

# GENERAL TERMS & CONDITIONS OF BALLUFF GMBH FOR THE TRANSFER OF PROTOTYPES FOR TEST PURPOSES (DATED 08/2020)

# BALLUFF

## 1. Scope – General information – Offers

- 1.1 With the transfer of prototypes, Balluff GmbH (hereinafter referred to as “**Balluff**”) aims to include the customers in the development of new series products at an early stage and incorporate their wishes and experiences in order to be able to provide a finished series product to all customers which takes into account the customer wishes and experiences as far as possible.
- 1.2 These General Terms and Conditions (hereinafter referred to as “**Terms and Conditions**”) of Balluff apply exclusively to the **temporary** or **permanent** transfer of prototypes for test purposes, as well as the transfer of such in **return for payment and free of charge**, if necessary together with the additional hardware and software required (hereinafter referred to collectively as “**Prototype(s)**”).
- 1.3 The following Terms and Conditions apply exclusively to the transfer of Prototypes. Balluff does not recognize conflicting or deviating terms and conditions or terms and conditions of the customer which are not stated in these Terms and Conditions, unless Balluff has expressly agreed thereto. This also applies if Balluff unreservedly transfers Prototypes to the customer with full knowledge of the conflicting conditions or conditions not defined in these Terms and Conditions.
- 1.4. These Terms and Conditions apply only to contractors within the meaning of § 14 BGB (German Civil Code).
- 1.5 Unless expressly agreed otherwise, the offers of Balluff are non-binding. An order and/or offer from the customer only becomes binding for Balluff when it has been confirmed in writing by Balluff or has been accepted conclusively by a transfer of the Prototypes or invoicing.

## 2. Delivery – Delivery time – Extension of delivery times

- 2.1 Unless expressly agreed otherwise, the dates agreed regarding the delivery of the Prototypes are generally not fixed dates (§ 323 (2) No. 2 BGB (German Civil Code), § 376 HGB (German Commercial Code)).
- 2.2 The delivery time only begins as soon as all details have been clarified and both contracting parties have agreed to all conditions of the contract. Prerequisites for adherence to the delivery dates include in particular: (a) all documents to be supplied by the customer arrive in good time at Balluff, (b) all licenses and permits to be procured by the customer have been issued on time; and (c) the customer fulfills all contractual obligations completely and on time, in the case of a transfer **in return for payment** all payment obligations.
- 2.3 Unless expressly agreed otherwise, the delivery time is deemed to be observed when the Prototype has left the Balluff factory within the agreed delivery period.
- 2.4 The delivery time shall be extended to an appropriate extent if (a) the non-adherence to the delivery date can be attributed to force majeure, i.e. an unforeseeable event over which Balluff has no influence and for which Balluff is not responsible (e.g. official measures and directives – regardless if they are applicable or not – war, revolutions, embargoes, fire, flooding, storms, explosions, or other natural catastrophes, business interruptions, pandemics, epidemics, etc.). This also applies, (a) if such an event occurs during a delay in delivery or at a sub-supplier of Balluff, (b) necessary licenses to be procured by the customer or third-party documentation are not submitted in good time; or (c) the customer fails to disclose required information on time.

## 3. Force majeure – Withdrawal – Reservation of timely and correct supply of incoming goods

- 3.1 If Balluff is unable to deliver the Prototypes within an appropriate period owing to force majeure (cf. Clause 2.4), both parties have the right to withdraw from the contract, wholly or partly. The same shall also apply in the case of subsequent impossibility of contract performance, for which Balluff is not responsible. Claims for damages on account of such a withdrawal are barred. If a party intends to withdraw from the contract for the reasons above, then they must immediately inform the other party thereof.
- 3.2 Balluff is relieved of the obligation to transfer the Prototypes if Balluff is not supplied in good time with the correct Prototype ordered for the fulfillment of the contract through no fault of its own.

## 4. Retention of title

- The following shall apply if the Prototypes are transferred to the customer **permanently and in return for payment**:
- 4.1 The Prototypes shall remain the property of Balluff until full payment of all the customer's liabilities arising from the business transaction with Balluff. This also applies if the price for certain deliveries designated by the customer has been paid. If the retention of title is linked to special requirements or formalities in the customer's country, then the customer is required to notify Balluff thereof and ensure their fulfillment at their own expense.
  - 4.2 A joining, mixing, or processing of the Prototypes shall only ever be done for Balluff as a manufacturer, but without creating any obligation for Balluff. If the (co)ownership lapses as a result of the joining, mixing, or processing, it is agreed now that the (co)ownership of the new object will pass to Balluff pro rata according to the ratio of the invoice amounts of the joined, mixed, or processed Prototypes. The customer shall keep the (co)ownership in safe custody for Balluff free of charge.
  - 4.3 Pledging or collateral assignments are not permitted. The customer must immediately notify Balluff of any seizure, confiscation, or other disposals or interventions by third parties.
  - 4.4 At the request of the customer, Balluff shall release the securities at the discretion of Balluff, insofar as their value exceeds the receivables of Balluff by more than 20%.

## 5. Duration of transfer

- 5.1 The respective contract relating to the transfer of the Prototypes (hereinafter referred to as “**Contract**”) defines whether the Prototypes are transferred to the customer **permanently** or only on a **temporary basis**.
- 5.2 In the case of a **temporary** transfer of the Prototypes, the transfer period is defined in the Contract. In such a case the Contract ends upon expiry of the defined period, without requiring a notice of termination.
- 5.3 In the case of a **temporary** transfer the customer shall return or hand over the Prototypes to Balluff at the head office of Balluff at the end of the Contract without being asked and at their expense and risk. The customer shall ship and hand over the Prototypes packed in their original packaging.

## 6. Place of use – Resale

- 6.1 The customer shall only use the Prototypes at the place of business of the customer, unless another place of use is agreed in the Contract.
- 6.2 The customer is not permitted to resell the Prototypes, separately or installed or integrated in another product.

## 7. Delivery – Conditions of delivery – Transfer of risk – Incoterms – Transport insurance

- 7.1 Unless expressly agreed otherwise, the Prototypes shall be delivered “ex works” (Incoterms 2020), Neuhausen a.d.F., Germany.
- 7.2 Unless expressly agreed otherwise, the risk of accidental loss and the accidental deterioration of the Prototypes shall pass to the transport company upon handover of the Prototypes, in the case of a personal handover upon handover to the customer, however to the customer at the latest when the Prototypes leave the Balluff factory. This also applies if Balluff has made the delivery. If the shipment is delayed for reasons attributable to the

customer, then the risk passes to the customer from when the Prototype was ready for dispatch and this was notified to the customer.

- 7.3 Balluff shall only conclude a transport insurance policy by agreement and at the expense of the customer.

## 8. Quality – Suitability for use – Approval tests – Special features

- 8.1 The quality and the suitability for use of the Prototypes are regulated exclusively and definitively in the Contract and the Terms and Conditions. Any further quality and usage guidelines are generally excluded.
- 8.2 The Contract states what approval tests have been carried out; in the absence of any such indication, then no approval tests have been carried out. The approval tests in relation to the Prototypes have not yet been concluded; this applies in particular, but is not limited to, the wireless radio license and the ATEX test.
- 8.3 The customer shall check whether they may use the Prototypes at the agreed location of use (cf. Clause 6.1) without approval tests and without certifications. If the customer uses the Prototypes at the agreed location of use, although they require approval tests and certifications, then this is done so solely at the risk of the customer.
- 8.4 The following applies in view of the fact that the objects of the Contract are Prototypes:
  - a. The customer is aware that the Prototypes are products which are in the pre-production stage, have not been definitively tested, and do not have market approval.
  - b. The Prototypes may only be used for test and research purposes.
  - c. The technical design of the Prototypes and any accompanying documentation are provisional.
  - d. The technical data of the Prototypes may change.
  - e. Balluff does not guarantee that Balluff will produce and deliver the identical Prototypes or Prototypes of identical construction.
  - f. Special care is required during the use and commissioning of the Prototypes.
  - g. Any safety notices concerning the Prototypes must be strictly observed.
  - h. The customer must immediately contact Balluff in case of problems related to the Prototypes.
  - i. The Prototypes may only be used to the extent that a danger to life, machines, or other goods of considerable value is ruled out in the case of malfunctions or a failure.
  - j. In the case of safety-relevant applications the customer must take additional measures for safety and accident prevention.

## 9. Claims for defects – Complaints

- 9.1 Balluff does not accept a restriction to the customer's legal obligations to inspect and notify defects (particularly of the following from § 377 HGB).
- 9.2 In the case of a **permanent** transfer of Prototypes **in return for payment**, claims for defects become time-barred 12 months after the transfer of risk. The preceding provisions do not apply insofar as the law i.e.w. §§ 438 (1) No. 2, 438 (3), 479 (1), and 634a (1) Clause 2 BGB (German Civil Code) prescribes longer periods of limitation and for the liability for damages from loss of life, physical injuries, damage to health, as well as for the liability for damages based on a malicious or grossly negligent breach of duty.
- 9.3 Claims for defects are barred in the following cases:
  - a. Non-compliance with and/or incorrect and/or incomplete implementation of the guidelines, requirements, and information in the Contract;
  - b. Natural wear;
  - c. Changes to the Prototypes, unless the defect is proven not to have been caused by these changes;
  - d. Improper use of the Prototypes;
  - e. Improper storage of the Prototypes;
  - f. Problems and/or damage arising as a result of incorrect or negligent handling of the Prototypes;
  - g. Problems and/or damage arising as a result of excessive use or unsuitable operating equipment;
  - h. Problems and/or damage arising from the joining, mixing, and/or processing of the Prototypes with unsuitable, incorrect, or defective components and/or improper handling and/or use by the customer and/or a third party;
  - i. Problems and/or damage arising from special external factors that are not preconditions in accordance with the Contract; and
  - j. Problems and/or damage which can be attributed to the fact that the customer did not use the accessories (hardware and software) offered by Balluff.
- 9.4 The customer may only demand compensation in accordance with Clauses 12 and 13.

## 10. Claims for defects of title

The following shall apply if the Prototypes are transferred to the customer **in return for payment**:

- 10.1 Unless expressly agreed otherwise, Balluff is obligated to transfer the Prototypes to the customer solely in the country of manufacture and place of delivery free from third-party industrial property rights.

“**Industrial property rights**” to this effect are patents, designs, brands, including their respective registrations, as well as copyrights.  
If a third party asserts a claim against the customer due to the infringement of property rights in connection with the Prototypes, Balluff shall be liable to the customer as described below:
- 10.2 At the discretion and expense of Balluff, Balluff shall either obtain a right of use for the respective Prototypes, modify them in such a manner that the property right is not infringed, or exchange the relevant Prototypes. If Balluff is unable to do this under reasonable conditions, the customer may withdraw from the Contract or reduce the contract price.  
The obligation of Balluff to pay compensation is governed by Clauses 12 and 13.
- 10.3 The aforementioned obligations of Balluff only exist if
  - a. the customer immediately informs Balluff in writing of the claims asserted by the third party,
  - b. the customer does not acknowledge an infringement, and
  - c. all defense measures and settlement negotiations are reserved exclusively for Balluff.If the customer ceases to use the Prototypes due to mitigation measures or other important reasons, the customer is obligated to notify the third party thereof so that no acknowledgment of a property right infringement is associated with the discontinuation of use.
- 10.4 The customer's claims are inadmissible if the customer is solely responsible for the property right infringement.
- 10.5 Furthermore, the customer's claims are inadmissible if the property right infringement is based on
  - a. special instructions defined by the customer,
  - b. the joining, mixing, and/or processing of the Prototypes by the customer and/or third party,
  - c. use of the Prototypes not foreseeable by Balluff,
  - d. use of the Prototypes which contradicts the provisions of the Contract and/or the Terms and Conditions,
  - e. is due to the fact that the Prototypes were modified by the customer, or
  - f. that the customer did not use the accessories (hardware and software) offered by Balluff.
- 10.6 Further claims or claims other than those stipulated in Clause 10 against Balluff or vicarious agents of Balluff owing to a defect of title are excluded.

## 11. Property rights – Rights of use

- 11.1 All property rights to the Prototypes remain solely with Balluff. This also applies in particular to the hardware and software transferred with the Prototypes.
- 11.2 The content and scope of the customer's rights of use in relation to the Prototypes arise exclusively from the Contract and these Terms and Conditions. In each case the customer is required to use the Prototypes solely for test purposes at the agreed place of use and always operate the Prototypes with reasonable care and prudence. In all circumstances the customer shall refrain from using or exploiting the Prototypes in any way outside of test purposes (particularly by means of reverse engineering) or allowing third parties to use or exploit the Prototypes in a manner outside of test purposes.
- 11.3 The customer shall treat the Prototypes, their functionality, and their accessories as confidential information of Balluff and not disclose any confidential information to third parties. Affiliated companies of the customer are also understood to be a third party within the meaning of Clause 11, insofar as Balluff has not previously consented to a disclosure to affiliated companies.
- 11.4 The rights to all work results, know-how, and property rights, which Balluff achieves in connection with the manufacture and transfer of the Prototypes, as well as within the framework of the collaboration with the customer, belong exclusively to Balluff, unless Balluff has made an express written agreement to the contrary with the customer.

## 12. Liability in the case of the transfer of the Prototypes free of charge

The following shall apply if the Prototypes are transferred to the customer free of charge:

- 12.1 With regard
- to the aforementioned special features,
  - the remarks,
  - the fact that they are only Prototypes, and
  - the fact that Balluff transfers the Prototype to the customer free of charge, the parties agree that any claims (particularly claims for defects and damages) of the customer against Balluff arising from the transfer of the Prototypes are ruled out, irrespective of the basis on which the claims are formed.
- 12.2 This also applies if a Balluff employee has advised the customer with regard to the possible use of the Prototypes and/or has instructed the customer on how to operate the Prototypes. Balluff also assumes no liability for the correctness of the data generated with the Prototypes.
- 12.3 The aforementioned liability limitations shall not apply in the event of deliberate infringements of duty or infringements caused by gross negligence on the part of Balluff, in the event of death, serious physical injury, or injury to health, or in the event of liability in accordance with the product liability law.
- 12.4 If a third-party engages Balluff in relation to a Prototype, which Balluff has transferred to the customer, then the customer shall be required to release Balluff of all claims of any kind and must reimburse Balluff for all costs, expenses, and damage incurred by Balluff in conjunction with this type of utilization.  
The customer may not object to the indemnification obligation, neither the plea of unexhausted remedies nor a right of retention nor the objection that the claim to be indemnified does not exist (indemnification on first demand).

## 13. Liability in the case of the transfer of the Prototypes in return for payment

The following shall apply if the Prototypes are transferred to the customer in return for payment:

- 13.1 Balluff is liable to the customer for damages and compensation of futile expenses (hereinafter referred to as "damages") within the meaning of Section 284 of the German Civil Code (BGB) for defects with the Prototypes or due to the infringement of other contractual or non-contractual obligations, including but not limited to illicit acts, only in the case of intent or gross negligence. The aforementioned liability limitation shall not apply in the case of death, serious physical injury, or injury to health, a material breach of Contract, as well as in the event of liability in accordance with the product liability law.
- 13.2 Damages for material breach of Contract are limited to compensation for typical contractual losses that Balluff had to have foreseen as a possible consequence upon entering into the agreement due to circumstances known to Balluff, except in cases of intent or gross negligence or injury to life, limb, or health, or liability under the product liability law.
- 13.3 Typical contractual, foreseeable losses within the meaning of Clause 13.2 are:
- per loss event: losses totaling no more than the net purchase price of the Contract in question.
  - per calendar year: losses totaling no more than the net sales amount at which the customer acquired Prototypes from Balluff in the previous calendar year. In the first contract year, losses totaling no more than the sales amount at which the customer acquired Prototypes from Balluff prior to the loss event.
- 13.4 In each case typical contractual and foreseeable losses under Clause 13.2 do not include indirect losses (such as loss of profit or losses resulting from production interruptions).
- 13.5 Irrespective of Clause 13.3, when setting an amount which Balluff must pay the customer as damages, the economic circumstances of Balluff, type, scope, and duration of the business relationship, any possible contributions to the cause and/or blame of the customer must be considered in favor of Balluff in accordance with Section 254 German Civil Code (BGB). Any compensatory damages, costs, or expenses to be borne by Balluff must be proportional to the value of the Prototypes.
- 13.6 All liability limitations apply equally to subcontractors or vicarious agents.
- 13.7 Any changes in the burden of proof to the detriment of the customer are not associated with the above provisions.
- 13.8 Material breach of Contract within the meaning of Clauses 13.1 and 13.2 is a breach of an obligation that must be fulfilled in order for the terms of the Contract to be met and the fulfillment of which the customer may regularly rely on.

## 14. Data - Exchange

- 14.1 The customer is entitled, but not obligated, to provide Balluff with the data which the customer generated about customer's applications using the Prototypes, preferably in digital form. Balluff shall always treat such data in the strictest confidence and only use such data for development purposes.
- 14.2 The customer and Balluff aim to agree on the use of the Prototypes with the objective of making series products from the Prototypes.  
However, there is no obligation on the parties from Clause 14.2.

## 15. Prices

- 15.1 The respective Contract defines whether the Prototypes are transferred in return for payment or free of charge.
- 15.2 The prices of Balluff are net prices. The prices apply ex works. Balluff shall invoice the costs for packaging, transport, and insurance separately, unless expressly agreed otherwise.
- 15.3 For international transactions the agreed prices are always net prices, i.e. this is the net price to be paid by the customer after deduction of any foreign taxes. The term "foreign taxes" covers in particular corporation tax, trade tax, value added tax, goods and service tax, other withholding taxes, customs, or other surcharges and costs, as well as other fees and duties, which are collected by a foreign state or a foreign municipality. All foreign taxes shall be assumed and paid in full by the customer. The customer undertakes to provide Balluff with all necessary tax certificates, tax assessments, and all other documents, which are required by Balluff in order to fulfill the tax obligations of Balluff abroad and in Germany.

## 16. Terms of payment – Offsetting – Securities – Assignment

- 16.1 If the Prototypes are transferred to the customer in return for payment, the terms of payment are defined in the respective Contract.
- 16.2 Offsetting the customer's receivables against receivables of Balluff is only permitted if the customer's receivables have been acknowledged by Balluff, are undisputed, or have been legally established.  
The customer is entitled to exercise a right of retention only to the extent that its counterclaim is based on the same contractual relationship.
- 16.3 The assignment of claims from the respective Contract is only permitted following the prior written consent of Balluff. No such entitlement to the granting of such consent arises. § 354a HGB (German Commercial Code) remains unaffected by this provision.

## 17. Export restrictions

- 17.1 The parties are aware that the Prototypes may be subject to export and import restrictions. In particular, there may be licensing requirements or the use of the Prototypes or associated technologies abroad may be subject to restrictions. The customer shall observe the applicable export and import control regulations of the Federal Republic of Germany, the European Union, and the United States of America, as well as all other relevant regulations. The performance of a Contract by Balluff is subject to the proviso that no obstacles stand in the way of its fulfillment due to national and international regulations of export and import law, as well as any other statutory regulations.
- 17.2 The customer undertakes not to transfer the Prototypes to a government authority for inspection of any granting of rights of use or for a further official permit without the prior written consent of Balluff and not to export the Prototypes to countries or natural or legal entities for whom export bans apply according to the corresponding export laws. In addition, the customer is responsible for compliance with all applicable statutory regulations of the country in which the customer's registered office is located, and other countries in relation to the use of the Prototypes by the customer and its affiliated companies.

## 18. Place of performance – Place of jurisdiction – Applicable law

- 18.1 The place of performance for all obligations from the respective Contract is Neuhausen a.d.F., Federal Republic of Germany.
- 18.2 For legal disputes which fall within the remit of the local courts, the Local Court of Stuttgart is agreed as the place of jurisdiction, and for legal disputes which fall within the remit of district courts, the District Court of Stuttgart is agreed as the place of jurisdiction. Balluff is also entitled to take legal action at the customer's registered office.
- 18.3 The law of the Federal Republic of Germany applies exclusively to the exclusion of the conflict of laws.

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