

GENERAL TERMS AND CONDITIONS FOR COMMISSIONS TO TNO



Disclaimer: the translation of these General Terms and Conditions into the English language was prepared with the utmost care. However, TNO does not accept any liability for the correctness and completeness of the compilation and content of the translation and the direct or indirect consequences of acting or failing to act on it. In all cases where the English version might divert from the original Dutch version, only the Dutch version shall be decisive.

1. DEFINITIONS

In these General Terms and Conditions, the following terms have the following specific meaning:

Agreement:

the agreement between the Client and TNO to carry out (research) activities as meant in clause 3.1;

Background:

all IP Rights, as well as knowledge (including know how), experience and other information to which a party is entitled and which was not developed or created in the context of the Agreement.

Background includes objects mutually made available by the parties within the scope of the Commission, including but not limited to auxiliary- and/or test materials, samples, prototypes, information carriers and/or computer software;

Client:

the party that commissions the (research) activities to TNO. For clause 4.4, clause 13.2 and clause 13.4 of the General Terms and Conditions, it also means auxiliary persons engaged by the Client;

Commission:

the (research) activities to be carried out by TNO as specified in the Agreement;

Export Laws and Regulations:

the applicable rules and regulations with respect to export and import, including but not limited to export and import of military goods and dual-use goods (jointly referred to as 'strategic goods') and chemical substances;

Final Report:

the outcome of the Commission as reported in final form by TNO to the Client;

Foreground:

all IP Rights, as well as knowledge (including know how), experience and other information developed or created within the scope of the Agreement. Foreground includes objects, including but not limited to auxiliary- and/or test materials, samples, prototypes, information carriers and/or computer software;

General Terms and Conditions:

these terms and conditions for commissions to TNO;

IP Rights:

all intellectual and industrial property rights, including but not limited to copy -, database -, trade names -, plant breeders-, model-, trademark - and patents rights and rights regarding topographies of semiconductors and domain names;

Offer:

an offer by TNO, in whatever form, for the (contemplated) performance of (research) activities, including any adaptations before the offer is accepted in accordance with clause 3.1;

TNO:

The public legal entity established by public law pursuant to the law of 19 December 1985 concerning the Netherlands Organisation for applied scientific research TNO, with its registered office in Delft, the Netherlands, with its principal place of business in The Hague, the Netherlands and registered with the Dutch Chamber of Commerce under number 27376655. For clause 12.2, clause 13.1 (second sentence), clause 13.2 (with the exception of sub a), clause 13.3 and clause 13.4 of the General Terms and Conditions, it also means auxiliary persons engaged by TNO.

2. APPLICABILITY

2.1 – These General Terms and Conditions are applicable to all Offers and Agreements. Dutch law is applicable to all Offers, Agreements and these General Terms and Conditions.

2.2 – General purchase—or other conditions of the Client are not applicable to the legal relationship between the Client and TNO and are hereby specifically excluded.

2.3 – TNO has defined and filed these General Terms and Conditions at the Court Registry of the Court of The Hague, the Netherlands and with the Dutch Chamber of Commerce. The General Terms and Conditions can also be obtained via www.tno.nl. Upon Client's request, a physical copy can be sent free of charge.

3. OFFER AND AGREEMENT

3.1 – An Offer is valid for one month, unless TNO explicitly stipulates a different term in the Offer. On acceptance of the Offer, an Agreement is deemed to be concluded. If the Client requests to perform (any part of) the Commission, the Client thereby accepts the Offer.

3.2 – The intended field of use of the Commission is specified in the Agreement. Once the Agreement (including all annexes) is concluded, this contains all agreements between TNO and the Client in respect of the Commission. Modifications, additions to or deviations from the Agreement are only binding if agreed in writing.

3.3 – The Client shall use the Offer (including any modifications, additions thereto or deviations therefrom) exclusively to determine if the Client will assign the Commission to TNO. If no Agreement is concluded, TNO solely retains all rights with respect to the content of the Offer, with the exception of any processed information originating from the Client.

4. THE COMMISSION

4.1 – TNO will perform the Commission within the agreed (estimated) term. If this term is likely to be exceeded, parties will consult each other in order to determine a new term. TNO will only be in default after the Client has demanded TNO in writing to perform one or more of its obligations under the Agreement within a reasonable term and that term has expired without TNO having performed these obligations.

4.2 – TNO has an obligation to use reasonable endeavours to carry out the Commission. TNO will draft a Final Report and will deliver the Final Report to the Client.

4.3 – If TNO delivers a good to the Client, TNO will not provide a warranty thereon. When a good is delivered, TNO will deliver the good Ex Works 'place of applicable TNO location'. 'Ex Works' needs to be interpreted in accordance with the International Commercial Terms 2010 (Incoterms 2010).

4.4 – The Client shall not use any outcome of the Commission in a manner that may result in a violation of Export Laws and Regulations. The Client shall indemnify TNO for claims of third parties resulting from non-compliance with Export Laws and Regulations by the Client. TNO may suspend its obligations and suspend the rights of the Client until the required permit, under Export Laws and Regulations, has been granted. TNO may terminate the Agreement if such permit is not granted or is not expected to be granted within a reasonable term, without having any obligations towards the Client.

4.5 – Upon TNO's request, the Client shall without delay deliver a statement to TNO regarding the end-user of the outcome of the Commission.

4.6 – In the performance of the Commission, TNO is entitled to engage auxiliary persons.

4.7 – If TNO has not received all the materials from the Client that are required for the performance of the Commission, TNO is not obliged to commence the performance of the Commission. If TNO

receives these materials later than agreed, the (estimated) term for the performance as stated in the Agreement shall be extended by at least the duration of this delay.

4.8 – If the Client has not collected the materials, that were made available to TNO (or the remainder thereof), within two weeks after the Final Report has been delivered, TNO will be free to take appropriate measures, including the destruction thereof, at the expense of the Client.

4.9 – When the Client makes materials available to TNO which are considered as dangerous goods, the Client shall clearly mark these materials in the customary manner and in the manner prescribed by law and, if necessary, provide them with instructions for storage and use.

5. CONFIDENTIALITY

5.1 – During two years after the delivery of the Final Report, TNO will keep the content of the Final Report confidential, with the exception of:

- a. TNO Background;
- b. Foreground developed by TNO, development of which was not an intended outcome of the Commission;
- c. methods and techniques used and/or developed by TNO for any outcome of the Commission;
- d. the use of findings of TNO in a form that cannot be traced back to the Client or the Commission.

5.2 – TNO will keep the information confidential that is provided by the Client, noted by TNO and is marked confidential, except for:

- a. information already in the possession of TNO before it was provided to TNO for the performance of the Commission;
- b. information in the public domain, or information which is made public, without a breach of confidentiality by TNO;
- c. information that TNO validly obtained from a third party or through its own research without having used confidential information from the Client.

TNO is no longer required to observe confidentiality if:

- a. this is necessary to correct misunderstandings which result from the Client having made public any outcome of the Commission;
- b. TNO discovers a serious danger to persons or goods;
- c. TNO, pursuant to a decision issued by a court of law or supervisory body under public law, is required to disclose information. If reasonably possible, TNO will consult with the Client before disclosing any information in such a case.

6. BACKGROUND

6.1 – All rights that the Client owns or obtains with respect to Background of the Client, shall remain vested with the Client. All rights that TNO owns or obtains with respect to Background of TNO, shall remain vested with TNO. TNO may at any time use its Background itself, have it used by third parties or use it on behalf of third parties.

6.2 – TNO is entitled to use the Background of the Client as far as necessary for the performance of the Commission.

6.3 – Commercial use of Background owned by TNO (also when it is part of any outcome of the Commission) is subject to prior and

express written consent by TNO. The latter may be subject to further conditions.

7. FOREGROUND

7.1 – If the Client has created (parts of) Foreground in the context of the Commission, the relevant IP Rights will vest in the Client. The written documentation relating to the Commission, is determinative for the scope of the IP Rights of the Client (or the exclusive right to vest these). Foreground that is created by or on behalf of TNO (regardless whether this is an intended or non-intended outcome of the Commission or methods and techniques used and/or developed by TNO for any outcome of the Commission), will vest in TNO.

7.2 – Copyrights on a preliminary, intermediate and Final Report, shall always fully vest in TNO.

8. PROTECTION OF FOREGROUND

8.1 – The party that has the right to protect (part of) the Foreground by means of one or more IP Rights, shall inform the other party about its exercise of that right and the specific content thereof. TNO and the Client shall provide each other with all reasonably required cooperation to vest one or more IP Rights. TNO will not carry out any investigation, with respect to the possibilities of protecting Foreground by means of IP Rights.

8.2 – If the Client has the right to protect (part of) the Foreground and refrains from doing so, the Client shall inform TNO and shall give TNO the opportunity to protect the (or that part of) the Foreground or to continue such protection, in which respect it is noted that all other reciprocal rights under the Agreement (including rights of use) shall remain unchanged.

8.3 – In the event the Client discovers an infringement on IP Rights with respect to Foreground of TNO and/or Background of TNO, the Client shall notify TNO as soon as possible.

9. USE OF FOREGROUND

9.1 – The Client acquires the right to use that part of the Foreground vested in TNO within the scope of application of the Commission, subject to the limitations laid down in clause 9. During two years from the date of delivery of the Final Report, this right of use is exclusive, except with respect to any incorporated Background of TNO.

9.2 – TNO is at any time entitled to use Foreground developed by TNO, the development of which was not intended as an outcome of the Commission, or to use methods and techniques that were used and/or developed by TNO with respect to any outcome(s) of the Commission itself, or have it used by third parties or use it on behalf of third parties.

9.3 – TNO is at any time entitled to use the Foreground (as background knowledge for other research) and, after the term of exclusivity has expired as meant in clause 9.1, by third parties or on behalf of third parties.

9.4 – TNO will not investigate the existence of third party IP Rights with respect to the Foreground.

10. USE OF A FINAL REPORT

10.1 – A Final Report, as well as a (possible) preliminary or an intermediate report or any subsequent explanatory notes to the Final Report, is solely for the Client's own use. Any other use requires TNO's prior written consent, including for:

- a. reproduction or disclosure by means of print, photocopy, in electronic form or in any other way, or storage in a searchable information file;
- b. making available to anyone other than parties with an immediate interest, including use by or on behalf of third parties;
- c. using or allowing the use, in whole or in part, for the purpose of lodging claims or to conduct legal proceedings;
- d. using or allowing the use, in whole or in part, for advertising or for adverse publicity purposes or for soliciting sales or for services in a more general sense.

Such prior written consent of TNO may be subject to further conditions. In all cases, anyone to whom a Final Report is made available on the basis of clause 10, must be able to assess the Final Report in its entirety.

11. PRICE AND PAYMENT

11.1 – A 'guide price' listed in the Offer or agreed to in the Agreement is a non-binding indication of the price for the Commission, excluding the expenses incurred by TNO (in consultation with the Client). The final price for the Commission (also in case there is no 'guide price') shall be determined and invoiced on the basis of subsequent calculation. TNO is entitled, each time as of January 1, to index that part of the price for the Commission not yet invoiced, in accordance with the annual adjustment of the rates used by TNO.

11.2 – If a 'fixed price' is agreed in the Agreement, this shall be the price for the Commission, excluding the expenses incurred by TNO (in consultation with the Client). If the scope of the Commission is changed or expanded—in agreement with the Client—, or in case TNO had to perform additional work because the Client did not—upon entering into the Agreement—inform TNO partly or fully about its wishes, demands or preconditions, TNO shall determine and invoice the Client for the additional costs incurred on the basis of subsequent calculation and the Client is obliged to pay these additional costs.

11.3 – TNO may at any time require the Client to make an advanced or interim payment.

11.4 – All amounts quoted in the Offer and/or in the Agreement are exclusive of VAT, unless stated otherwise.

11.5 – The Client shall pay a TNO-invoice within thirty (30) days of the invoice date. Any reliance on setoff is excluded. If the Client fails to pay the invoice in time, the commercial statutory interest rate is payable on the overdue amount, as well as all reasonable costs incurred by TNO to obtain payment of its invoice. TNO remains ownership of any goods delivered or to be delivered to the Client, until the relevant TNO-invoice (and possible the commercial statutory interest rate and cost incurred to obtain payment) has been paid in full. The Client shall not acquire IP Rights to (any part of) the outcome of the Commission until the price as meant in clause 11 is paid in full.

12. NON-PERFORMANCE

12.1 – If a non-performing party, after a demand to perform his obligation(s) within a reasonable term, is still in default, then the other party, subject to the conditions of clause 14.1, is no longer obliged to perform its (remaining) obligations under the Agreement and may terminate the Agreement.

12.2 – The Client is obliged to file any claims against TNO by means of a written and express notice to TNO as soon as possible, but in any case before the first annual anniversary of the date of delivery of the Final Report. Claims lodged after that date, will automatically lapse.

13. LIABILITY

13.1 – TNO is only liable for direct damages which are the direct result of an attributable breach of TNO to perform its obligations under the Agreement. The total aggregate liability of TNO under any and all legal grounds, is (cumulatively) limited to the amount of the price that the Client has to pay under clause 11.1.

13.2 – TNO is furthermore not liable for any damages of the Client:

- arising as a result of the application or use of any outcome of the Commission, other than in the event of willful intent or gross negligence of TNO;
- arising as a result of the fact that any outcome of the Commission cannot be protected by means of one or more IP Rights or because application or use of any outcome of the Commission infringes third party rights;
- resulting from defects in goods supplied to TNO, including software, and that are supplied (on) by TNO to the Client, unless and insofar as the supplier shall compensate TNO for such damages.

13.3 – The Client shall fully indemnify TNO against any claims of third parties for damages which result from application or use of any outcome of the Commission by the Client or by any third party to whom the Client has made such outcome of the Commission available, unless such outcome was the result of willful intent or gross negligence of TNO.

13.4 – TNO shall not be bound by any restrictions of the Client (resulting from the Agreement or otherwise) that serve to limit the liability of the Client wholly or partly.

14. TERM AND TERMINATION

14.1 – The Agreement shall continue for an indefinite period and terminates upon delivery of the Final Report and full payment of the price as meant in clause 11. The Agreement shall terminate by law and without an obligation for TNO to pay damages, if:

- the Client is declared bankrupt;
- the Client is granted (temporary) suspension of payment;
- the Client's business is liquidated or wound up, or;
- prejudgment or executory attachment is levied on substantial part of the Client's tangible and/or intangible assets or other goods.

In case the Agreement is terminated by means of this clause 14.1 or by means of clause 12.1 and the Final Report is not delivered, the date of termination of the Agreement shall be considered equal to the date of delivery of the Final Report.

14.2 – If the Agreement is terminated prematurely, the Client is not entitled to use any preliminary or interim outcome of the Commission, neither by itself nor by third parties or on behalf of third parties. If TNO and the Client nevertheless expressly agree in writing that the Client will acquire IP Rights with respect to any preliminary or interim outcome of the Commission, the acquisition of these IP Rights is subject to payment by the Client of the respective part of the price as meant in clause 11. The latter shall be determined by TNO in all reasonableness.

14.3 – If the Agreement terminates in any way, the provisions of the Agreement that are intended to continue to apply in full after the end of the Agreement, shall continue to apply in full, such as the provisions in respect of liability, right of use, confidentiality, choice of law and choice of forum.

14.4 – If any provision of the General Terms and Conditions is deemed invalid, that shall not affect the validity of the entire General Terms and Conditions.

14.5 – In case of a dispute between TNO and the Client concerning the Offer or the Agreement (or related agreements) that cannot be resolved amicably between the parties, this shall be exclusively settled by the competent court in The Hague, the Netherlands.