

# Terms and conditions of Wintershall Holding AG and associated companies for construction and installation work



■ BASF Group

(hereinafter referred to as Company) – issued: October 2006 -

## 1. General information

These terms and conditions apply to contracts for construction and installation work issued by Company. Any variation to the terms and conditions stipulated by Contractor will not be recognised. Even if the goods, work or services have been supplied and accepted by Company without reservation, Company will not recognise other terms and conditions stipulated by Contractor.

## 2. Contract basis

The following elements of the contract shall apply in the order set out below:

- a) the performance specification (including the associated approvals, plans, drawings and static calculations);
- b) the general term and conditions of construction and installation work of Wintershall Holding AG and associated companies;
- c) Company's technical specifications;
- d) the general conditions of purchase of Wintershall Holding AG and associated companies;
- e) part C of the German regulation governing construction work contracts in the version applicable at the time when the contract is concluded;
- f) the German civil code (BGB).

The European standards with the EN prefix are applicable to technical goods, work and services, in other respects the German standards with the DIN prefix apply.

## 3. Scope of work

- 3.1. Contractor is required to supply its goods, work and services free from defects and within the planned time frame.
- 3.2. Contractor is required to appoint a site manager for the whole construction period until the time of acceptance. Company must be notified without delay if the site manager is replaced.
- 3.3. Contractor is required to inspect the site at an early stage when tendering or negotiating the contract. Any obstructions and difficulties must be mentioned when tendering or during the contract negotiations. If this is not done, any obstacles and difficulties that would have been identifiable on careful inspection to ensure proper performance are covered by the agreed prices.
- 3.4. Furthermore Contractor has the following duties, which are covered by the agreed prices:
  - a) provision of the site facilities for its contract;
  - b) supply of electricity and water to the site as well as disposal during the construction period and until acceptance, including any connection charges incurred;
  - c) assuming responsibility for traffic safety for the work hereunder, in particular compliance with the accident-prevention measures stipulated by the employers' liability insurance association as well as the HSE guidelines issued by Company;
  - d) protection of the work carried out by Contractor against damage and theft until acceptance; in particular protection against winter damage and ground water;
  - e) locating and protecting underground pipelines and cables and in structural units;
  - f) obtaining the necessary acceptance from local authorities, including any costs and charges incurred as a result;
  - g) carrying out the surveying work required during the construction period, including any costs and charges incurred as a result;
  - h) preparing all as-completed documents and revise plans as well as handing over the operating documents, operating instructions and maintenance instructions;
  - i) affixing a construction sign in consultation with Company;
  - j) daily cleaning of the site to remove waste, packaging material etc. relating to his contract; disposal of such waste;
  - k) cleaning, maintenance and securing of paths and roads; preserving evidence of adjacent developments;
  - l) taking part in all construction meetings that relate to the contract;
  - m) continuous employment of at least one German-speaking employee on site;
  - n) checking documents provided by Company, and any future documents provided by Company, to ensure that they are complete and technically suitable; Contractor is required to check all information provided; if Contractor believes that a discrepancy has arisen, it is required to point this out to Company without delay and in writing;
  - o) taking any necessary trial runs and commissioning procedures into account when calculating the unit prices; and
  - p) observing the accepted engineering standards and codes of practice. In so far as specific characteristics are stipulated by the written or unwritten rules of construction practice, such characteristics are deemed to be contractually agreed. If there are several technically feasible performance options, the one offering better quality must be chosen.

## 4. Contract performance

- 4.1. Company's approval must be obtained if the contract is to be carried out wholly or in part by a third party. In this case Contractor is required to disclose the name and address of the subcontractor of its own accord.
- 4.2. Contractor is required to inform the Company without delay and in writing if it has any concerns about the intended way in which the work is to be carried out, about instructions issued by Company, about the quality of the materials and structural elements supplied by Company or about the performance of other contractors.
- 4.3. Contractor is required to inform Company without delay and in writing of any necessary deviation from the nature and scope of the agreed performance. Company's prior written approval must be obtained for any such deviation, except in the event of imminent danger.
- 4.4. If work has to be discontinued on account of unavoidable stoppages or breakdowns at Company's plants/sites, Contractor is not entitled to make any claims against Company.

## 5. Conduct during the performance of the contract

- 5.1. Contractor's employees and agents are required, for reasons of security, to submit to the entry controls to Company's facilities when working there, to conform to the normal hours of work and procedures, as well as to observe the safety regulations applicable in those areas and to comply with the Company's instructions in that regard.
- 5.2. Contractor is required to comply with all pertinent statutory provisions, official regulations and the provisions of the employers' liability insurance association, the generally accepted regulations relating to health and safety at work, as well as the data protection regulations, to find out about such regulations and to instruct its employees and agents accordingly at its own expense. Contractor releases Company from claims advanced against Company as a result of any violations of duty on the part of the Contractor's employees and agents. Contractor shall inform the Company without delay of any accidents and damage caused or sustained by employees and agents of Contractor in Company's facilities. A copy of the notification of the accident must be handed over to Company.
- 5.3. Contractor has to make its own provisions for housing and supervision of materials and auxiliary resources.

## 6. Materials, auxiliary resources

- 6.1. Subject to sub-section 6.4, all materials (e.g. general and construction materials, spare parts) as well as auxiliary resources (i.e. tools, equipment, machinery, vehicles, scaffolding, site huts, energy, water etc.) are to be provided by Contractor without Contractor being entitled to additional remuneration. The relevant delivery notes must be submitted to Company for any deliveries to Company's facilities.
- 6.2. Contractor is required to remove any material and auxiliary resources no longer required immediately after completion of the contract. Evidence of such material and resources having been previously delivered by Contractor must be provided when such items leave Company's facilities.
- 6.3. Contractor shall allow Company, or a third party designated by Company, to share the use of auxiliary resources provided by Contractor.
- 6.4. If it has been agreed that material and/or auxiliary resources are provided in whole or in part by Company, Contractor is required to collect and immediately inspect such items from the relevant sections in Company's facilities, quoting the order number and the purpose of those items. Company must be informed without delay and in writing of any complaints. Company will not accept complaints submitted at a later stage.
- 6.5. Company does not accept any liability, nor will Company provide any compensation for the materials and auxiliary resources delivered by Contractor or for any other items belonging to Contractor and located at the construction site.

## 7. Insurance

It is Contractor's responsibility to insure materials and auxiliary resources against the risk of fire and explosion.

## 8. Remuneration, invoicing, payments

- 8.1. The agreed prices include remuneration for all goods, work and services required for the performance of the contract (in particular personnel, materials, auxiliary resources and the goods, work and services specified in these conditions); this also applies to partial performance not expressly mentioned, in so far as required for providing the individual goods, work and services.
- 8.2. All work and services, additional work and services and measures that become necessary to provide protection against damage and the effects of the weather until acceptance are included in the agreed prices.
- 8.3. The agreed prices are not affected by increases in labour costs, the price of materials, social security contributions, tax rates of similar until acceptance. An exception to this is any change in the rate of value-added tax (VAT).

- 8.4. In so far as part payments have been agreed, Company will only pay 80 % of the amounts shown on verifiable interim invoices within the agreed credit period. The remaining 20 % will be paid with the final payment. Partial payments are only made if they exceed 10 % of the estimated total remuneration and amount to at least €10,000.
- 8.5. Contractor is required to prepare the final invoice with all the necessary original documents in a verifiable form and to send these to Company by recorded delivery within four weeks of acceptance. Company will check and pay the final invoice within 30 days of receipt, deducting the amount retained as security as agreed in sub-section 14.3.
- 8.6. In accordance with articles 28 and further EStG (income tax law), Company is required, unless Contractor submits a notice of exemption, to pay 15 % of the contract value to Contractor's local tax office. To ensure that Company can satisfy this obligation, Contractor must provide the details of its local tax office, its tax reference number and the banking details of its tax office at the latest on submission of the invoice. Company expressly advises Contractor that the provision of these details is a prerequisite for the payment becoming due for settlement.
- 8.7. Company will not make any payment for the working hours expended by Contractor's supervisory staff on paper work carried out in the interests of Contractor, which also includes writing out the daily time sheets, as well as for the expenditure of time and materials on fulfilling the obligations set out in sections 3, 4 and 5.
- 8.8. In so far as billing and remuneration have been agreed by site measurements, the following applies in addition to sub-sections 8.1 to 8.7:
- If standard rates have been arranged on the basis of a mutually agreed assumption of a particular total contract scope, then adjustment of the agreed standard rates may be claimed if the scope of work actually provided is more than 25 % above or below the assumed total scope. Contractor shall inform Company without delay if it becomes evident that the level of 25 % above or below the scope of the contract will be exceeded.
  - Payments are rendered by Company on the basis of a site measurements document to be prepared jointly on site, in which all measurements are to be entered in waterproof ink, and which must be signed by the persons recording those measurements.
  - Quantity surveys, site measurement lists, original receipts and certificates of material consumption must be enclosed with the invoices. Quantities must be ascertained on the basis of mathematical formulae (not by using an approximation method).

- 8.9. In so far as billing and remuneration have been agreed by time required, the following applies in addition to sub-sections 8.1 to 8.7:

Unless otherwise agreed Company will only make the following payments:

- Company will pay a reasonable hourly rate for the actual documented hours worked (without breaks) for each employee of Contractor or of its agent, as applicable, up to the maximum of the standard union rate payable by Contractor or the agent, plus
- an appropriate entrepreneurial premium;
- furthermore Company will reimburse Contractor or the agent for the documented costs incurred as severance pay, commuting and travelling expenses paid to the deployed employees in so far as such payments are standard practice and provided that the amount of such payments is reasonable.

## 9. Amended or additional work

- 9.1. Contractor is required to carry out amended and/or additional work at Company's request if such work becomes necessary for the performance of the contractually agreed work. This does not apply if Contractor's operation is not set up appropriately. Contractor's remuneration is determined on the basis of the price established for the work, hereunder taking the special costs of the work demanded into account.
- 9.2. If work not foreseen in the contract or amended work is demanded, Contractor is only entitled to special remuneration if it advises Company of such a claim before commencement of the work.
- 9.3. There is no entitlement to additional remuneration if Contractor's claimed supplement is based on circumstances which should have been foreseeable by diligent Contractors from the tender documents (construction plans and specification) in conjunction with the site inspection and where nevertheless no indication of this was given with details of the additional costs before the contract was concluded. Such work is then deemed to be additional work that is included in the calculations of the price requested together with the specification.
- 9.4. Orders for amended or additional work are only effective if they are issued by Company in writing.

## 10. Periods of performance

- 10.1. The contractually agreed dates or periods allowed are binding. This applies in particular to the agreed completion date, but also to the agreed commencement of work and to all interim dates, in particular the dates stipulated in a construction progress schedule.
- 10.2. Contractor is required to provide sufficient personnel, equipment, scaffolding, materials or structural components on site to allow Contractor to meet the deadlines. If this is not the case, Contractor is required to remedy the situation immediately at Company's request.
- 10.3. If Contractor believes to be hindered in the proper execution of the work, Contractor is required to notify Company of this without delay and in writing. If Contractor fails to provide such notification, Contractor is required to bear the costs of any resultant shortcomings and damage.

## 11. Functional tests and trial operation after installation work

- 11.1. The plant is completed when the installation work has been finished. The functional tests then commence with and without load for the individual plant units, plant groups and the plant as a whole.
- 11.2. The plant is operational on completion of functional tests. If the plant proves to be ready for operation after commissioning, trial operation must be started immediately to determine the serviceability of the plant.
- 11.3. During the trial operation the plant is run in accordance with a programme to be stipulated by Company, although it will be running under the supervision of Contractor and at Contractor's responsibility.
- 11.4. Damage to the plant/machinery arising during the trial operation is the responsibility of Contractor unless Contractor can demonstrate that Company's operators acted contrary to the operating instructions made known and explained by Contractor.
- 11.5. An agreement with the other companies involved as well as Company's production and maintenance departments must be reached via Company's site office with regard to commencing the trial operation.
- 11.6. The transfer of risk, acceptance and start of the warranty or limitation period are not associated with the commencement of trial operation or with any other events during the trial operation.

## 12. Acceptance

- 12.1. Formal acceptance is effected by Company's signing of the acceptance form. The option of acceptance by putting the plant into operation is excluded. Both parties have the right to invite an acceptance inspection with seven working days' notice.
- 12.2. Contractor is required to assist during the acceptance procedure and to provide the necessary labour and measuring equipment.
- 12.3. The option of notional acceptance provided for in article 640 paragraph 1 sentence 4 BGB is excluded.
- 12.4. The option of acceptance by certificate of completion is excluded.

## 13. Warranty

- 13.1. Contractor guarantees that the work is of the agreed quality, complies with the accepted state of the art and is suitable for use as required by the contract.
- 13.2. The agreed quality also includes properties which Company can expect in accordance with the public statements made by Contractor or its agents, especially in advertising or in the designation of particular characteristics of the work. To this extent article 434 paragraph 1 sentence 3 BGB applies to the contract.
- 13.3. If a defect is due to the specification or to instructions issued by Company, to materials or structural components supplied or stipulated by Company or to the quality of prior work carried out by a different contractor, Contractor may only cite such circumstances if Contractor has given notification of its concerns as required in accordance with sub-section 4.2.
- 13.4. If, in the event of inadequate performance, Company will request Contractor for subsequent performance within an additional period of time, Contractor is required to inform Company in writing immediately on receipt of such a demand whether it will remedy the defect, carry out the work again or whether it refuses to remedy the defect. Furthermore Contractor is required to inform Company whether the period allowed for subsequent performance is appropriate. If it fails to comply with these obligations to notify Company, Contractor is required to compensate Company for the damage incurred as a result.
- 13.5. Contractor assigns to Company all warranty claims as well as claims for the repayment of any overpaid remuneration to which Contractor is entitled in relation to its sub-contractors, in the event that Contractor files a petition in bankruptcy or that bankruptcy proceedings have been opened or that a petition in bankruptcy has not been opened or has been dismissed for insufficiency of assets. Company accepts the assignment.
- 13.6. The warranty period for all work provided by Contractor is five years and begins with acceptance.

#### 14. Securities

14.1 If it has been agreed in writing, Contractor shall provide security of 10 % of the net contract sum plus the statutory rate of value-added tax for the duration of the contract performance. This contract performance security covers the performance of all obligations arising from the contract, in particular the performance of the work as stipulated in the contract, including invoicing, remedying of defects and compensation as well as the reimbursement for overpayments including interest. Contract performance security is to be provided in the form of an absolute guarantee, unlimited in time, from a major German bank or a German credit insurer. The security bond must include a waiver of the defence of set-off and of avoidance (article 770 BGB), the defence of preliminary proceedings against a principal debtor (article 771 BGB), as well as the right of deposit with a public authority. Contractor shall bear the costs for the guarantee.

The contract performance guarantee must be handed over to Company and the transfer documented within 14 days of the contract being executed.

14.2 If the guarantee is not handed over before the first interim invoice is due for payment, Company may retain the security payment from this until the guarantee is provided and may, if appropriate, retain amounts from subsequent interim invoices.

14.3 If it has been agreed in writing, Company will retain 5 % of the net billing total plus the statutory value-added tax from the final account as security. This is paid out to Contractor subject to Contractor providing security for the warranty for the same amount, with the same requirements applying to the security bond as set out in sub-section 14.1.

The security for the warranty covers the fulfilment of warranty claims, including compensation, as well as to the reimbursement of overpayments including interest.

14.4 The contract performance guarantee is returned on Contractor's written request after acceptance and presentation of the final accounts as stipulated in the contract, when Contractor has performed the work stipulated in the contract, satisfied any claims (including third party claims) and has provided agreed security for the warranty period.

The warranty guarantee is returned by Company on Contractor's written request when the limitation periods for the warranty have expired and the claims raised until that time have been met.

#### 15. Termination

15.1 Notwithstanding its other rights, Company may terminate the contract for a serious reason if Contractor is seriously in breach of the contract.

15.2 A serious breach of the contract is deemed to have occurred in particular if Contractor does not desist from non-trivial behaviour that is contrary to the terms of the contract, despite a warning having been given under threat of termination of the contract.

15.3 A serious breach of the contract is further deemed to have occurred if Contractor has filed a petition in bankruptcy or if Contractor has suspended his payments not merely as a temporary measure or if bankruptcy proceedings have been opened against Contractor or if the petition in bankruptcy has been dismissed for insufficiency of assets.

15.4 A serious breach of contract is also deemed to have occurred if Contractor instructs a sub-contractor without the written approval of Company or permits and/or tolerates the further transfer by the sub-contractor. In such a case Company is entitled to terminate the contract if Contractor has not removed the sub-contractor acting without written approval from the construction site within a period stipulated by Company.

15.5 A general site measurement must be carried out within three working days of its being requested by one of the parties to the contract.

15.6 After termination of the contract Company is entitled to have the part of the performance not yet completed carried out by a third party at Contractor's expense. Any further claims, in particular for compensation, remain unaffected.

#### 16. Overpayment

In the event of Company claiming for recovery from overpayments (articles 812 and further BGB), Contractor may not invoke failure of enrichment (article 818 paragraph 3 BGB).

#### 17. Assignment

Assignment of Contractor's claims against Company is excluded. Article 354a HGB (commercial code) remains unaffected.

#### 18. Place of performance, governing law, legal venue, miscellaneous

18.1. Unless otherwise stipulated in the contract, the place of performance for both parties is Kassel, Germany.

18.2. The contractual relationship is governed by the law of the Federal Republic of Germany.

18.3. If Contractor is a registered trader, a legal person under public law or a special public fund, the legal venue is Kassel, Germany. However, legal proceedings may also be brought against Contractor at its place of general jurisdiction. Legal proceedings may be brought against Contractors who are not traders at the venue of Kassel, Germany if they are not resident or do not have a place of abode in Germany or if this is not known when the action is brought.

18.4. In the event of one of these provisions or part of any one provision being ineffective or being rendered ineffective, the remaining provisions or the remaining part of the provision shall remain effective.