

## **General Terms and Conditions – hereinafter: AGB**

of SYSGO AG (SYSGO)

As per August 2005

### **§ 1 General**

1. The General Terms and Conditions of SYSGO are valid exclusively; provisions to the contrary or diverging provisions of contractual partners will not be acknowledged unless SYSGO explicitly and in writing acknowledges their validity. These AGB are also valid if SYSGO performs its required services without reservations and being aware of provisions to the contrary or diverging provisions of the contractual partner.
2. Supplements to the contract are only valid if they are confirmed in writing by SYSGO. This refers also to subsequent amendments, modifications or other variances from the terms of the contract.
3. The contractual partner is aware of the fact that the performance may consist of Open Source Software ("OSS"). Because of the specific nature of OSS, being developed by a multitude of Persons outside SYSGO, possible information on properties of OSS given by SYSGO is not legally binding.
4. As far as the performance consists of OSS, SYSGO cannot grant rights to it.
5. Software in the sense of these General Terms and Conditions are all programs or parts of programs to be used with EDP equipment, data carriers, manufacturer's documentations, user manuals, working sheets, and all other documents to explain the programs and which are provided or developed by SYSGO to perform a contract.
6. Sales, software licenses, service and maintenance are only performed on the base of these General Terms and Conditions.
7. Contrary Terms and Conditions of the contractual partner herewith are being explicitly contradicted. An inclusion into the contract is only considered in particular cases and only after explicit agreement with SYSGO.
8. The AGB of SYSGO apply also to all future business with the contractual partner.

### **§ 2 Tenders/Contracts**

1. Tenders by SYSGO are not legally binding prior to their written confirmation.
2. The written confirmation of a tender is replaced by the invoice if the contract is performed immediately.
3. Authoritative as to the extent of the delivery is the confirmation by SYSGO.
4. Tenders by SYSGO are not binding unless after prior notification from SYSGO in writing.
5. If the order qualifies as a tender in the sense of § 145 German Civil Code, SYSGO may accept this within four weeks.
6. Undertakings as to product properties are only legally binding if explicitly confirmed by SYSGO in writing. Statements within the prospectus are not to be deemed as product property guaranteed or as warranty of any kind.

### **§ 3 Prices/Terms of Payment**

1. As far as the contract confirmation/the contract agreement does not state otherwise SYSGO's prices are ex shipping point and exclusive of postage and packing, which will be charged separately.
2. The statutory VAT is not included into the price. It will be indicated separately within the invoice in the statutory amount as at invoicing date.
3. The deduction of discounts requires a special written agreement.
4. As far as the contract confirmation/the contract agreement does not state otherwise is the net purchase price (without discount) due to be paid within 30 days from invoice date. Gets the contractual partner into arrears SYSGO is entitled to claim interest on payment in arrears in the amount of 8 % above the respective European Central Bank base interest rate p. a. as long as the contractual partner is not a final consumer, otherwise the outstanding accounts will bear 5 % interest p. a. The assertion of further damages remains reserved. However, the contractual partner is entitled to prove that no damage or a considerably lower damage occurred because of the delay in payment.
5. The contractual partner is only entitled to rights to set off if the counterclaims are established in a legally binding way, are undisputed or if they are acknowledged by SYSGO. The same is valid for the exercise of rights of retention. Furthermore, the exercise of a right of retention requires that the counterclaim rests on the same contractual relationship.
6. Bills of exchange and postdated checks are only accepted after special written agreement prior to the presentation and only as a matter of payment. Bill of exchange tax as well as bank charges, discount charges and collection charges are on the expense of the contractual partner.

7. In case the contractual partner fails to meet the obligation to pay and/or other obligations from the contract, suspends payments or an application for insolvency proceedings on the assets of the contractual partner or its statutory representatives is filed, the total remaining debt falls due to immediate payment. In this case SYSGO is entitled to declare rescission of all contracts and to retrieve merchandise already delivered under reservation of title as well as to claim refund of all expenses originating in the rescission (e. g. backhaul, decrease in value, expense allowance, etc.).

### **§ 4 Reservation of Title**

1. SYSGO reserves the title to the subject matter of a contract until receipt of all payments under the contract. In case of conduct contrary to the terms of contract SYSGO is entitled to retrieve the subject matter of the contract. The act of retrieval by SYSGO does not constitute a rescission of contract unless this is declared explicitly in writing by SYSGO. SYSGO is entitled to realize the subject matter of the contract after retrieval, the proceeds from the realization is to be credited against the debts of the contractual partner; allowing for reasonable realization expenses.
2. SYSGO reserves property right titles and copyrights in drawings, calculations, and other documents. This applies also to such documents marked as "confidential". Prior to the passing on of these the explicit written consent of SYSGO is required.
3. The contractual partner is obliged to treat the subject matter of the contract with care.
4. In case of levy of execution or other interventions from third parties the contractual partner is obliged to inform SYSGO immediately in writing, in order to enable SYSGO to take legal action according to § 771 German Code of Civil Procedure (ZPO). As far as the third party is not able to refund to SYSGO the expenses in and out of court of legal action according to § 771 ZPO the contractual partner is liable to SYSGO for the loss arising from this.
5. The contractual partner is entitled to resell the subject matter of contract in the due course of business activities as far as the subject matter is a tradable item; however, the contractual partner assigns to SYSGO already now all claims up to the finally billed amount (including VAT) arising against the buyer or third parties from the resale regardless to whether the resale was effected with or without processing of the item. Even after the assignment the contractual partner remains entitled to collect this claim. SYSGO's authority to collect the claim itself remains unaffected. However, SYSGO undertakes to not collect the claim as long as the contractual partner meets the payment obligations out of the agreed proceeds, there is no delay in payment, there is particularly no filing of an application to open insolvency proceedings or suspension of payments. However, if this is the case SYSGO may request to be notified on the assigned claims and the corresponding parties liable, to be given all information necessary to collect the claims, to be handed over all appropriate documents and that the parties liable (third parties) are notified about the assignment by the contractual partner.
6. The processing or remodeling of the tradable item by the contractual partner is always made for SYSGO. If the subject matter of the contract is being processed with other items not belonging to SYSGO, SYSGO acquires joint property in the new item in the proportion of the value of the subject matter of the contract compared to the other processed items at the time of processing. Besides, the same regulations apply to the item created by the processing as to the subject matter of the contract delivered with reservation of title.
7. Is the subject matter of the contract merged inseparably with other items not belonging to SYSGO, SYSGO acquires joint property in the new item in the proportion of the value of the subject matter of the contract compared to the other merged items at the time of merging. Is the merging made in a way that the item of the orderer is to be seen as main item, it is deemed stipulated that the contractual partner assigns joint property proportionally. The contractual partner keeps for SYSGO the sole or joint property thus created.
8. On request of the orderer SYSGO undertakes to release securities SYSGO is entitled to as far as the value of the securities exceeds the value of the claims to be secured by more than 20 %; the choice of securities to be released is incumbent on SYSGO.

### **§ 5 Periods and Times of Delivery**

1. The commencement of the period of delivery declared by SYSGO requires clarification of all technical questions. Part performances by SYSGO are admissible.
2. Times of delivery can only be declared for merchandise in stock. Beyond this there are only and exclusively "estimated times of delivery" without commitment in the sense of a fixed date. SYSGO is obliged to inform the contractual partner about expected delays in delivery immediately in writing.

3. Is an announced estimated time of delivery for the contractual partner unreasonably delayed, the partner is entitled to fix with SYSGO a reasonable period of grace of at least four weeks and to rescind the contract partially or in total after the expiration of this period without result; damage claims because of non performance are due to the contractual partner only in the amount of the foreseeable damage and only if the delay in performance results from intent or gross negligence by the statutory representatives, by the executives, or by other vicarious agents of SYSGO.

4. The observance of a stipulated period of delivery requires the timely and orderly performance of the contractual partner's obligations. The period of delivery is reasonably prolonged particularly in cases of plant or equipment failure, strike, lockout, non delivery by in-suppliers, or other circumstances for which SYSGO bears no responsibility.

#### **§ 6 Passing of the Risk**

1. As far as the contract confirmation does not state otherwise delivery is stipulated ex shipping point.

2. If the contractual partner so requests SYSGO will cover the delivery by a transportation insurance; expenses thus incurred are borne by the contractual partner.

3. Transportation material and all other packaging according to the currently valid packaging ordinance will not be taken back. Exempt from this are pallets. The Customer disposes of all packaging and transportation material at own expense.

#### **§ 7 Cancellation of Delivery**

1. If the contractual partner cancels the order partially or total and if SYSGO agrees into the cancellation, SYSGO is entitled to claim repayment of expenses. The repayment of expenses is to be made in a lump-sum and to be calculated as follows:

a) for not yet produced devices 50 % of the cancelled net value of the delivery if the cancellation was made later than 30 days before the scheduled delivery date

b) in all other cases there is to be paid a lump-sum repayment in the amount of 30 % of the cancelled net value of delivery.

2. As far as the contractual partner proves lower expenses only these are to be repaid. In case of proving higher expenses SYSGO is entitled to get these repaid.

3. SYSGO's right to claim damages for non-performance remains unaffected.

#### **§ 8 Warranty**

1. The contractual partner acknowledges that malfunctions of software cannot be entirely ruled out according to the state of the art, not even with greatest diligence. Therefore the unrestricted operability and/or the elimination of all faults cannot be guaranteed.

2. Therefore SYSGO warrants for the subject matter of the contract only to be free of faults of material and manufacturing which would considerably diminish its value or efficiency.

3. Defects of the subject matter of the contract corresponded by the contractual partner's written notice will be eliminated within a period of warranty of 12 months commencing with delivery. This will be made at SYSGO's choice either by rectification of defects or substitute delivery. SYSGO is to be granted a reasonable period to remove the defects.

4. The warranty for approved copies of software made by the contractual partner is restricted to faults of the copying software and requires that this software itself still commits SYSGO to provide warranty.

5. With approved modifications of the software the warranty is restricted to faults of the software that existed before the modifications were made. There is no warranty granted for the applicability of software.

6. If the rectification of defects or the substitute delivery fails, the contractual partner may claim conversion or reduction of the purchase price.

7. If the investigation of the reported malfunction results in a fault of the software not covered by the warranty, SYSGO may charge a discretionary cost sharing from the contractual partner. This applies particularly to faulty operating by the contractual partner or other malfunctions being not within SYSGO's field of responsibility.

8. To software individually developed for the contractual partner applies the stipulated performance description and acceptance procedure. If this description and/or acceptance is omitted, SYSGO tries, according to SYSGO's best knowledge and belief, to develop and/or customize the software in the sense of the contractual partner. In this case the acceptance is deemed made with delivery. The contractual partner's requests for changes will be considered, if possible at all according to the state of the art, within reasonable time and upon separate remuneration.

9. The documentation supplied may, in individual cases, differ slightly from the actual program, if the program was being developed further in the mean time.

10. The period of warranty/liability for defects is 12 months. The limitation period for claims based on defects generally commences with delivery of the items which are subject matter of the contract. With the delivery of part performances the period starts with acceptance of the last part performance. If a part performance is already used by the contractual partner, the limitation period for this part performance begins with the first day of use after the acceptance of this part performance.

#### **§ 9 Duties to Examine and Notify**

1. The contractual partner is obliged to examine the subject matter of the contract within 8 work days after delivery, particularly with respect to the operability of fundamental program capacities as well as the completeness of possible data carriers and/or manuals. Defects detected or detectable with this examination must be reported to SYSGO by registered letter within a further 8 work days. The notice of defects must contain a detailed description of the defects.

2. Notice must be given of defects not detectable in the course of the described orderly examination within eight work days after detection, including a detailed description of the defects.

3. In case of non-compliance with the periods to examine and notify the merchandise is deemed approved/accepted, even considering the defect concerned.

#### **§ 10 Liability**

1. SYSGO is liable for intent and gross negligence according to the statutory provisions.

2. For slight negligence SYSGO is only liable if an essential contractual obligation ("Cardinal Obligation") was infringed or if it is a case of default or of an impossibility for which SYSGO is responsible. In this case the liability is limited to the damage typically foreseeable and in all other cases the liability for slight negligence is excluded, with the exemption of claims according to the Product Liability Act and in cases of bodily injuries.

3. Also in the absence of warranted properties, initial impossibility, or impossibility occurring during default, the liability of SYSGO is limited to the damage typically foreseeable.

4. If the contractual partner indicated the incurrence of a disproportionately high damage, SYSGO is liable if SYSGO explicitly accepted liability for this in writing.

5. SYSGO accepts no liability for damages occurring from counseling, support in the implementation of new programs, or the operation of software, or from other losses or damages in connection with the purchase of software.

6. In cases of loss or damage of data carriers and related consequential damages or losses, SYSGO's liability is limited to the costs for the reload of data into the system from an orderly made backup copy and for the expenses for the replacement of data lost or damaged of the calendar day in which the damage occurred. Liability for other damages consequential to the defect is excluded.

7. SYSGO's liability for the total of all damages is limited to the contractual size of the order, with the exemptions of intent, gross negligence, claims from the Product Liability Act, and from bodily injuries. If a continuous payment of a flat rate was stipulated (e. g. because of a software maintenance contract) the liability is limited to the total amount of flat rate payments during the contractual year.

8. Per individual case of damage SYSGO's liability is limited to €50,000.--, with regard to the exemptions according to sub-clause 8.7.

9. Further claims of the contractual partner beyond those explicitly listed in here are excluded, as far as permitted by law.

10. The contractual partner is free to request with conclusion of the contract further liability of SYSGO at separate charge.

#### **§ 11 Warranty of Title**

1. SYSGO is responsible that the merchandise delivered is free from titles of third parties restricting or excluding the use by the contractual partner. SYSGO is further responsible for holding the authority to sell the products distributed.

2. If a third party claims infringement of property rights against the contractual partner, this partner immediately notifies SYSGO. In such case SYSGO is entitled to, but not obliged to, settle the claims asserted at own cost and on own behalf. The contractual partner is obliged to act in agreement with SYSGO in case of altercation.

3. If during a lawsuit conducted by SYSGO the further use of software by the contractual partner is prohibited or such a judgment is in SYSGO's opinion to be expected, SYSGO may optionally do the following:

- a) Change the software in a way that with equal function no property right is infringed any more and/or
- b) obtain the right for the contractual partner to further use the software and/or
- c) replace the software by another equivalent to it but not infringing property rights and/or
- d) take back the software and refund the purchase price to the contractual partner allowing a reasonable amount for the loss of usage and value.

4. The above clauses 1. to 3. are only valid if and in so far as the software was used according to the contract and the infringement of property rights was not caused by an alteration of the software made by the contractual partner or by a third party.

5. On the occasion of infringements of property rights the contractual partner is not entitled to other claims than the aforementioned.

#### **§ 12 Obligation of Secrecy/Data Protection**

1. SYSGO undertakes to employ exclusively personnel obliged to data secrecy according to § 5 Federal Data Protection Act (BDSG) when processing personal data.

2. SYSGO and its employees commit themselves to secrecy. This obligation of secrecy comprises all information about the contractual partner as well as this partner's customers, which are classified confidential or which are, after the circumstances, recognizable as business or trade secrets. This comprises also the names of the contractual partner's customers.

3. SYSGO and its employees commit themselves not to record nor to pass on nor to make use of this information as far as it is not necessary to achieve the contract purpose. SYSGO bears responsibility that third parties do not obtain knowledge of business and trade secrets of the contractual partner.

4. SYSGO will ensure by appropriate contractual agreements that personnel and representatives working for SYSGO also observe these obligations, even after the end of the employment contracts.

5. The above clauses 12.2 to 12.4 apply to the contractual partner accordingly.

6. Upon request SYSGO gives information on the measures taken to ensure data protection to the contractual partner's data protection officer.

7. SYSGO declares that the technical and organizational measures according to § 9 BDSG were taken.

8. The contractual parties notify each other immediately in writing as soon as the suspicion of breach of data protection is identified.

#### **§ 13 Exportation and Re-Exportation**

All deliveries by SYSGO are subject to the export permit according to the German foreign trade and payments law, of which the contractual partner is obliged to obtain knowledge. Prior to passing on, the contractual partner is to check with the appropriate authorities that the act of passing on the subject matter of the contract is not opposed to international or American or German export regulations.

#### **§ 14 General Regulations**

1. These General Terms and Conditions are supplementary to existing specific regulations between SYSGO and the contractual partner as stipulated in individual contracts. If individual regulations of these General Terms and Conditions are opposed to other contractual regulations (e. g. license agreement) then the latter regulations prevail.

2. Modifications and amendments of the contract require written form to obtain validity. This applies also to the clause requiring written form and the renunciation of the requirement of written form. Oral supplements are not agreed.

3. If one of the regulations of these General Terms and Conditions is partially or entirely invalid or becomes invalid or contains a loophole, then the legal effect of the other regulations remains unaffected. Instead of the invalid regulations or a loophole the contractual parties shall primarily agree on a regulation coming as close as possible to the desired economic result of the invalid or incomplete regulation.

4. As far as the orderer is a merchant entered as such into the commercial register SYSGO's place of business is the venue; however, SYSGO is also entitled to file action against the contractual partner at the court having jurisdiction at the latter's place of residence.

5. The contractual partner agrees into the storing, the processing and the passing on of personal data to third parties within the limits of the business relations, as far as the contractual partner's interests warranting protection are observed.

6. SYSGO is entitled to point out in public that the contractual partner uses software by SYSGO.

7. These General Terms and Conditions and the contracts concluded on the base of these are subject to the law of the Federal Republic of Germany to the exclusion of the UN law on the sale of goods (Convention on Contracts for the International Sale of Goods as per April 11, 1980, "UNCITRALKaufrecht").

8. Place of execution is SYSGO's registered office.

9. The legal relationships between the parties are exclusively subject to the law of the Federal Republic of Germany.

10. The above paragraphs represent a convenience translation from the original German version of the AGB. In the event of ambiguity, or difference arising between the original version and this translation, the original German version shall prevail.