

General Terms and Conditions VESPER AMERICAS INC



Article 1 Scope

1. These general conditions apply to all offers, agreements and deliveries from and with Vesper Americas Inc., a limited liability company incorporated under Delaware laws (hereinafter also referred to as "Vesper") and any other party unless explicitly agreed upon otherwise in writing.
2. The "agreement" as used herein, shall mean the agreement, including these General Terms and Conditions, between Vesper and the customer for the delivery of Vesper products.
3. The "customer" as used herein, is a natural or legal person with whom Vesper and its employees deal in the course of its business, including representative(s), agent(s), successor(s) and including visitors of the Vesper website.
4. "Products" as used herein, are all tangible goods, products and services supplied by Vesper to the customer.
5. Any purchasing, or other, terms and conditions of the customer are not applicable unless they have been explicitly accepted in writing by Vesper. Customer may issue a purchase order for administrative purposes only. Additional or different terms and conditions contained in any such purchase order will be null and void and do not bind Vesper.

Article 2 Offers and acceptance

1. All offers made by Vesper are non-binding and may be revoked at any time. Any amendments made by Vesper in writing shall entail a new offer, automatically revoking the previous offer. Any amendments by customer of a Vesper offer will be deemed a new offer by customer, which Vesper may accept or reject in its sole discretion. Offers will only be deemed accepted by Vesper if it does so in writing.
2. If the Customer shows interest in the offered products and or goods a sales agreement comes into existence at the moment both parties agree upon the price and other conditions and these conditions are confirmed in a written confirmation notice by Vesper.
3. Notwithstanding any other term in the agreement, no sales agreement will become effective if Vesper has requested for a payment security, unless the requested security is given by the customer, regardless of the requested form of this security.

Article 3 Quantity and weight of the products

1. Vesper has a best-efforts obligation to deliver the agreed upon quantities.
2. In addition to the provisions in article 2, Vesper will have met its obligations to the customer if the supplied quantity of the product does not divert more than 20% from the ordered quantity. The actual supplied quantity (either in weight or number) is invoiced at the price that was agreed upon in writing.
3. Scale weight difference of 5% of total weight is within the accepted tolerance.

Article 4 Packaging, transportation and delivery

1. The applicable conditions for delivery of the products, including the specific INCOTERMS 2020 delivery terms and the location of delivery, will be stated in the confirmation notice by Vesper.
2. If a delivery is made in parts, each delivery shall be regarded as a separate agreement.
3. Delivery periods are merely estimates, unless expressly agreed upon by the parties in writing otherwise. The delivery period begins at the moment when the agreement is confirmed with a confirmation notice as mentioned in article 2.2. Notwithstanding if the customer has the obligation to provide Vesper all necessary data for the delivery, but has not yet provided this data, the delivery period will not commence. The customer is in that situation liable for all damages and costs incurred by Vesper due to the failing of the customer to provide the necessary data.
4. Vesper has a best-efforts obligation to deliver the products as close to the estimated delivery date as possible. If Vesper has not met the delivery date this will not give the customer, the right to cancel or dissolve the agreement.
5. The customer has the right to dissolve or cancel the unperformed part of the agreement if the agreed delivery date is exceeded with more than three months. The customer has to inform Vesper immediately in writing if it wants to exercise this right.
6. In case the customer refuses to accept the delivery (either entirely or partly) of the products then Vesper has the right to immediately (without judicial intervention and without any notice of default) cancel or dissolve the agreement. If Vesper exercises the before mentioned right this does not limit or replace Vesper's right to full compensation.
7. Unless agreed upon in writing otherwise, the copy of the consignment note, carriage document, CMR or other form of receipt signed by or on behalf of the carrier and the customer, respectively, counts as a proof that the products listed on it have been delivered complete and in good (external) condition on the in the document specified date, unless a note has been made on the carriage document.
8. The goods are supplied in a suitable packaging for the agreed carriage, as determined by Vesper.

Article 5 Quality of the products

1. Vesper has a best-efforts obligation to supply products to the customer that meet the in the confirmation notice specified specifications.
2. Customer hereby understands and accepts that all samples, drawings, models, figures, dimensions, weights or any other specifications for products are estimates only, and for demonstrative purposes, and although Vesper will use best efforts to ensure their accuracy, it cannot guarantee the absence of anomalies or that the quantity or quality of the products will not differ, unless it has been explicitly stated in writing.
3. The products sold by Vesper are derived from or are recyclable materials which means divergences in color, composition, moisture, hardness, vulcanization rate, Mooney, tensile strength, packaging etc. will occur. The customer is aware that due to the nature of the products sold by Vesper these differences can and will occur. As a result, the customer cannot derive any rights and/or price reductions from these divergences.
4. The customer shall examine the products or cause them to be examined immediately on receipt. The customer shall notify Vesper in writing of any lack of conformity of the products, specifying the nature of the lack of conformity, within 2 business days after the customer has discovered or should have discovered the lack of conformity.
5. If the customer fails to notify Vesper in writing of any lack of conformity at the latest within a period of 7 days from the date on which the products were delivered, the products are deemed accepted and in accordance with customer's order, and Vesper will have no obligation to correct such shipments, unless customer bears all the expenses thereof.
6. In the case of any alleged shortage, errors, defects or non-conformance with the agreement, customer shall allow Vesper to inspect the products subject to the alleged defect and/or co-operate with any potential investigation by Vesper or by a third party engaged by Vesper. If the customer has given due notice of non-conformity to Vesper and completed the claims form required by Vesper, and Vesper confirms the non-conformance with the agreement, a fitting solution will be found for all parties. Complaints regarding shipment or products do not allow the customer to suspend performance under the agreement, terminate the agreement, or make or request any deductions from payments due to Vesper. THE SOLE AND EXCLUSIVE REMEDY FOR ALLEGEDLY DEFECTIVE PRODUCTS IS THE REPLACEMENT OF SUCH PRODUCTS OR PARTS OF SUCH PRODUCTS, AT NO COSTS FOR CUSTOMER.

Article 6 Payment

1. Unless stated otherwise in Vesper's confirmation notice, Customer agrees to pay, without the right to set-off any amount, all invoiced amounts within thirty (30) days of the invoice date, unless stated otherwise in the agreement or on the invoice. However, all amounts will be due immediately in case customer terminates or suspends all or a substantial portion of its business activities, becomes insolvent, admits its inability to pay its debts, or in case of the voluntary or involuntary filing of a petition for or adjudication of bankruptcy of customer under any federal, state or municipal bankruptcy or insolvency act, the appointment of a receiver, trustee, custodian, or liquidator, or any act or action constituting a general assignment by customer of its properties and/or interest for the benefit of creditors.
2. Payments are to be made by bank wire to the account shown on the invoice or as otherwise instructed by Vesper in writing.
3. Unless explicitly stated otherwise by Vesper in writing, all prices are in US Dollar. All prices are exclusive of, and customer shall pay, all taxes, duties, levies or fees, or other similar charges imposed on Vesper or customer by any taxing authority (other than taxes imposed on Vesper's income), related to customer's order, unless customer has provided Vesper with an appropriate resale or exemption certificate for the delivery location. In case of changes in law such that a tax is levied that is or becomes irrecoverable with a consequent increase to the costs to Vesper of delivering the Products, Vesper is entitled to increase its prices accordingly and retro-actively.
4. Vesper will provide the customer with an invoice in which the amounts to be paid for the applicable products are specified.
5. If the customer disputes all or part of an invoice, it must notify Vesper thereof in writing, stating its precise reasons, within 5 days of the invoice date, failure of which the invoice will be deemed accepted by customer. Disputing the invoice does not release the customer from its payment obligation.
6. The customer is not entitled to set off the invoice amount, whether disputed or otherwise, against any rightfully or wrongfully contended counterclaim and/or to suspend payment of any invoice.
7. Any charges or costs charged by the customer's bank must at all times be paid for by the customer in full and cannot in any way be deducted from the invoiced amount.
8. If Vesper is of the opinion that the customer's financial position and/or payment record gives cause thereto, the customer must make an advance payment and/or furnish adequate security in a form to be determined by Vesper, including an Article 9 UCC security right and/or a bank guarantee, at Vesper's written request. Security may be requested for both existing and future obligations. If customer fails to furnish the desired security, Vesper has the right without prejudice to its other rights, to immediately suspend the further execution of the agreement, and that which customer owes to Vesper for whatever reason will become immediately due and payable.
9. Customer is not allowed to process, sell, transfer, assign, pledge, encumber, hypothecate or similarly dispose of, either voluntarily or involuntarily, or to enter into any contract, option or other arrangement or understanding with respect to the sale, transfer, assignment, pledge, encumbrance, hypothecation or similar disposition of any products, unless all amounts due to Vesper relating to those products are fully paid up.

Article 7 Insurance

It is the sole responsibility of the customer to ensure that all products received from Vesper are fully insured against any eventuality including, but not limited to, fire, theft, flooding, etc, until such time all products have been fully paid.

Article 8 Warranties

1. Vesper warrants to customer that at the moment of delivery of the products, the products meet the agreed specifications and specifically agreed upon quality, both as stated in writing by Vesper, provided that these specifications are explicitly designated by Vesper as warranted specifications.
2. TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, VESPER, HEREBY DISCLAIMS ALL WARRANTIES, CONDITIONS, CLAIMS OR REPRESENTATIONS WITH RESPECT TO THE PRODUCTS WHETHER EXPRESS, IMPLIED OR STATUTORY OR OTHERWISE, INCLUDING, BUT NOT LIMITED TO IMPLIED WARRANTIES OR CONDITIONS OF MERCHANTABILITY, QUALITY, NON-INFRINGEMENT, COMPATIBILITY OR OF FITNESS FOR A PARTICULAR PURPOSE, UNLESS EXPLICITLY MADE AND PROVIDED BY VESPER IN WRITING TO CUSTOMER, AND ONLY FOR THE PERIOD CONTAINED THEREIN. NO ADVICE OR INFORMATION, WHETHER ORAL OR WRITTEN, OBTAINED FROM VESPER OR ELSEWHERE WILL CREATE ANY WARRANTY OR CONDITION NOT EXPRESSLY STATED IN THESE TERMS AND CONDITIONS.

Article 9 Non-performance, Termination

1. Where payment is not made within the terms of the agreement, contractual interest shall be owed at a rate of 1% a month, or the highest rate allowed by law, if lower, with effect from the first day following expiration of the payment term referred to in the agreement; part of a month shall be considered a full month. Payments made by customer shall always be used first to meet all the interest and costs owed and subsequently for the settlement of claims which have remained outstanding for the longest period of time, even when customer specifies that the payment relates to another claim. Customer shall not be entitled to refuse to discharge or to suspend the discharge of its payment obligations on account of alleged disturbance of, defect or error in the products or on any other account whatsoever. Customer will be liable for, and will pay upon first request of Vesper, all judicial and extrajudicial collection costs, including attorney fees, as well as any reversal charges that Vesper incurs due to the failure of the customer to fulfil its obligations under the agreement. The payment in respect of extrajudicial costs is fixed at 15% of the outstanding principal sum and interest (subject to a minimum of \$ 250 per claim), unless Vesper has demonstrably incurred more costs. The fixed amount will always be due by the customer as soon as it is in default and will be charged without further proof.
2. In the case of non-performance by the customer as mentioned in article 9.1 Vesper has the right to cancel or terminate the contract upon written notice without judicial intervention. If Vesper exercises the before mentioned right this does not limit or replace Vesper's right to claim full compensation for damages, loss of profits, interests and costs.
3. If customer believes that Vesper has failed to perform under the agreement for a breach, it must notify Vesper in writing, explaining in detail the alleged shortcomings, and allow 30 days for Vesper to cure if it has failed to perform. Only if Vesper fails to cure the alleged breach of the agreement within this time period, Vesper will be in default of the agreement.
4. Notwithstanding the above and without any obligation to return any payments or prepaid expenses, Vesper may terminate its relationship with customer, or may terminate or suspend Vesper's performance under the agreement at any time: (i) if customer is in breach of the agreement; (ii) if Vesper reasonably suspects that customer is using the products to breach the law or infringe third party rights; (iii) for a force majeure event that continues for more than ninety (90) days upon notice; (iv) if customer fails to pay any amounts due to Vesper; (v) if required due to change in laws/regulation by a regulator or authority with a lawful mandate; (vi) the bankruptcy of the customer has been applied for; (vii) an attachment is levied on the goods of customer; (viii) customer is liquidated or discontinued; and/or (ix) customer is in violation of any applicable laws or regulations.

Article 10 Liability

1. IN NO EVENT SHALL VESPER OR ITS AFFILIATES BE LIABLE, HOWEVER CAUSED AND WHETHER ARISING UNDER CONTRACT, WARRANTY, TORT (INCLUDING NEGLIGENCE), PRODUCT LIABILITY OR ANY OTHER FORM OF LIABILITY, FOR ANY INDIRECT, INCIDENTAL, SPECIAL, PUNITIVE OR CONSEQUENTIAL DAMAGES, OR ANY LOSS OF INCOME, BUSINESS, SALES, PROFITS (WHETHER ACTUAL OR ANTICIPATED) OR INTERRUPTION OF BUSINESS, INCLUDING DOWN TIME OF PROCESSING MACHINERY.
2. NOTWITHSTANDING ANYTHING ELSE IN THIS AGREEMENT TO THE CONTRARY, VESPER'S AGGREGATE LIABILITY FOR ALL CLAIMS OF ANY KIND SHALL NOT EXCEED TOTAL PAID BY CUSTOMER FOR THE PRODUCTS IN CONNECTION TO WHICH THE DAMAGING EVENT OCCURRED, BUT NOT TO EXCEED THE MAXIMUM SUM OF \$100,000 FOR EACH DAMAGING EVENT. FOR PURPOSES OF THIS ARTICLE, A SERIES OF CONNECTED DAMAGING EVENTS SHALL BE REGARDED AS ONE DAMAGING EVENT.
3. THE LIMITATIONS ON VESPER'S LIABILITY ABOVE SHALL APPLY WHETHER OR NOT VESPER, ITS EMPLOYEES, LICENSORS OR ITS AFFILIATES HAVE BEEN ADVISED OF THE POSSIBILITY OF SUCH LOSSES OR DAMAGES ARISING.

Article 11 Confidentiality, Publicity

1. Vesper and the customer shall keep as confidential the commercial and technical information mutually disclosed as part of their trading relationship.
2. Both parties may not, without previously obtain the other party's written consent, carry out any advertisement or publicly reveal any facts of their co-operation.
3. Vesper may disclose directly or indirectly contact details of its suppliers to the customer. It is forbidden for the customer or any other organization, company or person affiliated to the customer to directly or indirectly engage in direct trading relations with these suppliers for the period of two years after the last delivery of products or goods to the customer by Vesper.

Article 12 Force Majeure

Vesper shall not be liable or responsible to customer, or be deemed to have defaulted under or breached the agreement, for any failure or delay in fulfilling or performing any term of the agreement, when and to the extent such failure or delay is caused by or results from acts beyond Vesper's reasonable control, including, without limitation, the following force majeure events: (a) acts of God; (b) flood, fire, earthquake, other potential disaster(s) or catastrophe(s), such as epidemics and pandemics, including Covid19 related causes, or explosion; (c) war, invasion, hostilities (whether war is declared or not), terrorist threats or acts, riot or other civil unrest; (d) government order, law, or actions, whether or not related to Covid19 or any other pandemic; (e) embargoes or blockades in effect on or after the effective date of the Agreement; and (f) national or regional emergency; (g), power outages or shortages, lack of warehouse or storage space, inadequate transportation services, or inability or delay in obtaining supplies of adequate or suitable materials; and (h) other events beyond the reasonable control of Vesper. Vesper will not be liable for any delay in performing or failure to perform any of its obligations under these General Terms and Conditions or the agreement caused by force majeure events. Vesper will notify customer promptly in writing of the reasons for the delay or stoppage (and the likely duration) and will take all reasonable steps to overcome the delay or stoppage.

Article 13 Governing Law and Arbitration

Unless stated otherwise in writing, any and all agreements between the parties shall be governed by and construed in accordance with the laws of the State of New York, USA, notwithstanding conflict of law principles, and without giving effect to the United Nations Convention on the Contracts for the International Sale of Goods. All disputes and controversies arising out of or relating to these General Terms and Conditions, any agreement between the parties, or the relationship of the parties shall be finally and bindingly resolved under the Commercial Arbitration Rules of the American Arbitration Association in front of a sole arbitrator. The place of arbitration shall be New York, New York. The language of the arbitration shall be English. Any award, verdict or settlement issued under such arbitration may be entered by any party for order of enforcement by any court of competent jurisdiction. ANY CAUSE OF ACTION AGAINST VESPER, REGARDLESS WHETHER IN CONTRACT, TORT OR OTHERWISE, MUST COMMENCE WITHIN ONE (1) YEAR AFTER THE CAUSE OF ACTION ACCRUES. OTHERWISE, SUCH CAUSE OF ACTION IS PERMANENTLY BARRED.

Article 14 Final Provisions

1. If any provision of these General Terms and Conditions, the agreement or any other agreement between the parties, is held to be null, void or otherwise ineffective or invalid by a court of competent jurisdiction, (i) such provision shall be deemed to be restated to reflect as nearly as possible the original meaning of the terms or agreement in accordance with applicable law, and (ii) the remaining terms, provisions, covenants and restrictions shall remain in full force and effect.
2. Customer is not permitted to assign, delegate or otherwise transfer the agreement or any rights hereunder. Any such attempted assignment, delegation or transfer will be null and void. Vesper is permitted at its sole discretion to assign the agreement or any rights or obligations hereunder to any third party, without giving prior notice.
3. Any agreement between the parties is for the sole benefit of the parties thereto and, except as otherwise contemplated therein, nothing therein expressed or implied shall give or be construed to give any person, other than the parties thereto, any legal or equitable rights thereunder.
4. Nothing contained in any agreement between the parties shall be read or construed so as to constitute the relationship of principal and agent or of partnership between the parties. Neither of the parties may pledge or purport to pledge the credit of the other party or make or purport to make any representations, warranties, or undertakings for the other party.
5. Customer acknowledges that Vesper shall suffer irreparable injury in case of breach of the obligations under Articles 11. Accordingly, in the event of such breach, customer acknowledges that Vesper will be entitled to injunctive relief in any state or federal court of competent jurisdiction within the State of New York. Customer further submits to the personal jurisdiction of such courts for the purposes of any such action.