



**General Terms and Conditions of Procurement
of Elschukom
for use in business dealings with companies**

Version date: January 2009

I. General provisions

1. Elschukom's General Terms and Conditions of Procurement shall govern exclusively with respect to all deliveries made to it. They shall likewise apply to transactions concluded in future without any need for any other express incorporation of them by reference.
2. Any terms and conditions of delivery or other general terms and conditions of the Seller shall not be deemed to be incorporated into the parties' contract as a result of Elschukom's silence or of the making of a delivery to it. Elschukom hereby objects to application of any such terms and conditions.
3. Addenda, amendments or ancillary agreements made by telegram, telephone or orally shall not be effective unless Elschukom confirms them in writing.

II. Offers, formation of contract

1. Orders and agreements shall only be binding on Elschukom to the extent Elschukom has issued or confirmed them in writing.
2. All costs arising in connection with a Supplier's preparation and submission of an offer shall be borne by that Supplier.

III. Time of the essence

1. With respect to the Supplier's contractual obligations, time shall be deemed to be of the essence. All deadlines referenced are deemed to be binding and must be precisely complied with.
2. Where the Supplier has grounds to assume that it will be unable to comply with a deadline or meet another obligation, it shall furnish Elschukom with written notice thereof without delay.



IV. Deliveries

1. Unless otherwise expressly agreed in writing, all goods shall be delivered duty paid (DDP pursuant to the most recent version of Incoterms).
2. The goods shall be deemed to have been delivered at such time as Elschukom has confirmed receipt of the goods in writing.
3. The risk of accidental loss and accidental deterioration of the goods and of title to the goods shall pass to Elschukom at the time of delivery. The goods must be free and clear of the rights of third parties, in particular of any *in-rem* rights.
4. At the same time as it effects delivery of the goods, the Supplier shall furnish Elschukom with copies of the necessary licences.
5. The Supplier is not authorised, without Elschukom's express written consent, to effect partial deliveries or deliveries prior to the agreed delivery date. Elschukom shall not be liable for any costs the Supplier may incur prior to delivery with respect to the goods, in the course of manufacture, installation, assembly or other works associated with the goods.
6. The design, manufacture, installation and other works to be rendered by or on behalf of the Supplier on the basis of the parties' contract shall be undertaken in a workmanlike manner, using suitable materials.
7. At a minimum, all goods shall comply with the relevant quality and certification standards, particularly including the generally applicable material standards, and shall especially comport with such delivery agreements as have been agreed in an individual case with respect to the material or raw material in question or the finished goods in question as well as with the norms referenced in clause VIII 4.
8. The Supplier shall pack, label and ship the goods such that damage during transport is avoided and it is possible to unload, process, handle and store the goods efficiently. All goods shall be clearly labelled as being destined for Elschukom.

V. Services

1. The Supplier shall render its services with the necessary expertise and care, using suitable materials and sufficiently qualified personnel.



2. The Supplier shall bear unlimited liability for all third parties it uses in rendering its services.

3. Only Elschukom's written confirmation shall constitute formal acceptance of the services rendered.

VI. Notice of defects

1. Elschukom's examination of the goods supplied or services rendered shall not be deemed to constitute official acceptance. Official acceptance of the goods is in all cases given subject to a reservation with respect to quality, appearance and workmanship and quantity. Elschukom's examination or acceptance shall not relieve the Supplier of its obligations, commitments or warranties.

2. Elschukom shall examine the goods delivered to it within a reasonable time with respect to their external sound condition and completeness. Notice of patent defects must, as a rule, be provided within 2 weeks from the date the goods were received. With respect to latent defects, notice shall be furnished without delay upon the discovery thereof. Within 2 weeks from the date of such notice, the Supplier shall recover the goods in question from Elschukom at its own cost and expense/shall render its services pursuant to Elschukom's instructions. Where the Supplier fails to recover the goods within this 2-week period, then Elschukom may send the goods back to the Supplier at the Supplier's risk and cost, without prejudice to Elschukom's other contractual or statutory rights. Elschukom's further and other rights shall remain unaffected by the foregoing.

3. Where Elschukom has good cause for assuming that the Supplier will not be able to or will not supply/render the goods or services as agreed, Elschukom shall be entitled to terminate the contract with immediate effect/to rescind the contract. Elschukom's further and other contractual or statutory rights shall remain unaffected by the foregoing.

VII. Payment

1. All purchase prices referenced in the contract are deemed to constitute fixed prices.

2. All prices shall be deemed to constitute gross prices, net of VAT, excise taxes or similar taxes.

3. Where the transactions described in this contract are subject to value added or turnover taxes (VAT), excise taxes or similar taxes, the Supplier shall be entitled to indicate these to Elschukom. Elschukom shall pay these taxes in addition to the agreed price. The Supplier is responsible for remitting the value added tax/turnover taxes (VAT), excise taxes or similar taxes to the competent authorities/revenue offices. The Supplier shall prepare its invoices such that Elschukom is able to deduct input tax. The Supplier shall, in addition, inform Elschukom of whether Elschukom may, in a given case, rely on a tax law exception and to what extent it may do so.

4. The purchase price is deemed to cover any licence fees which may be applicable.



5. Subject to Elschukom' acceptance of the goods and/or services, it shall make payment within sixty (60) days from the end of the month in which Elschukom has received a correct invoice in proper form. Where Elschukom should fail to make payment within the above-referenced period, Elschukom's liability to the Supplier shall be limited to default damages in the amount of 6% *per annum* of the cash amount outstanding.

6. Elschukom may refuse to make payment for so long as the Supplier has not performed all of its contractual obligations.

7. Elschukom may set off claims of the Supplier against Elschukom with claims which Elschukom has against the Supplier.

VIII. Legal warranties

The Supplier hereby warrants to Elschukom

1. that the goods are fit for their intended purpose and that they are new, of good quality, design, material, construction, manufacture and free and clear of defects and

2. that the goods and services comport with the specifications, approved samples and all other technical requirements (electrical, geometrical, general physical) stipulated by Elschukom when it placed its orders;

3. that the goods are free and clear of third party rights, and in particular of *in-rem* encumbrances;

4. that the goods and services were manufactured and supplied/rendered in conformity with the applicable statutory norms (including norms under labour law), the EC General Product Safety Directive 2001/95 EC, the REACH & ROHS statutory norms and other European environmental directives, in particular 2002/95/EC–ROHS, 2005/69/EC–PAHS, 2006/122/EC–PFOS, 2006/1907/EC–REACH;

5. that the goods and services were furnished together with all such information and instructions as are necessary in order to property and safely use them;

6. that all required licences with respect to the goods are in place and are valid, and that the scope of such licences covers the intended use of the goods to its full extent, and that all of these licences include the right to transfer the licence as well as the right to grant sub-licences;

7. that Elschukom has been provided with written and detailed information with respect to the composition and the properties of the goods or substances containing chemical or hazardous materials. The Supplier shall, in addition, alert Elschukom to all relevant statutes, regulatory norms and other requirements in respect of such goods or substances, in order to put Elschukom in a



position to transport, store, process, use and dispose of the goods in question in a proper and safe manner.

IX. Express warranty of open-source software

The Supplier hereby warrants that the goods do not entail competence with open-source software. In this context, 'open-source software' shall mean:

1. any and all software which, as a precondition to its use, modification and/or sales and distribution thereof, requires that the software:

- a) be disclosed or distributed in source-code format; and/or
- b) be licensed for purposes of creating derivative works; and/or
- c) may only be distributed further free of enforceable intellectual property rights;

and/or

2. any and all software containing software referenced at (a) above or which is derived therefrom or statically or dynamically linked therewith.

X. Export control requirements

The Supplier shall procure all international and domestic export control and other approvals which are required pursuant to the relevant export control statutes and export regulations in respect of the goods, in order to put Elschukom and its customers in a position to comply with these statutes and regulations.

XI. Liability for quality defects

1. If an item of goods is defective, if a characteristic which is the subject of an express warranty is lacking or if the Supplier breaches a warranty, then Elschukom may

- a) at its option, within a reasonable time demand elimination of the defects or replacement of the goods, or
- b) if the elimination of the defect or the replacement delivery is to no avail, it may rescind the contract or abate the purchase price.

2. The Supplier shall bear all of the costs of repair, replacement and transport and shall reimburse Elschukom for all costs and disbursements (including, in particular, inspection/examination, processing, handling and warehousing costs) that Elschukom has plausibly incurred in this context.



3. In the case of goods subject to a notice of defect, the risk of accidental loss and accidental deterioration, and title to the goods subject to the notice of defect shall pass back to the Supplier at such time as notice of the defect is furnished. Physical delivery of the goods is deemed replaced by Elschukom's storage of the goods for the Supplier.

4. Elschukom's further and other contractual and statutory rights, in particular including its claims for compensatory damages, shall remain unaffected by the foregoing.

XII. Legal title and intellectual property rights

1. All instructions, specifications, drawings, information, forms, models, drafts, tools and other materials (hereinafter "Materials") which Elschukom has supplied or which the Supplier has provided at Elschukom's cost and expense shall be deemed to pass to Elschukom's ownership. Physical delivery thereof shall be deemed to be replaced by the Supplier's gratuitous storage of such Materials for Elschukom. The Supplier shall surrender the Materials to Elschukom upon its first demand. The Supplier shall label the Materials clearly as Elschukom's property, and shall store them for Elschukom safely, at the Supplier's own risk. The Supplier may not use the Materials except for purposes of performing the contract.

2. The Supplier hereby warrants and undertakes to Elschukom that the goods and services are free and clear of intellectual property rights of third parties and that they do not infringe intellectual property rights of third parties.

XIII. Indemnification

1. The Supplier undertakes to indemnify and hold Elschukom harmless against any claims arising from the infringement of intellectual property rights and to compensate Elschukom for any losses arising, for its costs and disbursements, in particular including lost profits and the costs of asserting its legal rights, or – at Elschukom's option – it shall undertake a defence against any such claims against Elschukom at the Supplier's own cost and expense.

2. Elschukom shall inform the Supplier in writing of any such claims. The Supplier shall, in connection with any such claim, furnish Elschukom with all such reasonable support as Elschukom requests.

3. In the event that third parties assert well-founded claims under intellectual property rights and the use of the goods supplied or services rendered is prohibited, then the Supplier shall, at its own cost and expense, and at Elschukom's option either:

a) procure a licence for Elschukom; or



b) replace the goods and services with a functional equivalent which is free of intellectual property rights, or modify them accordingly.

4. Where the Supplier fails to procure the right for Elschukom to use the goods or services, or to replace or modify the goods or services accordingly, Elschukom may terminate the contract with immediate effect/may rescind the contract. In such case, the Supplier shall make restitution of the purchase price to Elschukom. The Supplier's obligation pursuant to clause 1 hereof shall remain unaffected by the foregoing.

5. Without prejudice to all of Elschukom's further contractual and statutory rights, the Supplier shall indemnify and hold Elschukom harmless against any and all claims of third parties and shall bear liability for all damages, losses and expenditures which are directly or indirectly attributed to a defect or another breach of contract.

XIV. Force majeure

1. In the event that, due to a *force majeure* event, the Supplier is temporarily prevented from satisfying the obligations to which it is subject pursuant to the contract, then the satisfaction of these obligations shall be deemed suspended for so long as the *force majeure* event continues.

2. Where the circumstances on which a *force majeure* event is based continue for more than 30 days, Elschukom shall be entitled to rescind the contract by written notice to the Supplier with immediate effect and without entailing any duty to pay compensatory damages.

3. An event of *force majeure* on the part of the Supplier may not be based on a lack of manpower, manufacturing materials or resources, on strikes, breach of contract by third parties the Supplier has engaged to assist in its contractual performance, or on financial difficulties of the Supplier, nor may it be based on an inability to obtain the necessary licences for the software to be supplied or in obtaining the necessary legal or regulatory approvals or authorisations for the goods or services to be provided.

XV. Right of retention and termination

Without prejudice to all of Elschukom's further and other contractual and statutory rights, Elschukom shall, at its option, be entitled in the following circumstances to refuse performance of the obligations incumbent on it in whole or in part without entailing liability to Elschukom, or to terminate/rescind the contract by written notice to the Supplier:

1. where the Supplier makes an application for the opening of insolvency proceedings or otherwise of similar proceedings over the Supplier's assets;



2. an application for the opening of insolvency proceedings or of similar proceedings over the assets of the Supplier is filed and not dismissed within thirty (30) days of the date of the application is filed, or is dismissed for lack of assets in the estate;
3. the Supplier ceases its business operations or it is foreseeable that the Supplier will cease its business operations;
4. the Supplier breaches an obligation of the contract which is not immaterial, and the breach is not cured within thirty (30) days from the date a written notice regarding the breach and a demand for cure has been received.

XVI. Confidentiality

1. The Supplier shall preserve confidentiality with respect to all such information as Elschukom has made available and with respect to all such information as is made available in Elschukom's name in connection with the present contract. The Supplier may only use such information for purposes of performing its own obligations arising under the contract. All information is deemed to remain in Elschukom's ownership and the Supplier shall return any and all information to Elschukom upon its demand therefor, without retaining any copies thereof.
2. The Supplier shall treat the contents of this contract confidentially.

XVII. Miscellaneous

1. Without Elschukom's prior written consent, the Supplier may neither make sub-contracts with others, nor may it delegate, pledge or assign rights under the contract. A pre-approved sub-contract/a delegation, pledge or assignment which has been approved shall not be deemed to relieve the Supplier of its obligations under the contract.
2. Elschukom shall not be deemed to waive its rights or claims under the contract as a result of any default or delay in asserting or enforcing its rights.

XVIII. Data protection

Data which arises as a result of Elschukom's business relationships with its suppliers shall be stored, processed, modified and, where appropriate, deleted, in compliance with the provisions of applicable law.

XIX. Miscellaneous



1. This contract is governed exclusively by German law, excluding application of the United Nations CISG and German conflicts of law rules [*Internationales Privatrecht*].
2. For both parties, the place of performance is 98669 Veilsdorf, Federal Republic of Germany, and jurisdiction and venue for disputes (including for bill of exchange matters and measures serving the purposes of securing claims) shall lie with the courts with jurisdiction over 98669 Veilsdorf, Federal Republic of Germany. Elschukom's right to bring an action against the Supplier in the courts with jurisdiction over its registered office shall remain unaffected by the foregoing, except in cases covered by clause XIX. 3 hereof.
3. Where the Supplier has its registered office outside the European Union and where no judicial assistance treaty exists between that country and the Federal Republic of Germany with respect to recognition and execution of foreign court judgments, and if the country in which the Supplier has its registered office has acceded to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, then in such case the parties hereby agree that the Chamber of Commerce in Hamburg [*Handelskammer in Hamburg*] shall be the court of arbitration for disputes between them. The applicable substantive law is German law, excluding application of the United Nations CISG and German conflicts of law rules [*Internationales Privatrecht*]. The language of the arbitral proceedings shall be German. The parties shall both acknowledge the arbitral award as binding upon them, excluding all recourse to the ordinary courts.
4. In the event of litigation initiated by the Supplier before non-German courts, the Supplier shall be obliged to bear the costs of the litigation and to reimburse Elschukom all costs incurred by it in this context, in particular including its costs for its lawyers, court costs, travel costs and accommodation expenses.
5. The sole binding language of the contract is German. The foregoing shall apply even where, in addition to the German version, this text has been prepared in a language other than German.
6. If one of the terms and conditions set forth above is found to be invalid, the validity of the remaining terms and conditions hereof shall remain unaffected thereby.