

General Terms and Conditions of S+M GmbH for the creation of software



S+M GmbH, Richard-Lucas-Straße 3, 41812 Erkelenz, (hereinafter referred to as S+M) provides the development of software only under the following conditions.

1. Conclusion of contract

Offers from S+M are subject to change. A contract is only concluded upon written confirmation by S+M. Invoicing is tantamount to a confirmation.

2. Scope of services

2.1 The scope of the service is based on the service description in accordance with the specifications or the written order confirmation. In the context of agile programming, this can also be achieved by means of corresponding service descriptions recorded in writing by both parties about the process.

2.2 S+M does not owe any functionality of the software beyond the functionality of the software in accordance with point 2.1. Representations in user documentation, in test programs, in product and project descriptions, etc. are not guaranteed properties.

2.3 If S+M also undertakes to prepare documentation and/or a manual, the following regulations shall also apply analogously to this.

3. Time and place of performance

3.1 S+M will use its best efforts to create the software in accordance with the time constraints. If S+M is in default in the provision of services, the customer is obliged to send a written reminder for the provision of services, setting a reasonable deadline. After the fruitless expiry of the period, the customer is entitled to terminate the contract.

3.2 In principle, the respective software is made available to the customer for acceptance at the registered office of S+M.

3.3 If storage has been agreed by the customer or a third party, the work will be made available to the customer by reading it into the customer's hardware or via remote data transmission.

3.4 As a matter of principle, S+M only makes software available in object code. S+M is not obliged to hand over the source code to the customer. At the request of the customer, a copy of the source code may be deposited at the customer's expense with a depository to be designated by S+M for the customer. Interface information will be made available to the customer upon written request from S+M.

4. Obligations of the customer

4.1 The customer is obliged to provide S+M with all documents and information available to him or her or items necessary for the preparation free of charge for the duration of the preparation and to respond promptly to inquiries from S+M. The duty to cooperate includes, in particular, participation in the preparation of the specifications and the provision of the information required for the creation of the software, of a technical and project organisational nature and, if necessary, the hardware on which the software is to be used later.

4.2 The Customer shall provide S+M with access to its data processing technology at any time upon request, including by means of remote data transmission technology.

4.3 The Client shall give all required consents and, if necessary, obtain third-party approvals without undue delay.

4.4 Delay in completion or termination of the order due to breaches of obligations under the preceding paragraphs shall be at the expense of the Client. Any additional costs incurred as a result of the delay are to be borne by the customer. If the order is cancelled, point 5.3 is to be applied by analogy.

5. Remuneration

5.1 The amount of the remuneration is based on the written order confirmation. If no remuneration has been agreed, it shall be based on the current price list of S+M.

5.2 S+M reserves the right to change and adjust prices without prior notice if its own purchase and supplier prices also increase.

5.3 The remuneration is to be paid plus VAT. The remuneration is to be paid proportionately as follows:

50% upon conclusion of the contract
25% upon completion or delivery, if agreed
25% on purchase.

5.4 In the event of premature termination of the order, S+M shall be entitled to withhold the remuneration already received. The customer expressly reserves the right to prove a lesser damage. In the event that S+M has provided proportionately more services than was remunerated at the end of the order, the customer is obliged to pay the proportionate further remuneration. S+M expressly reserves the right to claim further damages.

5.5 S+M shall be entitled to claim damages for delay in the amount of 9 percentage points above the respective basic rate. Any rights to which S+M would otherwise be entitled shall remain unaffected by this.

5.6 The Customer may only offset a counterclaim if it is undisputed or legally established by S+M.

6. Subsequent change requests

6.1 Requests for changes by the Customer with regard to the range of functions, the software structure, the screen design or other features after the order confirmation shall only become part of the order if S+M expressly agrees to them in writing.

6.2 If the contractual balance of performance and counter-performance is impaired by the customer's request for change for S+M to a greater than negligible extent, the remuneration shall be adjusted. The basis for the adjustment of the remuneration is the additional time required and the remuneration calculated by S+M for the preparation. S+M is not obliged to disclose its calculation. However, it must justify the amount of the additional remuneration in a comprehensible manner.

7. Use of the Work

7.1 The customer acknowledges the copyrightability of the respective software in accordance with § 69 a et seq. UrhG. Furthermore, the customer acknowledges the software as a trade secret of S+M.

7.2 After acceptance and full payment of the remuneration for the respective work, the customer is granted the simple, locally unlimited right to use the work in accordance with the intended purpose of the order. The customer is expressly not granted any right to edit the software or parts thereof.

7.3 In the event that the order is terminated before acceptance, the customer will not be granted any copyrights to the work. In this case, the customer is rather obliged to transmit any drafts, drawings, etc., to S+M immediately to its place of business. Use of the software in any form is expressly excluded in this case.

7.4 S+M is entitled to have the software developed and/or created by it or parts thereof protected by commercial law at the Patent Office under its name or the name of a third party, in particular to apply for patents, utility models or designs/designs. S+M can freely dispose of the rights. The customer is only entitled to register and dispose of the rights after the written consent of S+M. S+M is also entitled to use the software, parts thereof or findings from its creation in orders for third parties and to grant third parties rights thereto.

7.5 S+M is entitled to affix a corresponding note to the software in a customary market place as follows:
© S+M, Erkelenz, year.

8. Property rights of third parties

8.1 S+M assures that, to its knowledge, the works it contributes are free of third-party rights and that the contractual use does not encroach on third-party property rights.

8.2 The Customer shall notify S+M immediately in writing if claims for infringement of intellectual property rights are asserted against him. In this respect, S+M indemnifies the customer against claims by third parties, whereby S+M reserves the right to take appropriate defensive measures and negotiate a settlement. Liability is excluded if the claims of third parties are based on works or data provided by the customer or if the software is not used in an unaltered original version.

8.3 If the use in accordance with the contract is impaired by third-party property rights, S+M shall have the right, to the extent reasonable for the customer, to acquire licenses and/or to change or replace the software in whole or in part, at its discretion and at its expense.

8.4 If S+M does not succeed in eliminating impairments caused by the rights of third parties in accordance with the rules of points 8.2 and 8.3, the customer is entitled to convert or reduce the damage.

9. Secrecy

9.1 The Contracting Parties undertake to keep secret for an indefinite period of time all information that becomes accessible to them in connection with this Agreement that is designated as confidential or that 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.

9.2 The same applies to personal data that falls under the provisions of data protection. 9.3 In the event of a breach of points 9.1 and 9.2, the respective contracting party shall forfeit a contractual penalty in the amount of five times the respective remuneration, to the exclusion of the continuation context.

10. Subcontractors

10.1 In principle, S+M is permitted to entrust subcontractors with obligations arising from the contract. The customer can only object to an obligation of subcontractors for good cause. If the customer objects to the involvement of subcontractors, S+M is entitled to terminate the contract immediately. Point 5.3 shall apply mutatis mutandis.

10.2 S+M shall be liable for subcontractors as for its own vicarious agent.

11. Acceptance

11.1 The customer is obliged to declare acceptance in writing within 14 days after the software has been made available to him by S+M for acceptance. The declaration of acceptance may not be refused due to essential defects. If the customer does not declare himself to S+M within the 14 days, the software shall be deemed to have been accepted.

11.2 If the Customer does not accept the Software, S+M shall be entitled to repair or replace the Software within a reasonable period of time. If the repaired or replacement software is also not acceptable, the customer is entitled to cancel the order. Point 5.3 applies analogously in this case.

12. Liability for defects

12.1 Defects in the Software shall be remedied by S+M within a reasonable period of time after the Customer has notified the Customer in writing of the defect. Defects will be rectified at S+M's discretion by repair or replacement. S+M may refuse to repair or replace. In this case, the customer is entitled to terminate the contract without notice. In the event of termination, S+M shall be entitled to compensation for the expenses incurred up to the time of termination. In this case, point 5.3 is to be applied by analogy. 12.2 If the software is to be returned to S+M for the purpose of repair or replacement, the costs incurred shall be borne by the customer. In this case, the customer also bears the risk of loss or damage to the software.

12.3 The customer's claim for defect rectification is excluded if the defect is not reproducible or cannot be demonstrated on the basis of machine-generated output. In this case, the customer is liable for the costs incurred by S+M for the examination of the software.

12.4 The warranty is void if the customer has made changes and/or interventions to the software, unless the customer proves in connection with the error message that the intervention was not the cause of the error. The customer is not granted any right to edit the software.

13. Liability

13.1 S+M shall be liable for damages due to defects of title and lack of warranted properties as well as for intent and gross negligence also of its legal representatives and executives in the amount of the foreseeable damage.

13.2 Liability for initial inactivity and the fault of vicarious agents is limited to three times the respective remuneration as well as to such damages that must typically be expected to occur during the creation of the software.

13.3 S+M shall only be 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 inactivity according to point 13.2 of this liability regulation is to be applied accordingly.

13.4 Liability for loss of data is limited to the typical restoration effort that would have occurred if backup copies had been made regularly and in accordance with the risk.

13.5 S+M shall not be liable for circumstances beyond the control of S+M in the event of unforeseen events, such as force majeure, export and import bans, strikes, lockouts, delays or failure to deliver essential parts. In the event of unforeseen events such as strikes, lockouts, delays or failures in the delivery of essential parts, the customer is entitled to withdraw from the contract. The abovementioned in sentences 1 and 2 shall also apply if such circumstances arise at the premises of subcontractors or suppliers of S+M.

13.6 The above provisions also apply to the employees of S+M and its subcontractors.

14. Final provisions

14.1 If the customer also uses general terms and conditions, the contract shall also be 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 regulations are replaced by the provisions of dispositive law. The same applies 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.

14.2 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 auxiliaries of S+M, they are only binding if S+M gives its written consent.

14.3 In the event that the export of the Software is subject to national or international export regulations, the Customer shall obtain the consent of the competent authorities.

14.4 If one of the provisions of these Terms and Conditions is or becomes invalid, this does not affect the validity of the remaining provisions.

14.5 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 place of jurisdiction is, as far as permissible, Cologne.

14.6 Only the German version of this document is valid.