

## **General Conditions of Delivery of Axians Networks & Solutions GmbH**

**Domestic – Purchase –**

**Issue 01/2014**

### **1. Application scope; Definition of terms used**

1.1 All deliveries, performances and proposals of Axians Networks & Solutions are subject exclusively to these General Conditions of Business. They are an integral component of all contracts for deliveries or performances Axians Networks & Solutions concludes with its contract partners (“hereinafter also referred to as “Customers”). They also apply for all future deliveries, performances or proposals to or from the Customer even if they are not separately agreed again.

1.2 Terms and conditions of the Customer or third parties do not apply even if we do not emphatically object to their applicability in the individual case, unless these are terms and conditions of manufacturers. Even though we may refer to a letter containing terms and conditions of business of the Customer or a third party or which refers to such, this does not imply any agreement on our part that those terms and conditions of business apply.

1.3 “Goods” in the meaning of this contract are all items to be contractually delivered to the Customer, including software, also then if such items are provided in a non-physical form, e.g. by way of electronic transmission.

1.4 If we deliver or produce software, our special terms and conditions for the delivery of software apply with priority in the event that they are explicitly included. These can be retrieved from our homepage or will be sent on request.

1.5 The corresponding special terms and conditions of contract apply with priority over these General Conditions in the case of contracts for services, projects, maintenance and for performances that are not deliveries. The special terms and conditions can be retrieved from our homepage or will be sent on request.

### **2. Proposal, proposal documents and contract conclusion**

2.1 A contract between the Customer and us first comes into being with our written confirmation of the order the Customer places with us. Our written order confirmation is decisive for the scope of the delivery or performance.

2.2 Our proposals are non-committal and non-binding for follow-up orders.

2.3 The Customer is obligated to carefully examine our proposal for correctness and appropriateness. This applies particularly for project proposals in which we have made assumptions designated as such and on which we have based our calculation and performance description. The Customer will inform us if such assumptions are inaccurate so that we can adjust the proposal accordingly.

2.4 We reserve all our proprietary rights and copyrights in all documents and records provided to the Customer, especially data carriers, documentations, illustrations, drawings and calculations; these documents and records may not be used for any purposes other than their proper contractual uses and may not be disclosed to third parties and must be returned carriage paid to us promptly when the contract ends or when the contractual purpose of use has been fulfilled. This applies particularly for documents and information designated as “confidential”. We are at all times entitled to demand that documents and records are returned to us if this secrecy is not assured.

### **3. Contract subject Goods or Performances**

3.1 Our goods are intended exclusively for use by entrepreneurs. The Customer is obligated to notify us accordingly if he intends to deliver the goods purchased from us to a consumer or to an entrepreneur who in turn supplies such goods to consumers.

3.2 The statements contained in our public pronouncements such as catalogues, prospectuses, advertisements, illustrations, advertising and pricelists concerning properties are only deemed to be characteristics if these statements have explicitly become a contract component. Public pronouncements by a manufacturer or his vicarious agent only pertain to the characteristics of the goods if they are agreed in the contract or if we have explicitly adopted them in writing in public pronouncements.

3.3 Until delivery, we reserve the right to make technical changes usual in the trade, especially improvements, if this gives rise to merely insignificant changes in the characteristics and the Customer is not unreasonably impaired.

3.4 Statements to characteristics do not contain any guarantee (assurance) in the meaning of § 276 section. 1 BGB (*German Civil Code*) and guarantee in the meaning of § 443 BGB, unless we have explicitly given such a guarantee in writing.

3.5 If goods are produced or changed due to stipulations of the Customer, we are not obligated to scrutinise these stipulations if no special agreement to do so has been concluded. The Customer has no claims on the grounds of defects arising because of these stipulations or caused by hardware or software delivered by third parties and used by the Customer.

3.6 Setup, installation or creation of technical readiness for operation are not subjects of our delivery. We can render these performances on request, but this requires a separate agreement. If the Customer wishes, separate particular agreements can be concluded for further performances (consulting, instruction, trainings).

### **4. Supplementary provisions for software**

4.1 Unless agreed otherwise, contractual software is standard software not manufactured individually for the needs of the Customer. Delivery contracts for software are therefore purchase contracts. The parties concur that with the current status of technology it is not possible to develop standard software free of errors for all application conditions.

4.2 In the case of standard software manufactured by a third party, we deliver to the Customer the manufacturer's original user documentation if the manufacturer provides this documentation. We are not obligated to deliver documentation going beyond this. As a rule, the documentation is delivered as online help within the context of the software. The Customer can inform us before contract conclusion if he wishes for more extensive written documentation. We shall then make a proposal to the Customer for such documentation.

4.3 We are obligated to handover the object code if (OEM) software is to be delivered. There is no entitlement to handover or disclosure of the source code.

4.4 If we are obligated to install software, then the Customer must ensure that the requirements notified to him concerning hardware and other environment, especially connection to the computer network and inclusive all cable connections, are fulfilled before the installation is carried out.

4.5 In the event that we deliver hardware, the Customer must ensure a suitable hardware and software environment inasmuch as we must connect to own hardware or software or to hardware or software purchased from third parties.

4.6 During test runs and during the installation the Customer will ensure that competent and trained employees are in attendance and will ensure that other works with the ITK plant are discontinued if necessary. The Customer will ensure that all his data is secured prior to each installation.

## **5. Usage rights**

5.1 The conditions of use of third party manufacturers apply if the delivery subject is standard software of third party manufacturers. The license agreement will be concluded directly between the manufacturer and the Customer. We are solely intermediaries. These conditions of use will be provided to the Customer on request, also before contract conclusion.

5.2 Unless given otherwise from the conditions of use pursuant to the foregoing section, the following conditions of use apply.

5.3 The Customer receives a non-exclusive right unlimited in time to use the software. This right is not transferable. The Customer may not grant usage rights to a third party. If a network license (= multi-user license) is not acquired, then the software may only be used on one single computer. The software must be completely deleted from the formerly used hardware in the event of changing hardware. The software may not be simultaneously stored, kept in reserve or used on more than one hardware unit.

5.4 In the case of a network license this usage right applies for the individual user places of the contractually defined local network. The Customer is obligated to prevent any and all use by third parties.

5.5 Unless mandatorily stipulated otherwise by law, the Customer is not authorised to replicate, disseminate, make publicly accessible, lease, change or process software or written material provided to him.

5.6 Existing copyright marks or registration features such as register numbers in the software may not be removed or changed.

5.7 Unless the decisive license conditions according to section 1 stipulate otherwise, the software may only be resold, leased for purposes other than purchase or otherwise loaned or provided for any independent use within the scope allowed by law and only under the following additional conditions:

5.7.1 the original data carriers are handed over to the acquirer or user,

5.7.2 the Customer has notified the name and address of the acquirer or user to us in writing,

5.7.3 the acquirer has declared himself agreed with our terms and conditions of delivery and performance and with the conditions of use of third party manufacturers whose standard software is contained in the software, and

5.7.4 the Customer has deleted or destroyed all copies or components of the software remaining with him from his system and all external data carriers, including backup copies, in such a manner that no possibility remains for him to use the software and that this can be evidenced to us on demand.

5.8 If the Customer culpably offends against the foregoing provisions, then notwithstanding other rights we shall be entitled to demand a contract penalty of EUR 20,000 for each contravention.

5.9 Third parties in the meaning of this section are also enterprises affiliated with the Customer or establishments segregated in place or organisationally such as branch dependencies.

## **6. Prices and payment/Partial delivery**

6.1 All prices are quoted in EURO ex-works plus shipment, insurance and packaging costs and plus the turnover tax applicable as at delivery inclusive original packaging.

6.2 If the delivery time is more than 4 months, we have the right to increase prices in accordance with price rises due to increased costs of personnel, working means or materials. If this increase is more than 4.5% of the agreed price, then unless he is a merchant the Customer has the right to withdraw from the contract and which must be exercised in writing within one week after receiving notification of the price increase.

6.3 Our invoices are due for payment immediately within the respective target payment time period.

6.4 The statutory default regulations apply. We charge default interest of 8% over the respective basic lending rate of the European Central Bank. This interest will be higher if we can evidence a burden with a higher interest rate.

6.5 Withholding payment due to counter-claims of the Customer which we have not acknowledged or are not established with lawful finality is not permitted, as is also offsetting with such counter-claims.

6.6 We are explicitly entitled to make partial deliveries. If partial deliveries are made, then the purchase price is due no later than after each delivery to the amount of the pro rata delivery scope. The following conditions of payment apply otherwise:

- 30% of the total gross order amount is due and payable with order acceptance;
- A further 30% of the total gross order amount is due and payable with commencement of the delivery or performance or with commencement of the contractually agreed performance time;
- The remainder of the total gross order amount is due and payable with delivery;
- In the case of a formal acceptance, a further 30 % of the total gross order amount is due and payable on completion and before acceptance, and 10% after acceptance.
- In the case of partial acceptances, the respective percentage remuneration for the accepted or completed performance part is due and payable.
- If a delivery is rendered in partial lots, then the remainder owed for the delivered portion is due and payable.

## **7. Exposure to loss**

7.1. If it becomes recognisable after contract conclusion that our claim to the counter-performance is at risk due to deficient ability of the Customer to pay, then the Customer must provide surety for his counter-performance in the absence of another advance payment obligation. If our contractual obligation is a performance of work, service or delivery of merchandise (staple goods) to be procured for the Customer and which is not saleable at any time elsewhere, then we can demand payment in advance from the Customer up to the amount of our procurement costs or, as we may choose, to the amount of 50% of his counter-performance and also that he provides surety for the remainder.

7.2. In otherwise, § 321 BGB applies with the proviso that we can refuse our performance if other claims from the same legal relationship in the meaning of § 273 BGB are exposed to risk.

7.3. If payment by instalments is agreed, then the entire remaining claim falls due if the Customer is wholly or partially in arrears with at least two consecutive instalments. Deferment arrangements become null and void if the Customer is in default with a payment or if the prerequisites of § 321 BGB come into being with regard to a claim.

## **8. Delivery and delivery time**

8.1 Because we procure hardware and standard software from suppliers, our delivery obligation is subject to timely and correct delivery to us. Unless a firm period or date is promised or agreed, any due periods and

dates we forecast for deliveries and performances are invariably only approximations. In the event that shipment was agreed, delivery periods and dates relate to the point in time of handover to freight hauliers, freight agents or other third parties engaged to undertake transportation.

8.2 Delivery hindrances for which we are not answerable cause the delivery period to prolong accordingly. This applies particularly in the event of deficient or lacking delivery to us (cf. section 1), force majeure, war, natural catastrophes, traffic or operational disruptions, impeded import, energy and commodities scarcity, government measures and labour disputes, as well as the breach of cooperation duties or obligations of the Customer. We are entitled to withdraw from the contract if the performance impediment persists for an unknown time and the contract purpose is at risk. If the hindrance lasts for longer than 2 months, then the principal is entitled to withdraw from the contract with regard to that part of it not yet fulfilled if he is not entitled to withdraw from the contract in its entirety.

8.3 The delivery period also prolongs for as long as the Parties are negotiating a change of the performance or if we submit an addendum proposal after assumptions in our proposal that have become a contract component have proven to be inaccurate.

8.4 Compliance with our delivery obligation presupposes prompt and duly proper fulfilment of the obligations incumbent on the Customer.

8.5 The Customer ensures that the goods can be properly delivered on the agreed delivery date. If the Customer does not accept goods in good time, then notwithstanding further rights we shall be entitled to set the Customer an appropriate subsequent period after which we may dispose of the item otherwise and deliver to the Customer with an appropriately extended subsequent period. Within the context of a claim for damages, we can demand 10% of the agreed price without turnover tax as compensation without substantiation, unless only significantly less damage was provably incurred. We reserve the right to assert actually higher damages.

8.6 We are entitled to make partial deliveries.

8.7 Our liability is limited to damage compensation in accordance with § 12 of these General Conditions of Delivery if we are in default with a delivery or performance or if delivery or performance is impossible, for whatever reason.

8.8 In otherwise, if we culpably default the Customer is first entitled to assert further-reaching rights after a subsequent period of at least three weeks set by the Customer after the default occurred has lapsed fruitlessly. If the Customer withdraws unjustifiably from a placed order, then notwithstanding the possibility of asserting an actually higher damage we can demand 10% of the purchase price for the costs incurred from processing the order and for lost profits. This does not deprive the Customer of the right to evidence lesser damage or that no damage has been incurred.

## **9. Place of fulfilment, shipment, packaging, passage of risk**

9.1 Unless stipulated otherwise, Cologne is place of fulfilment for all obligations from the contract relationship.

9.2 We decide at our own dutiful discretion the shipment type and packaging. Shipment packagings are charged separately.

9.3 Risk passes to the Customer at the latest with handover of the delivery item (commencement of the loading process is decisive) to the freight haulier, freight agent or other third party engaged to undertake transportation. This applies also in the case of partial deliveries or if we have assumed to undertake other performances (e.g. shipment or installation). If shipment or handover is delayed due to a circumstance for which the Customer is answerable, then risk passes to the Customer as from that day on which the delivery item is ready for shipment and we have notified this to the Customer.

9.4 The Customer bears storage costs after risk passes. Storage with us costs [0.25]% of the invoice amount of the delivery items to be stored per expired week. The rights are reserved to assert and evidence higher or lesser storage costs.

## **10. Acceptances**

10.1 The following provisions apply if a formal acceptance is required according to contract or law.

10.2 If we so wish, partial acceptances must be conducted for performance parts that can be delimited and used independently or for performance parts on which further performances build if the performance parts to be accepted can be separately verified. The last partial acceptance is simultaneously the final acceptance in the event that all other performance parts have been accepted.

10.3 A partial or final acceptance is deemed as declared at the latest then if after delivery of the performance and expiry of an appropriate time period for examination the Customer has not refused acceptance in writing with statement of reasons within a further subsequent period we have specified in writing (notional acceptance).

10.4. If the performance subject to acceptance also involves the delivery of hardware or standard software, then we are entitled to charge these to the Customer independent of acceptance of the performance otherwise.

## **11. Liability for deficiencies**

11.1 The Customer is obligated to examine the delivered goods immediately on delivery and to notify us in writing of any defects promptly (but no later than 5 working days after delivery). We shall not consider defects that are complained late, i.e. contrary to the aforesaid obligation, and they will be excluded from the warranty. Complaints voiced to field sales employees or third parties do not constitute proper complaints in terms of form and due period.

11.2 The Customer is obligated to give to us the complained delivery or parts thereof for the purpose of verifying the complaint. The warranty is void in the event of culpable refusal to do this.

11.3 The provisions governing the delivery period apply correspondingly in the event that subsequent improvement or replacement delivery is undertaken due to a justified defect complaint.

11.4 The existence of a defect determined and notified as such by effective defect complaint gives rise to the following rights of the Customer:

11.4.1 In the event of a deficiency the Customer initially has the right to demand subsequent fulfilment from us. In so doing, we have the right to choose at our own discretion whether the item will be newly delivered or the fault rectified.

11.4.2 Furthermore, if an attempt to subsequently fulfil fails, we have the right to attempt this again and in this case also as we choose. The Customer first has the right to withdraw from the contract or reduce the purchase price if the repeated subsequent fulfilment attempt also fails.

11.5 We can rectify the defect by giving the Customer action instructions on the telephone, in writing or electronically. In order to render subsequent improvement, the Customer must give us the information needed for error diagnosis and remedy, on request if necessary, and provide us with a trained and competent employee who assists in the subsequent improvement via remote data transmission or telephone. In the case of subsequent improvement on location, we must be accorded unimpeded access to the defect goods and, if necessary, other work on the hardware or in the network of the Customer must be discontinued. We assume the expenditure necessary for subsequent fulfilment, especially the costs for transportation, travel to and from the place of work, and labour and materials costs. The Customer shall bear any additional expenditure incurred because the Customer has brought the products to a place other than our domicile. If it transpires that the defect complaint was unjustified, we can demand that the expenditure we incurred is compensated if the Customer acted at least negligently.

11.6 The warranty period is one year as from delivery dispatch. In every case the Customer must evidence that the defect already existed when the delivery was dispatched.

11.7 We are not liable for natural wear and tear.

11.8 Deviating from the foregoing regulation, in the case that hardware and standard software of third party manufacturers is delivered or if third parties are engaged to perform maintenance, we shall for the purpose of subsequent improvement or replacement delivery be entitled to assign to the Customer the corresponding claims we have against our suppliers, the manufacturers or other third parties. Before asserting his right to subsequent fulfilment by us or to expenditure compensation after self-fulfilment, damage compensation instead or performance, withdrawal or reduction, the Customer must recourse to our suppliers or the manufacturers, if need be before a court of law, for subsequent fulfilment, damage compensation or compensation for expenditure incurred after self-fulfilment, unless this is unreasonable for the Customer.

11.9 We can also render subsequent fulfilment by way of hotline service in the case of documentation.

11.10 If the Customer withdraws for justified reasons, we are permitted to demand appropriate compensation for the usefulness gained by the Customer from the products during the time until reverse settlement. This compensation for usage will be determined on the basis of a total usage time of four years,

whereby an appropriate deduction is allowed for the impairment caused by the defect which led to withdrawal.

## **12. Liability for damage compensation in case of culpability**

12.1 Our liability for damage compensation, irrespective of legal grounds, especially due to impossibility, delay, defective or erroneous delivery, breach of contract, breach of duties in contract negotiations and tortious acts is, inasmuch as culpability is decisive in such a case, limited in accordance with this § 12.

12.2 We are not liable

12.2.1 in cases of minor negligence on the part of our organs, lawful representatives, employees or other vicarious agents;

12.2.2 in cases of gross negligence on the part of our non-managerial employees or other vicarious agents, unless the matter in question concerns a breach of essential contract duties.

12.3 Inasmuch as we are basically liable in terms of grounds for damage compensation pursuant to (2), then this liability shall be limited to the damage that we foresaw at contract conclusion as a possible consequence of breach of contract or, giving consideration to the circumstances, that we knew of or must have foreseen in applying the care usual in business dealings. Indirect damages and consequential damages resulting from defects in the delivery item are otherwise only eligible for compensation if such damages must typically be expected in using the delivery item for its intended purposes.

12.4 In the event of liability for simple negligence, our obligation to compensate damage to property or injury to persons is limited to the invoice amount of the delivery in question and per damage occurrence, even then if the matter concerns a breach of essential contract duties.

12.5 The aforesaid liability exclusions and limitations apply in the same scope in favour of our organs, lawful representatives, employees and other vicarious agents.

12.6 In the event that we issue technical information or give consultancy and this information or consultancy does not belong to the contractually agreed performance scope owed by us, then such information or consultancy is given gratuitously and under exclusion of any liability whatsoever.

12.7 The limitations of this § 12 do not apply for liability due to wilful conduct, injury to life, limb or health or liability in accordance with the German Product Liability Act (*Produkthaftungsgesetz*).

## **13. Retention of title**

13.1 Delivered goods remain our property until all our claims against the Customer from the business

relationship have been fulfilled. In the event of conduct by the Customer in breach of contract, especially default with payment, we are entitled to recover the goods following withdrawal and the Customer is obligated to surrender the goods.

13.2 The Customer invariably processes or reforms the goods for us. If the delivery items are processed with other items not belonging to us, then we acquire co-ownership in the new item in the ratio of the value of the delivery items to the value of the other processed items at the time of processing.

13.3 The Customer is entitled to resell the delivery items to resellers in orderly business dealings outside a current account relationship; however, the Customer herewith assigns to us all claims to the amount of the purchase price agreed between us and the Customer (including VAT) and to which the Customer becomes entitled from the resale, and this independent of whether the delivery items are resold without or after being processed. The Customer is authorised to collect these receivables also after they have been assigned. This does not impair our authority to collect the receivables ourselves; however, we obligate ourselves to not collect the receivables for as long as the Customer duly fulfils his payment obligations and is not in default with payment. If this is the case, however, we can demand that the Customer discloses the assigned receivables and their debtors, makes all statements necessary to collect these, surrenders the pertaining documents and notifies the assignment to the debtors (third parties).

13.4 Before ownership passes to him, the Customer may neither pledge the delivery items nor assign them as security. The Customer must notify us immediately in cases of attachment, confiscation or other interventions by third parties and must give us all information and documents necessary in order to safeguard our rights. Enforcement officers or a third party must be informed of our ownership. We obligate ourselves to release security to which we are entitled on demand by the Customer if this collateral is more than 20% in excess of the value of the as yet unsettled claims. The assertion of our rights from retention of title does not release the Customer from his contractual obligations. The value of the goods at the point in time of recovering them will only be credited against the existing debt.

#### **14. Export clause**

Solely the Customer is responsible for compliance with export regulations. We are not obligated to send goods to places for which export restrictions apply.

It is known to the Customer that with regard to a re-export of the delivery items there are restrictions in place and official permits may be necessary. Special provisions of the US Department of Commerce apply for re-exporting certain delivery items originating from the USA. These regulations also apply if certain components originating from the USA are incorporated into the delivery item. If the Customer intends to re-export delivery items again out of the country to which we delivered according to the contract, then in addition to the obligation to inform us correspondingly he is also obligated to inquire from the responsible authorities what the factual and legal prerequisites are under which this is possible and permissible. Claims against us do not exist.

The Customer indemnifies us against any third party claims in the case of an offence. The Customer is obligated to give us comprehensive information concerning the delivery/re-delivery of our goods in the event

that we are questioned by government authorities due to an offence for which the Customer is answerable against the laws governing exports.

#### **15. Suspension of the statutory limitation during negotiations**

A suspension of the statutory period of limitation on claims of the Customer only happens if we have given our written agreement to negotiations. The suspension ends 3 months after our last written statement.

#### **16. Jurisdiction/Choice of law**

16.1 Place of jurisdiction for any disputes arising from the business relationship between us and the Customer is as we choose our domicile or the domicile of the Customer. Cologne is exclusive place of jurisdiction for lawsuits against us. This regulation does not affect overriding statutory stipulations concerning exclusive places of jurisdiction.

16.2 The relations between us and the Customer are subject exclusively to the laws of the Federal Republic of Germany. The United Nations Convention on Contracts for the International Sale of Goods dated 11 April 1980 (CISG) does not apply.

#### **17. Severability clause/Written form**

17.1 In the event that the contract or these General Terms and Conditions of Business contain regulatory gaps, then such gaps shall be amended by agreeing lawfully effective regulations which the contract partners would have agreed according to the economic aims of the contract and the purpose of these General Conditions of Business had they known of the regulatory gap.

17.2 Additions and alterations of the agreements reached, including these General Conditions of Business, must be in writing to be effective. With the exception of executives and holders of commercial attorney, our employees are not entitled to reach verbal agreements deviating from this stipulation. Transmission via fax suffices to comply with the written form requirement; in otherwise, telecommunication transmission, especially via email, does not suffice.

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