

# General terms and conditions for the procurement and maintenance of standard software

## A COMMON INTRODUCTORY PROVISIONS

### 1 Subject matter and validity

1.1 These general terms and conditions (GTC) govern the conclusion, content and performance of contracts for the procurement, use and maintenance of standard software.<sup>1</sup>

1.2 Anyone (the service provider) submitting an offer to the service procurer thereby accepts these GTC, unless stated otherwise in the quote request. Amendments and addenda to these GTC shall require written agreement.

1.3 Unless otherwise expressly provided in the contractual document, the provisions concerning delivery, acceptance and warranty in accordance with section 26 refer separately and independently of each other to the licence contract and to the maintenance of the standard software. The warranty rights arising from the maintenance contract shall not affect those arising from the licence contract.

### 2 Offer

2.1 The offer, including demonstrations, is free of charge unless stated otherwise in the quote request.

2.2 The offer is to be prepared on the basis of the service procurer's quote request. If the offer deviates from the quote request or the GTC of the service procurer, the offer must indicate this expressly.

2.3 The service provider shall indicate value added tax separately in the offer.

2.4 The offer remains binding for the period indicated in the quote request. If there is no such indication, a period of six months after receipt of the offer shall apply.

### 3 Deployment of employees

3.1 For goods/services provided by employees of the service provider at the registered office of the service procurer, the service provider shall deploy only carefully selected and well trained staff. It shall replace employees who do not have the requisite expertise or who otherwise interfere with or jeopardise performance of the contract. In doing so, it shall pay particular attention to the service procurer's interest in continuity.

3.2 For the provision of goods/services in accordance with section 3.1, the service provider shall deploy only employees who have the authorisations required for the provision thereof.

3.3 Insofar as the service provider supplies goods/services onsite, it shall comply with the internal regulations, especially the service procurer's house rules. The service provider shall in any event comply with the relevant safety provisions. The service procurer shall provide the necessary information in a timely manner. The service provider shall impose these obligations on its employees, subcontractors and sub-suppliers, as well as on the third parties it calls upon.

3.4 The provisions set out in section 3 shall also apply to other staff deployed by the service provider for contract performance, including freelancers.

### 4 Involvement of third parties

4.1 For goods/services rendered by employees of the service provider at the premises of the service procurer, the service provider may call upon third parties (e.g. sub-suppliers, subcontractors) for the provision of its goods/services only with the prior written consent of the service procurer. The service provider shall remain liable for service provision in accordance with the contract by the third parties called upon.

4.2 Substitution is excluded unless otherwise expressly agreed.

4.3 The parties shall impose the obligations set out in sections 3 (deployment of employees), 5 (workplace health and safety provisions, employment conditions, equal pay for men and women, and environmental law), 24 (confidentiality) and 25 (data protection and data security) on the third parties called upon (e.g. suppliers, subcontractors, substitutes).

### 5 Workplace health and safety provisions, employment conditions, equal pay for men and women, and environmental law

5.1 For goods/services provided in Switzerland within the framework of contract performance, the service provider shall comply with the workplace health and safety provisions and employment conditions applicable at the place of performance, the notification and authorisation duties in accordance with the Federal Act of 17 June 2005 on Measures to Combat Illegal Employment (IEA)<sup>2</sup> and the provisions on the equal treatment of men and women in terms of equal pay. The employment conditions shall be deemed to encompass collective and standard employment contracts or, where no such contracts exist, the actual employment conditions customary for the location and occupation.

5.2 For goods/services provided abroad within the framework of contract performance, the service provider shall comply with the provisions applicable at the place of performance, but as a minimum with the Core Conventions of the International Labour Organization (ILO)<sup>3</sup>.

<sup>1</sup> For the production of individual software, the General terms and conditions for IT works contracts and contracts for the maintenance of individual software packages shall apply.

<sup>2</sup> SR 822.41

<sup>3</sup> ILO conventions: No. 29 of 28 June 1930 concerning Forced or Compulsory Labour (SR 0.822.713.9), No. 87 of 9 July 1948 concerning Freedom of Association and Protection of the Right to Organise (SR 0.822.719.7), No. 98 of 1

5.3 If the service provider second workers from a foreign country to Switzerland to provide the goods/services, compliance with the provisions of the Posted Workers Act of 8 October 1999<sup>4</sup> must be ensured.

5.4 For goods/services provided in Switzerland within the framework of contract performance, the service provider shall comply with the provisions of Swiss environmental law applicable at the place of performance, namely the Environmental Protection Act (EPA)<sup>5</sup>, the Waters Protection Act (WPA)<sup>6</sup>, the Nature and Cultural Heritage Act (NCHA)<sup>7</sup>, the Forest Act (ForA)<sup>8</sup> and the Chemicals Act (ChemA)<sup>9</sup>, as well as the ordinances based thereon.

5.5 For goods/services provided abroad within the framework of contract performance, the service provider shall comply with the environmental protection provisions applicable at the place of performance, but at least with the agreements on the environment in accordance with Annex 2 of the PPO<sup>10</sup> that are relevant for the service provider's performance.

5.6 The service provider is obliged to contractually impose the requirements according to sections 5.1 to 5.5 on its subcontractors.

**5.7 If the service provider or one of its subcontractors violates obligations arising from section 5, the service provider shall be liable to pay a contract penalty unless it proves that it is not at fault. Per violation, the penalty shall amount to 10% of the annual remuneration or of the total remuneration if one-off remuneration has been agreed, but no more than CHF 50,000 in total.**

## 6 Definitions

6.1 Contract: all of the documents belonging to the agreement (i.e. main document plus all associated components such as the GTC and other appendices).

6.2 Contractual document: the main document belonging to the agreement (i.e. without additional associated components such as the GTC and other appendices).

6.3 Standard software: software manufactured for a large number of different clients without taking account of the service procurer's specified requirements at code level.

6.4 Releases: further developments of the standard software, including firmware, which are termed minor versions (updates) or major versions (upgrades). New releases have new functionalities, bug fixes and/or improved performance.

6.5 Incident: a malfunction that limits or interferes with the contractually agreed usability or availability of the software. Incidents also include malfunctions caused by third parties, especially due to interactions with hardware or other software.

6.6 Patch: small changes to software, generally to remedy a bug or security problem in the software in question.

## B PROCUREMENT OF STANDARD SOFTWARE

### 7 Type and scope of use

7.1 The service provider grants the service procurer the right to use the service provider's standard software. The type and scope of use shall be governed by the individual agreement contained in the contract. Unless the parties agree otherwise in the contractual document, the use shall not be limited in time or space. It is not tied to any particular hardware.

7.2 The service procurer may, without additional remuneration, make the necessary copies of the standard software for backup and archiving purposes in order to use the copies on replacement hardware in the event that the original hardware breaks down.

7.3 The service procurer shall be authorised to parameterise the standard software with regard to its use in accordance with the contract and, within the framework of applicable law, to make it interoperable with third-party software.

7.4 Within the scope of sections 7.1 to 7.3, the standard software may be used in the company's own group or within the Federal Administration. Additionally, the service procurer may, with the written consent of the service provider, transfer the right to use the standard software to a third party.

7.5 The service procurer shall be entitled to have the standard software operated in the data centre of a third party called upon, exclusively for the purposes of the service procurer (outsourced data centre); it must impose the obligations arising from these GTC on said third party in writing.

### 8 Installation

Where agreed, the service provider shall install the standard software on the hardware designated by the service procurer against separate payment.

### 9 Documentation

9.1 Together with the standard software, the service provider shall provide the service procurer with the agreed quantity of the associated documentation (installation and user manual) in electronic format or hard copy in the agreed languages.

9.2 The service procurer may copy and use the documentation for use in accordance with the contract.

### 10 Instruction of the service procurer's staff

Where agreed and against separate payment, the service provider shall furnish initial instruction to be determined according to the scope and target audience.

July 1949 concerning the Application of the Principles of the Right to Organise and to Bargain Collectively (SR 0.822.719.9), No. 100 of 29 June 1951 concerning Equal Remuneration for Men and Women Workers for Work of Equal Value (SR 0.822.720.0), No. 105 of 25 June 1957 concerning the Abolition of Forced Labour (SR 0.822.720.5), No. 111 of 25 June 1958 concerning Discrimination in Respect of Employment and Occupation (SR 0.822.721.1), No. 138 of 26 June 1973 concerning Minimum Age for Admission to Employment (SR 0.822.723.8), No. 182 of 17 June 1999

concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (SR 0.822.728.2)

<sup>4</sup> SR 823.20

<sup>5</sup> SR 814.01

<sup>6</sup> SR 814.20

<sup>7</sup> SR 451

<sup>8</sup> SR 921.0

<sup>9</sup> SR 813.1

<sup>10</sup> SR 172.056.11

## 11 Import regulations

The service provider ensures compliance with any export restrictions and import regulations from the place of origin to the place of delivery in accordance with the contract. The service provider shall inform the service procurer in writing about any export restrictions in the country of origin.

## C MAINTENANCE AND SUPPORT

### 12 Maintenance and support for standard software

12.1 Within the framework of the contractual agreement, the service provider shall maintain the standard software for the purpose of preserving its usability. Unless otherwise agreed in the contract or the service description of the offer, software maintenance shall encompass corrective (debugging), adaptive (adjustment to changed circumstances) and perfective (expansion of functions) services, as well as the delivery of new releases and patches.

12.2 Within the framework of the contractual agreement, the service provider shall provide support by advising and assisting the service procurer with respect to the use of the software to be maintained. Unless otherwise agreed, support shall encompass in particular (non-exhaustive list):

- clarification of the cause of reported incidents;
- assistance with the installation of patches and releases by way of appropriate documentation;
- advice and support onsite or remotely, under the conditions set out in the contractual document.

12.3 The service provider undertakes to ensure an efficient organisation for maintenance and support; the service provider shall inform the service procurer immediately of the communication channels for enquiries and of the competent contact persons. The contract shall specify whether and how enquiries and reports may be transmitted in writing, by telephone or electronically.

### 13 Remote access

If the service provider supplies goods/services via remote access, it shall take all economically reasonable and technically and organisationally possible precautions to protect data communications from unauthorised access by third parties and to comply with the obligations under sections 24 and 25.

### 14 Instruction and information

14.1 In the event of new releases, the service provider shall, at the request of the service procurer, provide initial instruction to be determined according to the scope and target audience.

14.2 The parties shall immediately inform each other in writing of any facts or circumstances they have noted or that are recognisable to them that may interfere with or jeopardise maintenance or support. The service provider shall regularly inform the service procurer of further developments of the software. It shall draw the service procurer's attention to any impact of the use of new releases on the hardware concerned and on any external interfaces.

## 15 Updating of documentation

The service provider shall update the software documentation referred to in section 9.1 as necessary.

## 16 Remedy of incidents caused by third parties

At the request of the service procurer, the service provider shall participate in the search for the cause of incidents and the remediation thereof, even if one or more incidents may have been caused by the interaction of several systems or components. The parties shall determine in advance how these services are to be remunerated if it is proven that the malfunction was not caused by the software maintained by the service provider.

## 17 Standby, reaction and repair time

### 17.1 Standby time

During the standby time set out in the contract, the service provider receives incident reports and requests through the agreed communication channels. The type and scope of the services to be provided during the standby time shall be agreed contractually.

### 17.2 Reaction time

The reaction time covers the period in which the service provider has to start analysing and remedying an incident from the time of receipt of the incident report. The reaction time depends on the priority assigned to an incident and is to be agreed in the contract.

### 17.3 Repair time

The repair time covers the maximum period from receipt of an incident report by the service provider until the successful remedy of the incident. It shall be specified in the contract.

17.4 The service provider shall notify the service procurer that the incident has been remedied.

### 17.5 Failure to comply with agreed timeframes

**If the service provider fails to comply with one of the timeframes under sections 17.1 to 17.3, it shall be liable to pay a contract penalty, unless it proves that it is not at fault. The amount of the penalty shall be set out in the contract on a case-by-case basis. In such cases, contract penalties are owed even if the goods/services were accepted subject to a corresponding reservation. Payment of contract penalties shall not release the parties from performance or compliance with their contractual obligations; penalties shall be offset against any compensation for damages.**

## 18 Scope of use of releases

18.1 Unless otherwise agreed by the parties in the contract, the use of releases shall be unlimited in time and space. It is not tied to any particular hardware. The service procurer may make the necessary copies of the releases for backup and archiving purposes without additional remuneration.

18.2 The releases may be used in the company's own group or within the Federal Administration within the scope of section 18.1, as well as within the scope of section 7.5.

## 19 Start and duration

19.1 The contract will come into force upon signature by both parties, unless otherwise stated in the contractual document. The contract is entered into for either a fixed or an indefinite period.

19.2 If a contract is concluded for an indefinite period, it may be terminated in writing by the service procurer at the end of a calendar month, unless otherwise agreed; however, the service provider may not terminate the contract until after a term of five years. The termination may also concern only certain parts of the contract. Unless otherwise agreed, the notice period is twelve months for the service provider and three months for the service procurer.

19.3 The right to termination without notice for good cause remains reserved to both parties at all times. Good cause includes the following in particular:

- the occurrence of events or circumstances that make the continuation of the contractual relationship unreasonable for the terminating party, especially the persistent or repeated breach of essential contractual obligations;
- the official publication of the opening of bankruptcy proceedings or of a moratorium on debt enforcement concerning a party.

## 20 Consequences of termination

The contracting parties shall specify in the contract which operating resources, data and documentation made available within the framework of the contractual relationship must be returned to the other party or destroyed upon termination of the contractual relationship and within what timeframe.

## D COMMON FINAL PROVISIONS

### 21 Place of performance and transfer of benefits and risks

21.1 The place and time of performance shall be specified in the contract. Unless otherwise agreed, receipt of the data storage device at the place of software installation shall be considered the time and place of performance in the case of delivery of the standard software on a data storage device; if the standard software is delivered online, the availability of the software for download by the service procurer on the service provider's server shall be considered the time and place of performance.

21.2 Benefits and risks are transferred to the service procurer at the place and time of performance.

### 22 Default

22.1 If the parties fail to meet firmly agreed deadlines (expiry date transactions), they shall immediately be deemed to be in default, and in all other cases upon receiving a reminder.

**22.2 If the service provider is in default, it shall be liable to pay a contract penalty unless it proves that it is not at fault. This penalty shall amount to a total of 0.1% per contract per day of delay, but no more than 10% of the total remuneration in the case of one-off payments or of the remuneration for twelve months in the case of recurring services. It shall be owed even if the services are accepted subject to a corresponding reservation. Payment of the contract penalty shall not release the service provider from compliance with the contractual obligations. Contract penalties shall be offset against any compensation for damages.**

### 23 Remuneration

23.1 The service provider shall supply the goods/services at fixed prices. The remuneration shall be either one-off or recurring.

23.2 The contractually agreed remuneration covers all work which is necessary for proper performance of the contract. In particular, the remuneration covers the granting of all agreed rights of use, any agreed maintenance and support services, all documentation and insurance costs, as well as fees and public levies (e.g. value added tax, customs duties). The individual cost elements must be listed separately in the offer. When agreeing the remuneration, a distinction may be made between development, test, integration and production systems.

23.3 The remuneration shall be due upon handover or installation of the standard software, subject to any contractually agreed payment plan. The service provider shall assert the remuneration due by submitting an invoice. The due date of the remuneration and the billing frequency for maintenance shall be based on the contract. Value added tax shall be indicated separately.

23.4 The service procurer shall make outstanding payments within 30 days of receipt of the invoice.

23.5 For central Federal Administration<sup>11</sup> procurements, the service provider is obliged to submit an electronic invoice<sup>12</sup> to the service procurer if the contract value exceeds CHF 5,000 (excl. VAT). The service procurer determines the delivery options.

23.6 Subject to contractual arrangements to the contrary, the service provider may, with a three-month notice period, demand a justified adjustment of the recurring remuneration as of the beginning of the next calendar year, but at most in line with the trend of Switzerland's Consumer Price Index.

### 24 Confidentiality

24.1 The parties shall treat as confidential all facts and information that are neither obvious nor generally accessible. In case of doubt, facts and information are to be treated confidentially. The parties undertake to take all precautions that are commercially reasonable and technically and organisationally possible to ensure that confidential facts and information are effectively protected from access and knowledge by unauthorised parties.

24.2 The confidentiality obligation shall exist before the contract is concluded and shall persist after termination of the contractual relationship.

24.3 The confidentiality obligation will not apply for the service procurer if it is obliged to publish the following facts and information: name and address of the service provider, object of the procurement and value of the contract, tender procedure carried out, date of contract conclusion and commencement, and timeframe of contract execution. This shall be without prejudice to the mandatory duties of disclosure under Swiss law (e.g. as per the Freedom of Information Act<sup>13</sup>, the Public Procurement Act<sup>14</sup> and the Public Procurement Ordinance<sup>15</sup>).

24.4 The confidentiality obligation shall not be considered breached if confidential information is transmitted by the service procurer within the group (or within the Federal Administration)

<sup>11</sup> Art. 7 of the GAO (SR 172.010.1)

<sup>12</sup> <http://www.e-rechnung.admin.ch>

<sup>13</sup> SR 152.3

<sup>14</sup> SR 172.056.1

<sup>15</sup> SR 172.056.11

or to any third parties called upon. This shall apply to the service provider insofar as transmission is necessary for contract performance or contractual provisions are transmitted within the group.

24.5 Without the written consent of the service procurer, the service provider may not advertise the fact that cooperation exists or existed with the service procurer, and the service provider may not list the service procurer as a reference either.

24.6 The parties shall impose the confidentiality obligation on their employees, subcontractors, sub-suppliers and other third parties called upon.

**24.7 If one of the parties violates the confidentiality obligations above, it shall be liable to pay a contract penalty to the other party unless it proves that it is not at fault. Per violation, the penalty shall amount to 10% of the annual remuneration or of the total remuneration if one-off remuneration has been agreed, but no more than CHF 50,000 in total. Payment of contract penalties shall not release the parties from compliance with confidentiality obligations. Contract penalties shall be offset against any compensation for damages.**

## 25 Data protection and data security

25.1 The parties undertake to comply with the provisions of Swiss data protection legislation. They undertake to take the economically reasonable and technically and organisationally possible precautions to ensure that data arising in the framework of contract execution are effectively protected against unauthorised knowledge by third parties.

25.2 Personal data may be processed only for the purpose and to the extent necessary for contract performance and execution. To that extent and for that purpose, personal data may also be transmitted to a company in Switzerland or abroad associated with one of the contracting parties, provided that the prerequisites set out in the provisions of Swiss data protection legislation are met.

25.3 The parties shall impose these obligations on their employees, subcontractors and sub-suppliers, as well as on other third parties called upon.

## 26 Warranty

26.1 The service provider guarantees that it hands over the standard software in good faith with all the agreed and assured characteristics required for the intended use and that the software complies with the relevant legal requirements. The service provider furthermore guarantees that the goods/services supplied have all the agreed and assured characteristics, as well as the characteristics that the service procurer may in good faith also expect without any special agreement. The service provider assumes a warranty of 24 months from the handover or installation of the standard software or from receipt of the fully supplied, contractually agreed goods/services. During the warranty period, defects may be claimed at any time. Even after expiry of the warranty period, the service provider is required to honour claims arising from the warranty rights of the service procurer set out below, provided that the defects were brought to the service provider's attention in writing during the warranty period.

26.2 The service provider guarantees that it is in possession of all the rights to supply its goods/services in accordance with the contract. In particular, it is entitled to grant the service procurer the rights to use the standard software according to the contractually agreed scope.

26.3 In the event of a defect, the service procurer shall have the option of requesting rectification or deducting the corresponding value reduction from the remuneration. If there are substantial defects, the service procurer may withdraw from the contract. If the defect concerns the data storage devices or documentation supplied by the service provider, the service procurer shall additionally have the right to demand an error-free replacement delivery.

26.4 If the service procurer requests rectification or a replacement delivery, the service provider shall remedy the defects by the imposed deadline and bear the costs arising therefrom.

26.5 If the service provider fails to carry out the requested rectification or replacement delivery, or fails to do so successfully, the service procurer shall have the option

- of deducting the corresponding value reduction from the remuneration, or
- of withdrawing from the contract.

26.6 If damage has occurred due to a defect, the service provider shall additionally be liable for compensation therefor in accordance with section 29.

## 27 Property rights

The property rights pertaining to the standard software shall remain with the service provider or third parties. When exercising these rights, the rights of use of the service procurer in accordance with section 7 must be respected.

## 28 Breach of property rights

28.1 The service provider shall immediately, at its own expense and risk, defend against claims by third parties concerning a breach of property rights. If a third party brings proceedings against the service provider, the service provider shall immediately inform the service procurer in writing. If the third party asserts claims directly against the service procurer, the service provider shall, upon the first request of the service procurer and to the extent possible under the relevant code of procedure, participate in the dispute. The service provider undertakes to bear all costs (including compensation for damages) incurred by the service procurer due to the proceedings and any out-of-court settlement. In the event of an out-of-court settlement, the service provider shall be required to assume the agreed payment to the third party only if the service provider gave its prior consent.

28.2 If, pursuant to property rights asserted, the service procurer is unable to use the contractually owed standard software or to avail itself of goods/services in whole or in part, the service provider shall have the option of replacing the standard software by other standard software or of changing its goods/services in such a way that they do not breach the rights of third parties but nonetheless comply with the contractually owed scope of goods/services, or of obtaining a licence from the third party at its own expense. If the service provider fails to implement any of these options within a reasonable timeframe, the service procurer may withdraw from the contract with immediate effect. The service provider shall indemnify the service procurer within the framework of section 29. Insofar as the service procurer is responsible for the breach of property rights, the claims against the service provider are excluded.

## 29 Liability

29.1 The parties are liable for all damages they cause to the other party unless they prove that they are not at fault. Liability for personal injury is unrestricted. In any event, liability is limited to the actual, proven damage. Unless otherwise stipulated in the contract, liability for slight negligence is no more than CHF 1 million per contract. Liability for loss of profits is excluded.

29.2 In accordance with section 29.1, the parties shall be liable for the conduct of their employees, other auxiliaries and third parties called upon for the purpose of contract performance (e.g. sub-suppliers, subcontractors, substitutes) in the same way as for their own conduct.

## 30 Contract amendments, inconsistencies and partial invalidity

30.1 Amendments and addenda to the contract as well as cancellation of the contract must be in writing.

30.2 In the event of inconsistencies between the provisions, the following order of precedence shall apply: contractual document, GTC, quote request, offer.

30.3 If individual provisions of the contract prove to be invalid or unlawful, this shall not affect the validity of the contract. In such cases, the provision in question shall be replaced by an effective provision that is as equivalent as possible in economic terms. The same shall apply in the event of a gap in the contract.

## 31 Assignment and pledging

The service provider may not assign or pledge claims vis-à-vis the service procurer unless the service procurer has given its prior written consent. The service procurer may refuse consent only in justified cases.

## 32 Applicable law and place of jurisdiction

32.1 Swiss law alone shall apply, with the exclusion of conflict of law provisions.

32.2 Application of the provisions of the United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980 (Vienna Convention)<sup>16</sup> is expressly excluded.

32.3 If the service procurer is a unit of the central Federal Administration or a unit of the decentralised Federal Administration without legal personality, the exclusive place of jurisdiction shall be **Bern**; in all other cases, it shall be at the service procurer's registered office.

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<sup>16</sup> SR 0.221.211.1