

General terms and conditions for the periodical servicing of material testing machines

1. Application

1.1.

These general terms and condition apply to all contracts concluded between the company Zwick GmbH & Co. KG (hereafter referred to as "the contractor") and its customers' (hereafter referred to as "the customer") for the periodical servicing of material testing machines.

1.2.

We shall not be bound by any other terms and conditions our customer(s) may probably have established, which same shall even apply if we, after their receipt, do not expressly oppose to them.

2. Scope of performances

2.1.

Our offers contain a detailed definition of the scope of services we cover. Any such offers form part of the contract concluded with our customer(s).

2.2.

Any materials required for the rendering of our services will, in as far as not included in the scope of performances specified in above item 2.1, be billed in addition to the expenses actually incurred. All parts used are, in each case, invoiced according to the current prices charged by the contractor at the time the services are supplied.

No invoice is made out if the material is required within the framework of our warranty obligations and within the warranty period actually granted.

2.3.

If, during the execution of the servicing works (maintenance, inspection or calibration) it is found that repairs need to be made that are not covered by the scope of the performances stipulated in the valid contract concluded with our customer, this will be discussed with the customer at his facilities. The further course of action to be taken with regard thereto will be agreed seperately.

2.4.

The conclusion of this contract does not exonerate the customer from his obligation to execute the maintenance works prescribed in the related operator- and/or user manual (e.g. oil level control, check of the condition of the spindles, ...), except for if these maintenance works have explicitly been transferred to the contractor in this contract.

3. Reaction model (see amendment 1 to the maintenance contract)

The reaction time is considered as the span between the reception of the related fault message at the contractor's installations or the moment at which it is found to be certain that a phone based fault fixing will not be possible or is considered as the span between availability of the required spare parts and the arrival of the specialist on site.

4. Price and payment

4.1.

For each object specified in this contract for servicing, a fixed price is quoted. Any such fixed prices can be learned from the contract. The calculation of said fixed prices is based on the existing equipment- and accessory specification that is established with regard to the corresponding object. The scope of the related maintenance services including all details covered can be learned from the individual offers made with respect to the objects to be serviced. Any such offers form part of this contract.

4.2.

Any counterclaims the customer may have raised that are contested from our side or that have not been recognized by declaratory judgement do neither entitle the customer to refuse his performance until counter-performance is effected nor to make any set-offs of what kind ever.

4.3.

In the event the customer requires that the works stipulated herein be performed outside the usual business hours and the contractor consents to it, the customer shall bear all additional costs hereby incurred.

4.4.

The price to be paid for the work performed by the servicing personnel is plus legal VAT and falls due after the completion of the services to be rendered. The consideration to be paid for the reaction models is invoiced annually in the same month the contract began to run. Regarding thereto, the payment terms specified in the related offer shall apply.

4.5.

The customer shall, prior to any change of prices charged for the work performed by the servicing personnel, be informed thereof in writing. Any such changed prices are charged as of the next time stipulated for payment, which even applies in the event the customer has anticipated this payment.

5. Co-operation of the customer and rendering of technical support

5.1.

The customer shall, during the execution of the necessary servicing works, be obliged to support the servicing personnel at his own expense.

5.2.

The customer shall take all special measures and precautions necessarily required in order to ensure the safety and protection of persons and things at the place the servicing works are performed. He shall also be obliged to inform, in as far as these are of importance with regard to the servicing personnel used, the manager of the servicing team of any probably existing specific safety instructions. He shall inform the contractor of any infringement of these safety instructions the servicing personnel may have committed. The customer may, in the event that serious infringements were committed, deny, after corresponding agreement with the manager of the servicing team, that persons contravening such instructions be allowed to access the servicing place in question.

5.3.

The customer shall, at his own expense, be obliged to provide and supply electric current and water and all the required connections.

6. Fulfilment of the contract with respect to time

6.1.

The contractor hereby obliges itself to service the objects fixed and specified in compliance with the stipulations fixed in this contract at the agreed intervals.

6.2.

The contractor shall, if no certain date has been agreed between the contracting parties, inform the customer at least two (2) weeks in advance of the date of the execution of the servicing works.

In the case the contractor was unable to perform the works on the date provided for, the customer shall be obliged to inform the contractor thereof and to ensure that this information is received at least seven (7) days prior to any such date. In the event said information is forwarded belatedly by the fault of the contractor, the full price shall fall due if the service technicians cannot, at the time provided for it, be used otherwise or elsewhere.

6.3.

In the event the servicing is delayed by reason of industrial conflicts and/or actions, in particular strikes and/or lock-outs or by reason of circumstances that are not attributable to the contractor, the servicing period shall, unless such impediments affect the completion of the servicing works to be rendered in a demonstrable manner, be extended reasonably.

6.4.

In the event the customer incurs any loss that is attributable to the contractor's delay in performance, the customer shall be entitled to claim a lump-sum compensation for the loss occasioned by this delay. If no intent or gross negligence is involved in regard to the actions performed by the owner, its organs or its managerial staff, the compensation for the loss actually incurred shall not exceed the equivalent of one (1) monthly flat charge.

In the event the customer, in due consideration of the legal exceptions, fixes, after the due date has gone by without results, a reasonable time limit for the discharge of the services to be rendered under this contract, the customer shall, provided the contractor fails to meet this time limit too, be entitled to terminate this contract without notice.

Further claims shall, notwithstanding any intent or gross negligence involved in regard to the actions performed by the owner, its organs or its managerial staff, be excluded.

7. Beginning and term of contract

7.1.

This contract becomes effective as of the date of its signature by the authorized representatives of both contractors involved.

7.2.

The contract ends twelve (12) months after the end of the calendar year within which it became effective. Unless terminated in writing three (3) months prior to its expiry, the contract is, provided no other written agreement was made with the customer, renewed implicitly for another twelve (12) month term.

8. Warranty claims and liability

8.1.

In the event the agreed services are performed incompletely or improperly, the contractor shall be obliged to immediately make up for it or rectify any such defects free of charge.

8.2.

If the contractor fails to meet his obligation to make up or rectify any such defects or if he fails to eliminate any damages probably sustained, the customer may be entitled to fix a reasonable period of grace with regard thereto. If the contractor lets this term expire without conforming to his obligations, the customer may, at his own choice, claim a reduction of the fixed servicing prices or may terminate this contract without notice. The same shall apply with regard to other cases where the contractor fails to eliminate or remove any damages probably sustained. The customer shall, in as far as practicable, also be entitled to let the works be performed by a third party and claim from the contractor the reimbursement of the costs necessarily incurred.

8.3.

- (1) In the case the contractor's obligation to pay damages is based on the infringement of essential obligations to be met by him under this contract and if this constitutes ordinary negligence, the contractor hereby limits, except if the damage actually sustained is a damage to life, body or health, his liability for damages and the liability of his legal representatives and/or all persons he has employed in performing his obligations to the foreseeable, contractually anticipated damage.
- (2) In the case the contractor's obligation to pay damages is based on the infringement of non-essential obligations to be met by him under this contract and if this constitutes ordinary negligence, the contractor hereby excludes, except if the damage actually sustained is a damage to life, body or health, his liability for damages and the liability of his legal representatives and/or all persons he has employed in performing his obligations.
- (3) Regarding all cases where damages are sustained due to the contractor's negligent failure to comply with his duties under this contract and where he, regardless on what legal or statutory basis, is liable for damages, the liability of the contractor shall, except if these claims base on the Product Liability Law, be limited to the damage the contractor could have foreseen.
- (4) Alternatively, the contractor hereby excludes, in as far his action constitutes an ordinary liability that, with respect to its nature and outcome does not endanger the purpose of this contract, his liability for damages and the liability of his legal representatives and/or all persons he has employed in performing his obligations, except if these damages are damages to life, body or health.
- (5) The preceding provisions shall not apply to any claims based on the Product Liability Law.
- (6) In the event certain claims are asserted against the contractor that base on the manufacturer's liability according to § 823 BGB (base for claims based on tort laid down in the German Civil Code) the contractor hereby limits his liability beyond the provisions set out hereinbefore to the compensation or indemnification paid by his liability insurer. The amount to be covered shall be fixed and agreed in such a manner that all damages typically occurring within this business and liability sphere are, with the typical reference to the relevant issues, covered in a contractually anticipated manner. In as far as the insurer's liability does not accrue or accrues incompletely, the contractor's liability shall, limited to the amount actually insured, remain unaffected. In the event the amount covered is not agreed in the manner specified hereinbefore, the contractor hereby limits his liability to the amount typically to be covered with respect to the damage actually occurred, the contract concluded or the matters actually occurred.

9. Limitation of time

The term of limitation shall be twelve (12) months.

10. Other provisions

10.1.

Extensions to, displacements of or partial restorations of and/or other modifications to the machine and/or the installations may, during the term of the servicing contract, only be executed by the contractor himself or in close co-operation with him.

10.2.

The customer shall, during the regular business hours / working times, be obliged to allow access to the servicing personnel in charge to the machines and installations for the purpose of the execution of the previously announced servicing works. The customer shall also be obliged to provide the contractor with all information latter may desire with regard to the machines and/or installations to be serviced and to place all associated documents at his disposal.

10.3.

In the event the customer leaves machines or installations to a third party, his obligation to pay the annual premium shall, except that this third party accedes to this contract, continue to be in force. The contractor may refuse his consent to any such accession only for good cause.

10.4.

The contractor is not entitled to transfer all or any of his rights and obligations under this contract to any third party whoever.

10.5.

If one or more provisions set out in these general terms and conditions should be or become fully or partially invalid, void or impracticable, any such provision shall be replaced by a provision that legally as economically come as close as ever possible to the purpose and intent of this contract. The validity of the other provisions contained herein shall remain unaffected.

10.6.

Side agreements and/or alterations of this contract are subject to the written consent of both contracting parties involved.

10.7.

Prior to taking charge of the servicing of any foreign machines and/or installation, i.e. machines that have not been supplied by the contractor, or prior to taking charge of the servicing of machines and/or installations that were operated for a certain time or that were temporarily out of service, the contractor may inspect any such machines and/or installations first. All costs incurred in connection with any such inspection and any repair works will be put down separately to the customer's account.

11. Place of jurisdiction

11.1.

The place of jurisdiction for all litigations arising out of this contractual relationship shall be the competent court in Ulm, Germany. This contract shall be governed by the laws of the Federal Republic of Germany. The application of the UN Sales Convention (CISG) shall be excluded.