Heraeus – General Terms of Purchase 2016

1 Scope

1.1 All purchase orders (deliveries of goods and provision of services) of Heraeus (China) Investment Co., Ltd. and of the companies affiliated to it and domiciled in the People’s Republic of China (“Heraeus”) are subject to the following General Terms of Purchase (“GTP”) only, unless otherwise explicitly agreed by relevant contract parties in written form.

1.2 The GTP will apply to any contract formed in accordance with clause 2 to the exclusion of all other terms and conditions, including, without limitation, (i) any general terms and conditions and any supplementary provisions in the terms and conditions of the supplier which deviate from these GTP and any supplementary provisions in the terms and conditions of the supplier, except where Heraeus gives its express prior written consent to the applicability of the supplier’s general terms and conditions, and (ii) any terms and conditions which are implied by trade, custom, practice or course of dealings. The supplier’s general terms and conditions will also not become part of a contract between Heraeus and the supplier even if Heraeus, although being aware of the supplier’s deviating or contravening terms and conditions, takes delivery of goods, accepts services or effects payment for such deliveries or services.

2 Offer and Formation of a Contract

2.1 All orders, agreements and changes shall be binding only if placed or confirmed by Heraeus in writing. All correspondence must be exchanged with the purchasing department of Heraeus.

2.2 Orders placed by Heraeus without a time limit for acceptance may be accepted by the supplier only within fourteen (14) days from the order date. The supplier shall confirm the orders placed by Heraeus in written form. However, orders will not be binding if the supplier confirms the order with Heraeus in accordance with the orders placed by Heraeus even such orders are not confirmed by the supplier in written form.

2.3 Quotations are binding upon the supplier who issues the same and shall be irrevocable, unless otherwise expressly agreed in writing.

2.4 In case of a deviation or variance between the supplier’s order confirmation and Heraeus’ purchase order, a contract shall be formed only if the supplier has expressly advised Heraeus of the deviation and Heraeus has agreed to such deviation in writing.

2.5 Prices agreed and specified in the purchase order have been fixed following relevant commercial negotiations between Heraeus and the supplier, who hereby acknowledges that same are competitive on the national and international market, remunerative and to its full satisfaction.

3 Examination and Procurement Duties

3.1 Within the scope of its general and special professional knowledge, the supplier is obliged to the extent of written specifications and other terms of reference provided by Heraeus to exclude or avoid errors and inconsistencies on its own initiative and shall report to and clarify with Heraeus all concerns or objections, if any, promptly in writing.

3.2 The supplier is fully liable for the procurement of all subcontracted materials and for all services which are required for the goods ordered by Heraeus.

4 Delivery; Supplier’s Lien; Security in the Supply Chain

4.1 The period of delivery/performance specified by Heraeus in the purchase order including any order changes is binding. The supplier is not entitled to make delays in the delivery/performance of the goods or performance of the service, respectively, shall be effected within fourteen (14) days after the date of the purchase order. Time is of essence in relation to the performance of the obligations contained in this clause.

4.2 In case of delay or variance from the delivery/performance, set forth in clause 4.1, the supplier shall notify Heraeus promptly and advise a practicable date for the delivery/performance. In addition, the supplier shall promptly notify Heraeus without request of any difficulties in delivery/performance which may arise, for any reason whatsoever, immediately after such difficulties have come to the supplier’s knowledge.

4.3 The supplier is obligated to strictly comply with all instructions and requirements of Heraeus as regards mode of transport, forwarding agent, and shipping instructions.

4.4 Unless otherwise agreed, all deliveries and services shall be effected DDP “Point of Use” (Incoterms 2010). If delivery is made to construction sites or directly to third parties, unloading shall be at the cost and risk of the supplier.

4.5 Partial deliveries, over deliveries or under-deliveries are permissible only with the express written approval of Heraeus which shall not be unreasonably withheld.

4.6 The unconditional acceptance by Heraeus of a late delivery or late performance does not constitute a waiver by Heraeus of any compensatory claims arising to it from such late delivery or late performance, the foregoing shall apply until Heraeus has fully settled all payments owed by it for the goods or services so affected.

4.7 With regard to quantities, weights and dimensions, the figures determined by Heraeus during its incoming inspection shall prevail and be decisive, unless otherwise agreed by the supplier.

4.8 The supplier shall provide reasonable assistance to Heraeus in obtaining preferential tariffs and other governmental benefits and submit to Heraeus all supporting records and documents, especially certificates of origin, which are requested by Heraeus for this purpose.

4.9 If any payment instruments, shipping documents, certificates of origin or sales tax vouchers are missing, improper or incorrect, Heraeus reserves the right to refuse acceptance of the goods at the supplier’s cost and risk.

4.10 If the supplier has agreed to carry out the installation or assembly, or in the absence of any agreement, the installation or assembly is performed by Heraeus, the supplier shall bear all costs and expenses, such as travel expenses or tooling charges, unless otherwise agreed.

4.11 No contractual liens and reservations of title remain with the supplier, unless expressly agreed in a separate written agreement between Heraeus and the supplier.

4.12 The supplier shall give all organizational instructions and take all organizational measures, in particular in the areas of property protection, security of business partners, personnel and information, as well as in the areas of packaging and transport, which are required to ensure security in the supply chain, for example by adopting the requirements of internationally accepted initiatives on the basis of the WCO SAFE Framework of Standards (especially AEO). The supplier shall protect its deliveries of goods to and the performance of its services for Heraeus against unauthorized access and manipulation and shall have such deliveries and services performed by reliable personnel only. The supplier shall obligate any subcontractors commissioned by it to give corresponding instructions and to take corresponding measures.

4.13 The supplier represents and warrants that the goods (i) correspond with their description and any applicable specifications, drawings, samples and descriptions; (ii) are of satisfactory quality and fit for any purpose held out by the supplier’s general terms and conditions, and (iii) any terms and conditions which are implied by trade, custom, practice or course of dealings.
rate of 0.5% of the aggregate order value for each commenced calendar week of the supplier’s default, but no more than 5% of the aggregate order value. Heraeus shall deduct liquidated damages in full from the delivery of its payment. Without prejudice to the above entitlement of Heraeus, if the supplier has been in delay in delivery (which is not due to the Heraeus’s fault) for more than 30 days, Heraeus has the right to terminate the contract. The supplier shall fully indemnify Heraeus against all losses incurred by Heraeus (including but not limited to the difference between the price for procuring substitute products from a third party and the price of the goods under the relevant supply contracts). The supplier shall not apply if the burden of proof is established valid proof that the default was caused by an event of force majeure.

6.2 The liquidated damages pursuant to clause 6.1 shall be incurred as soon as the supplier defaults in delivery. The liquidated damages are immediately due for payment.

6.3 Heraeus may assert the liquidated damages in addition to its claim for performance of the supplier’s duty to deliver. If Heraeus accepts the supplier’s delayed performance, Heraeus may claim the liquidated damages even if it has not expressly reserved the right at the time of its receipt of delivery. Heraeus shall declare the reservation of its right to assert the liquidated damages no later than the time of its final payment of the delivery concerned.

6.4 The assertion of any further damage by Heraeus shall not be excluded.

7 Claims for Defects; Recourse and Product Liability; Insurance

7.1 The supplier is responsible for the perfect condition of the goods delivered and the services provided and for the existence of warranted characteristics. The supplier is liable for the correctness of the goods and services to the state of the art, to the generally accepted technical and occupational health and safety regulations of public authorities and trade associations, and for the compliance of the goods and services with any applicable laws.

7.2 Heraeus’ inspection is limited to defects which become apparent upon outward examination of the goods during the incoming inspection and to defects which become apparent during quality control by way of random sampling (such as testing delivery and short delivery, for example). Above and beyond the foregoing, it depends on the feasibility of such an inspection in the ordinary course of business, with due regard to the circumstances in the individual case. Heraeus’ duty to give notice of defects which are discovered later remains unaffected.

7.3 The statutory provisions on material defects and defects of title shall apply, except as otherwise provided herein below.

7.4 If the supplier, within the scope of subsequent performance of the contract, remedies a defect by rectification or by delivery of a fault-free product, the statutory warranty period shall commence to run again.

7.5 If the supplier defaults in its duty of subsequent performance of the contract within a reasonable time period fixed by Heraeus without having the right to refuse such subsequent performance, Heraeus is entitled to itself remedy, or cause to be remedied by any third party, the defect at the cost of the supplier and to claim from the supplier an advance payment of the costs thereby incurred.

7.6 All costs arising to Heraeus from the supplier’s delivery of defective goods or provision of defective services, especially travel and transportation expenses, labor and material costs, and the costs of an incoming inspection exceeding the usual scope, shall be borne by the supplier. Any costs incurred by the supplier for the examination and rectification of defects (including any removal and reinstallation work) shall be borne solely by the supplier even if it turns out that there was actually no defect. Heraeus shall be liable to pay damages to the supplier for unjustified claims for remedy of a defect only if Heraeus has recklessly, or grossly negligent, that no defect.

7.7 The supplier is obligated to indemnify and hold Heraeus harmless from and against any and all product liability claims, and from any loss or damage arising therefrom, if and to the extent that such claims are attributable to a defect in the goods delivered/manufactured or the services provided by the supplier. If the cause of the loss or damage is within the responsibility of the supplier, the burden of proof shall rest on the supplier. The supplier shall compensate for also any and all costs and expenses to the extent of the supplier’s indemnity obligation, including the costs of bringing an action or the costs generated by a product recall. Heraeus will inform the supplier of the scope and content of such product recall to the extent practicable and reasonable.

7.8 The supplier commits also to take out and maintain a product liability insurance with adequate coverage and to furnish proof of the existence of such insurance to Heraeus upon request.

8 Infringement of Third Party Proprietary Rights

The supplier warrants that no patent rights or other proprietary rights of any third party are infringed by or in connection with the supplier’s delivery of goods or services pursuant to the purchase contract or order. The supplier shall indemnify and hold Heraeus harmless from and against any and all claims which are asserted or entered against Heraeus by any third party on account of the infringement of a patent or other property right. The supplier will remedy the Heraeus’s costs and expenses arising to Heraeus out of or in connection with such third party claims. Irrespective of the foregoing, Heraeus shall be entitled to enter with any third party into agreements on the alleged infringement of the property rights, especially compromise settlement agreements, also without the consent of the supplier.

9 Prices and Terms of Payment

9.1 The prices specified in the purchase orders are binding. These prices include all and any services and ancillary costs (such as packaging fees etc.).

9.2 All invoices must state the exact description and quantity of the goods delivered or services provided, and the price per unit or quantity. All invoices must be sent to the address specified in the purchase order. Payment by Heraeus shall not be due until Heraeus’ receipt of a correct and complete invoice.

9.3 Unless otherwise agreed, the agreed prices become due and payable within sixty (60) calendar days after full performance of the delivery and/or service (as well as acceptance, if applicable) and receipt of a proper invoice.

9.4 Heraeus may, without limiting any other rights or remedies it may have, set off any balance owed to the supplier under the contract against any amounts payable by it to the supplier under the contract and/or any other agreement/contract between Heraeus and the supplier.

10 Industrial Property Rights and Know-How; Confidentiality

10.1 All items, information and documents set forth in clause 10.1 must be returned to Heraeus, to the extent that the supplier already applied for, or granted on such inventions shall vest exclusively in Heraeus. The same shall apply to any new technical know-how which does not belong to the state of the art. At the request of Heraeus, the supplier will exploit inventions which are made by its employees. The supplier agrees and undertakes to notify Heraeus in writing of any such new technical know-how or employee invention within a period of six (6) weeks. The supplier agrees that at any time and from time to time hereafter, it will on written request take any and all steps and execute, acknowledge and deliver any and all further instruments and assurances necessary or expedient in order to vest any patents or copyrights or copyright licenses and interests more effectively in Heraeus.

10.4 A party (“receiving party”) shall keep in strict confidence all technical and commercial know-how, specifications, inventions, processes or initiatives which are disclosed to the receiving party by the other party (“disclosing party”), except as expressly prohibited by the express prior written consent of Heraeus and such third party is bound by the same obligations of confidentiality.

10.2 All items, information and documents set forth in clause 10.1 must be returned to Heraeus, to the extent that the supplier already applied for, or granted on such inventions shall vest exclusively in Heraeus. The same shall apply to any new technical know-how which does not belong to the state of the art. At the request of Heraeus, the supplier will exploit inventions which are made by its employees. The supplier agrees and undertakes to notify Heraeus in writing of any such new technical know-how or employee invention within a period of six (6) weeks. The supplier agrees that at any time and from time to time hereafter, it will on written request take any and all steps and execute, acknowledge and deliver any and all further instruments and assurances necessary or expedient in order to vest any patents or copyrights or copyright licenses and interests more effectively in Heraeus.

11 Cancellation and Termination

11.1 Heraeus may cancel purchase order(s) or any portions thereof for any reason by written notice prior to delivery. Cancellation shall be effective upon the supplier’s receipt of the written notice from Heraeus, or thereafter upon the date specified in such cancellation notice. The supplier shall cease operation on subject purchase order(s) in accordance with the cancellation notice. Heraeus will have no liability for cancelled purchase orders other than as set forth in clause 11.2.

11.2 In the event of a cancellation under clause 11.1, upon provision of the relevant documents and proofs by the supplier supporting the amount of its costs incurred in connection with the cancelled purchase order prior to the effective date of the cancellation (but only to the extent that the supplier cannot, by using reasonable endeavors, reduce or mitigate them), Heraeus will pay the supplier for such reasonable costs, and the supplier will deliver to Heraeus (unless otherwise directed by Heraeus’ purchasing department) all completed parts, parts in process, all components procured on account of subject purchase order(s), and any tooling and equipment owned by Heraeus.

11.3 Heraeus may terminate the contract immediately and without compensation to the supplier by giving the supplier notice to that effect if at any time: (a) the supplier commits a material or persistent breach of the contract, (b) the breach becomes irreparable, (c) the supplier, whether or not in bankruptcy, makes a transfer of all or part of its assets, including its business, with creditors during liquidation process, enters into administration or go into liquidation, or a receiver or other security holder is appointed over all of any part of the supplier’s assets or undertakings; or (c) in the circumstances set out in clauses 5, 6.1 and 12.2.
12 Heraeus Code of Conduct

12.1 Supplier hereby commits to Heraeus to comply with all legally binding rules and regulations, in particular with all applicable laws for the protection of fair competition, all export and import prohibitions in force, all applicable customs and tax regulations as well as all applicable legal regulations for the protection of the environment, and not to offer, promise, or grant any benefits to employees of Heraeus as consideration for the preferential treatment in the procurement of products or services ("bribery"), to ban forced and child labor, and to ensure for its own staff payment of wages in accordance with all applicable labor laws, appropriate working hours, safety at work and a non-discriminating working environment and, in the case of subcontracting, to also bind its subcontractors by the foregoing provisions.

12.2 Heraeus may terminate this Contract without notice in the event that Supplier commits a breach of its obligations set forth in the preceding paragraph. Supplier commits to pay liquidated damages in the amount of 10% of the order value to Heraeus in the case of bribery, violation of the applicable laws for the protection of fair competition, or violation of the applicable labor laws governing the payment of wages, if the bribery or violation is to the detriment of Heraeus.

13 Miscellaneous

13.1 The place of performance for all payments between Heraeus and the supplier is the registered place of business of Heraeus.

13.2 These General Terms of Purchase and any agreement between Heraeus and the supplier shall be governed by and construed in accordance with the law of the People's Republic of China, without giving effect to its conflict of law provisions and without giving effect to the UN Convention on Contracts for the International Sale of Goods (CISG).

13.3 Heraeus and the supplier will first attempt to settle all their legal and technical disputes through negotiation. If no compromise can be reached, then the people's court at Heraeus' jurisdiction, shall be the competent courts for all legal actions that may arise between the parties.

However, Heraeus shall be entitled to bring, at its sole discretion, an action against the supplier also at the supplier's place of business or at the place of performance.