Terms and Conditions for Software Transactions

issued by the Association of the Austrian Electrical and Electronics Industry

1. SUBJECT

1.1 Software

These Terms and Conditions for Software Transactions shall govern legal transactions between business enterprises, namely the delivery of commodities and, mutatis mutandis, the rendering of services.

For the purpose of these terms and conditions software shall mean standard programmes or programmes which are specifically developed or adapted for the needs of a user according Section 40a of the Copyright Act and for the operation or control of electrical and/or electronic equipment or systems including all relevant documentation furnished thereon (see section 3 below).

1.2 Right to use the software

User shall have the non-transferable and non-exclusive right to use the software at the agreed location in compliance with the contracted specification. If software is delivered together with the hardware, the right of use is restricted to the delivered hardware, if it is delivered without hardware, the right is restricted to the contracted type, number and location of the hardware.

All other rights in respect of the software shall be reserved to Licensor. User shall in particular not be entitled to copy or modify the software or make it available to third parties or to use it on hardware other than the hardware contractually specified. Simultaneous use of software at different locations must expressly be agreed upon.

The use of software on hardware other than the hardware covered by the contract in question shall be permitted only under a separate written agreement obtained against payment.

1.3 Additional supplies and services

Additional supplies and services included but not limited to the supplies listed below shall be covered by separate agreement and invoiced at prevailing prices:

- duplication, translation or generation of software as well as supplies under 4.4 below;

- data carriers supplied by Licensor to the extent they are not part of the hardware supplied by him;

- diagnosis and elimination of malfunctions due to faulty handling, operation or use the software or any other circumstances not within the liability of Licensor;

- support in introducing and/or implementing the software and the training of operators, unless covered by the contract;

- improvements, i.e. enhancements offered to simplify operations, to reduce seizure of hardware or to widen range of application of the software.

2. OBLIGATION OF USER

User shall be responsible for

2.1 selecting the software from Licensor´s offer;

2.2 furnishing all information for individual-software development, prior to conclusion of contract;

2.3 using the software and the results obtained thereby;

2.4 safeguarding all rights reserved to Licensor (such as industrial property rights and copyrights including the right to copyright notice) in respect of the software and safeguarding the confidentiality in respect of Licensor´s industrial and business secrets also on the part of User´s employees or persons employed by him to perform any contractual obligation incumbent upon him, and/or on the part of third parties; this obligation shall also apply in cases where the software has been modified or combined with other programmes. This obligation shall survive the termination or expiry of the contract.

3. SOFTWARE SPECIFICATIONS

Standard software specifications shall be made available by Licensor in writing. Licensor shall have the right to modify the software specifications for new versions. The requirements specification for software ordered by User is to be agreed upon in writing by Licensor and by User.

Software specifications shall comprise, but shall not be limited to, documentation concerning

- performance characteristics
- special functions
- prerequisites for the use of hardware and software
- installation requirements
- operating conditions
- operating instructions (User Manual)

4. DELIVERY, RISK AND ACCEPTANCE

4.1 Licensor shall supply User with machine-readable software. Licensor is entitled to supply software version valid at the time of delivery.

4.2 Unless a delivery date has been agreed upon, Licensor shall schedule delivery in accordance with the prevailing delivery times and notify User of the delivery date.

4.3 User shall bear the cost and risk of shipment of software and data carriers.

4.4 If software in the possession of User is damaged or inadvertently erased in whole or in part, Licensor shall replace it to the extent said software is available and Licensor can be reasonably expected to do so, and shall charge User reasonable prices for production and handling as well as shipment and for the data carrier(s) supplied.

4.5 If formal acceptance by User has been agreed, the software shall be made available to User free of charge for use during a test period.

Unless otherwise agreed, the test period shall commence at that time the software is announced to be operational and shall last for a week.

4.6 Software shall be deemed accepted if

4.6.1 User acknowledges conformity with the contractual specifications, or

4.6.2 User fails to give written notice of major defects within the test period, or

4.6.3 User uses the software after the test period.

4.7 Concerning legal consequences in sections 5.1 and 8, time of delivery replaces time of acceptance if no provisions for formal acceptance have been made.

5. WARRANTY, MAINTENANCE AND MODIFICATIONS

5.1 For software in respect of which warranty has not been excluded, Licensor warrants conformity with the specifications valid at the time of delivery of the software, provided that the software is used in accordance with the installation requirements and operating conditions applicable.

The warranty shall comprise

- error identification and
- elimination of errors and malfunctions

during the warranty unless otherwise agreed, the warranty period shall be six months from acceptance in accordance with 4.6 and 4.7 above.

Error identification shall be performed upon notification by User or on account of findings by Licensor.

Errors, i.e. departures from valid specifications resulting in malfunctions shall as a rule be eliminated by supplying new software, unless an error can exceptionally be eliminated by Licensor in situ by modification of the programme.

Elimination of errors shall be conditional upon the error being an error resulting in malfunction, upon the error being reproducible, upon any new versions offered to User free of charge within the warranty period having been installed, upon Licensor receiving from User all documentation and information necessary for eliminating the error and upon Licensor being given access to the hardware and software during normal working hours.

2 The warranty shall not operate for software modified by User or third parties without Licensor's previous written consent even if the error occurs in a part of the software not modified. If it is found during error identification that the case in question is not covered by the warranty or that the error is not due to the software supplied, User shall bear all costs that may have accrued.

3 Licensor does not guarantee that the software functions meet User's requirements, that the programmes selected by User work together, that they work continuously and without errors or that all software errors can be eliminated.

4 If during the warranty period the software fails to conform with specifications in a way giving rise to malfunctions and if Licensor is unable despite sustained efforts to achieve conformity with specifications within a reasonable period so that User cannot use the software, either party may withdraw from the contract immediately against return of all goods and reimbursement of services received.

5 Defects in one or some of the programmes shall not entitle User to withdraw from the contract in respect of the other programmes.

6 Except for claims under 6 below any other warranty claims shall be excluded.

7 If User concludes a software maintenance agreement with Licensor, the latter shall be responsible for the duration of the agreement for

– error identification (see above),

– elimination of errors and malfunctions (see above) and maintenance.

Subject to the stipulation of the maintenance agreement, maintenance shall comprise

– routine adaptation of the software to the state of the art by Licensor without any changes in specifications or functions;

– the adaptation by Licensor of software to modifications made by him to the hardware supplied by him, including modifications of the operating system involved;

– measures to avoid errors.

INDUSTRIAL PROPERTY RIGHTS AND COPYRIGHT

Licensor shall support User in defending himself against any claims based on the contention that the software used under the contract infringes an industrial property right or copyright under the Austrian law. In case such claims are raised against him, User shall without delay notify Licensor and, in case proceedings are instituted, give him notice of litigation (Streitverkündigung) under Section 21 ZPO (Code of Civil Procedure).

In case of infringement claims against Licensor for which Licensor may be held responsible, the same may, at his own expense, modify or replace the software or obtain the right to use it.

If this cannot be done at reasonable cost, User shall, at Licensor's request, without delay return the originals and all copies of the software in question, including any documentation, made available to him. This shall fully and definitely settle all claims on the part of User with regard to the infringement of industrial property rights or copyrights, and Licensor shall have no further obligation to him.

LIABILITY

Licensor shall within the limits of statutory provisions be liable for damages proved to be due to intentional acts of gross negligence but not to acts of ordinary negligence. Compensation for consequential damages or damages for economic losses, loss of savings, loss of interest as well as damage resulting from third-party claims against User shall be absolutely excluded.

SETTLEMENT AND CONDITIONS OF PAYMENT

1 Unless otherwise agreed, a one-time royalty – which may be agreed upon in lieu of or in addition to recurring royalties – shall be payable as follows:

– 30% of the total at the time of conclusion of contract,

– 70% of the price of each software item separately listed in the offer, after acceptance of said item under 4 above has been effected.

2 Unless otherwise agreed, any recurring royalties agreed upon shall be invoiced and paid once a year in advance. Unless otherwise agreed, the royalty shall be subject to price adjustments to the extent of the percentage wage increase of a skilled worker of wage category 3 in the collective agreement on account of collective wage adaption in the Steel and Metal Processing Industry. Key date for such price adjustments shall be the day of the first quotation made by Licensor. Royalties shall be payable from the day of first acceptance under 4 above.

9. **TAXES AND FEES**

All prices and royalties agreed upon shall be excluding turnover tax, which shall be charged separately. User shall pay any fee, taxes or other imposts levied in connection with the transfer of the subject matter of the contract.

10. **RETURN AND DESTRUCTION OF THE SOFTWARE**

Upon expiry ot the right of use, User shall, at Licensor's option, either return to Licensor the entire software including any documentation made available with it, or destroy it and furnish definite proof of its destruction. This provision shall also apply to software that has been modified or combined with other programmes.

11. **LIFE AND TERMINATION OF CONTRACT**

The period for which the right of use is granted shall depend on the contract. Any agreement to the contrary notwithstanding, the right of use shall terminate

– upon expiry of the agreed period of use;

– at the time the software in question ceases to be used on the hardware in respect of which the contract has been concluded, it being understood that such termination of the right to use the software in question shall not affect the royalty payable therefor;

– by notice ot termination after expiry of any minimum period of use that may have been agreed upon and – unless otherwise agreed – subject to three months notice prior to the end of the applicable invoicing period;

– by premature dissolution of the contract for gross breach of contract unless the conditions on which the contract is based are restored within a reasonable period of time stipulated in writing;

– by premature dissolution of the contract on account of insolvency proceedings being instituted against User or if an application for insolvency proceedings is not granted for insufficiency of assets.

12. **OTHER PROVISIONS**

If User transgresses his contractual rights or infringes his obligations under 2.4 and 10 above, Licensor shall be entitled to claim liquidated damages which, depending on whether recurring royalties or a one-time royalty have been agreed upon, shall amount to up to ten times the annual recurring royalty and/or five times the one-time royalty, respectively.
Licensor shall not be held liable in respect of any services that he is unable to render due to circumstances for which he is not responsible; should said circumstances result in unreasonable hardship for Licensor, Licensor may claim compensation therefor from User. If any provisions of these Conditions are or become invalid, such invalidity shall not impair the validity of the remaining provision(s) but the invalid provision(s) should be replaced by (a) valid provision(s) reflecting the spirit and serving the economic purposes of these Conditions. Any ancillary agreements or modifications of these Conditions shall be in writing.

13. **JURISDICTION**

Any ligitation arising under the contract including ligitations over the existence or non-existence thereof shall fall within the exclusive jurisdiction of the court at Licensor's domicile; the competent court within the area of the Bezirksgericht Innere Stadt, Vienna shall have the exclusive jurisdiction if Licensor is domiciled in Vienna. The contract is subject to Austrian law.

14. **GENERAL TERMS OF DELIVERY**

Unless otherwise agreed above, the contractual relationship shall be governed by the prevailing General Terms of Delivery of the Austrian Electrical and Electronics Industry.

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