

**Supplemental Terms & Conditions for the
Temporary Licensing of Standard Software
– EVB-IT Überlassung Typ B –**

1 Agreement purpose

The terms outlined below govern the temporary licensing and usage of standard software* as amended within the framework of the respective agreement.

These terms do not apply to additional services such as installation*, integration*, configuration* or modification of standard software* 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 standard software* has been scanned by an up-to-date anti-virus program at an appropriate point in time prior to its respective delivery to the Procurer. The Contractor declares that this scanning yielded no indications of the standard software containing any malware*.
- 2.4 It is the Contractor's responsibility to ensure proper data backup*.

3 Licenses

- 3.1 The standard software* is copyright-protected.
- 3.2 The standard software* is licensed to the Procurer for proper usage during the contractual period stated in the agreement. The scope of proper usage and the nature and scope of the licenses* are outlined in the agreement. Except as otherwise provided in licensing clauses in the agreement, the Contractor grants the Procurer licenses* for the standard software* as follows:
 - a non-exclusive license*
 - a license* for the contractual system environment per the agreement
 - a non-transferable license*
 - a temporary, withdrawable license*
- 3.3 The Procurer agrees to implement appropriate technical and organizational measures so as to ensure proper usage of the standard software*.
- 3.4 The Procurer is entitled to make a copy of the standard software* for backup purposes. Proper usage requires, among other things, making copies of the standard software* as part of proper data backup.
- 3.5 The Contractor's consent is required for any usage within a different system environment* other than as agreed. If a system environment* defined in the agreement is not operable, usage within a different, suitable system environment* is temporarily permitted until the fault is resolved, for which the Contractor is not entitled to additional payment.
- 3.6 The Contractor agrees not to convert the standard software* into different code unless doing so is permitted under copyright law.
- 3.7 The Contractor shall notify the Procurer of any copying or usage locks contained in the standard software* of which the former is aware.

4 License term, termination

- 4.1 The licensing term for the standard software* is defined in the agreement. If the agreement does not provide for an ending date for the licensing period, the standard software* license may be terminated with three months' notice effective at the latter of calendar month-end or the end of any minimum agreement term* provided in the agreement. The agreement may provide for a different termination notice period.
- 4.2 A serious infringement by the Procurer of the contractual license terms* or of intellectual property rights* of the rights holder constitutes grounds for the Contractor to terminate the licenses* to the standard software* in question for cause. The Contractor must however first issue a warning letter, setting an appropriate grace period.
- 4.3 If the standard software* is subject to the Export Administration Regulations issued by the Bureau of Industry and Security of the US Department of Commerce, the Contractor must state a corresponding advisory in the agreement. The Contractor can terminate the licenses* to the standard software* in question for cause in case of violation of such export regulations by the Procurer.
- 4.4 In case of termination, the Procurer is obligated to either delete the original standard software* concerned in the termination, including documentation and any existing copies or return these to the Contractor. Upon request by the Contractor the Procurer shall issue a confirmation of such deletion. The Procurer is entitled to retain a copy of the standard software* for verification and archiving purposes if such is provided for in the agreement.
- 4.5 Other applicable laws remain unaffected.

5 Payment, fees

- 5.1 The agreement terms specify particularities concerning the fee amount, payment due date and invoicing. Payment shall not be due until the Procurer has received a verifiable invoice.
- 5.2 If the agreement has a payment conditionality clause, the following shall apply in the absence of other governing provisions:
The fee amount may not be increased within the twelve-month period following agreement conclusion. Further increases are likewise only possible following the elapse of further respective twelve-month periods. The Contractor is to be notified of any increase, which shall not be effective until three months after receipt of such notification, at the earliest. To be effective, the Contractor must state the amount payable as a general list price and this price must be charged to other buyers as well.
If the conditions are met allowing a price increase and a price increase of greater than 5% versus the previously valid price is to be implemented, the Procurer is entitled to terminate the agreement for the standard software* subject to the price increase within the announcement period, effective on or after the effective date of the new price.

6 Performance delays

- 6.1 In case of a performance delay, the Procurer may set an appropriate grace period to render performance. Should that grace period expire unfulfilled, the Procurer may withdraw from the agreement, wholly or in part, and claim damages in lieu of performance*.
Upon request by the Contractor, the Procurer must declare whether the Procurer intends to withdraw from the agreement for delayed performance or to demand performance of contract. Such request must be made within the period per item 6.1 sentence 1, appropriately in advance of the elapse of said period. The Contractor remains entitled to deliver performance until the response to such a request has been received. Items 6.2 and 6.3 remain thereby unaffected.
- 6.2 If the Procurer claims damages in lieu of performance* and the agreement does not state a license expiry date, the corresponding payment obligation shall be capped at twice the amount of the monthly fee due for the standard software* concerned. If the agreement states a license expiry date, the corresponding payment obligation shall be capped at 8% of the total fees due for the standard software* concerned.
The Procurer shall have no claims to compensation for lost profits. Any damage amounts applying a flat percentage already paid by the Contractor for delay of performance per item 6.3 shall be deducted.
- 6.3 If the Contractor fails to meet a contractual license deadline per the agreement by more than seven calendar days, for every further day of delay* the Procurer may claim damages for delayed performance in a flat percentage of 5% of the monthly fee due for the standard software* concerned. If the agreement does not state a license expiry date, the corresponding payment obligation shall be capped at twice the amount of the monthly fee due for the standard software* concerned. If the agreement does state a license expiry date, the corresponding payment obligation shall be capped at 8% of the total fees due for the standard software* concerned.
If however the Contractor demonstrates that a lower amount of damages or zero damages were incurred, that amount shall apply.
- 6.4 These limitations of liability do not apply to cases of intent, gross negligence, loss of life or bodily injury/harm.

7 Liability for defects

- 7.1 The Contractor warrants that the standard software* is free of defects which preclude or impair its usability for the contractually agreed purposes. This does not apply if the impairment of usability is insignificant.
- The Contractor shall be liable for ensuring that the standard software* has any special characteristics described in the agreement which are warranted.
- 7.2 The Procurer shall have no warranty claims for standard software* which the Procurer has altered or used in a system environment* other than as stipulated in the agreement, unless the Procurer is able to demonstrate that such usage did not cause the defect reported.
- 7.3 A defect must be reproducible or identifiable for the Procurer to have a claim.
- 7.4 The Procurer must report any defect without delay, stating any pertinent information known and relevant for defect identification on a form similar to Sample 1 – Fault Reporting Form – unless use of a different defect reporting form has been agreed. The Procurer shall take all reasonable steps to facilitate the identification of defects and their causes.
- 7.5 If obligation to remedy defects on the part of the Contractor is not contractually excluded, the following shall apply:
- 7.5.1 At his discretion, the Contractor may remedy a defect by way of either immediate elimination, circumvention or delivery of a new product. The remedying of a defect includes delivery of instructions correcting the documentation in printed or printable form, as necessary.
- The Contractor's obligation to remedy defects pertains to the last respective version of the standard software* accepted by the Procurer.
- The Procurer must accept any new version rolled out for the purpose of avoiding or eliminating defects. The Procurer is not obligated to accept a new version if doing so is unreasonable due to discrepancies in the new version vis-a-vis contractual stipulation in the agreement. If the Procurer does not accept a new version on those grounds, the Procurer's other rights to remedying of defects per item 7.5.2 remain unaffected. If a new version of the standard software* is licensed, the respective version replaced must be erased or handed over to the Contractor upon demand. If a new version of the standard software* licensed to the Procurer has more functionalities or better performance than the contractual version ("upgrade"), the Procurer shall only be obligated to pay a license fee, to be negotiated, if the Procurer wishes to make use of the upgrade. There is no obligation to make use of an upgrade.
- 7.5.2 If the Contractor does not successfully conclude efforts to remedy a defect within an appropriate period of time, the Procurer may set a final deadline for such. If such a final deadline is not fulfilled, the Procurer may demand a commensurate fee reduction or terminate the license agreement for the standard software* in question.
- If a defect is the Contractor's fault, the Procurer may claim damages in addition to being entitled to termination if the statutory conditions for such are met. If the agreement does not state a license expiry date, the corresponding payment obligation shall be capped at twice the amount of the monthly fee due for the standard software* concerned. If the agreement does not state a license expiry date, the corresponding payment obligation shall be capped at 8% of the total fees due for the standard software* concerned.
- 7.6 If obligation on the part of the Contractor to remedy defects has been contractually excluded, the other rights per item 7.5.2 shall remain unaffected.
- 7.7 The limitations of liability per item 7.5.2 do not apply to cases of non-fulfillment of a warranted characteristic, intent, gross negligence, loss of life or bodily injury/harm. The Procurer shall have no claims to compensation for lost profits.

8 Infringement of 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* delivered by the Contractor, thereby compromising or prohibiting the usability of the standard software*, the Contractor shall have liability as set forth below.

The Contractor may at his discretion and at his own expense either alter or replace the standard software* so that intellectual property rights are no longer infringed but it still essentially corresponds to the contractual functionalities and performance characteristics in a manner reasonable for the Procurer's purposes or indemnify the Procurer for and from license fees payable to intellectual property rights holders or third parties for usage of the standard software*.

If the Contractor is unable to appropriately do so, the Contractor shall notify the Procurer accordingly, prohibiting further usage as of a specific point in time. At the Contractor's discretion, the Procurer must either delete the original standard software* including documentation and any existing copies or return these to the Contractor. Claim to payment accrues solely for the period in which the standard software* was usable by the Procurer.

- 8.2 The conditions for liability on the part of the Contractor per item 8.1 are that the Procurer must notify the Contractor without delay of any third-party claims, must not recognize any asserted infringement claim and must either leave the conducting of any out-of-court settlement negotiations to the Contractor or conduct such in coordination with the Contractor. The Contractor shall bear necessary court costs and attorney fees borne by the Procurer for legal defense purposes.

If the Procurer ceases usage of the standard software* in order to minimize damages or for other valid reasons, the Procurer is obligated to notify the third party concerned that cessation of usage does not constitute acknowledgment of any infringement of intellectual property rights.

- 8.3 Claims against the Contractor are excluded for any intellectual property rights infringement for which the Procurer is at fault.
- 8.4 Further claims accruing to the Procurer due to infringement of third-party intellectual property rights* are excluded. This exclusion does not apply to cases of intent, gross negligence, loss of life or bodily injury/harm.

9 Other liability

- 9.1 Liability for delay is exhaustively regulated under item 6, warranty-related liability is exhaustively regulated under item 7 and liability for infringement of intellectual property rights is exhaustively regulated under item 8.

- 9.2 The Procurer and Contractor are furthermore liable to each other for damages for which they are responsible, as outlined below.

- 9.2.1 For property damage: up to EUR 500,000 per claim incident, capped at a total of EUR 1.0 million per agreement.

- 9.2.2 For pecuniary losses: up to the sum of three months of fees payable for the standard software*. Liability for pecuniary losses is limited to EUR 500,000 in total per agreement.

Claims for lost profits are excluded.

The Contractor has liability for data losses only in the amount of the expense necessary to restore data in case of regularly data backup by the Procurer. In cases of slight negligence on the part of the Contractor such liability shall only apply if the Procurer properly conducted data backup* immediately prior to the event that led to data loss*.

- 9.3 The liability limitations per items 9.2.1 and 9.2.2. paragraph 1 do not apply to claims in cases of intent, gross negligence, non-fulfillment of a warranted characteristic, loss of life or bodily injury/harm, nor to cases falling within the scope of the Product Liability Act.

10 Expiration of claims

Claims on the basis of items 6, 8 or 9 shall expire three (3) years from the date of awareness, and in no case later than eight (8) years after licensing.

11 Data protection, confidentiality, security

11.1 The Procurer shall ensure that the Contractor is informed of all relevant matters, beyond the scope of the statutory provisions, which the Contractor needs to know for data protection or confidentiality reasons.

11.2 Except as otherwise provided, prior to handing over any data carrier to the Contractor the Procurer shall ensure that sensitive content thereupon is deleted.

11.3 The Contractor shall ensure that all individuals the Contractor deploys for processing or contract fulfillment 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 documentation thereof must be provided to the Procurer upon request.

11.4 The Procurer may terminate the agreement wholly or in part if the Contractor culpably fails to fulfill the obligations per item 11.3 with reference to the matters per item 11.1 within an appropriate grace period to be set, or violates data protection regulations with intent or gross negligence.

11.5 The Procurer and Contractor 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. This shall also apply to the sharing of information on past experiences between and among public-sector organizations.

12 In-writing requirement

The agreement, amendments thereto and any declaration, communication or documentation obligations relating to the agreement must be executed/fulfilled in written form*, although an additional form may be contractually required as well.

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.

14 Severability

The invalidity of individual provisions of this agreement shall not affect the validity of any other provisions of this agreement. The contracting parties shall cooperate to replace any invalid provision with a valid one which fulfills the original intent between the invalid provision to the closest possible extent.

Terms and definitions

CISG	United Nations Convention on Contracts for the International Sales of Goods
Data backup, proper	Data backup includes all technical and organizational measures taken to ensure the availability, integrity and consistency of systems, including data and software stored on such systems which are used for processing purposes. Proper data backup means actions taken which allow either immediate or rapid restoration, depending on the level of data sensitivity, of systems, data, programs or procedures to their former state following a recognized impairment of their availability, integrity or consistency resulting from a damage-causing event. These actions involve at a minimum the restoration and testing of reconstructability of copies of software, data and procedures in defined cycles and generations.
Data loss	Loss due to deletion/erasure or loss of data integrity and consistency.
Minimum agreement term	The term during which regular termination is not possible.
Rights of use	Rights granted by the licensor to the licensee
Configuration	Adjusting of software settings, generally of standard software, to meet user requirements.
Damages in lieu of performance	An alternative to asserting damages in lieu of performance pursuant to § 284 of the German Civil Code (BGB) is claiming reimbursement of expenditures.
Harmful functionality	A functionality unwanted by the user which can jeopardize the availability of data, resources or services or compromise the confidentiality or integrity of data – either unintentionally or deliberately
In-writing requirement	Requirement pursuant to §§ 126, 126a, 126b, 127 of the German Civil Code (BGB), including simple electronic form.
Intellectual property rights	Patents, industrial property rights, copyright, etc.
Software installation	Enabling the executability of software on specific hardware devices via an agreed procedure.
Software integration	The connecting of different software packages (standard or custom software) to an overarching system through active, process-oriented and automated exchanging of data and information between the formerly separate software packages.
Standard software	Software (programs, modules, tools etc. – including documentation) developed to meet the needs of many different customers in the marketplace rather than specifically developed for the Procurer by the Contractor.
System environment	Technical and administrative usage environment for a system designated in an agreement on which the Contractor has approved use of the standard software.
Day of delay	Every calendar day begun after the Contractor has missed a deadline, representing a delay.