

# Terms and Conditions for Supplies and Services

## 1. General

1.1 All business, transacted by **ATM**, concerning computer commodities (Hardware, Firmware, Operating Systems, Software and other affiliated products and services) to **Buyer** is governed exclusively by the following "Terms and Conditions" unless otherwise explicitly stated to the contrary in the offer or the order confirmation forwarded by **ATM**.

**ATM's** "Terms and Conditions" shall take precedence over any terms and conditions issued by the **Buyer** at any time and, amendments or supplements by the **Buyer** to these "Terms and Conditions" as well as collateral agreements are only binding if confirmed in writing by **ATM**.

1.2 Offers expire 45 (forty five) days after the date of the offer, if not stated differently in the offer.

1.3 Offers are valid exclusively for export to the country of the **Buyer** or, country of enduser if expressly stated in such offer and/or order confirmation (see clause 13 "Export Restrictions and Requirements").

1.4 Unless otherwise agreed upon, interpretation of contract terms shall be governed by the INCOTERMS 1990 (latest version), including supplements valid at the time when the contract is concluded.

## 2. Scope of delivery and prices

2.1 The supply obligation comprises the supplies and services confirmed in writing by **ATM**.

2.2 If the commodities to be supplied shall be suitable for specific purposes of the **Buyer**, such specific purposes and requirements, which the commodities to be supplied have to comply with, must be indicated fully and expressly by the **Buyer** in the order and confirmed in writing by **ATM**.

2.3 Unless otherwise agreed upon, prices are calculated net free carrier German airport, German port or free carrier at frontier or any other place in Germany at the **Buyer's** option, including the customary packing. Special packing, shipping or storage shall necessitate additional charges. Should **Buyer** not indicate location of carrier in due time, carrier Frankfurt/Main airport or warehouse Frankfurt/Main and/or Courier Service in any location of Germany deemed to be agreed upon.

2.4 Unless otherwise expressly stated, proposals, quotations and offers do not include any taxes, dues, levies, fees and customs duties, and other legal or official charges. Such taxes, dues, levies, fees, customs duties and other legal or official charges have to be added at rates according to the laws and regulations of the country of **ATM**. Should such charges be introduced or increased during the validity of a contract, **ATM** reserves the right to charge the same accordingly.

2.5 Customs duties, dues, levies and other taxes charged in accordance with any laws and regulations outside the jurisdiction of the country of **ATM**, as well as any costs connected herewith, shall be borne exclusively by the **Buyer**.

2.6 Should other than EURO (EUR) as currency of contract have been agreed upon and should the exchange rate of the currency of the contract to the EURO (EUR) been altered between the date of quotation and date of invoicing, **ATM** is entitled to demand retention of the original relation of values on which the quoted prices were based.

## 3. Information, drawings and other documents

3.1 All information concerning drawings, explanations, descriptions and illustrations submitted by **ATM** are to be considered as approximate. Under no circumstances they shall be interpreted as 'warranted quality' of the commodities, if not expressly declared as such by **ATM**.

**ATM** reserves the right to alter the technical concept upon which the offer is based, as far as the performance and quality of the commodities offered for supply are not hereby affected.

3.2 **ATM** will retain the exclusive ownership and all copyrights in respect to any drawings and other documents. Drawings and other documents shall not be made accessible to third parties without **ATM's** written consent and shall be returned if so requested.

## 4. Terms of Payment, Invoicing

4.1 Payments shall be made out of an irrevocable and transferable Letter of Credit opened at a bank acceptable to **ATM**. The Letter of Credit shall be in English, payable in EURO (EUR) or other contract currency (if agreed upon), in a format as required by **ATM** and, confirmed and payable by a bank acceptable to **ATM**; must reference adherence to the 'Uniform Customs and Practices for Documentary Credits' (The International Chamber of Commerce Publication Number) in latest



version; and state "free carrier German airport, German port or free carrier at frontier", or any other place in Germany (either or).

4.2 The Letter of Credit shall be worded in such a way that drawings against this instrument may be accomplished against sight drafts drawn on the advising bank when accompanied by copies of invoice, bill of lading, or carrier's or warehouse receipt or, telex, telefax (facsimile) or telegram informing the **Buyer** about storage as per clause 5.5 below. Partial delivery, invoicing and payments shall be allowed. Formate of Letter of Credit shall be delivered in advance to **Buyer** on request.

## 5. Time of delivery and default

5.1 Delivery times shall only be binding if they have been agreed to by **ATM** in writing.

5.2 Adherence to the delivery time, the same shall be subject to the order being completely clarified, all permits, such as, but not limited to, Export and Import licenses being granted, and all documents, payments and/or Letter of Credit and securities to be furnished by the **Buyer** being received by **ATM**.

The delivery time will be reasonably extended if any of the foregoing requirements have not been complied within due time.

5.3 In the event of **ATM** being prevented from carrying out its supplies and services in due time by mobilisation, war, insurrection, strike, lock-out, interruptions of operation, fire, Acts of God, transport hindrances or shortage of materials on world-markets, alteration of legal provisions, administrative actions or decrees or any other unforeseeable events which are beyond **ATM's** control, the delivery time will be reasonably extended.

5.4 Should National Security Law and Regulations – or special instructions of the **Buyer** – require the performance of the contract, in whole or in part, by specifically authorized or qualified and named employees and, should said personnel be hindered in the performance by illness or other unforeseeable events, the delivery time will be reasonably extended.

5.5 In the event of dispatch being delayed for reasons beyond **ATM's** control, **ATM** shall be entitled to store the commodities to be supplied at the **Buyer's** risk and to demand reimbursement of any expenses hereby incurred. **ATM** shall be entitled to take out at the **Buyer's** expense an insurance against storage risks.

5.6 **Buyer** shall be advised by **ATM** at earliest possible time about cases of "Force Majeure" as per clause 5.3 to 5.4 as well as of storage of the commodities on **Buyer's** risk as per clause 5.5.

## 6. Testing and acceptance

6.1 Tests in the presence of the **Buyer** or his representative as well as any special tests must be agreed upon in advance. **ATM** shall be entitled to charge the costs of such tests to the **Buyer**.

6.2 Formal acceptances of the commodities to be supplied shall be carried out at the premises of **ATM**. Acceptance has taken place if the **Buyer** has not raised any justified complaints in writing up to the time when the test is completed. If not agreed upon to the contrary, acceptance of commodities shall occur upon successful completion of **ATM's** Standard Acceptance Testing and furnishing of the relevant Certificate(s) of Conformity. Should the **Buyer** require specific Acceptance Procedures, then, the **Buyer** shall specify in detail the requirements and, **ATM** shall quote its additional costs occurring in connection herewith.

6.3 The Certificate(s) of Conformity shall be signed upon successful completion of the Testing Procedure. However, the signature shall not be unreasonably withhold, especially not in the event that minor deficiencies do not hinder the performance as required by the contract substantially.

6.4 If the **Buyer** waives any acceptance test agreed upon, or if **Buyer** fails to be present at such test(s) despite having been invited in due time, the test(s) carried out by **ATM** shall be regarded as accepted.

6.5 In the event of tests being delayed for reasons beyond **ATM's** control, any additional expenses resulting therefrom shall be borne by the **Buyer**. Should such test(s) being delayed for reasons beyond **ATM's** control for more than 2 (two) weeks, **ATM** shall be entitled to carry out the test(s) on its own, and issue the respective test certificate(s) at its own discretion.

## 7. Transfer of risk

The risk will pass over to the **Buyer** as soon as the commodities to be supplied are taken over by the carrier or warehouse or Courier Service according to clause 2.3 above. If, however, a pricing had been agreed upon for which a different regulation of transfer of risk is stipulated under INCOTERMS 1990 (latest version), including the supplements valid at the time of conclusion of the contract, such different regulation shall apply. If the dispatch is delayed for any reasons beyond **ATM's** control, the risk is transferred to the **Buyer** upon notification of readiness for dispatch and storage of the commodities according to clause 5.5 above.



## 8. Installation

**ATM** shall install the commodities at **Buyer's** site ready for operation at a separate charge, unless otherwise agreed upon. Prerequisite will be that

- the **Buyer** keeps ready and equips the location for installation according to **ATM's** installation instructions and notifies **ATM** accordingly,
- the **Buyer** keeps available the commodities on site of installation; uncasing and installation has to take place only under direction of **ATM**,
- the delivered commodities were neither changed without written agreement of **ATM** nor exposed to an extraordinary load, nor improperly handled or used, nor damaged by persons beyond **ATM's** control.

## 9. Warranty, Liability

9.1 The commodities are warranted free from defects in material and workmanship for a period of 6 (six) months after date of delivery or other period demanded by law of **ATM's** jurisdiction, or in case of installation by **ATM**, same period of time after installation.

9.2 Any commodities purchased from **ATM** which become defective during this period will be repaired or replaced by **ATM** at **ATM's** premises. Peripheral devices are warranted for 90 (ninety) days after date of delivery or installation, respectively. All freight charges on commodities returned to **ATM's** premises for repair or replacement of a defective product subject to this warranty will be paid by **Buyer**. However, **ATM** will pay all freight charges on repaired products subject to this warranty returned to **Buyer** to locations as per clause 2.3 above.

9.3 **Buyer** shall pay any export and/or import taxes, fees, levies or duties imposed and obtain all necessary Export and/or Import Licences. It is agreed that failure to follow said requirements may result in delay of repair and return of the commodities repaired.

9.4 All warranties are contingent upon proper use and service in applications for which the commodities were specified and, do not cover commodities which have been subject to unusual physical or electrical stress, or on which the original identification marks have been removed or altered.

9.5 Further claims of the **Buyer** against **ATM** are excluded, in particular any consequential damages, such as, but not limited to, loss of production, loss of utilisation or loss of profit.

9.6 The liability on the part of **ATM**, its employees and all other persons appointed by **ATM** in connection with the execution of the contract for damage or injury to persons and property, negligence in the conclusion of the contract or culpable breach of contract is governed by statutory provisions; the liability is, however, limited to EUR 250.000,00 for each case, and to a total of EUR 1.000.000,00. Any other or further liability is hereby expressly excluded.

9.7 Should any of the commodities supplied by **ATM** be modified or merged in any way, partially or in whole, without the express written consent of **ATM**, and/or used on other than the Licensed Equipment (approved expressly in writing by or bought from **ATM**), then the warranty as well as the liability cease to continue.

## 10. Use of Software

10.1 The **Buyer** agrees that the use of software delivered in connection with the order is governed exclusively by the terms and conditions of **ATM's** standardised "Software License Agreement". Such software shall be used only on Licensed Equipment. Software of third producers – if not agreed upon to the contrary – is governed exclusively by the terms and conditions of the third producers. Software, specially designed for the **Buyer**, requires special terms and conditions, which have to be agreed upon before any specially designed software is to be delivered from **ATM** to the **Buyer**.

10.2 As far as "Free Software" is incorporated, the **Buyer** accepts such "Free Software" on the basis 'as it is', even if modified by **ATM**; no guaranty, warranty or liability is granted by **ATM** to the **Buyer**, provided the **Buyer** had been advised on the existence of such incorporated portions and, the terms and conditions (General Public Licence) of the copyright owner had been made available to the **Buyer**. Should such "Free Software" terms and conditions be available on the general market (e.g. Internet), **ATM's** obligation shall be considered as being fulfilled when **Buyer** had been advised where these "Free Software" terms and conditions can be obtained. In the event such an incorporation of "Free Software" had been instructed by the **Buyer** no special notification by **ATM** is required.

## 11. Patent and other industrial rights

11.1 **ATM** is liable to the **Buyer** for any infringement of patent rights and other industrial rights (hereinafter collectively referred to as "Patent Rights") of third parties only within the limits of the



following provisions: Compliance with this obligation is subject to the **Buyer** immediately informing **ATM** of any infringement claims raised by third parties and to the **Buyer** proceeding in an agreement with **ATM** in dealing with such claims and in the pursuance of its rights. Should any one of these conditions not be fulfilled, **ATM** will be relieved of his obligations. Should an infringement of third-party Patent Rights be ascertained and should for this reason the **Buyer** be enjoined by final decision from using any product supplied, either in whole or in part, **ATM** shall at its own expense and at its option either

- a) obtain for the **Buyer** the right to use the commodities supplied, or
- b) modify the commodities supplied in such a way that it becomes noninfringing, or
- c) replace the commodities supplied by another product of comparable efficiency which does not infringe any Patent Rights, or
- d) take back the commodities supplied against refund of the purchase price less value of theoretical depreciation.

11.2 In case **Buyer** makes modifications to the commodities supplied, or incorporates additional devices or combines them with other equipment or devices, by its own or by third, in such a way that Patent Rights of third parties are infringed **ATM** shall not be held liable.

## 12. Miscellaneous

12.1 Any agreements, irrespective of whether they are entered into at the conclusion of the contract or after, must be in writing. Verbal statements of **ATM**'s personnel are only binding if confirmed in writing by **ATM**.

12.2 Should any clause of these "Terms and Conditions" and/or contract be or become invalid, wholly or in part, the remaining clauses shall continue to be binding. The contracting parties will endeavour without delay to attain the economic result aimed at by the invalid clause in another legally admissible manner.

12.3 **ATM** shall be entitled to rescind the contract if the fulfilment of the same becomes impossible for reasons for which it is not liable. **ATM** is further entitled to rescind the contract if the conditions of the contract are so basically altered at a later date by circumstances which could not be foreseen at the conclusion of the contract that it cannot longer be reasonably expected to fulfil the contract.

## 13. Export Restrictions and Requirements

13.1 Agreements between **ATM** and **Buyer** concerning commodities are subject to all German and United States laws and regulations related to exports and to all administrative acts of said governments pursuant to such laws and regulations.

13.2 All supplies of **ATM**, included documentation and products made therewith, are submitted to export restrictions by the German and/or US governmental authorities, wherefore **n o n e** of them shall be resold, diverted, transferred, transhipped or otherwise disposed of, in any other third country, neither in their original form nor after being incorporated through an intermediate process into other end-items, without first obtaining an Export Licence from the governmental authorities of **Buyer**'s country. Should on **Buyer**'s request supplies being exported by **ATM** to a third country, the Export Licence has to be obtained from the governmental authorities of said third country.

13.3 Any export without first having obtained such an Export Licence is hereby expressly prohibited.

## 14. Law and Place of Jurisdiction

14.1 Any dispute, of whatever nature, arising out of, or in connection with the contract shall be exclusively settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce in Paris/France for final verdict. The place of arbitration shall be Geneva/Switzerland; language of the arbitration procedure shall be English. The arbitration tribunal (three arbitrators, the chairman being a judge) shall decide in accordance with the Swiss Code of Obligations. Neither the 'Hague Convention to a Uniform Law on International Sale of Goods', nor the 'United Nations Convention on Contracts for the International Sale of Goods', nor any other multilateral or bilateral conventions and regulations nor, any national laws except as per clause 13 above, shall apply.

14.2 The verdict shall also include the statement regarding the costs of the arbitration procedure, indicating which Party has to bear such costs (incl. the costs of the lawyers of the succeeded Party) in total or in part.

14.3 **ATM** and **Buyer** irrevocably accept such a verdict as being definitely and waive expressly the right to appeal.

14.4 Despite of the foregoing provisions, none of the Parties shall be excluded from seeking interim measures of protection by temporary injunction from any competent ordinary court.

