

## **BUSINESS GUIDELINE 5 GB**

### **GUARANTEES**

#### **CONTENTS**

1. DEFINITION OF GUARATEE
2. TYPES OF GUARANTEE
3. EXTENT OF THE GUARANTEE
4. APPLYING THE GUARANTEE
5. THE SANCTION FOR NON OBSERVANCE OF THE GUARANTEE OBLIGATION
6. BEGINNING AND DURATION OF GUARANTEE
7. THE LIMITING CLAUSE OF LIABILITY: INDISPENSABLE COMPLEMENT OF THE GUARANTEE CLAUSE
8. CONCLUSION

## 1. Definition of guarantee

### 1.1 Scope of the guarantee or legal definition

It is the commitment taken by the supplier of equipment that these goods will comply with the use they are ordered for and meet certain characteristics. (Good mean from a single pump to a whole pump plant).

### 1.2 Distinction of the guarantee obligation from the other obligations of the contract

A seller has two obligations, of equal importance, under the terms of a contract.

The first obligation is to deliver the goods sold.

The second is the „guarantee“. This obligation, in case it is not fulfilled, may, in certain cases, allow the buyer not to pay the agreed price, or to obtain a reduction to the price.

The guarantee is a technical obligation linked to the goods.

This means that within the contract, the guarantee obligation has to be shown separately from other obligations such as: time of delivery, packing, servicing, technical documents.

## 2. Types of guarantee

- The guarantee linked to the manufacturer of the equipment
- The guarantee of performance
- The guarantee linked to operation

### 2.1 Guarantee linked to the manufacturer of equipment

- Compliance with technical specifications of the manufacturer (or of the customer)
- Defective material
- Manufacturing defect
- Defects in design
- Defects in installation (if part of suppliers contract)

These are the most usual guarantees.

### 2.2 The guarantee of performance

- Efficiency
- Duty point
- NPSH
- Maximum power
- Shape of curve etc.

The guarantees of performance are particular to each contract and are defined with very precise technical limits and tolerances

### 2.3 The guarantee linked to the operation of the equipment

- Wear
- Noise and vibration
- Corrosion
- Availability (down time)

These guarantees are complex and cause an enormous financial risk for the pump manufacturer. They are offered only in special cases.

## 3. **Extent of the guarantee**

The extent of the guarantee will depend in general on the type of equipment sold which will mostly decide the type of guarantee to be granted.

### 3.1 Definition by product type

#### 3.11 Mass production

It is advisable to limit the guarantee to manufacturing only (3.2).

#### 3.12 Batch production (standard pumps)

It is advisable to limit the guarantee to the manufacturing and to the performance with the restrictions indicated in 3.3 Guarantees linked to operation are not made.

#### 3.13 Special pumps up to the pumping plant (special production)

Manufacturing, performance and operating guarantees may all be offered if requested by the customer.

### 3.2 The guarantee linked to the manufacturer of equipment

They are usually covered by standard contracts without further technical details.

Remarks:

- The „faulty design“ guarantee must be refused. This idea is too loose and badly defined. A product can only be badly designed in relation to specific criteria (either technical specifications, or the suitability for use for which it is intended).
- It is therefore preferable to use the notion of compliance with technical specifications.

### 3.3 The guarantee of performance

- If the testing conditions are not indicated in the contract, the manufacturer's standards should refer to his inhouse standard, or quote standards defining test conditions and tolerances.
- In any case, the test has to be carried out in manufacturer's factory or in a place of his choice.
- If the customer asks for another test on site, the extra price must be clearly stipulated. The manufacturer must define the measuring condition, so that in case of discrepancies, the onus is on the customer to demonstrate that measuring conditions and equipment are in con-concordance with specifications quoted.

### 3.4 Guarantee linked to the operation of the equipment

Each guarantee shall be subject to precise limitation and technical definitions.

Examples:

- Corrosion will depend on the properties of the liquid (i.e. pH, solids, content)
- The wear life will depend on the operating conditions.
- Noise and vibrations will depend on the pump loading and also on the characteristic of the installation.

## 4. **Applying the guarantee**

### 4.1 Burden of proof

It is advisable for the guarantee clause to ensure that it will be up to the customer at his own expense to prove that the guarantee obligations were not fulfilled.

Such a clause offers a double advantage:

- The proof is sometimes difficult and may even be impossible.
- This proof is sometimes costly and the customer may renounce his rights due to the possible high cost involved.

### 4.2 Conditions of proof (may in some cases replace 4.1)

For certain liabilities, it is recommended to detail in advance the means by which it will be determined that the guarantee is not fulfilled. Conditions of measurement, with what type of instruments, reference to standards etc.

Since some measurements may be impossible, this may be a reason for refusing a guarantee or granting a less onerous one.

## 5. **The sanction for non observance of the guarantee obligation**

- To make the goods conform to the guarantee.
- To replace the goods.
- To pay a liquidated damage (penalty).
- Cancellation of the contract, where the guarantee is a condition of a contract.

The above mentioned sanctions should be proposed by the manufacturer (to avoid the risk of even more unfavourable clauses being applied or requested).

The proposed sanctions are to be presented as being maximum limits and may be combined.

Example:

„The manufacturer may, at his own choice, either repair or replace the equipment. The above guarantee obligation being strictly limited to the replacement of the delivered equipment“.

## **6. Beginning and duration of guarantee**

### **6.1 Beginning of guarantee**

Beginning of guarantee must be stipulated unequivocally from a precise date under full control or knowledge of the manufacturer. The guarantee starting dates might be:

- Ready for despatch ex-works
- Delivered per INCOTERMS 1990 (eg. EXW, FCA, FAS, FOB, CFR, CIF, CPT, CIP), end of erection, or putting into operations, after an agreed period of running.
- Date of transfer of property of final client for goods sold through an agent.

### **6.2 Duration of guarantee**

The guarantee period is calculated from the beginning date:

- Usually 12 months for normal „8 hour a day“ operation.
- Or 6 months or less for „intensive continuous“ operation.

But in any case the guarantee has to be limited to a certain time period from leaving the manufacturer's works. (e.g. 18 months if the estimated time for transport, erection and putting into operations is 6 months).

### **6.3 Extension of guarantee**

- Extension of guarantee may be granted for a period of „non availability“ of the goods if faulty behaviour is proven.
- In no way should extension of guarantee be granted if the goods are not working due to conditions other than those agreed.
- If the customer asks for an extension of guarantee, it is recommended that payment be dampened to cover the risk and additional costs.
- In case of inclusion of a maintenance contract with costs a defined extension of guarantee could be provided.

## **7. The limiting clause of liability: Indispensable complement of the guarantee clause**

### **7.1 General limitation**

The responsibility of the supplier is strictly limited to the execution of his obligations in compliance with the present contract and to the payment of any damages stipulated, to the exclusion of all other indemnities and all other damages, such as loss of profit, trading loss etc.

### **7.2 Special limitation**

Guarantee should not cover:

- Damage resulting from improper storage or maintenance, improper operation of the goods, unsatisfactory performance of equipment are not covered by the contract or generally, reasons beyond the supplier's control.
- Damage following action by third parties or customers.

## **8. Conclusion**

For each guarantee the following questions should be considered:

- Under what conditions ?
- How can the guarantee be claimed ?
- How long ?
- Which is the maximum acceptable sanction ?

It should be noted, however, that non of the above shall alleviate the manufacturer from the legal obligation in complying with E.U. „Safety Machines“ directive as applicable to E.U. and EFTA countries.

Also, users must be made aware that the use of non-genuine parts shall void all Guarantees.

Further it is recommended to manufacturers to pay attention to their national jurisdiction concerning the significance of the term „guarantee“.