

# General Terms & Conditions of Sale

## Endress+Hauser (Malaysia) Sdn Bhd

### 1. Basis of contract

- 1.1 The Order constitutes an offer by the Customer to purchase Goods and/or Services in accordance with these Conditions.
- 1.2 The Order shall only be deemed to be accepted when the Supplier issues written an acceptance of the Order, at which point and on which date the Contract shall come into existence (“Commencement Date”).
- 1.3 The Contract constitutes the entire agreement between the parties. The Customer acknowledges that any statement, promise, representation, assurance or warranty made or given by or on behalf of the Supplier that is not expressly set out in the Contract shall not form part of the terms of the Contract.
- 1.4 Any samples, drawings, descriptive matter or advertising issued by the Supplier and any descriptions of the Goods or illustrations or descriptions of the Services contained in the Supplier's catalogues or brochures are issued or published for the sole purpose of giving the general or promotional idea of the Services and/or Goods described therein. They shall not form part of the Contract or shall not have any contractual force unless it is expressly incorporated into the Contract.
- 1.5 These Conditions shall apply to the Contract to the exclusion of any other terms that the Customer seeks to impose or incorporate, or which are implied by trade, custom, practice or course of dealing. The Supplier may amend these Conditions at any time at its absolute discretion.
- 1.6 Any quotation given by the Supplier shall not constitute an offer. It is only valid for a period of 30 days from the date of issue unless the Supplier agrees in writing to extend that period.
- 1.7 The Supplier may at its sole discretion include any additional terms and conditions in the Contract. For the avoidance of doubt, should there be any inconsistent or conflict with the existing Terms and Conditions, the additional terms and conditions shall be prevail to the extent of the inconsistency or conflict.
- 1.8 All of these Conditions shall apply to the supply of both Goods and Services unless stated otherwise. Special terms may apply in respect of software support services and/or other specific services if agreed between the parties in writing.

## **2. Goods**

- 2.1 To the extent that the Goods are to be manufactured in accordance with a specification supplied by the Customer, the Customer shall indemnify the Supplier against all liabilities, costs, expenses, damages and losses (including any direct, indirect or consequential losses, loss of profit, loss of reputation and all interest, penalties and legal and other professional costs and expenses) suffered or incurred by the Supplier in connection with any claim made against the Supplier for actual or alleged infringement of a third party's intellectual property rights arising out of or in connection with the Supplier's use of the Goods Specification. This clause 2.1 shall survive termination of the Contract.
- 2.2 The Supplier reserves the right to amend the specification of the Goods if required by any applicable statutory or regulatory requirements or in the interest of safety precautions.

## **3. Delivery of Goods**

- 3.1 The Supplier shall deliver the Goods to the location as set out in the Order Confirmation (Delivery Location) and in accordance with the INCOTERM referred to in the Order Confirmation (in the absence of written agreement to the contrary) at any time after the Supplier notifies the Customer that the Goods are ready.
- 3.2 The Supplier shall not be liable for any delay in delivery of the Goods that is caused by a Force Majeure Event or the customer's failure to provide the Supplier with adequate delivery instructions or any other relevant instructions for the supply of the Goods.
- 3.3 Subject to Clause 3.5 below, delivery of the Goods shall be deemed completed on the Goods' arrival at the Delivery Location.
- 3.4 In the event the Customer fails to accept or take delivery of the Goods within 10 Business Days of the Supplier notifying the Customer that the Goods are ready:
- (a) the Goods shall be deemed delivered on the 11th Business Day following the day on which the Supplier notified the Customer that the Goods were ready and the Supplier shall be entitled to raise an invoice in respect of the Goods deemed delivered; and/or
  - (b) the Supplier shall store the Goods until the actual delivery takes place, and charge the Customer for all related costs and expenses (including insurance). The Supplier shall have the right to charge at least 1% per month of the invoiced value of the stored Goods monthly for storage at the Supplier's premises. If storage at third party's premises is required, the total costs incurred (storage and transport) shall be solely borne by the Customer.

- 3.5 In the event 40 Business Days after the date the Supplier notified the Customer that the Goods were ready for delivery, the Customer still has neglected, refused and/or failed to accept the delivery of the Goods, the Supplier shall at its option be entitled to resell or dispose off part or all of the Goods. Any cost incurred for the reselling or the disposal shall be deducted from the proceeds of the sale or the disposal, and the balance of the proceeds together with any deposit or cost already paid by the Customer to the Supplier will be forfeited by the Supplier. For the avoidance of doubt, the title of the Goods shall remain with the Supplier until full payment has been made by the Customer and the Supplier has the right to forfeit whatever has been paid in the event of the default of payment of the balance payment by the Customer.
- 3.6 In the event the Supplier is required to obtain the necessary licences, particularly but not limited to the export/shipment/import of the Goods, the Supplier shall not be liable to any failure of the deliveries (performance of contract) due to the inconsistency or incompatibility with national or international regulations, particularly export control regulations, embargo or other sanctions. The Customer shall provide the Supplier timeously with all the necessary information and documents required for the export/shipment/import of the Goods.
- 3.7 In the event the Customer cancels the order, cancellation charges shall be levied against the Customer as per the following rate: -
- a) Down payment will be forfeited if the Customer does not take goods within 40 days
  - b) For order cancellations,
    - Order cancelled within 5 business days from the date of the order : 25% of the price of the goods ordered;
    - Order cancelled after 10 business days from the date of the order : 50% of the price of the goods ordered; and
    - Order cancelled after 20 business days from the date of the order : 100% of the price of the goods ordered.

#### **4. Quality of Goods**

- 4.1 The Supplier warrants that for a period of 18 months from the date of delivery (Warranty Period) or 12 months from date of commissioning, whichever comes first, the Goods shall:
- (a) conform in all material respects with their description; and
  - (b) be free from material defects in design, material and workmanship (the Warranty).

4.2 Subject to clause 4.3, in the event:

- (a) the Customer gives notice in writing during the Warranty Period within a reasonable time of discovery that some or all of the Goods do not comply with the Warranty;
- (b) the Supplier is given a reasonable opportunity of examining such Goods; and
- (c) the Customer (if asked to do so by the Supplier) returns such Goods to the Supplier's place of business at the Customer's cost for testing and in the reasonable opinion of the Seller the Goods do not comply with the Warranty, the Supplier shall, at its option, repair or replace the defective Goods, or refund the price of the defective Goods in full and refund the costs of returning the Goods to the Supplier subject to the Customer having fully paid for the Goods.

4.3 The Supplier shall not be liable for the Goods' failure to comply with the Warranty if:

- (a) the Customer makes any further use or tempering of such Goods after giving a notice in accordance with clause 4.2(a);
- (b) the defect arises because the Customer has failed to follow the Supplier's instructions (whether oral or in writing) as to the storage, installation, commissioning, use or maintenance of the Goods or (if there are none) good trade practice;
- (c) the defect arises from any drawing, design or Goods Specification supplied by the Customer;
- (d) the Customer alters, tempers or repairs such Goods without the written consent of the Supplier and/or its agent;
- (e) the defect arises as a result of fair wear and tear, wilful damage, negligence, or in abnormal working conditions by the Customer, and
- (f) The customer fails to make full payment of the goods and/or for the service rendered.

4.4 Unless stated otherwise in this clause 4, the Supplier shall not be liable to the Customer in respect of the Goods' failure to comply with the Warranty.

- 4.5 Where applicable, the Supplier is not obligated to accept delivery of or work on returned Goods unless the decontamination instructions have been adhered to. [Instructions can be found at [www.my.endress.com](http://www.my.endress.com)]
- 4.6 The terms of these Conditions shall also apply to any repaired or replacement Goods supplied by the Supplier under clause 4.2.
- 4.7 These conditions shall apply to any repaired or replacement of Goods supplied by the Supplier under clause 4.2. No extension of Warranty Period shall be implied from the Supplier's repairing of, changes to, or replacement of all or part of the Goods during the Warranty Period.

## **5. Title and risk**

- 5.1 Unless otherwise agreed in writing, the passing of the risk in the Goods shall be in accordance to specified mode of transport vis-à-vis the applicable terms of Incoterms 2010.
- 5.2 Title to the Goods shall remain with the Supplier and the Title shall only pass to the Customer upon the Supplier's receipt of payment in full (in cleared funds) for the Goods that the Supplier has supplied to the Customer, in which case title to the Goods shall pass at the time of payment of all such sums.
  - (a) In the event the Customer resells the Goods, the Title of the Goods shall pass to the Customer at the time specified in clause 5.3 below.
- 5.3 Subject to clause 5.4, the Customer may resell or use the Goods in the ordinary course of its business (but not otherwise) before the Supplier's receipt of payment for the Goods. However, if the Customer resells the Goods before that time:
  - (a) it does so as principal and not as the Supplier's agent; and
  - (b) title to the Goods shall pass from the Supplier to the Customer upon the resale by the Customer takes place.
- 5.4 In the event before the Title of the Goods passes to the Customer, any of the events listed in clause 11.3(b) to clause 11.3(d) below occurs, then, without prejudice to any other rights or remedy the Supplier may have under the Contract:
  - (a) the Customer's right to resell Goods or use them in the ordinary course of its business ceases immediately; and

- (b) the Supplier may at any time:
  - (i) require the Customer to deliver to the Supplier all Goods in its possession which have not been resold, or irrevocably incorporated into another product; and
  - (ii) if the Customer fails to do so promptly, the Supplier shall entitle to enter any premises of the Customer during office hours where the Goods are stored in order to recover them, and the Customer shall grant all the cooperation required for such removal.

## **6. Supply of Services**

- 6.1 The Supplier shall provide the Services to the Customer in accordance with the Service Specifications in all material respects in the Contract.
- 6.2 In the event within 90 days from the date of the order for service, the Customer has refused, neglected and/or failed to allow and/or provide for the Supplier's representatives to carry out the requested Services, it shall be deemed as a breach by the Customer under this Contract, the Supplier shall then entitle to forfeit any money already paid by the Customer and all applicable warranties shall be voided.
- 6.3 The Supplier reserves the rights to make any changes to the Services which are necessary to comply with any applicable law or safety requirement, or which do not materially affect the nature or quality of the Services, and the Supplier shall notify the Customer accordingly in any such event.
- 6.4 The Supplier warrants to the Customer that the Services will be provided using reasonable care and skill.

## **7. Customer's obligations**

- 7.1 The Customer shall:
  - (a) ensure that the terms of the Order and (if submitted by the Customer) the Goods Specification are complete and accurate;
  - (b) co-operate with the Supplier in all matters relating to the Services;
  - (c) provide the Supplier, its employees, agents, consultants and subcontractors, with safe and reasonable access to the Customer's premises, office accommodation and other facilities as reasonably required by the Supplier to properly provide the Services;

- (d) timeously provide the Supplier with such information and materials as the Supplier may reasonably require to supply the Services, and ensure that such information is accurate in all material respects;
  - (e) prepare the Customer's premises for the supply of the Services; and
  - (f) obtain and maintain all necessary licences, permissions and consents which may be required for the Services before the date on which the Services will commence.
  - (g) keep and maintain (at no cost to the Supplier) all materials, equipment, documents and other property of the Supplier (Supplier Materials) at the Customer's premises in safe custody at its own risk, maintain the supplier Materials in good condition until returned to the Supplier, and not dispose of or use the Supplier Materials other than in accordance with the Supplier's written instructions or authorisation.
- 7.2 If the Supplier's performance of any of its obligations in respect of the Services is prevented or delayed by any act or omission by the Customer or failure by the Customer to perform any relevant obligation (Customer Default) pursuant to this Contract:
- (a) the Supplier shall, without prejudice to its other rights or remedies, have the right to suspend or delay the performance of the Services (or any part thereof) until the Customer rectify the Customer Default;
  - (b) the Supplier shall not be liable for any costs or losses sustained or incurred by the Customer arising directly or indirectly from the Customer Default; and
  - (c) the Customer shall reimburse the Supplier on written demand for any costs or losses sustained or incurred by the Supplier arising directly or indirectly from the Customer Default.

## **8. Charges and payment**

- 8.1 The charges for Services shall be agreed between the Customer and Supplier base on time and materials prior to any Services being provided:
- (a) the charges shall be calculated in accordance with the Supplier's standard daily fee rates and/or Lump Sum, as set out in the Order Confirmation;
  - (b) the number of hours in one working day shall be agreed between the Customer and Supplier (the Supplier's normal working hours on a Business Day is between 0830 – 1730 hours);

- (c) if the number of agreed hours is exceeded, the Supplier shall be entitled to charge overtime rates on a pro-rata basis for each part day or for any time worked by individuals whom it engages on the Services outside the hours referred to in clause 8.1(b) as follows:
  - (i) an additional 50% on the standard daily fee rate for work carried out on week days, after the Supplier's working hours;
  - (ii) an additional 50% on the standard daily fee rate for work carried out on a Saturday; and
  - (iii) an additional 100% on the standard daily fee rate for work carried out on a Sunday and Public Holidays.
  
- 8.2 The Supplier reserves the rights to revise the price of Goods in the event to the applicable forex fluctuations exceeding 5% of the price of the Goods.
  - (a) The Customer shall pay each invoice submitted by the Supplier in accordance to the agreed payment terms in the Order Confirmation and credited fully into the nominated bank account in writing by the Supplier. The individual bank charges via online payment by the Customer shall be solely borne by the Customer.
  
- 8.3 All amounts payable by the Customer under the Contract are exclusive of Goods & Services Tax (GST) chargeable from time to time. Where any taxable supply for GST purposes is made under the Contract by the Supplier to the Customer, the Customer shall, on receipt of a valid tax invoice from the Supplier, pay to the Supplier such additional amounts in respect of GST as are chargeable on the supply of the Services or Goods at the same time as payment is due for the supply of the Services or Goods.
  
- 8.4 If the Customer fails to make any payment due to the Supplier under the Contract by the due date for payment, then the Customer shall pay interest on the overdue amount at the rate of 1.5% per month. Such interest shall accrue on a daily basis from the due date until actual payment of the overdue amount, whether before or after Court judgment. The Customer shall pay the interest together with the overdue amount.
  
- 8.5 The Customer shall pay all amounts due under the Contract in full without any set-off, counterclaim, deduction or withholding except as required by law. The Supplier may, without prejudice to its other rights or remedies, set off any amount owing to it by the Customer against any amount payable by the Supplier to the Customer. Time for payment shall be of the essence of the Contract.

## **9. Intellectual Property Rights**

- 9.1 All Intellectual Property Rights in or arising out of or in connection with the Contract and/or the Services shall be solely owned by the Supplier.



- 9.2 The Customer acknowledges that, in respect of any third party Intellectual Property Rights in the Services, the Customer's use of any such Intellectual Property Rights is conditional on the Supplier obtaining a written licence from the relevant licensor on such terms as will entitle the Supplier to license such rights to the Customer.

## **10. Limitation of liability**

- 10.1 Nothing in these Conditions shall limit or exclude the Supplier's liability for:

- (a) death or personal injury caused by its negligence, or the negligence of its employees, agents or subcontractors; or
- (b) fraud or fraudulent misrepresentation; or
- (c) any other applicable Malaysian statute laws.

- 10.2 Subject to clause 10.1:

- (a) the Supplier shall under no circumstances whatever be liable to the Customer, whether in contract, tort (including negligence), breach of statutory duty, or otherwise, for any loss of profit, loss of business, loss of goodwill, loss of opportunity or any indirect or consequential loss arising under or in connection with the Contract ; and
- (b) the Supplier's total liability to the Customer in respect of all other losses arising under or in connection with the Contract, whether in contract, tort (including negligence), breach of statutory duty, or otherwise, shall in no circumstances exceed the applicable price paid by the Customer for the Goods and/or Services from which the claim arises.

- 10.3 This clause 10 shall survive termination of the Contract.

## **11. Termination**

- 11.1 Without prejudice its other rights or remedies, either party may terminate the Contract by giving the other party not less than 3 months' written notice.
- 11.2 Without prejudice to its other rights or remedies, the Customer may terminate the Contract on 30 days' notice by giving such notice in writing to the Supplier, if the Supplier commits a material breach of its obligations under this Contract and (if such breach is remediable) fails to remedy that breach within 21 days after receipt of notice in writing to do so.

11.3 Without prejudice to its other rights or remedies, the Supplier may, at its discretion, terminate the Contract or suspend the supply of Services or all further deliveries of Goods under the Contract or any other contract between the Customer and the Supplier with immediate effect by giving written notice to the Customer in the event the Customer commits a material breach of its obligations under this Contract and if such breach is remediable, fails to remedy that breach within 7 days after receipt of notice in writing to do so. The material breach includes but not limited to:

- (a) the Customer fails to pay any amount due under this Contract by the due date for payment.
- (b) the Customer takes any step or action in connection with its entering administration, provisional liquidation or any composition or arrangement with its creditors (other than in relation to a solvent restructuring), being wound up (whether voluntarily or by order of the court, unless for the purpose of a solvent restructuring), having a receiver appointed to any of its assets or ceasing to carry on business or, if the step or action is taken in another jurisdiction, in connection with any analogous procedure in the relevant jurisdiction;
- (c) the Customer suspends, or threatens to suspend, or ceases or threatens to cease to carry on all or a substantial part of its business; or
- (d) the Customer's financial position deteriorates to such an extent that in the Supplier's sole opinion the Customer's capability to adequately fulfil its obligations under the Contract has been placed in jeopardy.

11.4 Upon termination of the Contract for any reason:

- (a) the Customer shall immediately pay to the Supplier all of the Supplier's outstanding unpaid invoices and interest and, in respect of Services supplied but for which no invoice has yet been submitted, the Supplier shall submit an invoice, which shall be payable by the Customer immediately on receipt; (what about order that has been placed and cannot be cancelled. Can Supplier bill customer for this as well?)
- (b) the accrued rights and remedies of the parties as at termination shall not be affected, including but not limited to the right to claim damages in respect of any breach of the Contract which existed at or before the date of termination or expiry.

## **12. Force Majeure Event**

12.1 For the purposes of this Contract, Force Majeure Event means an event beyond the reasonable control of the Supplier including but not limited to strikes, lock-outs or other

industrial disputes (whether involving the workforce of the Supplier or any other party), failure of a utility service or transport network, act of God, war, riot, civil commotion, malicious damage, compliance with any law or governmental order, rule, regulation or direction, accident, breakdown of plant or machinery, haze, fire, flood, storm or default of suppliers or subcontractors.

- 12.2 The Supplier shall not be liable to the Customer as a result of any delay or failure to perform its obligations under this Contract as a result of a Force Majeure Event.
- 12.3 If the Force Majeure Event prevents the Supplier from providing any of the Services and/or Goods for more than 12 consecutive weeks from the date of the Force Majeure Event, the Supplier shall, without prejudice to its other rights or remedies, have the right to terminate this Contract immediately by giving written notice to the Customer.

### **13. General**

#### 13.1 Assignment and other dealings

- (a) The Supplier may at any time assign, transfer, mortgage, charge, subcontract or deal in any other manner with all or any of its rights under the Contract and may subcontract or delegate in any manner any or all of its obligations under the Contract to any third party.
- (b) The Customer shall not, without the prior written consent of the Supplier, assign, transfer, charge, subcontract, declare a trust over or deal in any other manner with all or any of its rights or obligations under the Contract.

#### 13.2 Notices

- (a) Any notice or other communication given to a party under or in connection with this Contract shall be in writing via registered post or facsimile addressed to that party at its registered office (if it is a company) or its principal place of business (in any other case). A notice, demand or other communication served by registered post shall be deemed duly served on an address three (3) business days after posting, and a notice, demand or other communication sent by facsimile transmission shall be deemed to have been served at the time of transmission completed.
- (b) The provisions of this clause shall not apply to the service of any proceedings or other documents in any legal action.

**13.3 Severance**

If any provision or part-provision of the Contract is or becomes invalid, illegal or unenforceable, it shall be deemed modified to the minimum extent necessary to make it legal and enforceable. If such modification is not possible, the relevant provision or part-provision shall be deemed deleted, and the remaining provisions of this Conditions shall not be affected to the extent still applicable.

**13.4 Waiver**

A waiver of any right under the Contract or law shall be in writing and shall not be deemed to be a waiver of any subsequent breach or default.

**13.5 No partnership or agency**

Nothing in the Contract is intended to, or shall be deemed to, establish any partnership or joint venture between any of the parties. Neither party shall have authority to act as agent for, or to bind, the other party in any way.

**13.6 Third parties**

A person who is not a party to the Contract shall not have any rights to enforce its terms.

**13.7 Protection of Personal Data**

In the performance of the Contract, both Parties shall comply with their obligations as a data user, as defined in the Personal Data Protection Act 2010.

**13.8 Variation**

Except as set out in these Conditions, any variation of the Contract, including the introduction of any additional terms and conditions shall be agreed in writing and signed by the Supplier.

**13.9 Governing law**

This agreement and any dispute or claim arising out of or in connection with it or its subject matter or formation (including non-contractual disputes or claims) shall be governed by and construed in accordance with the Malaysian law.

**13.10 Jurisdiction**

Each party irrevocably agrees that the Malaysian courts shall have exclusive jurisdiction to settle any dispute or claim arising out of or in connection with this Contract or its subject matter or formation (including non-contractual disputes or claims).

**13.11 Time whenever mentioned in this Agreement shall be deemed to be of the essence of this Contract.**

## 14 Interpretation

In these Conditions, the following definitions apply:

- 14.1 **Business Day:** a day other than a Saturday, Sunday or any gazetted public holiday in Malaysia where the Goods or Services are to be located or performed.
- 14.2 **Commencement Date:** has the meaning set out in clause 1.2.
- 14.3 **Conditions:** these terms and conditions as amended from time to time in accordance with clause 1.5.
- 14.4 **Contract:** the contract between the Supplier and the Customer for the supply of Goods and/or Services in accordance with these Conditions.
- 14.5 **Customer:** the person or firm who purchases the Goods and/or Services from the Supplier.
- 14.6 **Deliverables:** the deliverables set out in the Order.
- 14.7 **Delivery Location:** has the meaning set out in clause 3.1.
- 14.8 **Force Majeure Event:** has the meaning given to it in clause 12.
- 14.9 **Goods:** the goods (or any part of them) set out in the Order.
- 14.10 **Goods Specification:** any specification for the Goods, including any relevant plans or drawings that are agreed in writing by the Customer and the Supplier.
- 14.11 **Intellectual Property Rights:** patents, rights to inventions, utility innovations, copyright and related rights, trade marks, industrial design, business names and domain names, rights in get-up, goodwill and the right to sue for passing off, rights in designs, database rights, rights to use, and protect the confidentiality of, confidential information (including know-how), and all other intellectual property rights, in each case whether registered or unregistered and including all applications and rights to apply for and be granted, renewals or extensions of, and rights to claim priority from, such rights and all similar or equivalent rights or forms of protection which subsist or will subsist now or in the future in any part of the world.
- 14.12 **Order:** the Customer's order for the supply of Goods and/or Services, as set out in the Customer's purchase order form or the Customer's written acceptance of the Supplier's quotation, as the case may be.

- 14.13 Order Confirmation: the Supplier's order confirmation issued to the Customer.
- 14.14 Pre-existing Materials: all Intellectual Property Rights, Documents, information and materials owned or provided by the Supplier relating to the Goods and/or Services which existed prior to the commencement of this agreement, including computer programs, data, reports and specifications.
- 14.15 Services: the services, including the Deliverables, supplied by the Supplier to the Customer as set out in the Service Specification below.
- 14.16 Service Specification: the description or specification for the Services provided by the Supplier to the Customer.
- 14.17 Supplier: Endress + Hauser (Malaysia) Sdn Bhd
- 14.18 Supplier Materials: has the meaning set out in clause 7.1(g)
- (General Terms & Conditions of Sale – 30 December 2016 Version)