

## **VMRG 2003 CONDITIONS**

Standard conditions of delivery and payment issued by the 'Vereniging Metalen Ramen en Gevelbranche (VMRG)\*', referred to as the VMRG CONDITIONS, filed at the Registry of the District Court in Utrecht on 11 February 2003 / deed number 03/36. Publication of the VMRG, Einsteinbaan 1, 3439 NJ Nieuwegein.  
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### **Article 1: Applicability**

- 1.1. These conditions apply to all offers made by members of the Metaalunie and to all agreements they conclude and to all agreements that may be the result thereof. The offeror/supplier is the Metaalunie member who uses these conditions. Such member is designated in these conditions as the contractor or seller. The other party is designated as the customer or buyer.
- 1.2. These conditions may only be declared applicable to agreements between VMRG members and their customers.
- 1.3. VMRG members declare that the agreed performance meets the requirements stipulated in the VMRG's quality regulations and the VMRG-Kwaliteitseisen en Adviezen© (VMRG Quality Requirements and Recommendations) applicable three months before conclusion of the agreement.
- 1.4. The standard conditions of the customer shall not apply and are expressly rejected.
- 1.5. Any deviations from these conditions shall only apply if the customer has confirmed them in writing to the contractor.

### **Article 2: Offers**

- 2.1. All offers are made without engagement.
- 2.2. If the customer supplies data, drawings etc. to the contractor, the contractor may assume them to be correct and may base his offer upon them. .

### **Article 3: Intellectual property rights**

- 3.1. Unless agreed otherwise, the contractor retains the copyright and all industrial property rights in the offers made by him and in designs, illustrations, drawings, models, test models, software etc. supplied by him.
- 3.2. The rights to the data referred to in paragraph 1 shall remain the property of the contractor irrespective of whether costs are charged to the customer for their production. Such data may not be copied, used or shown to third parties without the express consent of the contractor.
- 3.3. The customer guarantees that none of the data regarding the contractor's detailing, manufacturing and/or construction method used will be copied, shown to third parties, disclosed or used without the contractor's express written permission.

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*\*Dutch Organisation of Entrepreneurs in Small and Medium-Sized Businesses in the Metalworking and Mechanical Engineering Industry*

- 3.4. If the customer infringes the provisions of 3.2. and 3.3., the customer shall owe the contractor a penalty of €25,000. This penalty may be claimed in addition to any compensation owed by law.
- 3.5. The customer must return the data supplied to him as referred to in paragraph 1 at the first request of the contractor within the period specified by the contractor. In the event of an infringement of this provision the customer shall owe the contractor a penalty of €1,000 per day. This penalty may be claimed in addition to any compensation owed by law.

#### **Article 4: Advice, designs and materials**

- 4.1. The customer cannot derive any rights from advice and information obtained from the contractor if they do not relate directly to the order.
- 4.2. The customer is responsible for the drawings and calculations made by him or on his behalf, any other information provided by him, the functional suitability of the materials prescribed by him or on his behalf, the application method used and the surface treatment.
- 4.3. The customer shall indemnify the contractor against any claim by its third parties relating to the use of drawings, calculations, materials, samples, models and so forth supplied by or on behalf of the customer.
- 4.4. The customer may, at his own expense, examine (or arrange for the examination of) the materials which the contractor wishes to use before they are processed. If the contractor suffers damage as a result, this shall be borne by the customer.
- 4.5. The customer must note any colour differences before production starts. If the customer fails to check the materials for colour differences prior to production, the customer shall be liable for the associated risk and lose the right to file any complaints about the colour differences after delivery/completion.

#### **Article 5: Delivery period**

- 5.1. The contractor shall provide an indication of the delivery period and/or the time it takes to complete the entire delivery, the entire work, part of the work or partial deliveries.
- 5.2. In fixing the delivery period the contractor assumes that he can execute the order in the circumstances known to him at that time.
- 5.3. The delivery period starts when agreement has been reached on all technical details, all necessary data, final drawings etc. are in the possession of the contractor, the agreed payment or instalment has been received and the necessary conditions for execution of the order have been fulfilled.
- 5.4.
  - a. If circumstances occur other than those known to the contractor when he fixed the delivery period, the contractor may extend the delivery period by the time necessary to execute the order in the circumstances. If the work cannot be fitted into the planning schedule of the contractor, it shall be completed as soon as his planning schedule permits this.
  - b. If there is extra work, the delivery period and/or execution period shall be extended by the time that is necessary to supply (or arrange for the supply of) the materials and parts for this purpose and to carry out the additional work. If the extra work cannot be fitted into the planning schedule of the contractor it shall be completed as soon as his planning schedule permits this.

- c. If there is a suspension of obligations by the contractor, the delivery period and/or execution period shall be extended for the duration of the suspension. If continuation of the work cannot be fitted into the planning schedule of the contractor, the work shall be completed as soon as his planning schedule permits this.
- 5.5. If the contractor is attributable in default with regard to the delivery date, the contractor shall forfeit a penalty of €35, plus turnover tax, for each working day on which work can be performed, as referred to in Article 11, paragraph 3. The contractor shall not owe a penalty for exceeding the delivery date if this is the result of a non-attributable failure, as referred to in Article 8 of these conditions.
- 5.6. If the agreed delivery time and/or execution period is exceeded for any reason whatsoever, the customer shall not be entitled to claim damages or perform or have a third party perform the work to fulfil the agreement.

#### **Article 6: Transmission of risk**

- 6.1 In the case of delivery ex works, in accordance with Incoterms 2000, the risk in relation to the goods shall pass at the moment when the seller makes them available to the buyer.
- 6.2 Irrespective of the provisions of the previous paragraph, the customer and the contractor agree that the contractor shall arrange for the carriage. The risk of storage, loading, carriage and unloading shall be borne by the customer in this case too. The customer may insure himself against these risks.

#### **Article 7: Price changes**

- 7.1. The contractor is entitled to pass on to the customer any price increases that occur after the date on which the agreement is concluded – for example as a result of legislation amended by the government – and before the contractor has completed the performance of the agreement.
- 7.2. The price increase referred to in paragraph 1 is calculated on the basis of the increase in the 28120000 manufacturers' prices for metal construction structures index most recently adopted by Statistics Netherlands.
- 7.3. If the customer is a natural person acting privately and the price increase referred to in paragraph 1 occurs within three months after the date on which the agreement is concluded, the customer shall be entitled to dissolve the agreement.

#### **Article 8: Impossibility of performance**

- 8.1. The contractor shall be entitled to suspend performance of his obligations if he is temporarily prevented from performing them by circumstances that could not be foreseen at the time of the conclusion of the agreement and which are beyond his control.
- 8.2. Circumstances which could not be foreseen by the contractor and which are beyond his control are deemed to include failure of his suppliers and/or subcontractors to fulfil their obligations or to do so in good time, weather conditions, earthquakes, fire, loss or theft of tools, loss of processed materials, road blockades, strikes or work stoppages and import or trade restrictions.
- 8.3 The contractor shall not be entitled to suspend performance if performance is permanently impossible or if a temporary impossibility has lasted for longer than six months. The agreement may then be terminated in respect of such part of the obligations as have not yet been

performed. In that case the parties shall not be entitled to compensation for damage suffered or yet to be suffered as a result of the termination.

### **Article 9: Scope of the work**

- 9.1. The contractor shall ensure that all licences, exemptions and other decisions that are necessary in order to carry out the work are obtained in good time.
- 9.2. The price of the work does not include:
  - a. the costs associated with groundwork, pile-driving, wrecking, concrete work, foundation work, bricklaying, carpentry, tiling, plasterwork, painting, wallpapering, scaffolding, repair or other building work and work on central heating, etc.;
  - b. the costs of gas, water or electricity connections and other infrastructure facilities;
  - c. the costs of preventing or mitigating damage to goods present at or near the work;
  - d. the costs of removing materials, building materials or refuse;
  - e. the costs of horizontal and vertical transport on the construction site.
- 9.3. Nor does the price include the delivery and installation of any means of attachment, such as anchor rails, screw caps, adjusting laths and other supplies required for mounting purposes.

### **Article 10: Alterations to the work**

- 10.1. Alterations to the work shall result in any event in extra work or reduced work if:
  - a. there is an alteration to the design or the specifications;
  - b. the information provided by the customer does not correspond with the reality;
  - c. the tolerances measured in the work do not comply with the agreed specifications.
- 10.2. Extra work shall be calculated on the basis of the value of the price determinants applicable at the time when the extra work is carried out. Reduced work shall be calculated on the basis of the value of the price determinants applicable at the time when the agreement was concluded.

### **Article 11: Execution of the work**

- 11.1. The customer shall ensure that:
  - a. in accordance with the requirements of the VMRG V&G-plan Gevelbouw (VMRG Facade Construction Health & Safety Plan), upon commencement of the work, all the necessary safety measures – including safety nets, guard rails, attachment points for safety lines and fencing of the areas or work floors on the ground – have been taken and remain in place during the performance of the work to ensure safe and healthy working conditions for the fitters who, in addition to the requirements of the VMRG V&G-plan Gevelbouw, have to comply with the relevant requirements that the employer and/or construction site have to meet under the Working Conditions Act and/or any other national or international regulations (e.g. EU Directives);
  - b. the fitters are given the opportunity to start work immediately upon arrival on the construction site;
  - c. the work can be performed during normal working hours. The contractor shall only depart from the schedule if the customer informs the contractor in good time that the progress of work requires that the work starts or ends outside normal working hours;
  - d. the access roads to the construction site or the delivery location are accessible to the contractor's vehicles;
  - e. the designated construction site is suitable for assembly and, in the contractor's opinion, there is sufficient lockable, dry storage space available for the materials;
  - f. there is a road around the relevant building or property that is accessible to mobile cranes, as well as a levelled strip of land with a minimum width of 5 metres;

- g. the materials to be processed are made available to the contractor in the immediate vicinity of the location where the work is being performed;
  - h. there are sufficient water and electrical connections with sufficient power within a 50-m radius of the workplace. The mains connection should be 230/380 V;
  - i. pure and clearly visible modular and level dimensions are indicated in a sufficient number of locations in the building. This obligation does not apply if the customer is a consumer, i.e. someone acting privately;
  - j. there are sufficient appropriate accommodations or facilities such as sanitary facilities available on the construction site for the contractor's personnel and any other installation personnel employed, all to the contractor's satisfaction and in accordance with the Working Conditions Act.
- 11.2. If, despite the precautions referred to in paragraph 1, the contractor is held liable for infringement of the rules, the customer is obligated to indemnify the contractor for the ensuing costs, which expressly include the costs ensuing from any sanctions and/or directions from the Labour Inspectorate, for example.
- 11.3. In the event of circumstances that impede work, including inclement weather, the contractor's delivery and/or execution period shall be extended by a period equal to the delay in question.

Work-impeding circumstances are understood to include:

All circumstances, including inclement weather (such as precipitation, wind and frost), resulting in an unsafe work situation that does not meet the requirements of the VMRG V&G-plan Gevelbouw or prevents work being completed in accordance with the VMRG-Kwaliteitseisen en Adviezen©.

Days on which work-impeding circumstances arise shall be regarded by the contractor as days on which no work can be performed.

Days on which no work can be performed are understood to mean:

working days and half working days on which, due to circumstances beyond the contractor's control, no work can be performed by the majority of staff or machines for at least five and two hours, respectively.

- 11.4. The contractor accepts no liability for, for example, facilities, tools, materials, auxiliary materials, machines, scaffolding, platforms, vehicles, lifts, ladders, etc., made available by the customer. The customer guarantees that they meet the governmental (construction) safety requirements and shall indemnify the contractor against any third-party claims on account of damage resulting from the above materials.
- 11.5. The customer is entitled to inspect any stored materials that cannot be immediately installed on the construction site for compliance with the agreements made. Any non-conformities must be immediately reported to the contractor in writing. If the customer fails to inspect the materials, the contractor's records shall be decisive.
- 11.6. The customer shall be liable for all damage as a result of the loss, theft or burning of or damage to tools, materials and other property of the contractor located at the location where the work is performed and/or the location where tools, materials and other property are temporarily or permanently stored.
- 11.7. If the customer fails to discharge his obligations as referred to in the previous paragraphs and the work is delayed as a result, the work shall be executed as soon as the contractor's planning schedule permits this. In addition, the customer shall be liable for all loss or damage suffered by the contractor as a result

## **Article 12: Completion of the work**

- 12.1. In this article, completion is understood to mean delivery of the work by the contractor, in whole or in part, in accordance with the provisions of Article 12.2, to the other party to the contract/the customer.
- 12.2. The work shall be deemed to have been completed when:
- a. the customer has approved the work in whole or in part;
  - b. the work has been used by the customer; if the customer uses only part of the work, such part shall be deemed to have been completed;
  - c. the contractor gives written notice to the customer that the work has been completed and the customer does not indicate in writing within 14 days of the notice whether or not the work has been approved;
  - d. the customer does not approve the work on account of minor defects or missing parts, which may be remedied within a reasonable period of time and do not impede use.
- 12.3. If the customer does not approve the work, he shall be obliged to give written notice of this to the contractor specifying the reasons.
- 12.4. If the customer does not approve the work he shall give the contractor the opportunity to complete the work anew. The provisions of this article shall then apply once again

## **Article 13: Liability**

- 13.1. The contractor is liable for damage which the customer suffers and which is the direct and sole result of a failure attributable to the contractor. However, only loss or damage for which the contractor is insured or for which he should reasonably have been insured will be eligible for compensation.
- 13.2. The following are not eligible for compensation:
- a. consequential loss or damage, including for example loss or damage due to business standstills and loss of profit;
  - b. damage to goods which are being worked on or to goods which are in the vicinity of the place where the work is being carried out;
  - c. damage caused by the intent or deliberate recklessness of auxiliaries.
- 13.3. The customer indemnifies the contractor against all claims of third parties on account of product liability due to a defect in a product which has been supplied by the customer to a third party and consisted wholly or partly in products and/or materials supplied by the contractor.

## **Article 14: Warranty**

- 14.1. The contractor warrants the proper execution of the agreed performance for a period of five years after delivery or completion.
- 14.2. Contrary to the five-year period stipulated in paragraph 1, ventilation grilles and door and window furniture shall be guaranteed for a period of one year.
- 14.3. If the contractor uses any third-party materials or services in the performance of the work, the contractor's warranty to the customer shall under no circumstances extend beyond the warranty given by the contractor's supplier or subcontractor.
- 14.4. If the agreed performance consists in the carrying out of contracted work, the contractor warrants the soundness of the delivered construction and the materials used in the construction for the period referred to in paragraph 1, provided that he was free to choose such materials. If it

transpires that the delivered construction or the materials used are unsound, the contractor shall repair or replace them or credit the customer for a proportional part of the invoice.

- 14.5. If the agreed performance consists in the delivery of an item of goods, the contractor shall warrant the soundness of the delivered item during the period referred to in paragraph 1.

If it transpires that the delivery has not been sound, the item of goods must be returned free of charge to the contractor. Thereafter the contractor shall choose whether:

to repair the item of goods;

- to replace the item of goods;

- to provide the customer with a credit note for a proportionate part of the invoiced amount.

The customer shall bear any travel, accommodation and/or transport expenses.

- 14.6. Unless the customer is a consumer, i.e. someone acting privately, the costs of replacement or repair shall be borne by the contractor up to the part of the invoice amount (exclusive of VAT) pertaining to the manufacturing and installation costs of the part in question or up to the amount guaranteed by the contractor's supplier or contractor. Unless agreed otherwise, the value of the delivered work is calculated as a percentage of the invoice amount as follows:

a.	work preparation	10%
b.	sections and sheet-metalwork	30%
c.	surface treatment	10%
d.	sealing	5%
e.	glass and panels	20%
f.	door and window furniture, etc.	10%
g.	other materials	5%
h.	general costs	10%

The costs of installation shall be invoiced at a fixed rate of 10% of the invoice amount. In other words, the above invoice amount percentages shall be decreased by 10% each.

- 14.7. The customer must at all times give the contractor the opportunity to repair any defect or replace any defective part. The customer shall allow the contractor to use any available electrical connections, hoisting, lifting and transport equipment, scaffolding, window-cleaning systems, etc., free of charge.
- 14.8. The warranty shall not take effect until the customer has met all his obligations to the contractor. Any postponement of the effective date of the warranty shall not change the end date of the warranty.
- 14.9. The warranty period shall not be extended or renewed by any redelivery, replacement or repair.
- 14.10. No warranty is given for defects that are a result of:
- weathering and/or normal wear;
  - injudicious or abnormal use;
  - failure to perform maintenance or cleaning in accordance with the requirements of the VMRG-Kwaliteitseisen en Adviezen© applicable three months before conclusion of the agreement;
  - installation, assembly, modification, repair or additions by the customer or third parties;
  - minor finishing defects that do not affect soundness;
  - any damage resulting from changes in the form of architectural constructions, improperly performed construction, repair, cleaning or other work or use of materials that are not suited for the purpose;
  - any damage resulting from any unforeseen, temporary or permanent, detrimental environmental impact;

- h. goods, materials, working methods or constructions that do not comply with the regulations, requirements and recommendations provided in the VMRG-Kwaliteitseisen en Adviezen©, in so far as they have been applied on the customer's express instructions;
- i. any materials supplied by or on behalf of the customer;
- j. filiform corrosion;
- k. colour differences and/or loss of gloss in accordance with the relevant requirements of the provisions of the VMRG-Kwaliteitseisen en Adviezen© applicable three months before conclusion of the agreement;
- l. any defects that could have been detected upon delivery/completion;
- m. any damage and/or defects arising during or after delivery/completion due to external influences;
- n. sunblinds, window-cleaning systems, ladders, etc.;
- o. (thermal) glass breakage or the use of (mirror) wired glass;
- p. damage resulting from a thermal load exceeding 70°C;
- q. sealing, except with regard to waterproofness;
- r. sealing sections (EPDM), except with regard to flexibility.

### **Article 15: Claims**

The customer may no longer invoke an instance of non-performance if he does not lodge a written claim with the contractor within 30 days of the date on which he discovers the defect or could reasonably be expected to discover it.

If the customer is a consumer, i.e. someone acting privately, the customer shall be obligated to file any complaints within 2 months.

### **Article 16: Obligations not fulfilled by the customer**

- 16.1. If the contractor is prepared and able to fulfil his obligations under the agreement, but the fulfilment is impeded by circumstances for which the customer can be held liable, the customer shall be liable for any loss of interest, costs and damage incurred by the contractor.
- 16.2. Any goods not accepted after the delivery and/or execution period for the entire delivery, entire work, parts of the work or partial deliveries has/have lapsed shall be stored at the customer's expense and risk and be kept available for the customer. The contractor shall at all times be entitled to exercise the authority referred to in Section 6:90 of the Netherlands Civil Code.

### **Article 17: Payment**

- 17.1. Payment shall be made at the place of business of the contractor or by remittance to an account designated by the contractor.
- 17.2. Unless agreed otherwise, payment shall be made as follows:
  - a. cash in the case of an over-the-counter sale;
  - b. if payment in instalments has been agreed:
    - 30% of the total price at the time the order is placed;
    - 30% of the total price upon commencement of production;
    - 30% of the total price after the material is supplied
    - 10% of the total price upon completion;
  - c. in all other cases: within 30 days of the date of the invoice.
- 17.3. Regardless of the agreed terms of payment, the customer shall be obliged, at the request of the contractor, to provide such security for the payment as the contractor deems sufficient for the payment. If the customer fails to do so within the specified period, he shall be deemed to be

immediately in default. The contractor shall in that case have the right to terminate the agreement and recover his loss or damage from the customer.

17.4. The customer does not have the right to set off claims against the contractor, unless the contractor has been declared bankrupt.

17.5. The full claim for payment shall be immediately due and exigible if:

- a. a payment period has been exceeded;
- b. the customer has been declared bankrupt or has applied for a suspension of payments;
- c. the property or accounts receivable of the customer are seized;
- d. the customer (being a legal entity) is wound up or liquidated;
- e. the customer (being a natural person) is made the subject of a guardianship order or dies.

17.6. If payment has not been made within the agreed period for payment, the customer shall immediately owe interest to the contractor. The interest shall be 10% per year or the statutory rate of interest, whichever is the higher. For the purpose of calculating the interest, part of a month shall be treated as a full month.

17.7. If payment has not been made within the agreed period for payment, the customer shall owe the contractor all extrajudicial costs of recovery, subject to a minimum of €50.

The costs shall be calculated on the basis of the following table:

on the first €3,000	15%
on any additional amount up to €6,000	10%
on any additional amount up to €15,000	8%
on any additional amount up to €60,000	5%
on any additional amount over €60,000	3%

If the extrajudicial costs actually incurred are higher than those in the above-mentioned table, the costs actually incurred shall be owed.

17.8. If the contractor is held to be in the right in legal proceedings, all costs which he has incurred in connection with the proceedings shall be borne by the customer.

#### **Article 18: Reservation of title and right of lien**

18.1. After delivery of the goods the contractor shall retain title to them as long as the customer:

- a. fails or will fail to perform his obligations under this agreement or other similar agreements;
- b. fails or will fail to pay for activities performed or yet to be performed under such agreements;
- c. Has not paid claims that result from the non-observance of the above-mentioned agreements such as damage, penalties, interest and costs.

18.2. As long as title to delivered goods is retained by the contractor, the customer may not encumber them other than in the normal course of his business.

18.3. After the contractor has invoked his reservation of title, he may retake possession of the delivered goods. The customer shall allow the contractor to enter the place where the goods are situated.

18.4. If the contractor is unable to invoke his reservation of title because the delivered goods have been mingled, distorted or changed by way of accession (*accessio*), the customer shall be obliged to grant the contractor a lien on the newly created goods.

## **Article 19: Termination**

If the customer wishes to terminate the agreement in circumstances where the contractor is not in default and the contractor agrees to this, the agreement shall be terminated by mutual consent. The contractor shall in that case be entitled to compensation of all pecuniary damage, such as any loss suffered, loss of profit and costs incurred.

## **Article 20: Applicable law and choice of forum**

- 20.1. a. All agreements to which these conditions apply in whole or in part are governed by Netherlands law.  
b. The Vienna Convention on Contracts for the International Sale of Goods (CISG) is not applicable, nor is any other international regulation the exclusion of which is permissible.
- 20.2. Undisputed monetary claims arising from an agreement to which these conditions apply will be submitted for collection to the civil court within whose jurisdiction the contractor has its principal place of business, unless mandatory law dictates otherwise. The contractor is allowed to disregard this competence rule and abide by the statutory regulations of competence.
- 20.3. Any other disputes arising from an agreement to which these conditions apply shall be brought before an arbitration tribunal to the exclusion of an ordinary court of law.
- 20.4. The arbitration tribunal referred to in paragraph 3 shall be appointed in accordance with the bye-laws of the Stichting Raad van Arbitrage voor Metaalnijverheid en -Handel (Board of Arbitration for the Metal Industry and Trade), and give a decision in accordance with the Board's bye-laws.