

# Delivery conditions FME

**Delivery conditions of FEDA and FME/CWM. Filed at the court in The Hague on 6 december 2011 file nr. 90/2011 and nr. 91/2011. Distributed by FEDA, Postbox 190, 2700 AD Zoetermeer, The Netherlands.**

## Article I General

1. When these conditions are part of tenders and agreements concerning the performance of deliveries and/or services by the contractor, all clauses of these conditions shall be operative between the parties, insofar the parties have not explicitly agreed in writing to deviate from any clause(s). A reference by the purchaser to his own conditions of purchase is explicitly rejected by the contractor.
2. In these conditions the following terms shall have the meaning herein assigned to them:
  - product: goods as well as services, such as maintenance, advice and inspection;
  - in writing: by document signed by the parties or by letter, fax, electronic mail or by any other technical means agreed by the parties;
  - the contractor: the party who in his tender or order confirmation refers to these conditions;
  - the purchaser: the party to whom the tender and/or order confirmation is addressed;
3. In these conditions “service” shall also mean: contracting work.

## Article II Tender

1. Every tender made by the contractor is without engagement.
2. Every tender is based on the performance by the contractor under the agreement under normal circumstances and during normal working hours.

## Article III Agreement

1. If an agreement is entered into in writing, it is entered into on the day the contract is signed by the contractor or the day the order confirmation in writing has been mailed by the contractor.
2. By extra work is meant everything the contractor, in consultation with the purchaser, whether in writing or not, delivers and/or installs during the performance under the agreement exceeding the quantities explicitly laid down

in the contract or in the order confirmation, or exceeding the activities explicitly laid down in the contract or order confirmation.

3. Verbal promises by and arrangements with staff members of the contractor shall only bind the contractor to the extent these have been confirmed by the latter in writing.

#### **Article IV Price**

1. In the prices given by the contractor VAT and other government levies and taxes on sales and deliveries are excluded. These prices are based on delivery ex works according to Incoterms prevailing on the date of tender, except for stipulations in the present conditions to the contrary. Works refers to the premises of the contractor.
2. If one or more elements of cost price are subject to an increase after the date of entering into the agreement - even if this occurs due to foreseeable circumstances - the contractor is entitled to increase the price agreed upon accordingly.
3. In the agreement the authority of the contractor is included to charge extra work done by him separately, as soon as the amount to be charged is known to him. The rules in paragraph 1 and paragraph 2 of this Article apply accordingly to the calculation of extra work.
4. Cost estimates and plans are not charged separately, unless otherwise agreed upon. If the contractor should make new drawings, calculations, descriptions, models or tools, etc. for possible repeat orders, costs will be charged.
5. Packaging will not be included in the price and is charged separately. Packaging is not taken back.
6. Costs of loading and unloading and of transportation of raw materials, semimanufactures, models, tools, and other goods made available by the purchaser are not included in the price and are charged separately. Costs paid for by the contractor in this respect are regarded as an advance payment at the expense of the purchaser.
7. If the contractor has agreed to install a product, the price includes installation and ready-for-use delivery of the product at the address mentioned in the tender, as well as all costs, except for those costs which are not included in the price according to the preceding clauses or which are mentioned in Article VII. Costs made due to weather conditions in which it is impossible to work will be charged.

#### **Art. V Drawings, calculations, descriptions, models, tools, etc.; intellectual property**

1. Information provided in catalogues, illustrations, drawings, data on size and weight, etc. are only binding if and insofar they are explicitly laid down in a contract signed by the parties or a confirmation of the order signed by the contractor.
2. Tenders issued by the contractor, as well as drawings, calculations, software, descriptions, models, tools, etc. produced or provided by the contractor shall remain his property, even if costs have been charged in such respect. The

intellectual property of the information contained within same or based upon methods of production and construction, products etc. shall remain exclusively reserved to the contractor, even if costs have been charged in such respect. The purchaser shall see to it that, except for performance under the agreement, information given is only copied, shown, made known to or used by third parties with written permission by the contractor.

#### **Art. VI Term of delivery**

1. The term of delivery starts to run at the latest of the following points of time:
  1. the day the agreement is entered into;
  2. the day the contractor receives the documents, information, licences etc. necessary for performing the order;
  3. the day the formalities required for commencing the work have been fulfilled;
  4. the day the contractor receives the amount which should be paid in advance before work will be commenced under the agreement.
2. If a date or week of delivery is agreed upon, the term of delivery shall be the period between the date the agreement is entered into and the date or the end of the week of delivery.
3. The term of delivery is based on the working conditions at the time the agreement is entered into and on timely delivery of the materials necessary for performing the work ordered by the contractor. If any delay might occur due to change in the said working conditions, for which change the contractor is not to blame, or because materials timely ordered for the performance of the work are not delivered on time, the term of delivery will be prolonged for as long as necessary.
4. With regard to the term of delivery the product is deemed to be delivered when it is ready for testing, if testing in the premises of the contractor has been agreed upon, and in other cases when it is ready for shipment, all this after the purchaser has been given notice in writing and without prejudice to the obligation of the contractor to fulfil possible installation obligations.
5. Without prejudice to other clauses in these conditions regarding prolongation of the term of delivery, the term of delivery is prolonged for the duration of the delay which arises on the side of the contractor when the purchaser has not met some obligation resulting from the agreement or has not cooperated as could be demanded from him with respect to the performance under the agreement.
6. Delay in delivery shall not entitle the purchaser to terminate the agreement completely or partly, unless such delay exceeds 16 weeks or the contractor indicates that the delay will exceed 16 weeks. In case of such delay or indication the purchaser shall be entitled to terminate the agreement by notice in writing to the contractor and shall, where appropriate, be entitled to reimbursement of any part of the purchase price already paid and to compensation for the damage he has suffered, which compensation shall however not exceed 15 per cent of the agreed price for the product to be delivered. Unless the purchaser exercises his

right to terminate the contract, delay in delivery -for whatever reason- shall not entitle the purchaser to perform work or to have work performed under the agreement without the Court's leave.

## **Art. VII Installation**

1. If the parties have agreed that the contractor shall install the product to be delivered, the purchaser is responsible towards the contractor for performing correctly and on time all installations, provisions and/or conditions necessary for the erection of the product to be installed and/or for the correct operation of the product in installed state on time. This shall not apply if and insofar this performance is done by (order of) the contractor according to data and/or drawings made or presented by (order of) the latter.
2. Without prejudice to the provisions sub 1, the purchaser shall, if the parties have agreed that the contractor shall install the product to be delivered, in any case see to it at his own expense and risk that:
  1. the staff members of the contractor can commence and continue their work during normal working hours from the moment they arrive at the place of installation and, moreover, if the contractor deems it necessary, outside of normal working hours provided that the purchaser has been notified in time;
  2. suitable accommodation and/or all provisions under Government ordinances, the agreement and common use will be available to the staff members of the contractor;
  3. the access routes to the place of installation are fit for the required transportation;
  4. the assigned place of erection is fit for storage and installation;
  5. the necessary lockable depositories for materials, tools and other goods are available;
  6. the necessary and usual workmen, auxiliary tools, auxiliary and industrial materials (fuels, oils and greases, cleaning and other small materials, gas, water, electricity, steam, compressed air, heating, lighting, etc. included), and the usual measuring and testing instruments of the company of the purchaser are in the right place at the disposal of the contractor on time and free of charge;
  7. all necessary safety and precautionary measures have been taken and shall be maintained, and that all measures have been taken and shall be maintained in order to satisfy the appropriate Government regulations with respect to installation;
  8. h. the mailed products are at the right place at the beginning of and during the installation.
3. Damages and costs which arise because the conditions stated in this Article have not been fulfilled or have not been fulfilled on time are for the purchaser's account.
4. With regard to time for assembly and installation, Article VI applies accordingly.

## **Art. VIII Inspection and acceptance tests**

1. The purchaser shall inspect the product at the latest within 14 days after delivery as stated in Article VI sub 3 or -if installation has been agreed upon- at the latest within 14 days after installation. If this term passes without written and specified notification of well-founded complaints, the product is assumed to have been accepted.
2. If acceptance tests have been agreed upon the purchaser shall, after delivery as stated in Article VI sub 3 or, if installation has been agreed upon, after installation, give the contractor the opportunity to perform the necessary preparatory tests and to apply those improvements and modifications which the contractor finds necessary. The acceptance tests shall be performed immediately upon request of the contractor in the presence of the purchaser. If the acceptance tests have been performed without specified and well-founded complaints, and if the purchaser does not meet said obligations, the product is assumed to have been accepted.
3. The purchaser shall put the necessary facilities, including those referred to in art. VII sub 2 f, as well as representative samples of materials to be processed in sufficient quantities, on time, free of charge and in the right place at the disposal of the contractor for the acceptance tests and for any related tests, in order to simulate the circumstances of use of the product anticipated by the parties to the greatest extent possible. If the purchaser does not fulfil this, paragraph 2, the last sentence, applies.
4. In case of minor shortcomings, especially those which hardly or do not at all influence the anticipated use of the product, the product will be assumed to have been accepted despite these shortcomings. The contractor shall remedy such shortcomings as yet as soon as possible.
5. Without prejudice to the guarantee obligations of the contractor the acceptance according to the preceding paragraphs will exclude any claim of the purchaser for shortcomings in the performance of the contractor.

## **Art. IX Transition of risk and ownership**

1. As soon as the product has been delivered in the definition of art. VI sub 3, the purchaser bears the risk for all direct and indirect damage that may occur on or on account of this product, except insofar the damage is the result of the intent or conscious recklessness of persons which are members of the contractor's management. If the purchaser remains in default for taking up the product after having received a notice of default, the contractor will be entitled to charge any costs resulting there from to the purchaser.
2. Without prejudice to the last paragraph and the provisions of Article VI sub 3, the ownership of the product passes to the purchaser only when all debts of the purchaser to the contractor for deliveries or work, including interest and costs, have been paid for in full.
3. Where appropriate the contractor shall have the right of unhindered access to the product. The purchaser shall give all cooperation to the contractor in order to provide the contractor the opportunity to execute the retention of ownership as

stated in paragraph 2 by taking back the product, dismantling included if necessary.

#### **Art. X Payment**

1. If not otherwise agreed upon, payment of the price agreed upon will take place in two terms:
  - o 1/3 (one third) at the latest within 7 days after the day the agreement came into being;
  - o 2/3 (two thirds) at the latest within 14 days after delivery under art.VI sub 3.
2. Payment of extra work shall take place as soon as the purchaser has been charged for this.
3. All payments shall be made without any deduction or setting-off in the manner to be decided by the contractor.
4. If the purchaser does not pay within the period agreed upon, he is considered in default by right and the contractor may without any notice of default charge interest, counting from the expiry date, at a rate of 3 points above the legal interest in force in the Netherlands, as meant in Article 6:119a and Article 6:120 Civil Code (“Burgerlijk Wetboek”), as well as all judicial and extrajudicial costs in connection with the claim.

#### **Art. XI Guarantee**

1. Without prejudice to the following restrictions, the contractor guarantees the quality of the product he delivered (such product not being a service) as well as the quality of the materials used and/or delivered for the product, insofar defects in the delivered product are concerned which cannot be detected at inspection or acceptance tests respectively, of which the purchaser proves that these have arisen within 6 months after delivery under Article VI sub 3 solely or mainly as a direct consequence of a defect in the construction applied by the contractor or due to inadequate workmanship or use of bad materials.
2. Paragraph 1 applies accordingly to defects which cannot be detected at inspection or acceptance tests respectively caused solely or mainly by poor installation by the contractor. If the contractor performs installation of the product, the term of guarantee of 6 months sub 1 goes into effect on the day the installation has been completed by the contractor, whereas in that case the term of guarantee ends in any case when 12 months after delivery under Article VI sub 3 have passed.
3. The defects falling under the guarantee sub 1 and 2 will be removed by the contractor by repair or replacement of the defective part, whether or not in the premises of the contractor or by mailing a part for replacement, this always at the contractor’s discretion. All costs that go beyond the sole obligation as described in the preceding sentence, such as, but not restricted to, costs of transportation, costs of travelling and accommodation and costs of disassembly and assembly are at the expense of the purchaser. A new guarantee period of 6 months shall apply for repaired parts and parts in replacement. Any guarantee shall however

expire as soon as 12 months have passed since delivery as meant in Article VI sub 3 or, where the provisions sub 2 are applicable, as soon as 18 months have passed since such delivery.

4. With respect to repair, revision and maintenance work and similar services performed by the contractor outside any guarantee obligation and unless otherwise agreed, guarantee is only given for the good quality of the performance of the activities ordered, this for a period of 6 months. This guarantee holds that the contractor has the sole obligation in case of defects to perform work again, insofar this proves to be defective. In that case the second full sentence of paragraph 3 applies accordingly. In such case a new guarantee period of 6 months shall apply. Any guarantee shall however expire as soon as 12 months have passed since the original work or services concerned.
5. No guarantee is given with respect to inspections, advice and similar services by the contractor.
6. In any case not included in the guarantee are defects which arise from or are completely or partly caused by:
  1. not taking into account the operating and maintenance instructions or other than anticipated normal use;
  2. normal wear and tear;
  3. installation or repair by the purchaser or by third parties;
  4. the application of any Government regulation regarding the nature or the quality of the applied materials;
  5. used materials or goods respectively used in consultation with the purchaser;
  6. materials or goods which the purchaser has given to the contractor to be processed;
  7. materials, goods, methods and constructions insofar applied at explicit instruction of the purchaser, together with materials and goods delivered by or on account of the purchaser;
  8. parts the contractor has received from third parties, insofar as the third party has not given any guarantee to the contractor or the guarantee provided by the third party has expired.
7. If the purchaser does not, does not adequately or does not timely meet with an obligation resulting from the agreement with the contractor or an agreement related to it, the contractor is not held to any guarantee for any of these agreements. If the purchaser proceeds to or has someone proceed to any dismantling, repair or other work concerning the product without prior written approval by the contractor, every claim resulting from the guarantee ceases to exist.
8. Complaints for defects shall be made in writing as soon as possible after discovery of the defects, yet at the latest within 14 days after the term of guarantee has expired. Exceeding these terms results in expiration of every claim against the contractor relating to these defects. Legal action should be instigated within 1 year after timely complaint under penalty of expiration.

9. If the contractor replaces parts/products to fulfil his obligations under the guarantee, the replaced parts/products become property of the contractor.
10. Alleged neglect on the part of the contractor to fulfil his obligations of guarantee does not relieve the purchaser from his obligations which arise from any agreement entered into with the contractor.

## **Article XII Liability**

1. The contractor's liability is limited to fulfilment of the obligations of guarantee described in Article XI of these conditions. If the contractor has not fulfilled his obligations under Article XI of these conditions within a reasonable time, the purchaser may by notice in writing fix a final, appropriate time for fulfilment of the contractor's obligations. If the contractor fails to fulfil his obligations within such final time, the purchaser may himself undertake or employ a third party to undertake necessary remedial works at the risk and expense of the contractor. Where successful remedial works have thus been undertaken by the purchaser or a third party, reimbursement by the contractor of reasonable costs incurred by the purchaser shall be in full settlement of the contractor's liabilities for the said defect. These costs shall however not exceed 15% of the agreed purchase price for the delivered product.
2. Where the defect has not been successfully remedied, as stipulated sub 1,
  - o the purchaser is entitled to a reduction of the agreed purchase price of the delivered product in proportion to the reduced value of the product, provided that such reduction shall not exceed 15 per cent of the agreed purchase price for the delivered product, or
  - o where the defect is so substantial as to significantly deprive the purchaser of the benefit of the contract, the purchaser may terminate the contract by notice in writing to the contractor. The purchaser is then entitled to reimbursement of the purchase price paid for the delivered product and to compensation for the damage he has suffered up to a maximum of 15 per cent of the agreed purchase price for the delivered product.
3. Save for intent or conscious recklessness of persons which are members of the contractor's management and save for the provisions in Article VI sub 5 and in this Article sub 1 and 2, all liability of the contractor for defects in the delivered product and in connection with the delivery, such as for damage resulting from delay in delivery and from non-delivery, for damage resulting from liability towards third parties, for commercial damage, consequential and indirect damage and for damage resulting from any wrongful act or omission of (staff members of) the contractor, is excluded.
4. Thus, the contractor is also not liable for:
  - o infringement of patents, licences or other rights of third parties;
  - o damage or loss, from whatever cause, of raw materials, sub-assemblies, models, tools, and other goods made available by the purchaser.
5. If the contractor gives help and assistance of whatever kind at installation without having installation assigned to him, this will be at the risk of the purchaser.

6. The purchaser is bound to hold the contractor harmless respectively to indemnify the contractor for all claims for damages made by third parties.

### **Art. XIII Force majeure**

In these general conditions, “force majeure” means every circumstance independent of the contractor’s intention -even if this could already be anticipated at the time the agreement was entered into- which may permanently or temporarily prevent performance of the agreement, and, insofar as not already included, war, danger of war, terrorism, civil war, riots, strikes, lock out, traffic disturbances, fire and other serious disruptions in the business of the contractor or his suppliers.

### **Art. XIV Suspension and termination**

1. In case the agreement cannot be performed as a result of force majeure the contractor has the right either to suspend the performance of the agreement for at the most 6 months or to terminate the agreement in whole or partly, all this without taking the matter to Court and without being held liable for damages. During the suspension the contractor is free to and at the end of the suspension he must choose either for performance (if possible) or for complete or partial termination of the agreement.
2. In case of suspension as well as in case of termination sub 1, the contractor has the right to demand immediate payment of the raw materials, materials, parts and other goods he has purchased, reserved, processed and produced for the performance of the agreement, this for the value that should be reasonably pertaining thereto. In case of termination sub 1, after payment of the amount due according to the preceding full sentence, the purchaser is bound to accept the goods included therein, whilst failing to do so will give the contractor the right to store these goods at the expense of and for the risk of the purchaser or to sell or turn these goods into scrap at the expense of the purchaser.
3. In case of reasonable ground to fear that the purchaser is or will not be able or willing to fulfil his contractual obligations towards the contractor and in case of bankruptcy, suspension of payment, shutting down, liquidation or complete or partial assignment of the company of the purchaser, the contractor has the right to require adequate securities for all contractual obligations of the purchaser (whether due or not) and to suspend the performance of the agreement as long as such securities have not been provided. Failing such securities within a reasonable time set by the contractor, the contractor shall be entitled to terminate the agreement in whole or in part. The contractor shall have these

rights in addition to his other rights under the law, the agreement and these conditions.

4. If the purchaser does not, does not timely or does not adequately fulfil any obligation which results from the agreement entered into with the contractor or from an agreement related to same, the contractor has the right again to suspend the performance of the agreement and/or to terminate the agreement
5. In case of suspension sub 3 or 4, the contractor has the right to store the raw materials, materials, parts and other goods purchased, reserved, processed and produced for the performance of the agreement at the purchaser's expense and risk. In case of termination sub 3 or 4 the preceding sentence is applicable accordingly, but the contractor may then in addition to storage also choose to sell or turn the goods into scrap at the expense of the purchaser. In case of suspension or termination under sub 3 or 4, the contractor shall be entitled to full compensation for damage, but shall not be held liable for any compensation of damage himself.

#### **Art. XV Disputes**

All disputes that might arise as a result of an agreement to which these conditions apply completely or partly, or as a result of further agreements which are a consequence of such an agreement, shall be settled by the competent Dutch court or judge. If the law should not provide for a competent Dutch court or judge, the district court in the region ("arrondissement") of the contractor shall be competent in the dispute concerned.

#### **Art. XVI Applicable law**

All agreements to which these conditions fully or partly apply shall be governed by Netherlands law, prevailing for the Kingdom in Europe. The applicability of the Convention on the International Sale of Goods (Vienna Convention) is excluded.