

# **General Terms and Conditions of Business of x-tention Informationstechnologie GmbH**

**March 2009**

## **1. General information**

The **deliveries, services and offers** of x-tention Informationstechnologie GmbH ("**x-tention**") are subject to these General Terms and Conditions of Business ("**GT&Cs**"). These GT&Cs apply to all business transactions between x-tention and the customer, unless other arrangements were specified in the contracts between x-tention and the customer.

The general terms and conditions of the customer ("**Company**" or "**customer**") do not apply, unless their application was specifically agreed by x-tention. In the event that the validity of the general terms and conditions of the customer conflict with the GT&Cs of x-tention, the GT&Cs of x-tention shall take precedence. Actions by x-tention in fulfilment of a contract do not constitute the acceptance of the customer's general terms and conditions.

## **2. Remuneration**

All **prices**, unless otherwise specifically noted, are **exclusive of value added tax** and specified in euros.

The time and quantity details expressed in the separate contract are based on estimates made by x-tention. Settlement – in so far as no other agreement has been specifically made – shall be according to actual cost and/or usage.

**Travelling time** for x-tention staff shall be deemed to be working time and charged at the agreed hourly rate. Additional expenses, such as for example accommodation costs, shall be charged to the Company at actual cost.

All prices are valid ex-location of x-tention and without installation or erection.

Assembly, installation and erection work shall be charged at the agreed hourly rate on the basis of the time involved.

**Current remuneration for services and provision of services** is subject to an **annual indexation** on the basis of the 2005 Statistik Austria consumer price index. The reference figure for adjustments is the published index

value for the month in which the contract was concluded. x-tention is entitled to adjust these remunerations on the basis of the average index calculated by x-tention of the monthly published index values of the Statistik Austria for the preceding period Dec-Nov on 1 January of each year.

Should the labour costs alter due to a collective bargaining agreement (IT collective bargaining agreement) or internal agreements, or should other calculations of relevant cost centres or necessary costs incurred in order to provide the service, such as those for materials, energy, transport, subcontracted work, finance, etc., alter, x-tention shall be entitled to **increase** or **reduce** the prices accordingly. The increases shall be deemed to be accepted by the Company if they do not exceed 10% of the annual contract value.

All fees and taxes (in particular value added tax) resulting from the contractual relationship shall be charged on the basis of the applicable legislation.

Should x-tention become responsible for such charges and taxes, the Company shall in this context indemnify and hold harmless x-tention.

x-tention is entitled at any time to make the provision of services dependent on the payments or other securities provided by the Company at an appropriate level.

## **3. Terms of payment, default interest**

Unless otherwise contractually agreed, one-off services will be charged after service and repeat services charged quarterly in advance.

Invoices submitted by x-tention shall become payable within 8 calendar days from receipt without any deductions and exempt from any charges.

Payments by the Company shall only be considered to have been paid after the point in time that they are entered on the business account of x-tention. For part invoices, the payment terms agreed for the whole contract shall apply.

Where the Company is in default of payment, x-tention shall be entitled at its discretion as of the due date to demand the actually incurred damages or default interest according to § 352 UGB (Corporate Law).

In this event x-tention shall be further entitled to demand compound interest at the level of the default interest according to § 352 UGB.

If the Company defaults on payment for more than 28 days, x-tention shall be entitled to suspend all deliveries and services or to require prepayment or provision of securities by the Company. x-tention shall be furthermore entitled to require settlement for all services already provided with immediate effect, irrespective of any other payment deadlines.

**Offsetting** by the Company shall be permitted on the basis of a counterclaim recognised or undisputed by x-tention only.

The Company has no right of retention.

In the event of defaulting, the Company undertakes to reimburse x-tention for the reminder fees and collection expenses arising.

#### **4. Termination of contract**

Unless agreed otherwise, contracts may be concluded for indefinite periods of time subject to a 3-month notice period from either party in writing by the end of the calendar year.

Both parties shall be entitled to terminate the contract prematurely with immediate effect in the event of good cause. Such good cause shall exist for x-tention in particular if:

- Bankruptcy proceedings are opened over the assets of the Company or one of its shareholders or the opening of bankruptcy proceedings is rejected on the grounds of insufficient assets;
- The Company is more than 60 days in arrears with due payments despite reminders and/or grace periods;
- The Company makes it impossible to provide the service due to its persistent non-fulfilment of its obligation to co-operate:

- Circumstances exist which appear to make it impossible to comply with the timely or continued provision of the services demanded, inasmuch as they are represented by the Company;
- The Company repeatedly breaches the important duties entered into under this Contract;
- The Company acts in bad faith towards x-tention.

Good cause exists for the Company in particular if:

- Insolvency proceedings are opened over the assets of x-tention or the opening of insolvency proceedings is rejected on the grounds of insufficient assets;
- x-tention acts in bad faith toward the Company

If the contract is terminated with immediate effect by the Company, x-tention shall in any case be entitled to remuneration for the services contractually provided by it until that date. Possible claims for the recovery of damages and/or liquidated damages and/or compensation for parts of the services not yet carried out remain unaffected by this.

#### **5. Scope of services**

The scope of services by x-tention is defined in a separate contract with the Company (e.g. **SLA or Contract**). Unless agreed otherwise, x-tention shall provide the services during the **normal business hours of x-tention**.

The basis for the provision of the services by facilities and technology used by x-tention is the qualitative and quantitative service requirement of the Company ascertained on the basis of the information made available by the Company.

Should **new requirements** of the Company necessitate a change to the services or the technology, x-tention shall at the request of the Company make a corresponding proposal.

x-tention shall be entitled to **change at its own discretion the facilities** which it uses to provide the services if no detriment to the service provision is to be expected.

Services by x-tention, which are used by the Company **in excess of the agreed scope of the respective service**, shall be **remunerated according to the actual personnel and material costs at the current rates in use by x-tention**. This shall include, in particular, services outside the normal hours of business of x-tention, the analysis and rectification of faults and downtime which are the result of improper handling or operation by the Company or other circumstances for which x-tention cannot be held responsible.

x-tention shall be entitled to use the services of third parties (subcontractors). This shall not form any contractual agreement between the third party and the Company.

Where x-tention arranges **services of a third party** at the request of the Company, these contracts shall be exclusively in accordance with the terms and conditions of the third party.

Minor or other reasonable modifications made by the Company to our service provision and obligation to deliver shall be considered to be accepted.

#### **6. Obligation of the Company to co-operate**

The Company undertakes to **support all measures** which are necessary for x-tention to provide the services.

Inasmuch as the services are provided on-site at the Company, the Company shall provide the necessary network components, connections, power supply as well as the infrastructure of the necessary scope free of charge.

Before connection or transport of EDP technical products and/or before the installation of computer programs, the Company undertakes to **adequately back up the stored data which already exists on the computer system**.

The Company undertakes to comply with the respective assembly, installation and commissioning instructions. The Company also undertakes to take responsibility for room and building security, including protection against water, fire and access by

unauthorised persons. The Company shall not be entitled to give x-tention personnel instructions – of any nature whatsoever – and shall exclusively bring to the attention of the contact person appointed by x-tention all wishes concerning the provision of the services.

The Company shall make available at the agreed time and at its own cost **all information required to implement the contract**, data and documents as requested by x-tention and support x-tention on request in analysing problems and rectifying faults, coordinating process inputs and agreeing service provision.

Modifications or changes to the processes at the company, which might or could bring about changes to the provision of the services for the company by x-tention, require prior agreement with x-tention regarding their technical and commercial effects.

Unless otherwise specifically included in the scope of services, the Company shall at its own risk and its own expense ensure the provision of a necessary network connection.

The Company undertakes to treat the necessary passwords and log-ins required to use the services provided by x-tention as confidential.

The Company undertakes to store the data and information passed on to x-tention at its premises in order to rectify any damage or loss at any time in the event of its occurrence.

The Company shall in good time perform all co-operation obligations for which it is responsible so that x-tention is in no way hindered in providing its services.

The Company shall be responsible for ensuring that its personnel and third parties contracted to it cooperate appropriately in fulfilling the contract.

Should the Company not fulfil its obligation to co-operate by the deadlines agreed or not to the intended extent, the services rendered by x-tention shall still be considered to have been executed in accordance with the contract despite possible limitations.

Time schedules for the services to be rendered by x-tention shall be rescheduled in the appropriate measure. The Company shall remunerate x-tention separately for the additional expenses and/or costs at the valid rates applied by x-tention at the time.

The Company shall be liable for faults arising from its personnel or third parties which have been engaged not treating equipment or technologies provided by x-tention with due care and attention. In the event of damage, the Company undertakes to report this immediately in writing by e-mail or telephone via hotline to x-tention. The fault shall be rectified by x-tention or a third party contracted by it at the expense of the Company.

Unless agreed otherwise, the provision of materials and co-operation by the Company shall be free of charge.

### **7. Supply, place of performance**

The deliveries or service provision shall be carried out according to the terms and conditions and times agreed in the separate contract.

Unless agreed otherwise, the supply shall begin or the provision period commence with the acceptance of an offer from x-tention by the Company or in the event of an offer without commitment by x-tention with the order confirmation by x-tention. The place of provision shall be the domicile of x-tention, unless agreed otherwise.

The transfer of deliveries or service provision shall commence on acceptance by the Company at the place of performance. In the event of an agreed shipment of supplies on acceptance of the supplies by the carrier.

Should the Company not accept the goods as agreed (**default of acceptance**), x-tention shall be entitled after unsuccessfully granting a period of grace at the risk and cost of the Company to **store** the goods either at its domicile, for which the Company shall be invoiced 0.1% of the gross invoice value per calendar day commenced, or the goods shall be stored at the risk and cost of the Company at the premises of an authorised trader. At the same time, x-tention shall be entitled to demand that the contract be fulfilled or, after setting a reasonable period of grace of at least 2 weeks, to withdraw from the contract and to dispose of the goods at the cost of the Company.

### **8. Intangible property rights**

x-tention or its licensor shall be entitled exclusively to all copyrights on programs, methods, documentation, work results and other works (e.g. plans, drawings,

specification sheets, IT designs), also in the event that the Company has co-operated in their development.

The Company shall be granted the non-exclusive non-transferable not sub-licensable right to use the agreed services in the agreed scope for its own purposes limited to the period of the contract.

Every agreement on the permission to use work must be made in writing in order to use the software products in unaltered form.

For **Third-party software products** handed over to the Company by x-tention, the respective licence conditions of the respective producer of these software products shall take precedence over the provisions of these items. It is the responsibility of the Company to obtain knowledge of the scope and content of these licence conditions.

In the event that x-tention's copyrights are breached, x-tention shall be granted full satisfaction.

### **9. Service interruptions by ASP and operator services**

x-tention undertakes to **fulfil the contractual services**. Should x-tention not provide the services within the specified period or only deficiently, i.e. with **substantial deviations** from the agreed standards of quality, x-tention undertakes to rectify the faults immediately and to provide its services in a proper manner within a reasonable period and without fault. Should the provisions and co-operation of the Company or a breach of the obligations of the Company have a bearing on the deficiencies, any obligation on the part of x-tention to rectify the deficiencies shall be ruled out. In these events, despite possible limitations, the services provided by x-tention shall nevertheless be considered to have been carried out according to the contract. x-tention will at the request of the Company and at its cost undertake to rectify the deficiency.

The Company shall support x-tention in rectifying the deficiency and make all necessary information available. Deficiencies which occur are to be reported by the Company to x-tention immediately by hotline or e-mail. Late reporting will cause the Company to have to bear the costs for the additional expense and time in rectifying the deficiency.

### **10. Warranty**

Warranty claims by the Company shall in all cases be fulfilled **at the discretion of x-tention**, either by improvement or exchange within a reasonable period of time or by a reduction in price. Repudiation of contract (termination of contract by mutual agreement) may be requested by the Company only if the deficiency is not minor nor rectifiable by improvement or exchange and a reduction in price is not reasonable for the Company.

The period of warranty shall be six months from the acceptance of the delivery or approval of the service.

**Warranty claims by the Company which are intended to be settled by rectification of the deficiency by improvement or exchange can only be asserted if x-tention is in default in fulfilment of the warranty.**

It is incumbent on the Company to prove deficiency at the time of accepting the delivery or service.

The Company undertakes to inspect the delivery or service in accordance with § 377(1) UGB (Corporate Law) within a period of 7 calendar days of delivery.

Possible deficiencies are to be reported to x-tention without delay but no later than within 5 calendar days from detection and in writing with notification of the nature and extent of the deficiency. This shall also apply to deficiencies in accordance with § 377(2) UGB (Corporate Law).

The application of § 933b Allgemeines Bürgerliches Gesetzbuch (AGB – Civil Law Code) shall be ruled out.

### **11. Liability**

x-tention shall be liable for damages in accordance with the following points:

- Liability for slight negligence shall be excluded.
- Liability for gross negligence shall be limited to EUR 50,000.
- For malicious injury or a faulty product, liability shall be according to the product liability legislation under the legal regulations; recourse according to § 12 Product Liability Act is only admissible in the case of proof of at least gross negligence.
- Liability for loss of profits, consequential damages, loss of earnings, frustrated expenses, intangible damages, damages through claims of third parties and loss of data

shall – inasmuch as admissible by law – be ruled out.

The existence of fault must be proved by the damaged party.

### **12. Force majeure**

Inasmuch as and so long as the duties of x-tention cannot be fulfilled properly in due time as a result of force majeure (e.g. natural catastrophes, fire, strike, lock-out, breakdown of power supply, breakdown of transport, breakdown of the telecommunications network or data lines) as a result of amendments to legislation after conclusion of the contract, the results of which affect the provision of the services, or as a result of the non-availability of products, this shall not constitute a breach of contract.

### **13. Retention of title**

**All goods are supplied under retention of title** and remain in the ownership of x-tention until full and final settlement. In asserting ownership, a withdrawal from the contract only exists if is expressly declared. When goods are returned, x-tention shall be entitled to charge for the transport and manipulation costs incurred.

In the event of seizures by third parties of goods under retention of title – in particular by levies of execution – **the company undertakes to point out the retention of title by x-tention and to inform us immediately. The Company shall bear the full risk for goods subject to retention of title**, particularly for the danger of destruction, loss or deterioration.

### **14. Choice of law/jurisdiction**

Austrian Law shall apply with the exception of regulations on the choice of law as well as the provisions of the United Nations Convention for the International Sale of Goods (CISG). The exclusive place for the resolution of all disputes arising from this Contract shall be the court with jurisdiction over the subject matter at the domicile of x-tention.

### **15. Data protection**

x-tention will comply with the regulations of the Data Protection Law and Telecommunications Law when **dealing with personal data** and take the necessary technical and organisational measures for the data protection in the area of x-tention's responsibility. x-

tention undertakes to comply with the provisions of the Data Protection Act.

x-tention is not obliged to check the legitimacy of the data processing given in the contract by the Company in the sense of data protection regulations. The legitimacy of handing over personal data to x-tention as well as the processing of such data shall be assured by the Company.

x-tention shall take all reasonable steps to protect the stored data and information of the Company against unauthorised access by third parties.

x-tention shall, however, not be responsible if third parties nevertheless manage to obtain access to the data and information by illegal means.

By concluding this Contract, the Company agrees that the data from this business transaction can also be made available to subcontractors who are involved in the execution of this Contract.

#### **16. Confidentiality**

The Company and x-tention undertake treat as confidential and not to disclose to third parties all information or circumstances and relationships as disclosed by the other party's in connection with the execution of these contracts – inasmuch as they are not common knowledge – which are subject to the GT&Cs.

Subcontractors of x-tention shall not be considered third parties, inasmuch as they are under a duty of confidentiality in the sense of the content of this Item.

#### **17. Other**

The Company undertakes to inform us of **changes to its business address** for as long as the contractual transaction is not mutually completely fulfilled. Should the **notification be omitted, statements shall be considered to have been received if they are sent to the last notified address.**