

# GENERAL CONDITIONS for companies affiliated to the Dutch Association of Companies in the Bodywork Sector (Nederlandse vereniging van ondernemers in het carrosseriebedrijf (FOCWA-conditions))

## 1. Definitions

In these conditions, the terms below are defined as follows:

- 1.1 User: a member of the following associations: FOCWA Schadeherstel, FOCWA Specialisten or CarrosserieNL who uses these general conditions in an agreement.
- 1.2 Other Party: the natural or legal person, or his/her legal successor, for whom services are performed, goods are delivered, work is executed or any other legal act is performed by or on behalf of the User.
- 1.3 Consumer: an other party, a natural person who is not acting in the exercise of a business or a profession.
- 1.4 Object: the item referred to in the User's offer or in the agreement between the User and the other party.
- 1.5 Consumer dispute: a dispute between the User and a consumer.
- 1.6 Warranty Company: the User who is a member of the approved repairers' association, FOCWA Schadeherstel.
- 1.7 Insurance Compensation Fund: the User who is affiliated to the foundation, Stichting FOCWA Zekerheidsfonds.

## 2. Applicability

- 2.1 These General Conditions apply to and form an integral part of all agreements between the User and the other party, and to all ensuing agreements and further (legal) acts on the part of the User whether with, for or in dealings with the other party. Once they come into effect, these General Conditions will remain applicable to all new agreements between the parties, unless expressly agreed otherwise.
- 2.2 These General Conditions can also be inspected by the other party at the District Court of The Hague.
- 2.3 These General Conditions will at all times prevail over those (if any) of the other party. In so far as is necessary, the applicability of the other party's general conditions will be expressly rejected.
- 2.4 If any part of this agreement proves to be null or invalid or otherwise unenforceable, this will not affect the validity of the other provisions hereof. Any such null or invalid or otherwise unenforceable provision will be replaced by one which most closely approximates the intent and purpose of the original provision to the maximum extent permitted by law.
- 2.5 In the event of a conflict between the content of the Agreement between the User and Other Party and these Conditions, the provisions of the Agreement will prevail, provided always that this Agreement has been agreed in writing.

## 3. Proposals and offers

- 3.1 Any proposal (which expressly includes any offer) emanating from the User will be deemed to be without obligation, even where the proposal includes an acceptance period or where it otherwise ensues that the proposal is irrevocable.
- 3.2 Where the type of proposal or the proposal proper contains no acceptance period, the proposal will remain valid for a period of two weeks after its date.
- 3.3 The User shall exercise due care in the formulation of offers, price lists, brochures and any other particulars that may have a bearing on (future) legal relationships between the User and the Other Party. However all works to be ultimately executed and/or the costs associated therewith may vary, typesetting and printing errors excepted. The User therefore cannot guarantee the accuracy and completeness of such particulars.

## 4. Changes

- 4.1 Varying conditions or changes in the Agreement will only be valid subject to agreement in writing between the parties. However they will not form an integral part of these General Conditions.
- 4.2 Where it transpires during the execution of works that they cannot be executed or fully executed due to the condition of the object or associated parts or because of the goods supplied by the Other Party, the User shall bring this to the attention of the Other Party. The parties shall then consult with each other to determine whether the Agreement should be changed, provided always that no relevant provisional sums or offsettable amounts apply, as referred to in Article 5. Any such agreed changes in the Agreement will only become binding once they have been agreed in writing (and signed).

## 5. Provisional sums and contract variations

- 5.1 Where provision is made in an Agreement for specific works for the settlement of one or more provisional sums or offsettable amounts, the actual works as well as the supplied and/or used or reused quantities will be settled accordingly.
- 5.2 Where anticipated by the User that the relevant provisional sum will exceed the amount agreed in the Agreement by more than 10%, the User shall be obliged to bring this to the attention of the Other Party. The parties shall then consult with each other to determine whether the Agreement should be amended. Any such agreed changes in the Agreement will only become binding once confirmed in writing by the User and both parties have signed off on such confirmation.
- 5.3 In such circumstances as referred to in Article 5.2, both the User and the Other Party shall be at liberty to terminate the Agreement, without any notice of default being required. All works performed by the User up to the termination date will be charged accordingly to the Other Party.

## 6. Prices

- 6.1 Where the Other Party is a consumer, the prices will be inclusive of VAT and other levies, unless the User states otherwise. If the Other Party is not a consumer, the prices will be exclusive of VAT and other levies, unless the User states otherwise in writing.
- 6.2 The User shall be at liberty to adjust the price accordingly after a proposal has been made by the User or subsequent to the commencement of an Agreement where changes come into effect that affect the prices of auxiliary materials, raw materials or parts and wages or due to any other price-determining factors prior to the agreed deadline for completion or delivery and/or termination of the works. The consumer shall have the right to terminate the Agreement if the price change is deemed to be unacceptable based on the standards of reasonableness and fairness.
- 6.3 Price increases arising in connection with additions and/or changes in the Agreement requested by the Other Party will be chargeable to the Other Party.
- 6.4 If requested by the Other Party, an itemized account of the executed works will be furnished by the User. Where a price has been agreed in advance, an itemised list of the relevant works will be furnished on request to the Other Party.
- 6.5 Any dispute in respect of such lists or invoices should be made known by the Other Party within 10 days of receipt thereof, at the risk of forfeiting all rights.

## 7. Payment

- 7.1 Payment should be made prior to the completion or delivery of the object, unless agreed otherwise between the parties.
- 7.2 Where payment after completion or delivery of the object has been agreed, the Other Party shall

be obliged to pay the monies or balance payment due within thirty days of the invoice date, unless a different period has been specified by the User in the invoice.

- 7.3 However, monies due to the User will be deemed payable forthwith and in full, and the Other Party will be simultaneously placed in default, in the event that:
  - a. the Other Party applies for or is granted a moratorium or is subject to bankruptcy proceedings, or is declared bankrupt or assigns his/her estate;
  - b. the entirety and/or a part of the Other Party's assets are subject to attachment;
  - c. the Other Party ceases or alienates its business operations or a significant part thereof, or transfers shares therein to a third party or changes the nature thereof.
- 7.4 Debts owed by the Other Party – for whatever reason – must be paid to the User either in cash or by bank transfer.
- 7.5 In any mutual agreement with the User, the Other Party will be required to be the first to warrant performance. Performance on the User's part, in this context, shall mean completion or delivery of the object.
- 7.6 The Other Party will be placed in default by operation of law in the event of any failure on its part to promptly pay over monies when due, without any notice of default being required. The Other Party (if not a consumer) will subsequently be charged an interest rate of 1% per month on the amount due (whereby part of a month will count as a full month) until such time as full payment is made, unless the statutory interest rate is higher. In this case, the statutory interest rate will be payable until such time as the monies due are paid in full. All extrajudicial collection costs will be payable by the Other Party (if not a consumer). The extrajudicial collection costs payable by the Other Party (if not a consumer) will be charged 15% of the amount due, subject to a minimum of EUR 150.
- 7.7 Failure to make prompt payments when due will render the consumer in default. Once in default, this consumer will be charged extrajudicial costs plus the statutory interest rate on the outstanding amount. The extrajudicial costs and the statutory interest rate will be equal to the maximum permitted statutory payment in respect of extrajudicial costs and statutory interest. The extrajudicial costs will be charged if payment is not forthcoming from the consumer, upon commencement of the default, within 14 days of such demand, subject to due notice having been given of the extrajudicial costs involved.
- 7.8 Where the User is required to institute proceedings against the Other Party to demand performance of the Agreement, the Other Party will be obliged to pay all of the costs incurred in connection with the judicial procedure, such as the legal representation and defence counsel costs, in the event that the User's case proves successful, wholly or in part. Such costs are also deemed to include indemnification costs.
- 7.9 Payments received from the Other Party will first be applied in settlement of the outstanding costs, subsequently in payment of the interest due and finally in payment of the remuneration due.
- 7.10 The User shall be afforded the right of setoff pursuant to Book 6, Section 127 et seq. of the Dutch Civil Code. Under no circumstances will the Other Party be afforded the right of setoff.

## 8. Delivery period

- 8.1 The completion or delivery date signalled by the User in regard to the object is not a strict deadline within the meaning of Book 6, Section 83, subsection a of the Dutch Civil Code but rather a no-obligation deadline.
- 8.2 Changes in the Agreement, as referred to in Article 4.1 and Article 5.2, may result in an inability to meet the prearranged deadline, if any. In the event of such changes, the delivery period will be deemed to have been extended by a non-strict deadline that corresponds with the agreed changes.
- 8.3 Upon completion of the agreed works and notification thereof by the User to the Other Party, the relevant object should be collected by the Other Party within one week of sending the notification.
- 8.4 If the Other Party fails to comply with the condition set forth in clause 8.3 of this Article, the outstanding price must be paid nonetheless by the Other Party, just as if the object had been delivered to it. In such circumstances, the User will also be at liberty to charge all reasonable warehousing or storage charges to the Other Party.

## 9. Guarantee

- 9.1 The User warrants that all works executed by the User or outsourced to third parties will be performed in accordance with high standards.

This guarantee will extend to one year after completion or delivery of the object, unless agreed otherwise in writing.
- 9.2 Any items not produced by the User and used in connection with the works will be subject where applicable to the warranty and warranty period of the relevant supplier or manufacturer as the case may be.
- 9.3 If the User is a Warranty Company, a FOCWA Automotive Guarantee certificate may be issued by the User to the Other Party. By issuing this guarantee certificate, the User provides a supplementary guarantee in respect of the works listed in the guarantee certificate, subject to the conditions set forth in the guarantee certificate.
- 9.4 If the User is an Insurance Compensation Fund, a FOCWA Zekerheidsfonds Guarantee certificate may be issued by the User to the Other Party. By issuing this guarantee certificate, the User provides a supplementary guarantee in respect of the works listed in the guarantee certificate, subject to the conditions set forth in the guarantee certificate.
- 9.5 The warranty referred to in clauses 1, 3 and 4 of this Article will not apply in the case of:
  - a. defects that are due to an action not executed by or on behalf of the User and/or exposure of the object to extreme conditions, and/or construction errors that were not effected by or on behalf of the User during the construction process in relation to the object;
  - b. defects that have arisen due to the use of items which were not (originally parts of) the object that was made available by the Other Party to the User;
  - c. any colour variations in the coating of lacquer on the object not visible to the naked eye in daylight;
  - d. degradation in the coating of lacquer on the object that arises owing to:
    - an external cause;
    - parts not added or processed by the User;
  - e. defects to objects that have occurred due to failure by the User to execute an additional activity, either on behalf of or further to activities on the part of the Other Party, even though this additional activity had been regarded as necessary under standards of professional practice and provided that such necessity had been communicated by the User to the Other Party at the latest upon completion or delivery of the object;
  - f. items and/or works in respect of which the User had specifically stated at the time of entering into the Agreement that it was not happy with the choice of materials, parts and/or work methods as prescribed by the Other Party to the User;
  - g. items that are to be processed and found to be in a state that renders it impossible for the inherent defects – including corrosion – to be dealt with adequately or removed within the framework of what was agreed, also in the event that the items have not been pre-processed in the User's company.

9.6 Claims under the warranty referred to in clauses 1, 3 and 4 of this Article will become void if:

- the Other Party fails to present the object for appraisal/inspection within the period determined by the User;
- the Other Party fails to submit claims to the User in respect of visible defects within one month of delivery of the object; such claims must be in writing, clearly setting out the Other Party's complaints;
- the Other Party, if not a consumer, fails to submit claims to the User in respect of hidden defects within 14 days of discovery of such defects; such claims must be in writing, clearly setting out the Other Party's complaints;
- the Other Party fails to submit claims to the User in respect of electronic faults within one month of delivery of the object; such claims must be in writing, clearly setting out the Other Party's complaints;
- the Other Party fails to provide the User with the opportunity to deal with the defect;
- works that are connected with the works executed by the User, where performed by others on the object without the User's consent, unless it can be shown that there was an immediate necessity for such works to be executed by the Other Party.

#### 10. Liability and indemnification

10.1 Liability on the part of the User in respect of any damage to the object or items of the Other Party will be limited to the amount that is covered by the liability insurer in the circumstances in question. The User shall ensure that it has an adequate business liability insurance in place throughout the duration of the Agreement.

10.2 No liability will attach to the User in respect of any theft or loss of items belonging to the Other Party and/or third parties that are inside or on the object and held by the User for whatever reason. In this case, items belonging to the Other Party shall also mean cargo, equipment, records and valuable papers.

10.3 No liability will attach to the User in respect of any indirect loss, including, but not limited to, consequential loss, loss of profits or any damage ensuing from or in connection with inability to meet the deadlines referred to in Article 8 and the breaking off of foregoing negotiations.

10.4 The limitations of liability on the part of the User as set out in this Article will no longer apply if found to be contrary to applicable mandatory law or in the event that the loss or damage is due to intent or recklessness on the part of the User or its most senior managerial staff.

10.5 The Other Party shall indemnify the User against any claims from third parties and likewise compensate the User in respect of any loss or damage arising directly or indirectly, circumstantial or non-circumstantial, in connection with the performance of the Agreement and in respect of all ensuing financial consequences.

#### 11. Force majeure

11.1 The User will not be at fault if any failure on its part is due to force majeure.

11.2 For the purpose hereof, force majeure shall mean: any shortcoming that cannot be attributed to the User because the User is not at fault, whether by law, by virtue of any legal act, or for which the User cannot be liable under generally accepted standards. Force majeure shall include also:

- business interruption or interruption of operations of any kind, howsoever arising;
- Delayed or overdue deliveries by one or more of the User's suppliers;
- Transport problems or impediments of any kind, causing transport to the User or from the User to the Other Party to be hindered or impeded;
- War (or the threat of war) riot, sabotage, flooding, fire, lockouts, factory occupation, work strikes and amended government measures;
- inability on the User's part to execute its services due to an attributable shortcoming or carelessness on the part of third parties.

11.3 Within three weeks of the occurrence of any circumstance giving rise to force majeure, the User shall be at liberty either to extend the deadline for completion or delivery or to terminate the Agreement extrajudicially, without being liable for any compensation.

11.4 Following termination of the Agreement, the User shall have the right to demand payment in respect of costs already incurred and/or works executed up to that point; however, such right in respect of repairs and maintenance will apply only in so far as the Other Party can benefit from same.

#### 12. Replaced parts

12.1 Any parts and/or materials that are replaced and/or remain behind in connection with the works will become the property of the User, unless the parties agree otherwise in writing. In such circumstances, the Other Party should take possession of such parts and/or materials immediately upon completion or delivery of the object.

#### 13. Drawings and other documents

13.1 Unless agreed otherwise in writing, the User shall retain the copyrights and all intellectual property rights arising in connection with its offers, furnished designs, images, drawings, (trial) models, software and the like, with the exception of assessor's reports.

13.2 The rights to the data referred to in clause 1 of this Article shall continue to belong to the User regardless of whether or not the costs of generating same were charged to the Other Party. In the absence of prior express written consent from the User, such data may not be copied, used or shown to third parties. Infringement of this Article will render the Other Party liable to pay the User an immediately due and payable penalty of EUR 25,000 for each infringement. This penalty may be imposed in addition to claiming compensation as provided for in law.

13.3 The data furnished to the Other Party as referred to in clause 1 of this Article must be returned forthwith by same within the period specified by the User. Infringement of this provision will render the Other Party liable to pay the User an immediately due and payable penalty of EUR 1,000 per day. This penalty may be imposed in addition to claiming compensation as provided for in law.

#### 14. Advice and furnished information

14.1 No rights may be derived by the Other Party in respect of advice and information obtained from the User where this is not related to the contract.

14.2 Where data, drawings and suchlike are furnished by the Other Party to the User, the User may rely on the accuracy and completeness thereof in the performance of the Agreement.

14.3 The Other Party shall indemnify the User against any claim from third parties arising in connection with advices, drawings, calculations, designs, materials, samples, models and the like where furnished by or on behalf of the Other Party.

#### 15. Dissolution

15.1 Any entitled party who wishes to terminate the Agreement must declare this in writing. Prior to issuing a termination statement in writing, the entitled party must issue the other party with a written notice of default and allow the other party a reasonable period to meet its obligations and/or remedy the shortcomings, which shortcomings must be clearly specified in writing.

15.2 Where the Other Party fails to meet any payment obligation arising in connection with any agreement concluded with the User or under these General Conditions, or fails to do so promptly, completely, and adequately, the User shall be at liberty to terminate the Agreement forthwith wholly or in part without any notice of default or judicial intervention being required.

15.3 If the Other Party is a natural person, the joint heirs (in case of his/her death) may arrange for the works to be executed in full, and/or to suspend any works that have been commenced with subject to remuneration of the costs already incurred in respect of works executed by the User. The joint heirs shall be obliged within one month of the Other Party's death to notify the User in writing regarding which option has been chosen, in default of which the User shall have the right to terminate the Agreement without any judicial intervention being required. In all cases such as referred to in the first sentence of this condition, the joint heirs shall be and remain jointly and severally liable for paying any compensation due to the User.

15.4 Where the Agreement is terminated as referred to in clause 2 of this Article, the User shall be at liberty to demand payment in full of the agreed price, notwithstanding the right to be compensated for losses incurred pursuant to termination of the agreement.

#### 16. Retention of title and right of retention

16.1 All completed/delivered items plus any items yet to be completed/delivered within the framework of an Agreement (including objects) shall remain the exclusive property of the User until such time as all amounts owed by the Other Party to the User within the framework of this Agreement or other similar agreements have been paid in full.

16.2 Until such time as all outstanding amounts owed to the User by the Other Party within the framework of the Agreement (and/or other previous or later similar agreements) have been paid in full, the User may hold on to the relevant items of the Other Party and recover by preference the amounts due from same, unless the Other Party furnishes adequate security in respect of such amounts.

16.3 Where the deadline for payment of an outstanding amount in respect of works provided for in Article 7 has expired, the User shall also be entitled to arrange for any items belonging to the User that are fitted or assembled to the object or parts thereof to be disassembled/removed provided always that the object is not damaged in the process. The costs incurred in this connection may be passed on by the User to the Other Party.

16.4 Where the items referred to in clause 1 of this Article are worked on or processed by the User with the aid of auxiliary materials provided by or on behalf of the User, the items processed in this way (principal items within the meaning of Book 3, Section 4 of the Dutch Civil Code) will be deemed to have been furnished by the Other Party to the User as a possessory pledge.

16.5 Where works have been executed, the Other Party shall be obliged to take due care of the completed/delivered items that it receives subject to retention of title and to ensure that such is stored in a clearly identifiable manner as the User's property.

16.6 No completed/delivered items that are subject to a retention of title in favour of the User may be encumbered by the Other Party outside its normal business operations.

16.7 Where the Other Party fails to meet its payment obligations within the framework of an Agreement or encounters payment difficulties, the User shall be at liberty to repossess all items still in the Other Party's possession which had been completed/delivered and subject to retention of title within the framework of the Agreement, notwithstanding the other rights of the User. Moreover, the User shall be entitled to take possession of and to hold by way of a possessory pledge any newly processed or re-processed objects held by the Other Party and to retain such objects until such time as the Other Party meets all of its payment obligations.

16.8 Where a possessory pledge cannot be established for some reason, the Other Party shall be obliged to pledge the completed or outstanding items to the User via an authentic or registered private instrument.

#### 17. Disputes

17.1 A consumer dispute may be referred in accordance with the consumer's preference (which preference will be binding on the User), either by the consumer or by the User to the FOCWA-NIVRE Geschillencommissie (Disputes Committee). The dispute between the parties will then be considered by this Disputes Committee and it will issue a binding opinion.

17.2 Any non-consumer disputes arising in connection with an Agreement that is governed by these Conditions, or arising from a supplementary Agreement ensuing therefrom, will be referred to the Disputes Committee for the Bodywork sector (Commissie van Toezicht voor het Carrosseriebedrijf). The dispute between the parties will then be considered by this Disputes Committee and it will issue a binding opinion.

17.3 Where the services of the Disputes Committee referred to above are not availed of, the District Court in the district within which the User has its registered office and/or conducts its business shall have exclusive jurisdiction to hear the dispute, provided always that it comes within the jurisdiction of the District Court.

17.4 Disputes arising in connection with or ensuing from these General Conditions will be referred to the exclusive jurisdiction of the competent court in the Netherlands. This stipulation constitutes a written agreement within the meaning of Article 17 of the EEC Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (27 September 1968).

#### 18. Applicable law

18.1 These Conditions together with all offers and agreements provided for wholly or in part under these Conditions, as well as any disputes arising pursuant to these Conditions or connected therewith, will be exclusively governed by Dutch law.

Sassenheim, January 2016

These Conditions --/--were filed with the District Court in The Hague under number -----