

**Supplemental Terms & Conditions for
Hardware Purchasing
– EVB-IT Kauf-AGB –**

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1 Agreement purpose

- 1.1 The Terms & Conditions below govern the purchasing and delivery of hardware.
- 1.2 Hardware installation* is the responsibility of the Procurer except as agreed otherwise. If hardware installation* or pre-installation* of operating system software is agreed, these services are included within the scope of 'delivery'.

2 Nature and scope of the performance elements

- 2.1 The Contractor sells the hardware to the Procurer on the terms outlined in the contract, and transfers ownership thereof to the Procurer upon delivery of the respective hardware products.
- 2.2 The Contractor assumes responsibility for the disposal/recycling of packaging upon request by the Procurer, and also of the delivered hardware or elements thereof at the end of their respective useful lives as required by law, at no charge, except as otherwise agreed (a contractual disposal fee, for example). Disposal/recycling must be properly performed. The Contractor must perform disposal in such fashion as to ensure that stored data are neither readable nor restorable. The Procurer is entitled to remove hardware elements prior to their pickup for disposal.
- 2.3 Hardware documentation must be in German and delivered in printed or printable form, except as otherwise agreed.
- 2.4 The Contractor shall deliver the hardware free of malware*, e.g. in provided drivers or firmware. It must be verified by suitable means at an appropriate time prior to delivery that this is the case. The Contractor declares that such verification yielded no indications of malware* being present. This provision shall apply to all hardware provided, even if provided on a temporary or advance basis z.B. for testing purposes.
- The Contractor shall furthermore ensure that hardware deliverable by the Contractor is free of functionalities which pose a risk to the integrity, confidentiality or availability of the hardware, other hardware or software or data, thereby breaching the confidentiality or security interests of the Procurer, such as
- the undesired storing or transferring of data
 - the undesired alteration/manipulation of data or process logic, or
 - the undesired inputting of data or expansion of functionalities
- An action triggered by a functionality is undesired when the action was neither required by the Procurer per the performance specifications nor by the Contractor per a detailed provided description of the action and its effects, nor expressly authorized by the Procurer on an exceptional basis ("opt in").
- 2.5 If hardware installation* by the Contractor is agreed, this shall be performed on the delivery date unless otherwise agreed.
- 2.6 If pre-installation* of operating system software is agreed, installation shall be provided in accordance with the respective manufacturer specifications, except as otherwise agreed.
- 2.7 The Contractor shall inform the Procurer of any usage restrictions* potentially limiting usability of the hardware.
- 2.8 If the hardware is subject to export control regulations, the Contractor shall include an advisory thereof in the contract.
- 2.9 It is the Contractor's responsibility to ensure proper data backup*.

3 Staff of the Contractor and subcontractors

- 3.1 To provide delivery and any services, the contractor shall utilize staff who are qualified in accordance with applicable contractual provisions. Except as otherwise agreed, the Contractor is obligated to exclusively deploy staff to provide any on-site services required 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.
- 3.2 The Contractor may only deploy subcontractors or replace deployed subcontractors with the express permission of the Procurer. Permission may not be withheld without due cause. The Contractor shall bear costs for training a subsequently deployed subcontractor. Permission by the Procurer shall be deemed granted for the subcontractors stated in the Contractor's offer.

4 Payment, fees

- 4.1 Payment shall be due upon delivery of the hardware. Accordingly, partial payment shall be due upon partial delivery, as agreed.
- 4.2 Payment shall be due within 30 days of receipt of a verifiable invoice at the contractual invoicing address. Sales tax is charged extra on all stated prices at the applicable rate.

5 Performance delays

- 5.1 The deadlines for delivery of hardware, including any partial deliveries, are stated in the respective contract. In case of delays for which the Contractor is not responsible, the affected deadlines are to be moved back accordingly. Other claims accruing to the parties are thereby unaffected.
- 5.2 The Contractor shall be in default of performance if a deadline is not met. This shall not apply if the Contractor is not at fault for the delay. The Procurer may assert delay damages in case of delay. The Procurer may furthermore withdraw from the contract and demand damages in lieu of performance if the Contractor fails to meet a 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.
- 5.3 If a deadline is missed by more than seven calendar days, the Procurer shall be entitled to claim a contractual penalty of 0.2% of the total payment due for every calendar day of delay on the part of the Contractor, except as otherwise agreed. Sentence 1 applies regarding missed partial performance deadlines as well. In such case the contractual penalty amount is calculated by applying the percentage to the portion of the total payment due for the partial performance elements concerned. The total contractual penalty due pursuant to this clause is capped at 5% of the total payment due. The amount of any contractual penalties paid is deductible from the amount of asserted damage claims.
- 5.4 Superseding § 341 para. 3 BGB, the respective contractual penalty amount may be asserted up until payment in full is rendered for the respective performance element.

6 Place of fulfillment, passing of risk, shipping

- 6.1 The place of fulfillment shall be that of the Procurer's location, except as otherwise agreed.
- 6.2 Risk of accidental destruction/loss/damage/deterioration passes upon completion of delivery.
- 6.3 Except as otherwise agreed, the Contractor shall bear shipping and packaging costs.
- 6.4 The signing of a delivery note or similar confirms only that the hardware was physically delivered to a place within the Contractor's sphere of control, not that the delivery was complete or the hardware free of defects.

7 Procurer's rights in case of defects (warranty)

- 7.1 The Contractor agrees to deliver performance elements free of either material or title defects. Claims for material and title defects expire 24 months after delivery, except as otherwise agreed. The statutory claim expiration period shall apply to claims for any material or defects which the Contractor has maliciously concealed. The claim expiration period shall not in such case elapse prior to the end of the period per sentence 1.
- 7.2 The Procurer must report any defects, providing any known information of relevance for detection/identification of the defect in question. Unless differing procedures should be agreed for problem reporting, the Procurer shall as a rule utilize the problem reporting form (see Sample Form 1). If, in an exceptional case, a problem is reported only by phone or verbally without advance agreement thereupon, the Procurer must document the problem subsequently using the form.
- 7.3 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.
- 7.4 The Contractor must remedy reported defects without delay and within an appropriate grace period to be set by the Procurer. Except as otherwise agreed, the Contractor shall decide at his discretion whether to remedy a defect by way of repair or replacement with a new item. This decision is to be made respecting the interests of the Procurer, and must be reasonable for the Procurer. Item 8 supersedes in case of infringement of third-party rights. Pursuant to § 439 para. 2 BGB, the Contractor bears costs necessary for subsequent performance, including particularly transport, transport-related, labor and materials costs. If subsequent performance is rendered by way of replacement delivery, the Contractor's claim to compensation for usufruct from the original item is disappplied. If the hardware contains data of the Procurer, the Procurer may retain all or part of the defective hardware instead of returning it (e.g. data carriers), paying the Contractor fair value for such (factoring in the defect).
- 7.5 If response* or restoration times* are agreed but service hours are not agreed, the service hours shall be Monday to Friday from 8:00 a.m. to 5:00 p.m. (excluding official holidays at the place of fulfillment).
- 7.6 If the Contractor does not successfully finish work to remedy the defect within a grace period set, the Procurer may either set a second grace period for the Contractor after the fruitless elapse of which the Procurer may reduce payment appropriately or withdraw from the contract, wholly or in part. Withdrawal from the contract on the basis of a non-significant defect is excluded, however.
- 7.7 The Procurer may additionally claim damages or reimbursement of expenditures if the conditions per § 437 no. 3 of the German Civil Code (BGB) are met.

8 Third-party intellectual property rights

- 8.1 If a third party asserts a claim for infringement of intellectual property rights against the Procurer due to usage of the performance elements provided, 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 7:
- The Contractor may 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.
 - If the Contractor is unable to ensure subsequent fulfillment or is only able to do so under unreasonable conditions, the Contractor shall be entitled to repossess the performance elements concerned for reimbursement of payment rendered for those elements. The Contractor must grant the Procurer an appropriate run-out period, unless such is unreasonable from a legal standpoint or on other grounds. Other rights accruing to the Procurer, such as to contract withdrawal, reduce payment and claim damages, remain unaffected.
- 8.2 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.
- 8.3 If the Procurer is at fault for the rights infringement, claims against the Contractor are excluded.

9 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:

- 9.1 For slight negligence in breach of obligations, amounts due shall be limited to the total payment due under the contract in all cases. If the total payment due is less than € 50,000.00 in amount, the liability limit is still € 50,000.00.
- For property damage resulting from slight negligence, superseding sentences 1 and 2 the Contractor's liability shall be limited to € 500,000.00 per loss event and to € 1,000,000.00 in aggregate.
- 9.2 Liability for delays resulting from slight negligence shall be limited to 50% of the liability caps per item 9.1. The Contractor's liability shall not however exceed the contractual liability caps per item 9.1 for any further breaches of obligations resulting from slight negligence.
- 9.3 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.
- 9.4 Claims for lost profits are excluded, except as otherwise agreed.
- 9.5 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.

10 Data protection, confidentiality, security

- 10.1 If the Contractor is to collect, process or use personal data under a contract, the parties shall conclude a data processing contract that meets the applicable legal requirements.
- 10.2 The Contractor shall ensure that all individuals the Contractor deploys for processing or contract fulfillment act in compliance with applicable data protection laws. Documentation must be provided to the Procurer upon request of fulfillment of the requirement under data protection law to bind such individuals to uphold data confidentiality.
- 10.3 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 the Procurer's statutory obligations. The obligation to uphold confidentiality regarding business and operational secrets disclosed on the basis of the contract remains unaffected.
- 10.4 The Contractor is only authorized to disclose confidential information to subcontractors when the Procurer has expressly approved the use of those subcontractors, and only if the confidential information concerned is necessary for the provision of the respective performance elements by the subcontractor ("need-to-know" basis). This only applies if the subcontractor has first signed an agreement with the Contractor to uphold confidentiality to at least the same extent as the Contractor has agreed to uphold confidentiality vis-a-vis the Procurer. In that agreement, the subcontractor must be barred from disclosing confidential information unless the Procurer has expressly agreed to its disclosure in advance.
- 10.5 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 contract. Confidentiality obligations do not apply to information previously and legally known to the parties or which becomes known outside the contractual framework without breach of a confidentiality obligation.

11 Rights of retention

The Contractor shall have neither rights of retention nor rights to refuse performance unless the underlying counterclaims are undisputed by the Procurer or have been upheld by legal judgment.

12 Text form

Except as otherwise provided, communications and declarations relating to the contract must be made in text form, at a minimum.

13 Choice of law

The law of the Federal Republic of Germany shall govern; the UN Convention on Contracts for the International Sale of Goods (CISG*) is disappplied.

Terms and definitions

Setup	Unpacking and setup of the hardware, connecting to an electrical power source at the Procurer's facilities and conducting of device testing.
CISG	United Nations Convention on Contracts for the International Sale of Goods.
Data backup	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 purposes.
Usage restrictions	Measures which restrict usability.
Response time	Period within which the Contractor must commence work to remedy a defect. This period starts upon receipt of a defect notification during the contractual service hours and runs during the contractual service hours.
Malware	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.
Teleservice	Services utilizing technical telecommunications equipment located outside of the place where the hardware is deployed.
Restoration time	Period of time within which the Contractor must successfully conclude work to remedy a defect. This period starts upon receipt of a defect notification and runs exclusively during the contractual service hours.
Pre-installation	Installation of software on the hardware prior to delivery of the latter.