

Stemmer GmbH: General Terms and Conditions (version as of September 2009)

Scope of Application

The following General Terms and Conditions (“**T&Cs**”) apply to all our offers and to all the contracts we conclude (“**Contract[s]**”). Our performance is rendered exclusively subject to the following T&Cs. Any conflicting or diverging General Terms and Conditions of the Customer shall not apply to the Contract, unless we have expressly agreed to their application. Our T&Cs shall apply even if we perform without reservation, despite being aware of the Customer’s conflicting or diverging General Terms and Conditions. Any future business relations with the Customer shall likewise be governed by the following T&Cs, even if these are not expressly agreed anew at that time. Our Supplementary Terms for Service Agreements, Software Maintenance Agreements and Hardware Maintenance Agreements shall apply in addition to the following T&Cs.

1. Offer, Conclusion of the Contract

- 1.1. All offers issued by us are without obligation and non-binding, unless the offer concerned has expressly been designated binding by us in writing. A Contract is only concluded at the time we issue a written order confirmation, or at the latest upon our rendering performance.
- 1.2. We or our own suppliers have exclusive title to and copyright in any and all documents and their content that are enclosed with our offer.
- 1.3. The scope of our obligation to perform is determined exclusively by our written order confirmation along with any specifications of performance provided therein. We reserve the right to make technical alterations which do not impair the goods’ ability to function.
- 1.4. Dates of delivery or performance are only binding if we have expressly declared them binding in writing

2. Payment, Invoicing

- 2.1. Unless otherwise agreed by and between the parties, invoices must be paid without deduction within 14 days of receipt of invoice.
- 2.2. We are entitled to issue separate invoices for part-deliveries that the Customer can use separately.

3. Passing of Risk, Delivery, Reporting Defects

- 3.1. The risk of the goods’ accidental destruction or deterioration passes to the Customer when the goods are handed over to the forwarder we have chosen.
- 3.2. Transport insurance shall only be effected on the Customer’s express request. In any such case, the Customer must pay the costs for the transport insurance.
- 3.3. Upon delivery, the Customer must immediately inspect the outer condition of the goods, report any transport damage to the forwarder effecting delivery, secure evidence of the damage, and notify us accordingly without undue delay both by telephone and in writing.
- 3.4. In the event of the Customer reporting any defects, the Customer must grant and ensure unhindered access to the premises and to the equipment concerned.

4. Customer’s Obligations to Cooperate

- 4.1. The Customer shall assist us in the rendering of the agreed performance to a reasonable extent and insofar as is necessary and reasonable. The Customer undertakes in particular to provide and run the required equipment free of charge (e.g. hardware and software, communications facilities).
- 4.2. If any service cannot be provided or cannot be provided in good time for reasons for which the Customer is responsible, in particular because the Customer has failed to cooperate or to cooperate in good time as specified in Section 4.1 above, then the Customer shall compensate us for any losses or damage thus incurred and for any additional expenses. Moreover, in any such case all the dates and/or deadlines for performance agreed between the parties shall be extended by the duration of the delay for which the Customer is responsible. Further rights to which we are entitled shall remain unaffected.
- 4.3. The Customer undertakes to comply with any and all software license terms and terms of use stipulated for the software we supply by the respective software manufacturer (including the operating system installed on the hardware supplied).
- 4.4. Being the owner of the hardware we have supplied, the Customer is itself responsible for its proper disposal when finally ceasing its use. We are in no way obliged to take back and dispose of any hardware that is discarded equipment pursuant to Sect. 10 (2) Clause 1 of the German Electrical & Electronic Equipment Act [*ElektroG*].

5. Warranty

- 5.1. Material Defects
 - (a) If any goods supplied by us have defects that impair their contractual use more than just insubstantially, then first of all the Customer shall be entitled either to subsequent improvement or to a substitute delivery (post-performance), at our own option. If the Customer has set a reasonable deadline for post-performance, and if we refuse post-performance or if post-performance ultimately fails, then the Customer shall be entitled to withdraw from the Contract or to demand an appropriate reduction of the purchase price, at its own option. Post-performance shall not be deemed to have ultimately failed until at least two attempts to make subsequent improvements have produced no successful results.
 - (b) If an item diverges slightly from the specifications without its functionality being affected, then the Customer may only demand a reduction of the purchase price.
 - (c) We shall pay any expenses incurred for the purpose of post-performance, in particular transport costs, travelling costs, labour costs and the cost of materials. Any additional time and cost incurred on us due to the Customer having taken the goods to some location other than the original place of delivery shall be borne by the Customer.
- 5.2. Defects in Title
 - (a) If a third-party right is infringed in connection with the Customer’s use of an item under the normal or agreed circumstances, and if claims in this respect are asserted against the Customer by the proprietor of such rights, then the Customer must notify us in writing without undue delay about the claims being asserted by the third party. At our own option and at our own expense, we shall either obtain the right to use the item for the Customer’s benefit, or re-design the item in such a manner that no rights are infringed, or take back the item for the invoiced amount after deducting reasonable compensation for its previous use by the Customer. However, this shall only apply if, by making

reasonable efforts, we are unable to find some other solution, or if we cannot reasonably be expected to accept such other solution. We shall be released from our obligations pursuant to sentences 2 and 3 above if the Customer fails to follow our instructions for averting such third-party claims.

- (b) If a solution in the sense of Section 5.2 (a) sentence 3 is impossible or unacceptable to us, then the Customer shall be entitled to claim damages and reimbursement for expenses, subject to the limitation of liability set out in Section 7 below.

5.3 Provided that the Contract does not involve performances vis-à-vis a Consumer as Customer, all the Customer's warranty claims for defects shall become statute-barred one year after delivery of the goods.

5.4 The Customer's compensation claims for defects shall be governed by the provisions of Section 7 below. Sect. 444 of the German Civil Code [BGB] shall remain unaffected.

5.5 Product specifications and/or advertising claims may only be regarded as guarantees of characteristics and/or guarantees of durability if we have expressly confirmed this in writing.

6. Installation, Acceptance

6.1. If we install the goods supplied, then the Customer must effect acceptance on location immediately after installation has been completed. Obvious installation defects must be reported immediately. Once acceptance has been effected without reservation, claims for obvious defects are excluded.

6.2. The provisions of Section 6.1 above shall not apply if it can only be judged after a trial period whether the item is fit for use by the Customer. In any such case, acceptance shall be deemed effected after the Customer has had the item in operation for more than three weeks without reporting any serious defects.

6.3 In the event of defects in installation, Sections 5.1, 5.2, 5.4 and 5.5 above shall apply accordingly.

6.4 All the Customer's warranty claims for defective installation work shall become statute-barred one year after acceptance of installation has been effected pursuant to Section 6.1 or 6.2 above.

6.5. When installing goods, we are under no obligation to check any preceding work done by third parties, or to point out that such work has been done incorrectly or to poor standards.

7. Liability

Any obligation on our part to pay compensation to the Customer shall be governed by the following provisions of this Section 7:

7.1 If we act with intent or gross negligence, or if we assume a guarantee for characteristics and/or for durability, or if we fraudulently conceal a defect, then we shall be liable in accordance with statutory regulations.

7.2 We shall be liable in accordance with statutory regulations for any mortal injury, physical harm and damage to health resulting from slight negligence on our part. In all other respects, we shall only be liable for negligent breaches of cardinal duties, but only for predictable damage typical for the type of contract. A cardinal duty shall be understood to mean an essential contractual obligation, performance of which is imperative for implementing the contract and may be always relied on by the Customer.

7.3 Liability for predictable damage typical for the type of contract, which has to be compensated in the event of a breach of cardinal duty pursuant to Section 7.2 above, is limited to an amount of EUR 25,000 per claim and a total of EUR

100,000 for all claims within one contract year.

7.4 We shall not be held liable for any damages resulting from negligence, unless otherwise provided for in Sections 7.1 to 7.3 above.

7.5 Liability in accordance with the statutory provisions of German product liability law shall remain unaffected.

8. Retention of Title

8.1 We reserve title to the goods supplied (reserved goods) until all the claims have been satisfied to which we are entitled vis-à-vis the Customer at any present or future time under our business relations with the Customer.

8.2 Until title passes to the Customer, the latter is under the obligation to handle the reserved goods with care.

8.3 The Customer is entitled to re-sell the reserved goods in the ordinary course of business, as long as the Customer does not default in its payment obligations. By way of security, the Customer herewith assigns to us any claims to payment created on re-selling reserved goods. We hereby authorise the Customer to collect the payment claims assigned to us in its own name and for our account; this authority to collect receivables may be revoked at any time, but only if the Customer defaults in its payment obligations. At the Customer's request, we shall be under the obligation to release the security provided by the Customer pursuant to sentence 2 above, if the value of the items of security furnished by the Customer exceeds our total collateralised receivables by more than 20%.

8.4 Reserved goods may not be pledged or assigned to third parties by way of security.

8.5 The Customer is under the obligation to immediately inform us about any re-location of the reserved goods.

8.6 If the Customer acts in breach of contract, and in particular if it defaults in payment, we shall be entitled to take back the reserved goods, to demand assignment of the Customer's claims to surrender vis-à-vis any third parties, or – once a reasonable period of grace has expired without avail – to withdraw from the Contract. Taking back reserved goods and/or demanding their return shall not count as withdrawal from the Contract, unless we expressly issue a written declaration of withdrawal. For the purpose of taking back the reserved goods, the Customer is under the obligation to grant us access to the premises where they are located.

9. Assignment, Setoff, Right of Retention

9.1. Receivables, rights and/or obligations under this Agreement may only be assigned or transferred by the Customer with our prior written permission. This does not apply to the assignment of payment claims pursuant to Sect. 354a of the German Commercial Code [HGB].

9.2. Only counterclaims that are undisputed or have been declared *res judicata* may be offset by the Customer against our own payment claims.

9.3 The Customer may only assert right of retention for counterclaims created directly under the Contract. A Customer who is an entrepreneur, a public corporation or a government agency managing public assets is only entitled to assert a right of retention or a right to refuse performance if its counterclaims are undisputed or have been declared *res judicata*.

10. Non-Disclosure

10.1. Each party is under the obligation to keep secret the other party's business and trade secrets and any other confidential information and matters requiring protection – including the

offer documents which we submit to the Customer – which become known or are provided in connection with performance of the Contract (referred to in their entirety as “**Confidential Information**”).

- 10.2. This Section 10 shall not apply to information:
- (a) that becomes public knowledge without any breach of contract by the other party; or
 - (b) that was known to the party concerned prior to its communication; or
 - (c) that is imparted by a third party entitled to do so; or
 - (d) that has to be disclosed under statutory regulations or under a government or court order.
- 10.3 The receiving party may only use Confidential Information for the purpose of performing the Contract, and must treat the same confidentially for a period of three (3) years after termination of the Contract (indefinitely in the case of software).
- 10.4 On termination of the Contract, the receiving party is obliged at the request of the disclosing party to destroy any and all Confidential Information, or to surrender it to the party disclosing it.

11. Restrictions on Performance Obligations: **Force Majeure, Receipt of Supplies**

- 11.1 Neither party shall be liable for performance of its obligations if such performance is prevented by *force majeure*. This shall include in particular incidents that are unpredictable, uncontrollable, and beyond the control of the parties, in particular storms, flooding, landslides, earthquakes, high winds, lightning, fire, epidemics, acts of terrorism, armed combat (irrespective of whether war is declared), revolts, explosions, strikes or other labour unrest, sabotage, energy cuts, and expropriation by government agencies.
- 11.2 Our obligation to perform is subject to our receiving correct and punctual deliveries of goods or services upfront from our own suppliers. However, this only applies insofar as we have concluded an identical contract with the respective supplier to cover the transaction, and provided incorrect or unpunctual delivery is not due to our own fault.

12. Export Restrictions

- 12.1 We generally supply goods that are intended to remain inside the Federal Republic of Germany.
- 12.2 The Customer's attention is hereby drawn to the fact that in the event of exporting, the goods we supply may be subject to export legislation or export regulations laid down by other countries or by the European Union, and that they may only be used or transferred in accordance with such export legislation or export regulations. If the Customer is considering exporting goods supplied by us, then the Customer itself must perform and meet all and any reporting and approval obligations and requirements ensuing from such export legislation and export regulations.

13. Termination without Notice (of On-Going Obligations)

- 13.1. We are entitled to terminate the Contract without notice:
- where periodic instalments have been agreed, if the Customer defaults in payment of at least two consecutive invoiced amounts or of a not insubstantial part thereof; or
 - if the Customer defaults in payment more than once; or
 - if a petition is filed for insolvency proceedings to be instituted against the Customer's assets, or if such insolvency proceedings are actually instituted or turned down due to lack of assets; or

- if there is a risk of a deterioration of the Customer's financial situation.

Application of Sect. 321 of the German Civil Code [BGB] remains unaffected.

- 13.2. Other statutory rights entitling the parties to give extraordinary notice for terminating the Contract shall remain unaffected.

14. Miscellaneous

- 14.1. If any one or more provisions of these T&Cs are or become ineffective or unenforceable, this shall not affect the validity of the remaining provisions.
- 14.2. Any amendment to the Contract must be done in writing. This also applies to any waiver of the requirement for written form.
- 14.3. The Contract shall be exclusively governed by German law, excluding provisions of German private international law and excluding the CISG.
- 14.4. If the Customer is a trader, a public corporation, or a government agency managing public assets, Munich shall be the venue for any and all disputes arising from or in connection with the Contract. We are also entitled to sue at the Customer's registered location.