



March 17, 2014

## *Supplier Alert: BMW Updates Its Terms and Conditions*

Recently, BMW published a new version, dated February 28, 2014, of its N10078 International Terms and Conditions for the Purchase of Production Materials and Automotive Components (“New Terms”).<sup>1</sup> The New Terms replace the prior terms dated December 19, 2011 (“Old Terms”). This Supplier Alert provides a brief overview of substantive changes, the most notable of which are probably points 1, 10 and 15, below.

### **1. Definitions - “Affiliated Companies”**

The definition of “Affiliated Companies” has been expanded to include any company in which BMW AG directly or indirectly holds at least fifty (50%) percent of shares or voting rights. It appears that the New Terms are intended to be used for purchases by BMW AG and its “Affiliated Companies.” Notably, this encompasses BMW’s Chinese joint venture (BMW Brilliance Automotive).

### **2. Section 2.1 - Contents of the Contract**

The applicable terms are limited to the purchase order, the New Terms and any applicable “framework supply agreement”. “Framework supply agreements” (i.e., LTAs) were not included in BMW’s prior terms. Since BMW has long used framework supply agreements, it is likely that this change was intended as a clarification of the prior intent, rather than a change.<sup>2</sup>

### **3. Section 2.4 - Changes**

In addition to BMW’s right to request changes to the goods, the Supplier is now “under a duty to suggest changes to Buyer, which Seller considers necessary or expedient . . . .”

Also, Supplier must object to a BMW issued change order within 14 days. It is unclear whether this 14 day period applies to Supplier’s right to an equitable price adjustment.

### **4. Sections 2.6 and 7.8 - Termination Rights for Violation of Anti-Corruption Laws**

The Old Terms allowed termination only for uncured material breach. The New Terms (§2.6) expand BMW’s termination rights to allow termination for violation of anti-corruption and commercial bribery laws if “continuing collaboration is unreasonable for Buyer because of such violation.” This provision is not limited to the U.S. Foreign Corrupt Practices Act (which, broadly stated, applies to bribery of foreign governmental officials). It also encompasses the UK Bribery Act of 2010 (which, broadly stated, applies both to governmental and commercial bribery), as well as other state or national commercial bribery statutes.

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<sup>1</sup> The New Terms are available on Butzel Long’s website [here](#). BMW has prepared an overview of the New Terms, available [here](#).

<sup>2</sup> However, BMW likely created a new ambiguity by the way in which it refers to framework supply agreements within the new Terms. Although a detailed discussion is beyond the scope of this Client Alert, the New Terms are, at best, inconsistent and confusing as to whether a framework supply agreement is included within the defined term “Supply Contract.” Both the New Terms and Old Terms define “Supply Contract,” as “any contract formed by Seller’s acceptance of a Purchase Order or any contract signed by Seller and Buyer for the purchase of Goods”. On its face, this would seem to encompass a framework supply agreement. However, the New Terms confuse the issue by repeatedly referring to “the Supply Contract and/or a relating framework supply agreement,” which suggests that the framework supply agreement is separate from the Supply Contract. See, for example, Sections 11.1, 11.2, 13.4 and 21.6.

Also under the New Terms, if BMW has the right to terminate the Supply Contract, it also may terminate any other contracts with Supplier if “continuance would be unreasonable for Buyer.”

In addition, the New Terms allow BMW to refuse performance if performance would constitute a breach of applicable law (§7.8).

**5. Section 3.6 – Force Majeure**

The New Terms clarify that force majeure relief is not available for disruptions that could have been avoided through “preventive risk management.”

**6. Section 7.11 – Expanded Setoff Rights**

The New Terms expand BMW’s setoff rights in two respects. First, BMW may setoff against receivables that Seller has assigned to a third party (e.g., an A/R lender). Second, BMW may setoff claims of specified BMW affiliates against amounts owed to Seller. Both of these changes are generally consistent with the terms of other OEMs.

**7. Section 8 – Customs and Export Control**

The New Terms provide that Supplier must notify BMW of the “non-preferential and preferential origin of the goods.” The method and timing requirements for notice are described in §8.2. In addition, Supplier must also provide proof of origin, if required by the local import rules. The Old Terms only required a declaration of origin.

Further, the New Terms provide that if requested by BMW, Supplier shall implement customs procedures and comply with customs rules, in particular, for deliveries within the EU, with Art. 84 of Regulation (EC) No. 2913/92. Also for goods shipped within the European Union, the New Terms provide certain procedures as required under Art 3. Sec. 26 and 27 Regulation (EC) No. 300/2008 the Supplier must follow to avoid further security checks of the goods.

**8. Sections 9.1 and 9.7 – Quality Standards**

The New Terms require Supplier to provide BMW with the latest ISO/TS 16949 Certification (§9.1). The Old Terms required compliance with the ISO/TS standard, but not certification. BMW is entitled to take supporting action for failure analysis and the correction of failures within an escalation process if Supplier repeatedly fails to meet the quality or quantity objectives. Supplier must reimburse BMW for reasonable costs. Supplier may not change production of goods without prior written consent of BMW. Supplier must bear any costs incurred by BMW as a result of Supplier’s failure (§9.7).

**9. Section 9.8 – Manufacturing Location**

The New Terms require advance consent for any change in the manufacturing or shipping location of Seller or any sub-supplier, as well as any change of sub-supplier.

**10. Section 10 – Warranty**

Supplier warrants that the Goods are (new language in italics) “free of defects *according to the applicable law and particularly warrants that the Goods are suitable for the contractually stipulated use.*” Perhaps this is intended as the equivalent of the usual warranties of merchantability and fitness for purpose, but the language is not typical for U.S. contracts and its meaning is potentially uncertain.

**11. Section 11.8 – Antitrust Liability**

If Supplier commits an antitrust violation, Supplier must pay “liquidated damages” equal to 8% of the net invoice amount of the affected supplies. However, the provision is not a true liquidated damages provision (i.e., an automatic and exclusive measure of damages) as it allows Supplier to pay a lesser amount if it can prove that BMW has suffered no or lower damages and BMW to collect a higher amount if it can prove higher damages. Thus, the provision is probably better labeled as a burden-shifting presumption, rather than liquidated damages. This provision is unique to BMW.

**12. Section 13 - Tooling**

Under the New Terms, the time of transfer of title is specified in the purchase order. It is thus important to review each tooling purchase order to determine whether, for example, BMW claims title prior to the time of payment (§13.1). Seller retains all intellectual property rights in the tooling, with BMW receiving a broad, non-exclusive use license (§13.1). Supplier may use tooling provided or funded by BMW only for the production of Goods, except permitted in writing by BMW (§13.2).

**13. Section 14 - Spare Parts**

The New Terms require that the Supplier, one year before the expiration of the 15 year mandatory spare part supply term, submit a written proposal for an economically reasonable supply after the 15 year period.

**14. Section 17 - Confidentiality**

The New Terms require Seller to contractually bind its employees and third parties (e.g., sub-suppliers) to comply with Seller's confidentiality obligations.

**15. Section 18 – Insurance**

The New Terms require Seller to maintain “general insurance as well as products liability insurance and recall insurance.” BMW is the only OEM to specifically require recall insurance.

Butzel Long is prepared to assist you in understanding and responding to BMW's New Terms. For assistance, please contact your Butzel Long attorney or the authors of this Supplier Alert.

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