

# PROFLOATING

## GENERAL TERMS AND CONDITIONS

Profloating B.V.  
Honderdland 226  
2676 LV Maasdijk, The Netherlands

[www.Profloating.nl/termsandconditions](http://www.Profloating.nl/termsandconditions)

Filed with the Chamber of Commerce in the Hague under number 70887276, date: 12 November 2019

### **Article 1: Applicability**

1.1 These General Terms and Conditions of sale and delivery shall apply to all offers and quotations made and agreements entered into by Profloating (hereinafter 'Profloating') in which Profloating undertakes to deliver products to its (potential) customer (hereinafter 'the Client'). Profloating and Client hereinafter collectively to be referred to as 'Parties'.

1.2 The applicability of general conditions of the Client or any other general conditions is expressly rejected.

1.3 Save as set out in Clause 1.7 below, amendments to these General Terms and Conditions will only be valid if expressly agreed to in writing by Parties.

1.4 The text of the agreement shall prevail over any offers, quotations, conversations or correspondence before the date of signing of the agreement. In the event of any conflicts between the substance of the agreement concluded between the Client and Profloating on the one hand and these General Terms and Conditions on the other, the provisions set out in the agreement have precedence. In the event of any conflicts between the substance of the agreement and these General Terms and Conditions concluded between the Client and Profloating on the one hand and the United Nations Convention on Contracts for the International Sale of Goods on the other, the provisions set out in the agreement and these General Terms and Conditions have precedence.

1.5 Wherever these General Terms and Conditions use the term 'in writing', this shall mean by document signed by Parties, or by letter, fax, electronic mail and by such other means as agreed by the Parties.

1.6 Insofar as these General Terms and Conditions are also drawn up in a language other than English, in the event of any conflict the English text shall always prevail. Invalidation or unenforceability of any of the provisions of the agreement and/or these General Terms and Conditions, shall not impair the validity of the remaining provisions.

1.7 Profloating may change the terms of these General Terms and Conditions without the Client's consent. Profloating shall notify the Client of the change in writing, at least thirty calendar days in advance of the change taking effect.

## **Article 2: Offers and conclusion of agreement**

2.1 All offers made by Profloating are non-binding, are given subject to reservation and apply only by approximation, even if they contain an acceptance period or unless indicated otherwise. The Client cannot derive any rights from any errors in an Offer. Offers are once-only and will not apply to repeat orders.

2.2 If the Client supplies Profloating with data, drawings etc., Profloating may rely on their accuracy and shall base the offer on that information.

2.3 An agreement shall come into effect once Profloating has confirmed the Clients order in writing.

2.4 Any communication by a representative of Profloating shall only be binding insofar as the latter confirms this in writing.

2.5 In the event that agreement is reached to effect payment by means of a letter of credit, the agreement concerned shall only come into effect once Profloating accepts the relevant irrevocable (confirmed) letter of credit in writing according to UCP 600. This letter of credit will be opened by a bank subject to the acceptance in advance by Profloating.

## **Article 3: Prices**

3.1 Unless otherwise agreed in writing, prices shall be stated in Euro, exclusive of VAT, import duties, other taxes and charges, costs of quality inspection and/or testing, banking or transferring costs, costs of loading and unloading, packaging, transport, insurance and any other costs, and are based on 'free carrier', Maasdijk, the Netherlands (FCA, Incoterms 2010).

3.2 Any price cited by Profloating shall be based on the existing monetary conditions, labour costs, procurement prices, duties, taxes and other levies, subsidies and the like prevailing at the time the agreement concerned is concluded. In the event that one or more of these cost price components increase after conclusion of the agreement but before the relevant product(s) have been delivered, Profloating shall be entitled to charge the Client the relevant price increase.

## **Article 4: Intellectual property rights**

4.1. Unless agreed otherwise in writing, Profloating retains all intellectual property rights to all offers, designs submitted, illustrations, drawings, trial models, programs, etc.

4.2. The rights listed in Article 4.1 remain the property of Profloating, regardless of whether costs have been charged to the Client for the production of objects to which these rights apply. The relevant information may not be copied, used or shown to third parties without Profloating's explicit prior written consent. The Client will be liable to pay Profloating a penalty for each instance of violation of this provision, of the amount € 25.000,-. This penalty may be demanded in addition to any compensation damages awarded by law.

4.3. The Client must return all data provided as meant in Article 4.1 on Profloating's first demand, within the period specified by Profloating. If this provision is violated, the Client is liable to pay Profloating a penalty of € 1.000,- per day. This penalty may be demanded in addition to any compensation damages awarded by law.

4.4 Profloating reserves all of its intellectual property rights in connection with the products which it supplies. The Client shall not be permitted to modify all or part of any product supplied, or to affix

any other trademark to it, to use the relevant mark in any other way, or to register it in its own name.

#### **Article 5: Advice, designs and materials**

5.1 The Client cannot derive any rights from advice or information provided by Profloating that has no direct bearing on the engagement.

5.2 The Client is responsible for and guarantees the correctness of all drawings, calculations and designs made by or on behalf of the Client, the functional suitability of all materials prescribed by or on behalf of the Client, for all technical information and all relevant other information supplied by or on behalf of the Client.

5.3 The Client indemnifies Profloating for any claims from third parties arising in connection with the use of the drawings, calculations, designs, materials, samples, models, technical information and all relevant other information provided by or on behalf of the Client.

5.4 At all times the Client is responsible for a final check of all specifications provided by or on behalf of Profloating.

5.5 The Client may examine (or arrange for the examination of) the materials that Profloating intends to use before they are processed, at the Client's own expense. Any damages incurred by Profloating as a result are for the Client's expense.

#### **Article 6: Delivery**

6.1 The delivery time stated by Profloating shall under no circumstances be deemed to constitute a fatal date and shall be approximate only. Profloating shall not be in default in respect of such delivery time until the Client notifies it in writing that it is in default, in doing so stipulates a reasonable period of time within which Profloating has the opportunity to effect delivery, and the latter still fails to do so.

6.2 In determining delivery times, Profloating assumes that the engagement can be carried out under the circumstances as they are known to Profloating at that moment.

6.3 Delivery times do not commence until the relevant agreement is concluded in accordance with the provisions of Article 2, the Parties have agreed on all commercial and technical details, all necessary data, final and approved drawings, etc. are in Profloating's possession, the (pre)payment or instalment agreed has been received by Profloating, any security for payment has been accepted by the Client and the conditions necessary for the performance of the engagement have been met.

6.4 a. In the event of circumstances that are different to those known to Profloating when the delivery times were determined, Profloating may extend the delivery times at its own discretion by the time that it deems is required in order to perform the engagement under these changed circumstances.

b. In the event of contract extras, the delivery time will be extended by Profloating at its own discretion by the time it deems is required to supply (or arrange for the supply of) the materials and parts necessary for those contract extras and to carry out the contract extras.

c. In the event that Profloating's obligations are suspended, the delivery times will be extended by the duration of the suspension.

6.5 If the time for delivery is exceeded, the Client shall not be entitled to cancel or terminate the

agreement, claim compensation or to suspend any of its obligations, unless the time for delivery is exceeded with more than eight weeks, without the Client being entitled to any compensation. Minor deviations in the deliveries effected by Profloating in terms of quantities, weight and composition specified, for example, shall never be deemed to be a failure or default.

6.6 Profloating reserves the right to effect a delivery in parts. Each partial delivery shall be deemed to represent a separate and independent agreement. Profloating shall be entitled to demand payment for each partial delivery before proceeding with any other.

6.7 The Client's failure to comply with its obligation to effect payment (or to do so on time), entitles Profloating's to suspend delivery and the fulfilment of any of its other obligations.

6.8 Unless otherwise agreed in writing, delivery will take place 'free carrier', Maasdijk, the Netherlands (FCA, Incoterms 2010). Risk of damage to or loss of the object shall pass to the Client at the time of delivery or, if the Client wrongfully fails to take delivery, at the time when Profloating has tendered delivery of the object.

6.9 The Client undertakes to abide strictly by the instructions of Profloating in respect of the customs handling of the object and to provide to Profloating, as and when requested by the latter, all relevant documents, including but not limited to export/import documents from EU member states and/or third country required for the entitlement to export refunds or other subsidies. The Client shall be liable for and shall hold Profloating and its affiliates harmless from and against all costs and losses suffered or incurred by Profloating and its affiliates as a result of the Client's breach of this undertaking.

#### **Article 7: Force Majeure**

7.1 Profloating is entitled to suspend the fulfilment of any of its obligations if any circumstances that could not be foreseen when the agreement was concluded and that are beyond Profloating's influence, prevent the fulfilment of those obligations.

7.2 Circumstances that Profloating could not foresee and that are beyond Profloating's influence are understood to include (but are not limited to) the circumstance that Profloating's own suppliers and/or subcontractors fail to meet their obligations, or fail to do so in time, the weather, earthquakes, fire, loss or theft of tools, the destruction of materials to be processed, road blocks, strikes or work stoppages and restrictions on import or trade.

7.3 In case Profloating has already executed part of an agreement, the Client shall pay the purchase price for any products that have been delivered.

7.4 Either party shall be entitled to terminate the agreement by notice in writing to the other party if performance of the agreement is suspended for more than six months, without the Client being entitled to any compensation.

#### **Article 8: Liability**

8.1 Profloating is liable for all damages that the Client incurs that stem directly and exclusively from a shortcoming attributable to Profloating. However, only those damages for which Profloating is insured, or should within reason have been insured, qualify for compensation.

8.2 If, when the agreement is concluded, it is impossible for Profloating to take out insurance as meant in Article 8.1 or impossible to do so at reasonable conditions, or if it is subsequently impossible to renew the insurance policy at reasonable conditions, the maximum compensation payable for damages is the amount that Profloating charged for the agreement in question (exclusive of VAT).

8.3 The following damages do not qualify for compensation:

- a. trading losses, including all indirect losses caused by delays or other circumstances and loss of profits. The Client should take out insurance to cover such damages, if such is deemed desirable;
- b. supervision damages, which are understood to include damages caused, during or as a result of the performance of the work, to objects on which work is being carried out to objects situated at or in the vicinity of the work site. The Client should take out insurance to cover such damages, if such is deemed desirable;
- c. damages caused by intent or gross negligence on the part of helpers or non-management employees of Profloating;
- d. unusual chemical effects on materials, including but not confined to weed control or fertilizing agents etc.

8.4 Profloating is not liable for damages to materials provided by or on behalf of the Client that result from improper processing. At the Client's request, Profloating will repeat the process, using materials provided by the Client, at the Client's expense.

8.5 The Client indemnifies Profloating against all claims from third parties and particularly for product liability stemming from defects in products provided by the Client to third parties that consisted of or included products and/or materials provided by Profloating.

8.6 The Client shall submit any claims under this Clause to Profloating within one (1) year of occurrence of the alleged breach of Profloating's obligations or defect of the object, in the absence of which any right to claim compensation lapses.

#### **Article 9: Guarantee**

9.1 Profloating guarantees the products to be free from any construction errors or construction defects for the following periods after delivery by Profloating:

Profloating Main float;	15 years
Profloating Walk float:	15 years
Spreader bar	10 years
Anchoring	20 years

9.2 If the delivered object proves to have been defective, the object must be returned to Profloating Delivered Duty Paid, Maasdijk, the Netherlands (DDP, Incoterms 2010). Profloating will then elect either: to repair the object; to replace the object; or to credit the Client for a proportionate part of the invoice.

9.3 In all situations, the Client must allow Profloating the opportunity to repair any shortcomings.

9.4 The Client may only invoke guarantees after all its obligations towards Profloating have been fulfilled.

9.5 a. No guarantee is given when defects are the result of:

- Profloating being provided by the Client with incorrect and /or incomplete information, including but not confined to information relating to the weather conditions, the stability of the base, external influences etc.;

- failure to follow the assembly and service manual correctly and/or completely and, if applicable, failing to follow the advice that Profloating has given regarding securing the system to constructions and/or the base;
- unusual chemical effects on materials, including but not confined to weed control or fertilizing agents etc.;
- the use of damaged and/or defective components in the final installation
- normal wear and tear;
- improper use;
- lack of proper maintenance;
- fitting, assembly, alterations or repairs by the Client or by third parties.

b. No guarantee is given for delivered objects that were not new when they were delivered or for objects whose use the Client prescribed or that were provided by or on behalf of the Client.

c. No guarantee is given on inspections of and/or repairs to objects belonging to the Client.

### **Article 10: Complaints**

10.1 Immediately upon receipt of the object the Client shall carry out a thorough examination of the object in order to ascertain whether the object is in conformity with the agreement and complete.

10.2 The Client shall lose the right to rely on non-conformity or loss of the object if the Client fails to notify Profloating thereof in writing without any delay, but within seven calendar days of receipt of the object, specifying the nature of the non-conformity or loss as soon as possible after the Client has discovered or ought to have discovered such nonconformity or loss.

### **Article 11: Failure to take delivery**

In the event that the Client has not taken delivery of any object after the delivery deadline has passed or if, where the Client is to give delivery instructions, the Client fails to give such instructions, those objects will remain available to the Client. Any objects of which the Client has not taken delivery will be stored for the Client's account (including costs of handling and insurance) and risk. Profloating may at any time invoke the powers granted by Article 6:90 of the Dutch Civil Code.

### **Article 12: Payment**

12.1 Profloating shall at all times have the right to demand full or partial payment in advance. As to all other sales, payment must be made by the Client within 30 days after the relevant invoice date, unless otherwise agreed in writing. Whatever the means of payment used, payment shall not be deemed to have been effected before Profloating's account has been fully and irrevocably credited.

12.2 Notwithstanding the payment conditions specified above, the Client is obliged, at Profloating's first request, to provide security for payment to Profloating's satisfaction, upon or after entering into the agreement and before its effectuation. Failure on the Client's part to provide such security for payment within the period specified will immediately constitute default. In that event, Profloating is entitled to suspend or dissolve the agreement and recover any damages from the Client.

12.3 The Client's right to offset any claims against Profloating's counter claim is excluded and all payments shall be made free of any deductions or charges to the account of Profloating.

12.4 The full amount due is automatically payable in the following instances: a. if any payment deadline has been exceeded; b. if the Client has been declared bankrupt or requests suspension of payments; c. if any of the Client's assets or claims are seized; d. if the Client (if a company) is dissolved or wound up; e. if the Client (if a natural person) makes a request for judicial debt rescheduling, is placed under guardianship or dies.

12.5 If payment has not been made by the payment deadline specified, the Client shall be deemed to be in default without the need for any notice of default or judicial intervention and the Client is immediately liable to pay Profloating interest. That interest is payable at a rate of 12% per year, or at the statutory rate if that is higher. For the purposes of calculating the interest, partial months are counted as full months.

12.6 If payment has not been made by the payment deadline specified, the Client is immediately liable to pay Profloating all extrajudicial costs, to a minimum of € 75,-. The costs are calculated in accordance with the following table: over the first € 3.000,- 15%, over the excess up to € 6.000,- 10%, over the excess up to € 15.000,- 8%, over the excess up to € 60.000,- 5% and over the excess from € 60.000,- 3%. If the actual extrajudicial costs exceed those based on this formula, the Client is liable to pay the actual costs.

12.7 If judicial proceedings are decided in Profloating's favour, all costs incurred by Profloating in connection with those proceedings are for the Client's account.

### **Article 13: Retention of title and right of pledge**

13.1 After delivery, Profloating remains the owner of the objects delivered for as long as: a. the Client fails or will fail in the fulfilment of the (payment) obligations stemming from this agreement or any similar agreements; b. the Client fails or will fail to pay for any work performed or to be performed under such agreements; c. the Client has not paid any claims arising from non-fulfilment of those agreements, such as compensation for damages, penalties, interest and costs.

13.2 As long as any objects are subject to retention of ownership, the Client may not encumber those objects in any way. Retention of title shall not affect the passing of liability, responsibility, costs and risks under Clause 6.8.

13.3 Having invoked retention of title, Profloating may retrieve the objects delivered at its own discretion. The Client must allow Profloating to enter the place where those objects are located.

13.4 If Profloating cannot invoke retention of title because the objects delivered have been subject to confusion, deformation or accession, the Client is considered authorized and obliged to give the newly formed objects in pledge to Profloating and shall indemnify Profloating for any claims from third parties arising in connection herewith.

### **Article 14: Cancellation**

If the Client wishes to cancel the agreement without Profloating having failed in the performance thereof and if Profloating so agrees, Profloating is entitled to charge the expenses, damages and lost profit.

### **Article 15: Suspension and termination**

15.1 In the event that the Client fails to comply with its obligations pursuant to an agreement with Profloating, or fails to do so properly or on time, if there are grounds to fear that this will occur, or in the event that the Client applies for a suspension of payments, files for bankruptcy or liquidates his business, Profloating shall be entitled to suspend or terminate the agreement concerned without the need to give notice of default or for judicial intervention, and it shall not have an obligation to provide any form of compensation.

15.2 Following suspension or termination pursuant to this Article, any claim on the part of Profloating relating to the agreement and / or any direct or indirect damages whatsoever, shall be payable with immediate effect.

**Article 16: Miscellaneous**

16.1 The Client shall not transfer its rights and/or obligations ensuing from the agreement with Profloating to third parties or have them serve as security regarding claims by third parties, without the prior written consent from Profloating.

16.2 Profloating is authorized to engage third parties in the performance of the agreement on behalf of and at the expense of the Client, if there is cause to do so in Profloating's opinion or if such ensues from the agreement.

16.3 If any provision contained in these General Terms and Conditions should be held to be void or unenforceable, the validity of the other provisions shall not be affected thereby.

16.4 No waiver by Profloating of any breach by the Client, or failure by Profloating to insist on the Client's performance of obligations shall be considered a waiver of any subsequent breach of the same or any other provision.

16.5 The Client shall hold in confidence and not disclose to any third party any confidential information disclosed by Profloating. The Client shall not use such information for the Client's own benefit or the benefit of any third party.

16.6 Nothing in the relationship between Profloating and the Client shall create an agency, partnership or joint venture between the Parties and in specific the Client shall not be entitled to make any representation or warranty on behalf of Profloating.

**Article 17: Applicable law and competent court**

17.1 These General Terms and Conditions and any agreements entered into by Profloating shall be solely governed by and construed in accordance with the laws of the Netherlands.

17.2 The United Nations Convention on Contracts for the International Sale of Goods shall apply.

17.3 Only the Dutch civil court within whose jurisdiction Profloating's place of business is situated is competent to pass judgment on disputes, unless Profloating would elect to submit the dispute to competent courts elsewhere.

17.4 The provisions of article 16.3 leave intact the right of Profloating to obtain a settlement by means of arbitration by the International Chamber of Commerce under the Rules of Conciliation and Arbitration of the International Chamber of Commerce, by one or more arbitrator(s). The place of arbitration will be Amsterdam, the Netherlands. The arbitral procedure shall be conducted in the Dutch or English language.