

**Supplemental Terms & Conditions for
the Permanent Licensing of Standard Software for a One-
Time Fee**

– EVB-IT Überlassung-AGB (Contract Typ A) –

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– EVB-IT Überlassung-AGB (Contract Type A) –

1 Agreement purpose

- 1.1 The provisions outlined below govern the permanent licensing and usage of standard software* for a one-time fee (sale).
- 1.2 These terms do not apply to additional services such as installation, integration, customizing or modification of standard software* on the source code level to meet the needs of the Procurer.

2 Nature and scope of the performance elements

- 2.1 The Contractor licenses the standard software* on the terms outlined in the agreement.
- 2.2 The standard software* documentation must be in German and delivered in printed or printable form, except as otherwise agreed.
- 2.3 The Contractor shall license the standard software* free of any malware*. At an appropriate time prior to delivery it must be verified via scanning software that this is the case. The Contractor declares that such scanning yielded no indications of malware* being present. This provision shall apply to all hardware provided, even if provided on a temporary or advance basis, such as for testing purposes. The Contractor shall furthermore ensure that standard software* deliverable by the Contractor is free of functionalities which pose a risk to the integrity, confidentiality or availability of the standard software*, other software, hardware 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 Any activity is undesired which was neither required by the Procurer in the service specifications nor otherwise in connection with service performance, nor offered by the Contractor, providing a specific description of the activity and its manner of functioning, nor expressly authorized by the Procurer in a specific case ("opt-in").
- 2.4 The Contractor shall notify the Procurer of any copying or usage restrictions* that could compromise proper contractual usage of the standard software*.
- 2.5 If the standard software* is subject to export control regulations, the Contractor shall include an advisory thereof in the contract.
- 2.6 It is the Contractor's responsibility to ensure proper data backup.

3 Licenses

- 3.1 Barring other intended usages agreed in the contract, the Contractor grants the Procurer, upon contract conclusion,
- a non-exclusive license that is
 - transferable, applying the limitations per item 3.3
 - non-expiring, irrevocable and non-terminable
 - geographically unlimited
 - and usable in any hardware or software environment

to use the standard software*, which includes in particular the permanent or temporary storage thereof and the loading, displaying and running of the software. This shall also apply regarding any necessary copies.

The right to use the standard software* in any hardware or software environment whatsoever does not affect the limitation of defect claims per item 7.4.

- 3.2 The Procurer is obligated to implement appropriate technical and organizational measures so as to ensure proper usage of the standard software*.
- 3.3 If the Procurer exercises his right to transfer the license, the Procurer must bind the third party in question to uphold the Procurer's contractual obligations regarding the content and scope of rights of use. Upon such transfer to a third party, the Procurer shall no longer have rights of use. Copies of the standard software* not provided to third parties must be deleted. The Procurer is not obligated however to delete any copies of the standard software* made as part of proper data backup. The Procurer is furthermore entitled to retain and use a copy exclusively for verification and archiving purposes, except as otherwise agreed.
- 3.4 The Procurer is entitled to make a copy of the standard software* for backup purposes. The copying of the software* for its intended contractual use or for distribution of the standard software* for the purpose of proper data backup constitute intended contractual usages.
- 3.5 If licenses applicable to a hardware and/or software environment defined in the contract contain limitations, any usage deviating therefrom requires the Contractor's approval. If a hardware and/or software environment defined in the contract is non-functioning, until functioning is restored, its usage in a different environment is allowed even without the Contractor's approval.
- 3.6 The Contractor agrees not to convert the standard software* into different code or change the code unless doing so is permitted by law.

4 License fee

- 4.1 Payment of the license fee shall be due upon delivery of the standard software* 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 standard software*, 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 in the amount of 0.2% of the due license fee 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 partial license fee due for the portion in question. Thus sum total of contractual penalties payable pursuant to this clause shall not exceed 5% of the license fee.

Contractual penalty amounts are deductible from the amount of any damages claimed.

- 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 license.

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 costs for shipping, packaging and provision for downloading.
- 6.4 The signing of a delivery note or similar confirms only that the standard software* was physically delivered to a place within the Contractor's sphere of control, not that delivery was complete or that the delivered product is free of defects.

7 Procurer's rights in case of defects to the standard software* (warranty)

- 7.1 The Contractor agrees to deliver the standard software* free of product and title defects.
- 7.2 Claims for material and title defects expire 12 months after delivery, except as otherwise agreed. Upon the elapse of the first 12 months of the expiration of claims period, the Contractor may no longer withdraw from the contract on the basis of a defect affecting the standard software*. The statutory claim expiration period shall apply to claims for any material or defects which the Contractor has maliciously concealed. The claims expiration period shall not in such case elapse prior to the end of the periods per sentences 1 and 2.
- 7.3 Warranty claims do not accrue for system components* which the Procurer or a third party have modified/alterd without the Contractor's approval. This shall not apply if the Procurer demonstrates that such modification/alteration did not cause the defect reported or the Procurer merely installed new software versions* made available by the maker of the standard software*.
- 7.4 Warranty claims furthermore do not accrue for standard software* used by the Procurer outside the hardware and software environment unless the Procurer demonstrates that such usage does not cause the reported defect.
- 7.5 The Procurer must report any defects, providing any known information of relevance for detection/identification of the defect in question. Unless other fault reporting procedures are agreed, the Procurer shall use Form 1 as standard procedure for fault reporting.
- 7.6 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.
- 7.7 The Contractor grants the Procurer license to new software versions* of an identical type and scope as for the delivered standard software*.
- 7.8 The Contractor must remedy reported defects without delay and within an appropriate grace period to be set by the Procurer by delivering an updated software version* in which the defect is eliminated. The Contractor may provide a workaround solution* for as long as such is reasonably acceptable for the Procurer. The Contractor's obligation to remedy a defect within an appropriate period of time shall remain unaffected if and when such should not be reasonably acceptable. 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.

- 7.9 If the Contractor does not successfully finish work to remedy the defect within an appropriate 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.
- 7.10 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 standard software*, 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 render follow-up performance 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 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 or to reduce payment or 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, contractual liability shall be limited in all cases to the amount of the license fee. If the license fee* is less than €50,000.00, the liability limit is €50,000.00.
- 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. This limitation shall not apply if and to the extent data backup is part of the services to be provided by the Contractor.

- 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 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 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.
- 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

CISG	United Nations Convention on Contracts for the International Sale of Goods.
Download	Successful storage of the standard software* on the Procurer's systems
Copying and usage restrictions	Measures limiting the ability to copy and/or use standard software*.
Patch	Measure to fix a defect or fault in the standard software* that does not involve altering the source code*.
Software version	Term used herein to refer to separate releases/versions* of software as well as related patches*, updates* and upgrades*.
Source code	Coding of a software program in the respective programming language.
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.
Release/version	A new developmental stage of a standard software* program which exhibits significant differences vis-a-vis the previous release or version in terms of functionalities or data spectrum (e.g. from 4.5.7 to → 5.0.0).
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.
Standard software	Software programs, program modules, tools etc. which are developed to meet the needs of many different customers in the marketplace rather than being specifically developed for the Procurer by the Contractor.
Workaround solution	A temporary solution for working around a defect or fault affecting the standard software*.
Update	Multiple bug fixes of defects and/or faults bundled within a single release, potentially including minor functional optimizations and/or standard software* modifications (e.g. from version 4.1.3 → to 4.1.4).
Upgrade	Multiple bug fixes of defects and/or faults bundled within a single release, potentially including non-minor functional optimizations and/or standard software* modifications (e.g. from version 4.1.3 → to 4.1.0).