

Special Terms and Conditions for IT Application and Infrastructure Management Services (Status 11/2018)

This is an English translation of the German STC and for convenience only. Only the German version of these STC is legally binding.

1. Scope and Definitions

- 1.1 The Special Terms and Conditions ("**STC**") set forth below shall apply to orders for IT Application und Infrastructure Management Services.
- 1.2 The company within the BMW Group which actually places the order for IT Application und Infrastructure Management Services shall, hereinafter, be known as "**BMW**". The other party to the contract shall hereinafter be known as the "**Contractor**".
- 1.3 The present STC shall supplement the "General Terms and Conditions for Indirect Purchasing" ("**GTC**"), as from time to time amended. The GTC shall apply, including its definitions, unless these STC otherwise provide for a separate rule or specify a different rule in derogation from the GTC.
- 1.4 Within the meaning of these STC, "**IT Application and Infrastructure Management Services**" refer, in particular, to operation, maintenance or further development of Software that is developed on a customised basis for BMW, the operation of standard Software or IT hardware, as well as managed services such as helpdesk, storage and end user computing services.
- 2.4 The Contractor is responsible for integrating the IT systems utilised by it for purposes of rendering the Services within BMW's IT environment. In that context, the Contractor must ensure that BMW's internal and external IT systems are not adversely impacted, and specifically, that they are not adversely impacted as to their functionality, performance, reliability, availability, response times or similar parameters. The connection of the Contractor's IT systems to BMW's systems shall require BMW's prior approval.
- 2.5 No assumption and transfer of assets or employees:
- a) The Contractor shall have no entitlement to assumption of resources and assets (hardware, software, and existing contract claims and liabilities towards third parties). The same shall apply with respect to the assumption of BMW employees or any service providers who have previously worked for BMW.
- b) The Contractor is responsible for organising the Service Provision such that upon the end of the contract term, none of its employees or employees of any sub-contractor are deemed to pass to BMW by way of the transfer of business pursuant to Clause 613a of the German Civil Code [German acronym: BGB].

2. Service Provisions

By way of supplementation to Clause 3 of the GTC, the following shall apply:

- 2.1 The scope of the IT Application and Infrastructure Management Services to be provided by the Contractor, together with complete description of the scope of services, the testing and formal acceptance criteria, the deadlines and Service Levels to be adhered to, the description of the environment, the necessary contents of any documentation (hereinafter the "**Services**") and the materials to be provided and cooperation to be furnished by BMW shall be shown in BMW's Purchase Order.
- 2.2 The type and quality of the Services to be provided:
- a) The Contractor shall comply with the standards applied by BMW (e.g. ITPM, ITIL) and shall ensure that all employees deployed by it within the technical sphere have suitable qualifications. The performance of the Services shall be undertaken in line with the state of the art and conformity with recognised quality and market standards.
- b) The Contractor is responsible for providing all legally and commercially suitable and necessary resources in material and staffing regards (including facilities, equipment, data services, hardware and software).
- c) The Contractor shall also be responsible for procuring all such licences, approvals, consents and permits required for the provision of the Services pursuant to the requirements of law or demanded by its sub-contractors or third parties engaged by it.
- 2.3 In rendering the Services, the Contractor shall comply with the Service Levels stipulated in BMW's Purchase Order.
- a) The Contractor shall render the Services in line with standards customary in the industry, where no Service Levels have been agreed with respect to the Service to be rendered.
- b) Service Levels represent a specification of the quality of the Services, and do not represent any limitation on the Contractor's duty to render the Services consistently. The Contractor shall, irrespective of whether or not it achieves the agreed Service Levels, be liable for breaches of duty for which it is responsible in connection with the provision of its Services. BMW's right to assert claims going beyond contract penalties for non-achievement of Service Levels, in particular claims for damages, shall remain unaffected hereby.
- 2.6 The Contractor hereby confirms its agreement that, during the contract term, it shall cooperate with third parties engaged by BMW in order to coordinate the provision of its Services with the services and systems of any such engaged third party. The foregoing shall, in particular, include the following duties:
- a) provision of information with respect to all of the systems, data, IT environments and technologies used in rendering the Services,
- b) preparation and/or updating operational documentation, manuals and process documentation, and
- c) provision of support and cooperation services to such third parties engaged by BMW.
- 2.7 The Contractor shall, in the case of any spin-off of a unit from the corporate group structure of the BMW Group, in particular as a result of a partial sale of a business or a corporate spin-off, continue to provide the Services it is obliged to provide to the BMW Group to such unit on the same terms and conditions for a period of at least six (6) months upon request of BMW. Upon request of the BMW Group, the Contractor shall, in exchange for reasonable compensation, furnish termination support in line with Clause 13 in respect of a transition to a new service provider.

3. Place of Performance

- 3.1 Unless otherwise agreed, the place of performance shall be the location of the Contractor. The Contractor shall perform the agreed services at its locations as designated for this purpose, which shall have the corresponding technical and organisational provisions. Safety precautions such as fire safety, disaster protection and access controls must comport at least with the requirements of law.
- 3.2 The Contractor may only relocate the place of performance in whole or in part with BMW's prior written consent.

4. Cooperation and Client Supplied Resources

- 4.1 BMW shall provide the collaboration and BMW resources as described in its Purchase Order ("**Client Supplied Resources**"). In particular, BMW shall procure access to BMW's systems and premises for the Contractor to the extent this is required to enable it to perform the Services in question. The Contractor shall comply with BMW's site rules, security rules and other general policies applicable to external users.
- 4.2 BMW shall furnish all Client Supplied Resources to the Contractor solely for purposes of enabling it to perform the Services. The Contractor shall utilise such Client Supplied Resources with the requisite degree of care and shall comply with the terms of use thereof.
- 4.3 BMW's obligation to provide Client Supplied Resources shall end upon the expiry of the contract term. BMW may terminate provision of any resources with immediate effect if
- the Contractor breaches material contract obligations with respect to the Client Supplied Resources; or
 - the Contractor utilises the Client Supplied Resources in a manner in breach of the contract, and in particular, provides them to third parties without authorisation.
- 4.4 The Contractor shall, notwithstanding any failure by BMW to comply with its duties of collaboration or provision of Client Supplied Resources, undertake all reasonable efforts to render the respective Services in line with the contract.
- 4.5 Where BMW does not perform duties of cooperation, or does not fully perform them or performs them only belatedly, the Contractor shall promptly alert BMW upon learning thereof. The Contractor shall inform BMW wherever delays arise based on BMW's failure to discharge duties of cooperation, or failure to do so in line with the contract, or where there is a risk of corresponding delays.
- 4.6 Where BMW furnishes Services to the Contractor based on contracts between BMW and third parties ("**Third Party Supplied Resources**"), this shall be based on BMW's Purchase Order in line with Clause 2.1 of these STC. With respect to Third Party Supplied Resources, BMW grants the Contractor a right of use which is non-exclusive and non-transferable, to the extent and for so long as
- the Contractor requires this in order to perform the Services in line with the contract, and
 - this is permitted in line with agreements existing with third parties on the use of the Third Party Supplied Resources.

This right of use is granted on a gratuitous basis, except where the BMW Purchase Order specifies fees therefor. Where the provision of any Third Party Supplied Resources requires the consent of a third party, the Parties shall endeavour jointly to obtain the grant of permission.

5. Sub-contractors

By way of supplementation to Clause 3.5 of the GTC, the following shall apply:

- 5.1 Approved sub-contractors shall be recorded in an Annex to BMW's Purchase Order, including the scope of their sub-contract. BMW may revoke its consent to the deployment of a sub-contractor if it is revealed that the sub-contractor is not or will not be in a position to perform its obligations or if it has breached any material duty owed by the Contractor. The induction of the new sub-contractor shall be performed at the cost and expense of the Contractor.
- 5.2 The Contractor is required to ensure, by means of appropriate contract agreements with its sub-contractors that such sub-contractors shall in each case comply with the standards, guidelines and procedures agreed in BMW's Purchase Order, irrespective of whether these are the standards, guidelines and procedures of BMW or the Contractor.

6. Audits

The right to perform Audits to verify compliance in respect of information security granted by the Contractor to BMW pursuant to Clause 16.6 b) of the GTC shall apply likewise *mutatis mutandis* to the verification of compliance with the agreed processes and quality requirements.

7. Termination

By way of supplementation to Clause 6 of the GTC, the following shall apply:

- 7.1 A repeated, not insignificant breach of Service Levels shall be 'good cause' for termination.
- 7.2 In the event of any change of control of the Contractor, BMW may terminate the Contract if BMW
- has justified grounds to believe that the Contractor will be controlled by a competitor of the BMW Group following the change of control,
 - has well-founded doubts that the abilities or financial stability required by the Contractor to provide the Services in line with the Contract will no longer be present following the change of control, or
 - has well-founded doubts that the confidentiality obligations will continue to be complied with following the change of control.

In the event of a termination, BMW shall not be obliged to pay any indemnity payments. The Contractor shall likewise have no claim for specific performance or damages as a result of any such termination.

"**Change of Control**" is defined as the sale of all or a substantial portion of all of the Contractor's assets, a merger or consolidation of the Contractor with another or into another corporate entity, organisation or person, acquisition of the Contractor by another corporate entity, organisation or person, and any change of ownership in respect of more than fifty per cent of the voting rights in the Contractor as a result of one or several associated transactions.

- 7.3 To the extent the Parties have rights of termination under the law governing contracts for works and services, such rights are neither precluded nor limited hereby.

8. Compensation

By way of supplementation of Clause 9 of the GTC, the following shall apply:

- 8.1 Compensation shall be paid following formal acceptance, or (where no formal acceptance is envisaged in light of the characteristics of the Services, or where the contract does not require formal acceptance of the Services for payment to fall due) upon complete Service Provision, unless otherwise agreed. With respect to partial services, the foregoing shall apply *mutatis mutandis*, such that compensation shall only fall due upon complete provision of the respective partial services. Where the compensation is determined in line with intervals of time, the Contractor shall invoice BMW in each case for its Services after rendering them, in line with the agreed invoicing schedule.
- 8.2 BMW may withhold a reasonable amount of contract penalties, damages for default, additional expense or any agreed security from the compensation owed to the Contractor, and may, where applicable, offset them in line with the rules of applicable law.
- 8.3 To the extent that BMW withholds payment of compensation, the Contractor may not refuse to perform its Services (e.g. withhold or cease performance of the Service),
- where the Contractor has not notified BMW in advance of its refusal expressly and in writing, and set a reasonable grace period, and

- b) where, in light of the circumstances, in particular in light of the relative *de minimis* nature of the residual portion, refusal would constitute a breach of good faith.

BMW may provide security to avert the exercise of the Contractor's right to refuse performance. The provision of security by a surety is not permitted.

9. Warranty

By way of supplementation to Clause 12 of the GTC, the following shall apply:

- 9.1 A defect is deemed present when the Services do not comport with contractual requirements, Service Levels or Key Performance Indicators or are not fit for their contractual purpose or usual use.
- 9.2 The Parties shall promptly inform one another in writing as soon as they identify or suspect a defect in respect of the Services. Within its scope of responsibility, the Contractor shall, independently and at its own cost and expense, investigate the cause of the defect and take all necessary action to avoid a recurrence of the defect in the future. The Contractor shall inform BMW unbidden at regular intervals regarding the respective status and success of such measures.
- 9.3 Where the Parties have agreed Service Levels with respect to Services by the Contractor and in the event such levels are not achieved have provided for contract penalties in favour of BMW, BMW's right to abate the compensation shall not apply if the cause for the defect simultaneously leads to a failure to achieve an agreed Service Level and thereby triggers a contract penalty. BMW's right to assert other claims based on defects, in particular statutory claims, shall remain unaffected hereby.

10. Rights of Use

By way of supplementation to Clause 13 of the GTC, the following shall apply:

- 10.1 As of the time it commences rendering the Services, the Contractor grants BMW a non-exclusive, irrevocable right of use, not limited in geographic or substantive scope, but limited in temporal scope to the contract term, to all of the Contractor's application systems required in order to use the Services. This right of use also includes the provision of the application systems to all of the BMW Group entities, and use thereof at all of the BMW Group entities, provided that BMW itself is entitled to make use thereof.
- 10.2 Where the Contractor deploys protected works such as software and databases in order to render its Services, the Contractor shall ensure that BMW Group is entitled to use such works, if and to the extent this is necessary in order to render or to receive such Services. The foregoing shall also apply in respect of third parties engaged by BMW Group if and to the extent necessary in order to enable BMW's use thereof or where such third parties perform a contribution to BMW Group's use of the Services.
- 10.3 BMW AG shall be entitled, without limitation in time, geographical or substantive scope, to the exclusive rights of use to all work results developed by the Contractor not upon request of BMW Group but in the course of rendering the Services, e.g. scripts and reports. BMW AG shall grant the Contractor a non-exclusive right of use to such work results on a gratuitous basis for the period of the contract, to the extent this is necessary in order for it to render the Services.

11. Information Security

By way of supplementation to Clause 16 of the GTC, the following shall apply:

- 11.1 The Contractor shall ensure that access to BMW's IT systems in connection with the provision of the Contractor's Services is only permitted by persons holding corresponding access rights accordingly granted by BMW. The disclosure of access data (e.g. passwords) to enable access to such IT systems to third parties, in particular to sub-contractors,

shall only be permitted with BMW's prior written consent. As soon as any authorised person is no longer engaged in performing the contract, the Contractor shall promptly notify BMW thereof.

- 11.2 The Contractor shall undertake, at its own cost and expense, such necessary technical and organisational measures (e.g. training sessions) such that no impairments of BMW's IT systems or cases of misuse by the Contractor's staff members and third parties engaged by it may arise.

12. Emergency Measures

- 12.1 "**Emergency**" shall mean an impairment of IT Application and Infrastructure Management Services which give rise to not insignificant damage to BMW or are liable to do so to a high degree of likelihood.
- 12.2 The Contractor must have or implement plans of action for Emergencies ("**Disaster Recovery Plan**") which provide suitable and effective measures to reduce the scale of potential losses. The Disaster Recovery Plan must include communication channels which have been coordinated with BMW and business continuation and restoration plans. In particular, workaround solutions must be assured which can be provided within a short time, and the return to normal operations within a reasonable time must be ensured ("**Business Continuity**"). In addition the Contractor shall ensure that it is able to continuously meet the requirements agreed in the Service Levels ("**IT Service Continuity**").
- 12.3 The Contractor shall test the Disaster Recovery Plan at regular intervals with respect to the effectiveness and suitability of the measures throughout the entire contract term. The test results shall be reported to the responsible contact at BMW.
- 12.4 The Contractor shall coordinate its Disaster Recovery Plan with the BMW Group's internal disaster recovery plans.

13. Termination Support

The Contractor shall, in exchange for the agreed compensation, or in the alternative in exchange for reasonable compensation, take care to ensure that in the event of complete or partial termination irrespective of the grounds of termination, the Services may be adopted by a follow-on service provider. The rules on termination support as defined in the BMW Purchase Order shall apply.

14. Applicable Law

By way of supplementation to Clause 22 of the GTC, the following shall apply:

The Parties hereby agree that Sections 631 ff. of the BGB shall apply wherever the contract Services of the Contractor consist of creating Software for BMW, customising Software for BMW or performing further development with respect to such Software, or of producing other elements of works.