

# APM Technica AG

## GENERAL TERMS & CONDITIONS OF SALE AND DELIVERY ("GTC")

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### 1. Scope of Application

1.1 These General Terms & Conditions of Sale and Delivery ("GTC") shall apply to (a) the sale of products and systems ("**Products**") by APM Technica AG ("**APM**") to customers ("**Customers**") and/or (b) the execution of work on material provided by the Customers ("**Material Provided**").

1.2 These GTC shall also apply if the Customer submitted its own terms and conditions to APM and APM did not expressly refuse them. Any undertaking entered in deviation of these GTC shall be binding only if and to the extent agreed by APM in writing.

### 2. Conclusion of Contract

2.1 A contract shall become legally binding between APM and the Customer ("**Contract**") only after the issuance of an order confirmation by APM or by its conclusive action, such as, but not limited to, immediate delivery of the Products. APM's quotation and order confirmation in conjunction with these GTC shall form the final contractual provisions.

2.2 All descriptions and representations by APM on printed, digital or electronic media as well as any technical documentation such as, but not limited to, descriptions, drawings, brochures shall not have any legally binding effect and may be modified by APM at any time without notice. Only those descriptions and representations set out in a Contract shall be legally binding.

2.3 If a Customer requested engineering changes under a Contract, such requests shall become legally effective between the parties only pursuant to Clauses 2.1 and 5.3.

### 3. Intellectual Property Rights of the Documentation

Any Product documentation on printed, digital or electronic media such as, but not limited to, studies, blue prints, reports, brochures, photographs, software ("**Documentation**") shall remain the intellectual property of APM; specifically, any copyrights to the Documentation shall remain with APM. The Documentation shall neither be copied nor otherwise duplicated, nor be re-engineered, nor used for the copying or manufacturing of any products, nor be made available to any third party, without the express prior consent of APM.

### 4. Customer Information and Material Provided

Should APM need information, services and/or Material Provided from the Customer in order to execute a Contract ("**Information and Material Provided**"), then the Customer, or a third party appointed by it, shall warrant their timely delivery, accurateness, completeness and the required quality to APM. APM shall be entitled to rely on such Information and Material provided without any verification. APM shall inform the Customer forthwith if it realized that the Information and Material provided are faulty. The Customer shall keep APM harmless and indemnified and on request shall defend APM from and against any loss or damage, costs and expenses arising out of or in relation with such faulty Information and Material provided.

### 5. Price

5.1 To the extent not otherwise agreed in writing between the parties, the prices shall be deemed to be (a) "ex works" APM premises in Heerbrugg (Incoterms 2010) for deliveries made within Switzerland and (b) "FCA" APM premises in Heerbrugg (Incoterms 2010) for deliveries made abroad, in each case in Swiss Francs ("CHF"), net of any discounts or deductions, customarily packaged, net of any freight and insurance costs, net of any taxes and duties such as, without limitation, value added or sales taxes, customs duties, fees and risk premiums, all of which are for the Customer's account.

5.2 If the Customer requested special packaging or provided packaging material, APM shall be entitled to invoice for additional costs incurred as a consequence.

5.3 Any price increase which is not due to APM or is a consequence of Customer's engineering change request pursuant to Clause 2.3 entitle APM to charge these to the Customer.

### 6. Costs of Freight and Insurance

Only upon Customer's request, APM shall arrange for freight and marine insurance cover against loss, theft, destruction and any other damage of the Products in transit for the account and charge of the Customer. Upon delivery of the Products, any transport damage and other anomalies resulting from the transport must be forthwith acknowledged by the carrier. The extent of and the presumed reasons for any damage shall be set out in such acknowledgement.

### 7. Terms of Payment

7.1 Payments shall become due and payable within 30 days as of date of invoice unless expressly otherwise agreed in the Contract. The payment shall be deemed received when credited to APM's account.

7.2 The due date shall be deemed legally binding even if for reasons not imputable to APM the transport, delivery, handover or receipt of the Products have been delayed or rendered impossible, or APM has to execute additional work on the Products. Set-offs, deductions and retentions of amounts with the invoiced amount shall be excluded unless expressly agreed by APM beforehand.

7.3 Past due payments shall entitle APM to charge late interest effective as of the due date at the CHF 3-month LIBOR increased by 5% in addition to the invoiced amount.

7.4 Past due payments and – in APM's sole judgment – the deterioration of Customer's creditworthiness, shall entitle APM to immediately declare any outstanding amounts due and payable. In addition, APM shall be entitled (a) to hold off the delivery of Products, or (b) to request prepayment of or an irrevocable, unconditional bank guarantee issued by a first class Swiss bank for the invoiced amount, or (c) to rescind the Contract and claim for damages.

### 8. Reservation of Title, Security Interest

APM shall be entitled to request at its discretion from the Customer to arrange for a reservation of title on and/or a security interest under local law for its delivered Products. Should the Customer refuse to execute such request, APM shall be entitled to rescind the Contract without owing any damages or to withhold the delivery of the Products until such reservation of title and/or security interest has been executed.

### 9. Deliveries and Dates of Delivery

9.1 Unless anything has been agreed to the contrary, deliveries are deemed (a) "ex works" APM premises in Heerbrugg (Incoterms 2010) for deliveries made within Switzerland and (b) "FCA" APM premises in Heerbrugg (Incoterms 2010) for deliveries made abroad.

9.2 The dates of deliveries indicated by APM shall be deemed indicative dates only and not fixed dates. APM shall forthwith inform the Customer if a delivery date cannot be kept. IN SUCH CIRCUMSTANCE, IN NO EVENT SHALL APM BECOME LIABLE FOR DIRECT, INDIRECT AND/OR CONSEQUENTIAL DAMAGES THAT MAY BE ARISING FOR CUSTOMER, SUCH AS, BUT NOT LIMITED TO, LOSS OF SALES AND/OR PROFITS.

9.3 APM shall be entitled to make partial deliveries unless anything to the contrary has been expressly agreed.

9.4 The time of delivery shall be counted as of the date of APM's order confirmation, provided that all formalities have been fulfilled, any possible export, import and other authorization received, and all technical issues cleared and accepted by APM. If any of the foregoing has gone missing, the time of delivery shall be postponed until such time when such missing item has been fulfilled.

9.5 The time of delivery shall be extended in the following cases:

9.5.1 Force majeure, i.e. in case of occurrences that are beyond APM's reasonable control and/or not predictable even when applying reasonable due diligence. In such a circumstance, APM's obligations under the Contract shall be postponed and Customer shall not be entitled to claim for loss and damages under any title. Should the force majeure event last longer than 3 months, either party may at its convenience rescind the Contract whereby neither party shall be entitled to claim for loss and damage from the other party;

9.5.2 If the Customer was in default under any clause of the Contract, in particular if payments are past due. If payments are made through an irrevocable, unconditional letter of credit ("L/C") confirmed by a first class Swiss bank, such L/C shall be issued ahead of time before the delivery of the Products;

9.5.3 If the Customer requested engineering changes after an order confirmation has been issued by APM, provided that APM agreed to such request;

9.5.4 If the Customers made available Information and Material provided pursuant to Clause 4 to APM which are faulty or incomplete or late.

### 10. Incoming Inspection and Obligation to Notify Defects

The Customer shall proceed to a full-fledged incoming inspection immediately after the delivery of the Products, including a functional test of the Products. The Customer shall notify APM in writing about any defects of

the Products, delivery of wrong Products, wrong quantities or unsatisfactory services within 8 days as of the date of delivery, failing which the Products shall be deemed accepted. The Customer shall give APM the opportunity of remedy pursuant to Clause 11. In such circumstance, the Customer shall be prevented from claiming under any and all titles for loss or damage or rescinding the Contract.

#### **11. Product Warranty**

11.1 APM warrants to Customer only that the Products will be free from defects in workmanship and materials, under normal use, provided any and all operating and maintenance instructions of the Product are strictly respected.

11.2 The warranty period expires upon the expiry dates of the Products or is indicated in APM's quotation or order confirmation. The warranty period may therefore vary from Product to Product.

11.3 The sole remedy imposed on APM under this warranty is, at APM's sole option, to repair or replace the defective Product or parts thereof at APM's cost and expense. If work on Material provided was defective, the warranty will only cover the work done but not the Material provided. The warranty period for repaired or replaced Products is indicated on the delivery note. All replaced Products or parts thereof shall become the property of APM except for Material provided.

11.4 Customer's sole remedy for breach of the warranty shall be the express warranty in Clauses 11.1 to 11.3. The express warranty is exclusive and in lieu of all other warranties, terms or conditions, express or implied, either in fact or by operation of law, statutory or otherwise, including warranties, terms or conditions of merchantability, fitness for a particular purpose, satisfactory quality and non-infringement, all of which are expressly disclaimed.

11.5 APM shall not be liable if the alleged defect was caused by Customer's or any other person's misuse, neglect, improper installation, unauthorized attempt to open, repair or modify the Product, inadequate maintenance, disregard of operating instructions, excessive load or stress, normal wear and tear, or any other cause beyond the range of its intended use, by accident, fire, or other hazards, or any other cause not due or attributable to APM. This warranty does not cover physical damage to the Product or malfunctions resulting from the use of the Product in conjunction with any sort of ancillary or peripheral equipment if APM determines that there is no fault with the Product itself.

11.6 This express warranty does neither cover consumables, such as, without limitations, batteries, bulbs and fuses, which Purchaser can replace itself, nor epoxy compounds, nor calibrations of the Products made by the Customer after the delivery in accordance with the users' manual. Third party products shall be subject to such third parties' warranty conditions.

11.7 Purchaser must contact APM within the applicable warranty period to obtain a return material authorization ("**RMA**"). Dated proof of original purchase from APM and a detailed description of the defect will be required. APM shall not be responsible for Products or parts thereof received without a RMA and is entitled to return them to Purchaser at Purchaser's cost and expense. Purchaser must ship the defective Products and/or parts thereof at its own cost and expense to APM while repaired or replacement Products and/or parts will be shipped to Purchaser at APM's cost and expense. APM shall not be liable for damages in transit or loss of the Products. Such repaired Products or parts thereof will be shipped as soon as reasonably possible.

11.8 Cost of appraisal of Products that are alleged to be defective shall be borne by APM. If the alleged defect cannot be identified under commercially reasonable conditions by APM, the costs of appraisal as well as the costs of returning the Products shall be borne by Customer. The foregoing shall also apply in case of repair after the lapsing of the warranty period, if APM cannot identify the alleged defect.

11.9 APM shall be entitled to decide on the place of performance of the warranty work at its discretion.

11.10 APM is entitled to refuse any warranty work as long as the Customer is in default under the Contract or payments are past due.

#### **12. Limitation of Liability**

12.1 TO THE FULLEST EXTENT PERMITTED UNDER APPLICABLE LAW, APM EXCLUDES ANY LIABILITY, WHETHER BASED IN CONTRACT, STRICT LIABILITY, WARRANTY OR TORT (INCLUDING NEGLIGENCE), OR ANY OTHER BASIS WHATSOEVER,

FOR INCIDENTAL, CONSEQUENTIAL, INDIRECT, SPECIAL, OR PUNITIVE DAMAGES OF ANY KIND, OR ANY COSTS OF PROCUREMENT OF SUBSTITUTE PRODUCTS BY CUSTOMER, OR FOR THE LOSS OF REVENUE OR PROFITS, LOSS OF BUSINESS, LOSS OF INFORMATION OR DATA, OR FINANCIAL LOSS ARISING OUT OF OR IN RELATION WITH THE SALE, INSTALLATION, MAINTENANCE, USE, PERFORMANCE, FAILURE, OR INTERRUPTION OF THE PRODUCTS, EVEN IF APM HAS BEEN ADVISED OR SHOULD HAVE KNOWN OF THE POSSIBILITY OF SUCH DAMAGES OR LOSSES. WITHOUT LIMITING THE FOREGOING, APM LIMITS ITS LIABILITY, AT ITS SOLE OPTION, TO REPLACEMENT OR REPAIR OF THE PRODUCT. THIS LIMITATION OF LIABILITY FOR DAMAGES WILL NOT BE AFFECTED IF ANY REMEDY PROVIDED HEREIN SHALL FAIL OF ITS ESSENTIAL PURPOSE.

12.2 ANY LIABILITY FOR MATERIAL PROVIDED IS HEREBY EXPRESSLY EXCLUDED.

12.3 If Material provided has been damaged by APM intentionally or by gross negligence, APM shall be liable according to the law; in all other cases, APM shall be liable only for the direct material and manufacturing cost of labor net of any overhead costs.

#### **13. Term and Termination**

13.1 A Contract expires when it is fulfilled.

13.2 Termination for convenience: Either party may terminate a Contract, especially in case of successive deliveries, at any time by respecting a 3-month notice period. In such circumstance, APM shall carry on the deliveries throughout the notice period in accordance with the terms of the Contract. The right of any party to claim for loss or damage is hereby expressly waived.

13.3 Termination for cause: Either party may terminate a Contract with immediate effect and shall be entitled to claim for any loss and damage in the following cases:

13.3.1 debt collection and/or debt settlement proceedings (in particular in the context of insolvency) are instituted against the terminated Party; cessation of the business, sale or assignment of the business; or the existence of other important causes which reasonably prompt the terminating party's concerns about a loss or other damage;

13.3.2 breach of Contract such as, but not limited to, ongoing past due payments, provided that, to extent reasonably possible, the terminating party grants to the terminated party a 30-day period to remedy the contractual situation ("**Remedy Period**") and the terminated party fails or omits to remedy, in which case the terminating party shall be entitled to claim for any loss and damage.

#### **14. Applicable law and Jurisdiction**

These GTC and each Contract hereunder shall be governed and interpreted according to the laws of Switzerland, excluding its conflict of law provisions and the United Nations Convention on the International Sale of Goods dated 11 April 1980. The ordinary courts at the place of business of APM at Heerbrugg, Switzerland, shall be competent. APM shall however, at its sole discretion, be entitled to take legal action against Customer at the courts competent at Customer's place of business or domicile.

#### **15. Severability**

If a competent court of law was to declare any of the provisions of these GTC and/or Contract as null and void or unenforceable for whatever reason, the validity of all other provisions shall not be affected. In such instance, the null and void or unenforceable provisions shall be replaced by other legally valid or enforceable provisions, which shall within the limits of the law closest reflect the original economic intentions of the Parties.

#### **16. Modifications and Waiver**

No supplement, modification or waiver of these GTC and/or a Contract shall be binding unless executed in writing by both Parties. No waiver of any of the provisions of this Agreement shall constitute, or shall be deemed constituting, a waiver of any other provisions hereof (whether or not similar), nor shall any such waiver constitute a continuing waiver unless otherwise expressly provided.

Heerbrugg, July 2013

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