

## § 1. Validity of the General Terms and Conditions of Supply/Consumer Transaction

- § 1.1. The business transactions of ESA Elektronische Steuerungs- und Automatisierungs Ges.m.b.H., Steyrer Straße 6A, A-4493 Wolfers, company number 66109w (hereafter ESA, we or us) shall be governed exclusively by the following “General Terms and Conditions of Supply”. Our Contractual Partners shall be referred to below as “Customers” or “Contractual Partners”. These “General Terms and Conditions of Supply” shall be binding for all current and future business transactions with ESA, even if they are not expressly invoked.
- § 1.2. Any stipulations that depart from or supplement these “General Terms and Conditions of Supply”, including in particular any general terms and conditions of business or general terms and conditions of purchase of the Contractual Partner, shall only be incorporated into the contract if expressly accepted in writing by ESA. Should any individual clauses from these General Terms and Conditions of Supply be restated (either in full or in part) in offers or any other documentation of ESA, this shall not alter the fact that these General Terms and Conditions of Supply and each individual clause comprising them will be incorporated into the contract and become binding in full.
- § 1.3. If the Customer is a consumer within the meaning of the Austrian Consumer Protection Act [KSchG], the mandatory provisions of the KSchG and the Austrian Consumer Warranty Act [VGG] shall apply except insofar as specified otherwise in these Terms and Conditions of Supply.

## § 2. Offer/conclusion of a contract/cost proposal

- § 2.1. Offers by ESA are subject to confirmation and shall remain valid for 30 days unless they are expressly designated as binding. An order placed by the Contractual Partner shall only be deemed to have been accepted upon the issue of an order confirmation by ESA or upon performance, whereupon a contract shall be concluded. All information as well as illustrations, descriptions, schemata, diagrams etc. have only guideline status. All samples shall constitute non-binding samples for inspection. ESA reserves the right to make reasonable technical and structural changes. Any approvals of authorities or third parties that are necessary in order to implement the contract shall be obtained by the Customer, which shall inform ESA thereof and indemnify and hold harmless ESA where needed.
- § 2.2. A cost proposal or plan shall be drawn up by ESA to the best of its specialist knowledge; however, no warranty as to its accuracy can be provided. Should the costs increase by more than 15% after an order has been placed, ESA shall promptly inform the Contractual Partner of this fact. In the event of any unavoidable cost overruns by up to 15%, specific approval shall not be required and these costs may be invoiced without any further formalities. Unless agreed otherwise, any changes or supplements to the order may be invoiced at reasonable prices. **A fee shall be charged for cost proposals and planning services.**

## § 3. Scope of the order

- § 3.1. The scope of each specific order shall be agreed upon in the relevant individual contract.

- § 3.2. ESA shall be entitled to arrange for the tasks incumbent upon it to be performed by a third party. Such third parties shall be paid exclusively by ESA. No contractual relationship of any type whatsoever shall be established between the third party and the Customer.
- § 3.3. The Customer undertakes for a period of three years after the conclusion of this contractual relationship to refrain from entering into any business relationship of any type whatsoever with the persons or companies of which ESA has availed itself for the purpose of fulfilling its contractual duties. In particular, the Customer shall refrain from commissioning from such persons or companies any services that are identical or similar to those offered also by ESA.
- § 3.4. The Customer shall comply with the requirements laid down by the Austrian Act on Construction Coordination (Bauarbeitenkoordinationsgesetz, BauKG), in the latest valid edition. Unless agreed otherwise, the services and costs of the coordinator are not included in the offer and shall be paid for separately by the Customer. ESA shall not carry out any activities under the BauKG unless explicitly agreed to under contract.

## § 4. Duty of the Customer/declaration of completeness / operating and maintenance instructions

- § 4.1. The Customer shall ensure that the organisational framework conditions at its place of business during fulfilment of the order enable the work that is necessary for the expeditious completion of the order to be carried out with minimal disruption. Electricity, water, and other utilities (e.g. W-LAN) shall be provided free of charge by the Customer, and thus without any entitlement to recover costs.
- § 4.2. The Customer shall ensure and shall warrant that ESA is presented in a timely manner with all documentation necessary for the fulfilment and substantively correct implementation of the order (e.g. plans, drafts, dimensions, etc.), even if not specifically requested, and that ESA is informed of all processes and circumstances that could be of significance for the implementation of the order. This shall also apply for all documentation, processes, and circumstances that only come to light during the course of our activity. The Customer shall bear any costs arising on the grounds that any work needs to be repeated by ESA or is delayed due to the fact that information it provides proves to be incorrect or incomplete or is subsequently amended. The Customer shall also bear all excess costs arising for ESA as a result of the fact that the Customer, or a third party whose actions can be imputed to it, fails to provide ESA with any documentation, information and/or construction parts necessary in order to implement the order, does not do so in good time or does not do so in full. ESA shall not be under any duty to issue warnings in this regard.
- § 4.3. The Customer shall ensure that its employees along with any employee representation body established or prescribed by law (works council) are informed about ESA prior to the start of work by it.

§ 4.4. The Customer shall further be obliged to examine the documentation provided that is necessary in order to implement the order (information, programs, photographs, logos, etc.) for any copyright, trademark, labelling, or other third party rights, and warrants that the documentation is free from third party rights and can thus be used for the intended purpose. In the event that any claim is brought against ESA by a third party in relation to the breach of such a right, the Customer must indemnify and hold us harmless. The Customer shall pay compensation for all adverse effects arising for ESA as a result of such third party action, including in particular the costs of reasonable legal representation. The Customer undertakes to support the Contractor in defending against such third party claims and to provide the documentation necessary for this purpose.

§ 4.5. ESA shall only be obliged to provide the service once the Customer has complied with all of its obligations necessary in order to implement the order, and in particular has fulfilled all technical and contractual details.

§ 4.6. The Customer shall inform ESA in writing concerning the initiation of any debt restructuring procedures and/or the imposition of any debt enforcement moratorium within 3 working days. In this notice the Customer shall sufficiently substantiate whether the maintenance of the contract concluded with ESA concerning the continuation of the day-to-day operations of the Customer is absolutely necessary, and if so why.

§ 4.7. In order to ensure the orderly and safe operation of the contractual goods, the respective operating and maintenance instructions, as amended from time to time, must be strictly complied with.

**§ 5. Confidentiality/data protection/Austrian Data Protection Act [DSG], Austrian Telecommunications Act [TKG] declaration of consent/duty to provide information**

§ 5.1. The Customer hereby irrevocably undertakes to treat in confidence all operating and business secrets made accessible to it or made available to it by ESA or that have otherwise come to its attention in relation to or on the basis of a business relationship or contact with ESA and to refrain from making these accessible to third parties in any way whatsoever without the approval of ESA. The Customer further undertakes to use information solely on a “need to know” basis and solely in accordance with the contract concluded.

§ 5.2. The duty of confidentiality shall continue to apply for 7 years after the termination of the business relationship with ESA or, in the event that no business relationship is established, for a period of 3 years after the presentation of an offer by ESA.

§ 5.3. ESA shall be released from the duty of confidentiality in respect of the employees, auxiliary agents and agents of whose services it avails itself.

§ 5.4. However, it shall subject such persons to this duty of confidentiality in full. The Customer consents to the automated collection, storage and processing of its personal data, including specifically name/business name, occupation, date of birth, Commercial Registry number, VAT number, payment data, documentation data, powers of representation, contact person, business address and other addresses of the Customer, telephone number fax number, and email address for the purpose of contractual performance and the provision of support to the Customer, as well as marketing purposes, such as in order to dispatch offers, advertising leaflets, and newsletters (either as hard copies or electronically).

In addition, ESA shall be entitled to contact the Customer by telephone at any time. The Customer consents to the dispatch to it of post (either as hard copies or electronically) for marketing purposes until such consent is withdrawn. This declaration of consent may be withdrawn by the Customer at any time in writing by sending an email or a letter to the ESA contact address including—where permitted by law—an erasure request.

§ 5.5. The Customer has the right—to the extent permitted by law—to information concerning the rectification, erasure, or restriction of processing of its stored data, a right to object to processing, and a right to data portability in accordance with the requirements of the GDPR. Any complaints may be submitted to the Austrian Data Protection Authority [Datenschutzbehörde] ([www.dsb.gv.at](http://www.dsb.gv.at)). The Customer may send any questions relating to data protection or requests for the rectification, blocking, or erasure of personal data directly to the Controller at the following email address: [dsgvo@esa.at](mailto:dsgvo@esa.at).

§ 5.6. Personal data are processed primarily for the purpose of implementing business transactions along with related activities. The legal basis for the processing of personal data pursuant to Article 6 GDPR consists in particular in the consent of the data subject, compliance with statutory obligations (e.g. the Austrian Federal Tax Code [BAO], the Austrian Commercial Code [UGB], etc.), performance of a contract or the implementation of pre-contractual measures, and the upholding of the legitimate interests (e.g. reasonable customer care) of the controller (ESA).

**§ 6. Remuneration / price escalation clause**

§ 6.1. After completion of the agreed work, ESA shall be remunerated in accordance with the agreement between the contractual parties. ESA shall be entitled to issue interim invoices in line with progress in the work and to request advance payments in line with such progress. Payment shall fall due upon the issue of our invoice.

§ 6.2. Any cash outlays, expenses, travel costs, etc. incurred shall also be reimbursed by the Customer when invoiced by ESA.

§ 6.3. In the event that the agreed work is not carried out due to reasons falling within the control of the Customer, or owing to the early termination of the contractual relationship by ESA with justified cause, we reserve the right to claim payment of the remuneration in full, less any expenses that have been saved. If an hourly rate has been agreed upon, remuneration shall be paid on the basis of the projected number of hours for the entire work agreed upon, less any expenses that have been saved. It is agreed that saved expenses shall be set at a lump sum of 30 percent of the remuneration for each element of performance that the Contractor has not yet carried out upon termination of the contractual relationship.

§ 6.4. In the event that the work is not (or does not continue to be) carried out on the grounds that the materials provided by the Customer are unsuitable or prove to be unsuitable (impossibility), this shall be deemed to fall under the responsibility of the Customer and we reserve the right to demand payment of the entire remuneration agreed upon, less any saved expenditure. In addition to any objects provided, the term “materials” shall also include any object on which or with the assistance of which the work is to be completed (e.g. plan provided, object to be repaired, measurements), including preliminary work by other enterprises or by the Customer which ESA must supplement.

§ 6.5. In the event of a default by the Customer on an agreed payment or any other performance, ESA may without prejudice to its other rights either insist upon performance of the contract and demand payment of the full purchase price still outstanding under this and any other transaction and charge default interest on these amounts from the relevant due date at a level of 9.2% per annum above the relevant basic rate of the Austrian National Bank, or withdraw from the contract without any requirement to set a grace period.

§ 6.6. It is agreed that, in the event of the repair or maintenance of contractual objects, the only applicable obligation shall be the requirement to attempt to reinstate a fault-free condition. Should despite diligent workmanship, the desired outcome not arise, or not arise in full, the full fee agreed upon shall nonetheless be payable.

§ 6.7. ESA shall be vested with an unlimited right of retention over the Customer's contractual object in respect of all claims arising for it under the order in question, including in particular the right to claim for any costs that were necessary for or conducive to performance as well as any loss for which the Customer was at fault. ESA may invoke the right of retention over the object as well as the right to insist on reciprocal performance against any claims of the Customer to the transfer of the object repaired to it or to a third party, including any instructions concerning the manner in which the object repaired is to be disposed of, until the fee and any compensation claims have been settled in full.

§ 6.8. ESA shall be entitled in its own right, and shall be obliged if so requested by the Customer, to adjust the fee agreed upon under contract in the event of changes amounting to at least 15% in

- a) salary costs pursuant to law, an ordinance, a collective employment agreement, a works agreement, or
- b) any other cost factors necessary in relation to performance, such as material costs due to recommendations by the Joint Committee for Prices and Salaries or any changes to commodity prices on the national or world markets, changes to relevant exchange rates, etc. occurring after conclusion of the contract.

The adjustments shall occur insofar as the actual production costs upon conclusion of the contract have changed compared to those at the time of actual performance, provided that we are not in default.

#### § 7. Place of performance/transfer of risk

§ 7.1. The place of performance for all duties of the Contractual Partners shall be the registered office of ESA.

§ 7.2. Unless agreed otherwise in writing, the time at which risk transfers both for cross-border and also mutatis mutandis for non-cross border transactions shall be determined in accordance with the relevant applicable Incoterms. If no agreement has been met in this regard, the clause "EXW", "from the plant of ESA in A-4493 Wolfert", of the relevant applicable Incoterms shall apply.

§ 7.3. The risk of the loss or alteration of data shall transfer to the Contractual Partner upon downloading, or in the event of transmission over the internet, at the time they exit the ESA network interface.

#### § 8. Reservation of title

§ 8.1. We shall retain ownership of the goods delivered until payment has been made in full (along with interest and ancillary charges). In the event that our goods are processed, combined, or mixed with other materials, ESA shall acquire joint ownership over the resulting products in proportion with its value-added share.

The Customer shall comply with the necessarily formalities applicable at its location in order to uphold the reservation of title.

§ 8.2. Should the Customer sell the contractual item supplied—whether with or without our approval—notwithstanding our continuing status as the owner, the claim acquired by the Customer against the secondary buyer shall be assigned to us (assignment in lieu of payment). In the event of a sale, the Customer shall be obliged to promptly inform both ESA and the secondary buyer concerning this assignment of the claim.

#### § 9. Acceptance/partial delivery

§ 9.1. The Contractual Partner is obliged to accept the services and supplies provided by ESA.

Should it fail to state its acceptance on its own account, all performance shall be deemed to have been accepted 14 days after provision or delivery. If any installation or commissioning services have been agreed to, performance shall be deemed to have been accepted upon the occurrence of any of the following:

- if acceptance is confirmed by the Customer or its end customer;
- if the item installed or the service provided is operationally commissioned by the Customer or its end customer;
- or otherwise 14 days after the completion of installation or commissioning.

Ordinary and cost-plus services shall be deemed to have been accepted at the time they are provided.

§ 9.2. In the event that ESA services and supplies are separable, partial delivery and partial acceptance shall be permitted.

#### § 10. Protection of intellectual property

§ 10.1. We shall retain copyright over the works created by ESA, its employees, and third party appointees (including in particular offers, reports, analyses, expert opinions, organisation plans, programs, service descriptions, drafts, calculations, diagrams, data carriers, etc.). They may be used by the Customer for the duration and after termination of the contractual relationship exclusively for the purposes falling under the contract. The Customer shall thus have no entitlement to sell, reproduce, and/or disseminate such works without our express approval. No liability towards third parties shall under any circumstances accrue to ESA—in particular in relation to the accuracy of the work—as a result of the unauthorised reproduction/dissemination of the work.

§ 10.2. The Customer undertakes to refrain from filing industrial property right applications or from allowing third parties to file such applications in respect of the information received or the contractual objects.

§ 10.3. Any breach by the Customer of these requirements shall entitle ESA to terminate the contractual relationship forthwith, to claim specific remuneration, and to exercise any other statutory rights, including in particular to require that the relevant acts be desisted from and/or to claim damages.

#### § 11. Delayed delivery/withdrawal/delayed acceptance

§ 11.1. Delivery periods and deadlines shall be complied with by ESA as far as possible. Unless they have been expressly agreed upon as binding, they shall be non-binding and shall under all circumstances be construed as the estimated time of completion and transfer of performance to the Contractual Partner.

§ 11.2. The Customer may only withdraw from the contract on account of delayed delivery after expiry of a reasonable grace period, which must amount to at least 3 weeks. Notice of withdrawal shall be given by registered letter. The right of withdrawal shall only relate to the part of delivery or performance that is delayed.

§ 11.3. ESA shall be entitled to withdraw from the contract, without prejudice to its other rights, if:

- a. concerns have arisen concerning the Customer's ability to pay and, following a request by ESA, the Customer fails either to make an advance payment or to furnish suitable security; or
- b. insolvency procedures are launched in respect of the Customer's assets, or an application for the launch of such procedures is rejected on the grounds that the assets would not cover the costs, or the prerequisites for the launch of such procedures or for the rejection of such an application are met, or the Customer has discontinued payments.
- c. debt restructuring procedures are launched in relation to the Customer pursuant to an application by it or a debt enforcement moratorium has been imposed and the Customer has not informed ESA in a timely manner concerning this fact or has not sufficiently substantiated why the maintenance of the contract is absolutely necessary for the continuation of day-to-day operations.

A declaration of withdrawal may also be made for the above reasons in respect of an outstanding part of the service or supply. Without prejudice to the claims to damages of ESA, any performance or partial performance that has already been made shall be invoiced and paid for in accordance with the contract in the event of withdrawal. This shall also apply in the event that delivery has not yet been received by the Customer also in respect of preparatory work carried out by ESA.

§ 11.4. In the event that the Customer fails to accept the service or supply provided in accordance with the contract at the location agreed to under contract or at the time agreed to under contract, ESA may either demand compliance or withdraw from the contract without setting a grace period and otherwise dispose of the goods delivered. The goods may be stored at the cost and risk of the Customer. In the event of disposal, it is agreed that liquidated damages in the amount of 25% of the invoice amount, excluding VAT, shall be payable. ESA shall in addition have the right to the reimbursement of all justified expenses not covered by the payments received that we have been required to incur in order to perform the contract.

§ 11.5. The construction parts removed or exchanged – in accordance with the order – during the course of assembly, repair or servicing work shall be scrapped by ESA after the agreed performance has been completed. Should the Customer not agree with this and wish to recover the parts exchanged during the course of repair or servicing work, it must inform ESA concerning this fact in writing at the time the order is placed.

## § 12. Warranty

§ 12.1. The warranty period shall last for 12 months after acceptance in accordance with Section 9 of these Terms and Conditions of Supply. In the event that the Customer starts to use the services provided prior to its handover or acceptance, the warranty period shall start to run from this point in time.

§ 12.2. Proof of the presence of any defects must be furnished by the Contractual Partner. Section 924 of the Austrian Civil Code [ABGB] shall not apply. Any defects arising shall be objected to promptly, specifically, and in writing by the Contractual Partner. In the event of a warranty claim, ESA shall be entitled to determine the type of warranty service itself (rectification, exchange, reduction of the price, or rescission).

§ 12.3. The warranty shall expire immediately if the Customer itself or a third party not authorised by us makes any changes to the items delivered without our written approval.

§ 12.4. Any work carried out or services performed under warranty shall not extend the warranty period. There shall be no right of withdrawal pursuant to Section 933b ABGB.

§ 12.5. In the event that ESA rectifies any defects after expiry of the warranty and/or provides other ordinary or cost-plus services, these shall be invoiced as incurred.

§ 12.6. Any provision of guarantees by ESA must be expressly agreed upon and designated as such and shall only be valid if documented in writing. Information contained in brochures, programmes, price lists, user instructions, offers and any other general (technical) information provided by ESA shall not constitute a guarantee or assurance concerning particular characteristics.

## § 13. Liability/damages

§ 13.1. The Customer has itself selected the contractual object or the services agreed to under contract and has fully satisfied itself of its nature and quality along with the scope for using the performance agreed to under contract.

§ 13.2. Except in cases involving personal injury, the liability of ESA for all claims with any basis in law whatsoever shall be limited to wilful conduct or gross negligence. No liability shall arise under any circumstances for indirect losses or for consequential losses (including in particular consequential losses resulting from a defect), such as lost profit, the interruption of business operations, the loss of data and information, costs associated with production stoppages, the failure to achieve savings, interest losses and losses resulting from third party claims against the Customer.

§ 13.3. The liability of ESA shall be limited to a maximum of the value of the order for each conceivable instance of liability, to the exclusion of any further claims with any basis in law whatsoever.

§ 13.4. Damages claims may only be brought through court action or arbitration (in situations falling under section 15,2) within six months of the time when the loss and the responsible party came to light.

§ 13.5. If liquidated damages have been agreed to, no further losses may be claimed, irrespective of the basis in law.

§ 13.6. If any goods or services are respectively produced or provided by ESA on the basis of construction details, diagrams, models, or other specifications of the Customer, the restricted liability of ESA shall only extend to correct execution. ESA shall be released from any duty to provide a warning pursuant to Section 1168a ABGB and no reversal of the burden of proof may occur pursuant to Section 1298 ABGB.

§ 13.7. The client has to provide evidence, that the prerequisites for the claims asserted by him are met. This also applies in the event of intentional or grossly negligent action by ESA.

## **§ 14. Force Majeure**

- § 14.1. Should either contractual party be prevented from complying with its obligations under this Contract owing to a force majeure occurrence, such as armed conflict, a major fire, inclement weather, earthquake, flooding, pandemic/epidemic or in particular industrial unrest, the party affected shall give notice to the other contractual party of the occurrence of such an event as quickly as possible by fax or email and, where possible, state the expected duration of the event and the extent to which compliance with contractual obligations will be impaired.
- § 14.2. In the event of a force majeure occurrence, the contractual party affected shall not be liable for any delays, losses or errors relating to compliance with its obligations; however, it shall make every reasonable effort to ensure that the contract can be complied with as soon as possible. Both contractual parties shall promptly resume compliance with their obligations following the termination of the force majeure occurrence or the removal of its effects, and contractual deadlines shall be extended accordingly.

## **§ 15. Jurisdiction/choice of law**

- § 15.1. Jurisdiction for contracts within the EU  
It is agreed that exclusive jurisdiction to decide on all disputes arising in relation to a contract—including disputes concerning its existence — shall lie with the relevant courts with jurisdiction *ratione materiae* and *ratione loci* over the registered office of ESA.
- § 15.2. Arbitration clause – valid if the Contractor is not based within the EU  
All disputes arising from a contract entered into or concerning the breach, termination or invalidity of such a contract shall be definitively settled under the Rules of Arbitration and Mediation of the Austrian Federal Economic Chamber (VIAC) in Vienna (Vienna Rules) by three arbitrators appointed in accordance with these Rules. The location of the arbitration shall be in Vienna. The arbitration shall be conducted in German.
- § 15.3. Choice of law  
It is agreed that this contractual relationship shall be governed by the law of Austria, and that the UN Convention on Contracts for the International Sale of Goods and the provisions of the Austrian Act on Private International Law [IPRG] and other rules on the conflict of laws shall not apply.

## **§ 16. Electronic invoicing**

ESA shall be entitled to transmit invoices to the Contractual Partner electronically. The Contractual Partner hereby expressly consents to the transmission of electronic invoices by us.

## **§ 17. Further terms**

- § 17.1. Severability  
Should any of these Terms and Conditions of Supply be or become invalid or unenforceable in full or in part, this shall not affect the legal enforceability of all other terms and conditions of business. The contractual parties shall replace the legally invalid or unenforceable term with a valid and enforceable term, the content and purpose of which come as close as possible to the legally invalid or unenforceable term. Should any provision contained in these Terms and Conditions of Supply be invalid or unenforceable, even in part, this shall not result in their invalidation as a whole. On the contrary, the provision concerned shall be reduced in scope so as not to otherwise impair its efficacy and shall remain valid and applicable in any case to the extent that it is unobjectionable.

## **§ 17.2. Formal requirement**

All amendments or supplements to any contract or to these Terms and Conditions of Supply must be adopted in writing. This shall also apply to the amendment of this requirement of written form. No oral side agreements have been concluded.

## **§ 17.3. Offsetting**

It is not permitted to offset any of our claims against counterclaims of any type whatsoever.

## **§ 17.4. Subcontractors**

Subcontractors shall be permitted under all circumstances.

- § 17.5. Insofar as these General Terms and Conditions of Supply are also made available in full or in part in other languages, ESA does not provide any warranty and declines all liability for the translation of these General Terms and Conditions of Supply into other languages. In the event of any differences in meaning between the General Terms and Conditions of Supply drafted in different languages, the German version shall prevail over the versions in other languages.