

General Terms and Conditions of Business (GTB) for the Development of Part Programs of Mitutoyo Europe GmbH

1. Scope of Application

1.1.
The following Terms and Conditions apply supplementarily to the General Terms and Conditions (GTB) for Works and Services of Mitutoyo Europe GmbH as sole authority governing the business relationships of Mitutoyo Europe GmbH (hereinafter known as "Mitutoyo") and its Customers, including information and consulting related to the creation and delivery of part programs, hereinafter also known as software.

1.2.
These General Terms and Conditions of Business apply exclusively to companies in the sense of Section 14 BGB (German Civil Code).

2. Subject of the Contract

2.1.
In the event of an order, the subject of the contract will first be the development of a measurement strategy based on the Customer's drawing and the Customer's workpiece.

2.2.
Subject of the contract is furthermore the creation of a customized part program after the conduct of a measurement recording and insertion of the Customer's workpiece into the Mitutoyo reference measuring device. The above-mentioned part program controls the settings of the relevant program and machine parameters which are required to measure the parameters of the Customer's workpiece specified in the Mitutoyo offer. Moreover, the part program contains the measurement points required for the collection of the property calculation and controls the approach to the measurement point position by the Customer's measuring device specified in the Mitutoyo offer. If a part of the offer, the part program to be created can also be designed to perform an evaluation of the measurement results in the sense of the offer.

2.3.
Mitutoyo will deliver the prepared part program to the Customer – depending on the specification in the offer or the offer confirmation – on a suitable data carrier (e.g., CD-ROM or DVD), by e-mail, or by an on-site installation, including a trial run.

2.4.
If the finished part program is delivered by data carrier or e-mail, it will contain all of the major operating instructions in digital form (photos, superimposed touch remarks, operations to be performed).

2.5.
If the part program is not delivered on data carriers or by e-mail, the Customer will receive paper and/or data documentation after the installation and the completion of the trial run.

3. Shipment and Transfer of Risk, Source Code

3.1.
If the promised program is not installed at the site or sent to the Customer per e-mail, Mitutoyo will ship it, uninsured, at the Customer's risk and expense. Selection of the transport route and the transport means used shall be at Mitutoyo's discretion.

3.2.
In the event the program is sent by means other than e-mail, the risk of accidental loss or accidental deterioration shall transfer to the Customer upon the handover of the goods being delivered to the Customer, the forwarding agent, the freight carrier, or any other company designated to carry out the shipment, but no later, however, than upon the merchandise leaving the Mitutoyo branch office.

3.3.
If and when shipment is delayed because Mitutoyo, due to full or partial default of payment by the Customer, has exercised its right of retention, or owing to any other reason for which the Customer is accountable, the risk shall transfer to the Customer no later than on the date of notification of readiness for shipping and/or for installation.

3.4.
The Customer shall have a claim to surrender of the source code on which the runnable program is based upon full payment for the part program which is the subject of the contract.

4. Reproduction Rights

4.1.
The Customer may reproduce the delivered program to the extent that the reproduction is required for the use of the program in the Customer's business. The required reproductions include the installation of the program on the mass storage of the hardware being used and the loading of the program into the RAM.

4.2.
Moreover, the Customer may make reproductions as backup copies. Each and every reproduction must be labeled with an appropriate notice of the Mitutoyo copyright.

4.3.
Reproductions of the documentation supplied with the program and the presentation of the source code may be made by the Customer solely for the purpose of using the supplied program in the Customer's business.

4.4.
Any commercial exploitation of the program created by Mitutoyo outside of the regulations of Clauses 5 and 9 is expressly excluded and is prohibited for the Customer.

5. Further Sale and Further Leasing

5.1.
The Customer may sell or give the software, including the documentation, permanently to third parties, provided that the acquiring third party declares in writing to Mitutoyo that he is in agreement with the further application of the above terms and conditions of contract to his use. In the event the program is passed on to third parties, the Customer must surrender to the new user all of the program carriers, including any existing backup copies and copies of the documentation, or must destroy any copies which are not surrendered and confirm in writing to Mitutoyo the completeness of the destruction without waiting for the relevant request for the confirmation. The Customer's right to use the program expires upon the handover of the program. He is obligated to fulfill the information obligation pursuant to Clause 10.

5.2.
The Customer may temporarily relinquish the software, including the documentation, to third parties, provided that this is not done in the form of a lease for commercial purposes and that the third party also declares his agreement with the application of the above terms and conditions of contract to his use and confirms this agreement in writing, and provided that the third party is not a competitor of Mitutoyo and the Customer gives all of the copies of the program, including any existing backup copies and copies of the documentation, to Mitutoyo, or destroys the copies which have not been surrendered and confirms to Mitutoyo, without waiting for a request, in writing that this has been done. The Customer shall not have any right to use the program himself for the duration of the relinquishment of the software to the third party.

5.3.
The Customer may not relinquish the software to third parties if there is justified reason to suspect that the third party will violate the terms and conditions of contract, in particular that he will create prohibited reproductions.

6. Program Modifications and Commercial Exploitation

6.1.
Program modifications may be assigned to third parties which are potential competitors of Mitutoyo only if and when Mitutoyo does not wish to carry out the desired program modifications in return for reasonable and usual consideration. Mitutoyo shall be granted a sufficiently long period to consider the acceptance of the order.

6.2.
The Customer does not have the right to exploit commercially the supplied program, the supplied source code, and/or the supplied documentation beyond the scope described above.

6.3.
Copyright marks, serial numbers, or other features serving to identify the program may not be removed or changed under any circumstances.

7. Industrial Property Rights and Copyrights, Legal Defects

7.1.
Unless otherwise expressly agreed in writing, Mitutoyo is obligated to provide the promised program free of industrial property rights and third-party copyrights (hereinafter known as property rights) solely within the territory of Germany.

7.2.
If and when a third party raises legitimate claims against the Customer due to the violation of property rights by the part program supplied by Mitutoyo, Mitutoyo shall be liable to the Customer as described below:

Mitutoyo will, at its expense and discretion, either acquire a usufruct for the relevant delivery of part programs, or modify them so that the property right is not violated, or replace them. If this is not possible for Mitutoyo under reasonable conditions, the Customer shall be entitled to legal rights of cancellation or reduction of the price. The Customer cannot request compensation for fruitless expenses.

7.3.
The above-mentioned obligations of Mitutoyo shall exist only if and when the Customer has notified Mitutoyo immediately in writing of the claims asserted by third parties, has not acknowledged a violation, and Mitutoyo retains the right to conduct any and all defense measures and settlement negotiations. If the Customer suspends the use of the part program to minimize the loss or damage or for other reasons, he is obligated to point out to the third party that the suspension of use does not entail any acknowledgement of a violation of the property right.

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7.4.

Customer's claims shall be excluded if and when he is accountable for the property right violation.

7.5.

Moreover, Customer's claims shall be excluded if and when the violation of the property right was caused by specific instructions on the part of the Customer, by a use which was not intended by Mitutoyo, or if it was a result of the Customer modifying the supplied product or of his using it with products which were not delivered by us.

7.6.

The provisions of Clause 9 shall apply mutatis mutandis in the event of the occurrence of other legal defects.

7.7.

More extensive claims, or claims other than those regulated in this section (Clause 7), of the Customer against Mitutoyo and its vicarious agents based on a legal defect are excluded.

8. Application of DIN Standards

8.1.

If, during the course of the processing of this contractual relationship, the Parties should be in disagreement concerning the content of computer/technical terms, quality requirements, format requirements, or similar circumstances, compliance with the pertinent DIN standards as effective at the time of the conclusion of the contract shall be deemed agreed.

8.2.

If the DIN standard is modified after the conclusion of the contract, but before completion of the part program, Mitutoyo shall be obliged, within the scope of what is reasonable, to take into consideration the requirement of the new standard. It is not necessary for Mitutoyo to carry out major modifications of the programming work or make extensive modifications of the program if this is possible only through additional expenditures of time and money which are more than minor.

9. Warranty and Liability

9.1.

The warranty and liability are excluded in particular for the consequences of incorrect usage of the program and of its use on unsuitable operating equipment (hardware).

9.2.

Claims based on breach of obligation due to poor performance in the form of defects in the software shall also not exist for software errors which cannot be reproduced.

9.3.

Liability for losses of data shall be limited to typical expenditures required for restoration which would be required if backup copies have been regularly prepared as appropriate for the risk.

10. Information Obligations

In the event the Customer sells the promised program further, he is obligated to notify Mitutoyo in writing immediately of the name and complete address of the buyer.

11. Changes of Terms and Conditions of Business, Severance

11.1.

If a current or future provision of the concluded contract should be or become, in whole or in part, invalid/void or unenforceable for reasons other than those of Section 305 – 310 BGB, the validity of the remaining provisions of the contract shall not be affected.

The same applies in the event that oversights or exclusions are found after conclusion of the contract. The Parties shall replace the invalid/void/unenforceable provision or oversight/exclusion with a valid provision that contains the legal and economic import of the invalid/void/unenforceable provision and takes into account the entire content of the contract. The application of Section 139 BGB (Partial Invalidity) is expressly excluded.

11.2.

The change service for these GTB is conducted on the Web site www.mitutoyo.eu.