

# Standard Terms and Conditions of Sale – Products & Services Brooks Instrument B.V.

COS P&S NL: BROOKS INSTRUMENT B.V. – May 2021



## 1. DEFINITIONS:

In these Terms and Conditions of Sale, "Seller" means Brooks Instrument B.V.; "Buyer" means the person, firm, company or corporation by whom the order is given; "Goods" means the goods (including any Software and Documentation, as defined in Clause 9) described in Seller's Acknowledgement of Order form; "Services" means the services described in Seller's Acknowledgement of Order Form; "Contract" means the written agreement (including these Terms and Conditions) made between Buyer and Seller for the supply of the Goods and/or provision of Services; "Contract Price" means the price payable to Seller by Buyer for the Goods and/or Services and "Seller Affiliate" means any company which is for the time being directly or indirectly controlled by the ultimate parent company of Seller. For the purposes of this definition, a company is directly controlled by or is a subsidiary of another company or companies which holds 50% or more of the shares carrying the right to vote at a general meeting of the first mentioned company and a particular company is indirectly controlled by another company or companies if a series of companies can be specified, beginning with that company or those companies and ending with the particular company, so related that each company in the series is directly controlled by one or more of the companies earlier in the series.

## 2. THE CONTRACT:

**2.1** All orders must be in writing and are accepted subject to these Terms and Conditions of Sale. No terms or conditions put forward by Buyer and no representations, warranties, guarantees or other statements not contained in Seller's quotation or Acknowledgement of Order nor otherwise expressly agreed in writing by Seller shall be binding on Seller.

**2.2** The Contract shall become effective only upon the date of acceptance of Buyer's order on Seller's Acknowledgement of Order form or upon the date of fulfilment of all conditions precedent stipulated in the Contract, whichever is the later (the "Effective Date"). If the details of the Goods or Services described in Seller's quotation differ from those set out in the Acknowledgement of Order Form the latter shall apply.

**2.3** No alteration or variation to the Contract shall apply unless agreed in writing by both parties. However, Seller reserves the right to effect minor modifications and/or improvements to the Goods before delivery provided that the performance of the Goods is not adversely affected and that neither the Contract Price nor the delivery date is affected.

## 3. VALIDITY OF QUOTATION AND PRICES:

**3.1** Unless previously revoked by Seller, Seller's quotation is open for acceptance within the period stated therein or, when no period is so stated, within thirty days after its date.

**3.2** Prices are firm for delivery within the period stated in Seller's quotation and are exclusive of (a) Value Added Tax and (b) any similar and other taxes, duties, levies or other like charges arising outside the Netherlands in connection with the performance of the Contract.

**3.3** Prices (a) are for Goods delivered EXW (Ex works) Seller's shipping point, exclusive of freight, insurance and handling and (b) unless otherwise stated in the Seller's quotation, are exclusive of packing. If the Goods are to be packed, packing materials are non-returnable.

## 4. PAYMENT:

**4.1** Payment shall be made: (a) in full without set-off, counterclaim or withholding of any kind (save where and to the extent that this cannot by law be excluded); and (b) in the currency of Seller's quotation within thirty days of date of invoice unless otherwise specified by Seller's Finance Department. Goods will be invoiced at any time after their readiness for dispatch has been notified to Buyer. Services will be invoiced monthly in arrears or, if earlier, upon completion. Without prejudice to Seller's other rights, Seller reserves the right to: (i) charge interest on any overdue sums at 4% above the base lending rate of ING Bank (or such higher rate stipulated by applicable law) during the period of delay; and to (ii) suspend performance of the Contract (including withholding shipment) in the event that Buyer fails or in Seller's reasonable opinion it appears that Buyer is likely to fail to make payment when due under the Contract or any other contract; and (iii) at any time require such reasonable security for payment as Seller may deem reasonable.

## **5. DELIVERY PERIOD:**

**5.1** Unless otherwise stated in Seller's quotation, all periods stated for delivery or completion run from the Effective Date and are to be treated as estimates only not involving any contractual obligations.

**5.2** If Seller is delayed in or prevented from performing any of its obligations under the Contract due to the acts or omissions of Buyer or its agents (including but not limited to failure to provide specifications and/or fully dimensioned working drawings and/or such other information as Seller reasonably requires to proceed expeditiously with its obligations under the Contract), the delivery/completion period and the Contract Price shall both be adjusted accordingly.

**5.3** If delivery is delayed due to any act or omission of Buyer, or if having been notified that the Goods are ready for dispatch, Buyer fails to take delivery or provide adequate shipping instructions, Seller shall be entitled to place the Goods into a suitable store at Buyer's expense. Upon placing the Goods into the store, delivery shall be deemed to be complete, risk in the Goods shall pass to Buyer and Buyer shall pay Seller accordingly.

## **6. FORCE MAJEURE:**

**6.1** The Contract (other than Buyer's obligation to pay all sums due to Seller in accordance with the Contract) shall be suspended, without liability, in the event and to the extent that its performance is prevented or delayed due to any circumstance beyond the reasonable control of the party affected, including but not limited to: Act of God, war, armed conflict or terrorist attack, riot, fire, explosion, accident, flood, sabotage; governmental decisions or actions (including but not limited to prohibition of exports or re-exports or the failure to grant or the revocation of applicable export licenses), or labor trouble, strike, lockout or injunction. Seller shall have no obligation to supply any hardware, software, services or technology unless and until it has received any necessary licenses or authorizations or has qualified for general licenses or license exceptions under applicable import, export control and sanctions laws, regulations, orders and requirements, as they may be amended from time to time (including without limitation those of the United States, the European Union and the jurisdiction in which Seller is established or from which the items are supplied). If for any reason any such licenses, authorizations or approvals are denied or revoked, or if there is a change in any such applicable laws, regulations, orders or requirements that would prohibit Seller from fulfilling the Contract, or would in the reasonable judgement of Seller otherwise expose Seller and/or Seller's Affiliate(s) to a risk of liability under applicable laws, regulations, orders or requirements, Seller shall be relieved without liability of all obligations under the Contract.

**6.2** If either party is delayed or prevented from performance of its obligations by reason of this Clause for more than 180 consecutive calendar days, either party may terminate the then unperformed portion of the Contract by notice in writing given to the other party, without liability provided that Buyer shall be obliged to pay the reasonable cost and expense of any work in progress and to pay for all Goods delivered and Services performed as at the date of termination. Seller may deliver by instalments and if so each delivery shall constitute a separate contract and failure by Seller to deliver any one or more of the instalments in accordance with their terms shall not entitle Buyer to terminate the whole Contract or treat it as repudiated.

## **7. INSPECTION, TESTING, AND CALIBRATION:**

**7.1** Goods maybe inspected by Seller or manufacturer and, where practicable, submitted to Seller's or manufacturers standard tests before dispatch. Any additional tests or inspection (including inspection by Buyer or its representative, or tests in the presence of Buyer or its representative and/or calibration) or the supply of test certificates and/or detailed test results shall be subject to Seller's prior written agreement and Seller reserves the right to charge therefore; if Buyer or its representative fails to attend such tests, inspection and/or calibration after seven days' notice that the Goods are ready therefore, the tests, inspection and/or calibration will proceed and shall be deemed to have been made in the presence of Buyer or its representative and the Seller's statement that the Goods have passed such testing and/or inspection and/or have been calibrated shall be conclusive.

**7.2** No claims for shortfalls in quantity or for incorrect delivery may be made more than 14 days after delivery.

**8. DELIVERY, RISK & TITLE:**

**8.1** Unless otherwise expressly stated in the Contract, the Goods will be delivered Carriage Paid to (CPT) the destination named in the Contract; freight, packing and handling will be charged at Seller's standard rates. Risk of loss of or damage to the Goods shall pass to Buyer upon delivery as aforesaid and Buyer shall be responsible for insurance of the Goods after risk has so passed. Alternatively, if it is expressly stated in the Contract that Seller is responsible for the insurance of the Goods after their delivery to the carrier; such insurance will be charged at Seller's standard rates. "Ex-works", "FCA", "CPT" and any other delivery terms used in the Contract shall be defined in accordance with the latest version of Incoterms.

**8.2** Subject to Clause 9, title to the Goods shall pass to Buyer upon delivery in accordance with Clause 8.1.

**9. DOCUMENTATION AND SOFTWARE:**

**9.1** Title to and ownership of the copyrights in software and/or firmware incorporated into or provided for use with the Goods ("Software") and documentation supplied with the Goods ("Documentation") shall remain with the relevant Seller Affiliate (or such other party as may have supplied the Software and/or Documentation to Seller) and is not transferred hereby to Buyer.

**9.2** Except as otherwise provided herein, Buyer is hereby only granted a non-exclusive, royalty-free license to use the Software and Documentation in conjunction with the Goods, provided that and for so long as the Software and Documentation are not copied (unless expressly authorized by applicable law) and Buyer holds the Software and Documentation in strict confidence and does not disclose them to others, or permit others to have access to them (other than Seller's standard operating and maintenance manuals). Buyer may transfer the foregoing license to another party which purchases, rents or leases the Goods, provided the other party accepts and agrees in writing to be bound by the conditions of this Clause 9.

**9.3** Notwithstanding Sub-clause 9.2, Buyer's use of certain Software, (as specified by Seller and including but not limited to control system and AMS Software) shall be governed exclusively by the applicable Seller Affiliate or third party licence agreement.

**9.4** Seller and Seller Affiliates shall retain ownership of all inventions, designs and processes made or evolved by them and save as set out in the Clause 9 no rights in intellectual property are hereby granted.

**10. DEFECTS AFTER DELIVERY:**

**10.1** Seller warrants (i) subject to the other provisions of the Contract, good title to and the unencumbered use of the Goods; (ii) that Goods manufactured by Seller and/or Seller's Affiliates shall conform with Seller's specifications therefore and be free of defects in materials and workmanship and (iii) that Services provided by Seller or Seller Affiliates will be performed with all reasonable skill, care and due diligence and in accordance with good engineering practice. Seller will make good, by repair or at Seller's option by the supply of a replacement part or parts, any defects which, under proper use, care and maintenance, appear in Goods of Seller's Affiliates' manufacture and which are reported to Seller within 12 calendar months from putting such Goods into operation or 18 calendar months after their delivery, whichever period expires the sooner, (90 days after delivery in the case of Consumables and spare parts) (the "Warranty Period") and which arise solely from faulty materials or workmanship: provided always that defective items are returned to Seller at Buyer's cost carriage and insurance prepaid within the Warranty Period. ("Consumables" shall include glass electrodes, membranes, liquid junctions, electrolyte and O-rings). Replaced items shall become the property of the Brooks Instrument group. Repaired or replacement items will be delivered by Seller at Seller's cost to Buyer's mainland site in the Netherlands or, if Buyer is located outside the Netherlands, FCA in the Netherlands. Seller will correct defects in Services provided by Seller or Seller Affiliates and reported to Seller within ninety days after completion of such Services. Goods or Services repaired, replaced or corrected in accordance with this Clause 10.1 shall be subject to the foregoing warranty for the unexpired portion of the Warranty Period or for ninety days from the date of their return to Buyer (or completion of correction in the case of Services), whichever expires the later.

**10.2** Services are warranted for twelve (12) months from the date of shipment and are limited to the service work provided.

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**10.3** Goods or Services sourced by Seller from a third party (not being a Seller Affiliate) for resale to Buyer shall carry only the warranty extended by the original manufacturer.

**10.4** Notwithstanding Clauses 10.1 and 10.2, Seller shall not be liable for any defects caused by: wear and tear; materials or workmanship made, furnished or specified by Buyer; non-compliance with Seller's storage, installation, operation or environmental requirements; lack of proper maintenance; any modification or repair not previously authorized by Seller in writing; nor the use of non-authorized software or spare or replacement parts. Seller's costs incurred in investigating and rectifying such defects shall be paid by Buyer upon demand. Buyer shall at all times remain solely responsible for the adequacy and accuracy of all information supplied by it.

**10.5** Subject to Clause 12.1, the foregoing constitutes Seller's sole warranty and responsibility in regard to any non-conformity of the Goods or any attributable improper performance of the Services and Buyer's exclusive remedy in the event of any such non-conformity or attributable improper performance and any breach of the warranty. All rights and remedies of the Buyer with regard to any non-conformity of the Goods, any attributable improper performance of the Services and/or with regard to any rights or remedies under any warranty, will lapse after the respective Warranty Period. No representations, warranties or conditions of any kind, express or implied, shall apply as to satisfactory quality, merchantability, fitness for any particular purpose or any other matter with respect to any of the Goods or Services.

**11. PATENT, ETC. INFRINGEMENT:**

**11.1** Subject to the limitations set forth in Clause 12, Seller shall indemnify Buyer in the event of any claim for infringement of Letters Patent, Registered Design, Design Right, Trade Mark or Copyright ("Intellectual Property Rights") existing at the date of formation of the Contract arising from the use or sale of the Goods, against all reasonable costs and damages awarded against Buyer in any action for such infringement, or for which Buyer may become liable in any such action, provided always that Seller shall not be liable to so indemnify Buyer in the event that:

- (i) such infringement arises as a result of Seller having followed a design or instruction furnished or given by Buyer, or the Goods having been used in a manner or for a purpose or in a country not specified by or disclosed to Seller prior to the date of the Contract or in association or combination with and other equipment or software, or
- (ii) Seller has at its expense procured for Buyer the right to continue to use the Goods or has modified or replaced the Goods so that the Goods no longer infringe.
- (iii) Buyer has failed to give Seller the earliest possible notice in writing of any claim made or to be made or of any action threatened or brought against Buyer and/or Buyer has failed to permit Seller, at Seller's expense, to conduct and control any litigation that may ensue and all negotiations for a settlement of the claim, or
- (iv) Buyer has made without Seller's prior written consent any admission which is or may be prejudicial to Seller in respect of any such claim or action, or
- (v) the Goods have been modified without Seller's prior written authorization.

**11.2** Buyer warrants that any design or instructions furnished or given by it shall not cause Seller to infringe any Intellectual Property Rights in the performance of Seller's obligations under the Contract and shall indemnify Seller against all reasonable costs and damages which Seller may incur as a result of any breach of such warranty.

**12. LIMITATION OF LIABILITY:**

**12.1** Notwithstanding any other provision of the Contract and subject to the other provisions of this Clause 12, Seller's and Seller's Affiliates' total aggregate liability under the Contract for loss of or damage to property howsoever caused shall not exceed € 1,000,000. In all other cases Seller's and Seller Affiliates' total liability under the Contract to compensate any damage and, if applicable, to repay any amount receive from Buyer will in total not exceed a sum equal to the Contract Price.

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**12.2** Notwithstanding the above or any other provision of the Contract, Seller and Seller Affiliates shall not be liable in any circumstances for any of the following losses or damage: a) any loss of profits; b) increased costs; c) loss of revenue; d) loss of contracts; e) loss of use; f) loss of data or; (g) for any other consequential or indirect loss.

**12.3** The limitations of liability set forth in this clause shall apply regardless whether the relevant liability is based on a breach of contract, a wrongful act or any other theory of law.

**12.4** Nothing in this clause is intended to exclude liability for damage that ensues from willful misconduct or gross negligence by Seller's executive management.

**13. STATUTORY AND OTHER REGULATIONS:**

**13.1** If Seller's obligations under the Contract shall be increased or reduced by reason of the making or amendment after the date of Seller's quotation of any law or any order, regulation or bye-law having the force of law that shall affect the performance of Seller's obligations under the Contract, the Contract Price and delivery period shall be adjusted accordingly and/or performance of the Contract suspended or terminated, as appropriate.

**13.2** Except to the extent otherwise required by applicable law, Seller shall have no responsibility for the collection, treatment, recovery or disposal of (i) the Goods or any part thereof when they are deemed by law to be 'waste' or (ii) any items for which the Goods or any part thereof are replacements. If Seller is required by applicable law, including waste electrical and electronic equipment legislation, European Directive 2002/96/EC (WEEE) and related legislation in EU Member States, to dispose of 'waste' Goods or any part thereof, Buyer shall, unless prohibited by applicable law, pay Seller, in addition to the Contract Price, either (i) Seller's standard charge for disposing of such Goods or (ii) if Seller does not have such a standard charge, Seller's costs (including all handling, transportation and disposal costs and a reasonable mark-up for overhead) incurred in disposing of such Goods.

**13.3** Buyer's personnel shall, whilst on Seller's premises, comply with Seller's applicable site regulations and Seller's reasonable instructions, including but not limited to those relating to safety, security and electrostatic discharge.

**14. COMPLIANCE WITH LAWS:**

Buyer agrees that all applicable import, export control and sanctions laws, regulations, orders and requirements, as they may be amended from time to time, including without limitation those of the United States, the European Union and the jurisdictions in which Seller and Buyer are established or from which items may be supplied, and the requirements of any licenses, authorizations, general licenses or license exceptions relating thereto will apply to its receipt and use of hardware, software, services and technology. In no event shall Buyer use, transfer, release, export or re-export any such hardware, software or technology in violation of such applicable laws, regulations, orders or requirements or the requirements of any licenses, authorizations or license exceptions relating thereto. Buyer agrees furthermore that it shall not engage in any activity that would expose Seller or any of its affiliates to a risk of penalties under laws and regulations of any relevant jurisdiction prohibiting improper payments, including but not limited to bribes, to officials of any government or of any agency, instrumentality or political subdivision thereof, to political parties or political party officials or candidates for public office, or to any employee of any customer or supplier. Buyer agrees to comply with all appropriate legal, ethical and compliance requirements.

**15. DEFAULT, INSOLVENCY AND CANCELLATION:**

Seller shall be entitled, without prejudice to any other rights it may have, to cancel the Contract forthwith, wholly or partly, by notice in writing to Buyer, if (a) Buyer is in default of any of its obligations under the Contract and fails, within 30 (thirty) days of the date of Seller's notification in writing of the existence of the default, either to rectify such default if it is reasonably capable of being rectified within such period or, if the default is not reasonably capable of being rectified within such period, to take action to remedy the default or (b) on the occurrence of an Insolvency Event in relation to Buyer. "Insolvency Event" in relation to Buyer means any of the following: (i) Buyer being declared bankrupt; (ii) a suspension of payments being issued as regards Buyer; (iii) Buyer ceasing to carry on business or being unable to pay its debts; (iv) Buyer having filed for bankruptcy or a suspension of payments; (v) the general shareholders' meeting of Buyer (or another body of Buyer being authorized to take these

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decisions for Buyer) having passed a resolution as to the winding- up, bankruptcy, or dissolution of Buyer; or (vi) the happening in relation to Buyer of an event analogous to any of the above in any jurisdiction in which it is incorporated or resident or in which it carries on business or has assets.

Cancellation or Modification. Brooks may cancel any purchase order or release thereunder, or terminate any agreement relating to the purchase of Brooks' Products or Services upon reasonable prior written notice to Purchaser. Once Brooks has accepted a purchase order or begun taking actions with respect to a purchase order, Purchaser cannot cancel or modify that purchase order except with Brooks' written consent. In such event, Purchaser will be liable for cancellation or modification charges and all costs incurred and committed for the order or in connection with the cancellation or modification pursuant to Brooks schedule for such charges.

**16. SUPPLEMENTARY TERMS AND CONDITIONS:**

If the Goods comprise or include a control system, Seller's Supplementary Terms and Conditions Applicable to the Supply of Control Systems and Related Services shall apply to the control system and related services only. Such Supplementary Terms and Conditions shall take precedence over these Standard Terms and Conditions of Sales; copies are available from Seller upon request.

**17. MISCELLANEOUS:**

**17.1** No waiver by either party with respect to any breach or default or of any right or remedy and no course of dealing, shall be deemed to constitute a continuing waiver of any other breach or default or of any other right or remedy, unless such waiver be expressed in writing and signed by the party to be bound.

**17.2** If any clause, sub-clause or other provision of the Contract is invalid under any statute or rule of law, such provision, to that extent only, shall be deemed to be omitted without affecting the validity of the remainder of the Contract.

**17.3** Buyer shall not be entitled to assign its rights or obligations hereunder without the prior written consent of Seller.

**17.4** Seller enters into the Contract as principal. Buyer agrees to look only to Seller for due performance of the Contract.

**17.5** Unless otherwise stated in the Terms and Conditions, all information provided by Seller to Buyer shall remain confidential and not be disclosed to third parties without the express written approval of Seller.

**17.6** GOODS AND SERVICES PROVIDED HEREUNDER ARE NOT SOLD OR INTENDED FOR USE IN ANY NUCLEAR OR NUCLEAR RELATED APPLICATIONS. Buyer (i) accepts Goods and Services in accordance with the foregoing restriction, (ii) agrees to communicate such restriction in writing to any and all subsequent purchasers or users and (iii) agrees to defend, indemnify and hold harmless Seller and Seller's Affiliates from any and all claims, losses, liabilities, suits, judgments and damages, including incidental and consequential damages, arising from use of Goods and Services in any nuclear or nuclear related applications, whether the cause of action be based in tort, contract or otherwise, including allegations that the Seller's liability is based on negligence or strict liability.

**17.7** The Contract shall in all respects be construed in accordance with the laws of the Netherlands excluding, however, any effect on such laws of the 1980 Vienna Convention on Contracts for the International Sale of Goods and to the fullest extent permitted by law, shall be without regard to any conflict of laws or rules which might apply the laws of any other jurisdiction. All disputes arising out of the Contract shall be subject to the exclusive jurisdiction of the competent court of Amsterdam.

**17.8** The headings to the Clauses and paragraphs of the Contract are for guidance only and shall not affect the interpretation thereof.

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**17.9** All notices and claims in connection with the Contract must be in writing.

**Brooks Instrument B.V.**

Registered Office: **Einsteinstraat 57**

**3902 HN Veenendaal**

**The Netherlands**