

ESA GENERAL TERMS AND CONDITIONS OF SUPPLY

ESA ELEKTRONISCHE STEUERUNGS- UND AUTOMATISIERUNGS GES.M.B.H.

Valid from 17.07.2018

§ 1. Validity of the General Terms and Conditions of Supply

- § 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.
- § 1.3 If the Customer is a consumer within the meaning of the Austrian Consumer Protection Act [KSchG], the mandatory provisions of the KSchG shall apply except insofar as specified otherwise in these Terms and Conditions of Supply.

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

§ 2.1 Offer and conclusion of a contract

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. 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 Cost proposal

A cost proposal 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.

§ 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.

§ 4. Duty of the Customer / declaration of completeness

- § 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.
- § 4.2 The Customer shall ensure that ESA is presented in a timely manner with all documentation necessary for the fulfilment and implementation of the order, even if not specifically requested, and that it 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.
- § 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, etc.) for any copyright, trade mark, 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.

§ 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. However, it shall subject such persons to this duty of confidentiality in full.
- § 5.4 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, fax number, and email address for the purpose of contractual performance and the provision of support to the Customer, as well as for 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). 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.
- § 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

- § 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 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.
- § 6.5 In the event of the non-payment of interim invoices, ESA shall be released from its obligation to effect further performance. The foregoing shall however be without prejudice to the exercise of any further claims resulting from the non-payment.

§ 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 Wolfere", 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.
- 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.

§ 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.

§ 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. On this basis, we shall not be obliged to compensate any indirect or consequential losses (including in particular consequential losses resulting from a defect), such as e.g. 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 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.

§ 14. Jurisdiction / choice of law / mediation

- § 14.1 Jurisdiction
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.
- § 14.2 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.
- § 14.3. Mediation
Should any dispute arise in relation to this contract that cannot be settled amicably, the contractual parties shall amicably agree to involve registered mediators (Austrian Act on Civil Law Mediation [ZivMediatG]) specialising in business mediation chosen from the list kept by the Austrian Ministry of Justice in order to settle the dispute out of court. If it is not possible to reach agreement regarding the choice of business mediators or to agree upon the contents of a settlement, legal steps may be launched at the earliest one month after the failure of negotiations.

§ 15. 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.

§ 16. Further terms

- § 16.1 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.
- § 16.2 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.
- § 16.3 Offsetting
It is not permitted to offset any of our claims against counterclaims of any type whatsoever.
- § 16.4 Subcontractors
Subcontractors shall be permitted under all circumstances.