

## Supplemental Terms & Conditions for the Procurement of IT Services

### – EVB-IT Service-AGB –

1	Purpose of IT Service Procurement Contracts .....	2
2	Nature and scope of the services .....	2
3	Provision of replacement items* .....	9
4	System component* relocation and modification by the Procurer .....	9
5	Licenses .....	9
6	Fault classification .....	13
7	Response* and completion times* .....	13
8	Replacement items* .....	13
9	Test system for the IT system .....	14
10	Documentation .....	14
11	The Contractor's notification obligations .....	15
12	Staff of the Contractor and subcontractors .....	16
13	Fees .....	17
14	Performance delays .....	18
15	Cooperation by the Procurer .....	18
16	Acceptance of services .....	19
17	Procurer's rights in case of service deficiencies .....	19
18	Third-party intellectual property rights .....	20
19	Breach of duty in rendering services .....	21
20	Limitation of liability .....	21
21	Agreement term and termination .....	21
22	Changes to performance elements after contract conclusion .....	22
23	Source code* .....	23
24	Liability insurance .....	24
25	Data protection, confidentiality, security .....	24
26	Rights of retention .....	24
27	Arbitration .....	24
28	Text form requirement .....	25
29	Choice of law .....	25
	Terms and definitions .....	26

Definitions of the terms marked with an asterisk (\*) are provided at the end of the Supplemental Terms & Conditions for the Procurement of IT Services (EVB-IT Service-AGB).

Version 1.0 dated 03/24/2014

The English version of the terms of contract is only for your information.

The German version is legally binding.



## 1 Purpose of IT Service Contracts (within the EVB-IT framework)

- 1.1 IT Service Contracts are concluded individually within the framework of these Terms & Conditions for the purpose of regulating the providing of the contractual services by the Contractor for the contractual IT system.
- 1.2 The services to be provided by the Contractor may include in particular:
  - Restoration of operational readiness\*(troubleshooting, fault resolution)
  - Maintaining operational readiness\* (preventive measures)
  - Licensing of new software versions\*
  - IT system modification and/or expansion
  - Other IT services
- 1.3 Support services are generally provided under a work production contract (*Werkleistung*), which means the Contractor bears responsibility for the successful outcome of the contractual services.
- 1.4 Except as otherwise agreed, the Contractor shall provide the IT services applying the best available techniques as of the time of service performance.
- 1.5 Except as otherwise agreed, the Contractor shall install, customize\* and integrate all delivered, modified or newly created system components\* on the basis of the IT Service Contract\* and integrate these into the IT system\*.
- 1.6 The cooperation obligations of the Procurer are as outlined under point 14 of the IT Service Contract and item 15 of these Terms & Conditions for the Procurement of IT Services.
- 1.7 The Contractor shall only be entitled to provide the contractual services using automated processes, such as via license management or monitoring software, if the product to be utilized is specified in the offer and warrants therein that said product has no functionalities for communication with third parties nor any other functionalities which run counter to the interests of the Procurer. In particular, the product may have no functionalities which enable unauthorized data disclosure or transmit information about the IT system utilized to third parties, including system data and information on licensing or user behavior, for any purposes other than for provision of the IT services; furthermore the product may not save such data/information in a manner allowing it to be accessed by third parties. The express approval of the Procurer is required on a case-by-case basis for any new product version. The Procurer will approve such if the Contractor provides warranty regarding the new product to be rolled out per the above. The Procurer may prohibit usage of the product given adequate, concrete indications that the product does not conform with the requirements specified above if the Contractor is unable to demonstrate otherwise
- 1.8 Except as otherwise agreed, if software versions\* require support but the software maker no longer offers such support, the Contractor shall not be obligated to provide IT services for those software versions.

## 2 Nature and scope of IT services

### 2.1 Status quo assessment

The parties may agree to conduct a status quo assessment of the IT system.

Except as otherwise agreed, the Contractor shall be obligated in such case to document the individual system components\* of the respective system, including the type and scope of software\* used on the system, and verify proper system functioning when commencing with the provision of system services.

The Contractor then prepares a report outlining the complete assessment findings. This report discloses in particular any discrepancies between actual circumstances and the system specifications known to the Contractor, including any software\* license shortages, overages or irregularities. In the report, the Contractor is to

Definitions of the terms marked with an asterisk (\*) are provided at the end of the Supplemental Terms & Conditions for the Procurement of IT Services (EVB-IT Service-AGB).

Version 1.0 dated 03/24/2014

The English version of the terms of contract is only for your information.

The German version is legally binding.



submit non-binding proposals to the Procurer on resolving discrepancies and/or significant deficits with corresponding cost estimate.

When the report is presented the Procurer decides regarding assessment and addressing of the individual findings. The Contractor remains obligated to provide the contractual services even if the Procurer assesses the findings otherwise or decides not to resolve or fully resolve the discrepancies or deficits. The Contractor is entitled however to adjust the contract appropriately if provision of the service demonstrably results in significant additional expense and/or significant other problems due to the discrepancies or deficits.

## **2.2 Restoring and maintaining operational readiness\***

### **2.2.1 Restoration of operational readiness\*(troubleshooting, fault resolution)**

Restoring operational readiness\* of the IT system or of system components\* includes any fault resolution measures taken by the Contractor. Such fault resolution measures may include for example repairing hardware or providing software\* maintenance. The latter may include for example the creation or procurement and provision of an error-corrected version of the custom software\* or the provision of a version\* of the standard software\* in which the fault\* is eliminated. Item 2.3.3 applies mutatis mutandis.

If a fault\* occurs with the standard software\* and fault resolution has been agreed for the standard software\*, the Contractor is obligated to provide a software version\* in which the fault is resolved if available. If such is unavailable, the Contractor must provide a workaround solution\*. If this cannot be reasonably done, the Contractor must pressure the maker of the standard software\* to release a software version\* as soon as possible in which the fault has been resolved. The Contractor shall provide information regarding such efforts upon request. The Procurer may not, in general, demand changes to the object or source code\* of standard software\* as part of the obligation to provide a workaround solution\*, but may demand custom programming if such is reasonably possible.

If the same fault\* re-occurs within 14 days of declaring operational readiness\*, the fault shall be deemed unresolved.

If a flat fee has been agreed for fault resolution for an IT system not built by the Contractor, the Contractor may charge an additional fee for fault resolution within three months of the contract start date if the Contractor demonstrates that the fault\* was pre-existing as of the contract start date. If a status quo assessment per item 2.1 has been agreed, the above right only pertains to faults\* identified and communicated to the Procurer in the assessment report, and only if the flat fee is not adjusted due to the faults\* as per item 2.1.

The Procurer may instead have the fault\* resolved by asserting any accruing defect or warranty claims. The Contractor shall support the Procurer in such efforts.

If a flat fee is agreed for fault resolution, the Contractor may demand appropriate compensation from the Procurer to resolve any fault caused by the Procurer either intentionally or through gross negligence.

### **2.2.2 Maintaining operational readiness\* (preventive measures)**

Maintaining operational readiness of the IT system or of system components includes all measures taken by the Contractor to avoid future faults\*, such as the activities agreed under a maintenance plan. This includes for example regularly replacing wearing parts\* and IT system hardware promptly in advance of the end of their useful life. This also includes provision of new standard software\* versions\* which are available to the Contractor without having to pay license fees for usage by the Procurer,

and if agreed also includes the creation and licensing/provision of an error-corrected version\* of the custom software\*, as respectively necessary for maintaining operational readiness\*. Item 2.3. furthermore applies regarding the licensing/provision of new software versions\*

### 2.2.3 Acceptance of new system components\*

Except as otherwise agreed, the Procurer must accept a new system component\* which serves to resolve or avoid faults. The Procurer is not obligated to accept a new system component\* when doing so is unreasonable,

such as because the new system component\* differs significantly from the system component to be replaced\*, or if software\* rights would be reduced in scope. If the Procurer does not accept a new system component\* for this reason, the Contractor shall upon request by the Procurer propose a different solution which is reasonable to implement, if possible.

When the Procurer accepts a new system component\*, the following shall apply:

- If the new system component\* has greater functionality than the system component listed in the IT Service Contract (upgrade), the Procurer is only obligated to pay additional compensation if the Procurer wishes to make use of the upgrade. This shall still apply if the Procurer makes use of the upgrade even though the Procurer could use the new system component\* without the upgrade in accordance with contract, but not if the Procurer can only utilize the previous functionality with the upgrade. Additional compensation shall not be payable if provision of the new system components\* is already required for performance pursuant to item 2.3.
- If usage of the new system component\* results in increased cost, the cost difference shall be borne by the Contractor. This does not apply to increased cost resulting from the Procurer's intended usage of the upgrade/s. Sentence 2 of the first listed point under this item 2.2.3 shall apply accordingly.

### 2.3 New software versions\*

#### 2.3.1 Licensing of new versions\* of the standard software\*

The Contractor is obligated to provide/license any new versions\* of the standard software\* if and as agreed. A software version must be provided/licensed immediately when it becomes available.

#### 2.3.2 Provision/licensing of new versions\* of standard or custom software\*

The Contractor is obligated, if and as agreed, to provide software versions\* updated to reflect changes in laws and technical standards that affect the usability of the IT system for its intended purposes. The IT Service Contract may additionally provide for other circumstances requiring the licensing of new software versions\*, including changes in administrative regulations, pricing structures or interfaces, for example. If unavailable, the Contractor must create such software versions\* or have these created.

The Contractor shall provide the Procurer required software versions\* promptly in advance of the effective date of the respective regulation or standard or the scheduled change or modification date. If the licensed versions are not provided by the applicable deadlines, the Contractor shall be obligated to provide the Procurer a temporary solution. If provision of the licensed software version\* or temporary solution in question by the above deadlines is not reasonably possible for time reasons, such provision must still be completed within a reasonable period of time.

#### 2.3.3 Installation, customizing\* and integration\* of software versions to be provided by the Contractor\*

If the Contractor is obligated to provide new software\* versions\*, the

Contractor shall notify the Procurer when such software versions\* become available. The Contractor shall install\*, customize\* and integrate the software version into the IT system\*, except as otherwise agreed. If the source code of the standard software\* for the IT system has been modified for the Procurer or a third party, the foregoing shall include implementation of said modifications in the new software version\* for the Procurer. The Contractor is required to advise the Procurer of the impact of the above services on the IT system prior to the provision thereof. This includes any changes affecting software\* usability.

The Contractor must give the Procurer advance opportunity to demand that the Contractor install, customize\*, modify the source code of and integrate\* these software versions\* into the IT system

- at a later date within the term of the IT Service Contract requested by the Procurer, rather than immediately, or
- in accordance with reasonable stipulations outlined by the Procurer (observing security regulations, for example).

If new versions\* of the software\* result in the IT system no longer being usable fault\*-free, the Contractor is obligated to take all necessary measures to eliminate the fault. This may include making specific changes to the IT system, including changes to other software\*. Such changes may have to be made at the source code level and integrated into the IT system\*.

The Contractor must scan software versions\* to be licensed under the IT Service Contract at an appropriate point in time prior to its provision using up-to-date scanning software so as to identify the presence of any malware\*. If malware is found during such scanning, the Contractor must remove such before providing the software. In such case the Contractor shall notify the Procurer of the scanning results and any removal measures taken. This provision shall apply to all hardware provided, even if provided on a temporary or advance basis, such as for testing purposes.

If new software versions are subject to EU or US export control regulations, the Contractor shall include an advisory thereof in the IT Service Contract.

## 2.3.4 **Installation\*, customizing\* and integration\* of new versions\* of standard software\* provided by the Procurer**

The Contractor is obligated, if and as agreed, to install\* and customize\* new versions\* of software provided by the Procurer and integrate\* these into the IT system. The Contractor is required to advise the Procurer regarding the impact of the new software version\* on the IT system prior to the provision thereof. This includes disclosing known incompatibilities and errors and any ways in which software\* usability will be affected.

## 2.4 **Hotline**

2.4.1 If hotline service has been agreed, the Contractor shall record phoned-in fault reports, and if agreed also answer questions regarding usage of the IT system. The Contractor shall resolve the reported fault\*, if possible, by providing instructions by phone, or by providing teleservice\* during the phone call if agreed, and shall respond to questions about usage of the IT System if such is agreed. If these efforts do not prove successful within a reasonable period of time, the Contractor shall be obligated to

- resolve usage-related questions otherwise, relaying responses by phone or e-mail or
- escalate the reported issue internally within Support for resolution. If restoration of operational readiness\* is not an agreed service per item 2.2, the Contractor shall submit an offer for fault resolution to the Procurer applying the contractually agreed fee schedules, or on other reasonable terms if such have not been agreed.

If usage of a ticket system\* has been agreed, the Contractor is obligated to open a ticket for reported faults irrespective of whether a fault was already addressed in the phone call, documenting explanatory information on the ticket.

- 2.4.2 Except as otherwise agreed, the hotline may be utilized by any user of the Procurer.
- 2.4.3 All staff deployed by the Contractor to work the hotline must be properly trained in recording reported faults and providing first-level support. The hotline must be staffed by German-speaking personnel.
- 2.4.4 An Interactive Voice Response System (IVR) may only be utilized for initial call receipt and routing. Deviating provisions may be agreed in the IT Service Contract.
- 2.4.5 The Contractor is obligated to staff the hotline and deploy adequate technology so as to afford availability at all times within the agreed service hours\*, taking into account the projected volume of usage-related inquiries and fault reports so as to ensure that such phone inquiries and reports can be handled in parallel. If it is not possible for the addressing of a fault\* or answering of a complex user question to be handled by a single employee of the Contractor up until its successful resolution, the resolution process and progress must be logged in such fashion as to ensure that a staffing change does not result in delays or quality issues.
- 2.4.6 The respective parties shall bear their own telecommunication costs. The Contractor is not entitled to offer value-added services, mobile phone numbers or international numbers via the hotline.

### 2.5 On-call duty

- 2.5.1 The Contractor is obligated to maintain staff ready on-call, if and as agreed. This means ensuring that the Contractor is reachable by phone during the agreed times. The purpose of maintaining staff ready on-call is to ensure that
  - specially qualified staff as agreed are available during the contractual hours for support and troubleshooting (by telephone or teleservice\*)
  - specially qualified personnel as agreed provide the contractual services on site during the contractual hours.

2.5.2 Items 2.4.2 - 2.4.6 apply mutatis mutandis regarding on-call duty.

### 2.6 On-site services, regular presence on the Procurer's premises

As agreed, the Contractor shall provide on-site services for the Procurer during the contractual hours in the agreed scope. On-site services means performing the contractual service work and providing support to users on site at their work areas.

### 2.7 License management

#### 2.7.1 Status quo assessment

If a status quo assessment has been agreed, the Contractor is obligated to first assess actual usage of the contractual software\*, including particularly where it is used and installed, and show this in an electronic database (license database). The Procurer is obligated to grant the Contractor access to the system components\* relevant for usage of the software\* to the extent doing so is absolutely necessary for assessment.

The Contractor is furthermore obligated to determine the type and scope of licenses the Contractor has to the contractual software\*, including any attached stipulations of licensor, and add these to the license database accordingly. This includes in particular noting where the relevant license information, original data carriers and backup copies are respectively located. To this end, the Procurer is obligated to provide the Contractor the relevant documents the Procurer has, including particularly software licensing agreements, license certificates and other similar documents as well as any original data carriers and backup copies

to make the software\* accessible. If and as agreed, the Contractor shall additionally archive license information, including any license keys and/or the data carriers\* for the software, in the agreed manner.

Upon completion of the status quo assessment the Contractor shall provide the Procurer a written report on the assessment findings, including particularly any licensing shortages, overages or irregularities. The Contractor shall also point out optimization potential, in particular by advancing proposals regarding any necessary additional licensing, change of licensing model as advisable (e.g. from individual to volume licensing or organization-wide licenses), or other usage of surplus licenses.

## 2.7.2 License management

License management includes the ongoing receiving or recording and subsequent processing of changes versus the information documented in the status quo assessment, such as newly added, changed or returned/expired licenses to the contractual software\*, the locations where such are used and installed and updating of the license database accordingly. Paragraph 2 sentence 3 of item 2.7.1 applies mutatis mutandis. License management also includes ensuring fulfillment of licensor stipulations or monitoring of fulfillment on the part of the Procurer if the latter is solely responsible for such.

License management also includes conducting repeat status quo assessments as per item 2.7.1. at least annually.

If archiving of license information and/or of software\* data carriers has/have been agreed, license management also includes ongoing updating of the archive.

## 2.7.3 Other license management services

The Contractor is furthermore obligated to advise the Procurer upon request regarding any intended expansions or reductions in the scope of use (such as in a rebalancing) and to cooperate with the Procurer on any license audits. For such services the contractually agreed fee rates shall apply, or typical market rates where none are agreed.

## 2.8 Handling of Procurer claims against third parties

2.8.1 If and as agreed, the Contractor shall provide the Procurer via technical/organizational support in handling claims under service contracts between the Procurer and third parties concerning the contractual IT System as well as defect (warranty) and guarantee claims under corresponding purchase, movable asset production (*Werklieferungsvertrag*) or work production (*Werkvertrag*) contracts. To this end the Procurer shall make the relevant documents available to the Contractor as required. If and as agreed, the Contractor shall notify the Procurer promptly of any contract-relevant deadlines and dates pertinent to such matters as contract termination, renewal or amendment. Except as otherwise agreed, the Contractor shall not be entitled to modify, terminate or enact such contracts on behalf of the Procurer, nor to exercise disposal over claims of the Procurer without the Procurer's consent.

2.8.2 The Contractor has no obligation to provide services of a legal nature without a corresponding license.

## 2.9 Data backup services

If and as agreed, the Contractor shall assume responsibility for proper ongoing data backup\* in accordance with the agreed data backup plan to protect against data losses. As part of proper data backup\* the Contractor is obligated in particular to regularly verify that data backup\* is taking place by performing data restorations, reviewing backup logs, regularly changing out data carriers as a preventive measure and storing data carriers at the contractually agreed locations.

All data backup activities must be logged in detail. Logs are to be delivered to the Procurer in electronic form at any time upon request, and in any case once annually.

Additional rules and procedures regarding data backup and logging are outlined in the data security plan.

## 2.10 Special system component\* services

If and as agreed the Procurer shall be entitled to require that the Contractor provide IT services as outlined below, using for example the form attached as Model Document 4, Special IT Service Order Form. If corresponding flat rates have not been agreed in the IT Service Contract, the rates for time/expense-based billing per the IT Service Contract shall be applied. If these IT services result in a significant change in the scope of services to be provided by the Contractor on an ongoing basis versus the scope most recently agreed, either contracting party may demand that the contract be amended accordingly.

### 2.10.1 De-installation and re-installation of system components\* after relocation

The Procurer is entitled to demand at any time that the Contractor provide the following IT services in connection with the relocation of system components\*: de-installation, packaging, secure transport within a property, unpacking, re-installation, rendering of operational readiness\*. Reasonable lead time must be granted for such. The Contractor is not responsible for transporting system components\* outside of a property, nor for the suitability of the system environment\* at the re-installation site.

### 2.10.2 Modification of system components\*

The Procurer is entitled to demand at any time that the Contractor modify system components\* within the scope agreed in the contract, thereby modifying the IT system accordingly, as long as such modification is reasonable for the Contractor. Except as otherwise agreed, modification shall include all necessary measures to render the modified IT system\* operationally ready\* after modification of its system components\*.

### 2.10.3 Setup of new and replacement system components\*

The Procurer is entitled to demand at any time that the Contractor set up system components\* in accordance with the Procurer's specifications, thereby expanding or modifying the IT system, as long as such is reasonable for the Contractor. Except as otherwise agreed, setup shall include all necessary measures to render the modified IT system\* operationally ready\* after integration of the new system components\*.

## 2.11 Training

2.11.1 If training is an agreed service, the Contractor shall conduct such training under the Contractor's own responsibility. Except as otherwise agreed, training is to be conducted in German. Training is to be conducted at the Procurer's facilities, except as otherwise agreed. If training is not conducted at the Procurer's facilities, the Contractor is responsible for providing the facilities and related instruction/seminar infrastructure. A training day consists of eight instructional hours of 45 minutes' duration plus breaks of appropriate length. Fees for training include payment for appropriate preparations for training seminars and for granting contractual rights of use to the training documents.

2.11.2 Training-related materials are to be provided in German and in electronic form, and additionally in paper form depending on the number of participants, if requested by the Procurer. Provided copies become the property of the Procurer. Training-related materials include such aids and resources as electronic presentation files and samples used for training. If requested by the Procurer the Contractor shall issue certificates to participants completing training which specify the content and scope of the conducted training course.

If training-related materials are used which were not prepared/created for the Procurer, the Contractor shall grant the Procurer



a non-exclusive, irrevocable, non-expiring, transferable right to use training-related materials of the respective rights holder for the Procurer's own purposes, except as otherwise agreed.

Where training-related materials or elements thereof have been created for the Procurer, the Contractor shall additionally provide these in a standard, editable file format specified by the Procurer and grant the Procurer rights to use these for training and other exclusively internal purposes in accordance with item 5.2.2, except as otherwise agreed.

### **3 Reserves of replacement items\***

As agreed, the Contractor shall keep reserves of replacement items\* in stock to ensure the ability to maintain operational readiness\* of the IT system or system components\* and restore such on short notice as necessary. Except as otherwise agreed, reserve stocks shall be stored at the Contractor's facilities.

In the event of a fault\* affecting the IT system\* requiring prompt replacement of a part/component which the Contractor keeps in stock/reserve, the Contractor shall change out the affected system component\* or element thereof with a corresponding replacement item\*, transferring ownership thereof to the Procurer upon replacement. If replacement items\* initially required to be kept in reserve are paid for upon commencement of the IT services, transfer of ownership occurs at the time of stocking in reserve. In such case the Contractor is responsible for storage of the reserve replacement items\*. The Contractor shall provide to the Procurer the information necessary for identification. This includes in particular the device names/designations, storage locations and serial numbers. Payment for the storage of stocked reserves is included in and paid for by the fee for providing replacement items\*.

Paragraph 2 shall also apply where an impending fault\* cannot be avoided other than by changing out a replacement item\* as part of the contractual maintaining of operational readiness\* per item 2.2.2. In such case however the Contractor is obligated to coordinate replacement with the Procurer in advance unless occurrence of the fault\* is imminent, leaving no time for coordination.

The Contractor shall then repair the replaced item if technically possible and economically feasible and keep it in reserve for future use as replacement item\*. Otherwise, the Contractor shall keep an adequate new device stocked in reserve. The provisions per items 8.4 - 8.6. apply regarding defective items.

### **4 Relocation and modification of system components\* by the Procurer**

4.1 The Procurer is entitled to relocate system components\* to a different site than the contractually agreed location and to modify the hardware. The Procurer must notify the Contractor thereof promptly in advance. Either contracting party may request amendment of the contract with respect to the rights and obligations of the contracting parties to reflect accordingly changes resulting from the relocation or modification of the system components.

4.2 A separate agreement in accordance with item 2.10.1 or 2.10.2 is required if the Contractor is to dismantle and rebuild or modify the system.

### **5 Licenses**

#### **5.1 Rights granted by the Procurer**

##### **5.1.1 Granting of work and editing rights**

To the extent the Procurer is entitled to have the IT system, parts thereof or the IT system documentation worked on or edited by third parties, the Procurer shall grant the Contractor rights as necessary for performance of the contractual IT services which are

- non-exclusive
- non-transferable

- limited in duration to the necessary performance period, not exceeding in any case the duration of the IT Service Contract
- limited in terms of content to the necessary scope of and purpose for the IT services

to work on and edit such. As necessary for provision of the services, the Procurer grants the above rights to the corresponding source code\* of the respective software\* and to the documentation available on the Procurer's IT system.

If the parties do not hold the editing rights required for provision of the services, the Contractor shall provide notification thereof as part of his notification obligations per section 11.1. The Procurer shall then either obtain the necessary rights or jointly amend the contract accordingly together with the Contractor, for example such that the Contractor is to receive a reasonable additional fee for securing the rights in the necessary scope on behalf of the Procurer.

The Contractor is not entitled to utilize the rights granted for purposes other than as stated above, nor to fully or partially disclose such rights to third parties.

#### **5.1.2 Granting of rights to tools\***

If provision to the Contractor of software\* editing tools\* available to the Procurer is agreed, the Procurer grants the Contractor the non-exclusive, non-transferable right to use those tools\* for the duration of editing of the software\* or the underlying source codes\*, not exceeding in any case the duration of the IT Service Contract, for the sole purposes of editing and redesigning the software\* on behalf of the Procurer. If the Procurer grants the Contractor rights to the tools\* for fault fixing services after ending of the IT Service Contract, the provisions of the IT Service Contract shall continue to apply mutatis mutandis.

### **5.2 Rights granted by the Contractor**

#### **5.2.1 Rights to new software versions\***

5.2.1.1 Without exception, the Contractor shall grant the Procurer the same rights regarding new software versions\* as were granted for the previous software\* release/version. Rights to standard software\* not modified on the source code level are granted upon delivery of the new software version\*. Rights to any other software\* are granted at the time of editing thereof.

5.2.1.2 If the source code\* of software\* to which the Procurer holds rights is edited as part of the IT services, the type, scope and timing of the granting of rights as per item

5.2.1.1 shall apply regarding such source code\* as well. If the Contractor has agreed to escrow the source code\* of the previous version of the custom software\*, the Contractor shall likewise escrow the source code\* of the new software version\* in the same manner. Otherwise the Contractor shall hand over the source code\* of the new software version\* to the Procurer.

5.2.1.3 The Procurer is entitled to make a copy of new software versions\* for backup purposes, irrespective of the granting of rights per the above. The copying of the software for its intended contractual use or for distribution as part of proper data backup\* constitute intended contractual usages.

5.2.1.4 When a new licensed software version\* is provided as part of the services, the Procurer is entitled to continue using the previous software version\* in the contractually agreed scope instead of the new software version\*, except as otherwise agreed. The parallel usage of new and old software versions\* is only permissible however as long as the contractual license limitations are respected as a whole in doing so.

5.2.1.5 If the Contractor is not able to provide the Procurer with the rights to a new version\* of the standard software\* the Contractor has provided and of which the Procurer has a previous software version\*, because for example the maker of the standard software\* only grants such rights under modified

terms of use, the Contractor is obligated to inform the Procurer in detail prior to license provision of the limitations versus the previous software version\*, outlining the practical impact on regular usage by the Procurer. The same shall apply accordingly if the new software version\* has less functionality than the previous software version\*. The Contractor shall in such case propose an alternative solution to the Procurer, as long as such is reasonable for the Contractor and technically feasible, awaiting the Procurer's decision before taking any further steps. Further claims and rights accruing to the Procurer shall remain unaffected.

## **5.2.2 Rights to custom software\* created as part of the IT services and to source code modifications of standard software\* which are not integrated as standard**

5.2.2.1 Unless differing proper contractual usage is agreed in the IT Service Contract, the Contractor grants the Procurer a right to use custom software\* and source code modifications of standard software\* created as part of the IT services which are not integrated as standard at the time of their creation that is

- non-exclusive,
- geographically unlimited,
- usable in any hardware or software environment,
- transferable,
- permanently or temporarily sublicensable for non-commercial purposes,
- non-expiring, irrevocable and non-terminable,

for software\* in original or altered, translated, edited or modified form,

- to include in particular the permanent or temporary storing and loading thereof and the displaying and running thereof, along with any necessary copies
- and to alter, translate, edit or otherwise modify such
- for non-commercial purposes on any known medium, or to in any other manner save, reproduce, display, publish or distribute in physical or intangible form, including non-publicly in particular, and with the exception of the source code\* to publicly playback/render, including through the use of audio, video or other information media
- in databases, data networks and online services, including the right to provide the custom software\*, but not the source code\*, to users of the aforesaid databases, networks and online services for research purposes and for retrieval via tools selected by the Procurer, and to provide such for download for non-commercial purposes
- to operate such for the Procurer
- to use such for internal and non-internal purposes and to provide services to third parties
- to distribute such for non-commercial purposes.

The license grants rights of use to the software\*, including particularly its object and source code\* in all developmental, intermediate and final stages and to the related documentation and any other materials necessary to exercise the rights of use, such as analyses, specifications and requirements documents, plans and descriptions. If the Procurer exercises the right to transfer or sub-license the rights of use to the custom software\*, wholly or in part, or allows third parties to use such under the Procurer's reproduction and distribution rights, the Procurer shall contractually bind said third parties to fulfill the same obligations connected with the content and scope of the license. Liability on the part of the Contractor vis-a-vis third parties in

connection with sub-licensing or redistribution is excluded. This also applies to defect claims as well as to any claims asserted by the Procurer against the Contractor in consequence of claims over the custom software\* asserted against the Procurer by third parties. The Procurer shall lose any usage rights transferred to a third party. The Procurer is entitled however to retain a copy exclusively for verification and archiving purposes.

#### **5.2.2.2 Rights to pre-existing elements\* utilized as part of the IT services, Contractor's notification obligations**

Item 5.2.2.1 fundamentally applies likewise to pre-existing elements\*, although exclusive licenses to these are never granted.

Payment shall be due for the distribution and sublicensing of pre-existing elements\* if the Contractor quotes the fee payable for granting of the rights prior to usage thereof and the Procurer accepts that offer as stated. Compensation for the distribution or sublicensing of such pre-existing elements\* shall not be due until the Procurer exercises these rights to the pre-existing elements\*.

The right to edit pre-existing elements\* is excluded if the following conditions are met:

- The Contractor provided notification prior to usage that the Contractor is only licensing the object code\* instead of the source code\* to the pre-existing elements\* and is exercising this right.
- The Contractor shall enable the Procurer to generate the executable custom software\* through the agency of properly qualified staff from the licensed elements of the custom software\* in the source code\* and the licensed elements\* pre-existing solely in the object code\*.
- No right to editing accrues by statutory law.

Item 5.2.2.3 applies regarding the usage of tools\*.

The distribution and sub-licensing of pre-existing elements\* is only permitted together with the custom software\* or source code modifications of standard software\* that are not integrated as standard, either in the form provided or in modified, translated, edited or redesigned form.

#### **5.2.2.3 Rights to tools\***

If the Contractor does not utilize tools\* available on the market to generate the custom software\* or has not developed such and editing and redesigning of the custom software is not possible without use of such tools\* or only possible with unreasonable effort/expense, the Contractor shall give the Procurer a reproduction of the tool/s\* in question at or before provision of the licensed software\*, granting the Procurer thereto

- a non-exclusive license that is
- geographically unlimited,
- usable in any hardware or software environment,
- strictly together with the custom software which it is usable to edit or redesign, and is transferable,
- non-expiring, irrevocable and non-terminable

to utilize the tool/s\* in original form exclusively to edit and redesign the custom software\* for purposes of error resolution and further development, and for such purposes to use the tool/s\*,

- to include in particular the permanent or temporary storing and loading thereof and the displaying and running thereof, along with any necessary copies
- to allow third-party usage and operation for the Procurer
- to use such, both for internal purposes and in order to provide services to third parties.

The Procurer is furthermore entitled to produce another reproduction and distribute this together with the respective custom software, and to grant third parties the rights pursuant to this item 5.2.2.3 with the exception of the sublicensing, distribution and reproduction rights.

Instead of the tool\* utilized by the Contractor, the Contractor may give the Procurer a reduced version of the tool\*, granting the Procurer the rights stated under this item 5.2.2.3 if the custom software can be edited and redesigned just as well through the use of such.

The Contractor is not obligated to provide the tool\* if the Contractor demonstrates that the custom software can be edited and redesigned just as well using a different tool\* available on the market as with the tool\* utilized by the Contractor and informs the Procurer where to source that different tool.

## 5.2.3 Rights to other work results

The Contractor grants the Procurer the rights as per item 5.2.2 to other work results arising/created as part of the IT services.

This applies in particular to the results of installation, customizing\* and/or integration\* work and to generated/prepared logs, reports, expert opinions, presentations, analyses, database works and databases.

## 6 Fault classification

- 6.1 Except as otherwise agreed under the IT Service Contract, the following three fault classifications shall be recognized:
- 6.1.1 A critical fault\* (operation-preventing fault) is in evidence when usage of the IT system is not possible or only possible with major limitations.
- 6.1.2 A major fault (operation-impeding fault) is in evidence when usability of the IT system is substantially limited. A major fault\* is furthermore in evidence when a minor fault\* ultimately leads to a substantial limitation of usability of the overall system.
- 6.1.3 A minor fault\* is in evidence when usage of the IT system is unaffected or only slightly limited.

## 7 Response\* and completion times\*

- 7.1 If no response times\* have been agreed, provision of the IT services is to commence without delay upon receipt of the corresponding notification or upon occurrence of the contractual event within the contractual service hours\*. If completion times\* have not been agreed, the IT service work must be completed within an appropriate period of time.
- 7.2 If the Contractor fails to adhere to the contractual response or completion times\*, the Contractor shall be deemed in delay upon missing the deadline in question without issuance of any warning unless not at fault for missing the deadline.
- 7.3 For IT services performed under a work contract, to document successful completion by the applicable deadline it suffices to issue notification of completion, such as by declaring operational readiness\* in case of a fault\*, for example.

## 8 Replacement items\*

- 8.1 Replacement items\* must be of the same or better quality and in like-new condition at the time of replacement.

- 8.2 Replacement items\* are only to be utilized when a fault\* cannot be otherwise promptly resolved or as necessary to maintain operational readiness\* in conformance with contract. Item 13.5. applies regarding any replacement items\* requiring payment by the Procurer
- 8.3 Where IT services involve the replacement of items, the Contractor transfers ownership of the new items to the Procurer as of the time of replacement unless ownership has already been transferred, such as pursuant to item 3. The Contractor shall provide the Procurer with the information necessary to update the inventory schedule. This information includes particularly the device names and the serial numbers of both the replacement items\* and the items replaced.
- 8.4 At the Procurer's request the Contractor will dispose of the replaced items free of charge. The same applies regarding disposal of packaging for replacement items\*. Disposal must be properly performed. The Contractor shall request notification from the Procurer of whether disposal is desired either while replacing items or immediately thereafter.
- 8.5 The Contractor must specifically notify the Procurer in the event any items to be disposed of contain data carriers when they are replaced, offering to hand over these data carriers prior to their disposal. If the Procurer declines this offer, the Contractor must dispose of the data carriers in such manner as to ensure that the data stored are neither readable nor reconstructable.
- 8.6 Prior to disposal the Procurer must be given opportunity to remove parts of the items in questions.

### **9 Test environment for the IT system**

- 9.1 If and as agreed, system services that cause changes to the IT system shall first be implemented inside a test environment instead of the productive environment of the IT system. The nature and scope of the test environment are as outlined in the IT Service Contract. Except as otherwise agreed, the test environment shall be provided by the Procurer as part of the IT system and receive support from the Contractor as part of the contractual IT services.
- 9.2 Except as otherwise agreed, the Contractor shall conduct testing of the system services within the test environment. The Contractor shall notify the Procurer in advance of such service testing, providing opportunity for the latter's involvement in the testing. The Contractor shall notify the Procurer of the testing results once completed. If testing was successful, in coordination with the Procurer the Contractor then migrates the services to the productive environment of the IT system and declares operational readiness\*.
- 9.3 Except as otherwise agreed, the Contractor must ensure that the test system is properly updated, including in particular that the same software\* is used in the test environment as in the productive environment of the IT system. Except as otherwise agreed, the Contractor must also ensure that sufficient data—current data if necessary—is available in the test environment to ensure meaningful testing results. In coordination with the Procurer, the Contractor may use data from the IT system after this data is anonymized, or other data masking performed if personal data is not concerned.
- 9.4 If errors occur after migration to the productive environment of the IT system, the Contractor shall not be responsible for delays resulting from unknown and unforeseeable discrepancies between results in the test environment versus the productive environment of the IT system as long as the Contractor has properly provided the IT services due.

### **10 Documentation**

- 10.1 The Contractor shall appropriately document the IT services rendered in German and in a commonly used electronic format and shall hand the documentation over to the Procurer. The documentation also includes keeping records of all

versions\* of the software\* licensed and installed\* by the Contractor. The Contractor shall also hand over a list of the serial numbers of and the accompanying documents (such as system certificates) for newly deployed/installed replacement items\*. If the Contractor has conducted a status quo assessment or inventory of the IT system, particularly as per items 2.1 or 2.7, or if the Procurer presents a system description to the Contractor, the Contractor shall update the information/data contained therein. If the Contractor does not keep inventory records himself, the Contractor shall provide the Procurer the information/data required to update such in a suitable format without delay.

- 10.2 If the IT services or warranty work per item 17 requires updating or supplementation of the documentation for the IT system or system components\*, the Contractor shall revise the documentation and produce a consolidated version thereof, to the extent reasonable and legally possible, and if the IT system has a documentation library the Contractor shall update this library with new documentation, except as otherwise agreed. The Contractor is furthermore obligated to state all changes chronologically in a change list. If performing such revision or consolidation is not reasonable or legally possible, the Contractor shall instead be obligated to outline revisions and additions in a separate attachment and update this document on an ongoing basis to reflect future changes. Updates/revisions and additions must be implemented in the same detail and the same informational quality or greater as exhibited by the original documentation.

The documentation is to be handed over in a standard electronic format unless otherwise agreed.

- 10.3 The Contractor grants the Procurer the rights to updated and/or supplemented documentation for the Procurer which were contractually agreed for the original documentation. The following applies regarding newly prepared documentation:

- Except as otherwise agreed, the Contractor grants the Procurer a non-exclusive, irrevocable, non-expiring and transferable right to utilize documentation produced for the Procurer for the interests and purposes of the respective rights holder.
- Except as otherwise agreed, the Contractor grants the Procurer rights to any documentation prepared in accordance with item 5.2.2, including any excerpt/section thereof.

## **11 The Contractor's notification obligations**

- 11.1 The Contractor shall notify the Procurer without delay in text form if a specification or requirement of the Procurer or an activity necessary to fulfill the Contractor's contractual obligations is materially deficient, incomplete, contradictory and/or unperformable as outlined/agreed, or if a solution more economical for the Procurer exists.

The Contractor shall furthermore provide notification in the event

- the rights/licenses granted to the Contractor by the Procurer to provide the services are insufficient or not actually valid to the extent granted
- licenses for the IT system software\* are insufficient for use thereof
- the IT system is not or is no longer technologically up to date or adequate for meeting IT security requirements
- standard software\* of the IT system requires the provision of new software versions\* to keep the IT system operational ready\*
- technologies or processes of the Procurer or the Procurer's employees or contractors relevant to the IT system are no longer technologically up to date or adequate for meeting IT security requirements

- changes to EN, DIN, ISO, or other standards affect the Contractor's performance obligations.

11.2 The Contractor shall be liable for non-fulfillment of these obligations unless it is not reasonably expectable that the Contractor would become aware of the circumstances in question in the course of providing the IT services. The Contractor shall simultaneously notify the Procurer in text form of any apparent consequences thereof, to the extent possible with reasonable effort. The Contractor is not obligated to conduct investigations or checks that are not necessary for performance of the IT services. The Contractor shall notify the Procurer promptly of any cooperation required which is not already scheduled into the parties' coordinated planning so as to avoid compromising performance of contract. The Contractor shall notify the Procurer if the Contractor should find that the Procurer has not promptly or properly cooperated on a matter of significant importance for project success. In such case, the Contractor is obligated to point out the potential consequences of failure to cooperate.

### 12 Staff of the Contractor and subcontractors

- 12.1 The exclusive contact persons for the contracting parties shall be the individual persons designated as such in the contract. The parties must notify each other appropriately in advance of any change in their designated contact persons.
- 12.2 The Contractor shall render contractual performance through the agency of staff who are qualified to do so in accordance with the contractual provisions. Except as otherwise agreed, the Contractor is obligated to exclusively deploy staff to provide the IT services who are willing to sign a confidentiality agreement in accordance with the Act on Confidentiality Agreements for Private Contractors of Public Procurers (*Verpflichtungsgesetz*). The language of communication with the Procurer shall be German unless otherwise agreed.
- 12.3 The Contractor may only replace individuals in contractually agreed key positions with the Procurer's consent. The Procurer shall declare such consent without delay if such replacement is absolutely necessary and the Contractor proposes a qualified replacement individual. Such replacement is mandatory if further deployment is no longer possible. The Contractor may replace staff in non-key positions without the Procurer's consent if the replacement staff have the contractually required qualifications. The Contractor shall bear costs for training replacement staff.
- 12.4 The Procurer can demand that an individual deployed by the Contractor for performance of the contract be replaced for conduct constituting a significant breach of obligation, for insufficient performance or for non-compliance with the contractual staffing requirements, such as if statements made on his/her security clearance declaration per the Security Clearance Act (SÜG) are no longer true or accurate. The Contractor shall bear costs for training replacement staff. The Procurer has the right to demand the replacement of staff deployed for performance of the contract for other reasons. In such case the Contractor may demand reimbursement of reasonable costs thereby incurred, providing binding advance notification of that cost amount which shall be payable if the Procurer then wishes to go ahead with replacement of the person in question.
- 12.5 The Contractor may only deploy subcontractors or replace deployed subcontractors with the express permission of the Procurer. The Procurer shall grant such permission without delay if utilizing the new subcontractor as opposed to the original one would not have affected the contract awarding decision and there are no other objective reasons not to utilize that subcontractor. The Contractor shall bear costs for training a replacement subcontractor. Permission shall be deemed granted for the subcontractors stated in the Contractor's offer.



- 12.6 The Procurer shall communicate requests regarding the IT services to be provided exclusively to the contact person named by the Contractor and shall not issue any instructions to other individuals deployed by the Contractor. The individuals deployed by the Contractor shall not enter into any employment relationship with the Procurer, even in regard to services performed in the Procurer's facilities. The Contractor shall implement organizational measures ensuring that staff deployed by the Contractor for provision of the IT services are subject to the exclusive direction and disciplinary authority of their respective employer. Instructions shall be given exclusively within the framework of the contractual specification of duties.

### 13 Payment, fees

- 13.1 The fixed flat fee is a non-adjustable amount that represents the total compensation payable for contractual performance as per item 1.1, except for any separate compensation which may be contractually agreed for specific performance elements, including potentially a separate flat fee. Travel time compensation, incidental expenses\* and costs for travel, materials and replacement items\* are included in a fixed flat fee\*. No other/further amounts shall be billable by the Contractor unless the contracting parties agree to a change in the services renderable or a price change.

Except as otherwise agreed, contractual flat fees for recurring services shall be due on the 15th of the month after the month in which services were provided. The same applies for any flat base rates or other regularly payable fees agreed.

- 13.2 The following shall apply if time-based billing for IT services rendered is agreed in the IT Service Contract:

- 13.2.1 Except as otherwise agreed, time-based billing agreed is based on time required to render the services. Travel times, travel costs, incidental expenses\* and the provision of replacement items shall be payable/reimbursable as contractually agreed. Waiting periods affecting the Contractor for which the Procurer is responsible shall be compensated as work time. However, any cost savings realized by the Contractor by virtue of non-performance of work/services shall be deductible therefrom as well as any earnings from resulting redeployment of resources, and/or potential earnings missed through intentional non-redeployment. If a cap is agreed as maximum compensation billable on a time basis, the Contractor remains obligated to render performance in full regardless of whether the maximum has been reached. This shall not apply if the Contractor is not at fault for exceeding of the cap limit. The Contractor is obligated however in such case to render contractual performance in full for additional compensation billable on a time basis applying the contractual rates if the Procurer requests such.

- 13.2.2 Except as otherwise agreed, in case of time-based billing for services the Contractor must present, at the Procurer's discretion, either an offer priced at a fixed flat fee or a binding cost estimate for the services to be rendered applying the contractually agreed prices within the agreed response time\*. The type and scope/volume of the services and binding performance deadlines must furthermore be specified. A fee may not be charged for preparation of the cost estimate or offer. The Procurer must either accept or reject the offer without delay. Acceptance of the offer constitutes placement of an order for the offered services.

- 13.3 Fees for IT services billable on a time or expense basis which do not legally constitute *Dienstleistung* services shall be due at the end of the month of their acceptance. The right to demand installment payments\* if the conditions per § 632a of the German Civil Code (BGB) are met remains unaffected. Except as otherwise agreed, fees for services which legally constitute *Dienstleistungen* shall be due monthly in arrears. To receive compensation for work billable on a time basis the Contractor must provide signed work timesheets and documentation of other claimed costs, optionally using the Form 2—IT Service Contract Billing Documentation.

- 13.4 The per-day rate applies as the compensation maximum per calendar day, unless otherwise agreed. Definitions of the terms marked with an asterisk (\*) are provided at the end of the Supplemental Terms & Conditions for the Procurement of IT Services (EVB-IT Service-AGB).

Version 1.0 dated 03/24/2014

The English version of the terms of contract is only for your information.

The German version is legally binding.



- 13.5 A contractual full-day rate may only be billed if a minimum of eight billable hours were worked. If less than eight billable hours were worked, the hours worked are to be billed accordingly as a fraction of the full-day rate. If an hourly rate is agreed, compensation shall be payable pro rate for every hour commenced. Break times must be reported and are unpaid. A half-hour break will be presumed taken for any time period exceeding six hours in duration worked by the Contractor's staff. This shall not apply if the Contractor provides documentation indicating that breaks were not taken.
- 13.6 The Contractor must notify the Procurer if separate payment will be due for replacement items\* and of the amounts in question on the basis of any existing pricing agreements, requesting that the Procurer place a corresponding order before providing such. If specific fees, prices or rates as payment calculation basis have not been agreed, the Contractor may only charge market-typical fees/prices/rates, factoring in any customary discounts.  
Irrespective thereof, the Procurer is entitled to provide replacement items\* himself. Except as otherwise agreed, payment for replacement items\* shall be due at the end of the month in which they are installed/first used.
- 13.7 Compensation owed shall be due for payment 30 days after receipt of a verifiable invoice, except as otherwise agreed. For payments due on a recurring basis, it suffices to send a one-time, verifiable invoice for recurring billing as long as the fee payable does not change.
- 13.8 If price/rate adjustments have been agreed for services, the following shall apply unless other provisions have been agreed. An initial price/rate increase may only be implemented 12 months after the commencement of service provision under the IT Service Contract, and subsequent increases may be implemented no earlier than 12 months after the effective date of the last price/rate increase. Any increase becomes effective three months after the date of announcement thereof. The increase must be appropriate and aligned with market rates, capped at 3% of compensation payable at the time of announcement of the increase.
- 13.9 All stated prices do not include sales tax, which is charged extra at the applicable statutory rate.

**14 Performance delays**

- 14.1 The Procurer may assert delay damages in case of delay. The Procurer may furthermore terminate the IT Service Contract wholly or in part and claim damages in lieu of performance if the Contractor fails to meet an appropriate grace period then set by the Procurer. As an alternative to asserting damages, the Procurer may claim reimbursement of fruitless expenditures in accordance with § 284 of the German Civil Code (BGB). In the cases cited in the statutes § 281 para. 2 and § 323 para. 2 BGB, a grace period does not have to be given.
- 14.2 In case of non-conformity with contractual response and/or completion times\* the Procurer shall furthermore be entitled to charge a contractual penalty at a rate of 0.1% of the annual fees/compensation due per respective instance of delay in which the response and/or completion times\* are exceeded by 25% or more during service hours\*, capped at 1% of annual fees/compensation due. This shall not apply if the Contractor is not at fault for the delay. The total contractual penalty payable for a given contract year pursuant to this clause is capped at 5% of the fees/compensation due for that contract year. Contractual penalty amounts are deductible from the amount of any damages claimed.
- 14.3 Section 341 para. 3 of the German Civil Code (BGB) applies with the limitation that the penalty may only be claimed during the twelve-month period following triggering of the penalty.

**15 Cooperation by the Procurer**

- 15.1 The Procurer is responsible for the cooperative actions stated under items 2.7.1, 2.7.2, 5.1 and 9.3. of the IT Service Contract. The Procurer shall provide necessary information and documents in the Procurer's possession to the Contractor. The Procurer shall promptly give

the Contractor's staff access to the former's facilities and IT infrastructure maintained therein and hand over system component documentation on file as necessary for provision of the services and to fulfill the legal and contractual requirements pertaining to individual personnel (such as security clearance procedures per the Security Clearance Act – SÜG). If the Procurer fails to promptly and fully perform cooperative services despite being instructed by the Contractor to do so, the Contractor may prepare an offer to perform the cooperative services for and instead of the Procurer. Further claims of the Contractor remain unaffected.

- 15.2 The Procurer must report any faults\* or defects, providing any known information of relevance for detection/identification of the issue in question. Unless other procedures for fault reporting have been agreed, such as phone reporting or a ticket system\*, the Contractor shall as a rule utilize the fault reporting model document attached as Sample Form 1. The Contractor must take any reasonable measures to enable fault\* or defect localization and analysis, such as by providing technical information at the Contractor's disposal.
- 15.3 If teleservice\* has been contractually agreed, the Procurer shall provide the necessary technical facilities/equipment which the Procurer is to provide under the teleservice agreement and allow access to the system.
- 15.4 Ensuring proper data backup\* is the responsibility of the Procurer except to the extent data backup\* is part of the services to be provided by the Contractor.

## 16 Acceptance of IT services

- 16.1 Upon completing the performance of IT services on the IT system or system components\*, the Contractor declares operational readiness\*. IT services performed by the Contractor which involve non-minor changes to the IT system are subject to acceptance. Acceptance is not required for minor changes, for which a declaration of operational readiness\* from the Contractor suffices. The declaration substitutes for acceptance in such case. The Contractor has the right to demand that the Procurer make a binding statement of whether an IT service constitutes a non-minor or minor change. If usage of a test environment has been agreed, the services must first successfully pass testing in that environment before operational readiness\* is declared (see item 9). When IT services are subject to acceptance, the Procurer has the right to first have the system or contractual system component\* undergo function testing within an appropriate period of time following receipt of the declaration of operational readiness unless a specific deadline for such is agreed in the contract.
- 16.2 Other services which constitute services under a work production contract (*Werkleistungen*) always require express acceptance.
- 16.3 Acceptance shall be deemed given if the Procurer fails to meet the obligation of accepting the IT service work results within a specific period set by the Contractor.

## 17 Procurer's rights in case of IT service-related deficiencies/defects

- 17.1 The general expiration of claims period for product and title defect claims is 24 months. For title defect claims to custom software licensed/provided as part of the IT services\* this period is 36 months from the date of acceptance of the respective IT service, or from the declaration of operational readiness\* if no date of acceptance is agreed. Superseding the above, the statutory expiration of claims period shall apply in case of malicious concealment of defects by the Contractor. The claims expiration period shall not in such case elapse prior to the end of the periods per sentence 1.
- 17.2 Liability for title defects does not apply to claims for patent or utility model infringement under German law accruing to third parties against the Procurer by virtue of the Procurer using system components\* in a non-member state of the EU or EFTA.

- 17.3 If the Procurer reports a defect prior to elapse of the claims expiration deadline and the parties enter into negotiations as per § 203 BGB, elapse of the claim expiration period is suspended until the Contractor or Procurer should refuse to continue such negotiations. Claims shall expire no earlier than three months after the date of ending of suspension.
- 17.4 The Contractor shall remedy a defect without delay upon notification thereof either by way of repair/follow-up performance or by delivery of a new item at his discretion, observing an appropriate period to do so set by the Procurer. If the defect concerned affects standard software\*, the Contractor may provide a workaround solution\* until licensing of a software version\* in which the defect is eliminated as long as this solution is reasonable for the Procurer. The Contractor's obligation to remedy defects without delay remains unaffected. Item 18 supersedes in case of infringement of third-party rights.
- 17.5 If the Contractor does not successfully conclude efforts to remedy a defect within an appropriate deadline set, the Procurer may
- may set a second grace period for IT services performed under a work contract, declaring that the Procurer will remedy the defect on his own if the deadline is not met. If this deadline is not met, the Procurer is entitled to eliminate the defect independently and claim reimbursement of the expenditures necessary for such.
  - set a further reasonable grace period—if the prerequisite legal conditions for such are met—after which, if unmet, the Procurer may then terminate the IT Service Contract in whole or in part or reduce fees/compensation accordingly.

The Procurer may additionally claim damages or reimbursement of expenditures if the conditions under statutory law are met.

- 17.6 The Contractor shall notify the Procurer immediately of any claims accruing to the Contractor against subcontractors or suppliers for follow-up performance and reimbursement of expenses arising from defect liability or guarantees in connection with individual IT system services which go beyond the above claims and rights accruing to the Procurer, extending a binding offer to the Procurer in such notification to assign these claims unless doing so is validly prohibited in the contract between the Contractor and the respective supplier or subcontractor concerned. The Procurer may accept such assignment at his discretion. Defect or warranty claims accruing to the Procurer against the Contractor remain thereby unaffected.

## 18 Third-party intellectual property rights

If a third party asserts a claim for infringement of intellectual property rights against the Procurer due to usage of the Contractor's IT services, thereby compromising or prohibiting the usability thereof, the Contractor shall have liability as set forth below, irrespective of the rights accruing to the Procurer as per item 17:

- 18.1 The Contractor may at his discretion and at his own expense either alter or replace the performance elements so that intellectual property rights are no longer infringed but they still essentially correspond to the contractual functionalities and performance characteristics in a manner reasonable for the Procurer's purposes or indemnify the Procurer for and from infringement claims by intellectual property rights holders.
- 18.2 If the Contractor is unable to perform alteration or replacement as per item 18.1 or can only do so on unreasonable terms, the Contractor shall be entitled to take repossession of the performance elements, refunding payment rendered for such. The Contractor must notify the Procurer appropriately in advance of any product discontinuation unless doing so is unreasonable from a legal standpoint or on other grounds. Other rights accruing to the Procurer, such as to contract withdrawal, termination, payment reduction and claim damages, remain unaffected.

18.3 The parties shall notify each other respectively without delay of any third-party claims asserted. The Procurer will not recognize any rights asserted for an alleged infringement, and will either leave all litigation and out-of-court settlement negotiations exclusively up to the Contractor or conduct such in coordination with the Contractor. The Contractor shall reimburse the Procurer for expenditures necessary to defend against claims and for other losses incurred if the Procurer conducts or has to conduct defense measures and/or settlement negotiations for legal reasons. In such case the Procurer is entitled to receive an advance in the amount of the estimated defense costs.

18.4 If the Procurer is at fault for the rights infringement, claims against the Contractor are excluded.

### 19 Breach of duty in rendering services

If IT work which constitutes a service (*Dienstleistung*) is performed in a non-contractually conforming manner, the Procurer is entitled to demand that the Contractor perform the service in a contractually conforming manner within an appropriate grace period at no additional expense for the Procurer. Other rights accruing to the Procurer remain thereby unaffected, including particularly the rights to claim damages and to termination.

### 20 Limitation of liability

Unless liable under other contractual clauses, the following shall apply for all statutory and contractual claims for damages and expense reimbursement accruing to the Procurer:

20.1 For slight negligence in breach of obligations, contractual liability shall be limited in all cases to the total contract value\*. In such case however, the minimum liability amount shall be four times the amount of fees/compensation payable for the first contract year. Any agreed reduction for warranty claims shall not be factored into the above calculation of fee amounts.

20.2 The Contractor has liability for data losses only in the amount of expense that would have been necessary to restore the data if the Procurer had regularly and properly backed up the data. This limitation shall not apply if and to the extent data backup\* is part of the services to be provided by the Contractor.

20.3 Claims for lost profit are excluded, except as otherwise agreed.

20.4 The liability limitations do not apply to claims in cases of malice, intent, gross negligence, loss of life or bodily injury/harm, to cases falling within the scope of the Product Liability Act or warranty cases unless provided otherwise under a warranty agreement.

### 21 Contractual term and termination

21.1 If a specific IT Service Contract has no ending date, that IT Service Contract may be terminated, wholly or in part, with six months' notice effective at calendar month-end, subject in all cases to any minimum contract term provided for in the contract. A different termination notice period may be agreed in the IT Service Contract.

21.2 If the IT service performance period has a contractual ending date, the Procurer may only terminate the contract on an early basis, wholly or in part, if the Contractor permanently discontinues use of the IT system or individual system components\*. Termination is then effective at the end of the calendar month in which the midpoint date of the remaining contract term falls. The Contractor is then released from obligation to perform IT services for the system components\* concerned in the termination for the remainder of the contract term. The parties may agree separately on other arrangements superseding the above clause.

21.3 Except as otherwise agreed, § 649 of German Civil Code (BGB) applies mutatis mutandis in such case. Furthermore, either contracting party may terminate the IT Service Contract wholly or in part for cause – without observing a termination notice period – within an appropriate period of time after having become aware of the grounds for

termination. Cause shall be in evidence when circumstances are in place due to which continuation of the agreement is no longer reasonable for the terminating party in view of the overall situation in the given case at hand and of the interests of the contracting parties. If cause is in evidence due to breach of a contractual obligation, termination shall only be permissible if compliance has not been restored by the elapse of a statutory grace period or period set by warning letter, unless a grace period is not required pursuant to § 314 in conjunction with § 323 paragraph 2 of the German Civil Code (BGB). Further termination rights accrue pursuant to items 14.1, 17.5, 18, 24.2 and 25.3.

21.4 Upon ending of the IT Service Contract the Contractor must hand over all system documentation to the Procurer, including any revisions/updates required as per item 10. System documentation includes in particular all documents, reports, license databases and manuals for system components\* created/prepared or edited by the Contractor in performance of contract. If archiving per item 2.7 is a contractual service as part of license management, the corresponding archive must be handed over as well. The Contractor shall furthermore return all items of the Procurer which were not provided to the Contractor on a permanent basis for the purpose of performance of contract. The Contractor shall furthermore hand over all copies of both the object and source code\* of the IT system software\* in the Contractor's possession to the Procurer immediately upon elapse of the expiration of claims period for product and title defects, or otherwise delete these if requested by the Procurer. The Contractor may only use the software\* for defect remedy purposes, except as otherwise permitted under further rights acquired elsewhere by the Contractor.

21.5 Upon demand by the Procurer the Contractor shall be obligated to provide support and resources as reasonable and necessary to enable a new contractor to take over performance of the IT system services. The Procurer will pay the contractual fee rates for the required services/performance elements this involves.

## **22 Changes to services after contract conclusion**

22.1 At any time after contract conclusion the Procurer may request that the Contractor implement changes to the IT services if and as reasonable for the Contractor and within the Contractor's capability. Such change requests may concern services/performance elements already contractually agreed on a one-time or recurring basis or new services/performance elements not yet agreed. Except as otherwise agreed, the change procedure is to be documented using a form as per Model Document 3 - Service Contract Change Procedure.

22.2 The Contractor shall review changes proposed by the Procurer and notify the Procurer within a period of time which is appropriate, particularly in view of the nature and scope of requested changes, of whether such are reasonable and of the reasons why if not reasonable.

22.3 If such a reasonable change in the IT services does not result in significant additional expense for the Contractor, the Contractor shall render the IT services in changed form, notifying the Procurer thereof accordingly. Otherwise, the Contractor shall present the Procurer with a breakdown of the additional expense incurred which is verifiable in detail.

22.4 The following shall apply when a reasonable change in/to the IT services results in significant additional expense:

- If fixed fees/rates apply for the IT service to be changed, such as a flat monthly service fee, the Contractor shall submit a change implementation offer stating how the contractually agreed fee is to be adjusted.
- If the IT service to be changed is billable on a time-plus-expenses basis, the Contractor shall submit a change implementation offer stating the estimated additional cost applying the fees/rates already agreed for the IT service/s in question.

- If the change requires provision of a new service, the Contractor shall, at the Procurer's discretion, submit a change implementation offer on a flat fee basis and/or applying the fee rates already agreed for billing on a time-plus-expenses basis. The change implementation offer must be submitted within an appropriate period of time following requesting of the change. The Procurer must either accept or reject the change implementation offer within an appropriate period of time.
- 22.5 If substantial technical planning is required to prepare a change implementation offer, the Contractor may require an appropriate fee for doing so. In such case the Contractor shall prepare a corresponding offer for planning services, stating the fee. The Procurer must either accept or reject the Contractor's planning services offer within an appropriate period of time.
- 22.6 If agreement is reached regarding a change to performance elements, the IT Service Contract is to be amended accordingly, including particularly the performance description. If agreement is not reached, work shall continue on the basis of the governing IT Service Contract in place. If a change request is reasonable for the Contractor but agreement is not reached because the parties are unable to agree on the adjustment of fees/compensation, the Procurer may demand that the change be implemented regardless. The fees/compensation payable shall be adjusted appropriately in such case.

### 23 Source code\*

- 23.1 Except as otherwise agreed, the Contractor shall hand over to the Procurer the latest version of the source code\* of the custom software\* provided as part of the contractual IT services, updated as of the date of acceptance of the respective IT service, or if acceptance has not been agreed, updated as of the date of declaration of operational readiness\*, and thereafter as of the handover date of every new version\* of the custom software\*. This includes professional source code\* comments and a description of the required system parameters and other necessary information enabling the Procurer's specialist staff to edit the source code\* as independent further development of the custom software\*. Source code is to be handed over in electronic form on a data carrier in a documented process. The Procurer shall receive a license to all versions of the source code\* and to the documentation at the time of their respective production as per item 5.2.1.

The Procurer shall handle the source code\* as confidential\* internal information and only permit accessing by third parties within the limits of proper usage, binding such third parties accordingly to uphold confidentiality. The sentence above does not apply to source code\* of which the Procurer has handed over a previous version to the Contractor for system service purposes.

- 23.2 If escrowing of the source code\* to specific software\* is agreed, this shall be done with the escrow agent agreed in accordance with the escrowing clauses of the IT Service Contract. The escrowing requirement applies to the last changed version of the source code\* for a software version\* licensed by the Contractor under the IT Service Contract, including patches/bugfixes. The Procurer's rights to all versions of the source code\* to custom software\* are as per item 5.2.1. The Procurer has the right regarding all versions of the source code\* of standard software to be escrowed, contingent upon handover, to utilize these for purposes of bug fixing/troubleshooting and maintaining usability, including particularly the right to edit such within the integrated system and produce new executable software versions\* out of such, to which the Procurer is in turn entitled to the same rights as to the originally licensed version of the standard software\*. Rights per the above to the source code\* of custom software\* are granted upon the creation of the respective software program; rights to the source code\* of standard software\* are granted upon licensing of an executable software version\*.

If the provision of new software versions\* is agreed for the escrowed standard software\*, the escrowing obligation pertains to the source code\* of the respective licensed software versions\* provided.

The Procurer shall bear escrowing costs.

## 24 Liability insurance

- 24.1 If and as agreed, upon conclusion of the IT Service Contract the Contractor shall provide documentation to the Procurer of holding industrial liability insurance that is market-typical in terms of limits and scope, or a comparable insurance policy issued in an EU member state.
- 24.2 The Contractor shall maintain such insurance coverage until the IT Service Contract has ended and all defect liability claims have expired. If the Contractor fails to meet this obligation, the Procurer shall be entitled, given continuing non-compliance after elapse of an appropriate grace period, to terminate the IT Service Contract if continuing the contract is no longer reasonable. Further claims accruing to the Procurer, including damage claims in particular, shall remain thereby unaffected.

## 25 Data protection, confidentiality, security

- 25.1 If the Contractor collects, processes or uses personal data under a contract, the Contractor shall upon demand by the Procurer conclude a data processing agreement that conforms with applicable laws.
- 25.2 The Contractor shall ensure that all individuals the Contractor deploys for processing or fulfillment of the IT Service Contract act in compliance with applicable data protection laws. The signed agreements to uphold data privacy required under data protection law must be obtained no later than the point of initial commencement of work, and these must be presented to the Procurer upon request.
- 25.3 The Procurer may terminate the IT Service Contract wholly or in part if the Contractor culpably fails to fulfill the obligations per items 25.1 and 25.2 within an appropriate grace period to be set, or violates data protection regulations with intent or gross negligence. If violations of obligations per the above concern IT services renderable on a recurring or ongoing basis, right of service termination applies instead of right of withdrawal.
- 25.4 The parties are obligated to uphold confidentiality regarding all confidential information and business and operational secrets which they receive in connection with the contractual relationship, and shall not in particular disclose such to third parties or utilize such for any purposes other than the contractual purposes. The sharing of information on the experiences the Procurer has had with and between organizations in the public sector remains unaffected, as well as information necessary to fulfill statutory obligations.
- 25.5 Confidential information is information which a reasonable third party would deem worthy of protecting or is designated as confidential. This may include information which became known during a verbal presentation or discussion. Confidential information is exclusively to be used to fulfill obligations under the IT Service Contract. Confidentiality obligations do not apply to information previously and legally known to the parties or which becomes known outside the IT Service Contract without breach of a confidentiality obligation.

## 26 Rights of retention

The Contractor shall have no rights of retention nor rights to refuse performance unless the underlying counterclaims are undisputed by the Procurer or have been upheld by legal judgment.

## 27 Arbitration

The contracting parties may agree that any unresolvable disputes arising in the course of or in connection with contract fulfillment shall be brought before an arbitration tribunal with the aim of achieving a full or partial and temporary or permanent resolution in accordance with the panel's rules of arbitration. The parties to the IT Service Contract can only validly agree to arbitration if the arbitration tribunal in question is specifically named and is actually active in arbitrating such disputes. To allow arbitration the contracting parties mutually waive the right to invoke expiration of claims regarding



any claims connected with the matter in dispute during a period running from the date of arbitration filing until one month after ending of the arbitration proceedings. The expiration of claims period shall be suspended during this period of waiver.

**28 Text form**

Except as otherwise provided, communications and declarations relating to the contract must be made in text form, at a minimum. For fault reports and complaints, entry in a ticket system suffices.

**29 Choice of law**

The law of the Federal Republic of Germany shall govern. Conflict of laws conventions providing for applicability of a differing body of law and the United Nations convention on Contracts for the International Sale of Goods (CISG\*) are disappplied.

## Terms and definitions

<b>Installment payment</b>	Partial payment toward the total fee/compensation prior to the due date thereof. Entitlement to render payment in installments may be agreed in the IT Service Contract.
<b>Contract value</b>	The contract value is the total amount of all payable fees/compensation.
<b>Operational readiness</b>	A state or status in which the IT system can operate free of functional errors or faults.
<b>CISG</b>	United Nations Convention on Contracts for the International Sale of Goods
<b>Customizing</b>	Modification of system components* that does not affect source code.
<b>Data backup</b>	Data backup includes all technical and organizational measures taken to ensure the availability, integrity and consistency of data and software* stored on the IT system which is used for processing.
<b>Completion time</b>	Period of time within which the Contractor must successfully complete IT service work. This period begins upon receipt of a corresponding notification or occurrence of a contractual event during the contractual service hours* and runs exclusively during the contractual service hours*. For reports received outside of contractual service hours*, the completion time* period starts running at the start of the next service hours* period.
<b>Replacement items</b>	Generic term for spare/replacement system components*, parts*, wearing parts* and consumables*.
<b>Replacement system component</b>	A replacement system component is a new system component* that replaces a defective system component*.
<b>Replacement part</b>	A replacement part is a part which is installed to replace a defective part of a system component* to restore the component's original functionality.
<b>Custom software</b>	Software programs, program modules, tools etc. plus related documentation created by the Contractor to meet the requirements of the Procurer in fulfillment of contract. This includes modifications to standard or custom software* on the source code level. This does not include customizing* however or standard software* modifications which are integrated as standard

<b>Integration</b>	Any and all measures necessary for integrating the respective hardware and software* into the contractual system environment*
<b>Copying and usage restrictions</b>	Measures limiting the ability to copy and/or use a system component*.
<b>Incidental expenses</b>	Expenditures of the Contractor which are necessary for the performance of services which are neither travel costs nor costs for replacement
<b>Object code</b>	The intermediate output of a source code* compiler or translation procedure executed by a software program.
<b>Patch</b>	Temporary measure to fix a defect or fault* in the software* that does not involve altering the source code*.
<b>Software version</b>	Term used herein to refer to separate releases/versions* of software as well as related patches*, updates* and upgrades*.
<b>Source code</b>	Coding of a software program in the respective programming language.
<b>Response time</b>	Period within which the Contractor must commence IT service work. This period starts running upon receipt of the corresponding report or occurrence of a contractual event within the contractual service hours* and runs exclusively during the contractual service hours*. If a notification is received or the contractual event occurs outside of the contractual service hours, the response time* period starts upon commencement of the next service hours* period following thereupon.
<b>Release/version</b>	A new developmental stage of software* that exhibits significant differences vis-a-vis the previous release or version in terms of functionalities or data spectrum (e.g. from 4.5.7 up to 5.0.0).
<b>Malware</b>	Software* which has undesired functionalities not agreed with the Procurer and is designed at a minimum to jeopardize or compromise the availability of data, resources, services or the confidentiality or integrity of data, such as viruses, worms and Trojan horses.
<b>Service hours</b>	The hours within which the Procurer is entitled to provision of the services the Contractor has contractually agreed to perform.

<b>Software</b>	Computer programs in general, which may be standard software* or custom software*.
<b>Standard software</b>	Software programs, program modules, tools etc. (including the associated documentation) developed by the Contractor to meet the needs of many different customers in the marketplace, rather than being specifically developed for the Procurer.
<b>Fault</b>	A circumstance compromising the usability of an IT system or system components* for the contractually agreed purposes, or for the intended or otherwise customary purposes in the absence of such agreement. The existence of a fault is irrespective of statutory liability accruing to any party and of whether the compromising circumstance was already in evidence at the time of acceptance or of original delivery/performance.
<b>System component</b>	A component or element of the system, such as hardware or software*, including new software versions* licensed under the contract, but excluding patches.
<b>System environment</b>	The technological, spatial and technical operational environment of the IT system, consisting of hardware, software*, communication systems/services and the supply equipment necessary for operation of the IT system.
<b>Teleservice</b>	Service provided via technical telecommunications equipment from a location outside the place where the IT system is operated.
<b>Ticket system</b>	A trouble ticket or ticket system* is an IT system for handling incident reports and inquiries. These are categorized, confirmed by opening of a ticket and processed to answering the question or resolve the issue concerned. Processing status can be followed and monitored.
<b>Workaround solution</b>	A temporary solution for working around a defect or fault*.
<b>Update</b>	Issuance of an incremental new software version (e.g. from version 4.1.3 to 4.1.4) in which multiple faults are resolved and bugfixes are bundled together with minor functional improvements and/or adjustments to the software*.
<b>Upgrade</b>	Issuance of a non-incremental new software version (e.g. from version 4.1.3 to 4.2.0) in which multiple faults are resolved and bugfixes are bundled together with significant functional improvements and/or adjustments to the software*.
<b>Consumables</b>	Consumables are elements of system components* which

are used up and consumed within the useful life of the system component\* through the proper operation thereof.

## **Wearing parts**

Wearing parts are parts of system components\* which lose functionality in the course of their proper usage within the useful life of the system components. A defect is only in evidence if a wearing part loses its functionality before the end of its own useful life.

## **Version/Release**

See Release/Version\*.

## **Pre-existing elements**

All elements

- of custom software\* and
- modifications to standard software\* made on the source code level which are not adopted as standard

which the Contractor or a third party has developed independent of this contract.

## **Tool**

An aid useful for software\* development, editing and support.