

# **GENERAL TERMS AND CONDITIONS**

**for the sale and delivery of software support services  
(B2B)**

**2018 Version**

## **1. Scope of contract and validity**

1.1. The following conditions shall apply to all services and deliveries provided by the Contractor within the framework of this Contract for computer systems installed in Austria. Purchase conditions of the Client shall herewith be excluded for the respective legal transaction and the entire business relationship.

All offers are generally non-binding.

## **2. Scope of services**

2.1. The Contractor shall render services agreed upon in contract at their discretion at the location of the computer system or on their own premises within the usual working hours of the Contractor, insofar as nothing else has been agreed upon. Should, in exceptional cases and at the request of the Client, services be rendered outside of usual working hours, the additional costs shall be invoiced separately. The selection of the employee rendering the services agreed upon in contract shall be incumbent upon the Contractor, who shall also be entitled to commission third parties for this purpose.

2.2. The Contractor undertakes to fulfil the software programmes covered by the contract according to the respective following support category as agreed upon in contract:

#### **Support category A:**

- Information service:

The Client shall be informed about new programme versions, available updates, programme developments, etc.

- Hotline service:

The Contractor shall be available to the Client within the agreed hotline hours of the Contractor for consultations on a case-by-case basis of problems that arise in regard to the use of software programmes covered by the contract. The Contractor shall be entitled to initiate additional chargeable training measures not provided by the subject matter of the contract, should further consultation be used repeatedly for similar problems.

- Archiving and provision of software programmes as covered by the contract:

The Contractor undertakes to archive software programmes they develop as covered by the contract in a machine-readable manner as well as to document these to the extent necessary for the fulfilment of contractual obligations and to provide these to the Client according to the provisions of the purchase contract, should this be necessary.

#### **Support category B:**

- Update service:

The Contractor shall provide the Client with programme updates provided by the manufacturer on a date at their discretion. These shall include rectifying errors, remedying possible programme problems that neither occur during the test run nor during practical use within the guarantee period, improvements to scope of services, and alterations to the software programmes due to legal changes.

Legal changes that lead to new programme logic, i.e. alterations to previous functions leading to new programmes and programme modules, as well as possible necessary hardware extensions shall not be comprised by this Contract. These programmes shall be offered separately to the Client alongside the necessary data storage media and documents.

#### **Support category C:**

- Installation of programme updates:

It shall be incumbent upon the Contractor to import and/or install new programme updates on the computer system covered by the contract.

- On-site troubleshooting:

Should troubleshooting not be possible by means of hotline service, remote support, etc. according to the contractual scope of services, the Contractor shall deal with this at the site of the computer system.

- 2.3. Should a software programme covered by the contract behave in a different way compared to the respective service description/documents in the most recent version and should the Client be able to reproduce this differing behaviour, this shall be considered a matter in need of troubleshooting.

Notices of defects shall be made to the Contractor in writing. In order to accurately check possible errors, the Client undertakes to provide the Contractor, free of charge, with the computer system used (for systems in an online network with other computers, also the respective connection), software programmes, records, diagnosis records and data in an amount adequate for testing purposes during the

normal working hours of the Contractor, and to support the Contractor. Discovered errors attributable to the Contractor shall be solved within an adequate period.

The Contractor shall be exempt from this obligation should deficiencies attributable to the Client hinder the troubleshooting and these not be eliminated by the Client.

A software update or an adequate workaround shall be considered solving an error.

### **3. Services not covered by this Contract**

- 3.1. Unless explicitly determined in this Contract in another way, the costs for travel, work time and travel time for persons commissioned by the Contractor with rendering of the services.
- 3.2. Should the Client make unauthorized use of services, the Contractor shall be entitled to invoice the Client the expenses incurred at the respectively valid rates.
- 3.3. Services caused by alterations to operating systems or hardware, and/or alterations to software programmes and interfaces, which are mutually programme dependent, not covered by the contract.
- 3.4. Individual programme adjustments and/or new programming.
- 3.5. Programme alterations due to changes of legal provisions, should these require an alteration to the programme logic.
- 3.6. The Contractor shall be freed from all obligations arising from this Contract, should employees of the Client or third parties make alterations to software programmes as covered by the contract without prior consent of the Contractor, or should the software programmes be used inappropriately.
- 3.7. A barrier-free design as defined by the Austrian Federal Law on the Equality of Persons with Disabilities (Federal Disability Discrimination Act – *BGStG*) – this can be ordered separately.
- 3.8. Rectification of errors caused by the Client or third parties.
- 3.9. Losses or damage caused either directly or indirectly by actions or defaults during operation by the Client or user.
- 3.10. Data conversion, recovery of data sets and interface adaptations.**

### **4. Prices**

- 4.1. All prices mentioned are quoted from place of performance. Expenses for programme media (e.g. magnetic tape, hard disks, magnetic tape cassettes, etc.) as well as documents and possible contract fees shall be invoiced separately.
- 4.2. For services that could be rendered on the premises of the Contractor yet are rendered on the premises of the Client at the request of the Client, the Client shall bear all costs for travel, work time and travel time for the persons commissioned with rendering the services by the Contractor.
- 4.3. The Contractor shall be entitled to increase the fixed rates mentioned overleaf according to rises in salary and material costs and/or other costs and fees, which occur after conclusion of contract, and to charge the Client starting from the beginning of the month following the rise. Increases shall be considered as accepted by the Client as standard, provided that these do not exceed 10% a year.
- 4.4. All fees and taxes (particularly VAT) shall be calculated based on legal grounds as appropriate. Should fiscal authorities retrospectively charge additional taxes or fees, these shall be borne by the Client.

## **5. Delivery schedule**

- 5.1. The Contractor shall strive to answer respective enquiries of the Client within an appropriate period during the normal working hours of the Contractor.
- 5.2. The Client shall be entitled neither to right of withdrawal nor to damages due to agreed deadlines missed.
- 5.3. Partial delivery and deliveries in advance shall be admissible.

## **6. Payment**

- 6.1. The stipulated fixed-cost amounts shall be payable by the Client in advance for the calendar year/partial year.
- 6.2. Invoices issued by the Contractor shall be due 14 days from the invoice date without deduction and free of costs.
- 6.3. Compliance with payment deadlines agreed upon shall form a crucial condition for the performance of deliveries and/or contractual fulfilment by the Contractor. Non-compliance with the agreed payments shall entitle the Contractor to stop ongoing work and to withdraw from the contract. The Client shall bear all expenses related to this as well as loss of profit of the Contractor. In case of payment arrears, the standard base interest rate shall be charged. Should two instalments (in case of partial payments) not be paid, the Contractor shall be entitled to have immediate maturity come into effect and to render any notes payable due for payment.
- 6.4. The Client shall not be entitled to withhold payments due to incomplete overall deliveries, warranty or guarantee claims or defects.

## **7. Term of contract**

- 7.1. The contractual relationship, which implies the professional installation of the duly purchased software programme as covered by the contract, shall commence upon signing of the contract and shall be concluded for an indefinite period. This contract may be terminated by a contractual partner subject to a period of notice of three months to the end of a calendar year, however, at the earliest after the end of the 36<sup>th</sup> contractual month. Should the software programme be verifiably rendered useless or go down, the contractual relationship may be terminated prematurely subject to a period of notice of three months. In this event, the aliquot part of the annual fixed price for the services not used shall be transferred to an Austrian bank account to be named by the Client.

## **8. Impairments to performance**

- 8.1. The Contractor undertakes to render services according to contract. Should the Contractor not render the services by the designated deadlines or only insufficiently, i.e. with considerable deviations from the agreed quality standards, the Contractor shall immediately start with rectification of defects and duly render their services free of defects within an adequate period by either repeating the services concerned or implementing the necessary improvements at their discretion.
- 8.2. Should the deficiency be caused by facilitation or cooperation of the Client, or by an infringement of the obligations of the Client as stipulated in Clause 3.9, any obligation to rectification of defects free of charge shall be excluded. In such cases, the services rendered by the Contractor shall nevertheless be considered as

rendered according to contract in spite of possible limitations. The Contractor shall chargeably rectify the defect at the request of the Client.

- 8.3. The Client shall support the Contractor in the rectification of defects and shall provide all necessary information. The Client shall immediately notify the Contractor in writing or by e-mail of any deficiencies that occur. Any additional costs arising from delayed notification in the rectification of defects shall be borne by the Client.
- 8.4. The guarantee period shall be six months. Notices of defects shall be valid only if these concern reproducible defects and if these are submitted with written documentation within four weeks after delivery of the agreed service. With regard to guarantee, rectification shall, in any case, prevail over price reduction or redhibitory action. Should a notice of defects be justified, the deficiencies shall be rectified within an adequate period, in which the Client shall enable the Contractor for all measures necessary for examination and rectification. Reversal of burden of proof, i.e. the obligation of the Contractor to prove their innocence with regard to the defect, shall be excluded.

## **9. Liability**

- 9.1. The Contractor shall only be liable to the Client for damage the Contractor verifiably causes in cases of gross negligence. This shall also apply mutatis mutandis to damage caused by third parties brought in by the Contractor. In case of bodily injuries caused by the Contractor, the Contractor shall be liable without limitation.
- 9.2. Liability for indirect damage, e.g. loss of profit, costs related to interruptions, data losses or claims of third parties, shall be expressly excluded.
- 9.3. Claims for damages shall lapse according to legal provisions, however, at the latest after one year starting from the knowledge of the damage and the person responsible for this.
- 9.4. Should the Contractor fulfil work with the assistance of a third party and any guarantee and/or liability claims arise against this third party therefrom, the Contractor shall cede those claims to the Client. In such cases, the Client shall focus on this third party.
- 9.5. Insofar and for as long as obligations cannot be fulfilled in due time or in due form due to force majeure, e.g. war, terrorism, natural disasters, fire, strikes, lockouts, embargos, state intervention, power cuts, cancellation of transport, telecommunication network and/or data lines blackouts, legal amendments after conclusion of contract that have an effect on services, or other unavailability of products, this shall not pose a breach of contract.

## **10. Location**

- 10.1. The location of the computer systems as covered by the contract shall be contractually established. In case of a possible change of location of the computer system, the Contractor shall be entitled to recalculate the fixed rates or to prematurely terminate the contract.

## **11. Copyright and usage**

- 11.1. The Contractor and/or their licensors shall be entitled to copyright of the agreed services (programmes, documents, etc.). After paying the agreed remuneration, the Client shall be granted sole permission to use the software only for their own

purposes, only that hardware stipulated by the contract, and to the extent of the number of licenses acquired for simultaneous use at several work places. Conclusion of this Contract provides acquisition of permission to use a copyrighted product. Distribution by the Client shall be excluded as stipulated in the Austrian Federal Law on Copyright. Involvement of the Client in the creation of software shall not entitle them to acquire any rights beyond use of the product as set forth in the Contract. Each infringement of the copyright of the Contractor shall result in claims for damages, in which case full amends are to be made.

- 11.2. The Client shall be permitted to make copies for archiving and data security purposes subject to the condition that the software contains no express ban of the licensor or a third party, and that all copyright and ownership notices shall be transferred to the copies without alteration.
- 11.3. Should the disclosure of the interfaces be necessary to produce the interoperability of the software covered by this Contract, the Client shall separately request this from the Contractor for a fee. Should the Contractor not meet this request and decompilation take place according to the Austrian Federal Law on Copyright, the results shall only be used to establish interoperability. Malpractice shall lead to damages.

## **12. Loyalty**

- 12.1. The contractual partners agree to mutual loyalty. Both shall refrain from headhunting and employing, even via third parties, employees of the respective other contractual partner, who work on the fulfilment of orders, for the term of contract and twelve months after the contract terminates. Any contractual partner infringing this clause shall be obligated to pay lump-sum indemnification to the amount of one annual salary of the employee.

## **13. Confidentiality**

- 13.1. The Contractor shall obligate their employees to fulfil the provisions stipulated in Section 6 of the Austrian Data Protection Act.

## **14. Miscellaneous**

- 14.1. Should clauses of this Contract be or become invalid, this shall not affect the validity of remaining subject matter of the Contract. The contractual partners shall cooperate in order to find a regulation which comes as close as possible to the intention of the invalid clauses.

## **15. Final provisions**

- 15.1. Insofar as nothing else is agreed on, only the legal provisions regarding business-to-business transactions according to Austrian law shall apply, even if the order is implemented abroad. The local jurisdiction of the objectively competent court for the place of business of the Contractor shall be exclusively agreed upon for possible disputes. Pursuant to the Austrian Consumer Protection Law (*KSchG*), the Terms and Conditions above shall be valid insofar as the Austrian Consumer Protection Law provides no differing obligatory provisions for selling to consumers. Non-compliance with crucial parts of the Contract shall entitle the contractual partners to prematurely terminate the Contract without notice.
- 15.2. Any alterations and amendments to this Contract shall be made in writing. This shall also apply to the cancellation of this form requirement.

- 15.3. Should individual clauses of the contract be or become invalid or not feasible in full or in part, the other clauses shall be and shall remain valid. The invalid or non-feasible clause shall be replaced with a valid one, the intention of which comes as close as possible to the meaning and economic purpose of the invalid one.
- 15.4. Every ordinance made pertaining to the rights and obligations according to this Contract shall be subject to the prior written consent of the respective other contractual partner. Albeit, the Contractor shall be entitled to transfer the contract to an affiliated enterprise even without the consent of the Client.
- 15.5. The Contractor shall be entitled to commission third parties for the partial or full fulfilment of their obligations.

**The Austrian Professional Association for Consulting and IT recommends the following mediation clause as a pro-business method of dispute resolution:**

In the event that any disputes, which cannot be solved by mutual agreement, arise from this Contract, the parties to the contract agree to engage a listed mediator (Austrian Civil Rights Mediation Law (*ZivMediatG*) specialized in business mediation from the list of the Austrian Ministry of Justice in order to reconcile these out of court. Should no mutual agreement regarding the selection of the business mediator or with regard to content be possible, legal measures shall be initiated no sooner than one month after the negotiations fail.

In the event that mediation could not be held or was discontinued, any litigation initiated shall be subject to Austrian law.

As agreed, all necessary costs incurred due to previous mediation, particularly for legal advisors consulted, may be claimed in litigation or arbitration as "pre-trial costs".

**Supplement**

**to the 'GENERAL TERMS AND CONDITIONS**  
**for the sale and delivery of software support services'**  
**(B2B)**

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The above terms and conditions are only to be seen as template to create terms and conditions. The provisions thereof are suggestions, which may be deviated from in individual cases. Should a specific contract provide otherwise, it is generally helpful to clearly point out which clause of the terms and conditions is altered by the contractual agreement in order to avoid misunderstanding (e.g. 'This regulation replaces Clause X. of the T&C'). Use of the template shall not replace accompanying legal counsel.

Please consider the following notes:

#### **Validity**

In general, contractual agreements shall prevail over clauses from T&C. Furthermore, T&C only become part of a contract if this is (verifiably) agreed upon, ideally in writing. At the same time as (prior to) conclusion of the contract, the T&C must be communicated to the client. Communication of the T&C after conclusion of the contract shall be principally ineffective with regard to invoices, delivery notes and the like. Disadvantageous, unusual and surprising clauses in T&C, as well as clauses the client should not have to expect according to the circumstances of the contract and the layout of the document, shall not form subject matter of the contract unless the client has expressly (verifiably) been notified of this. License holders who use T&C on a regular basis must display the T&C in areas frequented by their customers.

#### **Data protection and confidentiality**

The responsible person, processors and their employees shall keep personal data from data processing, with which they were entrusted or to which they gained access only due to their professional work, confidential, notwithstanding other statutory non-disclosure obligations, insofar as there is no other legally admissible reason for transmission of the personal data, which was entrusted or became accessible (data secrecy). Employees are to be instructed about this and about possible consequences in case of violation.



Due to the changes caused by the EU General Data Protection Regulation and the Austrian Data Protection Adjustment Act 2018 (DSG), directly including further data protection clauses in the T&C is not recommended, but rather providing a supplement.

Written consent necessary where applicable with regard to data protection shall be obtained properly and obligations of information shall be fulfilled in a timely manner and in full. Additionally, data processing agreements are to be concluded, should data be processed for the client in the order (which may be assumed in this industry). Samples and further information can be found at: [www.wko.at/datenschutz](http://www.wko.at/datenschutz) and at: [www.ubit.at](http://www.ubit.at).

**N.B.:** As per the nature of works contracts, the contractor is entitled to have other independent third parties substitute them in order to fulfil the contract. This differs from the use of in-house auxiliary persons (e.g. salaried staff of the contractor) attributable to the contractor in any case.

From the perspective of data protection, however, you must agree with the client on passing on data to a sub-contractor within an order. This can be provided in a data processing agreement or in a separate agreement.

### **Miscellaneous**

The place of jurisdiction shall be explicitly agreed upon again in a contractual agreement with the client.