	Terms&Conditions — SW Use and Maintenance	
	Happy Clients in Realtime Communication and Control	

port GmbH | maint-sw | Status: Exp

Terms and Conditions
for the Use and Maintenance of Software Products

I. Provision of Software Products

§1   Delivery of Standard Programs

1.1   The software products (in the following: "programs") shall operate as specified in the product description and more detailed in their user documentation. The user documentation may describe functions not ordered by the customer.

The programs shall embody all legal and other provisions the programs must comply with.

1.2   *port* shall transmit the programs to the customer in machine-readable format (object code) on data storage media or *port* may provide them for download from the Internet. Unless otherwise agreed, *port* may deliver the programs by e-mail. *port* shall provide the user documentation either as a printed copy or in electronic format.

In the event *port*'s programs have interfaces for interoperability with other programs, *port* shall provide information for the use of the interfaces, if so requested by the customer, subject to reimbursement of *port*'s expenses. The customer may pass such information on to other contractors to the extent necessary.

§2   Right of Use

2.1   *port* shall grant the customer the right to use the programs within the limits of the scope defined in the contract, for the customer's own purposes and for the purposes of the customer's group of companies.

2.2   The license fee for the right of use is determined by the extent of the customer's right of use, in particular by the size of the configuration and/or the maximum number of simultaneously active users. Unless otherwise agreed, the customer is only entitled to use the programs on one designated IT system (single user license). If the customer wants to extend the right of use, the customer shall pay additional compensation, in advance of the extended use.

The customer is entitled to replace the designated IT system by another IT system used by the customer, but the customer is only entitled to use the programs on one IT system at the same time.

2.3   The customer agrees to use the programs only on configurations *port* has declared to be compatible with the programs. The customer shall inform *port* of any modifications of the customer's configuration without undue delay.

2.4   The customer may transfer the granted right of use per program to another user if the customer confirms to discontinue the use of the programs and if the new user accepts in writing towards *port* to take over all obligations to the protection of the programs and to comply with the restrictions of the right of use as they were agreed on between the customer and *port*.

If *port* has granted the customer an unrestricted right of use, this right of use is not transferable.

2.5   The customer shall not modify or enhance the programs and the related documentation in any way.

§3   Performances

3.1   It shall be the responsibility of the customer to install the programs on the customer's IT systems. At the request of the customer, *port* shall install the programs for compensation based on expense and execute a brief training session. The customer shall confirm successful installation in writing in such a case.

In the event it is agreed that *port* will install the programs, the customer shall ensure that qualified operating staff are available by the time of installation at the latest. *port* urgently advises that the customer train its employees in a training course.

3.2   It shall be the responsibility of the customer to bring the programs into operation. To this end, the customer shall inspect the programs under their conditions of use before the customer uses the programs productively. *port* is prepared to assist the customer in this respect upon request in return for

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compensation based on expense.

3.3 The customer shall examine all *port* performances for defects without delay, if appropriate in the proper course of business. In particular, the customer shall examine even programs for occasional use.

3.4 *port* shall appoint a customer adviser and the customer a contact person. The customer adviser and contact person shall either make decisions or bring about decisions without delay. The customer adviser shall record decisions in writing. The contact person shall be available to *port* to provide all necessary information. *port* shall be obliged to involve such contact person if necessary for the execution of the agreement.

§4   The Customer's Duties on Software Protection

4.1 The customer acknowledges that the programs, including the user documentation and additional documents, even in future versions, are copyright-protected and constitute business and trade secrets proprietary to *port*. The customer shall ensure with no limit in time that the programs are protected from misuse.

If *port* provides source codes the customer shall make the programs accessible only to employees creating and processing object codes derived from the source code.

4.2 If *port* provides programs in source code, the customer shall only make them accessible to any third party with *port*'s prior written consent. *port* shall not unreasonably withhold such consent, but *port* does not need to give it to enable the customer to obtain maintenance services for the programs from a third party.

4.3 The customer shall not create programs derived from the programs.

The customer shall use the user documentation for internal purposes only and only copy it to the extent admissible with regard to the customer's right of use. The customer shall not translate, modify or enhance the user documentation or develop any works based on the user documentation.

II. Maintenance and Support for the programs — if offered in the Quotation —

§5   Subject Matter

5.1 If maintenance and support is agreed on in the contract maintenance and support shall include the delivery of further developed versions of the programs, the remedy of defects and telephone support during the usual business hours of *port*, in return for a lump-sum compensation.

Support shall be performed starting with the installation of the programs.

5.2 All other performances shall be compensated separately, in particular the installation of further developed versions, the transfer of customer specific modifications to further developed standard versions, and the adaptation of customer specific enhancements to further developed versions.

5.3 The maintenance and support agreement shall run for an indefinite period of time. It may be terminated by the customer or by *port* to the end of a contract year, in writing, giving three (3) months notice.

port may not terminate until the end of the third support year, but shall be entitled to termination with the option of alterations to the agreement even earlier on objective grounds, particularly in the event support for system software required by the programs or other software needed for the operation of the programs is limited by the supplier thereof.

§6   Correction of Defects

6.1 Defects are defined as deviations from the features the programs shall have in accordance with § 1.1 or which they must have for customary use.

6.2 The duty to remove defects as a specified performance and to provide telephone support shall relate to the current and the preceding version of the programs. Support for the preceding versions shall end six (6) months after the release of the latest version. However, such duty shall conitnue to exist if the acceptance thereof would be unreasonable to the customer, provided *port* is capable of rendering such performances. In the above case, *port* is entitled to claim for added costs and expenses, including costs and expenses accruing for maintenance of the required support and maintenance

environment.

6.3   § 12 shall apply accordingly for the execution of defect removal as a specified performance.

§7   Further Development of the Programs under Maintenance

7.1   *port* shall deliver further developed standard versions including associated documentation to the customer as set forth in § 1.2, after the release of such versions by *port*. The above shall not apply to enhancements *port* offers separately, as new programs in *port*'s price list.

The customer shall test new versions before the customer uses them for productive purposes.

7.2   In the event the manufacturerer of the system software necessary for use of the programs for which *port* performs maintenance and support releases a new version of the system software under a maintenance agreement with *port*, *port* shall examine after the availability thereof whether such version works properly together with *port*'s programs under maintenance with the customer. If that is the case, *port* shall release such version (cf. § 2.3). Otherwise, *port* shall adapt *port*'s programs to the further developed version of the system software within a reasonable period. The reasonable period shall begin upon the release and availability thereof for *port*.

7.3   For system software whose manufactureres do not offer new versions within the framework of maintenance and support performances, instead offering new generations for sale from time to time, the following shall apply:

In the event the manufacturer offers improvements (e.g. service packs), *port* shall act in accordance with § 7.2.

In the event the manufacturer offers a new generation, *port* shall evaluate if *port* adapts *port*'s programs to the new generation with due regard for user requirements.

In the event *port* adapts *port*'s programs to the new generation, *port* shall only further develop the programs on this basis.

7.4   The customer shall ensure that the customer's IT-equipment, particularly the system software thereof meets the state of technology required by the programs under maintenance within the framework of further development in accordance with § 7.2 and § 7.3. *port* shall notify the customer promptly which state of technology must be provided for maintenance and support services.

The customer shall not introduce a new system software version until *port* has released the programs for such version (cf. § 2.3).

The customer shall notify *port* in advance if the customer plans to install a new version of the required system software.

7.5   § 7.2 through § 7.4 shall apply accordingly for other third-party programs with which *port*'s programs are to work together. § 7.3 and § 7.4 shall also apply for third-party programs which are freeware or in the public domain (e.g. Linux).

7.6   *port* agrees to further develop the respectice current version in the event changes in legal regulations or other provisions applicable for the programs require such further development.

7.7   Not covered by the lump-sump maintenance compensation shall be the inclusion of changes pursuant to § 7.2 through § 7.6 which can only be realized through full or partial reprogramming of the programs, or changes pursuant to new regulations or provisions. In such a case, *port* may request a reasonable additional compensation with due regard for all customers which require and request reprogramming.

7.8   *port* shall keep a further developed version of the programs compatible with the preceding version with regard to *port*'s own performances. However, if circumstances not attributable to *port* cause the incompatibility of the programs, e.g. if pre-supplier programs cause the incompatibility, *port* shall only be obliged to transmit the migration aids provided by the presupplier.

§8 Support Compensation

8.1 The lump-sum compensation shall be calculated in accordance with the specified scope of use (cf. § 2.1). The compensation shall be adjusted as soon as such scope increases.

8.2 The customer shall pay the lump-sum compensation annually in advance.

8.3 *port* is entitled to request the compensation which *port* charges upon the conclusion of new maintenance agreements pursuant to the price list, effective next calendar year, with a notice period of three (3) months. *port* shall be obliged to pass on reductions without a notice period.

III. General Provisons

§9 Charges and Payments

9.1 The provision compensation shall be due after delivery is made.

9.2 All support performances (particularly pre-installation support, preparations for use, installation and demonstration of operational readiness, conversion of old data, instruction, training or consulting) shall be compensated based on expense, unless otherwise agreed. Hourly rates, travel expenses and ancillary costs in this regard shall be in accordance with *port*'s price list. *port* may invoice monthly.

9.3 Payments shall be made in full within twenty (20) days after receipt of the invoice by the customer.

9.4 Duties, taxes and levies including VAT if applicable shall be paid by the customer on all prices.

9.5 If payments are delayed, the customer shall not be allowed to use the programs.

§10 Disruptions in the Performance, Default

10.1 In the event a cause for which *port* is not responsible, including strikes or lockouts, impairs compliance with a deadline, *port* may request reasonable extension of the deadline. In the event the expense is increased due to a cause falling within the scope of responsibility of the customer, *port* may request reimbursement for its added expense as well.

10.2 In the event *port* defaults for over 30 days, the customer may request a contractual penalty in the amount of 0.5 % of the value of the performances which cannot be used for the intended purpose, though no higher than 5 % of the contract value, for each additional week from that date. In the event of default in the delivery of a further developed version within the framework of support performances (cf. § 7), the annual lump sum for support then due shall be set as the contract value.

§11 Tele Support

11.1 On request by *port*, the customer shall enable *port* to perform tele support (tele diagnosis, tele corrections, transfer of new versions) to the extent technically possible. In concert with *port*, the customer shall at its own expense provide a telecommunication connection as needed to meet the requirements from time to time, so that the IT systems can be connected. The customer shall pay for the communication costs, unless otherwise agreed.

11.2 For security and privacy purposes, access to the customer's IT system by *port* shall be controlled by a security procedure established by the customer. The customer shall release the connection for usage. *port* shall inform the customer of the works performed by *port*.

11.3 If the customer does not enable *port* to perform tele support, the customer shall reimburse *port*'s additional costs, in any event travel time and additional costs for the correction of defects.

11.4 If the customer transfers data to *port* for their restoration or for the search of defects, *port* shall establish all technical and organizational measures in *port*'s organization equivalent to those the customer has to establish for security and privacy pursuant to the laws and statutes on data protection applicable to the customer. At the customer's request, details shall be agreed on separately.

§12 Agreements on Defect Removal

12.1 In the event defects occur during contractual use of the programs, the customer shall give notice of such defects in comprehensible form, specifying information useful for identification of the defect, and, upon the request of *port*, in writing.

A precondition for all claims against *port* shall be that the defect is reproducible or can be displayed through mechanically generated copies.

The customer shall assist *port*, within reasonable limits, in the removal of defects, particularly transmitting the program as used upon occurrence of the defect, at the request of *port*, making available machine time or integrating replacement deliveries provided by *port*.

12.2 *port* shall remove defects within a reasonable period. *port* shall render the supplementary performance either by removing the defects or rendering a replacement performance within a reasonable period, at its option. In the event of defects which seriously impair use of a program, *port* shall provide a workaround solution prior to the final supplementary performance, if necessary, so that the defect no longer has a serious impact.

port need only remove other defects at the time scheduled by *port* within the framework of proper version support. *port* shall provide workaround solutions for such defects as well if such is reasonable for *port* (in the event of programs expressly identified as such by pre-suppliers, *port* need only attempt corrective measures of the pre-supplier.

12.3 The duty for supplementary performance shall expire for programs which the customer modifies or in which the customer otherwise intervenes, unless the customer demonstrates that the intervention did not cause the defect.

12.4 *port* may request reimbursement for its own expenses in the event *port* performed work based on receiving notice of a defect (beyond telephone support in accordance with § 5.1) and the customer fails to demonstrate a defect.

§13 *port*'s Liability

13.1 In the event *port* defaults on its performances (through delivery) or supplementary performances (through removal of defects or replacement delivery), the customer may set a reasonable period for performance/supplementary performance. If the period expires without result, or if the performance/supplementary performance ultimately fails in any other manner, the customer may assert its statutory claims. Damage claims shall exist within the framework of § 13.3. *port* may request a period for the customer to declare whether the customer still requests primary or supplementary performance. If the customer does not request primary or supplementary performance within this period, the customer shall no longer be entitled to claim it.

13.2 The limitation period for claims based on defects shall be 24 months starting from delivery of the programs to the customer. The extension of the right of use (§ 2.2) shall not cause a new limitation period.

13.3 *port* including any person engaged in performing any obligation under this contract shall be liable for damages under any claim based on normal negligence only, if *port* breaches a basic obligation under this contract.

In this event, *port*'s liability shall be restricted to the higher of the following amounts:

- EUR 100,000.00,
- the contract value, or
- the characteristic and foreseeable damages.

If *port* breaches an obligation on the grounds of the maintenance agreement, the annual lump sum for support in the year in which the damage occurs shall be set as the contract value.

The customer may request a higher limit, but *port* may then require a surcharge for the aggravated risk.

The above limitations shall not apply in the event the damages are covered by *port*'s manufacturer's liability insurance and the insurer pays. *port* agrees to maintain the coverage existing upon the conclusion of the contract.

Claims for personal injury and claims based on the German Product Liability Act shall remain untouched.

§14 Confidentiality

14.1 *port* agrees to use all knowledge of trade and business secrets obtained within the framework of the contract relation and all information designated in writing as "confidential" only for the purpose of the execution of the contract and to treat such knowledge and information confidentially for an unlimited period of time.

14.2 The obligation for confidential treatment shall not apply for ideas, designs, know-how and techniques relating to program development and data already known to *port* or which were or are known outside of the contract.

14.3 *port* shall obligate its employees to observe confidentiality.

14.4 *port* may include the name the customer and a brief description of the performances rendered in a reference list. All other advertising references to the customer shall be discussed in advance with the latter.

§15 Miscellaneous

15.1 The contract and its modifications shall require written form.

15.2 The contract shall conform with and be governed by the laws of the Federal Republic of Germany without regard to its choice of law rules and excluding the provisions of the United Nations Convention on Contracts for the International Sale of Goods.

15.3 If the parties to the contract are merchants by registration, exclusive venue shall be *port*'s main place of business.