitly specified in the CONTRACT, OERLIKON AM shall not provide performance guarantees. If a performance guarantee has been agreed upon, it shall be fulfilled if the guaranteed values have been reached in a performance test, or, if no such test has been agreed upon, if the SCOPE OF SUPPLY goes into commercial operation. OERLIKON AM'S liability for not reaching the guaranteed values, although the pre-conditions for which the BUYER or the end-user are responsible have been fulfilled, shall be limited to liquidated damages amounting to maximum ten percent (10 %) of the CONTRACT price for all SCOPE OF SUPPLY, except for SYSTEMS, for which OERLIKON AM'S liability shall be limited to liquidated damages amounting to maximum five percent (5%) of the CONTRACT PRICE.

6.9. General Conditions applicable to OERLIKON AM'S Warranty

a) Place where Warranty Work is executed
OERLIKON AM reserves the right to require that the BUYER or the end-user returns the SCOPE OF SUPPLY or parts thereof to OERLIKON AM'S production facility to provide proper warranty service. Regarding SYSTEMS, OERLIKON AM shall use its best efforts to perform the warranty work at BUYER'S or end-user's facility, and as soon as reasonably practicable after receipt of written notification by the BUYER or the end-user. In case OERLIKON AM requires that the BUYER or end-user returns the SYSTEM or part thereof to OERLIKON AM'S facilities, OERLIKON AM shall reimburse BUYER or end-user solely the costs paid for sea or land transportation, with the exclusion of any internal costs. Regarding COATING AND MACHINING SERVICES, OERLIKON AM shall bear the costs for the corresponding repair or reprocessing work which occurs outside its works if it is not possible to carry out such repairs or reprocessing work in OERLIKON AM'S works, or if this would involve unreasonable expenses. Such costs shall be borne to the extent that they are reasonable under the circumstances prevailing, and provided BUYER or end-user has obtained OERLIKON AM'S prior written approval.

b) Start of Warranty Period

Unless otherwise agreed upon in writing, the warranty period for SYSTEMS, COMPONENTS, and MAINTENANCE / REPAIR / INSTALLATION SERVICES starts at the date of FINAL ACCEPTANCE of the respective SCOPE OF SUPPLY, in any case not later than 90 days after announcement of readiness for shipment in case of delivery of goods, or completion of the services. FINAL ACCEPTANCE shall not be deferred due to minor defects. For MATERIALS, COATING AND MACHINING SERVICES and SPARE PARTS the warranty period starts at the date of delivery EX WORKS.

c) Early termination of Warranty Period

The warranty periods stipulated in 6.1 through 6.7 above shall terminate if BUYER or a third party undertakes inappropriate or improper modification or repairs, or if the BUYER, in case of a defect, does not as soon as reasonably possible take all appropriate steps to mitigate damages and to notify OERLIKON AM in writing of its obligation to remedy such defect.

d) Maximum Warranty Period

Any warranty period (including but not limited to new warranty periods for replaced, or repaired goods, or repeated services, and including cases when commencement of the warranty period is deferred, etc.) shall expire after adding half of the number of months of the original warranty period.

e) Deliveries to Medical Industry

If the SCOPE OF SUPPLY is delivered for use in the medical industry - such as but not limited to (i) COATING AND MACHINING SERVICES applied on medical devices, (ii) SYSTEMS, COMPONENTS, SPARE PARTS, MATERIALS used for the production of medical devices, (iii) MAINTENANCE/REPAIR/INSTALLATION SERVICES on SYSTEMS etc. as mentioned under (ii) herein before - OERLIKON AM shall not assume any liability for biocompatibility, sterility or other requirements typically asked for in the medical industry. BUYER shall indemnify and hold OERLIKON AM harmless from any and all claims made by third parties against OERLIKON AM and shall make sure that BUYER'S insurance carriers shall waive their right of subrogation against OERLIKON AM.

f) Exclusion from OERLIKON AM'S Warranty

Excluded from OERLIKON AM'S warranty and liability for defects are all deficiencies which cannot be proved to have their origin in bad material, faulty design (if applicable), or poor workmanship, e.g. for deficiencies resulting from normal wear and tear, improper maintenance, failure to observe the operating instructions or deficiencies resulting from other reasons beyond OERLIKON AM'S control, including damages caused by erosion, corrosion or cavitation. Replaced parts shall become the property of OERLIKON AM.

The BUYER or end-user shall at its own expense arrange for any dismantling and reassembly of equipment other than the dismantling and reassembly of the equipment pertaining to the SCOPE OF SUPPLY, to the extent that this is necessary to remedy the defect.

Total liquidated damages as described under Articles 2.2 and 6.8 above shall be limited to ten percent (10 %) of the CONTRACT Price.

OERLIKON AM MAKES NO WARRANTY OR REPRESENTATION TO THE SCOPE OF SUPPLY OTHER THAN AS SPECIFIED IN THIS SECTION. ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE, ARE HEREBY DISCLAIMED.

6.10 Hazard Warning Responsibility

BUYER and OERLIKON AM acknowledge that each have respective obligations with respect to maintaining compliance with all safety and health related regulations concerning SCOPE OF SUPPLY. BUYER is familiar with the SCOPE OF SUPPLY and acknowledges its separate and independent knowledge of such risks, which are known in BUYER'S industry. BUYER shall maintain compliance with all safety and health related governmental requirements concerning SCOPE OF SUPPLY and shall take all reasonable and practical steps to inform, warn, and familiarize its employees, agents, contractors, and customers with all hazards associated therewith, including handling, shipment, storage, use, and disposal. BUYER assumes as to its employees, independent contractors, and subsequent purchasers of the SCOPE OF SUPPLY sold hereunder, all responsibility for all such necessary warnings or other precautionary measures. BUYER shall defend at its own expense, indemnify fully and hold harmless OERLIKON AM and its parents, subsidiaries, and affiliates and its and their agents, officers, directors, employees, representatives, successors, and assigns from and against any and all liabilities, losses, damages, demands, claims, penalties, fines, actions, suits, legal, administrative or arbitration proceedings, judgments of any jurisdiction, costs and expenses (including, but not limited to, attorney's fees and related costs) arising out of or in any manner related to BUYER'S failure to provide necessary warnings or other precautionary measures in connection with the SCOPE OF SUPPLY sold hereunder.

7. Overall Limitation of Liability

NOTWITHSTANDING ANYTHING TO THE CONTRARY IN THE CONTRACT, INCLUDING ALL DOCUMENTS MAKING PART THEREOF AND TO THE MAXIMUM EXTENT PERMITTED BY LAW, IN NO EVENT SHALL OERLIKON AM BE LIABLE TO THE BUYER OR ITS CUSTOMER FOR ANY INDIRECT, PUNITIVE, SPECIAL, INCIDENTAL OR CONSEQUENTIAL DAMAGES IN CONNECTION WITH THE CONTRACT, INCLUDING BUT NOT LIMITED TO, LOSS OF PROFITS OR INTERRUPTION OF PRODUCTION, LOSS OF OPPORTUNITY OR BUSINESS, DELAY IN DELIVERY (EXCEPT AS EXPRESSLY PROVIDED IN ARTICLE 2.2 HEREOF), OR CLAIMS BY THE BUYER'S CUSTOMER FOR SUCH DAMAGES, WHETHER SUCH LIABILITY IS BASED ON CONTRACT, INDEMNITY, TORT (INCLUDING NEGLIGENCE), STATUTE OR ANY OTHER BASIS OF LEGAL LIABILITY. THE REMEDIES OF BUYER SET FORTH HEREIN ARE EXCLUSIVE, AND OERLIKON AM'S LIABILITY WITH RESPECT TO ANY CONTRACT OR SALE OR ANYTHING DONE IN CONNECTION THEREWITH, WHETHER IN CONTRACT, TORT (INCLUDING NEGLIGENCE), UNDER ANY WARRANTY, STRICT LIABILITY OR OTHERWISE SHALL NOT EXCEED 100% OF THE PRICE OF THE CONTRACT, UNLESS CLAIMS ARISE DIRECTLY FROM GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF OERLIKON AM.

4. Export and other Governmental Documents

- 8.1. OERLIKON AM undertakes to provide the documents required by the authorities at OERLIKON AM'S place for the manufacturing and transportation EX WORKS of the SCOPE OF SUPPLY.
- 8.2. BUYER undertakes to provide all other documents required, e.g. documents required by an authority at BUYER'S or BUYER'S customer's place, or the place where the SCOPE OF SUPPLY will be used.
- 8.3. OERLIKON AM, BUYER and BUYER'S customer shall support each other without undue delay if one party needs information or documentation required by any authority, if such information or

documentation can be delivered easier by one of the other parties than the required party.

- 8.4. The BUYER hereby represents and warrants that it is, and will remain in compliance with the requirements of all applicable export laws and regulations, including but not limited to the U.S. Export Administration Regulations and International Traffic in Arms Regulations. Such requirements include, but are not limited to obtaining all required authorizations or licenses for the export or reexport of any controlled item, product, article, commodity, software or technology. Without limiting the generality of the foregoing, the BUYER hereby represents and warrants that it has not been, and is not currently, debarred, suspended or otherwise prohibited or restricted from exporting, reexporting, receiving, purchasing, processing or otherwise obtaining any item, product, article, commodity, software or technology regulated by any agency of the United States or any other state. The BUYER agrees to indemnify and hold harmless.

OERLIKON AM from any costs, penalties or other losses caused by, or related to, any violation or breach of the warranties contained in this provision.

9. Force Majeure

- 9.1. OERLIKON AM shall not be liable for any non-performance, loss, damage, or delay due to war, riots, fire, flood, strikes or labor difficulty, governmental acts such as but not limited to trade restrictions including embargoes, Acts of God, acts of the BUYER or its customer, delays in transportation, inability to obtain necessary labor or materials from usual sources, or other causes beyond the reasonable control of OERLIKON AM. In the event of delay in performance due to any such cause, the date of delivery or time for completion will be extended to reflect the length of time lost by reason of such delay. If the grounds for Force Majeure continue for more than six (6) months, either OERLIKON AM or BUYER may terminate the CONTRACT upon seven (7) days written notice to the other party.
- 9.2. OERLIKON AM shall be entitled to be compensated for the extra costs caused by the interruption, or, in case of termination, for the work done prior to termination and the expenses for non-cancelable procurements. BUYER shall be entitled to receive the work for which it has paid.

10. Free Issue Materials

Materials supplied by BUYER to OERLIKON AM (e.g. parts to be coated or machined, materials to be used for implementation in the SCOPE OF SUPPLY, etc.) shall at all times remain the property of BUYER. Subject to Article 6 and 7 hereinabove, OERLIKON AM shall be solely liable for damages caused negligently to such materials.

1. Miscellaneous

11.1. Applicable Laws and Jurisdiction

The CONTRACT is construed and shall be interpreted in accordance with the laws of Switzerland. The conflict of law rules shall be excluded.

IN CASE OF A DISPUTE, THE PARTIES SHALL MAKE THEIR BEST ENDEAVORS TO SOLVE SUCH DISPUTE AMICABLY. IF THIS SHOULD NOT BE POSSIBLE, ANY DISPUTES ARISING OUT OF OR IN CONNECTION WITH THE CONTRACT SHALL BE FINALLY SETTLED UNDER THE RULES OF ARBITRATION OF THE INTERNATIONAL CHAMBER OF COMMERCE BY THREE ARBITRATORS. EACH PARTY SHALL APPOINT ONE ARBITRATOR, AND THE CHAIRMAN SHALL BE APPOINTED BY THE TWO ARBITRATORS. PLACE OF ARBITRATION SHALL BE ZURICH. THE ARBITRAL PROCEDURE SHALL BE HELD IN THE ENGLISH LANGUAGE.

11.2. Assignment

Any attempt to assign, transfer, or delegate any of the rights, duties or obligations herein to a third party without prior written consent of the other party shall render such attempted assignment or transfer null and void. OERLIKON AM'S affiliated companies shall not be considered third parties for this purpose.

11.3. Waiver of Rights

OERLIKON AM'S or BUYER'S failure to exercise any of its rights shall not constitute or be deemed a waiver or a forfeiture of such rights.

11.4. Severability

If a provision of the CONTRACT is determined to be void or unenforceable, this finding shall not render other provision void or unenforceable, and OERLIKON AM and BUYER shall make their best endeavors to replace such provision by a valid one covering the original commercial intention as far as legally possible.

Terms and Conditions

OERLIKON AM GENERAL TERMS AND CONDITIONS OF SALE – Materials Sales

(United States)

1. GENERAL

1.1 Definitions

“**APPROVED AFFILIATE**” means, with respect to any entity, any other entity or person that, directly or indirectly through one or more intermediaries, controls or is controlled by or is under common control with such entity, which is approved by Oerlikon AM and BUYER in writing to provide or acquire the SCOPE OF SUPPLY under this CONTRACT.

“**BUYER**” means the party which signs the CONTRACT documents as counterpart to OERLIKON AM.

“**CONTRACT**” means these general terms and conditions of sale, and the PURCHASE ORDER plus all documents referred to therein.

“**EX WORKS**” means Ex Works according to Incoterms 2000 or, after replacement of the Incoterms 2000, the then effective Incoterms.

“**FINAL ACCEPTANCE**” means the document issued by the BUYER or the end-user at the beginning of the warranty period or, if no FINAL ACCEPTANCE document is foreseen in the CONTRACT, the document evidencing shipment of the goods or completion of the services.

“**GENERAL TERMS**” means these General Terms and Conditions of Sale of OERLIKON AM US Inc.

“**MATERIALS**” means any consumables (e.g. powders) used in the additive manufacturing process.

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“**SCOPE OF SUPPLY**” means the MATERIALS, and the pertaining documentation, to be delivered under the PURCHASE ORDER as explicitly specified and agreed upon by both parties.

1.2 Notwithstanding anything to the contrary:

- a) These GENERAL TERMS shall apply to each CONTRACT (including, without limitation, each PURCHASE ORDER) and to each delivery made by OERLIKON AM hereunder or thereunder, all of which shall be subject to the terms and conditions set forth in these GENERAL TERMS.
- b) Any terms or conditions contained in any purchase order document, invoice acknowledgment or other document or instrument of BUYER or proposed at any time by BUYER in any manner that vary from or conflict with any of the terms and conditions in these GENERAL TERMS are hereby objected to by OERLIKON AM without the need for any further notice of objection (and BUYER hereby waives any right or requirement to receive any further notice of objection) and shall be of no force or effect nor in any circumstances binding upon OERLIKON AM (or any of its AFFILIATES) unless expressly accepted in a writing signed by a duly authorized representative of OERLIKON AM.
- c) If BUYER’S purchase order documents are provided to OERLIKON AM, the terms and conditions in and related to those purchase order documents will be superseded by these GENERAL TERMS. Written acceptance or rejection by OERLIKON AM of any such terms or conditions provided to OERLIKON AM shall not constitute an acceptance of any other additional terms or conditions. These GENERAL TERMS apply to all deliveries made by OERLIKON AM.
- d) Deviations from these GENERAL TERMS have to be agreed upon in a mutually signed document.

1.3 The delivery encompasses the SCOPE OF SUPPLY and will be made EX WORKS.

1.4 In case of contradiction between CONTRACT documents, the following order of precedence shall apply:

- a) These GENERAL TERMS
- b) PURCHASE ORDER or other negotiated, agreed and mutually signed document, including all documents made a part thereof
- c) OERLIKON AM’S offer
- d) BUYER’S request for an offer
- e) BUYER’S Purchase Terms and Conditions

1.5 These GENERAL TERMS may be changed only in a written document signed by an authorized representative of BUYER and an authorized manager of OERLIKON AM.

1.6 OERLIKON AM’S sales and service personnel are not authorized to enter into any indemnity or hold harmless agreements on behalf of OERLIKON AM.

1.7 All information and data contained in brochures and price lists are binding only to the extent that they are by reference expressly included in the CONTRACT.

2. Terms of Delivery

2.1 OERLIKON AM shall deliver the SCOPE OF SUPPLY at the dates specified in the PURCHASE ORDER as confirmed in the ORDER CONFIRMATION. The delivery period shall commence at the date of coming into force of the PURCHASE ORDER, or, if an initial down-payment has been agreed upon, five days after date of receipt of such down-payment.

2.2 Oerlikon shall make the best effort to meet the delivery date requested by the Buyer, if for any unforeseen reasons, delivery is delayed, Oerlikon will keep the Buyer duly informed, but will not be liable for any loss, costs, damages or expenses (direct, indirect or consequential) suffered by the Buyer as a result of a delayed delivery, unless specific terms are agreed for a specific project, duly agreed and signed by both parties.

2.3 If in exceptional cases BUYER requests to return MATERIALS, the MATERIALS should be in their original packaging, sealed and unopened. Original invoices and lot numbers should match. A restocking fee amounting to fifteen percent (15%) of the value of the returned MATERIALS will be charged. The acceptance of such returns will be at the sole discretion of OERLIKON AM. Returns of other SCOPE OF SUPPLY than MATERIALS will not be accepted.

2.4 Oerlikon AM is entitled to partial deliveries. Customers accept partial deliveries.

3. Price and Payment

3.1 The prices for the SCOPE OF SUPPLY are those stated in the PURCHASE ORDER. **All wire orders are accepted with the understanding that 10% variance in quantity and price is acceptable to the customer.** For work carried out on a time basis, the prices shall be determined in accordance with the hourly rates specified

in the PURCHASE ORDER. If no agreement on hourly rates has been made, the hourly rate applied by OERLIKON AM for other customers and comparable work shall apply. Upon receipt of a partial delivery, a partial billing amount becomes due. All prices are exclusive of VAT, sales taxes, excise duties, or similar taxes and duties.

3.2 100 % within thirty (30) days after invoice date.

3.3 Payments for prices calculated on a time basis shall be invoiced on a monthly basis or after completion of the work, whichever occurs first. Payment shall be made within thirty (30) calendar days from invoice date.

3.4 If the BUYER should not comply with the agreed dates of payment, BUYER shall be liable, without reminder, for interest with effect from the agreed date on which payment was due, at a rate depending on the normal interest conditions at the BUYER’S domicile, but not less than five percentage points (5 %) above the three months’ LIBOR (London Interbank Offered Rate) applicable at the due date of the delayed payment.

3.5 All payments shall be made without any deductions in U.S. currency.

3.6 In case of late payment, OERLIKON AM may after having notified the BUYER in writing, suspend its performance of the SCOPE OF SUPPLY until the open and due invoices have been paid.

3.7 If BUYER and OERLIKON AM agreed on issuing a Letter of Credit by BUYER in favor of OERLIKON AM, such Letter of Credit shall be irrevocable, extendable, and confirmed by a first class worldwide active bank. Withdrawal of the money shall be against invoice and bill of lading or warehouse receipt.

3.8 In consideration for extending credit, BUYER, if requested by OERLIKON AM, shall grant OERLIKON AM a continuing security interest in the Product and the proceeds of any sale of goods manufactured using the Product and in accounts receivable.

3.9 OERLIKON AM shall retain title to and a purchase money security interest in the SCOPE OF SUPPLY sold hereunder until the purchase price shall be fully paid to OERLIKON AM. BUYER shall perform all acts that may be necessary to perfect and assure retention of title to the equipment by OERLIKON AM and if requested by OERLIKON AM, shall execute a security agreement and UCC financing statement covering the equipment.

4. Intellectual Property

4.1 BUYER shall provide the technical documentation (e.g. up-to-date drawings, descriptions, charts, instructions, specifications) which is necessary for the delivery of the SCOPE OF SUPPLY and is specified in the CONTRACT. BUYER confirms that OERLIKON AM is fully authorized to use (or have used) the technical documentation provided for the performance of the SCOPE OF SUPPLY by OERLIKON AM or its sub-suppliers, respectively. In case BUYER would not be authorized to order said performance from OERLIKON AM without violation of intellectual property rights of third parties, or if such right should be challenged, BUYER shall inform OERLIKON AM without any delay. In this case, OERLIKON AM shall stop the work until the approvals needed for the performance have been obtained.

4.2 OERLIKON AM shall not use technical documentation received from BUYER for any purpose other than to fulfill the CONTRACT.

4.3 Any know-how, inventions, patents or copyrights or the like belonging to or provided by OERLIKON AM and used for or developed in the course of the fulfillment of the CONTRACT by OERLIKON AM shall remain OERLIKON AM’S property, and no ownership shall be transferred to BUYER with respect to such know-how, inventions, patents and copyrights, independent of the hardware on which such know-how, inventions, patents or copyrights is made available (machinery, paper, electronic medium, etc.). However, BUYER shall be granted a limited right to use such know-how, invention, patents, copyright or the like for the operation, maintenance and repair of the SCOPE OF SUPPLY on a non-exclusive basis, which right shall not include the use of the said intellectual property for the reproduction of the SCOPE OF SUPPLY or parts thereof. If the SCOPE OF SUPPLY consists of ENGINEERING SERVICES, OERLIKON AM shall upon completion of the Services, and expressly conditioned upon full payment of all fees and costs due, transfer to BUYER property rights, with respect to inventions, patents and copyrights.

4.4 a) OERLIKON AM warrants that the SCOPE OF SUPPLY and any part thereof, in the particular form sold by OERLIKON AM, shall not infringe any intellectual property rights of third parties. In the event of any patent infringement relating to the said SCOPE OF SUPPLY, OERLIKON AM may, in its sole discretion, procure the right to use the SCOPE OF SUPPLY without impairing its suitability, or modify or replace it so that it is rendered non-infringing. The obligations of OERLIKON AM set forth herein are contingent upon (i) OERLIKON AM receiving prompt written notice from BUYER of such infringement; (ii) OERLIKON AM receiving assistance from BUYER in the defense; and (iii) the right of OERLIKON AM to settle or defend.

b) This obligation of OERLIKON AM shall not apply to (i) the SCOPE OF SUPPLY or part thereof which has been manufactured according to BUYER’S design, (ii) services performed by using BUYER’S documentation, (iii) the use of the SCOPE OF SUPPLY or any part thereof in conjunction with any other product in a combination not furnished by OERLIKON AM as part of the SCOPE OF SUPPLY, (iv) products fabricated by using the SCOPE OF SUPPLY. As to any such equipment, service, product, part or use in such combination, OERLIKON AM assumes no liability whatsoever for infringement of intellectual property rights of third parties, and BUYER shall indemnify OERLIKON AM against any respective infringement claims. OERLIKON AM shall co-operate with BUYER in the same manner as required by OERLIKON AM under 4.4 a) (i) to (iii) herein above.

4.5 OERLIKON AM’s copyrighted material shall not be copied by BUYER except for archiving purposes or to replace a defective copy.

5. Term & Termination

5.1 This Contract shall terminate five (5) years from the last date entered below unless extended by another agreement in writing, except that the obligations of confidentiality shall survive this Agreement for a period of not less than fifteen (15) additional years from the date of termination.

5.2 Either Oerlikon AM or Buyer may terminate this Contract at any time by giving the other party ninety (90) days advance written notice of termination, with such termination to be effective immediately upon the expiration of the ninety (90) day notice period.

6. Warranty

6.1 **MATERIALS** OERLIKON AM warrants that when dispatched from OERLIKON AM’S factory, all MATERIALS meet the specifications described in the respective product data sheet. If requested to do so by BUYER in writing, and as BUYER’S sole and exclusive remedy, OERLIKON AM agrees to replace, at OERLIKON AM’S own cost, any MATERIALS which do not meet the specifications described in the said product data sheet or which have been specifically agreed upon in the CONTRACT. These remedies shall be provided for the defects notified to OERLIKON AM during the warranty period under the conditions defined in Article 6.9 herein below and are granted for two (2) months.

6.2 **Performance Guarantee**

Unless explicitly specified in the CONTRACT, OERLIKON AM shall not provide performance guarantees. If a performance guarantee has been agreed upon, it shall be fulfilled if the guaranteed values have been reached in a performance test, or, if no such test has been agreed upon, if the SCOPE OF SUPPLY goes into commercial operation. OERLIKON AM’S liability for not reaching the guaranteed values, although the pre-conditions for

OERLIKON AM GENERAL TERMS AND CONDITIONS OF SALE (United States)

which the BUYER or the end-user are responsible have been fulfilled, shall be limited to liquidated damages amounting to maximum ten percent (10 %) of the CONTRACT price for all SCOPE OF SUPPLY.

6.3. General Conditions applicable to OERLIKON AM'S Warranty

a) Place where Warranty Work is executed

OERLIKON AM reserves the right to require that the BUYER or the end-user returns the SCOPE OF SUPPLY to OERLIKON AM'S production facility to provide proper warranty service.

b) Start of Warranty Period

Unless otherwise agreed upon in writing, the warranty period starts at the date of FINAL ACCEPTANCE of the respective SCOPE OF SUPPLY, in any case not later than thirty (30) days after announcement of readiness for shipment in case of delivery of goods, or completion of services. FINAL ACCEPTANCE shall not be deferred due to minor defects. For MATERIALS the warranty period starts at the date of delivery EX WORKS.

c) Early termination of Warranty Period

The warranty periods stipulated in 6.1 through 6.3 above shall terminate if BUYER or a third party undertakes inappropriate or improper modification or repairs, or if the BUYER, in case of a defect, does not as soon as reasonably possible take all appropriate steps to mitigate damages and to notify OERLIKON AM in writing of its obligation to remedy such defect.

d) Maximum Warranty Period

Any warranty period (including but not limited to new warranty periods for replaced, or repaired goods, or repaired services, and including cases when commencement of the warranty period is deferred, etc.) shall expire after adding half of the number of months of the original warranty period.

e) Deliveries to Medical Industry

If the SCOPE OF SUPPLY is delivered for use in the medical industry OERLIKON AM shall not assume any liability for biocompatibility, sterility or other requirements typically asked for in the medical industry. BUYER shall indemnify and hold OERLIKON AM harmless from any and all claims made by third parties against OERLIKON AM and shall make sure that BUYER'S insurance carriers shall waive their right of subrogation against OERLIKON AM.

f) Exclusion from OERLIKON AM'S Warranty

Excluded from OERLIKON AM'S warranty and liability for defects are all deficiencies which cannot be proved to have their origin in bad material, faulty design (if applicable), or poor workmanship, e.g. for deficiencies resulting from normal wear and tear, improper maintenance, failure to observe the operating instructions or deficiencies resulting from other reasons beyond OERLIKON AM'S control, including damages caused by erosion, corrosion or cavitation. Replaced parts shall become the property of OERLIKON AM.

Total liquidated damages as described under Articles 2.2 and 6.8 above shall be limited to five percent (5 %) of the CONTRACT Price.

NOTWITHSTANDING ANYTHING TO THE CONTRARY, AND TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, (A) OERLIKON AM MAKES NO WARRANTY OR REPRESENTATION OTHER THAN THE WARRANTIES AND REPRESENTATIONS MADE SOLELY TO BUYER THAT ARE SET FORTH IN THESE GENERAL TERMS, AND (B) OERLIKON AM (ON BEHALF OF ITSELF AND ITS AFFILIATES) HEREBY DISCLAIMS ANY AND ALL OTHER WARRANTIES AND REPRESENTATIONS, WHETHER ORAL OR WRITTEN, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, ANY AND ALL IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE, AND ANY AND ALL WARRANTIES ARISING FROM COURSE OF DEALING, COURSE OF PERFORMANCE OR USAGE OF THE TRADE. NEITHER BUYER NOR ANY OTHER ENTITY OR PERSON SHALL MAKE OR HAVE ANY AUTHORITY TO MAKE ANY REPRESENTATION, WARRANTY OR STATEMENT THAT CONTRADICTS OR CONFLICTS WITH THIS PARAGRAPH OR ANY PART HEREOF. THIS PARAGRAPH SHALL SURVIVE THE TERMINATION OR EXPIRATION OF THESE GENERAL TERMS OR ANY CONTRACT(S) OR ANY RELATED DOCUMENT(S).

6.4. Hazard Warning Responsibility

BUYER and OERLIKON AM acknowledge that each have respective obligations with respect to maintaining compliance with all safety and health related regulations concerning SCOPE OF SUPPLY. BUYER is familiar with the SCOPE OF SUPPLY and acknowledges its separate and independent knowledge of such risks, which are known in BUYER'S industry. BUYER shall maintain compliance with all safety and health related governmental requirements concerning SCOPE OF SUPPLY and shall take all reasonable and practical steps to inform, warn, and familiarize its employees, agents, contractors, and customers with all hazards associated therewith, including handling, shipment, storage, use, and disposal. BUYER assumes as to its employees, independent contractors, and subsequent purchasers of the SCOPE OF SUPPLY sold hereunder, all responsibility for all such necessary warnings or other precautionary measures. BUYER shall defend at its own expense, indemnify fully and hold harmless OERLIKON AM and its parents, subsidiaries, and affiliates and its and their agents, officers, directors, employees, representatives, successors, and assigns from and against any and all liabilities, losses, damages, demands, claims, penalties, fines, actions, suits, legal, administrative or arbitration proceedings, judgments of any jurisdiction, costs and expenses (including, but not limited to, attorney's fees and related costs) arising out of or in any manner related to BUYER'S failure to provide necessary warnings or other precautionary measures in connection with the SCOPE OF SUPPLY sold hereunder.

7. Overall Limitation of Liability

NOTWITHSTANDING ANYTHING TO THE CONTRARY, AND TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, (A) OERLIKON AM (INCLUDING OF ITS AFFILIATES) SHALL NOT BE LIABLE (TO BUYER OR TO ANY OTHER ENTITY(IES) OR PERSON(S)) FOR ANY SPECIAL, INDIRECT, INCIDENTAL, CONSEQUENTIAL, EXEMPLARY OR PUNITIVE DAMAGES, LOSS OF PROFITS, LOSS OF REVENUE, LOSS OF INCOME, LOSS OF OPPORTUNITY OR BUSINESS, LOSS OF USE, DELAY DAMAGES, OR INTERRUPTION OR LOSS OF PRODUCTION, IN EACH CASE EVEN IF INFORMED OF THE POSSIBILITY OF SUCH DAMAGES (AND BUYER SHALL INDEMNIFY, DEFEND AND HOLD HARMLESS EACH OF THE OERLIKON AM INDEMNIFIED PARTIES FROM AND AGAINST ANY AND ALL CLAIMS MADE BY END-USERS AND BUYER'S CUSTOMERS FOR ANY SUCH DAMAGES OR LOSSES), (B) OERLIKON AM (INCLUDING OF ITS AFFILIATES) SHALL NOT, BY VIRTUE OF, IN CONNECTION WITH OR IN RELATION TO THESE GENERAL TERMS OR ANY CONTRACT(S) OR ANY RELATED DOCUMENT(S), OR ANY SCOPE(S) OF SUPPLY, GOOD(S) AND/OR SERVICE(S) PROVIDED OR PERFORMED HEREUNDER OR THEREUNDER, BE LIABLE TO ANY ENTITY OR PERSON OTHER THAN BUYER, (C) OERLIKON AM'S TOTAL, CUMULATIVE AND AGGREGATE LIABILITY, IF ANY, WITH RESPECT TO ANY CONTRACT, INDEMNITY, TORT (INCLUDING NEGLIGENCE), UNDER ANY WARRANTY, STRICT LIABILITY OR OTHERWISE SHALL NOT EXCEED ONE HUNDRED PERCENT (100%) OF THE APPLICABLE CONTRACT PRICE OR PORTION THEREOF UPON WHICH SUCH LIABILITY IS BASED, UNLESS CLAIMS ARISE FROM GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF OERLIKON AM (D) NO ACTION ARISING FROM OR RELATING TO ANY ACT OR OMISSION ON THE PART OF OERLIKON AM (INCLUDING OF ITS AFFILIATES) (OR ANY EMPLOYEE, REPRESENTATIVE OR AGENT OF OERLIKON AM OR ANY OF ITS AFFILIATES) MAY BE COMMENCED MORE THAN ONE (1) YEAR AFTER THE CAUSE OF ACTION HAS ACCRUED, AND (E) THE REMEDIES OF BUYER SET FORTH IN THESE GENERAL TERMS ARE EXCLUSIVE. TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, THE EXCLUSIONS AND LIMITATIONS SET FORTH IN THIS ARTICLE 7 WILL APPLY REGARDLESS OF WHETHER LIABILITY ARISES FROM BREACH OF CONTRACT, WARRANTY, TORT (INCLUDING BUT NOT LIMITED TO NEGLIGENCE), BY OPERATION OF LAW, OR OTHERWISE. THIS ARTICLE 7 (AND ALL INDEMNIFICATION, DEFENSE AND HOLD HARMLESS PROVISIONS SET FORTH IN THESE GENERAL TERMS) SHALL SURVIVE THE TERMINATION OR EXPIRATION OF THESE GENERAL TERMS OR ANY CONTRACT(S) OR ANY RELATED DOCUMENT(S).

As used herein "gross negligence" shall mean reckless disregard of, or wanton indifference to, harmful and avoidable consequences and "willful misconduct" shall mean conduct that is committed with an intentional disregard for the safety of others and/or the safety of another's property. "Gross negligence" and/or "willful misconduct" shall not include any act or omission or any error of judgment or mistake made in good faith.

8. Export and other Governmental Documents

8.1. OERLIKON AM undertakes to provide the documents required by the authorities at OERLIKON AM'S place for the manufacturing and transportation EX WORKS of the SCOPE OF SUPPLY.

8.2. BUYER undertakes to provide all other documents required, e.g. documents required by an authority at BUYER'S or BUYER'S customer's place, or the place where the SCOPE OF SUPPLY will be used.

8.3. OERLIKON AM, BUYER and BUYER'S customer shall support each other without undue delay if one party needs information or documentation required by any authority, if such information or documentation can be delivered easier by one of the other parties than the required party.

8.4. The BUYER hereby represents and warrants that it is, and will remain in compliance with the requirements of all applicable export laws and regulations, including but not limited to the U.S. Export Administration Regulations and International Traffic in Arms Regulations. Such requirements include, but are not limited to obtaining all required authorizations or licenses for the export or re-export of any controlled item, product, article, commodity, software or technology. Without limiting the generality of the foregoing, the BUYER hereby represents and warrants that it has not been, and is not currently, debarred, suspended or otherwise prohibited or restricted from exporting, re-exporting, receiving, purchasing, processing or otherwise obtaining any item, product, article, commodity, software or technology regulated by any agency of the United States or any other state. The BUYER agrees to indemnify and hold harmless OERLIKON AM from any costs, penalties or other losses caused by, or related to, any violation or breach of the warranties contained in this provision.

9. Force Majeure

9.1. OERLIKON AM shall not be liable for any non-performance, loss, damage, or delay due to war, riots, fire, flood, strikes or labor difficulty, governmental acts such as but not limited to trade restrictions including embargoes, Acts of God, acts of the BUYER or its customer, delays in transportation, inability to obtain necessary labor or materials from usual sources, or other causes beyond the reasonable control of OERLIKON AM. In the event of delay in performance due to any such cause, Oerlikon AM shall provide written notice to Buyer and the date of delivery or time for completion will be extended to reflect the length of time lost by reason of such delay. If the grounds for Force Majeure continue for more than six (6) months, either OERLIKON AM or BUYER may terminate the CONTRACT upon seven (7) days written notice to the other party.

9.2. OERLIKON AM shall be entitled to be compensated for the extra costs caused by the interruption, or, in case of termination, for the work done prior to termination and the expenses for non-cancelable procurements. BUYER shall be entitled to receive the work for which it has paid.

10. Confidentiality

10.1 Any information that either Party discloses and wishes to be included as Confidential Information under this Agreement shall be clearly identified as confidential. Disclosures made orally or visually shall be confirmed in writing within fourteen (14) days after the initial disclosure. In consideration for receiving this Confidential Information, the Parties agree to hold such information in confidence and not use it except under the following conditions:

10.2 All Confidential Information disclosed by the disclosing Party hereunder shall remain the property of the disclosing Party. Nothing in this Agreement shall be considered as conferring on the receiving Party by implication, estoppel, or otherwise, any right, title, interest or license, to any intellectual property, including but not limited to any patent, patent application, claim of any patent and/or patent application, Confidential Information, trade secret or other intellectual property now or subsequently by the disclosing Party. The receiving Party shall keep confidential any and all knowledge, information, know-how, economic information, trade secrets and data, whether technical, non-technical or computer generated including but not limited to drawings, sketches, plans, data sheets, and/or specifications (herewith referred to as "Confidential Information") derived from drawings, specifications and other data furnished by the disclosing Party related to the Project and without obtaining the disclosing Party's prior written consent, the receiving Party shall not:

- a. divulge, export or use, directly or indirectly, the Confidential Information for the benefit of any third party;
- b. use the Confidential Information of the disclosing Party for its own use or for any purpose except for valuation or specification of the above-mentioned Project.
- c. disclose the Confidential Information of the disclosing Party to any other person other than its directors, officers and employees and Affiliated Companies having a need-to-know who are directly involved in the Project, however, the receiving Party shall be responsible for any failure of such persons and Affiliated Companies to keep confidential all Confidential Information disclosed by the disclosing Party and any failure of such persons to comply with the terms of this Agreement, and the receiving Party shall cooperate with the disclosing Party in enforcing the rights of the disclosing Party in connection with a breach of this Agreement; and which may be enforced by either the Recipient or the Disclosing Party.

10.3 The receiving Party shall:

- a. take reasonable security measures and use care to preserve and protect the security of, and to avoid disclosure or use of the Confidential Information of the disclosing Party and to store and save all confidential files in reasonably protected directories, limiting access to above mentioned personnel only;
- b. refrain from copying or reproducing the documents or electronic files that embody Confidential Information, unless as necessary for evaluation or specification of the Project;
- c. refrain from reverse engineering, disassembling or decomposing any prototypes, software or other tangible objects which embody Confidential Information of the disclosing Party and which are provided to the receiving Party hereunder;
- d. promptly advise the disclosing Party in writing of any misappropriation or misuse by any person of such Confidential Information of the disclosing Party which may come to its attention.

10.4 The Party receiving Confidential Information under this Agreement shall be held to the same standard of care in protecting such information as the receiving Party normally takes to preserve and safeguard its own confidential information of similar kind.

10.5 All Confidential Information disclosed by the disclosing Party hereunder shall remain the property of the disclosing Party. Nothing in this Agreement shall be considered as conferring on the receiving Party by implication, estoppel, or otherwise, any right, title, interest or license, to any intellectual property, including but not limited to any patent, patent application, claim of any patent and/or patent application, Confidential Information, trade secret or other intellectual property now or subsequently by the disclosing Party.

10.6 The receiving Party shall, upon the written request of the disclosing Party, return without retaining copies, all documents, materials, and other tangible medium containing such Confidential Information which was furnished by the disclosing Party pursuant to this Agreement including materials prepared in whole or in part based on said Confidential Information.

10.7 The disclosing Party does not make any warranty or representation as to the accuracy or completeness of the information disclosed. The disclosing Party, its employees or agents, shall not be liable to the receiving Party, or its employees or agents, incidentally or consequentially, resulting from their receipt or use of the Confidential Information.

11. Miscellaneous

11.1 Applicable Laws and Jurisdiction

OERLIKON AM GENERAL TERMS AND CONDITIONS OF SALE
(United States)

All matters connected with this CONTRACT, a PURCHASE ORDER, or document related to the purchase of SCOPE OF SUPPLY hereunder, and the performance thereof shall be construed, interpreted, applied and governed in all respects exclusively by the laws of the state of North Carolina, without regard to the principles of conflicts of law.

The parties agree that the state or federal courts of the state of North Carolina shall have sole and exclusive judicial jurisdiction to determine any matter arising under this Agreement that cannot be resolved by the parties directly, and waive any claim that (i) they are not personally subject to their jurisdiction; (ii) the venue is improper; (iii) the forum is inconvenient; or (iv) the subject matter may not be enforced by these courts.

In case of a dispute, the parties shall make their best endeavors to solve such dispute amicably. If this should not be possible, the courts at OERLIKON AM'S place shall have exclusive jurisdiction. OERLIKON AM reserves the right to claim against BUYER at BUYER'S place. All disputes shall be settled in accordance with the provision of the CONTRACT and the documents pertaining thereto.

11.2 Assignment

Any attempt by BUYER to assign, transfer, or delegate any of the rights, duties or obligations herein to a third party without prior written consent of OERLIKON AM shall render such attempted assignment or transfer null and void.

11.3 Waiver of Rights

OERLIKON AM'S or BUYER'S failure to exercise any of its rights shall not constitute or be deemed a waiver or a forfeiture of such rights.

11.4 Severability

If a provision of the CONTRACT is determined to be void or unenforceable, this finding shall not render other provision void or unenforceable, and OERLIKON AM and BUYER shall make their best endeavors to replace such provision by a valid one covering the original commercial intention as far as legally possible.

11.5 Approved Affiliates

Provided OERLIKON AM and BUYER agree in writing, APPROVED AFFILIATES of BUYER shall be entitled to purchase SCOPE OF SUPPLY under the terms of this CONTRACT.



Terms and Conditions

OERLIKON AM GENERAL TERMS AND CONDITIONS OF SALE – Engineering Services, Parts (United States)

1. GENERAL

1.1 Definitions

“APPROVED AFFILIATE” means, with respect to any entity, any other entity or person that, directly or indirectly through one or more intermediaries, controls or is controlled by or is under common control with such entity, which is approved by Oerlikon AM and BUYER in writing to provide or acquire the SCOPE OF SUPPLY under this CONTRACT.

“BUYER” means the party which signs the CONTRACT documents as counterpart to OERLIKON AM.

“CONTRACT” means these general terms and conditions of sale, and the PURCHASE ORDER plus all documents referred to therein.

“ENGINEERING SERVICES” means design and CAD support work provided by OERLIKON AM for customer specified in the CONTRACT.

“EX WORKS” means Ex Works according to Incoterms 2000 or, after replacement of the Incoterms 2000, the then effective Incoterms.

“FINAL ACCEPTANCE” means the document issued by the BUYER or the end-user at the beginning of the warranty period or, if no FINAL ACCEPTANCE document is foreseen in the CONTRACT, the document evidencing shipment of the goods or completion of the services.

“GENERAL TERMS” means these General Terms and Conditions of Sale of OERLIKON AM US Inc

“ORDER CONFIRMATION” means the document provided by OERLIKON AM to BUYER as a response to BUYER’S purchase order documents either by e-mail, facsimile or as a hardcopy.

“PARTS” means components manufactured by Oerlikon AM for buyer based on PURCHASE ORDER.

“PURCHASE ORDER” means the purchase order documents issued by BUYER in the version confirmed by OERLIKON AM in the ORDER CONFIRMATION. In case of deviations between said purchase order documents and the ORDER CONFIRMATION, the version of the ORDER CONFIRMATION shall become the binding PURCHASE ORDER unless BUYER expresses its dissent by e-mail, facsimile or hard copy within three (3) working days after receipt of the ORDER CONFIRMATION.

“SCOPE OF SUPPLY” means the PARTS and/or ENGINEERING SERVICES, and the pertaining documentation, to be delivered under the PURCHASE ORDER as explicitly specified and agreed upon by both parties.

1.2. Notwithstanding anything to the contrary:

- a) These GENERAL TERMS shall apply to each CONTRACT (including, without limitation, each PURCHASE ORDER) and to each delivery made by OERLIKON AM hereunder or thereunder, all of which shall be subject to the terms and conditions set forth in these GENERAL TERMS.
- b) Any terms or conditions contained in any purchase order document, invoice acknowledgment or other document or instrument of BUYER or proposed at any time by BUYER in any manner that vary from or conflict with any of the terms and conditions in these GENERAL TERMS are hereby objected to by OERLIKON AM without the need for any further notice of objection (and BUYER hereby waives any right or requirement to receive any further notice of objection) and shall be of no force or effect nor in any circumstances binding upon OERLIKON AM (or any of its AFFILIATES) unless expressly accepted in a writing signed by a duly authorized representative of OERLIKON AM.
- c) If BUYER’S purchase order documents are provided to OERLIKON AM, the terms and conditions in and related to those purchase order documents will be superseded by these GENERAL TERMS. Written acceptance or rejection by OERLIKON AM of any such terms or conditions provided to OERLIKON AM shall not constitute an acceptance of any other additional terms or conditions. These GENERAL TERMS apply to all deliveries made by OERLIKON AM.
- d) Deviations from these GENERAL TERMS have to be agreed upon in a mutually signed document.

1.3. The delivery encompasses the SCOPE OF SUPPLY and will be made EX WORKS.

1.4. In case of contradiction between CONTRACT documents, the following order of precedence shall apply:

- a) These GENERAL TERMS
- b) PURCHASE ORDER or other negotiated, agreed and mutually signed document, including all documents made a part thereof
- c) OERLIKON AM’S offer
- d) BUYER’S request for an offer
- e) BUYER’S Purchase Terms and Conditions

1.5. These GENERAL TERMS may be changed only in a written document signed by an authorized representative of BUYER and an authorized manager of OERLIKON AM.

1.6. OERLIKON AM’S sales and service personnel are not authorized to enter into any indemnity or hold harmless agreements on behalf of OERLIKON AM.

1.7. All information and data contained in brochures and price lists are binding only to the extent that they are by reference expressly included in the CONTRACT.

2. Terms of Delivery

2.1. OERLIKON AM shall deliver the SCOPE OF SUPPLY at the dates specified in the PURCHASE ORDER as confirmed in the ORDER CONFIRMATION. The delivery period shall commence at the date of coming into force of the PURCHASE ORDER, or, if an initial down-payment has been agreed upon, five days after date of receipt of such down-payment.

2.2. Oerlikon shall make the best effort to meet the delivery date requested by the Buyer, if for any unforeseen reasons, delivery is delayed, Oerlikon will keep the Buyer duly informed, but will not be liable for any loss, costs, damages or expenses (direct, indirect or consequential) suffered by the Buyer as a result of a delayed delivery, unless specific terms are agreed for a specific project, duly agreed and signed by both parties.

2.3. If in exceptional cases BUYER requests to return MATERIALS, the MATERIALS should be in their original packaging, sealed and unopened. Original invoices and lot numbers should match. A restocking fee amounting to fifteen percent (15%) of the value of the returned MATERIALS will be charged. The acceptance of such returns will be at the sole discretion of OERLIKON AM. Returns of other SCOPE OF SUPPLY than MATERIALS will not be accepted.

2.4. Oerlikon AM is entitled to partial deliveries. Customers accept partial deliveries.

3. Price and Payment

3.1. The prices for the SCOPE OF SUPPLY are those stated in the PURCHASE ORDER. All wire orders are accepted with the understanding that 10% variance in quantity and price is acceptable to the customer.

For work carried out on a time basis, the prices shall be determined in accordance with the hourly rates specified in the PURCHASE ORDER. If no agreement on hourly rates has been made, the hourly rate applied by OERLIKON AM for other customers and comparable work shall apply. Upon receipt of a partial delivery, a partial billing amount becomes due. All prices are exclusive of VAT, sales taxes, excise duties, or similar taxes and duties.

3.2. 100 % within thirty (30) days after invoice date.

3.3. Payments for prices calculated on a time basis shall be invoiced on a monthly basis or after completion of the work, whichever occurs first. Payment shall be made within thirty (30) calendar days from invoice date.

3.4. If the BUYER should not comply with the agreed dates of payment, BUYER shall be liable, without reminder, for interest with effect from the agreed date on which payment was due, at a rate depending on the normal interest conditions at the BUYER’S domicile, but not less than five percentage points (5 %) above the three months’ LIBOR (London Interbank Offered Rate) applicable at the due date of the delayed payment.

3.5. All payments shall be made without any deductions in U.S. currency.

3.6. In case of late payment, OERLIKON AM may after having notified the BUYER in writing, suspend its performance of the SCOPE OF SUPPLY until the open and due invoices have been paid.

3.7. If BUYER and OERLIKON AM agreed on issuing a Letter of Credit by BUYER in favor of OERLIKON AM, such Letter of Credit shall be irrevocable, extendable, and confirmed by a first class worldwide active bank. Withdrawal of the money shall be against invoice and bill of lading or warehouse receipt.

3.8. In consideration for extending credit, BUYER, if requested by OERLIKON AM, shall grant OERLIKON AM a continuing security interest in the Product and the proceeds of any sale of goods manufactured using the Product and in accounts receivable.

3.9. OERLIKON AM shall retain title to and a purchase money security interest in the SCOPE OF SUPPLY sold hereunder until the purchase price shall be fully paid to OERLIKON AM. BUYER shall perform all acts that may be necessary to perfect and assure retention of title to the equipment by OERLIKON AM and if requested by OERLIKON AM, shall execute a security agreement and UCC financing statement covering the equipment.

4. Intellectual Property

4.1. BUYER shall provide the technical documentation (e.g. up-to-date drawings, descriptions, charts, instructions, specifications) which is necessary for the delivery of the SCOPE OF SUPPLY and is specified in the CONTRACT. BUYER confirms that OERLIKON AM is fully authorized to use (or have used) the technical documentation provided for the performance of the SCOPE OF SUPPLY by OERLIKON AM or its sub-suppliers, respectively. In case BUYER would not be authorized to order said performance from OERLIKON AM without violation of intellectual property rights of third parties, or if such right should be challenged, BUYER shall inform OERLIKON AM without any delay. In this case, OERLIKON AM shall stop the work until the approvals needed for the performance have been obtained.

4.2. OERLIKON AM shall not use technical documentation received from BUYER for any purpose other than to fulfill the CONTRACT.

4.3. Any know-how, inventions, patents or copyrights or the like belonging to or provided by OERLIKON AM and used for or developed in the course of the fulfillment of the CONTRACT by OERLIKON AM shall remain OERLIKON AM’S property, and no ownership shall be transferred to BUYER with respect to such know-how, inventions, patents and copyrights, independent of the hardware on which such know-how, inventions, patents or copyrights is made available (machinery, paper, electronic medium, etc.). However, BUYER shall be granted a limited right to use such know-how, invention, patents, copyright or the like for the operation, maintenance and repair of the SCOPE OF SUPPLY on a non-exclusive basis, which right shall not include the use of the said intellectual property for the reproduction of the SCOPE OF SUPPLY or parts thereof. If the SCOPE OF SUPPLY consists of ENGINEERING SERVICES, OERLIKON AM shall upon completion of the Services, and expressly conditioned upon full payment of all fees and costs due, transfer to BUYER property rights, with respect to inventions, patents and copyrights.

4.4. a) OERLIKON AM warrants that the SCOPE OF SUPPLY and any part thereof, in the particular form sold by OERLIKON AM, shall not infringe any intellectual property rights of third parties. In the event of any patent infringement relating to the said SCOPE OF SUPPLY, OERLIKON AM may, in its sole discretion, procure the right to use the SCOPE OF SUPPLY without impairing its suitability, or modify or replace it so that it is rendered non-infringing. The obligations of OERLIKON AM set forth herein are contingent upon (i) OERLIKON AM receiving prompt written notice from BUYER of such infringement; (ii) OERLIKON AM receiving assistance from BUYER in the defense; and (iii) the right of OERLIKON AM to settle or defend.

b) This obligation of OERLIKON AM shall not apply to (i) the SCOPE OF SUPPLY or part thereof which has been manufactured according to BUYER’S design, (ii) services performed by using BUYER’S documentation, (iii) the use of the SCOPE OF SUPPLY or any part thereof in conjunction with any other product in a combination not furnished by OERLIKON AM as part of the SCOPE OF SUPPLY, (iv) products fabricated by using the SCOPE OF SUPPLY. As to any such equipment, service, product, part or use in such combination, OERLIKON AM assumes no liability whatsoever for infringement of intellectual property rights of third parties, and BUYER shall indemnify OERLIKON AM against any respective infringement claims. OERLIKON AM shall co-operate with BUYER in the same manner as required by OERLIKON AM under 4.4 a) (i) to (iii) herein above.

4.5. OERLIKON AM’S copyrighted material shall not be copied by BUYER except for archiving purposes or to replace a defective copy.

5. Term & Termination

5.1. This Contract shall terminate five (5) years from the last date entered below unless extended by another agreement in writing, except that the obligations of confidentiality shall survive this Agreement for a period of not less than fifteen (15) additional years from the date of termination.

5.2. Either Oerlikon AM or Buyer may terminate this Contract at any time by giving the other party ninety (90) days advance written notice of termination, with such termination to be effective immediately upon the expiration of the ninety (90) day notice period.

6. Warranty

Only the warranty provision(s) referring to a specific SCOPE OF SUPPLY shall apply.

6.1 PARTS

The warranty period shall be 6 (six) months. Obvious defects of a good have to be claimed in writing within 14 days after receiving the good. Hidden defects must be claimed promptly when noticed. If a good is proven and recognized by Oerlikon to be defective, Oerlikon AM will decide whether to replace or rework the defective good. In that case, the defective good has to be returned to Oerlikon AM. Oerlikon AM will bear the costs arising for reworking the good. Any other warranty claim is excluded. If the customer repairs or makes other changes to goods Oerlikon AM delivered without the approval of Oerlikon AM, the warranty expires. If reworking or replacements cannot be realized within appropriate period of time, customer may reduce the payment or request to withdraw from the contract. A warranty for consequential damages is excluded.

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6.2 ENGINEERING SERVICES

OERLIKON AMS obligations consist of using proper care and skill in performing the work described in the CONTRACT. However, OERLIKON AM does not provide any warranty for successful achievement of the results envisaged in the CONTRACT.

6.3. Performance Guarantee

Unless explicitly specified in the CONTRACT, OERLIKON AM shall not provide performance guarantees. If a performance guarantee has been agreed upon, it shall be fulfilled if the guaranteed values have been reached in a performance test, or, if no such test has been agreed upon, if the SCOPE OF SUPPLY goes into commercial operation. OERLIKON AM'S liability for not reaching the guaranteed values, although the pre-conditions for which the BUYER or the end-user are responsible have been fulfilled, shall be limited to liquidated damages amounting to maximum ten percent (10 %) of the CONTRACT price for all SCOPE OF SUPPLY.

6.4. General Conditions applicable to OERLIKON AM'S Warranty

a) Place where Warranty Work is executed

OERLIKON AM reserves the right to require that the BUYER or the end-user returns the SCOPE OF SUPPLY to OERLIKON AM'S production facility to provide proper warranty service.

b) Start of Warranty Period

Unless otherwise agreed upon in writing, the warranty period starts at the date of FINAL ACCEPTANCE of the respective SCOPE OF SUPPLY, in any case not later than thirty (30) days after announcement of readiness for shipment in case of delivery of goods, or completion of services. FINAL ACCEPTANCE shall not be deferred due to minor defects. For MATERIALS the warranty period starts at the date of delivery EX WORKS.

c) Early termination of Warranty Period

The warranty periods stipulated in 6.1 through 6.3 above shall terminate if BUYER or a third party undertakes inappropriate or improper modification or repairs, or if the BUYER, in case of a defect, does not act as soon as reasonably possible take all appropriate steps to mitigate damages and to notify OERLIKON AM in writing of its obligation to remedy such defect.

d) Maximum Warranty Period

Any warranty period (including but not limited to new warranty periods for replaced, or repaired goods, or repeated services, and including cases when commencement of the warranty period is deferred, etc.) shall expire after adding half of the number of months of the original warranty period.

e) Deliveries to Medical Industry

If the SCOPE OF SUPPLY is delivered for use in the medical industry OERLIKON AM shall not assume any liability for biocompatibility, sterility or other requirements typically asked for in the medical industry. BUYER shall indemnify and hold OERLIKON AM harmless from any and all claims made by third parties against OERLIKON AM and shall make sure that BUYER'S insurance carriers shall waive their right of subrogation against OERLIKON AM.

f) Exclusion from OERLIKON AM'S Warranty

Excluded from OERLIKON AM'S warranty and liability for defects are all deficiencies which cannot be proved to have their origin in bad material, faulty design (if applicable), or poor workmanship, e.g. for deficiencies resulting from normal wear and tear, improper maintenance, failure to observe the operating instructions or deficiencies resulting from other reasons beyond OERLIKON AM'S control, including damages caused by erosion, corrosion or cavitation. Replaced parts shall become the property of OERLIKON AM.

Total liquidated damages as described under Articles 2.2 and 6.8 above shall be limited to five percent (5 %) of the CONTRACT Price.

NOTWITHSTANDING ANYTHING TO THE CONTRARY, AND TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, (A) OERLIKON AM MAKES NO WARRANTY OR REPRESENTATION OTHER THAN THE WARRANTIES AND REPRESENTATIONS MADE SOLELY TO BUYER THAT ARE SET FORTH IN THESE GENERAL TERMS, AND (B) OERLIKON AM (ON BEHALF OF ITSELF AND ITS AFFILIATES) HEREBY DISCLAIMS ANY AND ALL OTHER WARRANTIES AND REPRESENTATIONS, WHETHER ORAL OR WRITTEN, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, ANY AND ALL IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE, AND ANY AND ALL WARRANTIES ARISING FROM COURSE OF DEALING, COURSE OF PERFORMANCE OR USAGE OF THE TRADE. NEITHER BUYER NOR ANY OTHER ENTITY OR PERSON SHALL MAKE OR HAVE ANY AUTHORITY TO MAKE ANY REPRESENTATION, WARRANTY OR STATEMENT THAT CONTRADICTS OR CONFLICTS WITH THIS PARAGRAPH OR ANY PART HEREOF. THIS PARAGRAPH SHALL SURVIVE THE TERMINATION OR EXPIRATION OF THESE GENERAL TERMS OR ANY CONTRACT(S) OR ANY RELATED DOCUMENT(S).

6.5. Hazard Warning Responsibility

BUYER and OERLIKON AM acknowledge that each have respective obligations with respect to maintaining compliance with all safety and health related regulations concerning SCOPE OF SUPPLY. BUYER is familiar with the SCOPE OF SUPPLY and acknowledges its separate and independent knowledge of such risks, which are known in BUYER'S industry. BUYER shall maintain compliance with all safety and health related governmental requirements concerning SCOPE OF SUPPLY and shall take all reasonable and practical steps to inform, warn, and familiarize its employees, agents, contractors, and customers with all hazards associated therewith, including handling, shipment, storage, use, and disposal. BUYER assumes as to its employees, independent contractors, and subsequent purchasers of the SCOPE OF SUPPLY sold hereunder, all responsibility for all such necessary warnings or other precautionary measures. BUYER shall defend at its own expense, indemnify fully and hold harmless OERLIKON AM and its parents, subsidiaries, and affiliates and its and their agents, officers, directors, employees, representatives, successors, and assigns from and against any and all liabilities, losses, damages, demands, claims, penalties, fines, actions, suits, legal, administrative or arbitration proceedings, judgments of any jurisdiction, costs and expenses (including, but not limited to, attorney's fees and related costs) arising out of or in any manner related to BUYER'S failure to provide necessary warnings or other precautionary measures in connection with the SCOPE OF SUPPLY sold hereunder.

7. Overall Limitation of Liability

NOTWITHSTANDING ANYTHING TO THE CONTRARY, AND TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, (A) OERLIKON AM (INCLUDING OF ITS AFFILIATES) SHALL NOT BE LIABLE (TO BUYER OR TO ANY OTHER ENTITY(IES) OR PERSON(S)) FOR ANY SPECIAL, INDIRECT, INCIDENTAL, CONSEQUENTIAL, EXEMPLARY OR PUNITIVE DAMAGES, LOSS OF PROFITS, LOSS OF REVENUE, LOSS OF INCOME, LOSS OF OPPORTUNITY OR BUSINESS, LOSS OF USE, DELAY DAMAGES, OR INTERRUPTION OR LOSS OF PRODUCTION, IN EACH CASE EVEN IF INFORMED OF THE POSSIBILITY OF SUCH DAMAGES (AND BUYER SHALL INDEMNIFY, DEFEND AND HOLD HARMLESS EACH OF THE OERLIKON AM INDEMNIFIED PARTIES FROM AND AGAINST ANY AND ALL CLAIMS MADE BY END-USERS AND BUYER'S CUSTOMERS FOR ANY SUCH DAMAGES OR LOSSES), (B) OERLIKON AM (INCLUDING OF ITS AFFILIATES) SHALL NOT, BY VIRTUE OF, IN CONNECTION WITH OR IN RELATION TO THESE GENERAL TERMS OR ANY CONTRACT(S) OR ANY RELATED DOCUMENT(S), OR ANY SCOPE(S) OF SUPPLY, GOOD(S) AND/OR SERVICE(S) PROVIDED OR PERFORMED HEREUNDER OR THEREUNDER, BE LIABLE TO ANY ENTITY OR PERSON OTHER THAN BUYER, (C) OERLIKON AM'S TOTAL, CUMULATIVE AND AGGREGATE LIABILITY, IF ANY, WITH RESPECT TO ANY CONTRACT, INDEMNITY, TORT (INCLUDING NEGLIGENCE), UNDER ANY WARRANTY, STRICT LIABILITY OR OTHERWISE SHALL NOT EXCEED ONE HUNDRED PERCENT (100%) OF THE APPLICABLE CONTRACT PRICE OR PORTION THEREOF UPON WHICH SUCH LIABILITY IS BASED, UNLESS CLAIMS ARISE FROM GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF OERLIKON AM (D) NO ACTION ARISING FROM OR RELATING TO ANY ACT OR OMISSION ON THE PART OF OERLIKON AM (INCLUDING OF ITS AFFILIATES) (OR ANY EMPLOYEE, REPRESENTATIVE OR AGENT OF OERLIKON AM OR ANY OF ITS AFFILI-

ATES) MAY BE COMMENCED MORE THAN ONE (1) YEAR AFTER THE CAUSE OF ACTION HAS ACCRUED, AND (E) THE REMEDIES OF BUYER SET FORTH IN THESE GENERAL TERMS ARE EXCLUSIVE. TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, THE EXCLUSIONS AND LIMITATIONS SET FORTH IN THIS ARTICLE 7 WILL APPLY REGARDLESS OF WHETHER LIABILITY ARISES FROM BREACH OF CONTRACT, WARRANTY, TORT (INCLUDING BUT NOT LIMITED TO NEGLIGENCE), BY OPERATION OF LAW, OR OTHERWISE. THIS ARTICLE 7 (AND ALL INDEMNIFICATION, DEFENSE AND HOLD HARMLESS PROVISIONS SET FORTH IN THESE GENERAL TERMS) SHALL SURVIVE THE TERMINATION OR EXPIRATION OF THESE GENERAL TERMS OR ANY CONTRACT(S) OR ANY RELATED DOCUMENT(S).

As used herein "gross negligence" shall mean reckless disregard of, or wanton indifference to, harmful and avoidable consequences and "willful misconduct" shall mean conduct that is committed with an intentional disregard for the safety of others and/or the safety of another's property. "Gross negligence" and/or "willful misconduct" shall not include any act or omission or any error of judgment or mistake made in good faith.

8. Export and other Governmental Documents

8.1. OERLIKON AM undertakes to provide the documents required by the authorities at OERLIKON AM'S place for the manufacturing and transportation EX WORKS of the SCOPE OF SUPPLY.

8.2. BUYER undertakes to provide all other documents required, e.g. documents required by an authority at BUYER'S or BUYER'S customer's place, or the place where the SCOPE OF SUPPLY will be used.

8.3. OERLIKON AM, BUYER and BUYER'S customer shall support each other without undue delay if one party needs information or documentation required by any authority, if such information or documentation can be delivered easier by one of the other parties than the required party.

8.4. The BUYER hereby represents and warrants that it is, and will remain in compliance with the requirements of all applicable export laws and regulations, including but not limited to the U.S. Export Administration Regulations and International Traffic in Arms Regulations. Such requirements include, but are not limited to obtaining all required authorizations or licenses for the export or re-export of any controlled item, product, article, commodity, software or technology. Without limiting the generality of the foregoing, the BUYER hereby represents and warrants that it has not been, and is not currently, debarred, suspended or otherwise prohibited or restricted from exporting, re-exporting, receiving, purchasing, processing or otherwise obtaining any item, product, article, commodity, software or technology regulated by any agency of the United States or any other state. The BUYER agrees to indemnify and hold harmless OERLIKON AM from any costs, penalties or other losses caused by, or related to, any violation or breach of the warranties contained in this provision.

9. Force Majeure

9.1. OERLIKON AM shall not be liable for any non-performance, loss, damage, or delay due to war, riots, fire, flood, strikes or labor difficulty, governmental acts such as but not limited to trade restrictions including embargoes, Acts of God, acts of the BUYER or its customer, delays in transportation, inability to obtain necessary labor or materials from usual sources, or other causes beyond the reasonable control of OERLIKON AM. In the event of delay in performance due to any such cause, Oerlikon AM shall provide written notice to Buyer and the date of delivery or time for completion will be extended to reflect the length of time lost by reason of such delay. If the grounds for Force Majeure continue for more than six (6) months, either OERLIKON AM or BUYER may terminate the CONTRACT upon seven (7) days written notice to the other party.

9.2. OERLIKON AM shall be entitled to be compensated for the extra costs caused by the interruption, or, in case of termination, for the work done prior to termination and the expenses for non-cancelable procurements. BUYER shall be entitled to receive the work for which it has paid.

10. Confidentiality

10.1 Any information that either Party discloses and wishes to be included as Confidential Information under this Agreement shall be clearly identified as confidential. Disclosures made orally or visually shall be confirmed in writing within fourteen (14) days after the initial disclosure. In consideration for receiving this Confidential Information, the Parties agree to hold such information in confidence and not use it except under the following conditions:

10.2 All Confidential Information disclosed by the disclosing Party hereunder shall remain the property of the disclosing Party. Nothing in this Agreement shall be considered as conferring on the receiving Party by implication, estoppel, or otherwise, any right, title, interest or license, to any intellectual property, including but not limited to any patent, patent application, claim of any patent and/or patent application, Confidential Information, trade secret or other intellectual property now or subsequently by the disclosing Party. The receiving Party shall keep confidential any and all knowledge, information, know-how, economic information, trade secrets and data, whether technical, non-technical or computer generated including but not limited to drawings, sketches, plans, data sheets, and/or specifications (herein referred to as "Confidential Information") derived from drawings, specifications and other data furnished by the disclosing Party related to the Project and without obtaining the disclosing Party's prior written consent, the receiving Party shall not:

- a. divulge, export or use, directly or indirectly, the Confidential Information for the benefit of any third party;
- b. use the Confidential Information of the disclosing Party for its own use or for any purpose except for valuation or specification of the above-mentioned Project.
- c. disclose the Confidential Information of the disclosing Party to any other person other than its directors, officers and employees and Affiliated Companies having a need-to-know who are directly involved in the Project, however, the receiving Party shall be responsible for any failure of such persons and Affiliated Companies to keep confidential all Confidential Information disclosed by the disclosing Party and any failure of such persons to comply with the terms of this Agreement, and the receiving Party shall cooperate with the disclosing Party in enforcing the rights of the disclosing Party in connection with a breach of this Agreement; and which may be enforced by either the Recipient or the Disclosing Party.

10.3 The receiving Party shall:

- a. take reasonable security measures and use care to preserve and protect the security of, and to avoid disclosure or use of the Confidential Information of the disclosing Party and to store and save all confidential files in reasonably protected directories, limiting access to above mentioned personnel only;
- b. refrain from copying or reproducing the documents or electronic files that embody Confidential Information, unless as necessary for evaluation or specification of the Project;
- c. refrain from reverse engineering, disassembling or decomposing any prototypes, software or other tangible objects which embody Confidential Information of the disclosing Party and which are provided to the receiving Party hereunder;
- d. promptly advise the disclosing Party in writing of any misappropriation or misuse by any person of such Confidential Information of the disclosing Party which may come to its attention.

10.4 The Party receiving Confidential Information under this Agreement shall be held to the same standard of care in protecting such information as the receiving Party normally takes to preserve and safeguard its own confidential information of similar kind.

10.5 All Confidential Information disclosed by the disclosing Party hereunder shall remain the property of the disclosing Party. Nothing in this Agreement shall be considered as conferring on the receiving Party by implication, estoppel, or otherwise, any right, title, interest or license, to any intellectual property, including but not limited to any patent, patent application, claim of any patent and/or patent application, Confidential Information, trade secret or other intellectual property now or subsequently by the disclosing Party.

10.6 The receiving Party shall, upon the written request of the disclosing Party, return without retaining copies, all documents, materials, and other tangible medium containing such Confidential Information which was fur-

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nished by the disclosing Party pursuant to this Agreement including materials prepared in whole or in part based on said Confidential Information.

10.7 The disclosing Party does not make any warranty or representation as to the accuracy or completeness of the information disclosed. The disclosing Party, its employees or agents, shall not be liable to the receiving Party, or its employees or agents, incidentally or consequentially, resulting from their receipt or use of the Confidential Information.

11. Miscellaneous

11.1 Applicable Laws and Jurisdiction

All matters connected with this CONTRACT, a PURCHASE ORDER, or document related to the purchase of SCOPE OF SUPPLY hereunder, and the performance thereof shall be construed, interpreted, applied and governed in all respects exclusively by the laws of the state of North Carolina, without regard to the principles of conflicts of law.

The parties agree that the state or federal courts of the state of North Carolina shall have sole and exclusive judicial jurisdiction to determine any matter arising under this Agreement that cannot be resolved by the parties directly, and waive any claim that (i) they are not personally subject to their jurisdiction; (ii) the venue is improper; (iii) the forum is inconvenient; or (iv) the subject matter may not be enforced by these courts.

In case of a dispute, the parties shall make their best endeavors to solve such dispute amicably. If this should not be possible, the courts at OERLIKON AM'S place shall have exclusive jurisdiction. OERLIKON AM re-

serves the right to claim against BUYER at BUYER'S place. All disputes shall be settled in accordance with the provision of the CONTRACT and the documents pertaining thereto.

11.2 Assignment

Any attempt by BUYER to assign, transfer, or delegate any of the rights, duties or obligations herein to a third party without prior written consent of OERLIKON AM shall render such attempted assignment or transfer null and void.

11.3 Waiver of Rights

OERLIKON AM'S or BUYER'S failure to exercise any of its rights shall not constitute or be deemed a waiver or a forfeiture of such rights.

11.4 Severability

If a provision of the CONTRACT is determined to be void or unenforceable, this finding shall not render other provision void or unenforceable, and OERLIKON AM and BUYER shall make their best endeavors to replace such provision by a valid one covering the original commercial intention as far as legally possible.

11.5 Approved Affiliates

Provided OERLIKON AM and BUYER agree in writing, APPROVED AFFILIATES of BUYER shall be entitled to purchase SCOPE OF SUPPLY under the terms of this CONTRACT.