Software Maintenance Terms and Conditions
issued by Austrian Association for the Electrical and Electronics Industries
FEEI - Fachverband der Elektro- und Elektronikindustrie Österreich

1. Object of the contract

1.1 These Software Maintenance Terms and Conditions apply to legal transactions between companies for the maintenance of software licensed and previously supplied by the contractor. Software, within the meaning of these terms and conditions, concerns computer programs as defined by Article 40a of the Austrian Copyright Act [Urheberrechtsgesetz] that are distributed as standard by the contractor or custom developed/adapted by the contractor for the principal to use on, operate or control electrical and/or electronic equipment and systems.

1.2 Maintenance, within the meaning of these terms and conditions, means that the contractor ensures that the software functions as agreed in the licensed version. This particularly includes the loading of fixes, patches and software updates.

1.3 The precise scope of the maintenance services is to be specified in an individual contract.

1.4 Unless agreed otherwise in an individual contract, the maintenance of third-party software does not form part of the contract.

1.5 The contractor reserves the right to suspend maintenance if the software is no longer in its portfolio. The contractor shall notify the principal in good time and shall try to propose alternatives where possible.

2. Contract conclusion

2.1 Offers by the contractor shall be considered non-binding in case of doubt. The contract shall be regarded as concluded when the contractor confirms the order in writing after receiving the principal's purchase order.

2.2 Any subsequent changes or additions to the software maintenance contract including these terms and conditions must be made in writing. Any provisions that deviate from these terms and conditions shall be deemed to have been agreed in an individual contract if the contractor consents to them explicitly.

3. Principal's duty to cooperate

3.1 The principal shall be obliged
   a) to do whatever is necessary to ensure that the services may be started on time and performed without interruptions;
   b) to perform any required preparatory work expertly at its own expense and under its own responsibility and to make all existing documents available to the contractor in good time. These documents shall remain the property of the principal and may be used by the contractor and/or the latter's subcontractor only for the purpose of the maintenance services;
   c) to take the necessary measures to prevent accidents at its expense;
   d) to enable the contractor or its subcontractor to gain physical access or to create the conditions required for this;
   e) to establish an opportunity for the contractor to gain remote access to the software requiring maintenance; and
   f) to inform the contractor without delay about changes in the application environment.

3.2 If the principal fails to meet its obligations, the contractor shall be entitled to refuse the provision of services and to rescind the contract after setting a reasonable deadline. At any rate, the principal shall be liable for any damage (for instance, downtimes, etc.) incurred by the contractor due to non-compliance with these obligations.

4. Charging for services

4.1 Unless otherwise agreed, the services shall be charged according to time and effort (daywork). If agreed in writing, they may also be charged at a flat rate. Unless explicitly agreed otherwise, the services shall be performed during the contractor's usual business hours.

4.2 Daywork services
The services provided by the contractor shall be billed as follows:
Fee for staff: The principal shall confirm the hours worked by the contractor's staff in writing.
The working time shall begin upon arrival of the staff on the principal's premises and shall end when they leave. If the principal fails to provide appropriate confirmation without sufficient reason, the records of the contractor shall be taken as a basis for invoicing. The rates agreed or specified in the offer shall apply to the hours worked.
For maintenance carried out by remote access, the contractor shall itself keep a record of the working time.

4.3 Services at flat rates
The flat rate shall cover the services agreed in writing to be provided regularly by the contractor. It presupposes an unimpeded workflow and timely completion of all work to be performed by the principal in advance. Additional expenses incurred by the contractor due to circumstances outside the latter's sphere of influence, such as subsequent modifications to the content or scope of the services, waiting times, etc., shall be borne by the principal.

4.4 Unless otherwise agreed, accommodation and travel costs of the contractor's staff shall not be included in the price and shall be charged separately.

4.5 Prices are exclusive of VAT and, unless otherwise agreed, also exclusive of any other taxes, charges and fees.

5. Payment

5.1 The amount and due date of the one-time and/or ongoing usage fee is to be agreed in an individual contract, as should any value guarantee.

5.2 The principal shall not be entitled to withhold or offset payments on account of warranty claims or other claims.

5.3 A payment shall be deemed made on the date the contractor is able to dispose of the amount paid.

5.4 If the principal is in default on an agreed payment or any other performance arising from this or any other legal transaction, the contractor may, without prejudice to any other rights
   a) postpone performance of its own obligations until this payment or other performance has been effected, and claim an appropriate extension of the period of performance,
   b) demand payment of all outstanding receivables arising from this or any other legal transaction and charge the statutory default interest plus VAT for these amounts, with effect from the respective due date, unless the contractor is able to provide proof of any additional costs,
   c) perform other legal transactions only against cash in advance in the event of qualified insolvency, i.e. after two instances of default,
   d) terminate the contract with immediate effect, granting a period of grace of 14 days. At any rate, the contractor shall be entitled to bill any pre-trial expenses, in particular dunning expenses and lawyers' fees, according to applicable statutory provisions, to the principal.

5.5 The contractor shall be entitled to submit the invoice electronically.

6. Warranty and assumption of responsibility for defects

6.1. The contractor hereby warrants proper performance of the contractually agreed maintenance. Unless agreed otherwise in an individual contract, the statutory warranty period shall apply to the individual maintenance services.

6.2 Unless agreed otherwise in an individual contract, the burden of proving that the defect already existed at the point of handover shall be based on the statutory warranty provisions.

6.3 No warranty claims may be derived nor liabilities established from information provided in catalogues, brochures, advertising materials and written or oral statements not included in the contract.

6.4 Unless agreed otherwise in an individual contract, the prerequisites for the assertion of warranty claims are an immediate examination of the maintenance performed as well as an immediate written notice of defects in which the principal must do its very best to provide details of the deviation from the specifications, the operating steps that led to the defect and the software error message.

6.5 The prerequisites for the elimination of any defect are that
   a) this involves a fault that impairs function;
   b) this is reproducible;
   c) the principal has installed new versions offered to it free of charge within the warranty period, if applicable;
   d) the contractor receives all documentation and information required to rectify the fault from the principal; and
   e) the contractor can access hardware and software during its normal working hours.

6.6 The elimination of defects, which are function-impairing deviations from the valid specifications, shall, at the contractor's discretion, involve the delivery of new software or a corresponding modification to the program.

6.7 No warranty shall be assumed for software modified by the principal or third parties without the contractor's prior written consent, even if the defect occurs in an unmodified part of the program.

6.8 All claims based on deficiency of the software supplied and licensed shall not be subject to these terms and conditions.

7. Industrial property rights and copyright

7.1 The contractor shall assist the principal with fighting any claims based on a violation of an industrial property right or copyright valid according to the Austrian legal system that has been caused by provision of the service. The principal shall inform the contractor in writing without delay if such claims are asserted against it, and shall also serve a third-party notice in the event of a legal dispute.

7.2 If claims arising from the violation of property rights are asserted for which the contractor is responsible, the contractor may modify or replace the software or obtain a right of use, at its own expense. If this is not possible with reasonable cost and effort, the principal must return the original plus all copies of the software, including supplied documentation, immediately at the contractor's request. This shall conclusively settle any claims the principal may have concerning the violation of industrial property rights and copyright, to the exclusion of any further obligation on the part of the contractor.

7.3 The contractor shall reserve the right to examine ("Audit") the use of the software covered or affected by maintenance services provided that it sends written notice of this examination 14 days in advance. The principal shall be obliged to help with the Audit and to grant the contractor sufficient access to information. Any underpayment of the fee must be settled within 14 days of receiving a written request, together with the costs of the Audit. If the payment is not made, the contractor shall be entitled to terminate the contract extraordinarily.
If the contractor does not find anything in the Audit, each party shall bear its own costs.

7.4 The principal shall ensure that, due to open source software used by the principal, the software covered or affected by maintenance services is not subject to the same open source software (OSS) licensing conditions.

7.5 For software for which the contractor only has a derived right of use and which is not open source software (third-party software), the terms and conditions of use agreed between the contractor and its licensor shall apply in addition and shall take priority over these provisions if and to the extent that those terms and conditions of use relate to the principal (e.g. end-user license agreement). The contractor hereby draws attention to those terms and conditions and shall make them available to the principal on request.

8. Liability

8.1 Unless agreed otherwise in an individual contract, the contractor shall only be liable for damage, in line with statutory regulations, if and to the extent that its intent or gross negligence is proven. Total liability of the contractor in cases of gross negligence shall be limited to the lower of the net contract value or EUR 500,000. The contractor's liability shall be limited to the lower of 25% of the net contract value or EUR 125,000 per claim.

8.2 Unless agreed otherwise in an individual contract, any liability for slight negligence, with the exception of personal injury, and compensation for consequential damage, pure financial loss, indirect loss, production downtime, cost of financing, cost of substitute power, loss of power, data or information, lost profit, savings not achieved, interest losses and losses from third-party claims asserted against the principal shall be excluded.

8.3 Unless agreed otherwise in an individual contract, all forms of compensation shall be excluded in case of non-compliance with any requirements for installation, implementation and use (such as those included in operating instructions) or official authorisation requirements.

8.4 If contractual penalties have been agreed, any claims of the principal in excess thereof on the same legal grounds shall be excluded.

8.5 The provisions of item 8 shall apply conclusively to all claims on the part of the principal against the contractor, under any legal ground and title whatsoever, and shall also apply to all staff members, subcontractors and sub-suppliers of the contractor.

9. Termination and rescission of the contract

9.1 Either party shall be entitled to terminate the contract if, upon violation of a contractual provision, the party violating the provision has failed to comply with a written request by the other party to remedy such violation within 30 days after receipt of this request.

9.2 If insolvency proceedings are opened in respect of the assets of a contracting party or a request for initiation of insolvency proceedings is rejected for lack of sufficient assets, the other contracting party shall be entitled to rescind the contract without granting a period of grace. If such rescission is declared, it shall become effective immediately once the decision is made not to continue the company. If the company is continued, the rescission shall only become effective 6 months after initiation of the insolvency proceedings or after rejection of the request for initiation due to a lack of assets. In any case, the contract shall be terminated with immediate effect provided that the insolvency law governing the insolvent contracting party does not provide otherwise or if termination of the contract is essential to avoid serious financial disadvantages for the contract partner of the insolvent contracting party.

9.3 Termination of the contract under 9.1 shall not establish any liability on the part of the party terminating the contract.

10. Privacy

10.1 The principal shall ensure compliance with the laws governing the protection of personal data. If the contractor receives access to personal data during the course of the maintenance, the principal shall ensure that the data subjects have consented to the use of their data if and to the extent this is necessary for provision of the maintenance services.

10.2 The principal shall grant the contractor a territorially and temporally unlimited, non-exclusive, transferable and complimentary right to process the data of the system concerned by the order in an automated manner and to analyse it statistically in a neutralised form as well as to use the findings from the maintenance for its own purposes and also, in particular, for providing third parties with maintenance services.

11. Assertion of claims

Any claims on the part of the principal must be asserted in court within 3 years after performance of the services, otherwise they shall be forfeited unless other deadlines are provided for by statutory provisions.

12. Compliance with export regulations

12.1 When passing on the goods supplied or maintenance services performed by the contractor to third parties, together with the pertinent documents, regardless of the manner in which they are provided or regardless of the services performed by the contractor, including technical support of any kind, the principal must comply with the applicable provisions of the national and international (re-)export regulations. In any case, the principal must comply with the (re-)export regulations of the contractor's country of domicile, the European Union, the United Kingdom of Great Britain and Northern Ireland and the United States of America when passing on goods and/or maintenance services performed to third parties.

12.2 If required for export control checks, the principal must immediately provide the contractor upon request with all necessary information, including information about the final recipient, final destination and intended use of the goods and/or services.

13. General

13.1 The contractor must inform the principal if it shall engage subcontractors. Companies affiliated with the contractor shall be deemed to have been approved in advance.

13.2 If individual provisions of the contract or of these terms and conditions should be invalid, this shall not affect the validity of the remaining provisions. The invalid provision must be replaced with a valid provision that approximates the intended objective as closely as possible.

13.3 The German-language version shall be deemed the authentic version of the terms and conditions and shall also be used to interpret the contract.

14. Place of jurisdiction and applicable law

The exclusive place of jurisdiction for resolving all disputes arising from the contract – including those regarding its existence or non-existence – shall be the court with subject-matter jurisdiction at the contractor's head office; in Vienna, this shall be the court located in the district of the Local Court of Innere Stadt. The contract shall be governed by Austrian law to the exclusion of conflict of law rules. Application of the UNCITRAL UN Convention on Contracts for the International Sale of Goods shall be excluded.

15. Reservation clause

Performance of the contract on the part of the contractor shall be subject to the reservation that no obstacles exist under national or international (re-)export regulations, in particular no embargoes and/or other sanctions.

As of April 2018