

Standard Terms and Conditions of Kontron Modular Computers GmbH (Kontron)

Current as of 05/2007

Preamble

The following terms and conditions shall apply to the contractual relationship between the supplier/company (referred to hereafter as the supplier/Kontron) and the purchaser/customer (referred to hereafter as the customer); they shall also apply to any further deliveries made or services provided. These terms and conditions shall be applicable in respect of commercial entities (§ 310 clause 1,14 of the German Civil Code/BGB) but not in respect of consumers.

§ 1 General provisions

- (1) Terms and conditions of the customer's which differ from Kontron's terms and conditions and which have not been expressly accepted by Kontron shall not bind the parties albeit that they may not have been expressly rejected by Kontron. Kontron's terms and conditions shall apply to the exclusion of all other terms and conditions.
- (2) This agreement is subject exclusively to German law (in particular as regards the incorporation and interpretation of these terms and conditions and the conclusion and interpretation of legal transactions). The UN Convention on Contracts for the International Sale of Goods (CISG) and the provisions relating to conflicts of law contained in the Introductory Act to the German Civil Code/EGBGB shall not apply to this agreement.
- (3) The validity of all remaining provisions shall not be affected in the event that individual provisions of these terms and conditions or any of its sections are void. The contractual parties shall be required to replace the void provision with a valid provision that matches the void provision's economic purpose, provided this does not cause any major change to the substance of the agreement. The same shall apply if circumstances which have not been expressly provided for in the agreement now require provision to be made for them.
- (4) The deemed place of performance for all duties arising directly or indirectly from this agreement, including the duty to pay, shall be Kontron's place of business.
- (5) This agreement is subject to the exclusive jurisdiction of the courts of Munich. In the event of a district court being given functional jurisdiction, the parties agree that Munich District Court II shall have exclusive jurisdiction.

§ 2 Offers, scope of services and concluding the agreement

- (1) Contractual offers made by Kontron are subject to change. An agreement shall not be deemed to be concluded until Kontron has provided written confirmation of the customer's order.
- (2) The company reserves the right to make constructional technical alterations as are usual in the trade to the scope of services offered (in particular as relates to design, choice of materials, specification and method of construction) provided this does not unreasonably prejudice the customer nor affect the fitness for purpose of the service provided. Further, the customer shall declare itself in agreement with other proposals for alteration made by Kontron provided it is not unreasonable to expect the customer to do so. Improvements to the goods shall be deemed to be acceptable provided it is not unreasonable to expect the customer to accept them, taking into account Kontron's interests. Documents on which the offer or order confirmation is based, such as images, drawings, dimensions and weight specifications, shall be deemed to be estimates only unless Kontron expressly designates them as being binding.
- (3) All industrial property rights in quotes, drawings and other documentation shall be owned solely by Kontron.

§ 3 Prices and conditions of payment

- (1) Prices are quoted net ex works exclusive of packaging and all other handling and transport costs. The applicable amount of value added tax as at the date of the invoice shall also be added to the price. Packaging is treated as a primary cost and shall not be taken back unless Kontron is obliged to do so by law.
- (2) Kontron reserves the right to require cash on delivery in respect of deliveries worth less than € 2,000.
- (3) In the event that a period of more than 4 months elapses between the date on which the agreement is concluded and the date of delivery, Kontron not being responsible for such delay in delivery, Kontron may duly increase the price taking into account the cost incurred in respect of materials, salaries and other incidental expenses which are to be borne by the seller. The customer may withdraw from the agreement in the event of an increase in price of more than 40%.
- (4) Additional expenses incurred as a result of a customer's request for alterations, and which are taken on board by Kontron, shall be charged to the customer.
- (5) In the event of a customer being responsible for exceeding the deadline for payment, Kontron may require the payment of interest in accordance with §§ 288 clause 2, 247 of the German Civil Code/BGB whilst reserving its right to make further claims.
- (6) Kontron may adjust its prices accordingly in the event of changes in customs tariffs, import or export taxes.

§ 4 Set-off and withholding

The customer may not set-off or withhold funds unless the counterclaim has been accepted or it is undisputed or final judgment has been passed in relation to the counterclaim.

§ 5 Delivery dates, delay, frustration

- (1) Delivery dates are estimates only and shall not be binding. They shall be duly extended in the event of a customer delaying assistance or neglecting to provide assistance as required or agreed on the part of the customer. The same shall apply in respect of measures relating to industrial action, in particular strikes or lock-outs, and in the event of unforeseen difficulties that are not within the control of Kontron, e.g. force majeure (fire, natural disasters), delays in delivery by suppliers, traffic

congestion, lack of raw materials or a lack of power supply etc., notwithstanding Kontron having duly taken precautionary measures against the occurrence of difficulties of this kind. Alterations requested by a customer to the goods supplied shall also result in the delivery date being duly extended.

- (2) Delivery in parts shall be permissible so long as it is not unreasonable to expect the customer to accept such delivery. Each part delivery made under a continuous supply agreement shall be deemed to be a separate delivery.
- (3) Delivery to the customer shall be subject to correct punctual supply being received by Kontron. Kontron will notify the customer of any delays. In the event that Kontron does not receive correct punctual supplies from its suppliers, and Kontron is not responsible for this, the time of performance shall be postponed accordingly. Alternatively Kontron may in this instance declare that it wishes to withdraw from the agreement in respect of those goods that have not been delivered. The customer shall have no further right to claim damages or reimbursement of expenses from Kontron.
- (4) Kontron shall be liable in accordance with the law in the event of a fixed contract having been agreed. The same shall apply in the event of a customer being able to assert that as a result of the delay for which Kontron is responsible, the customer's interest in performance of the agreement has ceased to exist. The right to claim damages or reimbursement of expenses on the grounds of a delay in delivery in accordance with § 8 shall be limited or excluded under this agreement.

§ 6 Despatch and passing of risk

- (1) Risk shall pass to the customer as soon as the delivery is passed to the person carrying out the transportation, or the delivery has left Kontron's warehouse for the purpose of being despatched. Should despatch be delayed for reasons for which Kontron is not responsible, risk shall pass to the customer as soon as the customer receives notification of the delivery being ready for despatch.
- (2) Kontron shall, at the customer's request, be obliged to arrange appropriate insurance cover at the customer's expense.

§ 7 Retention of title

- (1) Kontron shall retain title to the goods delivered until such a time as they have been paid for in full. This right of retention of title shall continue to apply until such a time as all duties, including any future or contingent duties, resulting from the business relationship between the customer and Kontron have been performed.
- (2) The customer may resell, process or integrate the goods with others in the ordinary course of business, in which case the customer agrees to assign to Kontron all claims and ancillary rights it may have in respect of such resale, processing or integration or on any other legal grounds (in particular as regards insurance or illicit acts) to the value of the final invoice amount (inclusive of value added tax). If the goods delivered are part owned by Kontron as a result of Kontron retaining title to the goods, such assignment of rights shall be in proportion to Kontron's part ownership share. Should the contractual goods be resold in connection with a third party's goods that are not owned by the customer, the resulting claims shall be assigned to Kontron in proportion of the final invoice amount of Kontron's goods to the final invoice amount of the third party goods. The customer shall continue to be entitled to enforce such claims after they have been assigned, however this shall not affect Kontron's right to enforce them itself. Kontron agrees to refrain from enforcing any such claims for so long as the customer is able to service its payment obligations from payments received by it, the customer does not fall into arrears, no petition for commencement of insolvency proceedings is made and payment is not suspended. Should any of the aforementioned situations occur, however, the customer shall if requested disclose details of the claims and of the obligors, provide all the necessary details for enforcement of the claims, along with the relevant documentation, and notify the obligors (third parties) of the assignment. The aforementioned shall also apply in the event of a customer reselling, processing or integrating the contractual goods into others in breach of this agreement.
- (3) Kontron's right to retain title to the goods shall also extend to the full value of any products resulting from the processing or integration of the contractual goods, whereby these processes shall be deemed to have been carried out for Kontron so that Kontron is considered to be the manufacturer (§ 950 German Civil Code/BGB). In the event that any contractual goods are processed or integrated in connection with other goods which are not owned by Kontron, Kontron shall acquire part ownership in proportion to the relevant objective values of these goods, in which case it is agreed that the customer shall take good care of the goods for Kontron.
- (4) In the event of a breach of this agreement by the customer, in particular with respect to a delay in payment, Kontron may take back the goods provided a deadline for payment as set by Kontron has passed without payment having been received. Kontron may enter onto the customer's business premises for this purpose. The mere taking back of goods shall not constitute a withdrawal by Kontron from this agreement, unless a deadline for payment as set by Kontron has passed without payment having been received and withdrawal from the agreement is expressly asserted by Kontron. The cost of taking back goods (transportation costs, in particular) shall be borne by the customer. Further, Kontron may prohibit the customer from selling on, processing, combining or integrating

into other goods any contractual goods that are subject to Kontron's right of retention of title, and may revoke the customer's right to enforce its claims (see clause (2) above).

- (5) The securities to which Kontron is entitled shall not be realised insofar as the estimated value of the securities exceeds the nominal value of the claims that are to be secured by 50%. The decision as to which securities have been released shall be at Kontron's discretion.
- (6) Should the validity of Kontron having retained title to goods be subject to special provisions or special formalities in the country of destination, it shall be the customer's responsibility to ensure that any such requirements are met.

§ 8 Material defects and defects of title (warranty)

- (1) Kontron will be liable for defects in the goods delivered in accordance with the following provisions provided the customer has duly complied with its duties of inspection and complaint notification as set out in § 377 German Commercial Code/HGB (the complaint must be notified to Kontron in writing).
- (2) The customer shall not have a right to claim for defects unless the defect is of a material nature. The customer's right to claim will at Kontron's discretion be limited to the defect being remedied or a new fault-free good being delivered (subsequent performance). In the event of frustration or failure of subsequent performance the customer shall be entitled to demand a reduction in price or to withdraw from the agreement. The customer shall reimburse to Kontron any costs incurred in the event that a more detailed inspection of notified defects reveals that there is no defect or that such defect is not the responsibility of Kontron. The cost of providing subsequent performance shall be borne by Kontron, provided the cost is not increased due to contractual goods having been placed at a location other than the place of performance.
- (3) Any other claims for damages or reimbursement of expenses made by the customer shall be regulated in accordance with § 11.
- (4) Unless longer limitation periods are prescribed by law, the right to claim for defects shall be limited to a period of 24 months commencing at the time at which the goods are delivered to the customer. In the event that the goods require installation by Kontron, the limitation period shall commence as soon as the goods are ready for use.
- (5) Any assurances or guarantees shall not be deemed to have been validly given unless expressly given in writing by Kontron.
- (6) The deemed place of performance for subsequent performance shall be the customer's place of business, unless the law provides that it should be Kontron's place of business. Kontron may refuse to provide subsequent performance if the cost of subsequent performance has risen because the customer has taken the goods to a location the result of which is that subsequent performance would become unreasonable.

§ 9 Software

- (1) Software licence
Licenced software including subsequent new versions and components thereof and relevant documentation must only be used on the central processing unit on which it was initially installed. Software may only be copied for backup purposes provided the copyright notice from the original copy is included and provided it is copied for use on that central processing unit only. The customer shall protect the software from access by third parties. Persons exercising the customer's right to use the software on the customer's behalf shall not be deemed to be third parties.

Kontron shall retain all exploitation rights in relation to the software. Should a customer act in breach of these licence provisions, Kontron shall be entitled to terminate the licence and to demand the return of the software and all components and copies thereof, provided a warning notice specifying a deadline as given by Kontron has passed without remedial action having been taken. The customer shall be responsible for ensuring valid use of the software and, as applicable, its further distribution.

The licence shall be deemed to have been granted on delivery of the software. The licence fee shall fall due at the same time. The terms and conditions governing the software shall be considered accepted when the customer accepts the software.

Source programmes shall not be provided unless a special written agreement has been made in this respect.

- (2) Software warranty
The following provisions shall apply in addition to the provisions in §§ 8, 10 and 11 of these terms and conditions:
 - (2.1) In line with the current technological status quo, software is never completely defect-free as regards its structure. In the case of major defects, instructions given for bypassing the consequences of the defect shall be deemed to constitute sufficient subsequent performance.
 - (2.2) Kontron does not warrant that the programme functions will be adequate for the customer's requirements or that they will work in the combination chosen by the customer. In line with the current technological status quo, no guarantee can be given in respect of the software's operation being uninterrupted or defect-free nor that all possible defects have been completely removed.
 - (2.3) Liability for defects in respect of the replacement or loss of data resulting from a delivery of software shall be excluded from this agreement. The customer is obliged to secure its data accordingly.
 - (2.4) Due to the particularities of the individual programmes, the scope of applicable liability for defects can not be notified to the customer in a legally binding manner in the offer or product description.

§ 10 Particularities in respect of breaches of industrial property rights

- (3) Within the scope of subsequent performance Kontron may, at its discretion:
 - grant to the customer the right to continue using the good;
 - replace the good or alter it so that there is no longer a breach of industrial property rights; or
 - take back the good and credit its reduced value, as calculated in accordance with writing-down principles, to the customer if the aforementioned courses of action are not feasible for Kontron at commercially acceptable conditions.
- (4) §§ 8, 9 and 11 apply analogously.

§ 11 Withdrawal and general liability

- (1) The customer's legal right to withdraw from the agreement shall not be excluded or limited save as provided in § 8. Equally, this agreement does not purport to exclude nor limit Kontron's legal or contractual rights and entitlements.
- (2) Kontron shall be liable without limit for intentional and grossly negligent acts only (including those of its legal representatives and agents) and for damage to life, bodily harm and damage to health. Kontron shall also be liable without limit for guarantees or assurances given if a defect that is covered by such a guarantee or assurance triggers liability. Further, there shall be no limit to liability resulting from hazardous circumstances (in particular in accordance with the German Product Liability Act/Produkthaftungsgesetz). This shall not affect possible liability in accordance with the entrepreneur's recourse principles contained in §§ 478 et seq. German Civil Code/BGB.
- (3) Kontron's remaining liability in respect of culpable breaches of material contractual duties (cardinal duties) shall be limited to foreseeable loss as is typical for this kind of agreement. All other liability shall be excluded regardless of its legal basis (in particular claims resulting from a breach of primary or secondary contractual obligations, illicit acts and liability for other tortious acts).
- (4) The same (exclusions, limitations and exceptions) shall apply in respect of claims on the grounds of fault at the time of concluding the agreement.
- (5) This § 11 shall apply analogously in relation to the reimbursement of expenses (to the exception of any reimbursement as provided in §§ 439 II and 635 II German Civil Code/BGB).
- (6) Exclusions and limitations of liability shall also apply in respect of Kontron's legal representatives and agents.
- (7) This agreement does not purport to reverse the burden of proof. Cardinal duties means material contractual duties, i.e. those duties which give the agreement its character and on which the customer may rely.

§ 12 Export und re-export

- (1) Deliveries by Kontron shall be subject to the grant of an export licence by the Department of Commerce in Washington DC/USA or by the relevant authority of a different country of delivery.
- (2) In view of the seller's import licence, goods and technological know-how delivered by Kontron are intended for use and destination in Germany. Any re-export by the customer must be authorised and is subject to German foreign trade laws and the US export regulations, the observance of which is the customer's responsibility.

§ 13 Field of use of goods; overall responsibility

- (1) Use of Kontron's goods in the field of security shall not be permissible unless clearance has been obtained from Kontron. This shall apply in particular in respect of use in the aviation and aerospace industry, the military and the fields of medical engineering and automotive engineering.
- (2) If goods are to be incorporated into any total system, the customer must carry out sufficient compatibility and acceptance tests prior to use or resale. Responsibility for the total system shall continue to lie with the customer.