

Standard Terms and Conditions of Sale ("Terms") of Actebis Peacock GmbH

§ 1 Validity of Terms

These Terms apply to all orders, quotations and sales of goods and/or services by Actebis Peacock to any Purchaser or potential purchaser ("Purchaser"). These Terms shall therefore also apply to all future business relations, even if not expressly agreed upon anew. Acceptance of goods or services by Purchaser shall deem acceptance of these Terms. All other terms and conditions, in particular purchasing conditions, are expressly objected to by Actebis Peacock and they shall not even be acknowledged if we do not expressly object to those terms and conditions after receipt.

Any deviation from these Terms shall only be effective if confirmed in writing.

§ 2 Offer and order acceptance

1. All offers and quotations by Actebis Peacock are for information only and shall not be binding. Acceptance of orders is subject to Actebis Peacock's written order confirmation. The same shall apply to any additions or side agreements. Modification or waiver of any other provision in one instance shall not constitute modification or waiver in any other instance. In case of immediate delivery, our invoice may substitute the written confirmation.
2. Unless expressly marked as binding in writing by Actebis Peacock all drawings, designs, illustrations, features, specifications and particulars of dimensions and weights and other such information submitted by Actebis Peacock are approximate only.
3. The employees of Actebis Peacock are not entitled to amend these Terms, neither in writing nor verbally.
4. At its own discretion, Actebis Peacock shall have the right to determine, adjust or refuse a credit line at any time. If Purchaser is exceeding his credit line upon his call, we shall be freed from our obligation to deliver. However, if Purchaser is exceeding his credit line he has the option to receive goods against cash payment.
5. As far as these Terms are incorporated later, a contract is deemed to be dissolved, if the conditions of § 2 section 1 are not existent.
6. Actebis Peacock shall have full discretion in accepting or rejecting any order.

§ 3 Prices

1. Unless otherwise specified, the prices in our offers shall be valid for seven (7) calendar days from date the price is offered. The price stated in our confirmation of order shall prevail. Price increases due to monetary fluctuations are charged to the Purchaser for products and services not yet delivered.
2. All prices for products and services are excluding VAT, valid on the day of shipment ex warehouse Soest or in case of direct delivery from German border or German port of entry. Purchaser will pay any tax, packaging, environmental lump sum/fees, transport, toll, freight, copyright levies, insurance and legal charges.
3. Additional delivery cost and services shall be charged separately.
4. For freight free delivery of orders below € 300, Actebis Peacock will invoice a surcharge. This surcharge will not apply to orders placed online.

§ 4 Delivery and Performance Period

1. Actebis Peacock will use all reasonable endeavours to deliver the goods on or before the agreed delivery date, however, Actebis Peacock does not undertake, guarantee or warrant that delivery will be made on the agreed delivery date.
2. Delays in delivery and in performance due to Force Majeure such as Acts of God and other unpredictable events, essentially complicating the delivery for Actebis Peacock or making delivery impossible and which are not due to Actebis Peacock (such as war, events similar to war, instructions by government, non-permission of export, import or transit permissions, national measures to limit trade traffic, strike, lockout and any other interruptions, traffic jams, no matter whether these events occur at Actebis Peacock, its suppliers, contractors or its subcontractors), entitle Actebis Peacock to postpone the delivery or service for the time of the disturbance plus an appropriate initial period or to withdraw from the contract entirely or partly if it has not been fulfilled.
3. If any delivery time is so extended by more than 3 months, then the Purchaser shall be entitled after granting in written form an appropriate period of grace, at least 14 days, to withdraw from the agreement completely or partly if it has not been fulfilled. If the delivery period is extended pursuant to article 4.2 or if Actebis Peacock is released from its obligation, the Purchaser shall not be entitled to claim any compensation. Actebis Peacock can only rely on the stated conditions if the Purchaser has been given prompt notice of the delay.
4. If Actebis Peacock is not in compliance with the agreed delivery times and dates and if the delays are attributable to causes for which Actebis Peacock is solely responsible, Purchaser shall be entitled to claim liquidated damages. These shall be up to 0,25 % for each complete week of delay, but not exceeding in the aggregate 5 % of the value of the delayed part of the delivery. Any other claims are excluded, unless the delay is based on gross negligence or wilful misconduct of Actebis Peacock.
5. Actebis Peacock is entitled to deliver the goods in one or more instalments. With delivery contracts each partial delivery and partial performance is deemed an independent performance. The period of delivery shall also be prolonged by the period the Purchaser is in default on meeting his contractual obligations. The period of delivery shall also be prolonged by the period the Purchaser is in default on meeting his contractual obligations. At any time, Actebis Peacock reserves the right, at its option, to refuse delivery until the Purchaser has made payment for the goods and services.
6. If the delivery date or date of performance is not shown separately on our invoice it corresponds to the invoice date.

§ 5 Default in Acceptance

If the Purchaser refuses or fails to take delivery of the goods or services ordered or is in delay, Actebis Peacock shall be entitled to store the delivery items at the Purchaser's risk and expense. For this purpose Actebis Peacock can use the services of a carrier and may also use a warehouse keeper.

During the period of default of acceptance, the Purchaser shall pay Actebis Peacock compensation for storage expenses at the rate of 1 % per week of the purchasing price with a maximum of Euro 30 per week, unless Purchaser proves a lower damage for Actebis Peacock. In case of higher storage costs, Actebis Peacock can require compensation of the actual costs by providing proof to the Purchaser.

If Purchaser continues to refuse the acceptance of delivery items after a period of grace granted or if he declares non-acceptance of goods, Actebis Peacock can refuse to fulfil the order and request compensation for non-execution of the said order. Actebis Peacock is at its option entitled to request as compensation either a lump sum of 20 % of the agreed purchase price – unless the customer proves a minor damage - or substitution of the damage which has actually arisen for the Purchaser.

Any refusal to take delivery shall not relieve Purchaser to pay the corresponding invoice when due.

§ 6 Quantity of Delivery

1. Visible differences in quantity or damage to the goods must be immediately disclosed in writing to Actebis Peacock and the carrier upon receipt of the goods, hidden differences in quantity within 4 days after receipt of the goods. Acceptance of the goods by the carrier or transport agent is deemed to be proof for quantity, error free wrapping and shipping.

2. Should Actebis Peacock inadvertently deliver goods that have not been ordered by the Purchaser, the Purchaser undertakes to notify Actebis Peacock in writing within 14 days of the erroneous delivery and to keep the goods ready for pick-up by a carrier or forwarding agent to be instructed by Actebis Peacock. Should the Purchaser fail to notify Actebis Peacock of an erroneous delivery in writing or do so after the 14-day period, the delivery is deemed accepted, meaning that the Purchaser is obliged to pay the usual, fair and reasonable purchase price for the goods to Actebis Peacock.

§ 7 Transfer of Risk

1. Risk of loss and damage shall pass to Purchaser as soon as the shipment has been transferred to the person carrying out the transport or the shipment has left the warehouse of Actebis Peacock for the purpose of forwarding.

2. In case there is a delay in shipment not caused by us or if shipment becomes impossible, the risk shall pass to the Purchaser upon being informed of the readiness for shipment.

3. In case Actebis Peacock takes the cost for the transportation based on agreement in individual cases, risk of loss still passes to Purchaser at the time the products leave the Actebis Peacock' warehouse and Purchaser shall be responsible for obtaining and paying for appropriate insurance.

§ 8 Warranty for defects

1. Claims for defects of the customer presume that he has properly satisfied his duties for inspection and complaints owed according to § 377 HGB.

2. Insofar as a defect to the purchase object exists, the customer is entitled to demand subsequent performance. The subsequent performance is carried out at our choice either by remedying the defects or through delivery of a faultless object. In the event of correction of defects the necessary expenses shall only insofar be replaced to the extent that these have not been increased due to the fact that the purchased object has been taken to another location than the place of performance.

3. If the subsequent performance fails, the customer is at his choice entitled to demand cancellation or reduction.

4. We are liable according to the statutory provisions insofar as the customer asserts claims for damages, which are due to wilful intent or gross negligence including wilful intent or gross negligence of our representatives or vicarious agents. Insofar as we are not accused of wilful breach of contract, the liability for damages is limited to the foreseeable, typical incurring damages.

5. We are liable according to the statutory provisions insofar as we culpably breach an essential contractual duty; in this case however the liability for damages is limited to the foreseeable typically incurring damages.

6. Insofar as the customer is entitled to a claim for compensation of the damages instead of performance, our liability is also limited within the framework of Par. 3 to compensation of the foreseeable, typically incurring damages.

7. Liability owing to culpable injury to life, the body or health remains unaffected; this also applies for the mandatory liability according to the Product Liability Act.

8. Insofar as not otherwise regulated above, liability is excluded.

9. The statute of limitations for claims for defects is 12 months, beginning from passing of risk.

10. The statute of limitations in the event of a delivery recourse according to §§ 478, 479 BGB remain unaffected; it is five years, beginning from delivery of the faulty object.

§ 9 Joint liability

1. Further liability for damages than provided for in § 8.6, is – irrespective of the legal nature of the asserted claim – excluded. This applies in particular for claims for damages from fault upon conclusion of the contract, owing to other breaches of duty or owing to claims under tortious law for compensation of property damages according to § 823 BGB.

2. The limit according to Par. 1 shall also apply insofar as the customer requests reimbursement of fruitless expenses instead of a claim for compensation of damages, instead of performance.

3. Insofar as liability for damages towards us is excluded or limited, this shall also apply with regard to the personal liability for compensation of our employees, workers, representatives and vicarious agents.

§ 10 Return/subsequent performance processing

Faulty products are to be sent or delivered by stating the model and serial number and a copy of the delivery or invoice documents with an exact description of faults to Actebis Peacock GmbH, c/o Service Logistics, Graf-Zeppelin-Strasse 9, 33181 Bad Wünnenberg-Haaren or if agreed to the supplier.

No new warranty deadlines shall come into force through the exchange of single parts, modules or whole appliances regarding the claims and rights owing to defects. This shall not include statute of limitations regarding the parts affected by the correction of defects.

The buyer is obliged to regular and proper data backup and must ensure that the data are secured before sending the goods. Actebis Peacock assumes no liability for loss data stocks and ensuing follow-up damages. Costs for data backup or new installation of software or the appliances itself regarding the appliances to be repaired are not assumed by Actebis Peacock.

§ 11 Retention of Title

1. Actebis Peacock shall retain title of goods until it has received payment in full of all sums due in connection with the supply of all goods and services to Purchaser at any time. For these purposes Actebis Peacock has only received payment when irrevocably credited to its bank account. The Purchaser grants to Actebis Peacock the following securities which Actebis Peacock on request of the Purchaser shall release if the value exceeds the claim significantly by more than 20 %.
2. A possible proceeding shall always be carried out for Actebis Peacock as manufacturer according to § 950 BGB without Actebis Peacock binding in any way.
3. If any goods owned by Actebis Peacock are attached to, mixed with or incorporated with other goods not owned by Actebis Peacock and are not identifiable or separable from the resulting composite or mixed goods then title to the resulting composite or mixed goods shall vest in Actebis Peacock and shall be retained by Actebis Peacock as long as and on the same terms on which it would have retained title to the goods in question.
4. Actebis Peacock' co-ownership shall be in proportion to the stated values of our goods.
5. Purchaser shall store goods owned by Actebis Peacock in such a way that they are clearly identifiable as Actebis Peacock property, shall remain records or such goods identifying them as Actebis Peacock property, of the person to whom it sells or disposes of such goods and of the payment made by such person for such goods. The Purchaser will allow Actebis Peacock to inspect these records and the goods themselves on request.
6. The Purchaser shall be entitled to process and sell the goods of retention in the ordinary course of business as long as he is not in default. Pledges and liens shall not be permissible.
7. The Purchaser shall already now assign all claims including all saldo debts for open account from reselling or other legal ground (insurance, illegal action) with regard to the goods of retention completely to Actebis Peacock. Actebis Peacock shall authorize Purchaser irrevocably to collect claims addressed to us on its own account and on its own name. The authorization to collect can only be revoked if the Purchaser is not fulfilling his obligation to pay.
8. In case of third parties access of goods of retention the Purchaser shall indicate the ownership of Actebis Peacock and shall notify Actebis Peacock immediately.
9. If the Purchaser is breaching contractual obligations as they are but not limited to default of payment, debt delinquency, bankruptcy, liquidation, receivership, composition with its creditors, insolvency, Actebis Peacock shall be entitled to take back the goods of retention or to request assignment of the revindication of the Purchaser towards third parties.
10. Repossession as well as attachment of goods of retention through us does not constitute reason to withdraw from the contract and to withhold delivery for any undelivered goods and stop goods in transit. The acceptance and attachment of goods of retention by Actebis Peacock shall not be deemed as termination of the contract. All said assignments are accepted by the Purchaser and Actebis Peacock.

§ 12 Payment

1. Unless agreed otherwise, all invoices become immediately due and shall be payable according to direct debit from Purchaser's bank account by Actebis Peacock. Our prices do not include any cost for delivery or freight insurance. Where we organise the freight, the cost for parcel service, carrier or company vehicle will be separately charged to the Purchaser. At the request of Purchaser, Actebis Peacock can insure the goods for a reasonable charge against transport damages or loss.
2. In spite of regulations to the contrary of the Purchaser, Actebis Peacock shall be entitled to book payments against the oldest invoices. If costs and interests have accrued, Actebis Peacock shall be entitled to book payments first against cost, then against interests and finally against the delivery of goods or services.
3. Payment shall only be considered to be made if we have the amount at our disposal. Checks shall only be accepted in fulfilment and shall only be deemed as payment upon their final cashing.
4. If the Purchaser is in default, we shall be entitled to charge interest at 3 % above the European Central Bank rate from the respective date. This shall be lower if the Purchaser proves a lower charge. Possible cash discounts deductions may only be offered if due invoices are paid on the due date. The receipt of payment at Actebis Peacock shall prevail.
5. All debts, even if not due yet, shall be immediately payable if the Purchaser delays payment, does not fulfil essential commitments or if we learn of circumstances that in our opinion impact the creditability of the Purchaser, especially suspension of payment, pending insolvency or bankruptcy proceedings. In such cases we shall be entitled to withhold deliveries still not made or perform them only against advance payment or securities.
6. The Purchaser shall only be entitled to offset claims if they have been awarded by a competent court of jurisdiction or if they are indisputable.

§ 13 Non-Assignment

Assignment of claims against us by a third party is excluded, unless we have expressly consented to the assignment. Provided the claims are not generally non-assignable according to § 8 paragraph 8 of these Terms (warranty claims), consent has to be provided by Actebis Peacock if the Purchaser can prove essential interests prevailing over our interests in maintaining non-assignment.

§ 14 Use of Products

The products are designed for normal commercial use. Use in critical security systems, nuclear appliances, military facilities, life support applications or for the production of weapons is forbidden unless written approval is received by the manufacturer of the products.

§ 15 Intellectual Property Rights

All trademarks on the goods are and remain intellectual property of the respective manufacturers. For the use of these trademarks prior written approval of the respective manufacturer is required. All use and delivery of software is subject to the license agreement accompanying the Product.

As far as software is included within delivery it shall be transferred to the commercial Purchaser for the purpose of one-time reselling and to the end customer for exclusive use, i.e. he may neither copy it nor transfer it to others for use. Right of multiple use requires special written agreement. Furthermore the use of the software is subject to the license agreement of the manufacturer of the software.

Actebis Peacock disclaims any liability for the infringement of intellectual property rights in case the products are exported out of the country to which Actebis Peacock delivered the products, as Actebis Peacock may not guarantee that all rights are protected there.

§ 16 Confidentiality

During the course of the business relationship or at any time after the termination thereof, Purchaser shall not disclose or use any business or company secrets or other confidential information relating to Actebis Peacock, its parent or affiliated companies. Purchaser agrees that such information will only be communicated to those members of its staff whose knowledge of such information is essential and will bind these members of its staff to confidentiality.

§ 17 Data Protection, Data Storage

Purchaser authorizes Actebis Peacock to process data about the Purchaser received with regard to the business relationship or in connection with it, no matter whether they come from the Purchaser or from third parties, within the context of the German law for protection of personal data. Customer data is stored pursuant to § 33 BDSG.

§ 18 Export

All products, spares, technical data, software and documentation may be subject to export and import laws, rules and regulations including but not limited to those of the Federal Republic of Germany, the European Union, the United States of America and the country of import. In the event Purchaser exports the Product outside the Federal Republic of Germany, Purchaser shall comply with all applicable export and import rules and regulations and obtain all applicable licenses.

§ 19 Governing Law

1. All terms and legal relations between Actebis Peacock and Purchaser shall be governed by the law of the Federal Republic of Germany. The UN Convention of Contracts for the International Sale of Goods shall not apply. If Purchaser is trader according to the HGB (i. e. German Commercial Code), legal entity of public rights or public fund, Soest is the place of jurisdiction for disputes arising directly or indirectly from the agreement. Soest is also the place of performance or transfer assumed under packaging regulations. Actebis Peacock, however, is entitled to take proceedings against the Purchaser in every other court of jurisdiction.

2. If any provisions of these Terms are invalid or non enforceable it will not affect the validity of other provisions. Actebis Peacock and Purchaser shall agree to enter negotiation with the aim of substituting or amending the ineffective or incomplete provision with a new provision that approximates the economic purpose of the intended provisions.

§ 20 Special project pricing

In case the manufacturer of the products offers special project pricing for specific end user accounts, Purchaser has to provide Actebis Peacock within 10 days of Actebis Peacock' request with a copy of the proof of delivery (POD) of the products to the end user as well as a copy of the invoice to the end user.

The Purchaser is obliged to observe the respective guidelines relating to project business activities. This also applies to the retention period of the files of the project business activities according to commercial and fiscal law regulations. In case the Purchaser infringes our guideline or the guideline of the manufacturer, Actebis Peacock has the right to invoice any improperly claimed or paid amounts and Actebis Peacock and/or the manufacturer may exclude the Purchaser from any future special project prices.

§ 21 Advertisement

The Purchaser expressly consents to receiving advertisement from Actebis Peacock by telefax or e-mail without receiving prior request.