

GENERAL TERMS AND CONDITIONS

„Agreement“

between

FACTON GmbH
Konrad-Zuse-Ring 12 b
14469 Potsdam
“FACTON”

and

...

„Contractual Partner“

INHALT

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PREAMBLE

This Agreement sets out the conditions under which two parties share Confidential Information with each other and in particular how Confidential Information should be treated by the other party, its managing directors, employees, staff, authorised persons and advisors („Representatives“).

Now therefore, the parties agree as follows:

1. DEFINITIONS

1.1

Supplier means the FACTON Group Company identified in the attached Proposal or Statement of Work.

1.2

Client means the customer that has signed the Proposal or Statement of Work included and attached to these terms and conditions.

1.3

FACTON Group Company means FACTON GmbH, a German “Gesellschaft mit beschränkter Haftung” with its principal place of business at Prager Strasse 2, 01069 Dresden, Germany or any legal entity of which more than fifty per cent (50%) of its ownership interest is owned or controlled, directly or indirectly by FACTON GmbH.

1.4

FACTON Group Materials means all materials other than Special Materials, provided by Supplier under a Proposal or Statement of Work, such as training manuals, self study guides and documentation whether in machine readable form or not.

1.5

FACTON Group Software means any software owned or developed by any FACTON Group Company.

1.6

Services means any training, technical assistance, consulting, software installation, configuration and parameter set-up to be performed by Supplier or Supplier’s sub-contractor. Creation of software programs exclusively related to Client’s tailor-made tools is included within the scope of this Agreement.

1.7

Special Materials means customized materials or software code prepared specifically for Client (excluding development on FACTON Group Software and development requiring access to FACTON Group Software source code) prepared by Supplier and specifically identified in the Proposal or Statement of Work as being Special Materials.

1.8

Proposal” or “Statement of Work means the document signed by Client and Supplier describing the Services, Special Materials and FACTON Group Materials to be delivered, price and payment schedule, and attached to these General Terms and Conditions.

1.9

Agreement means this document entitled “General Terms and Conditions”, together with the signed Proposal or Statement of Work to which it is attached or incorporated by reference, and any fully executed amendments thereto.

2. PROFESSIONAL SERVICES

2.1

Supplier will furnish Services, Special Materials and FACTON Group Materials to Client as set forth in the Proposal or Statement of Work, subject to these General Terms and Conditions. If nothing else is agreed in a Proposal or Statement of Work the professional services rendered by Supplier within the scope of the Proposal or Statement of Work and these General Terms and Conditions are professional service and consultation acc. to §§ 611 and the following BGB (German Civil Code).

2.2

The following order of precedence shall control in the event of any conflict in terms and conditions: (1) this document and (2) the Proposal or Statement of Work. Any purchase order issued by Client is for the limited purpose of internal accounting and shall not in any way modify or supplement the terms of these General Terms and Conditions.

2.3

The Proposal or Statement of Work must be signed by an authorized representative of each party to become effective.

2.4

Supplier shall be entitled to (a) determine the assignment of Supplier personnel for performance of Services, (b) replace or reassign such personnel or (c) subcontract with qualified third persons, including but not limited to any FACTON Group Company, for part or all of the performance of Services. No person performing Services on behalf of Supplier hereunder shall be restricted or prevented from performing services for others that are similar to Services provided under this Agreement.

3. CONFIDENTIAL INFORMATION AND EXPORT CONTROLLED DATA

3.1

Client and Supplier may need to disclose Confidential Information during the performance of Services. Confidential Information means sensitive information which may

include technical data, financial information, business information or any other information which is considered as confidential by the disclosing party. Confidential Information does not include ideas and concepts that may occur to individuals who have been exposed to Confidential Information.

3.2

Confidential Information shall be disclosed either: (a) in writing and conspicuously marked as being the disclosing party's Confidential Information; or (b) orally, visually or by delivery of nontangible items, which is identified as Confidential Information at the time of disclosure and confirmed and identified in writing within fifteen days of disclosure.

3.3

For a period of three (3) years from the date of receipt of Confidential Information, the receiving party will take the following actions: (a) Use at least the same degree of care that it uses with respect to its own Confidential Information, but in no event less than a reasonable degree of care to avoid disclosure of the other party's confidential information; (b) disclose Confidential Information only to Client or FACTON Group personnel, including its subcontractors, who have a need to know with respect to the performance or receipt of Services; (c) promptly report any loss of any Confidential Information to the disclosing party.

3.4

The receiving party may make a reasonable number of copies of materials provided by the disclosing party and containing Confidential Information as necessary for the performance of Services.

3.5

The obligations of confidentiality in this Agreement will not apply to any information that: (a) is already in the possession of the receiving party without any obligation of confidentiality; (b) is independently developed by the receiving party without reference to Confidential Information of the disclosing party; (c) is or becomes publicly available without breach of confidentiality obligations; or (d) is required to be disclosed in accordance with a judicial or governmental order or decree.

3.6

Unless provided for in a separate agreement, Client shall not disclose or exchange to Supplier any information that (a) is subject to the United States Government's International Traffic in Arms Regulations (ITAR) or (b) requires a license from the United States government under the Export Administration Regulations (EAR) for the export or re-export of such information to citizens of countries designated under the EAR as being in Group B, such as France, or Group D, such as India.. The export or re-export of Confidential Information or non-confidential information received from a party to this Agreement is subject to compliance with applicable export control laws and regulations.

4. INTELLECTUAL PROPERTY RIGHTS

4.1

Special Materials - Upon payment of the applicable fees, Supplier shall grant to Client an irrevocable, world-wide, non transferable and non-exclusive license to use, copy and modify Special Materials for its own internal purposes only.

4.2

FACTON Group Materials - Upon payment of the applicable fees, Supplier shall grant to Client an irrevocable, worldwide, non-transferable and non-exclusive license to use such FACTON Group Materials for its own internal purposes only. No right to: (1) adapt, copy, distribute or modify such FACTON Group Materials or prepare derivative works based upon such FACTON Group Materials or (2) to authorize others to do any, some, or all of the foregoing, is granted to Client, unless Client obtains Supplier's prior written permission through an amendment of these General Terms and Conditions.

4.3

Supplier shall have and retain exclusive ownership of (i) any inventions, discoveries, innovations, improvements, ideas, techniques or know-how conceived by Supplier during the performance of Services (ii) Special Materials and (iii) FACTON Group Materials. This ownership includes the right to obtain and hold in its own name copyrights, registrations, and similar protection which may be available for such items.

4.4

Except as expressly provided herein, these General Terms and Conditions do not grant or convey either directly, by implication or otherwise, any right or license to any invention, patent, copyright or other intellectual property of either party to the other party.

5. WARRANTIES AND LIMITATION OF LIABILITY

5.1

The warranty in this agreement does not affect the warranty granted for each Company Software, for which Client has a license. If Supplier and Client agree in a Proposal or Statement of Work that Supplier should provide work performances in accordance with §§ 631 and the following BGB (German Civil Code), Supplier warrants that the performance characteristics agreed to in the Proposal or Statement of Work have been fulfilled and conform to the scope of service. The warranty period for work performances is 12 month. The warranty period begins the earliest of the following three dates: (a) first working day after final acceptance; (b) in the case of non-productive use, 8 weeks after delivery of the work product; or (c) in the case of productive use, 4 weeks after report of ready status of work product by Supplier. The parties understand and agree that within thirty days after delivery of any work product hereunder, Client is required to notify Supplier in writing and with specificity of any failure of the delivered work product to meet the agreed upon specifications. If Client does not

so notify Supplier, the work product shall be deemed accepted and the warranty period shall commence. If Client does so notify Supplier, Supplier shall have a reasonable period to correct any such failure and redeliver the corrected work product to Client. The foregoing acceptance test process may be repeated three times. If acceptance fails Supplier shall refund Client all fees paid to Supplier in connection with the rejected portion of the applicable Service, Special Material or FACTON Group Materials. Within warranty period Supplier will remedy defects under warranty if Supplier was informed thereof by Client in writing. If Supplier does not succeed in eliminating a defect within reasonable period of time Client can, at his option, to the extent that the value or suitability of the service is limited, require a reduction of the paid compensation or rescission of the agreement. In case of minor defects or deviation a withdrawal from the agreement is excluded. Supplier is not responsible for (i) any modification of a Special Material made by Client or a third party without Supplier's consent; or (ii) any use of a Special Material in combination with items not provided by Supplier.

5.2

Unless expressly provided in the Proposal or Statement of Work, Supplier shall have no obligation to support, maintain or enhance any computer software, documentation, or materials provided to Client under these General Terms and Conditions.

5.3

Any written or oral statements concerning results or goals that may be attained during the performance of Services and all surveys, forecasts, recommendations and opinions contained in any proposal, report, presentation, Special Material or FACTON Group Material are made on the basis of then current information available to Supplier, including, but not limited to, information provided by Client. Under no circumstances shall any such statement be deemed or construed as a representation, undertaking or warranty, whether express or implied, of achievable results or goals.

5.4

Supplier warrants that it, and not Client, is responsible for the employer/employee relationship with its personnel assigned to provide Services and that it shall pay all related employment taxes, maintain any legally required employment-related insurance and take all other actions legally required as an employer.

5.5

The warranties described in this article are exclusive and client hereby waives any and all other warranties, whether express or implied, including any implied warranty of merchantability, title, non-infringement or fitness for a particular purpose or use.

5.6

Supplier shall be liable without limitation for personal injuries and damages caused by gross or willful negligence and for such damages, which have accrued through the breach of a guarantee assumed with the conclusion of this agreement. For damage caused by ordinary negligence, regardless of legal ground (e.g. even claims from breach of contract, tortuous act etc.), Supplier shall be liable for each case of loss up

to an amount of EUR 500.000,00 or up to the amount corresponding to the charges actually paid by Client in the preceding twelve month for the damage-causing service, in the event this value is higher.

In the event of ordinary negligence Supplier shall not be liable for either indirect, incidental or consequential damages (including lost profits, loss of data or lost savings). This also includes the reimbursement of futile expenditures to the extent that incidental or consequential damages are hereby at issue.

In case of delay of Supplier, Supplier will reimburse Client the provable damage caused through this within the limits of this liability clause.

Any further liability for damage is excluded especially liability without a fault.

5.7

Client recognizes that the charges and fees hereunder are based in part on the limited warranty and limitation of liability set forth above.

6. CLIENT RESPONSIBILITIES

6.1

As a condition of Supplier's performance of Services, Client shall perform certain tasks specified in the Proposal or Statement of Work at no charge to Supplier.

6.2

Client shall reasonably cooperate with Supplier in performing Services, including providing Supplier with safe and timely access to Client's computer systems, personnel (executives and staff), facilities, utilities, any software program, data and information reasonably necessary for the performance of Services, whether or not defined in the Proposal or Statement of Work, at no charge to Supplier. Client shall ensure that it has the appropriate licenses from third parties licensors for such third party's software programs, third party data and information in order to allow Supplier to perform Services for Client. Client is responsible for the accuracy and completeness of the information and data Client supplies to Supplier for use hereunder and Client hereby licenses Supplier to use such information and data to perform Services.

6.3

While Supplier will use reasonable efforts to interpret Client needs, Supplier is dependent upon Client for the accurate and complete provision of data. Client is responsible for evaluating Supplier's proposal based upon those technical, price, performance and risk factors determined by Client to be in its best interests.

6.4

Client shall maintain current and complete back up for any data and programs that may be affected by Supplier's performance of Services.

6.5

Client shall defend and indemnify Supplier from any action brought against Supplier based on a claim that any materials or information provided by Client to Supplier constitutes (i) an infringement of a third party's trademark, copyright of a country signatory to the Berne Convention; or United States, Canadian, European Union or Japanese patent, provided that the patent is registered as of the date of such material or information is delivered to Supplier; or (ii) a misuse of a third party's confidential, proprietary or trade secret information.

7. PAYMENT

7.1

Supplier will submit invoices to Client in accordance with the Proposal or Statement of Work. Payment shall be due within fourteen (14) days from the date of the invoice. Client shall pay interest for late payment at a rate of eight percent points per year acc. to §§ 247, 288 BGB (German Civil Code) on all sums unpaid at the due date, plus reasonable attorney's fees and other costs incurred by Supplier in collecting unpaid amounts and in enforcing these General Terms and Conditions.

7.2

FACTON may invoice a lump sum for travel expenses.

7.3

Client shall pay, without recourse to Supplier, amounts equal to any taxes, however designated, assessed or levied relating to this Agreement or Services or materials provided hereunder, excluding taxes based on Supplier's net income.

8. TERM AND TERMINATION

8.1

This Agreement shall become effective as of the first day of performance of Services and shall continue in effect until completion of Services or until a party terminates this Agreement by providing one (1) month prior written notice to the other party.

8.2

Supplier will be paid for Services performed through the date of termination, reasonable subcontractor termination charges, if any, and any other costs and expenses that Supplier has paid or is obligated to pay relating to its performance for the term of Services. Such payment shall constitute Client's entire liability in case of any such termination.

8.3

Either party may terminate Services for default by providing thirty (30) day prior written notice to the other party. In the event of termination of Services by Client for Supplier's default, and if the default is not remedied within said thirty (30) day period, Supplier agrees to promptly provide Client with all items of work in progress associated with Services upon payment by Client of any amounts owed.

8.4

The rights and obligations of Sections 3, 4, 5, 7, 8, 9 and 10 shall continue after expiration or termination of this Agreement and shall bind the parties and their legal representatives, successors and assigns.

9. GENERAL

9.1

Neither party shall be liable for failure to perform its obligations hereunder, if such failure results from causes beyond its reasonable control such as acts of God, fire, explosion, terrorism, strikes or labor disputes, delays by vendors and/or manufacturers, governmental acts, staff unavailability due to illness or airline flight delay or similar causes.

9.2

This Agreement shall not prevent either party from entering into similar agreements with others or from independently developing or acquiring materials or services that are similar to those provided under this Agreement.

9.3

Except regarding subcontracting pursuant to Section 2.3, neither party shall assign, delegate or otherwise transfer any right or obligation hereunder without the prior written consent of the other party. Any transfer through merger or acquisition does not require consent.

9.4

Nothing contained herein shall be deemed to authorize or empower either party to act as agent for the other party or to conduct business in the name of such other party. Nothing in this Agreement shall be deemed to create between the parties a joint-venture or partnership.

9.5

Failure of either party to require strict performance by the other party of any provision shall not affect the first party's right to require strict performance thereafter. Waiver by either party of a breach of any provision shall not waive either the provision itself or any subsequent breach.

9.6

In the event any part of this Agreement is invalid, illegal or unenforceable, its remaining provisions shall nevertheless be binding with the same effect as if the invalid, illegal or unenforceable part was never part of this Agreement.

9.7

This Agreement is the complete agreement between the parties relating to the subject matter hereof and supersedes all prior proposals, agreements, understandings, representations and communications, whether oral or written. This Agreement may be modified only by written amendment signed by the parties' duly authorized representatives.

9.8

While an Statement Of Work remains in effect and for the following six months, Client agrees that it will request and obtain Supplier's prior written consent, acting in Supplier's sole discretion (which may include, without limitation, conditioning any consent on Company's receipt of a placement fee from Client), before taking any action to employ or retain any personnel of Supplier whom Client knows to have performed Services under the SOW. This consent requirement will apply to any direct or indirect solicitation of, acceptance of solicitation from, employment, retention or other engagement of the services of any such personnel. If Client breaches this agreement to request, obtain and fulfill any conditions applicable to Supplier's consent, then Client shall pay an amount equal to fifty percent (50%) of the annual base compensation of the applicable person in his or her new position. Although the foregoing payment is the only monetary remedy for breach of this paragraph, the parties acknowledge that the nonconsensual loss of personnel with training and expertise unique to Supplier's business would be disruptive to its project planning, undermine its ability to perform its service business on a timely basis and cause other irreparable harm beyond an immediate loss of revenue and the costs of hiring and training new, skilled personnel. Therefore, in the event of any breach or threatened breach of this paragraph, Supplier also may obtain injunctive and/or other equitable relief without waiver of legal remedies. This paragraph will not apply to hiring in response to general advertisements unrelated to this Agreement.

10. APPLICABLE LAW

10.1

This Agreement shall be governed by and construed, and the legal relations between the parties shall be determined in accordance with, the laws of the Federal Republic of Germany, excluding application of any conflict of laws principles and excluding application of the United Nations Convention for the International Sale of Goods. Place of Jurisdiction is Munich.

10.2

In the event of a dispute concerning the execution, construction or interpretation of this Agreement, the parties shall meet to seek an amicable resolution of the dispute within three (3) months from initial notice thereof by either party to the other. Notwithstanding the foregoing, this paragraph will not be construed to prevent a party from instituting, and a party is specifically authorized to initiate, formal legal proceedings at any time to obtain or preserve a superior position (or maintain parity) with respect to other creditors, to include the other party in a third party action in which indemnification may be sought pursuant to this Agreement, to seek equitable relief to protect a party's Confidential Information or other intellectual property, or to avoid the expiration of any applicable limitations of actions or other similar period. Subject to the obligation to meet to seek an amicable solution as provided in the first sentence of this paragraph, Client hereby irrevocably agrees to submit any dispute arising out of, or in connection with the validity, interpretation and/or performance of, this Agreement to the exclusive jurisdiction of the Courts of the Federal Republic of Germany, and each party consents to the jurisdiction of said courts for any such dispute. Without prejudice to the foregoing, Supplier may, in its discretion, bring any claim or dispute (including but not limited to seeking injunctive relief and/or equitable remedies) arising out of, or in connection with, the validity, interpretation and/or performance of this Agreement before any courts and/or administrative authorities, in any jurisdiction, having jurisdiction over the subject matter of any such claim or dispute.

10.3

The parties understand and agree that a breach or threatened breach of section 3 or 4 of this Agreement would not be adequately remedied by monetary damages and may cause irreparable harm. Accordingly, in the event of any such breach or threat thereof, and the injured party shall have the right to seek injunctive and other equitable relief, without waiving other rights or remedies.

FACTON GMBH

CONTRACTUAL PARTNER

(Place, Date)

(Place, Date)

(Stamp, Signature)

(Stamp, Signature)