

Terms and Conditions

1. INTRODUCTION

- 1.1. These Terms and Conditions (“Terms”) apply to all Quotations and Agreements of Confocal NL B.V. registered with the chamber of commerce under number 65256336 (“Confocal NL”), with its (potential) customer (“Customer”) regarding the sale and supply of products (“Products” or “Product”) and the provision of services (for example installation, training, repair, upgrades, and software updates (the “Services”). These Terms apply to the exclusion of terms and conditions of Customer in whatever form. In the event of any contradiction, inconsistency or addition not expressly accepted in writing by Confocal NL, the Terms shall be deemed to supersede any contradictory, inconsistent or additional terms stated in any document prepared or sent by or on behalf of Customer.
- 1.2. These Conditions are stipulated for the benefit of Confocal NL, its affiliated companies, its directors, and employees, as well as third parties engaged by Confocal NL.
- 1.3. In case of an explicit contradiction between an order confirmation and the Terms and Conditions, the provisions of the order confirmation shall prevail.

2. ORDERS

- 2.1. The acceptance or confirmation of an order will supersede all prior communications and constitute a complete and binding contract between Customer and Confocal NL, which contract cannot be modified or cancelled without the written agreement of both parties.
- 2.2. The Terms form part of the agreement established after express confirmation in writing of an order or after acceptance of an offer issued by Confocal NL.

3. PRICES AND CONDITIONS OF PAYMENT

- 3.1. Proposals, offers, or quotations are subject to acceptance only during the period stated thereon. If no period is stated, the acceptance period shall be 30 days.
- 3.2. Unless otherwise stipulated in the order confirmation, prices are in Euro excluding VAT and excluding all taxes, transport costs, custom duties or charges or any costs or charges that could not be foreseen at the time of conclusion of the agreement and are beyond the reasonable control of Confocal NL.
- 3.3. Payments must be made according to the following conditions to the designated Confocal NL bank account within 14 days after the date of the invoice (the “Due-Date”):
 - Prepayment: 50% of the total contract value will be invoiced upon acceptance of the purchase order or contract
 - Payment at Shipping: 40% of the total contract value will be invoiced and due upon the shipment of the product.
 - Final Payment at Acceptance: The remaining balance of 10% of the total contract value shall be due upon technical acceptance of the installation of the product.

Payments are deemed to have been made at the time at which it is received or credited to the Confocal NL bank account.

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- 3.4. If Customer fails to pay an amount by the Due Date, Customer shall be in default (in Dutch: in verzuim) without a notice of default being required. In that event, and without prejudice to all other rights and remedies available to Confocal NL, Confocal NL shall be entitled to:
 - charge Customer interest on all amounts due and unpaid as of the Due Date of each unpaid invoice at a rate of 1.5% per month or 5% above 1 month Euribor if that is higher, from the due date until payment is received.
 - suspend or terminate serviced if payments are not received within 45 days after the due date
- 3.5. Confocal NL is entitled to cancel discounts, rebate schemes or payment arrangements without warning in whole or in part with retroactive effect as soon as a (partial) payment or prepayment is overdue.
- 3.6. Customer may only set off payments against claims insofar as they have been expressly recognized by Confocal NL or result from a court judgment rendered between Confocal NL and Customer which cannot be appealed. Suspension of payment by Customer is never allowed.
- 3.7. Confocal NL reserves the right to modify its fees and charges at any time, effective for any subsequent renewal term. Customers will be notified of any pricing changes at least 60 days prior to the start of the renewal term.
- 3.8. Any disputed charges must be reported to Confocal NL in writing within 30 days from the date of the invoice. Undisputed portions of the invoice must be paid according to the payment terms.
- 3.9. Confocal NL reserves the right to suspend or terminate services if the customer's account becomes delinquent, without notice and without liability to Confocal NL.
- 3.10. The Customer agrees to pay all reasonable costs and expenses incurred by Confocal NL in collecting any overdue amounts, including but not limited to attorneys' fees and court costs.

4. DELIVERY

- 4.1. All sales shall be made in accordance with the incoterms agreed upon in writing. If no incoterm is agreed upon, EXW (Incoterms 2020) Confocal NL shall apply.
- 4.2. Delivery times and delivery dates in offers or order confirmations and/or other written correspondence are approximate only and not firm. If a deadline for delivery has been expressly agreed upon in writing and it is exceeded, Customer must give Confocal NL written notice of default giving Confocal NL the opportunity to rectify the delivery within a reasonable period of at least 15 working days (Mon-Fri excluding official holidays).
- 4.3. If installation is not part of the offer Customer is obliged to check the Products upon delivery for transport damage or any other form of damage. Customer must give written notice of visible defects within five working days after arrival of the Products, by including a specific description of the nature of the defect.
- 4.4. Confocal NL may arrange the installation of Products and will issue an acceptance certificate upon successful completion. The Products shall be deemed accepted in accordance with all specifications upon signature of this certificate by an on-site employee or other person working for the Customer. If no acceptance certificate is signed, Products will be deemed accepted if (i) Customer puts the Product into service, or (ii) Customer fails to send a written notice outlining defects or nonconformity to agreed specifications within five working days of commencement of installation or ten working days after delivery, whichever is earlier.

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- 4.5. Customer shall provide a safe and suitable place for installation of Products in accordance with Confocal NL's instructions. Failure to comply with Confocal NL's instructions regarding the site where the Client intends to install and use the Products shall void all warranties and in such case the Customer waives all claims regarding conformity to specifications and functionality.
- 4.6. Title to delivered goods ("Retained Goods") is retained by Confocal NL until all payment obligations of Customer towards Confocal NL have been fulfilled. If law applicable in the country the retained Goods are located does not permit reservation of title to the Retained Goods, but permits reservation of similar rights, Confocal NL shall be entitled to assert such rights. Customer commits to supporting all measures taken to protect the title to or security interests in the Retained Goods.

5. SOFTWARE

- 5.1. Confocal NL supplies the Products with embedded software and other software as specified in the quotation or offer. Confocal NL only grants Customer the non-exclusive right to use the embedded software, other software, applications, and associated documentation (collectively referred to as the "Software") solely for the operation of delivered hardware for its intended purpose.
- 5.2. The right of use of Software is limited to the agreed period. In the absence of such an agreement, the right of use is equal to the period of use of the relevant hardware. In particular, the right to use the Software shall not include the right to translate, lease, lend, sublicense, distribute or publicly reproduce the Software or make it available, online or by other means, to third parties outside Customer and its affiliates.
- 5.3. The right to use the Software shall not include the right to reproduce the Software unless such reproduction is necessary for the operation of the hardware intended or supplied therefore or to produce a backup copy. Unless provided otherwise by mandatory law or written contractual regulations, Customer shall not be authorized to modify, decompile, disassemble or otherwise reverse-engineer the Software, whether in whole or in part, to acquire the source code. Customer shall not remove, alter or obscure any proprietary notices from any part of the Software or documentation.
- 5.4. Customer may only transfer the right to use the Software to third parties together with the hardware Customer purchased from Confocal NL along with the Software or for which the Software from Confocal NL is intended. In that case, Customer will impose the above obligations and restrictions on the third party.
- 5.5. All other rights to the Software shall remain with Confocal NL. Software is copyrighted, and Confocal NL and its licensors retain exclusive right, title and interest in and to the Software and all copies, translations, modifications, improvements, enhancements, updates or portions thereof, including all Intellectual Property Rights.
- 5.6. Confocal NL will provide Software updates if explicitly agreed or on a voluntary basis. In the latter case, Confocal NL is always entitled to terminate the provision of updates or to charge a fee for doing so.
- 5.7. Confocal NL does not warrant that (i) the Software will meet Customer's requirements, (ii) the Software will operate in combination with other hardware, software, systems or data not provided by Confocal NL (except as expressly specified in the documentation provided with the Product), (iii) the operation of the Software will be uninterrupted or error-free, or (iv) all Software errors will be corrected. Exceptions to the foregoing may apply based on service agreements or specific warranties outside of these Terms.

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- 5.8. Insofar as Software is provided to Customer for which Confocal NL owns only a derived utilization right and which is not open-source software (such as third-party software), the terms of use agreed between Confocal NL and its licensor shall – also regarding the relationship between Confocal NL and Customer – apply additionally and prior-ranking to the provisions of this Section. If and to the extent that opensource software is provided to Customer, the terms of use governing such open-source software shall apply prior-ranking to the provisions of this Section.

6. WARRANTY AND DEFECTIVE PRODUCTS

- 6.1. Confocal NL warrants that Products will be free of material defects in material and workmanship for a period of one year commencing from the date of acceptance. Book 7 of the Dutch Civil Code shall not apply.
- 6.2. If a delivered Product is or becomes defective or lacks a guaranteed characteristic during the warranty period, Confocal NL shall be entitled, at its option and as its sole obligation, to repair or replace the Product. The obligation to honour a warranty claim arises only if the defect or nonconformity existed prior to delivery or is the direct result of faults attributable to Confocal NL. Unless agreed otherwise, claims for a defective or noncompliant Products can only be made within the warranty period.
- 6.3. The warranty automatically lapse if (i) the Customer uses, modifies, maintains or repairs the Product with parts, products or services other than those supplied or approved by Confocal NL, (ii) the Customer causes repairs, updates or other work to be performed on the Product by its own or unauthorized personnel or third parties without Confocal NL's consent, or (iii) the Product is resold or otherwise transferred, made available for use, leased or loaned to a third party.
- 6.4. Warranty shall not apply if a defect or nonconformity is the result in whole or in part of (i) circumstances attributable to the Customer, such as transportation, accidents, failure to use proper operational and safety procedures, including neglecting to adhere to documented operational instructions and safety guidelines provided by Confocal NL or specified in the product manual, improper use, installation by non-certified personnel, deviating from recommended application guidelines, or neglecting scheduled maintenance tasks as outlined in the product documentation , or (ii) external forces such as flooding, leakage, fire, explosions, power surges, power failures or defective electrical installations.
- 6.5. Specifically excluded from this warranty is all standalone computer and data storage equipment not manufactured by Confocal NL. Such equipment will carry only the original manufacturer's warranty.
- 6.6. In case of repair and replacement Confocal NL shall use commercially reasonable efforts to repair or replace the Products within 8 weeks of arrival of the defective Product. Confocal NL warrants to the Customer that replacement Products will be new or of equal functional quality and warranted for the remaining portion of the original warranty or 90 days, whichever is longer. Repairs will be performed, at Confocal NL's option, at either Confocal NL's facility or Customer's business location. For repairs performed at Confocal NL's facility, Customer must contact Confocal NL in advance for authorization to return Products and must follow Confocal NL's delivery instructions.

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- 6.7. Software is considered to have a defect only if Customer can prove that there are reproducible deviations from the specifications. A defect shall not be deemed to exist, however, if it does not manifest itself in the latest version of the Software supplied to Customer and the use thereof by Customer can reasonably be required. Furthermore, Customer will not have any claims based on defects if it is based on any of the following circumstances: (i) incompatibility of the Software with the data processing environment used by Customer, (ii) use of the Software together with software supplied by third parties unless this is expressly provided for in the documentation of Confocal NL or is otherwise permitted by Confocal NL in writing, or (iii) improper maintenance of the Software by Customer or third parties not approved by Confocal NL.

7. INTELLECTUAL PROPERTY

- 7.1. All intellectual property rights, Software, and know-how in and to the Products as well as all documentation for the Products and all trademarks used in connection with the Products shall remain or vest in, and be the exclusive property of, Confocal NL or its affiliates or third-party licensors.
- 7.2. Customer shall have a limited, non-exclusive, non-transferable, and non-sublicensable right to use the intellectual property rights and Software that may subsist in the Products only for the purpose of and to the extent necessary for using the Products. This right shall only be in force for as long as Buyer is entitled to use and uses the Products in accordance with the agreement and these Terms. Buyer shall not reverse engineer, disassemble, decompose or analyse for the purposes of finding out the composition or functionality of the Products or the Software contained in the Products.
- 7.3. Buyer shall not modify or remove or conceal Confocal NL's and its subcontractors' trademarks or other intellectual property markings or business name, logos or other markings affixed to the Products ("Confocal NL Trademark").
- 7.4. If a third party claims that the Products or Software infringes that party's patent or copyright or other intellectual property right ("Infringement Claim"), Customer shall: (a) promptly notify Confocal NL in writing of the Infringement Claim, and (b) allow Confocal NL to fully control, and cooperate with Confocal NL in, the defense, possible litigation and any related settlement negotiations and (c) not acknowledge any infringements. Failure to comply with the foregoing shall void any claim by Customer with respect to an Infringement Claim. If an Infringement Claim is made or appears likely, Confocal NL may, at its option, obtain a license so that Customer may continue to use the Product, modify the Product or replace it with a product that is functionally equivalent. If Confocal NL is unable to do either of these things within a reasonable time, Customer may at its sole option rescind the contract or demand a reasonable reduction in the purchase price.
- 7.5. Confocal NL shall not be liable for any Infringement Claim that result from (i) Customer's modification of a Product or use thereof other than in its specified operating environment, (ii) the combination, operation, or use of a Product with products provided by Customer or other manufacturers or other products not provided by Confocal NL as a system, or (iii) actions for which Customer is responsible. Any claims from Customer for compensation shall be limited as set forth in Section 9.1 of these Terms.

8. LIABILITY

- 8.1. Other than pursuant to the warranty obligations set forth above, the liability of Confocal NL for direct and indirect damages is excluded, except insofar (i) as a direct result of intent or gross negligence on the part of Confocal NL's management, (ii) within the scope of article 6:185 of the Dutch Civil Code (Products Liability).

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- 8.2. If Confocal NL is liable under 8.1 above, the liability, to the extent not contrary to mandatory law, shall be limited to an amount equal to 50% of the purchase price of the Product that caused the damage for which the Customer claims compensation. If the damage cannot be linked to a specific delivery or occurred in connection with Services, the limit shall be equal to 50% of the amount excluding VAT paid by Customer in the preceding 12 months before the damage first became apparent. Liability for consequential damage is excluded to the maximum extent. Examples of consequential damage in this respect are loss of profit, loss of production, interruption of business, contractual claims of third parties, lost usage, lost opportunities, credit costs, and loss of data, information and/or software.
- 8.3. Customer shall indemnify Confocal NL for all third-party claims related to Customer's use of the Products.
- 8.4. Legal actions (in Dutch: Rechtsvorderingen) in connection with the failure of Confocal NL to fulfill its obligations, including legal actions to recover damages resulting from a defect in a Product and or related to the failure of a Product to meet the guaranteed specifications within the warranty period, may only be brought within 12 months after Customer became aware of the damage or noncompliance or could reasonably have become aware of it.

9. FORCE MAJEURE

- 9.1. Confocal NL shall not be liable for failure or delay in performing any of its obligations to Customer due to circumstances beyond its reasonable control of it or its (sub) suppliers, such as strikes, lockouts, labour difficulties, riots, inability or difficulty in obtaining or procuring supplies, labour or transportation, epidemics, fires, storms, floods, earthquakes, explosions, accidents, interference by civil or military or supranational authorities, whether legal or de facto, acts of the public enemy, war, rebellion, insurrection, sabotage, embargoes, orders given priority by any public authority or any other cause beyond the reasonable control of Confocal NL.
- 9.2. If the force majeure situation lasts longer than three months or as soon as it is reasonable to assume that it will last longer than three months, Confocal NL has the right to terminate all or part of the agreement without becoming liable for damages.

10. CONFIDENTIAL INFORMATION AND PERSONAL DATA

- 10.1. Parties shall observe confidentiality in respect of all information, specifications, business information and know-how concerning and provided by the other party. Upon request of a party, the other party shall return this information or destroy it within fourteen days.
- 10.2. Both parties agree to comply with the provisions of the General Data Protection Regulation (GDPR) (Regulation (EU) 2016/679) with respect to any personal data that may be processed or transferred in connection with this Agreement.

11. EXPORT AND ASSIGNMENT

- 11.1. Confocal NL and Customer are required to comply to applicable laws and regulations concerning export/import control and sanctions, as enforced or administered by regulatory bodies such as the European Union, the United States of America, or any other relevant jurisdiction. This includes, but is not limited to, compliance with EU financial sanctions, the EU export control regime, the U.S. Treasury Department Office of Foreign Assets Control list of U.S. Specially Designated Nationals, the U.S. Department of Commerce Denied Person's List, Entity List, or the U.S. Commerce Department's Export Administration Regulations (EAR) (collectively "Trade Compliance Regulations").

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11.2. Confocal NL shall not be liable to Customer for any loss, damage or costs relating to (i) changes in Trade Compliance Regulations, (ii) any delay or failure to obtain authorization, or (iii) any other direct or indirect limitation or delay due to Trade Compliance Regulations.

11.3. Customer shall indemnify Confocal NL against all claims from third parties and related costs and fines in connection with noncompliance with Trade Compliance Regulations or other export regulations.

11.4. Customer shall not assign the contract or any part thereof without the prior written consent of Confocal NL. Confocal NL may assign the contract (or part thereof) and/or engage sub-contractors, agents and others in the performance of the Contract without restriction.

12. SEVERABILITY

12.1. If one of any of the provisions of these General Terms or the agreement should, for whatever reason, be void or invalid, this shall not affect the validity of the other provisions and parties undertake to replace the invalid regulation with a valid one which comes closest to the economic intent of the invalid regulation.

13. GOVERNING LAW

13.1. These Terms shall be governed by and construed in accordance with the laws of the Netherlands, without giving effect to any choice of law or conflict of law provisions. Any dispute arising out of or in connection to any agreement between Confocal NL and Customer and/or these Terms (including any disputes relating to any non-contractual obligations arising out of or in connection with any agreement between Confocal NL and Customer and these Terms) are subject to the exclusive jurisdiction of the court of Amsterdam, the Netherlands. The United Nations Convention of Contracts for the International Sale of Goods shall not apply.