

Cumela Terms and Conditions

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Definitions and application

- 1.1. These terms and conditions apply to all offers and all agreements the user of these general terms and conditions, hereinafter to be referred to as contractor, makes or concludes with third parties, hereinafter to be referred to as principal.
- 1.2. These general terms and conditions can only be deviated from by an agreement entered into in writing. These deviations have no binding effect on other agreements with principal.
- 1.3. Once having concluded contracts under the present terms and conditions, principal agrees to their applicability to later agreements between principal and contractor.
- 1.4. The terms and conditions are referred to by means of CUMELA-Terms and Conditions.

Offers and agreements

- 2.1. All offers are free from engagement.
- 2.2. Barring a stipulation to the contrary, contractor shall have the right to charge to principal any and all reasonable costs which contractor shall have had to incur in order to make his offer.
- 2.3. Agreements can only be entered into on behalf of contractor by persons authorized thereto. Agreements with contractor's employees engaged in the execution of the work shall not have any binding effect upon contractor. At principal's first demand contractor shall specify which persons within contractor's business are authorized to conclude agreements.
- 2.4. Contractor will assume the data received from principal to be correct and base his offer thereon. Loss resulting from the incorrectness or incompleteness of these data is for principal's account.

Rights to industrial and intellectual property

3. Any and all specifications, descriptions, budgets, plans, drawings or any other documents provided by contractor shall remain contractor's property and shall be returned to contractor at contractor's first demand. In addition contractor's copyright and all other intellectual and industrial rights shall apply in full.

Prices

- 4.1. Any and all prices stated by contractor or agreed upon between contractor and principal, except when explicitly stated otherwise, shall be inclusive of turnover tax, insurance, import duties, levies, rights and any other taxes.
- 4.2. When normal working hours on working days are exceeded, or work has to be carried out on Saturdays and on Sundays and Seasonal holidays, all this at principal's request, contractor will add a surcharge to the prices agreed upon, proportional to the ensuing extra cost.
- 4.3. In the absence of a fixed price agreed upon, the price of a completed assignment shall be established according to the operations carried out and the materials supplied or used, on the basis of rates agreed upon by the parties before commencement of the operations or, lacking such a price-establishment, on the basis of rates locally in force at the time of completion of the work.
- 4.4. When there are several principals, they shall all be jointly and severally liable for the fulfillment of their contractual obligations.
- 4.5. The proviso in the preceding paragraph shall equally apply to partially completed assignments.
- 4.6. Contractor shall be authorized to charge principal for pre-operational cost.
- 4.7. Contractor shall be authorized, prior to the performance of the agreement, to require security from principal for the fulfillment of his liability to pay.
- 4.8. Contractor shall be authorized to on-charge to principal price increases of cost-determining factors, which shall at any rate include, but not exclusively so, the cost of raw materials and fuel, tools, manufacturing, transport, exchange rate movements, dump and treatment rates and surtaxes, according to contractor's discretion, which have come into existence after the agreement was concluded, but before completion or delivery. If contractor does this within 3 months after the conclusion of the agreement, principal shall be authorized to terminate the agreement, a right he shall exercise within 8 days after the price increase notification. Such a termination of the agreement shall not entitle any of the parties to compensation.

Performance

- 5.1. Contractor shall carry out the assignment both in a way and during a period of time within the term of performance agreed upon, which contractor deems most suitable, whilst taking into account principal's interests and – as much as possible – principal's relevant wishes. The date of the performance of the assignment shall be communicated by contractor to principal in a timely manner.
- 5.2. Contractor shall be entitled to extend the term within which the work is to be completed if through force majeure or through circumstances principal is accountable for or on account of an alteration in the agreement or the conditions applying to the performance, contractor cannot be expected to complete the work within the term agreed upon.
- 5.3. If the term within which the work is to be completed is exceeded, contractor shall not be liable to pay any compensation to principal unless otherwise agreed upon in writing by the parties.
- 5.4. In the event that commencement or progress of the work is delayed by factors principal is accountable for, any ensuing loss or cost to contractor shall be compensated for by principal.
- 5.5. When contractor and principal dispute as to whether weather conditions and/or working conditions, including circumstances which affect the application of fertilizers or crop protectors, have an adverse effect on the quality of the work/operations, contractor shall be entitled not to proceed to execute the work/operations without any ensuing obligation to pay compensation. If at principal's express request, contractor should decide to carry out the work/operations, it shall be for principal's risk and principal shall never be entitled to any compensation in the event that the results of the work/operations should be negative.
- 5.6. Delivery shall take place at a location to be determined by principal and which shall be accessible by metalled road. As from the moment of delivery the goods shall be for principal's risk. This proviso can only be deviated from in an agreement in writing.

Force majeure

- 6.1. Contractor principal shall be entitled to postpone the fulfillment of his obligations for the time of the duration of the force majeure situation.
- 6.2. Force majeure shall be deemed to include a situation which, at the time of the agreement's conclusion, could not in all reasonableness be expected and which is outside contractor's sphere of influence. This shall be considered to include: government measures, extraordinary weather conditions, strikes, transport hold-ups, illness, civil commotion and/or wars, and an attributable cause of force majeure or a case of force majeure on the part of persons on whom contractor depends for the manufacture and/or supply of products.
- 6.3. Force majeure shall never be a ground for compensation to principal.

Alterations in the scope of the work or in circumstances

- 7.1. Alterations in the scope of work will in any case result in additions or reductions if:
 - a. there are alterations in the design or the specifications;
 - b. the information provided by principal is not in conformity with reality;
 - c. amounts estimated are deviated from by more than 10%;
 - d. normal working hours are exceeded by more than 10%.
- 7.2. Additions shall be calculated on the basis of the value of the price-determining factors current at the moment when the additions are carried out. Reductions shall be calculated on the basis of the value of the price-determining factors in force at the moment when the agreement was entered into.
- 7.3. In the event that during the execution unforeseen circumstances become evident which have not been communicated by principal in writing nor that they were – without investigation – visible to the naked eye to contractor at the time of the on-site inspection prior to the start of the work – such as – for instance – stones or other objects below the surface, remains of foundation or boggy patches or soil types that differ from what is visible on the surface, contractor shall be entitled to adjust the price in connection with the extra costs arising from these unforeseeable circumstances. If principal fails to agree to the adjusted price, contractor shall be entitled to terminate the agreement by means of a registered letter with immediate effect. In that case principal shall not be entitled to claim any form of compensation, the contractor being entitled, though, to proceed to arrange final settlement by virtue of subsection 2 of Section 7:764, Dutch Civil Code.
- 7.4. If the balance of reductions exceeds that of the additions, contractor will be entitled at the final settlement to charge 10% of the difference of the balances to principal. This proviso does not apply to reductions resulting from a request on the part of the principal.

Obligations on the part of principal

- 8.1. Principal shall see to it that contractor shall in due time have at his disposal such data and approvals, such as licences, exemptions and rulings as are necessary for the planning of the work, unless otherwise agreed upon by parties in writing.
- 8.2. Principal shall be obliged to investigate into and inform contractor in writing about any and all circumstances referring to the location and the existence of obstacles, cables, pipelines or networks and other obstructions and risks such as, but not exclusively so, the presence of – for instance – stones or other objects below the surface, remains of foundation or boggy patches, the occurrence of protected indigenous plant and animal species as well as parcel constraints (e.g. water extraction area) and pollution of the soil as a result of building materials and objects occurring in the work.
- 8.3. Principal shall, for operations in which subsurface obstacles can be hit, carry out (or order to be carried out) a KILC-notification with the Land Registry Office at least 5 working days but not more than 20 working days prior to the commencement of the operations, which notification includes – inasmuch as relevant – the request for information on individual network connections. Principal himself shall see to it that all the cable- and pipeline/network administrators respond. Principal shall submit the results of the investigation to contractor prior to commencement of the operations.
- 8.4. Unless otherwise agreed upon in writing, principal shall ensure the disconnection respectively the interruption beyond the area boundaries of all the connections in use to public utilities and, if any, other pipelines and/or cables or networks and other obstacles and provides the necessary certificates.
- 8.5. Principal shall, at contractor's request, allow inspection of the environmental protection situation of the soil to be worked on, the presentation of a design stage V&C (= safety, health and environment) plan and/or the execution or an instruction for the execution of an asbestos inventory by a certified asbestos inventory agency (SC 540) and/or a soil survey in accordance with the Building Materials Decree.
- 8.6. Principal shall be obliged to remove all obstructions as well as inform contractor about any circumstances that result or may result in contractor failing to carry out the assignment quickly and correctly and without damage in the period referred to in article 5.1.
- 8.7. Principal shall see to it that the site at which the agreement is to be performed is, in contractor's opinion, readily accessible.
- 8.8. Principal shall clean and keep clean the public road prior to, during and after operations in which the public road is used.
- 8.9. If materials provided by principal prove in any way to be polluted, causing contractor to incur extra costs, these costs shall be for principal's account.
- 8.10. Materials contributed by principal or objects removed at principal's instruction shall remain principal's property and are therefore for account and risk of principal.
- 8.11. Unless otherwise agreed upon principal shall be responsible for the removal, if any, of products such as soil and waste produced in the performance of the agreement.
- 8.12. Principal shall be responsible for the provision of data regarding the (environmental) quality of the soil areas to be excavated or treated, or the materials to be transported by contractor.
- 8.13. The costs of samples and analyses of the products to be excavated, transported, treated or deposited are for principal's account, unless otherwise agreed upon in writing.
- 8.14. If principal has not complied with or will be unable to comply with the stipulations of this article he shall immediately, but at the utmost five working days prior to the commencement of the agreement, inform contractor in writing. The stipulations of article 11 shall as then apply.

Completion or delivery of the work

- 9.1. The work shall be considered complete and delivered when
 - a. principal has given his approval to the work;
 - b. the work has been put into use by principal. When principal puts into use part of the work that part shall be considered completed/delivered;
 - c. contractor has notified principal in writing of the completion of the work and principal has not, within 14 days after being notified, communicated in writing whether the work has been approved or not;
 - d. principal has not given his approval to the work because of small defects or the lack of parts which can be repaired or postdelivered within 30 days and which do not make it impossible for the work to be put into use.
- 9.2. If principal withholds his approval of the work he shall have the duty to notify contractor in writing, stating reasons.
- 9.3. If principal withholds his approval of the work he shall grant contractor the opportunity to proceed to complete/deliver the work anew. He shall grant contractor a reasonable term to do this. The stipulations of this article shall as then again apply.
- 9.4. After delivery/completion of the work contractor will no longer be responsible for defects in the work except for the work or any part of the work being defective through any fault of contractor, his supplier, his subcontractor or his personnel, which defect within reasonableness could not have been detected earlier by principal and subsequently could not be communicated within a reasonable period of time. The legal action resulting from the defect under this paragraph shall be prescribed if instituted after the expiry of one year from delivery/completion.

Rental

- 10.1. Contractor undertakes to provide the equipment or machinery, including accessories, agreed upon, and in good repair for the period agreed upon, whereas principal undertakes to take delivery of the equipment from contractor, observing the term agreed upon and the date of notice, if any, agreed upon.
- 10.2. When accepting the hired item, principal shall carefully inspect the hired item for soundness, undamaged condition and completeness. If principal finds any defects or shortcomings he shall immediately inform contractor in writing.
- 10.3. Additional hours shall be on-charged, fewer hours shall not be subtracted, unless otherwise agreed upon in writing.
- 10.4. Principal shall use the hired item solely within the framework for which the hired item, by its nature, is suitable and exclusively for the purpose for which it is hired 10.5. Principal shall use the hired item observing the directions which contractor, by means of manuals and similar documents or otherwise provides. Principal certifies to be sufficiently experienced with and have the expertise for the hired item.
- 10.6. Principal shall inspect the hired item on an ongoing basis for correct operation and, insofar not agreed upon otherwise, in a timely manner carry out the required daily maintenance for continuance of correct operation, all this in accordance with the manufacturer's specifications.
- 10.7. The cost of maintenance and repair, all this insofar they are the result of normal wear and tear when properly used in accordance with its purpose, shall be for contractor's account.
- 10.8. Principal shall take all reasonable measures to prevent damage to and/or loss of the hired item.
- 10.9. Principal shall take all customary measures to prevent theft of the hired item. Principal shall be liable for theft and fraudulent appropriation of the hired item.
- 10.10. Principal himself shall be responsible for the operator in charge of operating the equipment to have the required expertise and principal shall be responsible for instructing the operator.
- 10.11. Principal shall be liable for any and all damage, of whatever nature and in whatever way inflicted or caused to the hired item during the rental period. Upon detection of any defect, shortcoming or of damage to the hired item, principal shall not continue its use save after consultation with contractor. If principal fails to (timely) consult with contractor, the cost of damage as a result of the continuing use shall be for or rest with principal.
- 10.12. Principal shall be liable for all damage, of whatever nature and in whatever way inflicted or caused by the hired item to visible and invisible, moveable and immovable goods/properties belonging to third parties (e.g. subsurface cables and wires or pipelines).
- 10.13. Principal or machine operator, whoever collects the hired item from contractor, shall identify themselves by means of a legal identity document.
- 10.14. Principal shall be liable for any and all damage to or caused by the hired item during transport, so also in between transport modes, carried out by principal or on principal's instruction, in whatever way or by whomsoever caused.
- 10.15. When contractor or contractor's representative registers the kind and number of hours of rent on work order slips these will be signed weekly and signed for approval by both parties. If principal or principal's representative does not use the opportunity to go for approval, principal shall be deemed to agree with the data of the work order slips.
- 10.16. Principal shall be prohibited from re-renting or sub-renting the hired item or make it available for use or otherwise to third parties without prior written permission from contractor.
- 10.17. Principal shall sign-out the equipment hired by him before 15.00 hours and report to contractor if this equipment will not be required for hire the next day. If principal fails to do so, contractor will charge principal with an extra day's rental of the hired equipment.
- 10.18. Upon failure to timely return the (hired) equipment after expiry of the rental period, principal shall pay the loss resulting from this excess to contractor.
- 10.19. The rental period shall be determined in one or more whole days beginning on the day the hired item is made available and expiring on the day the hired item, nothing being missing, is accepted for return by contractor.
- 10.20. If not agreed upon otherwise, the rental shall be exclusive of fuel and transport costs to and from site.
- 10.21. When principal insures the equipment hired by him the insurance cover shall be at least equal to the terms and conditions of the Nederlandse Boursloot voor Landmaterieel 2006, rubriek 4.1.1: Casco Standard en rubriek 4.2.2: Aansprakelijkheid Uitgebreid. (Dutch Bourse Policy for Earth-moving Equipment 2006, heading 4.1.1: Casco Standard and heading 4.2.2: Liability Comprehensive).
- 10.22. When principal insures the equipment used by him the liability insurance for the equipment in hire shall include contractor in his capacity of principal/owner of the equipment. Principal explicitly and irrevocably grants contractor permission to derive rights from this insurance. If the proviso of this paragraph is not complied with or principal has failed to observe any other obligation in this article and contractor is made liable by a third party to pay compensation in any way, principal shall be bound to indemnify contractor completely and compensate contractor completely for what contractor must pay to this third party.
- 10.23. In the event that the hired item will be involved in an accident resulting in a claim being made on contractor's insurance, principal shall pay the entire excess and any loss resulting therefrom.

Liability

- 11.1. Contractor restricts his liability for the loss or damage sustained by principal as a result of wilful misconduct or gross negligence on contractor's part, and otherwise with due observance of the following.
- 11.2. Loss or damage for which liability is explicitly excluded:
 - a. consequential loss, including trading loss, loss resulting from standstill and loss of profit;
 - b. damage to property held in trust; damage to goods which contractor transports, processes, treats, hires, borrows, uses, stores or for whatever other reason has custody of;
 - c. loss or damage caused by auxiliary personnel, engaged by principal or by third parties, also in the case of wilful misconduct or gross negligence;
 - d. loss or damage principal sustains as a result of claims from third parties
 - e. soil structure deterioration.
 - f. loss or damage as a result of spraying with crop protectors and/or fertilizers which ought not to be for contractor's account
 - g. such as used by crop protectors and/or fertilizers etc., provided, recommended or prescribed by principal.
 - g. loss or damage brought about by cuts to subsidies, surcharge duties, fines and surtaxes.
- 11.3. If so required, principal shall take out insurance himself against the loss or damage referred to in paragraph 11.2.
- 11.4. Liability for that matter shall be limited to the invoice amount that refers to the operations concerned.
- 11.5. Notwithstanding article 11.4 it is provided that, if contractor is insured against such damage or loss, liability shall be limited to the amount paid out on the basis of the insurance augmented with the excess.
- 11.6. If so requested, further information on the contents of the policy terms of the insurance policies taken out shall be provided.
- 11.7. Principal shall indemnify contractor against claims, if any, from third parties which, directly or indirectly, immediately or remotely connected with the performance of the agreement and the cause of which is attributable to a party other than contractor including the failure to observe principal's duties as referred to in article 8. This indemnification includes and comprises among other things claims with respect to statutory provisions relating to sequential liability and (administrative) penalties resulting from non-compliance with legislation such as but not exclusively the Underground Cables and Pipelines Information Exchange Act, Fertilizers Act, Flora and Fauna Act etc.
- 11.8. If by virtue of the preceding paragraph contractor should receive a claim from third parties, principal shall assist contractor both judicially and extrajudicially and promptly take any action as may be expected of him in such a case. In the event that principal should fail to take adequate action, contractor shall be entitled to take such action himself without notice of default. All costs and damage on the part of contractor and of third parties shall in full be for account and risk of principal.

Complaints

- 12.1. Visible defects shall be reported in writing to contractor within 24 hours after the actual transfer of the article or the completion of the work.
- 12.2. Other defects shall be reported in writing within due time after having been detected or should, in all reasonableness, have been detected.
- 12.3. After expiry of these periods of time the right to rely on a defect ceases to be applicable.
- 12.4. Lodging a complaint does not remove the obligation to pay.
- 12.5. In the execution of the operations contractor shall be expressly permitted to deviate from an advice, plan or drawing issued earlier, as such an advice, plan or drawing refers to a plan of execution drawn up prior to commencement of the operations, and during the operations it may sometimes be appropriate to make adjustments.
- 12.6. The right to lodge complaints lapses upon the expiry of one year after the termination of the operations or the completion of the work.

Payment

- 13.1. Contractor shall be entitled to invoice periodically or at the completion of the work. Contractor may require (part) advance payments of the price agreed upon. Unless a different payment term has been indicated payment shall be made within 30 days after the date of the invoice into a bank account to be appointed by contractor, all this without the right to reduction or set-off.
- 13.2. In the event principal has failed to pay within the payment term referred to in 13.1 he will be in default by operation of law without further notice. Contractor shall be entitled to compensation of interest at the statutory rate as of the day on which payment should have been made at the latest.
- 13.3. Principal shall never be entitled to set off unacknowledged debts against each other.
- 13.4. Contractor shall be entitled to set off debts.
- 13.5. In the event principal fails to comply with any obligation under the agreement or fails to comply with such obligation in a timely or appropriate manner, the ensuing costs shall be for principal. These costs comprise any and all judicial and extrajudicial costs such as costs of demand, collection and legal representation. In the event principal has failed to pay a term, contractor shall be entitled to halt the work until the moment the term due has been paid, provided he has warned principal in writing to pay within 7 days and such payment has not materialized. The proviso in the preceding sentence has no effect on contractor's right to compensation of damage, costs and interest.
- 13.6. The entire claim shall be due and payable immediately if:
 - a. a term of payment has been exceeded;
 - b. principal has gone into involuntary liquidation, files a petition for suspension of payment, or has been granted a legal debt rescheduling arrangement;
 - c. property or debts owned by principal have been seized;
 - d. principal (as a company) is dissolved;
 - e. principal (as a natural person) is placed under tutelage or dies.

Reservation of title and right of retention

- 14.1. Contractor shall remain the owner of any and all items supplied or made available as well as the works erected with these items and any items as yet to be delivered until the following debts have been paid:
 - a. debts relating to the consideration for items supplied or to be supplied by contractor to principal pursuant to an agreement, or b. operations pursuant to such an agreement also carried out or to be carried out for the benefit of principal, as well as c. with respect to debts relating to shortcomings in the performance of such agreements.
- 14.2. Principal shall retain from any party that impairs the aforementioned reservation of title such as establishing a right of pledge, transfer to a third party, sale or assembly.
- 14.3. Contractor shall have the right of retention of items submitted to him for processing, repair or storage. In a case that contractor invokes this stipulation contractor's right shall not cease to have effect as a result of principal furnishing security.

Choice of law and forum

- 15.1. All agreements are governed by Dutch law.
- 15.2. Disputes shall be resolved by the locally competent court in the place where contractor has his seat. Contractor, however, shall be permitted to apply to the court that has jurisdiction in the principal's place of business or residence.
- 15.3. Parties can agree in writing to choose a different form of dispute settlement such as arbitration or mediation.