

**General Terms and Conditions of c.a.p.e. IT GmbH**

Date: Chemnitz, 17 October 2011

**1 Area of Agreement**

1.1 The general terms and conditions shall apply to all services and deliveries which c.a.p.e. IT GmbH, hereafter named c.a.p.e. IT, provides to the contractee. They shall apply to all legal and business relations between c.a.p.e. IT and its customers.

1.2 Variations to these general terms and conditions shall only be effective if confirmed by c.a.p.e. IT in written form. The same shall apply to any waiver of this written-form requirement.

1.3 The scope of individual services owed by c.a.p.e. IT shall result from the awarded contracts. Orders shall only be executed using these general terms and conditions. These shall also apply to future business relations, even though they might not be explicitly agreed upon once again.

**2 Offers and Contract**

2.1 c.a.p.e. IT's offers are subject to confirmation if not agreed upon otherwise in written form. An order shall come into being when the contractee awards a contract in written form and it is accepted/confirmed by c.a.p.e. IT in writing. The same shall apply to additions, changes, recalculations or contract extensions.

2.2 For the scope of services and delivery, the written order confirmation of c.a.p.e. IT is authoritative. The contractee is obligated to check the order confirmation for accuracy and completeness. Deviations from quotations and/or orders are to be reprehended in writing immediately.

2.3 Even after an order had been confirmed, c.a.p.e. IT shall reserve the right to deviations from the quotation documents for technical reasons insofar as such changes are reasonable for the contractee and the cause for such changes is rooted in the technical enhancement of products.

2.4 Service agreements are all contracts between c.a.p.e. IT and the contractee which involve the rendering of services by c.a.p.e. IT as required or agreed and which are invoiced – if applicable - at cost. With service agreements, the following rules apply:

2.4.1 Except when otherwise stipulated, a written price and delivery date confirmation shall be deemed as non-binding target price and, respectively, target delivery date and not as binding confirmation. Binding price and delivery date confirmations requested by the contractee require a written statement on the part of c.a.p.e. IT. In case of requested a posteriori changes in price, delivery date or service, c.a.p.e. IT reserves the right to invoice additional expenses.

2.4.2 On a monthly basis, c.a.p.e. IT documents all of its rendered services in written performance records which are usually submitted to the contractee for written confirmation the following month. The contractee shall confirm these performance records within 5 workdays or shall demand necessary adjustments within this period of time. Otherwise, these performance records shall be automatically deemed accepted.

2.4.3 Except when otherwise stipulated, service performances shall be documented by c.a.p.e. IT with the smallest unit of 15min (0.25h) in 15min steps.

2.4.4 Billing shall be based upon a given month's performance record and usually happens the following month. This billing procedure may sometimes lead to billings beyond the end of the performance period (e.g. because of delayed accounts of expenditures).

**3 Payment, Conditions of Payment, Delay of Payment**

3.1 The contractee shall pay c.a.p.e. IT the agreed upon payment plus official value added tax (VAT). Prices and payments result from the respective quotation if not agreed upon otherwise.

3.2 Payment is due without deductions no later than 30 days after invoice receipt. After that, in accordance with §286 para. 3 BGB (German Civil Code), the contractee shall be in default without a separate reminder on the part of c.a.p.e. IT being required.

3.3 Conditions of payment, as agreed upon in the aggregated order, shall apply to partial billings analogously.

3.4 Except when otherwise stipulated, additional expenditures (such as costs for travelling and accommodation) shall be reimbursed at cost. Relevant receipts will be submitted to the contractee without request. The following rules apply:

3.4.1 Travelling times resulting from travel on official business shall be reimbursed at half the hourly rate stipulated in the contract. In cases in which per diem rates were agreed upon, the calculation of the hourly rate shall be based on an 8h working day.

3.4.2 Hotel costs shall be reimbursed by the contractee up to a maximum of 100 EUR per person and overnight stay.

3.4.3 Travelling costs (rental cars, fuels, train, flight, ...) shall be reimbursed by the contractee at cost. The per-kilometer allowance for the use of the contractor's company cars shall be 0.40€/km.

3.4.4 In accordance with tax regulations, the contractee shall reimburse lump sums for additional board expenditures during out of town stays:

- Out of town for minimum 8h: 6 EUR
- Out of town for minimum 14h: 12 EUR
- Out of town for 24h: 24 EUR

3.5 In the event of default, c.a.p.e. IT shall be entitled to charge default interest in the amount of 8% above the effective basic rate of interest. For both contracting parties offsetting shall only be permitted for legally recognized or unchallenged outstanding debts.

**4 Services, Changes in Services, Deadlines**

4.1 c.a.p.e. IT delivers its services with diligence and under consideration of the current state of art. In the provision of its services, c.a.p.e. IT shall be entitled to use third parties. In such case, c.a.p.e. IT shall require the contractee's approval before the provision of service.

4.2 The provision of partial deliveries or partial services shall be permissible.

4.3 If the contractee changes his requirements, c.a.p.e. IT shall be entitled to demand adequate reimbursement, provided that these changes affect the conditions of the contract. In such case, agreed upon deadlines can be postponed. Agreed upon time limits shall also be extended due to interferences that c.a.p.e. IT cannot be held responsible for and all other cases of force majeure. In cases in which an agreed upon deadline is postponed or extended, the customer shall be informed immediately in written form.

4.4 Delivery and service deadlines shall be only deemed binding if they were explicitly agreed upon as binding.

4.5 Binding delivery and service deadlines shall begin on the day of c.a.p.e. IT's order confirmation. The meeting of deadlines presupposes the timely arrival of documents to be provided by the contractee, his hardware and/or software supply, the presence of all permissions to be provided by the contractee, the completeness and approval of plans by the contractee as well as the contractee's compliance with agreed upon payment conditions and other essential contractual obligations.

4.6 In case of non-binding delivery deadlines, c.a.p.e. IT shall not be in default before the expiration of eight weeks and the arrival of a first reminder, which needs to contain an appropriate deadline setting.

**5 Withdrawal from Contract**

5.1 In case of exceeding a bindingly agreed upon delivery time due to c.a.p.e. IT's sole responsibility or illegal action, or in cases in which an agreed upon service was not delivered despite an appropriate grace period and the contractee cannot be held responsible, the contractee, by means of registered mail, shall be entitled to withdraw from the respective contract. This shall not apply to force majeure.

5.2 Cancellations shall only be possible with c.a.p.e. IT's written approval. If c.a.p.e. IT approves of a particular cancellation, it shall be entitled to invoice not only the costs for already delivered services, but also a cancellation charge in the amount of 30% of the overall project's uncleared order value.

5.3 c.a.p.e. IT shall be entitled to withdraw from contract when:

- the contractee is in default – wholly or partially – in spite of reminder;
- the contractee violates another essential condition of the contract or of these general terms and conditions;
- insolvency proceedings are instituted on a contractee's assets or when the institution of such proceedings is disallowed due to lack of assets;
- the execution of an order is delayed or rendered impossible on grounds the contractee is to be held responsible for;
- concerns regarding the contractee's financial solvency have emerged and the contractee does neither comply with an appropriately timed request for advance payment nor furnishes an appropriate security.

**6 Duty to Collaborate**

6.1 Where required, the contractee is duty bound to support c.a.p.e. IT and to provide all requirements that allow for a proper order execution on the part of c.a.p.e. IT.

6.2 The contractee shall provide all information and services necessary for orientation and execution free of charge.

6.3 If collaborations on the part of the contractee are not provided, delivery and service deadlines shall lose validity. c.a.p.e. IT reserves the right to invoice costs resulting from such instances.

## 7 Installation and Implementation

7.1 The installation and/or implementation of the delivery item shall be carried out by c.a.p.e. IT exclusively on the grounds of an explicit agreement in written form. Precondition for this is that all interfaces, framework and environment parameters as well as the components to be installed/implemented are precisely specified in written form before the conclusion of the contract.

7.2 Before installation and implementation, it shall be further assumed that all components are available timely and in working order.

7.3 If not agreed upon otherwise, c.a.p.e. IT shall only verify the technical applicability/operational capability of components to be installed/implemented, but not the economic viability or other aspects of their operational use.

7.4 If an installation and/or implementation has been contractually agreed upon, the contractee is responsible for creating the following prerequisites:

- a. Provision of spatial infrastructure (electricity, air conditioning, ...)
- b. Testing of functionality of components to be connected
- c. Provision of qualified staff members authorized to decide
- d. Compliance with official safety regulations and observation of general safety

## 8 Acceptance

8.1 Provided that services require acceptance, they shall be accepted by the contractee. Acceptance of services rendered shall be contractually agreed upon.

8.2 For definable partial service deliveries, c.a.p.e. IT shall be entitled to request partial acceptance. After the final partial acceptance, the overall service shall be deemed accepted. Partial acceptances are also to be agreed by contract.

8.3 The contractee shall be obligated to verify the contractual accordance of services regarding essential contents and functionalities and, contractual accordance provided, to declare their acceptance in written form. The verification deadline shall be two weeks from provision for acceptance, if not agreed upon otherwise.

8.4 Software shall be deemed accepted automatically as soon as the software is used in live/productive operation or after expiration of the verification deadline of two weeks with no production-hindering flaws specified in written form. In case of minor flaws, it shall not be allowed to withhold acceptance of services.

8.5 Initial training and familiarization of the contractee or his operational staff regarding c.a.p.e. IT's developed and delivered software shall not be included in the scope of services and shall be contractually agreed upon separately.

## 9 Reference Data

9.1 Denominating the customer's name as well as using the customer's logo and also respecting the protection of privacy and confidentiality, the contractor shall be allowed to use the service provision underlying a particular project contract as reference data. Detailed information concerning a particular project, its contents, etc. will only be published with the contractee's written consent.

## 10 Transfer of Risk

10.1 The risk (regarding service, payment) shall be transferred to the contractee as soon as the contract goods or service has been properly forwarded or handed over.

10.2 The risk shall also be transferred to the contractee in case of a default in acceptance.

## 11 Materials Defect Liability / Warranty of Title

11.1 Considering the state of art, c.a.p.e. IT calls attention to the fact that is not possible to develop software programs in such a way that they will function faultlessly under all conceivable conditions.

11.2 At the creation of individual software as well as the adaptation of software, the subject of a guarantee by c.a.p.e. IT shall be software which is principally usable within the meaning of the functional specification of contracts for services, respectively the description of contents of work packages of service agreements.

11.2.1 Basic software, which provides the basis for c.a.p.e. IT's further and additional developments and which was not created by c.a.p.e. IT, shall be excluded from any claims for defects. Third-party software, which was not created, adapted or further developed by c.a.p.e. IT, shall also be excluded from any claims for defects.

11.2.2 All valid defects on contractually agreed software to be created for which c.a.p.e. IT is at fault, shall be corrected and remedied free of charge. Warranty expenditures shall not be considered calls/expenses within the meaning of a support contract that can be entered into with c.a.p.e. IT GmbH.

11.3 The 24-month statute of limitation for claims for defects shall begin at acceptance.

11.4 Flaws shall be reported in comprehensible and written form specifying information useful for flaw identification. Obligations to examine and contest required by law which pertain to the contractee shall remain unaffected.

11.5 Insofar as required, the contractee shall be obligated to support c.a.p.e. IT in the correction of faults. c.a.p.e. IT shall correct the faults in appropriate time. If the correction of faults fails twice within appropriate deadlines, the contractee shall be entitled to mark down the reimbursement or to demand the cancellation of the contract. The replacement of component parts or complete components in the framework of supplementary performance shall not result in new deadlines.

11.6 Claims for supplementary performance shall not apply if the flaw originated from the contractee or, considering the contractually presumed use or described functionalities, constitutes only a minor impairment of the delivery/service.

11.7 Liability for defects shall be forfeited for such software which the contractee modifies or interferes into otherwise, unless the contractee proves that the interference does not cause the defect. c.a.p.e. IT shall be entitled to invoice reimbursement for its efforts insofar as it has taken action due to a flaw report without an actual flaw being existent.

11.8 Explanations or descriptions of and/or about services portrayed in manuals, price lists, advertising materials or depictions shall not constitute undertakings as to quality, unless contractually agreed upon.

## 12 Trademark Rights

12.1 The contractee shall be obligated to inform c.a.p.e. IT immediately about third party trademark claims with regard to delivered services or software and to leave legal defence to c.a.p.e. IT on its own account.

12.2 On its own account, c.a.p.e. IT shall be entitled to perform necessary changes on services and goods due to third party trademark claims, even if they had been delivered and paid already.

## 13 Reservation of Proprietary Rights

13.1 c.a.p.e. IT shall reserve the proprietary rights to services delivered to the contractee until all accounts resulting from the contractual relationship have been settled.

13.2 Services and deliveries provided for presentation and testing purposes shall remain the property of c.a.p.e. IT.

## 14 Rights of Use

14.1 For custom-made software and documentation and subsequent improvements, c.a.p.e. IT grants the licensee a non-exclusive, non-transferable right of use for internal use on the specific IT-system or systems the software was delivered for.

14.2 For backup purposes, the contractee shall be allowed to make a full copy of the programs and add the original data carrier's copyright mention to them. Apart from that, the licensee shall not be entitled to copy programs and documentations. The criminal liability of further reproduction, consequently the use on more workstations than licensed, shall be pointed out explicitly. The same conditions shall apply to programs delivered in the framework of software maintenance. The right of use shall be granted under the condition that payment for the use has been made in full.

14.3 Without c.a.p.e. IT's written approval, the contractee shall not be allowed to grant third parties access to the delivered software or parts thereof.

14.4 In case of c.a.p.e. IT delivering hardware, software or other services from other producers, the contractee shall receive the rights of use according to the license terms of each producer and according to the contract entered into with c.a.p.e. IT.

14.5 For Open Source Software (OSS), the official OSS-license, use- and proprietary rights stipulations apply. If the contractee performs customizations, enhancements or subsequent improvements on Open Source Software, the OSS-license and rights of use continue to apply for the customized, enhanced or improved software. Open source software based solutions are distributed by c.a.p.e. IT under their original license. The license terms of these original licenses are to be respected.

14.6 The OTRS-based solutions distributed by c.a.p.e. IT are licensed as open source software under the GNU Affero General Public License, Version 3 (AGPLv3). The license terms of AGPLv3 in relation to the software's holders of rights are to be respected by the contractee. In accordance with AGPLv3's license terms, further developments which were performed by c.a.p.e. IT on behalf of the contractee must be made available to the users of the software in the source code under the AGPLv3 license terms, if either (a) the user is conveyed a copy of the software or (b) the user interacts with the software via a network according to number 13 AGPLv3. C.a.p.e. IT will provide the contractee with the source code of its further developments so that the contractee is able to fulfill the license terms of AGPLv3.

## 15 Copyrights

15.1 c.a.p.e. IT is the holder of all proprietary, copy, trademark and all other protective rights to all individually created software and other written services. The licensee shall acknowledge that the software is copyrighted. The licensee shall only be entitled to use the software within the contractual limits. Except for explicit written agreement, the acquisition of rights to software or other written services is excluded.

15.2 c.a.p.e. IT reserves the publication, processing and exploitation rights. Copyright and trademark right mentions must not be avoided.

15.3 Existing rights of Open Source Software hold true.

15.4 In case of non-compliance against obligations resulting from sections 14 or 15, c.a.p.e. IT shall be entitled to the enforcement of compensation claims.

## 16 Liability

16.1 Contractee and c.a.p.e. IT shall be liable for damages which they can be held responsible for, as follows:

a. Damage to property up to 500,000 EUR per damaging event, however, in total to a maximum of 1.0 million EUR per contract;

b. Financial damages up to a maximum of 10% of the contract's overall remuneration. Liability for financial damages shall be limited to a total of 500,000 EUR per contract.

Claims for lost profits are denied. Only predictable damages shall be taken into consideration.

16.2 Limitations of liability as in number 16.1 a. and 16.1. b. subparagraph 1 shall not apply for damages by intent, gross negligence, harm to life, limb and health, or insofar as product liability law regulations apply.

16.3 In case of data loss, the contractor c.a.p.e. IT shall also be liable for damages by ordinary negligence, but shall be limited to the time and cost for restoring the data that would have been incurred if data backups had duly been made by the contractee. A proper backup of data by the contractee is to be performed at least once a day, limiting the contractor c.a.p.e. IT's extent of liability for time and cost for restoring the data to a maximum of one day.

16.4 Upon request by the contractee, c.a.p.e. IT will show that the maximum amounts guaranteed in number 16.1 a. are covered by insurance whose framework and scope conforms to current German commercial liability insurances or comparable insurances in EU member states.

16.5 For viruses in software individually developed by c.a.p.e. IT, c.a.p.e. IT shall be liable only insofar as the software had already been infected at the time of surrender and the virus had been identifiable at the time. The contractee is obligated to the installation of an up-to-date antivirus software and the continual update thereof.

## 17 Protection of Privacy, Confidentiality

17.1 The contracting party shall agree to the processing and storing of personal data subject to the German Federal Data Protection Act (BDSG).

17.2 Both contracting parties shall be obligated to maintain unlimited silence regarding commercial, contractual and company secrets as well as regarding all information to be considered confidential. The relaying of such information to persons that are not involved in the project execution shall require written consent from the respective contracting party.

17.3 All of c.a.p.e. IT's employees and affiliated companies are bound to the BDSG and other applicable legal regulations.

17.4 Personal data and information will be processed only within c.a.p.e. IT and affiliated companies. Data will not be passed on to third parties. If data is passed on to service providers for the purpose of order data processing, they will be bound to the BDSG and other applicable legal regulations. Insofar as c.a.p.e. IT and affiliated companies are bound – legally or by court decision – to deliver your data to authorities entitled to receive information, we will do so.

17.5 All of c.a.p.e. IT's employees and affiliated companies shall be obligated to maintain complete confidentiality concerning all business matters made known to them in the course of services performed. It is not relevant in what ways these information became known. The obligation to maintain complete confidentiality shall extend beyond the period of service provision.

## 18 Place of Execution, Applicable Law and Place of Jurisdiction

18.1 The place of execution for all obligations resulting from a contractual relationship shall be the contractor's office premises in Chemnitz, Germany, if not agreed upon otherwise in written form.

18.2 For the general terms and conditions as well as the entire business relations between c.a.p.e. IT and the contractee, the jurisdiction of the Federal Republic of Germany shall be applicable excluding the application of CISG (UN Convention on Contracts for the International Sale of Goods, translator's note).

18.3 The place of jurisdiction is Chemnitz.

## 19 General

19.1 Changes and additions to these conditions or the contract must be in writing in order to be effective. Unless otherwise stipulated, the electronic form (§ 126a BGB [German Civil Code]) can be used insofar as the contract or the GTC require written form.

19.2 In cases of doubt or legal ineffectiveness of individual or several clauses, the remaining clauses shall remain binding. The contracting parties are obligated to agree upon a clause that is as close as possible to the cause of the effectless clause.

19.3 All registered trademarks are the property of their respective owners.