

# Fedecom terms and conditions 2014

General terms and conditions issued by Fedecom (trade association of mechanisation industry) filed at the Registry of the District Court in Rotterdam on 21 February 2014.

Fedecom edition, Postbus 2600, 3430 GA Nieuwegein. ©Fedecom

## Article 1: Applicability

- 1.1. These terms and conditions apply to all offers made by a Fedecom member, to all agreements concluded by a member and to all agreements that can ensue therefrom, all of which insofar as the Fedecom member is offeror, or as the case may be supplier, to as client.
- 1.2. The Fedecom member who makes use of these terms and conditions will be referred to as contractor. The other party is referred to as client.
- 1.3. In the event of conflict between the contents of the agreement concluded between client and contractor and these terms and conditions, the provisions of the agreement will prevail.
- 1.4. These terms and conditions can exclusively be used by Fedecom members.

## Article 2: Offers

- 2.1. All offers are without obligation.
- 2.2. If client provides data, drawings and suchlike to contractor, contractor can assume the accuracy and completeness thereof and contractor will base its offer thereon.
- 2.3. The prices referred to in the offer are based on delivery, "ex works", from the place of business of contractor, in conformity with the Incoterms 2010. The prices are excluding turnover tax and packaging.
- 2.4. If client does not accept the offer from contractor, contractor will have the right to charge client for all costs incurred by contractor when making the offer to client.

## Article 3: Intellectual property rights

- 3.1. Unless agreed otherwise in writing, contractor retains the copyright and all other industrial property rights to the offers made by contractor, including designs, images, drawings, (test) models, software and suchlike provided by contractor.
- 3.2. The rights to the data referred to in subclause 1 of this article remain the property of contractor regardless of whether client has been charged for the costs of the production thereof. This data will not, without prior permission in writing from contractor, be copied, used, or disclosed to third parties. Client will owe to contractor for each breach of these provisions an immediately due and payable financial penalty of € 25,000. This financial penalty can be claimed in addition to the compensation on the basis of the law.
- 3.3. Client will return the data provided to client as referred to in subclause 1 of this article on first request within a period to be set out by contractor. In the event of breach of this provision client will owe an immediately due and payable financial penalty to contractor of € 1,000 per day. This financial penalty can be claimed in addition to the compensation on the basis of the law.

## Article 4: Advice and provided information

- 4.1. Client cannot derive any rights from the advice and information that client acquires from contractor if this does not relate to the assignment.
- 4.2. If client provides data, drawings and suchlike to contractor, contractor can assume the accuracy and completeness thereof during the performance of the agreement.
- 4.3. Client determines and is responsible for the extent and the efficiency of the repair(s) and/or work to be executed. Client decides on the (technical) specifications following which the repair(s) and/or work will ultimately be executed.
- 4.4. Client indemnifies contractor against any claims by third parties with regard to the use of advice, drawings, calculations, designs, materials, samples, models and suchlike provided by or on behalf of client.

## Article 5: Delivery period / execution period

- 5.1. The delivery period and/or execution period will be recorded by contractor as an estimate.
- 5.2. When determining the delivery period and/or execution period contractor assumes that it can execute the assignment under the circumstances as known to contractor at that time.
- 5.3. The delivery period and/or execution period will only commence when agreement has been reached on all commercial and technical details, and once all necessary data, final and approved drawings and suchlike are in the possession of contractor, the agreed (instalment) payment has been received and the terms and conditions necessary for the execution of the assignment are fulfilled.
- 5.4. a. If circumstances arise that differ from those that were known to contractor when contractor recorded the delivery period and/or execution period, contractor can extend the delivery period and/or execution period by the time that contractor requires for the execution of the assignment under these circumstances. If the work cannot be fitted into the schedule of contractor, this will be executed as soon as the schedule permits this.  
b. If there is additional work the delivery period and/or execution period will be extended by the time that contractor requires to deliver (have delivered) the materials and parts for this and that is needed to execute the additional work. If the additional work cannot be fitted into the contractor's schedule, this work will be executed as soon as the schedule permits this.  
c. If there is a suspension of obligations by contractor, the delivery period and/or execution period will be extended by the duration of the suspension. If continuation of the work cannot be fitted into the contractor's schedule, the work will be executed as soon as the schedule permits this.  
d. If there are adverse weather conditions preventing work, the delivery period and/or execution period will be extended by the delay arisen through this.
- 5.5. Client will be obliged to pay all costs incurred by contractor as a result of a delay in the delivery period and/or execution period as set out in subclause 4 of this article.
- 5.6. The exceeding of the delivery period and/or execution period will under no circumstances give any right to compensation or termination.

## Article 6: Risk transfer

- 6.1. Delivery takes place "ex works", from the place of business of contractor, in conformity with the Incoterms 2010. The risk of the goods transfers at the time when contractor makes these available to client.
- 6.2. Regardless of the provisions of subclause 1 of this article, client and contractor can agree that contractor arranges the transport. The risk of storage, loading, transport and unloading will in that event be on the part of client. Client can take out insurance against these risks.
- 6.3. If trading takes place and client, in expectation of the delivery of the new goods, retains possession of the goods to be traded in, the risk of the goods to be traded in will remain on the part of client and all costs will be at the expense of client, until the time when client has given these in the possession of contractor. The costs referred to in the previous sentence also include the costs of maintenance and any damage, arisen through whatsoever cause. If client cannot deliver the goods to be traded in, in the condition in which these were when the agreement was concluded, contractor can terminate the agreement.

## Article 7: Price change

- 7.1. Contractor can charge on to client any increase of cost determining factors that occurs after the concluding of the agreement.
- 7.2. If client is a consumer, being a natural person who does not act in the exercise of his/her profession or business, and the price increase referred to in subclause 1 occurs within three months from the date on which the agreement was concluded, the client will have the right to terminate the agreement.
- 7.3. Client will be obliged to pay the price increase as referred to in subclause 1 of this article at the discretion of contractor at one of the following times:
  - a. when the price increase occurs;
  - b. simultaneously with the principal sum;
  - c. with the next agreed payment term.

## Article 8: Force majeure

- 8.1. Contractor has the right to suspend the fulfillment of its obligations if contractor is temporarily prevented due to force majeure from fulfilling its contractual obligations toward client.
- 8.2. Force majeure is inter alia taken to mean the circumstance if suppliers, subcontractors of contractor or carriers engaged by contractor do not, or not in a timely manner, fulfil their obligations, or if contractor is hindered in its activities by the weather, earthquakes, fire, power failure, loss, theft or loss of tools or materials, road blockades, strike actions or work stoppage and import or trade restrictions.
- 8.3. Contractor will no longer be entitled to suspension if the temporary hindrance to activities has lasted more than six months. Client and contractor can terminate the agreement with immediate effect after the expiry of this period, but exclusively for that part of the obligations that has not yet been fulfilled.
- 8.4. If there is force majeure and fulfillment is, or will be, permanently impossible both parties will be entitled to terminate the agreement with immediate effect for that part of the obligations that has not yet been fulfilled.
- 8.5. Parties do not have any right to compensation of the damage to be suffered as the result of the suspension or the termination within the meaning of this article.

## Article 9: Extent of the work

- 9.1. Client must ensure that all licences, exemptions and other decisions that are necessary for the execution of the work are acquired in a timely manner. Client is obliged on first request from contractor to send a copy of the aforesaid documents to contractor.
- 9.2. The following are not included in the price for the work:
  - a. the costs for ground pile-driving, cutting, breaking foundations, brick, carpentry, plastering, painting, wallpapering, repair or other structural work;
  - b. the costs of connection to gas, water, electricity or other infrastructural facilities;
  - c. the costs of prevention and limitation of damage to, on or of goods present at the work;
  - d. the costs of removal of materials, building materials or refuse;
  - e. travel and accommodation costs.

## Article 10: Amendments of the work

- 10.1. Amendments of the work will in any event result in additional or less work if:
  - a. there is an amendment of the design, the specifications or the contract documents;
  - b. the information provided by client does not correspond to reality;
  - c. estimated quantities deviate by more than 10%.
- 10.2. Additional work will be calculated on the basis of the price determining factors, as these apply at the time when the additional work is carried out. Less work will be set-off on the basis of the price determining factors, as these applied at the time of the concluding of the agreement.
- 10.3. Client will be obliged to pay the price of the additional work as referred to in subclause 1 of this article at the discretion of contractor at one of the following times:
  - a. when additional work occurs;
  - b. simultaneously with the principal sum;
  - c. with the next agreed payment term.
- 10.4. If the total of the less work exceeds that of the additional work, contractor can charge client in the final account 10% of the difference. This provision does not apply to less work that is the result of a request from client.

## Article 11: Execution of the work

- 11.1. Client will be responsible for ensuring that contractor is able to execute its work without disruption and at the agreed time and that it will be provided with the required facilities during the execution of its work, such as:
  - a. gas, water and electricity;
  - b. heating;
  - c. lockable dry storage space;
  - d. facilities prescribed on the basis of the Working Conditions Act and Regulations.
- 11.2. Client bears the risk and is liable for damage related to loss, theft, burning and damage of property of contractor, client and third parties, such as tools, materials intended for the work, or used during the work, that are situated at the location where the work will be executed, or at another agreed location.
- 11.3. Client is obliged to take out adequate insurance against the risks referred to in subclause 2 of this article. Client must in addition take out insurance against the risk of work-related damage of the materials to be used. Client must send to contractor on first request a copy of the insurance(s) concerned and evidence of payment of the premium. If there is damage, client will be obliged to report this promptly to its insurer for further processing and settlement.
- 11.4. If circumstances occur that make it necessary to execute the work at a time that falls outside the usual working hours of contractor, contractor will be entitled to charge the additional costs ensuing therefrom to client.
- 11.5. If there is an assignment for inspection and/or repair and this work must take place at the client's location, contractor will not be obliged to notify client of its visit, or of the exact time of its arrival, that of its staff, or third parties engaged by contractor for the work.
- 11.6. Client will be responsible for ensuring that the item to be inspected and/or repaired will be made available to contractor in a cleaned condition, in such a manner that the work ensuing from the agreement can be executed.
- 11.7. If client does not fulfil its obligations as described in the previous subclauses of this article, and due to this a delay in the execution of the work occurs, the work will be executed as soon as client has fulfilled its obligations and the schedule of contractor permits this. Client will be liable for all damage ensuing for contractor from the delay.

## Article 12: Delivery of the work

- 12.1. The work will be deemed to have been delivered in the following event:
  - a. if client has approved the work;
  - b. if the work has been taken into use by client. If client takes a part of the work into use, this part will be deemed to be delivered;
  - c. if contractor has notified client in writing regarding the completion of the work, and client has not made it known in writing within 14 days from the notification whether or not the work has been approved;
  - d. if client does not approve the work on the basis of small defects or missing parts that can within 30 days be repaired or subsequently delivered and these do not prevent the taking into use of the work.
- 12.2. If client does not approve the work client will in that case be obliged to make this known to contractor in writing stating reasons. Client must provide contractor with the opportunity to still deliver the work.
- 12.3. Client indemnifies contractor against claims by third parties for damage of parts of the work that are not delivered caused by the use of parts of the work that have already been delivered.

## Article 13: Liability

- 13.1. In the event of an attributable failure contractor will be obliged to still fulfil its contractual obligations.
- 13.2. The obligation of compensation on the part of contractor, on the basis of whatsoever statutory ground, is limited to that damage for which contractor is insured on the basis of an insurance taken out by or for the benefit of contractor, but will never be higher than the amount that will be paid out by this insurance in the case concerned.
- 13.3. If no reliance on the limitation of subclause 2 of this article accrues to contractor for any reason whatsoever, the obligation of compensation will be limited to a maximum of 15% of the total assignment amount (excluding VAT). If the agreement comprises of parts or partial deliveries, the obligation of compensation will be limited to a maximum of 15% (excluding VAT) of the assignment amount of that part or that partial delivery.
- 13.4. The following are not eligible for compensation:
  - a. consequential loss. Consequential loss is inter alia taken to mean business interruption loss, loss of production, lost profit, transport costs and travel and accommodation costs. Client can, if possible, take out insurance against this damage;
  - b. damage to property in the care, custody or control of, but not owned by the insured. Damage to property in the care, custody or control of, but not owned by the insured is inter alia taken to mean damage caused during the execution of the work to goods which are worked on or goods that are situated in the vicinity of the location where work is executed. Client can, if required, take out insurance against this damage;
  - c. damage caused by intention or willful recklessness on the part of servants or agents or non-managerial employees of contractor.
- 13.5. Contractor will not be liable for damage of materials delivered by or on behalf of client as a result of processing not conducted in a proper manner.
- 13.6. Client indemnifies contractor against any claims by third parties due to product liability as the result of a defect of a product that is delivered by client to a third party and that (partly) comprised of products and/or materials delivered by contractor. Client will be obliged to compensate all damage suffered by contractor in this context, including the (full) costs of defence.

## Article 14: Guarantee and other claims

- 14.1. Unless agreed otherwise in writing contractor guarantees the proper execution of the agreed goods and services for a period of six months from delivery/completion. If a derogating guarantee period is agreed, the other subclauses of this article will also apply.
  - 14.2. No guarantee is provided for delivered goods that were not new at the time of delivery.
  - 14.3. If the agreed goods and services have been substandard, contractor will make the choice of either still executing these property or of crediting client for a proportional part of the invoice. If contractor opts for the proper execution of the goods and services, contractor will personally determine the manner and time of the execution. If the agreed goods and services (also) comprised the processing of materials delivered by client, client must at its own risk and expense redeliver new materials.
  - 14.4. Parts or materials that are repaired or replaced by contractor must be sent by client to contractor.
  - 14.5. The following are at the expense of client:
    - a. all transport or dispatch costs;
    - b. costs of disassembly and assembly;
    - c. travel and accommodation costs.
  - 14.6. Client must in any event offer contractor the opportunity to repair any defects or to execute the processing once again.
  - 14.7. Client can only rely on any guarantee after client has fulfilled all its obligations with regard to contractor.
  - 14.8. a. No guarantee will be provided if defects are the result of:
    - i. normal wear and tear;
    - ii. improper use;
    - iii. no, or incorrectly conducted, maintenance;
    - iv. installation, assembly, modification or repair by client or by third parties;
    - v. defects or unsuitability of goods originating from, or prescribed by client;
    - vi. defects or unsuitability of goods or auxiliary materials used by client.
  - b. No guarantee will be provided for:
    - i. the inspection and repair of goods of client;
    - ii. parts for which a manufacturer's warranty is provided.
- 14.9. The provisions of subclauses 2 up to and including 8 of this article apply mutatis mutandis to any claims by client on the basis of breach of contract, non-conformity or whatsoever other basis.
- 14.10. Client cannot transfer rights on the basis of this article.

## Article 15: Obligation to complain

- 15.1. Client can no longer rely on a defect of the goods and services if client has not made a complaint in writing to contractor regarding this within fourteen days after client has discovered the defect or reasonably ought to have discovered the defect.
- 15.2. Client must have submitted a complaint regarding the level of the invoice amount in writing to contractor within the payment request from contractor concerning all invoices. If the payment term amounts to more than thirty days client must have made a complaint in writing no later than within thirty days from the invoice date.

## Article 16: Goods not taken delivery of

- 16.1. Client is obliged after the expiry of the delivery period and/or execution period to take delivery of the goods or matters that are the subject of the agreement at the agreed location.
- 16.2. Client must provide contractor with all cooperation that can reasonably be expected from client in order to give contractor the opportunity to make the delivery.
- 16.3. Goods not taken delivery of will be stored at the expense and risk of client.
- 16.4. In the event of breach of the provisions of subclauses 1 and/or 2 of this article client will owe a financial penalty to contractor of € 25 per day with a maximum of € 25,000. This financial penalty can be claimed in addition to compensation on the basis of the law.

## Article 17: Payment

- 17.1. Payment will be made at the place of business of contractor or to an account to be designated by contractor.
- 17.2. Unless agreed otherwise payment will take place as follows:
  - a. cash in the event of over the counter sales;
  - b. in the event of payment by instalments:
    - i. - 50% of the total price with the assignment;
    - ii. - 50% of the total price on delivery;
  - c. in all other cases within thirty days from the invoice date.
- 17.3. If client does not fulfil its payment obligation client will be obliged, instead of payment of the agreed sum of money, to fulfil a request from contractor for tendering in payment.
- 17.4. The right of client to set-off its claims against contractor is excluded, with the exception of insolvency on the part of contractor, or should statutory debt rescheduling be applicable to contractor.
- 17.5. Regardless of whether contractor has fully executed the goods and services, all that which client owes, or will owe, to contractor on the basis of the agreement will be immediately due and payable when:
  - a. a payment term is exceeded;
  - b. a bankruptcy petition is submitted or moratorium is applied for with regard to client;
  - c. attachment is levied on goods or claims of client;
  - d. client (company) is dissolved or liquidated;
  - e. client (natural person) submits an application for statutory debt rescheduling, is placed under guardianship or has died.
- 17.6. If payment has not taken place within the agreed payment term, client will immediately owe interest to contractor. The interest amounts to 12% per year, but will be equal to the statutory interest if this is higher. During the calculation of interest a part of the month will be regarded as a full month.
- 17.7. Contractor will be entitled to set-off its debts owed to client against claims by companies affiliated with contractor against client. In addition contractor will be entitled to set-off its claims against client against debts of companies affiliated with contractor owed to client. Contractor is further entitled to set-off its debts owed to client against claims against companies affiliated with client. Affiliated companies include the companies that form part of the same group, within the meaning of Section 24b Book 2 of the Civil Code, and a participating interest within the meaning of Section 24c Book 2 of the Civil Code.
- 17.8. If payment has not taken place within the agreed payment term client will owe to contractor all extrajudicial costs with a minimum of € 75. These costs will be calculated on the basis of the following table (principal sum including interest):

- over the first € 3,000 - 15%
- over the remainder up to € 6,000 - 10%
- over the remainder up to € 15,000 - 8%
- over the remainder up to € 60,000 - 5%
- over the remainder above € 60,000 - 3%

The actually incurred extrajudicial costs will be owed if these are higher than follows from the aforesaid calculation.
- 17.9. If contractor succeeds in judicial proceedings, all costs incurred by contractor related to these proceedings will be at the expense of client.

## Article 18: Securities

- 18.1. Regardless of the agreed payment terms client will be obliged on first request from contractor to provide security, sufficient in the opinion of contractor, for payment. Client will be immediately in default if client does not provide this security within the period of time set out for this. In that event contractor will have the right to terminate the agreement and to recover its damage from client.
- 18.2. Contractor remains owner of the delivered goods as long as client:
  - a. fails or will fail in the fulfillment of its obligations under this or other agreements;
  - b. has not paid claims ensuing from the non-performance of aforesaid agreements, such as damage, financial penalties, interest and costs.
- 18.3. As long as the delivered goods are subject to retention of title client will not encumber or dispose of these goods outside the usual business operations of client.
- 18.4. After contractor has invoked its retention of title, contractor can collect the delivered goods. Client will provide full cooperation to this. The costs of the collection will be at the expense of client, along with the costs of any handling or damage of the delivered goods.
- 18.5. Contractor has a right of pledge and the right of retention on all goods of which contractor acquires, or will acquire, possession on whatsoever basis, and on all claims that contractor has or might raise against client, with regard to anyone who requires handing over thereof.
- 18.6. If client, after the goods are delivered to client by contractor in conformity with the agreement, has fulfilled its obligations, the retention of title will be restored with regard to these goods if client does not fulfil its obligations under an agreement concluded later.

## Article 19: Termination of the agreement

If client wishes to terminate the agreement without there being a failure on the part of contractor and contractor agrees thereto, the agreement will be terminated by mutual consent. Contractor will in that event have the right to compensation of all financial loss, such as loss suffered, lost profit and costs incurred.

## Article 20: Applicable law and court of competent jurisdiction

- 20.1. The law of the Netherlands applies.
- 20.2. The Vienna Sales Convention (C.I.S.G.) does not apply, nor any other international regulations the exclusion of which is permitted.
- 20.3. Only the Dutch civil court with competent jurisdiction in the place of business of contractor will hear and determine disputes, unless this is contrary to mandatory legal provisions. Contractor can derogate from this rule on jurisdiction and apply the statutory rules on jurisdiction.