

# Terms and Conditions, Markus Winand

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A-1160 Wien, Maderspergerstraße 1-3/9/11  
Tel: +43 1 944 40 47  
email: markus.winand@winand.at

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## **A General Terms and Conditions**

### **A.1 Abbreviations and Terms**

- A.1.1 The self-employed IT services provider Markus Winand shall hereinafter be referred to as the "Contractor".
- A.1.2 Natural or legal entities operating an IT system, developing software or otherwise involved in electronic data processing shall hereinafter be referred to as "Principals".
- A.1.3 A Principal enters into a contract in accordance with these Terms and Conditions with the Contractor
  - A.1.3.1 to call on support services relating to the operation of their IT system, the installation and/or development of software and items of a similar kind by telephone or email for consideration (short Instant-Coaching), or
  - A.1.3.2 to carry out a training for the principal (short Inhouse Training).
- A.1.4 "General Terms" refers to the General Terms and Conditions (Item A) of the Contractor in the applicable version.
- A.1.5 "Special Terms" refers to the applicable Special Terms and Conditions (Item B and Item B.3.2.1) of the Contractor in the applicable version.

### **A.2 Integral Parts of the Contract**

- A.2.1 Unless otherwise specified, the content of the contract shall consist of the following integral parts:
  - A.2.1.1 conditions which were individually agreed on between Contractor and Principal,
  - A.2.1.2 the service description,
  - A.2.1.3 the respective applicable Special Terms,
  - A.2.1.4 the General Terms provided to the Principal by the Contractor.
- A.2.2 The integral parts of the contract complement each other. In the case of any contradictions the provisions first mentioned in the list (Item A.2.1) shall prevail.

### **A.3 Conclusion of the Contract and Applicability of these General Terms and Conditions**

- A.3.1 The contract (Item A.1.3) shall either be concluded by the Principal accepting an offer made by the Contractor or by the Contractor accepting an order made by the Principal. The Principal shall be bound by their offer for fourteen days upon receipt by the Contractor.
- A.3.2 According to Item A.2.2 the General Terms and the applicable Special Terms shall always apply when the contractor enters into a contract. The Principal may view them online at <http://winand.at/gtc/> and print a copy for his own files by downloading them. The General Terms and Special Terms shall be sent to him on request.

### **A.4 Default**

- A.4.1 In the case of a delayed payment the Principal shall pay interest for said delay. The interest rate is eight percentage points above the base interest rate (§ 352 UGB), but at least 12 % p.a.
- A.4.2 The Principal shall compensate the Contractor for all interest payments and damages, costs and cash expenses caused by him, as well as the expenditure for all related extrajudicial debt collection measures. The amount of this expenditure is calculated on the basis of the provisions on the maximum fees enforceable by debt collection institutes introduced by the acting minister for economic matters (BGBl. 1996/314 idgF). The aforementioned expenditure shall also be owed to the Contractor if he handles the debt collection himself. The Principal shall pay a minimum processing fee of EUR 10.00 exclusive of VAT.

## **A.5 Offsetting Prohibition and Legal Succession**

- A.5.1 The Principal shall only be entitled to offset any claims of the Contractor by way of a counterclaim which was either declared by a court or explicitly acknowledged by the Contractor in written form.
- A.5.2 The inclusion of any third parties in the rights and obligations of the Principal shall only be permissible subject to the Contractor's explicit written consent.

## **A.6 Business Confidentiality and Marketing**

- A.6.1 The Contractor and the Principal shall keep confidential beyond the duration of the contract all information and files pertaining to the other party and marked as "confidential" or which are otherwise unmistakably identifiable as operational or business secrets and shall neither record nor make use of such information nor disclose it to any third parties, unless said information is required for the fulfillment of the purpose of the contract. These obligations also apply for any employees and agents of the parties.
- A.6.2 Confidential information (Item A.6.1) refers to all information one party supplies to the other party in any way (in writing, orally or in the form of plans, documentation etc.), particularly technical data, customer details, purchasing conditions and agreements, suppliers and sales partners, business expertise, product ideas, data relating to research, development, manufacturing, technology, financial matters, cost structures and all data covered by the provisions for the secrecy of communication.
- A.6.3 The following information is not required to be kept confidential:
  - A.6.3.1 information lawfully supplied by a third party or verifiably accessible by the public in another way other than through a violation of the obligation of secrecy;
  - A.6.3.2 information independently generated by employees of one the parties;
  - A.6.3.3 information already known to the party acquiring the information at the time the other party supplied said information;
  - A.6.3.4 information explicitly excluded from the obligation of secrecy by the party supplying the information by way of a written consent for disclosing said information to third parties;
  - A.6.3.5 information that is required to be disclosed due to legal requirements, authorities or courts.
- A.6.4 The Contractor is entitled to name the Principal as reference customer and quote the services rendered for them in this context, as well as to disclose rendering services supplied to the Principal for marketing purposes and to make such information publicly accessible for public relations purposes.

## **A.7 Term and Termination of the Contract**

- A.7.1 The contract may be terminated for cause in writing at any time effective immediately. An immediate termination for cause is particularly justifiable
  - A.7.1.1 in the event of a default in payment on the part of the Principal after a reminder letter was sent to them and a grace period of 14 days was granted;
  - A.7.1.2 if the Principal supplied incorrect information on their business or financial situation or did not disclose relevant information which might have caused the Contractor not enter into the contract in the first place;
  - A.7.1.3 if the financial situation of the Principal or any third party vouching for them deteriorates notably, e.g. in the case of any standstill agreements, extrajudicial settlements or payment suspension declarations, if the list of assets is brought before a court, if insolvency proceedings are initiated or if such proceedings are not initiated due to insufficient assets to cover costs;
  - A.7.1.4 if the Principal passes away or becomes incapacitated or in the case of a liquidation if the Principal is a legal entity;
  - A.7.1.5 if the Principal is in violation of any integral contractual obligations and the violation or its consequences are not remedied within 14 days from the date of the reminder letter.

## **A.8 Miscellaneous Provisions**

- A.8.1 Any provisions deviating from these General Terms and Conditions and changes or amendments to contracts shall only be valid in the written form. There are no additional verbal agreements. Declarations with legal relevance for the contract shall only be valid when made in the written form or by email.
- A.8.2 Should any of the provisions of the contract be or become invalid, the validity of the other provisions shall remain unaffected thereby, unless the enforceability of the contract would then constitute an unreasonable hardship due to the fact that part of the contract became invalid. The invalid provision shall be replaced by a replacement provision which resembles the purpose of the invalid provision as accurately as possible.
- A.8.3 All disputes arising from or in connection with the contracts, even if said disputes concern the validity of the contract itself, shall be governed by Austrian law with the exception of its reference provisions.
- A.8.4 Vienna shall be the place of performance as well as the sole place of jurisdiction.

## **B Special Terms „Inhouse Training“**

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### **B.1 Object of the Contract**

- B.1.1 The object of the agreement (Item A.1.3) is the carrying out of training for the Principal by the Contractor on a paid basis.
- B.1.2 The Principal specifies the training participants and provides a suitable space for the training, covering any related fees.
- B.1.3 The Contractor makes the training material available that has been specified in the offer.

### **B.2 Compensation**

- B.2.1 The services included in the costs are listed in the offer. The specified fee is valid for the set maximum number of participants. The absence of one or more participants does not constitute a grounds for granting a fee reduction of any kind.

### **B.3 Cancellation and Postponement**

- B.3.1 By the Principal:
  - B.3.1.1 The cancellation of the agreement as well as any rescheduling must be communicated in writing.
  - B.3.1.2 Any costs that the Contractor incurs in relation to cancellation or postponement (for example cancellation fees related to travel) are to be paid by the Principal.
- B.3.2 By the Contractor:
  - B.3.2.1 In the event that a training has to be cancelled due to illness or other unforeseen circumstances, no claims can be made in regard to an obligation to carry out the training. There is no entitlement for any kind of compensation to be paid by the Contractor for any related expenses. The same is to be considered valid should it become necessary for a training to be postponed on short notice. Should a training be cancelled, a refund of any payments already made for the training will be made to the account from which the payment originated. Any other claims are precluded.

## **C Special Terms „Instant-Coaching“**

### **C.1 Abbreviations and Terms**

- C.1.1 "Hardware" refers to the physical components of a computer system, i.e. all device components of such a system. "Software" refers to all immaterial elements, i.e. programs designed to operate a computer and programs only executable by means of a computer.
- C.1.2 "Errors" or "malfunctions" refer to hardware and software errors that can cause the failure of specific computer functions, computer components or of the entire system. Hardware errors arise when components of the computer are faulty or when adverse external conditions cause component or system failure. "Software errors" are errors within programs which cause the faulty execution or non-execution of specific program steps. Their occurrence causes the program not to function as per specifications, to produce faulty results, to interrupt erratically or to behave in an otherwise non-functional way which prevents or impairs use of the program.
- C.1.3 "PayPal" refers to the online payment solution of PayPal Inc., San Jose, California ([www.paypal.com](http://www.paypal.com)).
- C.1.4 "Authorization and Capture" refers to an online payment whereby the Principal authorizes payments up to a specified total amount through PayPal that allows the Contractor to execute payments up to the authorized amount through PayPal at a later time.
- C.1.5 "Authorization Amount" refers to the maximum total amount the Principal authorized with the „Authorization and Capture“ method.

### **C.2 Object of the Contract**

- C.2.1 The object of the agreement (Item A.1.3) provides that the Contractor shall furnish the Principal with the requested support services related to the operation of their IT system, the installation and/or development of software and items of a similar kind for consideration. In this context the Contractor shall provide a Helpdesk which the Principal may call or write an email to in order to receive technical information, assistance or support for malfunctions which are fixable by the Principal.
- C.2.2 The support shall only be provided at the Principal's request.
- C.2.3 The support shall be provided by telephone or email or alternatively via desktop sharing, e.g. by means of a TeamViewer session, hereinafter referred to as remote maintenance. The Contractor shall decide entirely at his own discretion whether the requested help is provided by telephone, email or remote maintenance.
- C.2.4 The support shall involve expert assistance in the form of information, instructions to be followed by the Principal themselves or via remote maintenance. Its goal is to contribute to maintaining and establishing operability respectively. This does not entail any guarantee as to whether the Principal's desired results can be achieved through said support services.
- C.2.5 The Contractor shall provide the support within the scope of his own technical and operational capabilities, i.e. this does not include a guarantee, that service will be available on working days within service hours (Monday to Friday, 9am to 5pm CET). The Contractor shall only accept support requests for further processing when they are made by an authorized person (Item C.4) and when they include the following details:
  - C.2.5.1 for troubleshooting support: configuration of the location affected by the error and error description, as well as a simple error diagnostic of the error's probable cause;
  - C.2.5.2 for all other support requests: disclosure of all circumstances relevant for the support services;
  - C.2.5.3 name and phone number of the responsible contact person at the respective location.
- C.2.6 The support services shall not be rendered, should it become apparent that the desired results cannot be achieved by means of the requested support or only by incurring unreasonable expense. The Contractor is moreover entitled to refuse acceptance and processing support requests without stating any reason. This could e.g. be the case if the request is outside the areas of expertise or support offered or if similar circumstances apply.
- C.2.7 The support shall not include
  - C.2.7.1 provisions designed to remedy hardware malfunctions or other malfunctions the Contractor cannot address for any given reason;
  - C.2.7.2 services on location at the Principal's premises or support outside the hours detailed in Item C.2.5;
  - C.2.7.3 developing or supplying software;
  - C.2.7.4 preparing documentation or any advisory function related to hardware and/or software.
- C.2.8 The Contractor shall provide any of the services detailed in Item C.2.7 against separate compensation at the Principal's request. All personnel, travel, lodging and material costs incurred in connection with any such additional services shall be paid independent of the agreed-on support fees in accordance with the Contractor's current applicable price list.

### **C.3 Conclusion of the Contract and Applicability of these General Terms and Conditions**

- C.3.1 The General Terms and Special Terms for Instant-Coaching shall apply for the duration of the entire business relationship between Principal and Contractor, i.e. they shall also be applicable for subsequent orders, even though they may not be related to the original contract.

### **C.4 Term and Termination of the Contract**

- C.4.1 The contract is of unlimited duration unless otherwise explicitly specified and may be terminated by any of the parties in writing and with a notice period of one month at the end of each calendar month.

## **C.5 User Data**

- C.5.1 User data shall refer to all data identifying the Principal and required for using the Helpdesk. In the absence of any other provisions this data shall consist of mail addresses derived from the domain of the Principal or any other domain detailed in the contract.
- C.5.2 The Principal shall ensure that there is no misuse of the user data and that only authorized persons take advantage of the Contractor's services. Said persons commit themselves to keeping the user data confidential and not to disclose them to third parties or otherwise make said data available and to inform the Contractor on any suspected misuse by telephone without delay.
- C.5.3 The Principal shall in general provide the organizational and technical means required to prevent an unauthorized use of the services rendered by the Contractor. Should any third parties take advantage of the service, the Principal shall pay for the services thus rendered, whereas the otherwise agreed-on prices shall be applicable, provided that he agreed to the rendering of said services or knew of their rendering or caused them to be rendered due to slight negligence on his part.

## **C.6 Compensation, Terms of Payment, Guaranteed Value, Default**

- C.6.1 The Principal shall compensate the Contractor for the support services rendered. The amount of the compensation is calculated on a non-performance basis and by the hour. Payment is done
  - C.6.1.1 through the Authorization and Capture procedure via PayPal or
  - C.6.1.2 in case of a special agreement monthly in arrears via wire transfer.
- C.6.2 The Contractor shall receive a fee for each half-hour or part of a half-hour. The hourly rate is exclusive of VAT and any other taxes and fees that might arise, which shall be paid by the Principal.
- C.6.3 Should any party to the contract limit the volume of support services by imposing a time limit valid for the respective calendar month or by imposing a consequent maximum fee limit or by setting the Authorization Amount, the Contractor shall inform the Principal of this event as soon as said limit is reached, in order that the Principal may forego having services rendered beyond this limit. The Contractor shall equally have no more obligations as soon as said time limit is reached, unless the Principal explicitly agrees to compensate the Contractor for any exceeding of the limit at the agreed-on hourly rate.
- C.6.4 The invoice amount shall be calculated on the basis of the Contractor's time recordings. The invoice amount is collected by the Contractor via Authorization and Capture immediately after rendering the service (Item C.6.1.1) or paid by the Principal via wire transfer for each calendar month in arrears if agreed (Item C.6.1.2). In the latter case the fee for the services rendered during the completed month shall be payable within 14 days from the invoice date.
- C.6.5 If the Principal suspects that the invoice amount payable by them is incorrect, they shall submit their objections in written form within 4 weeks from the invoice date, otherwise the invoiced amount shall be deemed as acknowledged. If there are only objections regarding certain items of the invoice, the undisputed items of the invoice shall be paid at due date.
- C.6.6 In order to guarantee the value of the hourly rate, said rate shall be linked with the development of the index to which the Austrian Statistical Office (Statistik Austria) attributed a value of 100 in the year of 2015. The index as of the calendar month of the signing of the contract shall constitute a benchmark. If the index is no longer valid, it shall be replaced by a similar replacement index. If the replacement index is no longer valid, the increase in living costs shall be calculated in an adequate manner (by an expert) and the recalculation of the hourly rate shall be based on said calculation.
- C.6.7 If adjustments to the index are not enforced for a longer period, this shall not constitute a waiver of the guaranteed value. A waiver is required to be submitted in written form.
- C.6.8 In the case of a delayed payment the Principal shall pay interest for said delay. The interest rate is eight percentage points above the base interest rate (§ 352 UGB), but at least 12 % p.a.
- C.6.9 The Principal shall compensate the Contractor for all interest payments and damages, costs and cash expenses caused by him, as well as the expenditure for all related extrajudicial debt collection measures. The amount of this expenditure is calculated on the basis of the provisions on the maximum fees enforceable by debt collection institutes introduced by the acting minister for economic matters (BGBl. 1996/314 idgF). The aforementioned expenditure shall also be owed to the Contractor if he handles the debt collection himself. The Principal shall pay a minimum processing fee of EUR 10.00 exclusive of VAT.

## **C.7 Changes of the General Terms and Conditions and Fee Arrangements**

- C.7.1 According to § 25 of the Austrian Law on Telecommunications (TKG) from 2003, the Contractor is entitled to change the General Terms and Conditions and the fee arrangements, which shall also be applicable to existing contracts.
- C.7.2 The Contractor shall inform the Principal on the essential contents of such changes not exclusively to their benefit in an adequate manner, e.g. by printing the changes on an invoice billed periodically and at the latest one month before the change comes into effect. The Principal shall at the same time be informed on when the change will come into effect as well as on the fact that they are entitled to terminate the contract free of charge prior to said date.

## **C.8 Participation and Liability**

- C.8.1 Neither the Principal's IT system nor the software running on said system or designed for such purposes are supplied by the Contractor. Neither is the Contractor involved in any projects arising from support requests. The Principal shall provide under the aforementioned circumstances that the Contractor is supplied with all data relevant for the requested support services and they shall inform the Contractor about all circumstances relevant for said support. This also applies to all circumstances that become known while the support services are rendered.
- C.8.2 It will often only become apparent if the support can deliver the result desired by the Principal while the services are rendered. The Contractor can therefore offer no guarantees on whether the support will deliver a specific result. He can only be made liable if intent or gross negligence can be proven. Claims for damages made against him come under the statute of limitations within one month after the Principal was made aware of the damage.
- C.8.3 The Contractor cannot be made liable for indirect damages, consequential damages, missed savings, immaterial damages, damages arising from third party claims as well as loss of data and programs as well as their recovery.