

Terms and Conditions

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

The Terms and Conditions set forth herein, and any supplements which may be attached hereto, constitute the full and final expression of the contract, and supersede all prior quotations, purchase orders, correspondence or communications whether written or oral between Oerlikon and the customer. Notwithstanding any contrary language in the customer's purchase order, correspondence or other form of acknowledgment, customer shall be bound by these terms and conditions when it sends a purchase order or otherwise indicates acceptance of this contract, or when it accepts delivery from Oerlikon. THE CONTRACT FOR SALE FOR ENGINEERING SERVICES OR PARTS IS EXPRESSLY LIMITED TO THE TERMS AND CONDITIONS STATED HEREIN. ANY ADDITIONAL OR DIFFERENT TERMS PROPOSED BY CUSTOMER ARE REJECTED UNLESS EXPRESSLY AGREED TO IN WRITING BY OERLIKON. No contract shall exist except as herein provided.

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 AM 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 OERLIKON AM is entitled to partial deliveries. Customers accept partial deliveries.
 - 2.4 The PARTS delivered shall conform to the print specifications (if any) and conform to the quality, quantity and description stated in the PURCHASE ORDER and as presented in any drawing. If delivered PARTS do not meet print specifications OERLIKON AM rework or replace PARTS to meet print specifications. Buyer shall notify OERLIKON AM within 14 days of any non-conformity, any claims made beyond 14 day will be handled per OERLIKON AM's discretion.
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 BUYER warrants that (i) the SCOPE OF SUPPLY and any 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, shall not infringe any intellectual property rights of third parties. In the event of any patent infringement relating to the said SCOPE OF SUPPLY, BUYER 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. 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 losses, costs, damages and expenses (including court costs and attorneys' fees) arising from a claim of infringement of any intellectual property right of a third party. As to any such equipment, service, product, part or use in such combination, it is

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BUYER's due-diligence to ensure non-infringement of any intellectual property right of third parties. OERLIKON AM is not obligated in any way to ensure such non-infringement and it is understood such due-diligence has been done before placing a PURCHASE ORDER with OERLIKON AM.

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

5. 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 6 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 6 (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.

6. Export Control and other Governmental Documents

- 6.1. 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.
- 6.2. 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.
- 6.3. 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.
- 6.4. 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.
- 6.5. BUYER agrees that the parts or engineering services ordered will not be used for any purposes prohibited under EAR 736 and 744.
- 6.6. BUYER shall indemnify and hold harmless OERLIKON AM, its officers, employees, and agents from any losses, costs, claims, causes of action, damages, liabilities, and expenses, including attorney fees, all expenses of litigation and/or settlement, and court costs caused in whole or in part by the actions or omissions of BUYER, its officers, employees, agents, suppliers, or subcontractors in relation to its export/import activities.

7. Force Majeure

- 7.1. 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.
- 7.2. 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.

8. Confidentiality

- 8.1. 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:

- 8.2. 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.

- 8.3. 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.

- 8.4. 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.

- 8.5. 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.

- 8.6. 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.

- 8.7. 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.

9. Miscellaneous

9.1. 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 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.

9.2. 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.

9.3. 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.

9.4. 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.

9.5. 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.