

BMW Terms and Conditions Change Analysis

<u>Subject Matter</u>	<u>2018 BMW Terms</u> ³	<u>2022 BMW Terms</u> ⁴	<u>Differences</u>	<u>Impact (H/M/L)</u>
Definitions: <i>Goods</i>		Definitions	<ul style="list-style-type: none"> Expanded the definition of Goods to include “other assets”. 	L
Definitions: <i>Intellectual Property Rights</i>		Definitions	<ul style="list-style-type: none"> Broadened the definition of “Intellectual Property Rights,” to also include “property rights related to copyrights (including the right to databases), other industrial or intellectual property rights...(including the right to apply for one of the aforementioned property rights” and Trade Secret rights including know-how. The full definition now reads: “all patents, utility models, design rights, trademarks, product designations, copyrights, property rights related to copyrights (including the right to databases), other industrial or intellectual property rights irrespective of whether such have been registered or registration has been applied for (including the right to apply for one of the aforementioned property rights), and Trade Secret rights including know-how.” ✓ <i>The expanded definition may give BMW additional rights to indemnity or other relief if the newly added intellectual property rights are infringed.</i> 	H
Definitions: <i>Long-term Supply Contract</i>		Definitions	New Defined Term. A “Long-term Supply Contract” is defined to mean “a framework agreement that grants the companies of the BMW Group the right to issue Purchase Orders for delivery of Goods to the Seller, on an ongoing basis over the entire Project Period for consecutive periods of time (usually calendar years), at the agreed and mutually updated	H

³ BMW “BMW Group International Terms and Conditions for the Purchase of Production Materials and Automotive Components,” dated March 31, 2018.

⁴ BMW “BMW Group International Terms and Conditions for the Purchase of Production Materials and Automotive Components (IPC),” dated December 1, 2022.

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			<p>conditions over the Project Period (including prices, capacities and volume flexibilities) and thus close the Supply Contracts for the period and the conditions specified in the Purchase Order.”</p> <p>✓ <i>“Long Term Supply Contract” is a new concept for the BMW Terms. The 2018 Terms addressed only discrete POs, with no contract binding the Seller beyond the life of the PO. It appears that the introduction of “Long Term Supply Contract,” when read together with the new or revised defined terms “Project Period,” “Purchase Order” and “Supply Contract” (all discussed below) means that BMW will typically issue Long Terms Supply Contracts with a life of program duration and then issue POs under it with a fixed duration, typically annual. It is not clear whether the annual POs will serve more than a ministerial function. Stated differently, it is not clear whether BMW can alter the commercial or legal terms through the annual PO/</i></p>	
Definitions: <i>Project Period</i>		Definitions	<ul style="list-style-type: none"> • New Defined Term. A “Project Period” is defined to mean “unless agreed otherwise, the entire serial delivery period starting at SOP (Start of Production), via EOP (End of Production) to EOS (End of Service) respectively end of the delivery obligation of spare parts.” ✓ <i>See commentary above re “Long-Term Supply Contracts.”</i> 	H
Definitions: <i>Purchase Order</i>		Definitions	<ul style="list-style-type: none"> • Modified the definition of “Purchase Order” to include the language in italics: “any order for the delivery of Goods issued by Buyer to Seller for a specific period of time (usually one calendar year).” Be a protected trade secret is under this definition. ✓ <i>See commentary above re “Long-Term Supply Contracts.”</i> 	M
Definitions: <i>Self-billing Procedure</i>		Definitions	<ul style="list-style-type: none"> • New Defined Term. “Self-billing Procedure” is defined to mean “automatic billing method of Goods deliveries and services of the Seller to the Buyer.” 	L
Definitions: <i>Subcontractor</i>		Definitions	<ul style="list-style-type: none"> • New Defined Term. “Subcontractor” is defined to mean “third party engaged by the Seller within the framework of a Supply Contract 	M

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			(including Affiliated Companies) for whose actions the Seller is fully responsible.”	
Definitions: <i>Supply Contract</i>		Definitions	<p>Revised and expanded definition of “Supply Contract.”: “any contract normally concluded (a) by an order issued by the Buyer to the Seller on the basis of a Long-term Supply Contract or (b) by an explicit or implied acceptance by the Seller of an order issued by the Buyer and obliges the Buyer to deliver Goods, for the period agreed in the Supply Contract, to the company of the BMW Group that issued the order and concluded the Supply Contract as Buyer.”</p> <p>✓ <i>See commentary above re “Long-Term Supply Contracts.”</i> ✓ <i>See also discussion of Section 2.1.</i></p>	M
Definitions: <i>Trade Secrets</i>		Definitions	<ul style="list-style-type: none"> • New Defined Term. “Trade Secrets” is defined to mean “technical and commercial information that is not publicly known or not readily accessible and therefore of economic value, and including information that is marked as Trade Secrets.” <p>✓ <i>The definition is less strict than the standard legal definition of trade secret. In other words, information that would not ordinarily be a protected trade secret may be under this definition.</i></p>	M
Definitions: <i>Work Days</i>		Definitions	<ul style="list-style-type: none"> • New Defined Term. “Work Days” is defined to mean “All calendar days of the week except Sundays and holidays.” 	L
General	1.1	1.1	<ul style="list-style-type: none"> • Goods are intended for unrestricted worldwide use by BMW Group and worldwide distribution to third parties. 	M
General	1.2	1.2	<ul style="list-style-type: none"> • Terms and Conditions become binding upon the formation of a Supply Contract, but, no later, than upon delivery of Goods by Seller <p>✓ <i>Updated to reflect the revised meaning of Supply Contract</i></p>	M

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General	1.4	1.4	<ul style="list-style-type: none"> • BMW has the right to identify a different “application” on which Seller will be obligated to submit information. This addition prepares for the use of Catena-X as a system for Seller master data. 	L
General	1.5	1.5	<ul style="list-style-type: none"> • If legally permissible, Seller must inform the responsible purchasing department(s) of any planned changes significant to the business relationship (e.g., change of name, change in legal form, or other changes material to the supply relationship). <ul style="list-style-type: none"> ✓ <i>“Legally permissible” protects publicly traded suppliers from securities law risks if they inform BMW of material non-public future plans</i> 	M
Purchase Orders and Supply Contract <i>Acceptance of purchase & Contract Formation</i>	2.1, 2.2	2.1	<ul style="list-style-type: none"> • A Supply Contract exists if BMW issues a Purchase Order under a Long-Term Supply Contract . <ul style="list-style-type: none"> ✓ <i>See discussion above of “Long Term Supply Contract” in the Definitions section.</i> • If there is no Long-Term Supply Contract, but a Purchase Order is issued for the delivery of Goods, the Seller accepts by either accepting in writing within 14-days or taking any action towards fulfilling the Purchase Order. If neither occurs, then BMW has the right, but not the obligation, to withdraw the Purchase Order without liability. • BMW deleted the following language: “Each Purchase Order accepted by Seller pursuant to Clause 2.2 will constitute a separate Supply Contract.” 	H
Purchase Orders and Supply Contract <i>Terms and Conditions</i>	2.1	2.2	<ul style="list-style-type: none"> • Any terms and conditions in the Purchase Order, these December 2022 Terms and Conditions, as well as the conditions of the Long-Term Supply Contract shall apply to a Supply Contract. If there⁴ is internal conflict, the Supply Contract shall prevail. <ul style="list-style-type: none"> ✓ <i>There is possible tension, if not inconsistency, between the definition of “Supply Contract,” Section 2.1 and this provision. Section 2.2 appears to contemplate a discrete document called a</i> 	M

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			<i>“Supply Contract,” while the definition seems to use Supply Contract as a legal conclusion arising from the issuance and acceptance of other documents (Long Terms Supply Contracts and POs), rather than a discrete document. This can potentially lead to uncertainty and conflict as to which document(s) constitute the complete legal agreement.</i>	
Purchase Orders and Supply Contract Termination in case of potential insolvency	2.7	2.7	<ul style="list-style-type: none"> Both BMW and Seller may terminate the Supply Contract if “there is a significant deterioration in the economic situation of the other contracting party.” <ul style="list-style-type: none"> ✓ <i>The 2018 terms allowed termination only for actual insolvency.</i> 	M
Purchase Orders and Supply Contract Obligation to supply	N/A	2.11	<ul style="list-style-type: none"> Seller does not have any rights to refuse performance or right of retention against a claim of the Buyer or to enforce a claim in connection with the Supply Contract of its own, unless it is an undisputed or legally established claim of Seller. <ul style="list-style-type: none"> ✓ <i>In substance, this means that a Seller which believes that BMW has breached may sue, but may not withhold supply or take any other action adverse to BMW unless and until it prevails in its lawsuit.</i> Seller must supply the Buyer on the basis of agreed upon contracts. 	H
Delivery Times and Delay Delivery times and quantities	3.1	3.1	<ul style="list-style-type: none"> Seller bears the procurement risk along the supply chain, unless the parties have agreed otherwise. <ul style="list-style-type: none"> ✓ <i>“Procurement risk” seemingly encompasses BMW caused obsolescence or excessive inventories.</i> 	M
Delivery Times and Delay Force Majeure	3.6	3.6	<ul style="list-style-type: none"> Force Majeure is defined to mean “an event beyond reasonable control of the incapable party and which cannot be averted and foreseen even if utmost care is taken.” 	M

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			<ul style="list-style-type: none"> ✓ <i>“Utmost care” is a higher standard than under general force majeure principles.</i> • The revisions delete the prior list of examples of possible force majeure events. • The obligation in Section 3.4 to “take all actions necessary and appropriate to ensure” supply remains unaffected by the force majeure event. 	L M
Packaging, Transport <i>Additional costs in case of incorrect notification of readiness for shipment</i>	4.5 d	4.5 d	<ul style="list-style-type: none"> • If Seller’s notification to carrier contains incomplete or incorrect information, Seller is responsible for the carrier’s claims for reimbursement of failure freight and/or stall fee. 	L
Invoicing and Payment	7.1–7.2 7.2 7.7 7.11	7.1–7.3 7.3 20.7 7.11	<ul style="list-style-type: none"> • Revised to incorporate the newly defined Self-billing Procedure. The electronic transmission of billing documents and the Self-billing Procedure are BMW standards and mandatory for parties. • Changes to the information needed for an invoice. • Clause 7.7 of the 2018 BMW Terms (Buyer’s right to refuse performance in the event of a breach to of relevant statutory provisions) was moved under Compliance Clause 20.7 in the New Terms for organizational purposes. • The addition of additional BMW companies that the Buyer may offset against the Seller’s claims. ✓ <i>In other words, entirely different BMW entities may setoff against amounts due under unrelated programs.</i> 	M M L M
Customs	8.1–8.2	8.1–8.2	<ul style="list-style-type: none"> • Seller must minimize customs costs and simplify the reporting process. Revisions were made for customs changes of international 	M

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	8.3	8.3	<p>requirements, obligations for the reporting process and per system usage (CALISTO).</p> <ul style="list-style-type: none"> • Seller must examine existing customs suspensions or punitive tariffs and notify the Buyer, and if applicable, these customs suspensions must be applied for. Other customs notice requirements include (i) anti-dumping measures, and (ii) punitive tariffs on imports into the corresponding importing countries. 	M
Quality	9.6 and 9.8 9.9	9.6 and 9.8 9.8 9.9	<ul style="list-style-type: none"> • Seller must ensure that its subcontractors comply with BMW's quality commitments <i>and that the obligation is passed on along the entire supply chain.</i> • Upon request, Seller must inform BMW about its supply chain (including subcontractors), unless there's good cause to the contrary. • Changed Product Safety Officer (PSO) to Product Safety and Conformity Officer (PSCO). 	M M L
Warranty	10.2	10.2	<ul style="list-style-type: none"> • Removed that the warranty period begins on the date of delivery. ✓ <i>The removed language does not change the warranty period, as the date of delivery is also the relevant date under the Uniform Commercial Code.</i> 	L
Liability and Damage Compensation	11.2 11.5 11.6	11.2 11.5 11.6	<ul style="list-style-type: none"> • Seller's duty to indemnify is broadened to include: (i) products into which Defective Goods are assembled (previously only the defective Goods themselves); and (ii) intentional misconduct. • BMW no longer has an obligation to notify the Seller of third-party claims in order to seek indemnity. • For a third-party claim against Buyer allegedly caused by (a) defective Goods, (b) Seller's breach of contract, (c) intentional misconduct or negligence by Seller or (d) Seller's non-compliance with any law, regulation, or requirement, Buyer and Seller shall, in good faith, immediately attempt to reach an agreement specifying the 	M H H H

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			<p>terms under which Seller and Buyer would apportion responsibility as well as the financial burden arising from the claim.</p> <p>✓ <i>This implicitly recognizes that there may be shared responsibility for some breaches. In that respect it is more favorable to suppliers than most industry contracts</i></p>	
Tooling	N/A	13.1	<ul style="list-style-type: none"> • If a Tooling Purchase Order is placed, BMW’s “Terms for Transfer of Title of Production Means” applies. ✓ <i>It appears that those incorporated terms replace extensive detailed requirements in the 2018 Terms regarding matters such as ownership, financing and assignment.</i> ✓ <i>Seller should obtain and understand those terms if it receives a tooling PO.</i> 	M
	13.2–13.8	13.2	<ul style="list-style-type: none"> • If no tooling PO has been issued, Seller still must insure the Tooling. • Seller must ensure that tooling obligations are followed by its subcontractors and passed on along the supply chain. 	M
	N/A	13.3		M
Spare Parts	14.1	14.1	<ul style="list-style-type: none"> • Seller must ensure that its subcontractors provide spare parts and that this obligation is passed on along the supply chain. 	M
Intellectual Property Rights	15	15	<ul style="list-style-type: none"> • Generally, Clause 15 replaces Buyer with the BMW Group. ✓ <i>This means, for example, that Buyer must indemnify every BMW entity against losses and costs arising from an infringement claim, not merely the specific BMW entity that is the Buyer.</i> 	L
	15.1	15.1	<ul style="list-style-type: none"> • Seller must indemnify and defend BMW against any claim arising out of a third party’s intellectual property rights with respect to the Goods, even if there is no breach of warranty. 	M
	15.1	15.1	<ul style="list-style-type: none"> • Seller is <u>not</u> liable for infringement of Intellectual Property Rights of a third party for producing Goods according to the Buyer’s technical instructions if Seller did not and could not have known of the infringement.,. 	H
	N/A	15.1		H

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	15.4	15.4	<ul style="list-style-type: none"> Intellectual Property infringement claims against the contractor must be brought within three years, beginning with knowledge. If Seller is notified of an “allegation” of infringement it must either obtain a license or procure a non-infringing substitute. Under 2018 Terms, this duty arose only for actual infringement ✓ <i>In other words, Seller must remedy the alleged infringement even if it disputes the infringement.</i> 	H
Information Security	17	17	<ul style="list-style-type: none"> Generally, Clause 17 updates and extends information security requirements due to increased threats. 	H
	17.2	17.2	<ul style="list-style-type: none"> Seller must utilize state-of-the-art technical and organizational measures to ensure information security. Proof of this is possible by using ISO/IEC 27001, ISO/IEC 62443 and ISO/SAE 21434. If Buyer is responsible for data backup or processing, it must be able to restore the data. 	H
	n/a	17.2	<ul style="list-style-type: none"> Seller must utilize protection measures for data during the entire term of the supply contract and the project period. Seller must also implement data recovery measures. 	H
	17.3	17.3		M
	17.5	17.5	<ul style="list-style-type: none"> Clause 17.5 extends Seller’s obligations in the event of an Information Security Incident to (i) inform BMW; (ii) take all necessary steps to clarify the matter and limit damage; (iii) accept appropriate measures taken by BMW to protect the BMW IT infrastructure; (iv) support BMW in data recovery if there’s an interruption or delay in the delivery of Goods; (v) upon BMW’s request, provide all relevant details regarding the Information Security Incident; and (iv) upon BMW’s request, provide a security report for a specified period. 	M
	N/A	17.8	<ul style="list-style-type: none"> Buyer has the general audit right to review and ensure compliance with information and IT security requirements. The notice and audit requirements under Clause 21.5 apply to this provision. 	M

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Confidentiality	18.1	18.1	<ul style="list-style-type: none"> Confidentiality obligations apply only to information which is marked as confidential or “are usually considered as confidential by the public” ✓ <i>2018 Terms did not contain this restriction.</i> 	M
	18.2	18.2	<ul style="list-style-type: none"> Confidential information is expressly defined to include a) Prototypes, test parts or samples, b) Trade Secrets, know-how or results, c) description and existence of the business relationship, contractual agreements technical specifications, process descriptions, volume and cost data, d) schedules, goals, ideas and inventions and e) other not publicly available information, including knowledge of internal circumstances and processes that one party obtains about the other party in the course of the business relationship or the business correspondence and personal data. ✓ <i>The 2018 Terms did not include an express definition or itemization.</i> 	M
Compliance (Replaces Social Responsibility, Section 21, and Environment, Section 20)	21.1	20.1	<ul style="list-style-type: none"> “Respect of animal welfare” is added to the list of social responsibilities. 	L
		20.2	<ul style="list-style-type: none"> Clause 20.2 is a general compliance clause. Seller must also comply with and implement the “BMW Group Supplier Code of Conduct.” 	M
		20.4	<ul style="list-style-type: none"> Seller warrants that it must transmit only such data to BMW as it is entitled to transmit. 	M
		20.6	<ul style="list-style-type: none"> Seller must take appropriate training, information, control and sanction measures, and implement a compliance function. 	H
		20.7	<ul style="list-style-type: none"> Buyer has the right to refuse participation in service provision, acceptance of service and remuneration if and to the extent a law would be violated in doing so.. 	L
General Provisions – Audit	22.5	21.5	<ul style="list-style-type: none"> Buyer and Seller may mutually agree to a remote/hybrid audit. 	M
	22.5	21.5	<ul style="list-style-type: none"> Buyer has the right to engage a third party for its audit, but the third party cannot be a competitor of the Seller. 	M
Governing Law	23.1	22.1	<ul style="list-style-type: none"> Excludes the conflicts of law of the Private International Law (PIL). 	L