

**General sale, delivery, service and payment terms and conditions (referred to as “AGB”) of BMK Group GmbH & Co. KG, BMK professional electronics GmbH, BMK electronic solutions GmbH & Co. KG, BMK electronic services GmbH (referred to as “BMK”)**

**As of: 03/2020**

## **1. Application**

**1.1** All business transactions which relate to the purchase and delivery of goods, the repair or service of devices or software or other services of BMK with our customers shall be based on these AGB.

**1.2** Contractual conditions of the customer which are contrary, are supplementary or differ from this AGB shall be not accepted. This shall also apply if BMK carries out the business transaction without reservation in the knowledge of opposing or deviating business terms of the customer.

**1.3** Regulations which differ from these AGB shall apply only in exceptional cases when explicitly confirmed in writing by BMK.

**1.4** Within the scope of an ongoing business relationship, these AGB shall also be valid after the first effective inclusion even if we do not explicitly refer to them in subsequent transactions.

## **2. Offers and Conclusion of Contract**

**2.1** Offers of BMK shall principally be subject to confirmation, unless otherwise

specified in the respective offer. BMK shall reserve the right to correct possible calculation or printing errors.

**2.2** With the order, the customer gives a binding declaration that the respective order will be placed. Contracts with BMK shall only become legally binding after a written declaration of acceptance by BMK and/or when BMK starts to process the order. The same shall apply for order changes and additions to the order.

**2.3** Subsequent changes to the object of the contract as well as any ambiguities concerning the performances of BMK (for example ambiguities in the functional specifications document, etc.) shall mean financial expense for the customer. If incremental costs result from such changes or ambiguities, these shall be indicated by BMK and be paid separately by the customer, unless expressly agreed otherwise. If no agreement on changes or ambiguities is reached, BMK shall be entitled to cancel the order. In this event, the customer shall pay for the services/deliveries already supplied by BMK in full. Grounds allowing for a compensation claim to made against BMK shall be excluded in this case.

**2.4** If BMK render development services, only the content of the order, order confirmation, the product description and the requirements specification and functional specifications document (documentation) shall be binding. For the quality of the development service rendered by BMK, the respective product description in

the documentation shall be binding. BMK shall not owe any quality going beyond this. Guaranties shall explicitly not be made on the strength of the product description. A guaranty shall be subject to an explicit confirmation in writing by BMK.

### **3. Order documents and plans**

**3.1** BMK shall reserve the rights relating to its offer documentation as well as to the documents submitted within the scope of the contractual relationship.

**3.2** The customer shall acknowledge the rights of BMK and shall not copy the documents either in full or in part, shall not make them available to any third party or shall not use them for any other purpose other than for that for which they were forwarded without the prior written permission of BMK.

### **4. Delivery and passing of risk**

**4.1** Periods and dates (such as delivery periods and delivery dates) stated by BMK shall not be binding, unless they have been confirmed in writing and explicitly indicated as being the fixed date. Partial deliveries and/or partial services of BMK shall be permissible. Excess or short deliveries up to 5% of the order quantity shall also be permissible. The agreed prices shall be adjusted accordingly. If the service provided by BMK to the customer is dependent on the delivery of BMK by third parties, BMK shall be entitled to withdraw from the contract in the event of a

non-delivery for which it is not responsible and/or if a delivery by its suppliers is not correct or does not arrive on time.

**4.2** Delivery and shipping of objects shall be made on the account and at the risk of the customer. The risks shall be passed on to the customer, as soon as the goods leave the warehouse of BMK.

**4.3** BMK is not liable for the impossibility of delivery or for delivery delays, insofar as these are caused by force majeure or other events that were not foreseeable at the time of the conclusion of the contract (e.g. operational disturbances of all kinds, difficulties in the procurement of materials or energy, epidemics, pandemics, transport delays, strikes, legal lockouts, lack of workers, energy or raw materials, difficulties in the procurement of necessary official permits, official measures or the missing, incorrect or untimely delivery by suppliers), for which BMK is not responsible. The delivery or service periods are extended or postponed by the period of the hindrance plus an appropriate start-up period.

### **5. Payment, prices, due date and payment conditions**

**5.1** All prices shall be principally calculated ex the BMK warehouse plus the legal value added tax applicable at the point in time of the delivery. Any costs for packaging, insurance, cargo as well as other additional costs shall be borne by the customer. Price quotations given by BMK

shall be open, provided that these have not been explicitly confirmed as fixed prices by BMK.

**5.2** Invoices shall be due immediately and are to be paid within 14 days of receipt by the customer. If an acceptance is necessary, this shall be carried out by the customer immediately. If no explicit acceptance is carried out by the customer within 10 days after the delivery, the acceptance shall be irrevocably deemed to have been carried out. If the customer is in default of its payments to BMK or to an affiliated company of BMK or BMK has reasonable doubts regarding the willingness to pay or the ability to pay on the part of the customer, all outstanding invoices shall become due immediately. BMK shall be entitled to demand cash in advance for further services and/or shall perform deliveries on a cash-on-delivery basis.

**5.3** If BMK experiences an increase in staff or material costs after the first year, BMK shall be entitled to adjust its prices to the maximum 5 % above the price level of the previous year. The changes in prices shall be made known to the customer at least one month before the new prices will come into effect. The customer shall be entitled to terminate the contract with the effect from the time at which the new prices should become effective for him for the first time. If the customer does not terminate the contract within a month upon receipt of the price announcement, the con-

tractual relationship will be continued on the basis of the new prices.

**5.4** The customer shall pay in euro cashless by bank transfer to the bank account indicated by BMK without deduction of discounts, expenses, taxes and charges of any kind. Bank charges in particular shall be borne by the customer. The customer shall be entitled to pay by cheque. However, cheques shall be accepted by BMK only on account of performances.

**5.5** If the customer is not obliged to pay in advance according to the above-mentioned conditions, BMK shall have the right to demand from the customer an advance payment of an amount of its own discretion of up to 50 % of the order value, provided that the order value exceeds net EUR25,000. In this respect, the customer shall be obliged to pay in advance. The instalment payment shall be due within 14 days upon receipt of the respective invoice issued by BMK.

## **6. Prohibition of set-off and assignment; subcontractors**

**6.1** The customer shall be only entitled to set-off to the extent that undisputed or legally binding claims of the customer exist.

**6.2** The assignment of rights on the part of the customer arising from the contractual relationships with BMK shall only become effective with the prior consent of BMK. This does not apply when sec-

tion 354 a of the German Commercial Code (*HGB*) is applicable.

**6.3** BMK shall be entitled to fulfil its contractual obligations to use third parties (subcontractors).

## **7. Retention of title**

**7.1** The delivered goods (reserved goods) shall remain property of BMK until any and all of BMK's current and future claims against the customer are satisfied, including any current account balance claims. Should the customer be in violation of the agreement - particularly in case of payment delays - BMK shall reserve the right to reclaim the reserved goods after having given due notice. The customer shall bear the costs of transportation for the reclaimed goods. Provided BMK reclaims the reserved goods, this shall constitute BMK's withdrawal from the agreement. Should BMK seize the reserved goods, this shall also constitute a withdrawal from the agreement. BMK shall reserve the right to realize any reclaimed reserved goods. The proceeds from the realization shall be offset with the amounts owed by the customer after having deducted an appropriate amount for the realization costs.

**7.2** The customer shall handle the reserved goods with care. The customer shall insure them sufficiently at the original value for its own account against damage from fire, water and theft. Should any maintenance and inspection work be nec-

essary, the customer shall perform such work in due time.

**7.3** The customer may utilize the reserved goods and resell them in the proper course of business, provided the customer is not in arrears with payment. The customer may, however, not pledge the reserved goods or assign them by way of security. As a precaution, the customer shall assign to BMK in full any payment claims of the customer against its buyers acquiring the goods in the course of a resale, which may arise for any given legal reason against their buyers or any third parties (particularly claims from unlawful acts and claims from insurance benefits), including any current account balance claims. BMK hereby accepts this assignment.

The customer may collect the claims assigned to BMK for BMK on its own account and in its own name, provided BMK does not recall this authorization. BMK's right to collect these claims by itself shall remain unaffected by this; BMK shall, however, not assert these claims by itself and not recall the direct debit authorization as long as the customer duly meets its payment obligations.

Should the customer, however, be in breach of the agreement – particularly in case of payment delays – BMK may prompt the customer to disclose the assigned claims as well as the relevant debtors, disclose the assignment to the relevant debtors and hand over any doc-

umentation as well as supply any information BMK may require to assert its claims.

**7.4** Any processing or modification of the reserved goods by the customer shall always be performed for BMK. Should the reserved goods be processed using other items not in BMK's possession, BMK shall acquire co-ownership of the new item at the ratio of the value of the reserved goods (final invoice amount including VAT) to the other items processed at the time of processing. Furthermore, the provisions applying to the reserved goods shall apply to the new item produced by the processing.

Should the reserved goods be inextricably linked to or mixed with the other items that do not belong to BMK, BMK shall acquire co-ownership of the new item at the ratio of the value of the reserved goods (final invoice amount including VAT) to the other items processed at the time of linking or mixing. Should the reserved goods be linked or mixed in such a way that the customer's item is regarded as the main item, the customer and BMK now agree that the customer shall transfer pro rata co-ownership of the item in question. BMK hereby accepts this transfer.

The customer shall preserve the ensuing sole ownership or co-ownership of an item on BMK's behalf.

**7.5** Should any third parties seize the reserved goods or intervene in any other way, the customer shall indicate BMK's

ownership and shall notify BMK immediately in writing so that BMK can enforce its property rights. Should the third party be unwilling to reimburse the legal or extrajudicial expenses arising in this connection to BMK, the customer shall be held liable in this case.

**7.6** Should the customer make such a request, BMK shall be obliged to release the securities BMK is entitled to insofar as their realizable value exceeds the value of BMK's outstanding claims against the customer by 10%. BMK shall, however, be entitled to choose the securities to be released.

## **8. Liability for defects (Mängelhaftung)**

**8.1** If the preparation of a service is agreed between BMK and the customer, thus the legislation concerning works and services is applicable the following shall apply:

BMK shall warrant that the goods delivered are free of manufacturing defects during normal use and the use according to the contract. However, if a defect which is justified occurs, BMK shall be entitled to itself decide whether to carry out a rework of the faulty object or provide a replacement delivery. If the supplementary performance finally fails, the customer can withdraw from the contract or reduce the payment pursuant to section 634 no. 3 of the German Civil Code (BGB) and demand compensation pursuant to section 634 no.

4 of the *BGB*. Claims on the part of the customer for reimbursement of incurred expenses shall be excluded pursuant to section 634 no. 2 of the *BGB* (self-remedy). Number 9 applies with respect to compensation claims.

**8.2** The customer shall inform BMK in writing about obvious defects immediately, at the latest, however, within 5 business days upon receipt of the delivery. Other defects that cannot be detected within this period despite careful examination shall be made known to BMK immediately upon their detection in writing. In the case of a mutual commercial transaction, section 377, 378 of the *HGB* shall apply.

**8.3** If Service Agreement Law is applicable for the services supplied by BMK, the following shall apply:

If the services supplied by BMK are deficient, BMK shall first be entitled and obligated to carry out a rework. If a rework finally fails, the customer shall be entitled to compensation in accordance with number 9.

**8.4** Damage occurring as a consequence of usual wear and tear, deficient maintenance (provided that BMK has not taken over responsibility for the maintenance according to the contract), violations of regulations, excessive use, deficient construction and assembly work of third parties, incorrect operation and other causes for which BMK is not responsible shall be excluded from the warranty.

**8.5** The warranty shall expire if the customer or third parties changes or repairs the services of BMK without the prior written consent of BMK, unless the customer can prove that the defect has not resulted from this.

**8.6** Claims on the part of the customer relating to material defects and defects of title shall expire at the end of the 12 month period following the acceptance of the service/work and/or after the knowledge of defects when services are rendered, provided that the customer is an entrepreneur. Otherwise, this warranty shall expire within 24 months.

## **9. Liability**

**9.1** BMK's liability shall be unlimited in the case of intent and gross negligence as well as for injury to life, body and health.

**9.2** In the event of a slightly negligent violation of essential contractual obligations, BMK's liability shall be limited to foreseeable damage and damage typical for the contract.

**9.3.** Moreover, any other liability on the part BMK shall be excluded. In particular, BMK shall be not obliged to check whether a product or software developed as a result of a customer order violates patent rights or copyrights of third parties, or if it is free from rights of third parties, unless otherwise agreed in a particular individual case. In this context, comprehensive research can be optionally agreed with BMK at an extra cost.

**9.4** The unlimited liability according to the Product Liability Act shall remain unaffected.

**9.5** The personal liability of legal representatives and agents shall be limited similar to the own liability of BMK according to the above provisions.

**9.6** If BMK produces medical products for the customer within the scope of a manufacturing order, BMK shall be neither producer nor distributor of the finished product, unless the contracting parties shall explicitly agree something otherwise in writing. Accordingly, no further obligations on the part of BMK concerning the production of the product to be produced and to be delivered shall also exist, in particular not pursuant to the Medical Product Act, as long as this does not stipulate mandatory prerequisites for liability or obligations on the part of BMK. If the customer intends to transfer duties for which he is responsible according to the Medical Product Act to BMK, a written, detailed and clearly formulated prior mutual statement and/or demarcation of mutual responsibilities shall definitely be required. The customer's system end test as the distributor of the product shall be construed in accordance with the requirements of the purpose of use and shall be able to safely identify potential non-conformities. The respective responsibility shall lie solely with the customer as the distributor of the product. A liability on the part of BMK shall be excluded.

## **10. Insurance exclusive clause**

It is expressively pointed out that BMK products are not suitable and intended for the use in the following areas:

- a. Aircraft and spacecraft
- b. Off-shore plants
- c. Nuclear facilities
- d. Medical technology, in the case of life-preserving activities.

To this extent the liability on the part of BMK with respect to the customer is completely excluded, unless a corresponding use is agreed explicitly and in writing, as well as the BMK's liability with respect to any third parties and any insurance coverage for the use of the products shall be clarified between the contracting parties.

## **11. Business secrets**

BMK shall ensure that all of the customer's business secrets as well as any information designated as confidential by the principal shall be treated with the strictest confidentiality. In return, the customer gives its commitment to treat all information about the methods and procedures of BMK as business secrets requiring absolute confidentiality.

## **12. Scope of service for the maintenance and/or repair of hardware**

**12.1** The following regulations shall apply in addition to general regulations if a contract relating to the maintenance

and/or repair of hardware is concluded between BMK and the customer.

**12.2** Depending on the individual contractual agreement, BMK shall render the preventive services (preventive maintenance) to preserve the operational readiness of the hardware to be maintained and/or repairs or supplements (corrective maintenance) to eliminate occurring faults, referred to as maintenance services.

**12.3** In order to carry out maintenance services, BMK can exchange defect parts and/or defect systems and can build in technical changes. The consumables, wear or spare parts used shall be either new or equal in their usability to new parts. The costs for such parts shall be paid separately by the customer, unless expressly agreed otherwise. Technical changes shall be discussed with the customer in advance. Data stored on parts or systems being changed or taken back shall be deleted by BMK immediately. If this is not possible, BMK shall make these parts completely unusable. The costs associated with the disposal of spare parts changed shall be paid separately by the customer, unless expressly agreed otherwise.

**12.4** This maintenance services do not include services in connection with the exchange of consumables and wear parts. If these services are rendered by BMK on the customer's demand, these shall be invoiced separately to the customer and

according to the currently applicable prices of BMK.

**12.5** These repairs do not include failures of the hardware that have been caused by an incorrect use of the hardware (e. g. non-observance of the concerned user manual), changes to the hardware by the customer or by third parties commissioned by the customer or by other circumstances for which the customer is responsible.

**12.6** The execution of the maintenance shall be subject to the provision that BMK obtains its deliveries from its own supplier in due time and according to the contract.

**12.7** BMK shall be entitled to render services by subcontracting (subcontractor). BMK shall be liable for the services rendered by subcontractors as if they were rendered by BMK itself.

**12.8** The maintenance work shall be carried out by BMK during normal business hours.

**12.9** The place of performance for the maintenance of the hardware of the customer shall be the agreed business premises of the customer and the point of installation indicated there.

**12.10** The realisation of the hardware at a different place as the agreed place of performance shall be made known by the customer to BMK in writing at least two months in advance. In this case, BMK shall continue the maintenance if no increased expenditures will be connected with this. If the realisation impacts the ex-

penditures which accrue with the rendering of the service, BMK shall be entitled to demand the payment of a consideration corresponding and appropriate to the changed conditions.

**12.11** In general, only the hardware that has been explicitly included in the maintenance contract shall be an object of the maintenance contract. The procurement of spare parts shall not be part of the maintenance contract, unless the procurement of spare parts has been carried out by BMK.

### **13. Scope of service for the preparation and/or maintenance of software**

**13.1** The nature and extent of mutual services for the preparation and maintenance of software shall be regulated by the following contractual agreements:

- a. Service description
- b. These general terms and conditions (AGB)
- c. Generally applied regulations und professional standards

In case of disagreements the contractual agreements shall apply in the above order.

**13.2** If BMK prepares software for the customer, BMK shall take over the elimination of defects in the programs and the program documentation. The programs shall render the services determined in the service description when they are used correctly as laid out in the agreement. If BMK is not the licensor of the existing software at the customer, prior to the con-

tract beginning, the customer and BMK will determine the status of the software by way of a status report which will be the basis for the later identification of errors.

**13.3** If it has been agreed in the contract, BMK will hand over to the customer certain new statuses of the software in order to keep them up-to-date and in order to prevent failures. BMK will hand over to the customer the updates of the software with technical modifications and improvements as well as smaller functional extensions and improvements. Furthermore, BMK will hand over to the customer patches with corrections for the software and other measures to help circumvent possible failures.

**13.4** The scope of service shall not include the surrender of upgrades with key functional extensions and necessary changes due to legal provisions which can be only realised through a partial or complete reprogramming of the concerned software to be maintained. In this case, BMK can demand an appropriate additional consideration after prior notification in writing. If the customer does not give its written permission in this context, BMK can terminate the contract on important grounds or exclude the concerned software from the contract.

**13.5** If, within the scope of services rendered by BMK, open-source software is rendered for the customer, BMK shall be not deemed as the licensor for this software being used. In this case, the con-

tracting partner shall comply with the respective licence conditions of third parties if such conditions exist.

**13.6** BMK shall only award the licence to use the software prepared to such a degree as this is necessary in order to use the software in the contractually agreed manner.

**13.7** BMK shall be entitled to render services by subcontracting (subcontractor). BMK shall be liable for services rendered by subcontractors as if they had been rendered by BMK itself.

**13.8** BMK or subcontractors commissioned by BMK shall render services as agreed in the service description in countries of the European Union, unless regulated otherwise. BMK or subcontractors commissioned by BMK can also move the place of performance to other countries outside of the European Union at its/their own discretion if no significant disadvantages result for customer from this.

**13.9** Unless not otherwise agreed, BMK shall not provide the customer with the source code of the software produced. This source code shall remain in the possession of BMK.

#### **14. Data protection clause**

Personal data from the contract may only be used for the purpose of the fulfilment of the contract, customer support, market and public opinion research as well as for own advertising campaigns. Personal data of the customer arising within the scope of

the contractual relationship and necessary for the execution shall be saved by BMK. If this is necessary to fulfil the contract, these data shall also be provided to other companies which are charged by BMK with the execution of the contract or parts thereof in a permissible way.

#### **15. Place of jurisdiction, applicable right**

**15.1** Augsburg shall be the exclusive place of jurisdiction for all disputes arising from this contract, as far as permitted by law.

**15.2** The legal relationship shall be only subject to the substantive law of the Federal Republic of Germany to the exclusion of the international private law and the UN Convention on Contracts for the International Sale of Goods.

#### **16. Severability clause**

If any provision of the contract with the customer, including these general terms and conditions (AGB), shall be invalid or become invalid in whole or in part, the validity of the remaining provisions are not affected thereby. The provision invalid in whole or in part shall be replaced by one whose economic success is as close as possible to the invalid one. The same shall apply if a gap arises which needs to be filled when fulfilling the contract or if a provision becomes meaningless or impracticable as a result of changed circumstances.