



# General Terms and Conditions for the Purchase of Standard Software of E.ON IT GmbH

As of: December / 2009

## 1 Subject matter of the Agreement

- 1.1 These Terms and Conditions shall apply to the perpetual assignment and use of standard software against one-time payment of compensation.
- 1.2 If the Contractor's confirmation of the order deviates in its terms from E.ON IT's Terms and Conditions, nevertheless only E.ON IT's Terms and Conditions shall apply even if E.ON IT fails to object to the Contractor's deviating terms. Deviations from or additions to E.ON IT's Terms and Conditions shall only be valid to the extent E.ON IT has expressly acknowledged them in writing.
- 1.3 If this English version conflicts with the German version, the German version shall be exclusively binding.

## 2 Definitions

- 2.1 All companies referenced in the E.ON Group company overview belong to the "E.ON Group" within the meaning of these Terms and Conditions. That company overview may be accessed via the Internet at: [http://www.eon-einkauf.com/fundamentals/en/html/index\\_fundamentals.html](http://www.eon-einkauf.com/fundamentals/en/html/index_fundamentals.html) In addition, E.ON IT will provide the company overview by post, e-mail or facsimile upon request.
- 2.2 "Right of use" within the meaning of these Terms and Conditions are rights of exploitation covering all possible types of use under secs 15 – 27 of the German Copyright Act [UrhG] as well as all rights of exploitation under secs 69 a – g of the German Copyright Act and the right to further develop the standard software.
- 2.3 "E.ON IT" or "Client" is E.ON IT GmbH.

## 3 Orders and order confirmation

- 3.1 Orders (in these GT&C also called "purchase orders") will be valid only if they are placed in writing. Oral ancillary agreements in respect of orders shall only be binding if they are confirmed in writing. The foregoing shall also apply to amendments and supplements to orders made subsequently.
- 3.2 The Contractor shall without undue delay provide E.ON IT with written notice of any changes and extensions to the scope of the goods and services if, during the course of performance, such changes or extensions are found to be necessary. They will require the prior written consent of E.ON IT.

## 4 Type, scope and quality of goods and services

- 4.1 The Contractor shall supply complete and clear documentation relating to the standard software. The Contractor shall supply the documentation for the standard software in German or English and in printed or printable form. E.ON IT may reproduce the documentation as needed.
- 4.2 The standard software shall have been examined for viruses using a current virus detection program prior to its delivery to E.ON IT. The Contractor hereby represents that its examination of the standard software has not revealed any indications of viruses, worms, Trojan horses or the like.
- 4.3 The Contractor shall alert E.ON IT without undue delay where risks or the potential for additional expense could arise from applying the defined specifications or defined standards or from the software tools used or from interactions between them, or where such risks or potential for additional expense become the subject of publications or the Contractor otherwise gains knowledge thereof. The Contractor shall advise E.ON IT with respect to possible solutions.

## 5 Deadlines for providing goods and services

The Contractor shall inform E.ON IT without undue delay and in writing, where circumstances arise or where it becomes aware of circumstances in which agreed deadlines cannot be met.

## 6 Place of performance, passage of risk and passage of title

- 6.1 The place of performance for the supply of standard software shall be such delivery address as is stated in the order. The place of performance for payment is Hanover.
- 6.2 Delivery of the standard software shall be deemed to have been completed when the software has been received at the place of performance and E.ON IT has concluded its own functional testing thereof without encountering any problems. E.ON IT carries out its functional testing within 12 business days of its receipt of the standard software.
- 6.3 Upon the successful completion of the functional testing, title and risk shall pass to E.ON IT.

## 7 Right of use

- 7.1 The Contractor hereby grants E.ON IT a non-exclusive, transferable, perpetual and geographically unlimited right of use, entitling it to use or permit others to use the standard software in any system environment it wishes.
- 7.2 This right of use pursuant to sec. 7.1 shall include the right to lease the standard software within the E.ON Group whereby the lessee shall be authorized to grant a sublease to another E.ON Group company.  
Such right to lease shall be granted only in accordance with the contractually agreed volume of usage.
- 7.3 The right of use pursuant to sec. 7.1 also encompasses the right to make the standard software available to E.ON Group companies for their use via 'application service providing' (or comparable forms of use).
- 7.4 The right of use pursuant to sec. 7.1 also encompasses the right to make the standard software available on a software distribution platform in order to automate its installation and de-installation processes. The Contractor agrees that E.ON IT may use a single, user-independent license key for all installations.  
This type of software installation shall be effected in accordance with the contractually agreed volume of usage.
- 7.5 If new companies are added to the E.ON Group, then E.ON IT will be entitled to grant these companies permission to use the standard software in terms of secs 7.1 – 7.4.

If a company leaves the E.ON Group, then any permissions to use which were granted on or before the date of the company leaving the Group shall continue in force and effect. After a company has left the E.ON Group, E.ON IT shall continue to be entitled to grant that company rights of use on a perpetual basis.

- 7.6 The granted right of use to the standard software shall also include all prior releases thereof.
- 7.7 E.ON IT will be entitled to create a copy of the standard software as a backup. The act of copying the standard software, which is done for purposes of duly backing up data, is deemed to be a part of the proper use.
- 7.8 Where E.ON IT is authorized to transfer a right of use to a third party, it may retain a copy of the software for testing and archiving purposes.
- 7.9 The Contractor hereby warrants that the standard software contains no copy protection and lockouts.

## 8 Compensation, prices and invoicing

- 8.1 The total price stated in the contract shall be the full

compensation for all contractual goods and services. Payment of compensation shall be due when the Contractor has satisfied its delivery obligations (clause 6.2) and after E.ON IT has received an invoice in verifiable form. The foregoing shall apply *mutatis mutandis* in the case of agreed partial performances.

- 8.2 The prices stated in the order are deemed to be fixed prices, inclusive of all deductions and surcharges, but are quoted net of the applicable statutory VAT.
- 8.3 Every invoice must separately itemize the legally applicable amount of VAT. Originals of invoices must be sent in written or text form to the headquarters of E.ON IT in Hanover (E.ON IT GmbH, Accounting/Finance, Humboldtstrasse 33, 30169 Hanover), stating the order number and attaching accounting documentation.

#### 9 Warranty

- 9.1 The Contractor shall deliver the standard software supplied to E.ON IT free and clear of any defects in title or quality.
- 9.2 E.ON IT is entitled to enforce the full scope of statutory warranty claims.
- 9.3 The limitation period for warranty claims shall be deemed extended by the period between the notice of the claim and the Contractor's subsequent performance (German: "Nacherfüllung").  
If the defective standard software is remedied or replaced, in whole or in part, then the limitation period will be deemed to begin anew.
- 9.4 Elimination and cure of defects shall be deemed to include the delivery of a printed or printable set of instructions for corrections to the documentation, if such action is necessary.

#### 10 Notice of defects

In cases involving the delivery of standard software which E.ON IT is required to inspect pursuant to sec. 377 of the German Commercial Code, the period for inspecting the standard software and for providing notice of an apparent defect will be 12 days from the date the delivery was received. The notice period for hidden defects will be 5 days from the date the defect was discovered.

#### 11 Infringement of industrial property rights

The Contractor hereby warrants that the contractual services shall not infringe third party industrial property rights or copyrights. The Contractor hereby undertakes to indemnify and hold harmless E.ON IT against any third party claims for infringement of such rights and to hold E.ON IT harmless in other respects.

#### 12 Liability

The Contractor shall bear liability pursuant to the provisions of applicable law in cases involving intentional acts or omissions and negligence [*Vorsatz und Fahrlässigkeit*]. It may not rely on sec. 831(1) second sentence of the German Civil Code.

#### 13 Insurance

The Contractor must maintain liability insurance coverage on terms and conditions considered customary in the industry (minimum coverage EUR 1.5 million per claim) for the entire duration of the contract, which must also cover losses arising from the manufacture and supply of software. Upon E.ON IT's request, the Contractor shall furnish evidence of its compliance with this obligation; lower levels of coverage in an individual case must be agreed in consultation with E.ON IT.

#### 14 Prohibition on assignment and set-off

- 14.1 Assignments as well as other transfers of rights and obligations of the Contractor are prohibited, unless they fall within the scope of sec. 354a of the German Commercial Code.

- 14.2 The Contractor may only exercise a right of set-off against claims of E.ON IT if its own counterclaims are not disputed or have been determined by *res judicata* judgment. The Contractor may not assert a right of retention under the present contractual relationship with E.ON IT on the basis of other contractual relationships with E.ON IT.

#### 15 Confidentiality

- 15.1 The Contractor hereby covenants to treat as absolutely confidential any and all information, to which it becomes privy in connection with the present contractual relationship with E.ON IT, and agrees to use such information only for purposes of performing this contract. Confidential information within the meaning of this provision shall include documents, details, data as well as other information that have been designated as such or are by their nature to be regarded as confidential.
- 15.2 Moreover, in so far as confidential information contains person-related data, the use thereof shall be governed by the stipulations under section 16. In the event of conflict between the provisions in this section 15 and the provisions in section 16, the provisions in section 16 shall take precedence in respect of person-related data.
- 15.3 The Contractor hereby covenants only to provide such employees or third parties with access to E.ON IT's confidential information as have a need to know it in order to perform the services under this contract and as have previously given an identical written undertaking of confidentiality. The Contractor shall, upon the request of E.ON IT, furnish E.ON IT with evidence of its having imposed this obligation on its employees and third party agents.
- 15.4 All information shall remain the property of E.ON IT. The foregoing also applies to any copies, including where the Contractor has created them. The Contractor shall have no right to retain the information, copies or data carriers.
- 15.5 The Contractor must return information provided to the Contractor to E.ON IT at the latter's request, but in any event no later than at such time as the limitation period for the defect claims has expired, in a complete fashion and unbidden, or it must, at E.ON IT's option, destroy the information, except where legal duties of retention otherwise require.
- 15.6 The Contractor shall inform E.ON IT without undue delay in the event of any indications that any of the terms of this section have been breached.
- 15.7 E.ON IT may rescind the contract, either in whole or part, if the Contractor does not perform its obligations under this section within a reasonable grace period.
- 15.8 The obligations under this section shall survive the termination of the contract.

#### 16. Data Protection, Data Security, Commissioned Data Processing

To the extent that the Contractor obtains access to or uses person-related data of E.ON IT or other companies of the E.ON Group in scope of the ordering process or in scope of the fulfilment of its duties arising from the purchase order, the provisions of this section 16 shall apply.

- 16.1 The Contractor shall be obliged to observe the statutory provisions on data protection (e.g. the German Federal Data Protection Act [Bundesdatenschutzgesetz] and the Telecommunications Act [Telekommunikationsgesetz]) and ensure and monitor compliance therewith in observance of the provisions in this section 16.
- 16.2 The Contractor shall collect, process and use person-related data for E.ON IT by way of commissioned data

processing subject to directives, in accordance with section 11 of the German Federal Data Protection Act, (hereinafter referred to as "Commissioned Data Processing") only in so far as this is essential for the performance of the Contractor's duties arising from the purchase order. All appendices and documents which the purchase order refers to are also content of the purchase order within this meaning.

The type of data to be used by the Contractor within the framework of commissioned data processing, as well as the categories of persons concerned shall be specified in the purchase order and/or in an appendix to the purchase order (hereinafter referred to as "Person-Related Data").

Person-related data within the meaning of these GT&C also include person-related data which E.ON IT processes itself on behalf of a third party and makes available to the Contractor, in so far as the E.ON IT uses the Contractor's services for the performance of its duties in relation to the third party.

E.ON IT shall, also in the case of commissioned data processing, continue to remain the owner and "master" of the person-related data. The Contractor shall not have the right to retain person-related data or retain data carriers or documents containing such data.

Commissioned data processing shall, in respect of person-related data, encompass the acts which are essential for the performance of the Contractor's duties arising from the purchase order and are referred to in the purchase order. Access to data stocks and the right to process data on a commissioned basis shall be granted only in so far as, and to the extent that, such access is essential for the proper performance of the aforesaid duties. Use of the data by the Contractor beyond the foregoing shall not be permitted. In particular, the Contractor shall not be permitted to make any copies or duplicates of the data without E.ON IT's knowledge and consent.

The duration of commissioned data processing shall be limited to the duration of the services to be rendered by the Contractor according to the purchase order.

E.ON IT shall have the right to issue the Contractor with directives concerning the type, scope and methods of data processing and concerning the data security measures to be taken in this connection. The Contractor shall solely be entitled to process person-related data within the scope of E.ON IT's directives. If the Contractor is of the opinion that a directive from E.ON IT contravenes the statutory provisions concerning data protection, it shall point this out to E.ON IT without undue delay.

E.ON IT's right to issue directives and its right of control arising from the purchase order and this section 16 may also be safeguarded by any other person mandated by E.ON IT.

The processing and use of the data shall take place exclusively in the territory of the Federal Republic of Germany, in a member state of the European Union or in any other state which has signed up to the European Economic Area Treaty. Any relocation to a country other than the above shall require E.ON IT's prior consent.

Changes to the subject, scope, type, duration or purpose of the commissioned data processing, or changes to the circle of persons concerned, shall require a corresponding written agreement between the Contractor and E.ON IT.

16.3 Furthermore, the provisions on commissioned data processing shall apply mutatis mutandis, if the testing or servicing of automated procedures or of data processing

systems is carried out by the Contractor for E.ON IT and access to person-related data cannot be ruled out in this respect.

16.4 The Contractor warrants that its protection of data shall be adequate for ensuring the confidentiality, availability and accuracy of the data. Within the sphere of its responsibility, the Contractor shall monitor compliance with the essential technical and organisational security measures relating to data protection in accordance with section 9 of the German Federal Data Protection Act. In particular, the Contractor shall safeguard corresponding entry, admission, access, circulation, input, order and availability controls. The Contractor further warrants that person-related data collected for different purposes shall be able to be processed separately. Moreover, the Contractor warrants that the following data shall be processed separately:

- E.ON IT's data,
- the Contractor's data and
- the data of other clients of the Contractor.

Prior to the commencement of commissioned data processing, and thereafter at E.ON IT's request, the Contractor shall prove in writing that it is complying with the technical and organisational measures relating to data processing. If intervals of time for the furnishing of proof are stipulated in the purchase order, the proof shall, in addition to the stipulation in the sentence above, also be furnished at those intervals on a regular basis. In each case, the Contractor shall be obliged to furnish proof in such a manner that the Contractor hands over to E.ON IT in each case written documentation in which the technical and organisational measures taken by the Contractor, within the meaning of this no. 16.4, are described in sufficient detail that E.ON IT can meet the examination duties incumbent upon it under section 11 of the German Federal Data Protection Act. Owing to technical progress and developments in legislation which are to be expected, it may become necessary that the technical and organisational measures taken be adapted to technical progress and developments in legislation. In this respect, therefore, the Contractor shall be permitted, for adaptation to technical progress, to implement alternative adequate technical and organisational measures. The level of security of the measures agreed upon with E.ON IT must not be fallen below in this respect. Material changes shall be documented and communicated to E.ON IT without undue delay. Essential adaptations of the technical and organisational measures to changed statutory provisions shall be implemented by the Contractor without undue delay. Material adaptations shall be documented and communicated to E.ON IT without undue delay.

16.5 E.ON IT shall be responsible, as the data controller, for assessing the permissibility of the data processing and for safeguarding the rights of the persons concerned under the data protection laws. If E.ON IT has caused person-related data to be corrected, deleted or locked in relation to the Contractor, the Contractor shall be obliged to wholly follow this directive. If a person concerned asserts rights in relation to E.ON IT, particularly the right to information, the Contractor shall carry out, without undue delay, all acts essential for the performance of E.ON IT's obligations in relation to the person concerned.

16.6 No later than prior to the commencement of commissioned data processing, the Contractor shall

appoint in writing a data protection officer as provided for in section 4 f of the German Federal Data Protection Act. This person must possess the essential expertise and reliability and use his influence to bring about compliance with the provisions on data protection. The Contractor shall inform the data protection officer about the commissioned data processing.

Further duties of the Contractor shall ensue from, in particular, section 11, subsection 4 of the German Federal Data Protection Act.

The Contractor shall be obliged to ensure that it passes on E.ON IT's directives to all employees who have access to person-related data in connection with the performance of the Contractor's contractual duties according to the purchase order. Moreover, the Contractor shall be obliged to prohibit those employees, also for the period after their employment ends, from processing or using person-related data contrary to E.ON IT's directive or for a purpose other than for the performance of the contractual duties in relation to E.ON IT (data secrecy). The obligation of data secrecy shall be imposed upon the employees prior to the take-up of commissioned data processing. On request, the Contractor shall prove in writing to the data protection officer designated by E.ON IT that this obligation has been passed on.

- 16.7 The contracting of subcontractors by the Contractor shall only be permissible in so far as this is expressly permitted by the purchase order.

The Contractor shall diligently select the subcontractor and, prior to contracting the subcontractor, satisfy itself that this subcontractor is able to comply with all duties laid down in this agreement for the Contractor. Moreover, the Contractor shall be obliged to impose upon the respective subcontractor the duties laid down in this section 16, with the proviso that the subcontractor takes the place of the Contractor. Furthermore, the Contractor shall contractually ensure that all rights laid down in this agreement are, at E.ON IT's option, able to be safeguarded either by the Contractor in accordance with E.ON IT's directive or by E.ON IT itself. If the Contractor safeguards the rights in accordance with E.ON IT's directive, the Contractor shall be obliged to pass on all information to E.ON IT without undue delay, particularly documentation and results of controls. On request, the Contractor shall prove in writing to E.ON IT's data protection officer that the duties laid down in this section 16.7, subsection 2 have been performed.

The provisions in the above subsection 2 of this section 16.7 shall also apply mutatis mutandis to other persons who are appointed for the performance of the Contractor's duties in relation to the E.ON IT and who have access to person-related data. The appointment of such persons shall only be permissible in so far as this is expressly permitted by the purchase order.

- 16.8 The Contractor's duties stated in this section 16 shall not be affected by discontinuation of the contractual relationship which has been established with E.ON IT as a result of the purchase order. This particularly applies to the obligation to maintain data secrecy. After commissioned data processing has ended, the Contractor shall only be permitted to continue to store or otherwise retain the person-related data made available, in so far as statutory retention periods mandatorily demand further retention at the Contractor. Otherwise, the Contractor shall be obliged, upon discontinuation of commissioned data processing, to hand over all person-

related data in its possession to E.ON IT without undue delay or, according to consultation and agreement with E.ON IT, destroy the person-related data without undue delay in conformity with data protection rules and provide E.ON IT with written confirmation of destruction. The above also covers person-related data generated for data securing and logging. In the case of returning person-related data to E.ON IT, the data mentioned in the above sentence, as well as any and all copies or duplicates of the data shall, following hand-over to E.ON IT, be destroyed at the Contractor by the Contractor without undue delay in conformity with data protection rules and E.ON IT shall be provided with written confirmation of destruction.

- 16.9 The Contractor grants the E.ON IT, particularly its data protection officer, the right to monitor at any time, and without hindrance, whether the data processing is being carried out in accordance with the provisions of the law on data protection, the contractual provisions and the directives issued by E.ON IT. The Contractor undertakes to support E.ON IT in this connection to the extent necessary, particularly by making the necessary information available, carrying out all acts necessary in this connection and granting the necessary admission, entry and access rights. E.ON IT shall be entitled to call in third parties (particularly supervisory authorities) for carrying out the aforesaid controls, in so far as the third parties are entitled to carry out the controls in relation to E.ON IT. The Contractor shall also acquiesce to and support documentation of the results of the controls prior to the commencement of commissioned data processing and during commissioned data processing.

- 16.10 E.ON IT shall be entitled to have a security check carried out on the Contractor's service providers in accordance with section 12b of the Atomic Energy Act [Atomgesetz], if they render services in connection with the handling or carriage of radioactive materials or in connection with the construction or operation of facilities within the meaning of section 7, section 11, subsection 1, no. 2, or section 9a, subsection 3 of the Atomic Energy Act. The Contractor undertakes to make available the essential data of those service providers in this connection.

- 16.11 The Contractor shall, without undue delay, give E.ON IT written notification of all indications of a breach of the data protection provisions or of this section 16 or of E.ON IT's directives. The duty to inform shall particularly apply in the case of indications of an event within the meaning of section 42a of the German Federal Data Protection Act. If the security or confidentiality of the person-related data at the Contractor is jeopardised by attachment or seizure, by insolvency or composition proceedings or by other events or measures of third parties, the Contractor shall inform E.ON IT thereof in writing without undue delay. The Contractor shall, without undue delay, inform all persons responsible in this connection that the sovereignty over and ownership of the data lie with E.ON IT.

- 16.12 E.ON IT reserves the right to pass on to affiliates of E.ON AG, within the meaning of sections 15 et seq. of the Public Limited Companies Act [AktG] and to E.ON AG, for the purposes of Group-wide procurement the Contractor's data made available in connection with the purchase order and the right to store those data, even after a contract has ended, within the scope of applicable data retention provisions or for possible further purchase orders.

**17 Written Form**

Unless expressly otherwise agreed above, the contract, any amendments thereto, as well as any contract-relevant declarations, notices and duties of documentation, must be made in writing. The provision contained in sec. 126 subsection 3 of the German Civil Code shall never apply as between the parties hereto.

**18 Publication and advertisement**

Disclosure of the business relationship that exists with E.ON IT is only permitted with E.ON IT's prior written consent. This shall also apply with respect to the publication of data relating to this contractual relationship.

**19 Jurisdiction and venue**

Jurisdiction and venue shall lie with the courts of Hanover.

**20 Language of contract and governing law**

20.1 The language of the contract is German.

20.2 Governing law is the law of the Federal Republic of Germany, excluding application of the UN Convention on Contracts for the International Sale of Goods of April 11, 1980. Customary commercial terms shall be interpreted in accordance with the Incoterms – ICC, Paris, as from time to time amended.