

General Contractual Conditions of S+M GmbH



Deliveries and services of the company S+M GmbH, Richard-Lucas-Strasse 3, 41812 Erkelenz, are made exclusively under the application of the following General Contractual Conditions. They also apply to all future business relationships, even if they are not expressly referred to again.

Part 1 - General Provisions

The General Provisions supplement the provisions of the following parts. The provisions of the following parts take precedence over the General Provisions as special provisions for the respective types of contracts.

1. Conclusion of Contract

Offers from S+M are non-binding. Orders and orders are only considered accepted when they have been confirmed in writing by S+M. Invoicing is equivalent to written confirmation.

2. Remuneration, payment modalities

The prices of S+M do not include VAT. All invoices are due immediately and without deduction. If the customer does not pay on time, S+M does not have to formally put the customer in default. In the event of default, default interest of nine percentage points above the base rate is due. A processing fee of €3.00 is charged for reminders. S+M expressly reserves the right to assert further damages. Offsetting against the remuneration is only permissible in the case of undisputed or legally established counterclaims.

3. Liability

S+M shall only be liable for intent and gross negligence and shall be limited to damage foreseeable in the course of the performance of this contract. Liability for initial inability and the fault of other vicarious agents is limited to such damages that must typically be expected to occur in the context of software services and/or hardware transfer. S+M is only liable for slight negligence if an obligation is violated, compliance with which is of particular importance for the achievement of the purpose of the contract (cardinal obligation). In the event of a breach of a cardinal obligation, the limitation of liability for initial inability pursuant to subsection (2) shall apply accordingly. Liability for data loss is limited to the typical recovery effort that would have occurred if backup copies had been made regularly and in line with the risk. In the case of SaaS services, S+M is not liable for the availability of communication channels held by third parties for calling up and data transfer when using the SaaS. This also applies if the communication channels have been made available to S+M for this purpose. S+M assigns any claims against communication providers to the customer. The above regulations also apply to the employees or subcontractors of S+M. S+M's liability for the lack of guaranteed properties or the applicability of the Product Liability Act remains unaffected.

4. Subcontractors

S+M is entitled to provide services and obligations under this contract also through third parties (hereinafter referred to as subcontractors). S+M is liable for services provided by subcontractors as well as for its own employees.

5. Secrecy

The contracting parties undertake to keep secret for an indefinite period of time all information that becomes accessible to them in connection with this contract, its negotiation and implementation, which is designated as confidential or which is recognizable as business or trade secrets due to other circumstances, and, unless necessary to achieve the purpose of the contract, not to record it, to pass it on to third parties or to exploit it in any way. The same applies to personal data that falls under the provisions of data protection. In the event of a violation of paragraph 1, a contractual penalty of five times the remuneration shall be forfeited, to the exclusion of the continuation context.

6. Final Provisions

If the customer also uses general terms and conditions, the contract is also concluded without an express agreement on the inclusion of general terms and conditions. Insofar as the various general terms and conditions are identical in content, they are deemed to have been agreed. Contradictory individual provisions are replaced by the provisions of dispositive law. The same shall apply in the event that the Customer's terms and conditions contain provisions that are not contained in these Terms and Conditions. If these terms and conditions contain provisions that are not contained in the customer's terms and conditions, these terms and conditions shall apply. All agreements that contain an amendment, supplement or specification of these contractual conditions, as well as special assurances and agreements, must be set down in writing. If they are declared by representatives or auxiliary persons of S+M, they are only binding if S+M gives its written consent. The above provisions also apply to the abolition of the written form requirement. In the event that the export of goods is subject to national or international export regulations, the customer must obtain the consent of the competent authorities. The costs of export, in particular customs duties, taxes, fees and other costs, are to be borne by the customer. If one of the provisions of these Terms and Conditions is or becomes invalid, this does not affect the validity of the remaining provisions. With regard to all legal relationships arising from this contractual relationship, the parties agree to apply the law of the Federal Republic of Germany to the exclusion of the UN Convention on Contracts for the International Sale of Goods. The exclusive place of jurisdiction is – as far as legally permissible – Cologne. Only the German version of this document is valid.

Part 2 - Purchase of goods

The provisions of Part 2 apply to the supply of goods and take precedence over them by applying the general provisions of Part 1. The provisions shall not apply, not even to the interpretation of benefits of Part 3, unless expressly referred to accordingly.

7. Delivery

Unless otherwise agreed, the delivery date shall be based on the general delivery times of S+M. In the event of a delay through no fault of S+M, the delivery date shall be extended by a correspondingly reasonable period of time. S+M is entitled to make partial deliveries if this is reasonable for the customer. If S+M is in default with delivery, the customer must first set a grace period of at least four weeks. After the fruitless expiry of the grace period, the customer is entitled to withdraw from the contract. The risk passes to the customer when the goods are handed over to the transport company. This also applies if S+M has commissioned the transport or assumes the costs for it. Complaints regarding transport damage must be made directly to the transport company within the legally prescribed periods. In the event that the transport company is commissioned, S+M assigns any claims for damages to the customer. The conclusion of transport and other insurance is left to the customer.

8. Acceptance

The customer is obliged to accept the goods on the agreed date. If the customer refuses to accept it, the risk of destruction or deterioration nevertheless passes to him. In this case, S+M is entitled to store the goods at the customer's expense and risk. If the customer refuses to accept the contract in whole or in part, or if the contract is not performed for a reason for which the customer is responsible, S+M shall be entitled to compensation in the amount of 20% of the contract value in lieu of payment of the purchase price, in the event of simultaneous withdrawal from the contract.

9. Remuneration

The prices of S+M are exclusive of the costs for transport and packaging. If delivery of goods is to be provided four months after conclusion of the contract, S+M reserves the right to increase the agreed price appropriately in the event of rising purchase prices, wage and salary tariffs, customs duties and freight as well as other official charges.

10. Retention of title

Until all claims arising from the business relationship have been paid in full, S+M reserves title to all items delivered within the framework of this contract. If the customer disposes of the items before the transfer of ownership to him, he assigns the rights resulting from the disposition to S+M. S+M already accepts all assignments.

The customer must notify S+M immediately in writing of any seizures or other access by third parties. He must immediately take all measures necessary to lift and avert such access.

11. Warranty

The goods provided by S+M to the customer are only suitable for the use provided for in the offer. In case of doubt, use in a different environment will require adaptation, although S+M cannot promise that this will be possible in the deviating environment. The lack of possibility of use in a different environment therefore does not constitute a defect. In the event of software being transferred to hardware, S+M does not guarantee that the program functions will meet the requirements of the customer that have not been assured to the customer in writing or that the software will work together in the selection made by the customer. Complaints due to obvious defects must be made immediately, but no later than one week after receipt of the goods, by registered letter with acknowledgement of receipt. Deficiencies that cannot be detected during the proper inspection must be reported within 8 working days of discovery in compliance with the complaint requirements set out. In the event of a violation of the duty to inspect and complain, the goods shall be deemed to have been approved with regard to the defect in question. In the event of notices of defects, the goods complained of must be returned immediately, as far as possible in the original packaging, stating the complaint. The customer bears the transport risk for shipments to S+M. The warranty right is initially limited to rectification. If the defect cannot be remedied or if further attempts at rectification are unreasonable for the customer, the customer reserves the right to reduce the purchase price or withdraw from the contract. Defects that are due to violation of the duty to notify or improper procedures or procedures that do not comply with S+M's specifications for the treatment, installation and care of the goods are excluded from the warranty. This does not apply if the customer proves that the effects did not cause the defect.

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Part 3 - Services as SaaS

The provisions of Part 3 apply to services provided as Software-as-a-Service (SaaS) and take precedence over them by applying the General Provisions of Part 1. The provisions do not apply, not even to the interpretation of benefits of Part 2, unless expressly referred to accordingly.

12. Services

For the duration of the contract, S+M shall provide the customer with services by way of Software-as-a-Service (SaaS) in the current version within the scope of the offer accepted by the customer for browser-based use online (all year round, 24 hours, seven days a week, 365/366 days a calendar year). S+M provides the customer with appropriate passwords for the use of the SaaS. The passwords are stored in an encrypted form in a database and cannot be viewed by S+M or third parties.

If the SaaS also provides for the use of server memory by the Customer, S+M shall make it available to the Customer on a client-specific instance on a server located in Germany. The server memory is used to store the data obtained by the customer in connection with the use of the SaaS. The data is backed up by S+M on a regular basis for display on the SaaS.

The guaranteed availability of the SaaS is 99% on an annual average. The permissible unavailability of 1% per year is only available for unplanned outages. Excluded from 99% availability are planned and, as far as possible, announced interruptions for necessary maintenance, updates and repairs under the following conditions:

The interruption does not exceed four maintenance per month on a monthly average (calculated over twelve months) and is within the usual range, whereby only those maintenance operations that lead to a significant impairment of the SaaS usage are evaluated.

The interruption will not take place between 09:00 and 18:00. Interruptions between 09:00 and 18:00 require the prior approval of the customer in text form or in writing, whereby this approval may only be refused under good cause. If the customer does not respond to an inquiry from S+M within 48 hours, the consent shall be deemed to have been granted.

The break will not last longer than 6 hours. Longer interruptions require the prior authorisation of the Client in text form, whereby this authorisation may only be refused under good cause. If the customer does not respond to an inquiry from S+M within 48 hours, the consent shall be deemed to have been granted.

The interruption is not exclusively due to an intentional or negligent breach of contractual or statutory obligations by S+M.

13. Obligations of S+M

S+M is continuously developing the SaaS and will improve it through ongoing updates and upgrades. The customer is not entitled to any specific changes, adjustments or improvements. The Updates and Upgrades shall be available for use by the Customer in accordance with the offer accepted by the Customer and the provisions in Section 12.1.

S+M undertakes to back up data within the scope of the state of the art. For this purpose, communication between the hardware provided by S+M, the server and the SaaS is currently provided via the customer's browser via an SSL-encrypted Internet connection.

S+M is available to the customer for a fee for questions about functionality and/or changes/configurations to the SaaS by telephone/video conference and/or by e-mail on weekdays between 09:00 a.m. and 05:00 p.m.

14. Remuneration

The remuneration for the use of the SaaS (provision fee) is based on the offer of S+M. If there is no regulation, the remuneration according to the price list of S+M in Appendix 1 is deemed to have been agreed.

Unless otherwise agreed in the offer, the monthly commitment fee is due for the first time with the conclusion of the contract for the current calendar year and subsequently at the beginning of each year for the year. The commitment fee for the first year of the contract is to be paid on a pro rata basis at the beginning of the contract in the calendar year, whereby a month commenced is to be paid in full.

If the provision fee also includes the telecommunications service agreed between the customer and the telecommunications provider, which is accompanied by S+M only for the customer, S+M is entitled to compensate for any additional costs incurred by the customer in the event of use other than for data transfer within the scope of Vensoft by the customer.

S+M is entitled to adjust the remuneration after the expiry of two years in line with the general price development. The adjustment must be notified to the customer in writing six weeks before the increase. If the increase amounts to more than 3% of the average monthly remuneration of the last twelve months, the customer may terminate the contractual relationship in writing within three weeks of the notification of adjustment being sent (receipt by S+M). If S+M does not receive notice of termination within the period, the consent to the increase in remuneration shall be deemed to have been given.

15. Obligations of the customer

Without prejudice to S+M's obligation to back up data, the customer is responsible for regularly backing up his data and information obtained in the course of using the SaaS. For this purpose, the SaaS offers the export of the stored data in common formats for data storage at the customer's site.

The Customer is obliged to keep the passwords provided to him for the use of the SaaS secret and not to make them accessible to third parties. The customer is personally liable for any misuse in the use of the passwords provided to the customer.

16. Term and Termination

Unless otherwise provided for in the offer, the contract shall commence upon acceptance of the offer from S+M or the commencement date specified herein and shall have a term of 60 months commencing at the end of the first year of the contract. The contract is automatically extended for a further 12 months in each case unless it is terminated in writing by one of the parties with a notice period of 3 months to the end of the respective contract. The right of the parties to terminate for good cause remains unaffected.

At the end of the contract, S+M is obliged to make the customer's stored data available by S+M in structured, clear, documented, machine-readable formats of medium complexity, which correspond to the then current state of the art. The customer is not entitled to the provision of the data in a format specified by him or by a third party for him.

In the event of default of payment, S+M is entitled to temporarily block access to the SaaS services and the data. Access does not have to be restored until the violation has been eliminated. In this case, the customer remains obliged to continue to pay the contractually owed commitment fee.