

NKE AUSTRIA GmbH General Conditions of Purchase (11/2021)

1. Decisive conditions/Contract signing/Formal requirements

The legal relationship between the supplier (hereinafter referred to as the contractor) and NKE AUSTRIA GmbH (hereinafter referred to as the customer) shall be governed exclusively by the following conditions. The contractor's conditions and differing agreements shall only apply if the customer has recognised them in writing. Neither acquiescence nor acceptance of the service or payment thereof shall be interpreted as recognition.

The supply contract and any amendments, side agreements, clarifications regarding the termination thereof and all other clarifications and notifications must be made in writing unless otherwise stipulated in these conditions.

2. Ordering

1. Supply contracts (ordering and acceptance), also call-off orders and changes and additions thereto must be made in writing. Call-off orders may also be effected by means of data transmissions.
2. If the contractor does not accept the order within two weeks after receipt, the customer shall be entitled to revoke it. Call-off orders shall become binding if the contractor does not raise an objection thereto within two weeks after their receipt.
3. The customer shall be entitled to require such construction and configuration changes to be made to the supplied items as the contractor may be reasonably expected to make. If such changes are requested, due consideration must be given to their effects, particularly with regard to additional and reduced costs and to delivery deadlines.

3. Payment

1. Payment shall be made by the customer 21 days net after receipt of the invoice with 3% discount or within 60 days net. If the invoice is received before the delivery, the due date for payment shall be calculated on the basis of the actual delivery date.
2. In the event of an incorrect delivery, the customer shall be entitled to withhold payment proportional to the value of the order. This withholding entitlement shall be equivalent to double the anticipated cost of correcting the error.
3. The contractor is not entitled to assign its receivables from the customer to third parties or cause them to be collected by third parties without the prior, written agreement of the customer. Such agreement shall not be refused without good reason.
4. The customer shall be entitled to exercise its offsetting and withholding rights to the extent permitted by law.
5. In the case of contractually agreed prepayments, the customer is entitled to require security in the form of an open-ended directly enforceable bank guarantee in the amount of the prepayment sum at the first request, unless some other form of security is agreed. The bank guarantee must be provided by a financial institution or credit insurer that is permitted to conduct business in the EU.
6. The customer is entitled to request a price reduction during the term of a contract if it is able to prove that the agreed price no longer corresponds to the market price. If the contractor does not comply with this request, the customer shall be entitled to cancel the contract for substantive reason.

4. Notification of defects

The customer is entitled to conduct an inspection of the delivered products immediately before or during processing or treatment, installation or other form of use. The customer is not obliged to examine the goods and report defects immediately. A notification of defect shall be considered made in due time if it is reported within 2 weeks after the defect becomes definitely evident. The contractor waives any right to object for reasons of delayed inspection and/or delayed notification of defect.

5. Third party companies

The contractor shall not be entitled to assign contracted delivery and service agreements nor the customer's counterclaim in whole or in part to third parties unless the customer has consented to such assignment in advance. Such consent shall not be valid unless given in writing. Pure material procurement activities are excepted from this provision.

6. Confidentiality

1. The contractor undertakes to treat all commercial and technical information that is not common knowledge and becomes known to it by virtue of its business relations as industrial secrets. Drawing, models, patterns, samples and the like must not be divulged or otherwise made available to unauthorised third parties. Reproduction of such objects is not permitted except in the context of operational necessity and within the constraints of copyright provisions. Subcontractors must be bound by the same obligation.
2. If the contractor violates its obligations as set forth in Item 6.1. it shall immediately be liable to pay a contractual penalty in the amount € 15,000.00 for each violation incident. The contractor shall be entitled to obtain a legal ruling regarding the appropriateness of the contractual penalty.
3. The contractor shall not use its business relationship with the customer for advertising purposes except with the prior, written agreement of the customer.

7. Terms of delivery

1. Agreed deadlines, lead times and prices are binding. Compliance with the delivery deadline or delivery period shall be based on the time of receipt of the delivery at the customer's premises.
2. All consignments must be packaged appropriately for shipping and must be delivered to the customer free from packaging and freight charges, the goods are transported at the risk of the contractor. If a different agreement has been made explicitly (in writing), the contractor must ensure that the goods are made available in good time, packaged adequately for transportation, while considering the usual time for loading and shipping.
3. Return of packaging materials must be the subject of a separate agreement. The contractor shall bear any and all duties, taxes, levies and costs of importing associated with the order.
4. The customer shall only take out transport insurance if it is obliged to do so according to the contractually agreed delivery clause.

8. Delayed delivery

1. The agreed delivery and service deadlines (referred to hereinafter as the Delivery) are binding. The delivery deadlines apply to the receipt of the contractor's delivery at the customer's plant or at the delivery address designated by the customer (consignment arrival). If the contractor falls culpably into arrears with the Delivery, the customer shall be entitled to claim compensation in the amount of 0.4% – up to a maximum not exceeding 5% of the value of the agreed Delivery – for each calendar day of delay. This provision shall continue to apply if the customer withdraws from the contract. The customer shall retain the right to require payment of compensation for delay until complete payment has been made.
2. The customer's right to legal recourse in the event of delay shall be unaffected.
3. Without prejudice to its other rights, if the contractor has not succeeded in making up the delay at the end of a reasonable grace period set by the customer, the customer shall also be entitled to engage a third party to perform the services not yet provided by the contractor, at the contractor's cost.
4. If third parties are prevented from making the Delivery by protective rights, the contractor shall be obliged to obtain a corresponding exemption from such protective rights for the third party.
5. At all events, the contractor shall remain obliged to satisfy the terms of the contractual penalty that was incurred before the contract was cancelled.

9. Quality and documentation:

1. The goods to be delivered must conform to the applicable statutory provisions, the regulations governing accident prevention, and the prevailing, recognised rules of technology; they must also correspond most exactly with all documentation on which the order is based, such as drawings, descriptions, samples, specifications, acceptance conditions and the like.
2. Any deviation from the above requires the prior, written agreement of the customer. Particular attention must also be paid to DIN, EN, ISO, IEC, VDE standards, and EC directives. The CE declaration of conformity must be provided immediately at the request of the customer at no extra charge.
3. The contractor is obliged to carry out a continuous quality control programme corresponding to the state of the art and adequate for the nature and volume of the ordered goods.
4. If the customer requests the submission of initial samples, the contractor must not commence volume production until it has received explicit, written approval therefor from the customer.

10. Warranty

1. In the event of that defective goods are delivered, the contractor must first be given the opportunity to quarantine and rework the defective goods, or to make a substitute delivery before the start of production (processing or installation), unless this is unreasonable for the customer. If the contractor is unable to fulfil its obligations or if it does not comply with this requirement immediately, the customer shall be entitled to withdraw from the contract in this respect and return the goods at the contractor's risk; the customer shall further be entitled to supply its needs from elsewhere. In urgent cases, after consulting with the contractor the customer shall be entitled to repair the goods itself or have them repaired by a third party without allowing the contractor the opportunity to repair them. Costs incurred by such action will be borne by the contractor.
2. If the same goods are delivered in a defective state again, after receipt of a written warning and in the event of a successive incorrect delivery, the customer shall be entitled to withdraw from the unfilled portion of the order as well.
3. If the defect is not discovered until after production has started, despite observing its obligation defined in Item 4 (Notification of defects), the customer shall also be entitled to require compensation for the loss the customer suffers as a result of the additional expense – without prejudice to the rights set forth in the preceding.
4. The parts to be replaced by the contractor must be made available to the contractor immediately upon request, and at the contractor's cost. The customer shall be entitled to scrap the parts at the cost of the contractor if the contractor does not collect the defective parts by the end of a defined collection period. Any warehousing costs shall be borne by the contractor.
5. The warranty shall expire at the end of 36 months after delivery to the customer by the contractor.
6. Unless otherwise agreed in the preceding, the warranty shall be governed by the statutory provisions.

11. Liability

1. No exclusions of liability in any respect, nor any limitations of the liability of partners contracting with the customer, particularly not of liabilities pertaining to the warranty or compensation for damages, will be accepted unless such exclusions or limitations have been negotiated with the customer explicitly and separately, and recorded in writing. If operational safety is threatened, if there is a risk of extraordinarily extensive damage or in order to preserve the customer's ability to supply its own customers, the customer shall be entitled to carry out the subsequent repair itself or to engage third parties for this purpose after notifying the contractor thereof. The costs of such action shall be borne by the contractor. The contractor shall be liable for all losses and expenses suffered directly and indirectly by the customer as a result of pertinent defects. Expenses associated with performing a goods inward inspection that exceeds the normal scope is also subject to compensation if at least parts of the delivery have been found to be defective. This also applies for a partial or complete inspection of the deliveries received by the customer or its customers subsequently in the course of business. If the contractor uses the services of third parties in the provision of the services, the contractor shall be liable for such third parties and for vicarious agents.

2. The contractor further assumes individual responsibility for compensating the customer's customers or the customer itself for expenses they incur for early prevention, avoidance or limitation of damages (e.g. recall campaigns) prior to or in connection with defect responsibility incidents.
3. The contractor shall pay compensation for the expenses the customer is legally obliged to pay in compensation to its customers for defects that are attributable to defects in the delivery purchased from the contractor.
4. The contractor is obliged to hold adequate insurance protection against the risks of this Item 11 (Liability) for the duration of the supply contract. Proof of such insurance must be submitted to the customer upon request.

12. Customer-supplied components

1. Materials, parts, containers, special packaging, tools, measuring instruments or the like that are supplied by the customer (customer-supplied components) shall remain the property of the customer. If such components are processed, joined or mixed the customer shall receive joint ownership and the right of first refusal regarding the new product in proportion with the fraction of value of the overall product constituted by the customer-supplied component. Customer-supplied components may not be reproduced except with the prior, written consent of the customer. The reproductions become the property of the customer as soon as they are produced. The contractor shall have no right of retention in respect of the customer-supplied components for any reason whatsoever. Customer-supplied components and reproductions thereof must not be made available to third parties (including subcontractors) and are not to be used for any purposes except those agreed. If the contractor violates any of the obligations stipulated in the preceding, it shall be liable to pay compensatory damages in the amount of € 10,000 for each culpable incident of violation. The customer reserves the right to prove damages in excess thereof; in this case, the contractual penalty will be added. The contractor shall have the opportunity to prove that the level of damage is lower or nonexistent.
2. If the objects defined in the preceding Item 12.1. are produced on the instructions of the customer, ownership thereof shall revert to the customer upon approval of the samples. These will then only be provided to the contractor for its use, thus eliminating the need to transfer them. The contractor is obliged to issue the objects to the customer at any time and shall bear the risk for any accidental perishing thereof until they are issued.

13. Tools

Notwithstanding any other agreements, the customer shall receive sole or joint ownership to the extent that it demonstrably participated in the costs for tools used to manufacture the object of supply. Ownership of the tools reverts to the customer when the payment is made. They remain on loan with the contractor. The contractor is not authorised to exercise any actual or legal rights of ownership over the tools without written approval from the customer; it may not change their location or render them permanently inoperative. The contractor must mark the tools in a way that identifies them as the property of the customer. The contractor shall bear the costs of maintaining, repairing and replacing the tools. Replacement tools shall remain the property to customer in the same proportion as its ownership of the original tool. In the case of joint ownership of a tool, the customer shall be offered the right of first refusal in the purchase of the contractor's share of ownership of the tool. The contractor shall use tools owned by the customer solely for the purpose of manufacturing the object of supply. Upon completion of the supply programme, the contractor must return the tools to the contractor immediately upon request; upon receipt of jointly owned tools, the customer must pay the contractor the current value of the contractor's partial ownership in the tool. The contractor shall have no right of retention under any circumstances. The contractor shall be obliged to return the tools even if insolvency proceedings have been instituted against it or in the event of a prolonged interruption in supply. The contractor must take out an insurance policy that provides the contractually agreed coverage for the tool, if no such agreement has been reached, standard coverage must be provided.

14. Software

1. Software will be provided to the customer on data carriers in current commercial use, in machine-readable code together with user documentation.
2. We must also receive software developed individually for the customer in source code and manufacturer's documentation. Copies in the source code and manufacturer's documentation must be delivered to the customer during acceptance testing and must reflect the most recent version of the program at the end of the test phase.
3. Modifications made to the software under the terms of the warranty must be entered in the source code and the manufacturer's documentation immediately by the contractor; one copy of each updated version must be made available to the customer immediately.
4. The customer is purchasing the irrevocable, exclusive right to software or any part thereof and all other results of services developed for the contractor; the right shall be unrestricted with regard to time or location and shall grant the customer complete freedom of use, including the right to adapt, reproduce, modify, extend, and to grant simple user rights to third parties, unless a restriction to such right is included in the following paragraphs.
5. If the purchase of a right of use as defined in the preceding paragraph is prevented by rights of third parties to the third party programs that have been incorporated in the services or by other results of third party services, the scope of the customer's right of use must be defined accordingly in the contract.
6. The contractor shall retain the right to continue using related standard programs, software modules, tools and the expertise contributed from within the company for preparing the results of services; the contractor may also apply this to orders from third parties. The contractor is not permitted to reproduce, process or otherwise use all or part of the results of services and solutions developed for us.
7. The contractor shall not be entitled to publish results of the services of any kind – including parts thereof – without obtaining the customer's written permission beforehand.

15. Force majeure

Labour conflicts, civil unrest, government measures and other unforeseeable, unavoidable events shall exonerate the contractor and the customer from their contractual obligations for the duration of the disruption and to the extent of their effects. The affected party must inform the other contracting partner immediately and thoroughly, and must take all reasonable steps to limit the consequences of such events as far as possible. The affected party must inform the other contracting partner as soon as the cause of the disruption has ended.

16. Legal Compliance

Suppliers/service providers are obliged to provide their services in accordance with the legal requirements of the occupational safety and environmental protection laws.

17. General provisions

1. The place of performance for deliveries and services is the destination designated by the customer.
2. The contractual relationship shall be subject to Austrian law with the exception of the conflict of laws provisions and the United Nations Convention on Contracts for the International Sale of Goods (CISG). The place of jurisdiction is Steyr, subject to a different exclusive legal venue. However, the customer is also entitled to institute legal proceedings against the contractor with any other competent court.
3. If no convention regarding the enforceability of Austrian judgments exists between Austria and the country where the contractor has its registered office, all disputes arising in connection with this contract or the breach, dissolution or nullity thereof shall be definitively ruled upon in accordance with the Arbitration and Mediation Ordinance of the International Arbitration Board of the Austrian Chamber of Commerce, Vienna (Vienna Rules) by one or more arbitrators appointed in accordance with these Rules. Austrian substantive law shall be applied. The language to be used in the arbitration proceedings is German.
4. If a provision is or becomes invalid, the validity of the other provisions shall be unaffected thereby.