

General Terms and Conditions of ÖBB-Technische Services-GmbH

version of: 01.01.2021

The following general terms and conditions (in the following “GTC ÖBB-TS”) apply to deliveries and other services (in the following “Services”) of ÖBB-Technische Services – Gesellschaft mbH (in the following “ÖBB-TS”) as well as payments to ÖBB-TS. In addition, the General Conditions of Delivery and Payment of the Austrian Machine and Steel Engineering Association (Allgemeine Lieferbedingungen des Fachverbandes der Maschinen- und Stahlbauindustrie Österreichs) in their respective applicable version and relevant law applies. The general terms and conditions of the Client (in the following “Client”) only apply if ÖBB-TS has expressly acknowledged such conditions in writing. The acceptance of an offer of a delivery, performance or a contract for services, the acceptance of goods, or the performance of services by the Client is deemed as acceptance of the GTC ÖBB-TS under exclusion of the Client’s general terms and conditions.

The Services are offered by ÖBB-TS pursuant to the available resources and the technical and operational feasibility. ÖBB-TS does not accept any liability if offers cannot be submitted due to the lack of operational/technical feasibility or if the capacities are not available.

The GTC ÖBB-TS including any amendments are available under: <https://ts.oebb.at/en/technische-services/agb-coc>.

1. Offers

- 1.1 ÖBB-TS performs its Services in accordance with its respective service catalogue, the contractually agreed scope, and the GTC ÖBB-TS. ÖBB-TS offers light and heavy maintenance services in its facilities. Light maintenance services include day-to-day repairs, short-term component exchanges and safety checks carried out on a regular basis (in the following “Light Maintenance Services”). Heavy maintenance services are more substantial works as well as less regular and less frequent major overhauls of vehicles lasting several days or weeks (in the following “Heavy Maintenance Services”).
- 1.2 The offers of ÖBB-TS are subject to change and non-binding, unless expressly specified otherwise in the respective offer in writing. The documents included in the offers, e.g. drawings, illustrations, samples, and examples as well as information regarding dimensions, weight, performance, and consumption are not deemed specifically warranted properties, unless agreed otherwise in writing. ÖBB-TS reserves the right to make mandatory changes due to the construction requirements.
- 1.3 ÖBB-TS reserves its ownership and the right to all intellectual property rights in connection with any cost estimates, drawings, and all other documents; the Client shall not disclose any of such information to third parties nor shall it use such information for the purposes of third parties.

2. Acceptance of orders and ancillary agreements

- 2.1 Conclusion of service contract:
 - 2.1.1 In general, a service contract requires a prior written request that must contain at least the following:
 - construction series/types, for which the Services are to be provided,
 - which Services are to be provided and the scope of such services,
 - place of performance,
 - performance time or performance period,
 - the operational and engineering details required for the Services (in particular, maintenance plans and instructions),
 - if requested by ÖBB-TS, evidence that the Client has obtained the permits required for its transport services. The Client will immediately notify ÖBB-TS in writing if any permit has been amended or revoked (irrespective of whether this has been requested by ÖBB-TS), of any requested and performed changes to, or the revocation of, a permit.
 - 2.1.2 The service contract between ÖBB-TS and the Client shall be entered into in writing.

- 2.1.3 The acceptance of an order as well as representations or ancillary agreements by employees of ÖBB-TS, including supplements or amendments of any kind are only binding if they have been confirmed by ÖBB-TS in writing (e-mail is sufficient).
- 2.1.4 In the case of framework agreements, the respective service contract is entered into in accordance with the provisions of the framework contract. The framework contract shall be entered into in writing.
- 2.2. Handling of requests:
- 2.2.1 In case of incompatibilities between requests by railway undertakings for access to Light Maintenance Services in the service facilities of ÖBB-TS and capacities already allocated, ÖBB-TS will first try to find an amicable solution through discussions and coordination with the applicants concerned. This also applies to assistance train services.
- 2.2.2 If no amicable solution can be found, ÖBB-TS shall decide in the order of the following priority criteria:
1. urgent assistance train service,
 2. existing contracts,
 3. security-related access requests,
 4. loaded vehicles,
 5. plan maintenance,
 6. establishment of runnability,
 7. plannable access requests,
 8. duration of the contract.

Allocations for ad-hoc orders shall be made in the order in which they are received by ÖBB-TS

- 2.2.3 If a request for access to the services referred to in point 2. 2. 1 is made and no capacity can be allocated to the applicant after the coordination procedure has been carried out and the priority criteria applied, ÖBB-TS shall examine viable alternatives together with the applicant

3. Price and payment conditions/set-off

- 3.1 The Client shall pay fees in accordance with the respective service/ framework contract. The fees are in each case determined on an individual customer-related basis.
- 3.2 The basic price for Services provided by ÖBB-TS is an average hourly rate of EUR 127.17 (excluding VAT), which is subject to surcharges and discounts for Light and Heavy Maintenance Services, conversions, rebuilding, mobile maintenance services, as well as any other services. The basic price serves as initial indicative price information and is based for this purpose on (i) a moderate creditworthiness of the Client, (ii) vehicles or series for which (a) the ÖBB-TS personnel to be deployed still have to be trained separately as well as (b) a management of obsolescence must be set up to ensure the availability of spare and wear parts, and (iii) types of repair for which ÖBB-TS has no reliable empirical values to date. ÖBB-TS will check whether these conditions are met by the Client when submitting the offer. When determining further if necessary applicable surcharges and discounts, in particular the specific requirements for the required maintenance facility, the extent of the specifically required engineering services, the order volume, the required time to perform the order (e.g. instruction on short notice, requested service and/or delivery period), the specific requirements of the Client in connection with certifications, documentation, integration in systems of the Client, product specific training, training certifications and specific logistics organisation as well as processing (inter alia, vehicle supply (Fahrzeugzulauf), material logistics, order control) have to be considered. Required materials, in particular spare and wear parts are invoiced separately by ÖBB-TS unless such parts are provided by the Client. Overtime, including night, Sunday and holiday shifts, is invoiced in accordance with the respective agreed surcharges. Travel and standby times are deemed to be working hours. Travel costs as well as day and accommodation charges are invoiced separately.

- 3.3 If ÖBB-TS provides Services exceeding the agreed scope of Services, which have been agreed with the Client or which are within agreed fee limits, such Services will be invoiced separately. This does not include any required materials, which will be invoiced separately by ÖBB-TS.
- 3.4 The agreed prices are deemed ex-works – EXW (delivering company unit) (in accordance with Incoterms in their respective applicable version), this includes loading within the plant and excludes sales tax and packaging.
- 3.5 Payment must be made without deductions, free of charge and within 14 days as of the invoice date. ÖBB-TS is entitled to set off any outstanding receivables against payments due by the Client.
- 3.6 In the case of any doubt with respect to the creditworthiness of the Client, ÖBB-TS is entitled in its free discretion to demand a reasonable security from the Client taking into account the value of the respective Services.

ÖBB-TS is in particular entitled to demand a security if:

- a) any payments due by the Client are overdue for more than one month,
 - b) the Client has been in default in the previous three months with payments equaling in aggregate an average monthly payment,
 - c) ÖBB-TS has obtained a credit report of a credit agency, which it considers non-satisfactory,
 - d) an application to open insolvency proceedings over the assets of the Client is submitted,
 - e) there are other circumstances that indicate poor creditworthiness, such as e.g. the filing of an application for legal aid, declared unwillingness to pay (this is not the case if the claims of ÖBB-TS are challenged and thus paid subject to reservation) or lack of an address for service or if the Client is not available (for more than two weeks) at such address.
- 3.7 If changes are required to the performance of the order due to circumstances in the sphere of the Client, the Client bears any additional costs in this regard.
 - 3.8 If payments are not made when due, ÖBB-TS is entitled to charge an annual default interest of 9.2% plus the respective base rate and the costs of any payment reminders, however, at least 12% per year of the total amount due. This does not preclude the exercise of any further rights of ÖBB-TS in connection with the payment default.
 - 3.9 The Client is not entitled to suspend any payments or to set-off against any counterclaims contested by ÖBB-TS. The Client is entitled to set-off undisputed claims or claims, which have been finally decided by court, against claims of ÖBB-TS.
 - 3.10 ÖBB-TS is entitled to set-off its claims against the Client at any time against claims of the Client against ÖBB-TS.

4. Performance of contract, shipping and delay

- 4.1 The delivery period commences with the receipt of the order confirmation, the performance period for assembly or repair work commences with the handing over of the vehicle. In the case of customer-specific technical requirements, the delivery or performance period commences upon the expiry of 14 days following the date on which the Client has provided the required documents (e.g. construction drawings, plans etc.), permits, or approvals, or has made the agreed advance payment. If the parties have specifically agreed that ÖBB-TS is responsible for the dispatch or delivery, the delivery or performance period is deemed complied with if the respective device leaves the plant before the relevant period has expired.
- 4.2 In the case of unforeseeable disruptions/hindrances beyond the sphere of influence of ÖBB-TS, such as force majeure, operational disruptions and unlawful industrial action, the performance or delivery period will be extended accordingly. Point 4.3 applies. In the case of any delay due to late deliveries of important raw materials or components etc. that is not within the sphere of influence of ÖBB-TS, and also those that are within the sphere of influence of the Client, the performance or delivery period is extended accordingly, provided that these hindrances and/or circumstances are material for the non-compliance with the respective period. ÖBB-TS is also not liable for any consequences of a delay of performance, for which ÖBB-TS is not responsible, as long as such disruption/hindrance exists. The occurrence of such hindrance

and its discontinuation (Ende des Hindernisses), shall be notified immediately in writing. ÖBB-TS is entitled to partially or fully rescind the contract in the case of such hindrance after informing the Client; in this case the Client is not entitled to any claims for damages unless in the case of as gross fault (wilful intent and gross negligence) of ÖBB-TS.

- 4.3 If the performance of Services is partially or wholly impossible due to disruptions, ÖBB-TS shall offer to perform equivalent Services in another maintenance facility or parts of such if this is reasonable for the Client considering operational resources (örtliche und betriebliche Möglichkeiten) of ÖBB-TS, provided the cause for the disruption is within the sphere of influence of ÖBB-TS.
- 4.4 If the agreed performance or delivery period or such period as extended in accordance with point 4.2 is exceeded by more than 4 weeks, the Client is entitled to terminate the contract subject to a grace period of at least four weeks, of which ÖBB-TS must be notified by registered mail; the Client is not entitled to any claims for damages unless it has provided evidence that ÖBB-TS acted with gross fault (wilful intent and gross negligence).
- 4.5 If the Client incurs a loss due to a delay for which ÖBB-TS is responsible, the Client is entitled to damages equalling 0.5% for each full week, however, no more than 5% of the value of that part of the delivery or service that cannot be used at the time agreed or for its intended purpose and 5% of the payment for other services. Any further claims for damages and claims for damages or loss due to delays caused by ÖBB-TS's suppliers are excluded unless the Client has provided evidence that ÖBB-TS acted with gross fault (wilful intent and gross negligence).
- 4.6 The Client is obliged to cooperate with ÖBB-TS to the extent required for ÖBB-TS to provide the ordered Services. In particular, the instructions issued by ÖBB-TS to ensure safety must be observed. The Client must ensure that its employees and any third parties employed by it to perform its contractual obligations (Erfüllungsgehilfen) comply with these instructions when accessing the maintenance facilities of ÖBB-TS. Section 8 Occupational Health and Safety Act (ASchG) applies accordingly. The Client will provide ÖBB-TS in due time prior to performance of the ordered Services all documents required for the performance (in particular, maintenance instructions). ÖBB-TS maintains a safety management system in accordance with Directive (EU) 2016/798 on railway safety. Thus, ÖBB-TS is obliged to comply with the Directive (EU) No. 402/2013 and Directive (EU) No. 1078/2012. ÖBB-TS must check the proper application and the effectiveness of its safety management. The Client shall provide all information required to enable compliance with the security levels of the railway system at all times and to implement all corrective measures required in this regard. ÖBB-TS will provide the Client with all relevant information.
- 4.7 If it was agreed that ÖBB-TS is responsible for shipping, ÖBB-TS decides the type of transport and the transport route. Shipping is at the risk and at the cost of the Client. ÖBB-TS is only liable for damages if the Client has provided evidence that ÖBB-TS has acted with gross fault (wilful intent and gross negligence). Any transport or breakage insurance contract is only concluded following the agreement of the parties and on behalf and at cost of the Client.
- 4.8 ÖBB-TS is entitled to perform partial deliveries.
- 4.9 ÖBB-TS is only obliged to comply with delivery or performance periods, provided that the Client has complied with all contractual obligations in all pending business transactions.
- 4.10 If the shipping is delayed due to circumstances attributable to the Client, the Client bears all resulting additional costs, e.g. storage costs. ÖBB-TS is in such case entitled to terminate the contract subject to a grace period of no more than 14 days and claim damages for non-performance following the expiry of such grace period. ÖBB-TS can claim further damages subject to providing the respective evidence.
- 4.11 For services performed in facilities of the Client, the Client must provide the necessary devices and auxiliary materials (e.g. winches, rails, electric power etc.) free of charge and in good time, even if the assembly is included in the price (3.1) or a lump sum has been agreed for the assembly. Arrangements that are necessary for assembling to be prepared by the Client, e.g. construction measures, must be completed prior to the arrival of any employees of ÖBB-TS.

Furthermore, the Client must implement the necessary measures to protect people and property from damage and injury. ÖBB-TS only accepts liability for auxiliary staff contracted out by the Client, for equipment and auxiliary materials, if evidence has been provided that ÖBB-TS acted with gross fault (wilful intent and gross negligence).

5. Transfer of risk

- 5.1 The risk is transferred to the Client as soon as the vehicle or the object subject to repair, maintenance or other work has left ÖBB-TS's plant; the same applies to partial deliveries or in the event that ÖBB-TS has specifically agreed to bear the costs for shipping, or transporting, assembling, or installing, or similar work. If the repair, maintenance or other work is required in connection with an object that remains within the sphere of influence (Herrschaftsbereich) of the Client, the risk is transferred when the Client is notified that the work has been completed.
- 5.2 If the shipping (point 4.2) or the delivery is delayed for reasons for which ÖBB-TS is not responsible, the risk is transferred to the Client when ÖBB-TS notifies the Client of its readiness to deliver.

6. Reservation of ownership, rescission

- 6.1 ÖBB-TS reserves ownership in the delivery object until complete payment and until all other claims against the Client have been satisfied irrespective of their legal basis.
- 6.2 As long as the reservation of ownership (point 6.1) is effective, the Client may only sell the delivery object to a third party in the ordinary course of business even if the delivery object is connected with other assets or it has been processed; the Client is not entitled to sell the delivery object pursuant to the previous sentence if the resulting receivables have been assigned to a third party or are subject to an assignment prohibition, if the Client is unable to pay (point 6.5) or does not comply with its contractual obligations. Any other disposal is not permitted. The Client must promptly notify ÖBB-TS of any seizure, confiscation or other disposal by a third party. The Client bears any costs in connection with the enforcement of the ownership rights of ÖBB-TS.
- 6.3 As long as the reservation of ownership (point 6.1) is effective, the Client assigns his existing and future claims and other rights in connection with any further sale, the leasing or hiring out as well as in connection with leasing transactions to ÖBB-TS, even if the delivery object was previously connected with other assets or has been processed. If the delivery object is sold together with other assets without or following an amalgamation (Verbindung) or processing or is only transferred for the use of a third party the claim can only be assigned in an amount equal to any outstanding payments owed to ÖBB-TS. The right to claim further damages remains unaffected.
- 6.4 In the case of any non-compliance with the Client's obligations, in particular payment default, non-compliance with other obligations, respectively inability to pay (item 6.5), ÖBB-TS is entitled to rescind the contract subject to a 14 days grace period and claim damages for non-performance. ÖBB-TS can claim further damages subject to providing the respective evidence.
- 6.5 The inability to pay is assumed if bankruptcy or administration proceedings are opened over the assets of the Client, or an application to open bankruptcy proceedings is rejected due to lack of funds, or the Client failed to pay at least three claims of ÖBB-TS in full and when due within the last 60 days prior the due date of the respective liability and does not make an advance payment or provide suitable security (in particular a bank guarantee) following a written demand or a demand via e-mail.

7. Warranties

- 7.1 ÖBB-TS warrants the correctness of its processing instructions as well as its operation manuals and customer advice. The Client is solely responsible for the compliance with statutory or other regulations when using the delivery object as well as to review the suitability of the delivery object for the intended purpose. ÖBB-TS is only responsible its processing instructions and operating manuals, which are deviating from processing instructions and operating manuals of ÖBB-TS if ÖBB-TS confirmed them in writing or via email in advance.

- 7.2 Delivery objects or provided services must be inspected by the Client immediately after delivery or providing of such services; the Client has to notify any defects immediately after their discovery, stating the number and date of the order confirmation, the bill of lading, or the invoice as well as the production and commission number in writing (or via email), otherwise the delivery or services are deemed accepted. The complaint must specify which delivery object or service is defective, the description of the defects and under what circumstances they occurred. Each individual defect must be described in detail. The Client shall reimburse ÖBB-TS for any costs caused by unjustified complaints.
- 7.3 The warranty obligations of ÖBB-TS in connection with repair and maintenance work are limited to work performed by ÖBB-TS. ÖBB-TS does not provide any warranties for the faultless functioning of a machine, plant, means of transport, etc., if a defective function is the result of a component provided by the Client or a third party or occurred due to incorrect or incomplete information provided by the Client or a third party.
- 7.4 The warranty period is six months; this also applies to deliveries of immovable assets or assets, which are deemed immovable. The warranty period commences upon the transfer of risk (point 5). The Client must provide evidence that a defect occurring in the warranty period has already been present at the time the risk was transferred.
- 7.5 If ÖBB-TS provides a warranty, it will, within a reasonable period at its discretion, however, at least four weeks, either replace the defective object or repair it, grant the Client an appropriate price reduction or rescind the contract (redhibition). Any exchanged parts become the property of ÖBB-TS. ÖBB-TS will not reimburse the Client for the costs of an attempted or performed rectification of a defect undertaken by the Client himself or a third party.
- 7.6 If the contractual obligation is limited to the delivery of components, ÖBB-TS only bears the costs of the replacement or the spare parts and their shipping.
- 7.7 The delivery or service object or the defective component must be sent or transported to ÖBB-TS at the risk of the Client immediately upon request of ÖBB-TS.
- 7.8 The Client is not entitled to retain payments due to warranty claims or other counterclaims against ÖBB-TS, which have not been acknowledged.
- 7.9 ÖBB-TS does not assume any warranty for defects due to the non-compliance with installation instructions or operating manuals provided by the Client, or which had to be procured by the Client or if the Client has not procured that users comply with such instructions, if the delivery object was repaired or other work was performed on it without the approval of ÖBB-TS or it was or is used in contradiction to the instruction of ÖBB-TS for purposes, for which it has not been intended and this is the cause of the defect.
- 7.10 The Client waives the specific right of recourse pursuant to Austrian law relating to warranty claims (besonderer gewährleistungsrechtlicher Rückgriffsanspruch) unless the parties agreed otherwise in writing.

8. Damages and product liability

- 8.1 All entitlements of the Client to claim damages for property and financial losses of any kind and on whatever legal basis are excluded, unless the Client provides evidence that the damage was caused by ÖBB-TS unlawfully, intentionally or with gross negligence. The replacement of consequential damages (e.g. from loss of production), the replacement of lost profits and the compensation for mere financial losses (reiner Vermögensschaden) are excluded unless in the case of gross negligence and intent. Mandatory claims under the Product Liability Act (PHG) are not affected. The liability exclusion does not apply to personal damage and the impairment of physical integrity.
- 8.2 Furthermore, such claims can only be enforced at court within six months after the knowledge of the occurrence of the damage.
- 8.3 ÖBB-TS is only liable for those parts of the delivery object that it procured from a producer or a component supplier to the extent it is entitled to a warranty claim against such producer or supplier.

- 8.4 If the delivery object was produced in accordance with construction specifications, drawings or models made by the Client, ÖBB-TS is not liable for the correctness of the construction, but only that it was performed in accordance with the specifications of the Client.
- 8.5 The Client shall indemnify and hold harmless ÖBB-TS for any claims of third parties against ÖBB-TS in connection with the production and delivery in accordance with drawings, samples, models or other documents provided by the Client.
- 8.6 The product liability obligations of ÖBB-TS in connection with property damages including any rights of recourse under applicable product liability regulations are excluded. The Client has to comply with all health and safety regulations, technical specifications, installation instructions, operating and use manuals, and, in particular all guidelines regarding electrical engineering technology when using the plants, machines and other objects delivered by ÖBB-TS and also to employ only qualified personnel in connection with the operation of the devices.
- 8.7 The Client must ensure that point 8.6 also applies for its customers and request that they ensure that point 8.6 applies also with respect o their customers.
- 8.8 Furthermore, the Client will notify ÖBB-TS promptly of any liability arising and provide ÖBB-TS with the necessary documents.
- 8.9 The warranty (or any specifically agreed warranty) of ÖBB-TS and its obligation to pay damages is excluded in the case of (intended) material modifications to the delivery object by the Client.

9. Data protection

- 9.1 ÖBB-TS stores personal data relating to the Client in connection with the contractual relationship (business name, address, account details) and contact details as well as personal data relating to the function and responsibilities of the Clients employees in the CRM system of the Rail Cargo Group to the extent this is necessary for the performance of the respective contract (Art. 6 Abs. 1 lit. b GDPR) as well as to safeguard the legitimate interests of ÖBB-TS (Art. 6 Abs. 1 lit. f GDPR), i.e. the efficient central customer administration. Such personal data will be used within the Rail Cargo Group (ÖBB-TS and companies affiliated with it within the meaning of section 189a Z 8 Business Code (UGB)) and if required, may also be disclosed to subcontractors in connection with these purposes.
- 9.2 The Client is obliged to inform its employees about the disclosure of their personal data (contact details, function and responsibilities) to ÖBB-TS and Rail Cargo Group (ÖBB-TS and companies affiliated with it within the meaning of section 189a Z 8 UGB).
- 9.3. ÖBB-TS stores and processes personal data relating to the Client as long as this is required for the performance of the contract or for the exercise or defence of legal claims, however, in any case, as long as required to comply with statutory retention obligations (e.g. Federal Fiscal Code (BAO), Business Code (UGB)).
- 9.4. The Client has the following rights in relation to personal data:
 - 1. Right of access to personal data (Art. 15 GDPR).
 - 2. Right to rectification (Art. 16 GDPR), right to erasure (Art. 17 GDPR) and the right to restriction of processing (Art. 18 GDPR).
 - 3. Right to object (Art. 21 GDPR).
 - 4. Right to data portability (Art. 20 GDPR).
 - 5. Right to lodge a complaint with a supervisory authority (Art. 77 GDPR).

10. General provisions

- 10.1 Place of performance is the plant of ÖBB-TS, which is responsible for the delivery, the court competent (sachlich und örtlich) for commercial matters in Vienna, Austria has jurisdiction. ÖBB-TS is, however, also entitled to initiate proceedings against the Client at the court competent (sachlich und örtlich zuständig) at the registered office or residence of the Client.

- 10.2 Austrian law applies, excluding any of its conflict of law provisions and the UN Convention on Contracts for the International Sale of Goods.
- 10.3 The Client hereby authorises ÖBB-TS to carry out name checks in Austria. Upon request of ÖBB-TS, the Client will provide ÖBB-TS with a written power of attorney to request copies and information from the register of persons within the meaning of section 5 para 4 first sentence Land Register Computerisation Act (GUG).
- 10.4 The Client hereby agrees to the assignment by ÖBB-TS of all rights and obligations under and in connection with the relevant contract to companies that have been (or will be) created by way of de-merger (Spaltung) from ÖBB, of which ÖBB-TS is or will be a majority shareholder, of which ÖBB-TS has acquired or will acquire the majority of the capital contribution (shares), however also, that all rights and obligations under or in connection with the relevant contract are transferred to its legal successors, so that such legal successor have the same rights and obligations under the contract as ÖBB-TS. Furthermore, the Client hereby agrees that such companies or persons will accede to the relevant contract and have the same rights and obligations as ÖBB-TS.