

Terms and conditions of business

The following terms and conditions of business represent the agreement between the two parties upon issuing of order:

Guarantee

PROFACTOR guarantees the performance of research activities based on state-of-the-art scientific knowledge and processes. In case of software services, PROFACTOR guarantees the compliance of software with the program documentation provided. However, we are unable to completely rule out software errors. All research results will be documented on paper or on storage medium. To avoid loss of entitlements ensuing from deficiencies in the performance of this contract, Client shall be obliged to inspect (part) consignments from PROFACTOR without delay, and to inform PROFACTOR of any deficiencies by providing a detailed written description of said deficiencies. Client is not permitted to retain payment on account of minor defects, or to retain payment for one item due to a major defect of another item. No claims against warranty are possible while Client is in arrears, however, this shall not affect the start, term or termination of the warranty period.

Client is obliged to furnish proof to support claim of defective performance at time of performance. Client is obliged to assist PROFACTOR in ascertaining and remedying defects (by granting access to premises, relevant documents, etc.). Should Client not provide said assistance in remedying defects, despite written reminder by PROFACTOR, all claims against warranty resulting from defective performance are voided.

Claims against warranty shall expire 6 months after acceptance of the service by Client.

PROFACTOR shall remedy defects by means of repair or substitute delivery, at PROFACTOR's discretion, within a reasonable period, and to the exclusion of all further claims. This applies to defects that are communicated to PROFACTOR by Client in writing, and comprehensibly within the warranty period. Should PROFACTOR be unable to ascertain or reproduce the claimed defect, Client shall bear all costs of inspection. In case of minor defects, PROFACTOR may, but is not obliged to, waive its right to repair or replace, and offer Client a reasonable discount; this applies particularly to cases in which the effort involved in replacing a defective item or remedying a defect is viewed as unreasonable by PROFACTOR. In case of minor and non-minor defects, PROFACTOR may opt to, but is not obliged to, take back goods to the exclusion of further claims, and to credit customer's account with the amount of order. The original warranty period is not extended by repair or replacement.

Strict adherence to instructions for use provided in documentation is a pre-condition for warranty. All claims against warranty are voided should Client modify, rework, or extend programs or data.

In case of delay in remedying the defect or replacing the defective item caused by PROFACTOR, Client shall exclusively have the right to terminate the contract with respect to the goods or services affected by said delay and excluding all other claims, after giving at least 6 weeks' written notice. The cancellation shall become effective only if PROFACTOR fails to adhere to the extension explicitly set by notice. Minor defects do not constitute a right to cancel contract.

Delays

In case of encumbrances to production and delivery beyond the influence of PROFACTOR such as force majeure, strikes, business disruptions or delays in delivery, cuts in or loss of working hours, transportation difficulties, a late provision of information and data, or intervention by authorities, both parties agree to a reasonable extension of the dates and deadlines for performance.

In case of delay in delivery caused by PROFACTOR, Client has the right to demand fulfillment of contract or to cancel contract with respect to the goods affected by said delay only, and to the exclusion of all other claims, after giving 6 weeks written notice.

The cancellation shall become effective only if PROFACTOR fails to adhere to the extension explicitly set by notice.

Client is not entitled to claim liquidated damages for delays.

Industrial property rights

Unless explicitly agreed in writing to the contrary, PROFACTOR assigns to Client, for the duration of the contract, limited right of use, restricted to use within the Republic of Austria, of the works ensuing from services, work or inventions arising from or in connection with the contract, particularly to all works subject to copyright laws, and specifically to ideas, concepts, software, prototypes, etc for the duration of contract. The scope of this use of the works depends on the purpose of the contract in question.

When third party services are drawn upon, PROFACTOR undertakes to ensure that agreements are reached with third party to ensure that PROFACTOR owns the rights of use for the services within the meaning of this item of the contract.

Modifications to services, works, and inventions, specifically to works in the sense of copyright law, are only permitted with express approval of PROFACTOR and/or copyright holder.

The acquisition of any rights of use, or patent rights by Client, assumes full settlement of any amounts outstanding to PROFACTOR. PROFACTOR shall retain all rights of use, and/or patent rights up to this point. In case of delay in payment, PROFACTOR additionally reserves the right to prohibit any and all use of services rendered until all amounts outstanding to PROFACTOR have been settled in full.

Retention of title

PROFACTOR retains title until all amounts outstanding to PROFACTOR have been settled in full. In case of delay in payment, PROFACTOR reserves the right to repossess goods subject to retention. Repossession of goods subject to retention of title does not constitute a cancellation of contract. PROFACTOR will sell goods subject to retention of title freehand, and credit Client's account with amount received, less all costs incurred by repossessing and reselling goods. Garnishment of goods subject to retention executed on request by PROFACTOR does not constitute a relinquishment of right of retention.

If Client has already disposed of goods subject to retention, all titles owned by Client from the sale or disposal to third parties, of said goods subject to retention, shall be transferred to PROFACTOR. Client is obliged to disclose all details of purchaser, purchasing price, delivery date, location of goods, and to publish the cession of goods.

Should third parties attempt to gain possession of goods subject to retention by seizure, garnishment and the like, Client shall undertake to inform third party of PROFACTOR's right of retention, and to advise PROFACTOR immediately in writing. Client shall indemnify PROFACTOR and hold them harmless against all expenditures incurred in refuting attempts to access goods subject to retention.

Subject to prior notice, PROFACTOR retains the right to cancel contract, and to repossess goods subject to retention, if Client is in default (even for reasons beyond his control), or circumstances arise that endanger fulfillment of PROFACTOR's entitlements.

Price changes

Prices and dates are quoted on the basis of cost/information available when initial offer was drafted. Should sustained changes in requirements occur during the term of the project, thus entailing research work above and beyond the scope of the offer, PROFACTOR retains the right:

- to extend the term of the project in mutual agreement with Client,
- to invoice Client for additional expenses.

Rights of use, exploitation rights, secrecy

Unless an agreement to the contrary exists, PROFACTOR shall retain rights of use, and exploitation rights, except for right of immediate use within Client's enterprise.

Notwithstanding any agreement on rights of use and exploitation rights, PROFACTOR is entitled to generally advertise the research results in order to publicize the PROFACTOR's activities in general, and more specifically to potential markets. This also applies to the use of results for general publication, teaching, and marketing purposes.

Client can be named as a reference during such presentation.

Non-disclosure and exclusivity of research results are subject to separate written agreement.

Client explicitly declares that intermediate input provided by Client is not the industrial property of a third part or third parties.

PROFACTOR will undertake to avoid conflicts with existing industrial property rights. In case of infringement on third party industrial property rights, PROFACTOR shall only be liable to Client for any claims for compensation levied against Client in case of intent or gross negligence on the part of PROFACTOR.

Both parties agree to a mutual exchange of information and to coordination between PROFACTOR and Client.

Liability and damages

Client is aware that services rendered by PROFACTOR represent a prototype not designed for serial use, but for the possible development of products for serial use.

Client shall use services rendered at Client's own risk. PROFACTOR thus provides no guarantee, and accepts no liability for the specific usability or exploitability of services rendered, nor for material defects, malfunction, etc. In case of material defect PROFACTOR provides warranty only when our supplier can be held liable to provide a replacement, and PROFACTOR could have been reasonably expected to exercise greater caution in detecting such defects.

Liability on the part of PROFACTOR is thus limited to damage proven to have been caused deliberately or by gross negligence on the part of PROFACTOR. Under no circumstances shall PROFACTOR accept liability for consequential damage, pecuniary loss, loss of profit, and third party damage. Compensation for damage is restricted to sum total of order.

Claims for compensation must be raised in a court of law within one year of performance. No liability will be assumed for claims arising, or raised after this deadline.

Offsetting ban

Client shall not be entitled to offset any counterclaims against claims made by PROFACTOR or to assert a right of retention for payments to which the Client is contractually bound by PROFACTOR.

Third-party rights

If a third party claims rights to a service rendered by PROFACTOR and therefore asserts said claims to the Client, PROFACTOR shall defend the Client in order to indemnify and hold harmless the Client. For this purpose, the Client shall relinquish all rights of defense to PROFACTOR. In order to support PROFACTOR, Client shall be obliged to provide PROFACTOR with all available and necessary information for the preparation of a corresponding legal defense. PROFACTOR shall be responsible for the decision as to the scope of the legal defense and the conclusion of settlement agreements. The acceptance of any liability for costs resulting from third-party claims requires immediate written information regarding said claims.

Legal succession

These provisions shall also apply for and against legal successors of the parties. The Client may not assign, sublicense or transfer in any other way the contractual relationship and any associated rights conceded by PROFACTOR to a third party without prior written consent.

Amendments to contract and services

Assurances by PROFACTOR or amendments to contract are subject to written confirmation by PROFACTOR. Wherever written form is stipulated, facsimile transmission shall be deemed to fulfill this stipulation. A contractual declaration transmitted via e-mail shall only be deemed as valid in writing if a signed written document is electronically transmitted as a scanned attachment. Deliveries by PROFACTOR to Client shall be effected to the last known address provided by Client, or to an electronic address. Client is obliged to advise PROFACTOR of changes of address, in lieu of which deliveries to the last known address shall be deemed to have been received by Client.

Should any part of this agreement be invalid for any reason, it is to be replaced with a corresponding text, which is valid and equivalent to the meaning intended by PROFACTOR. The rest of the agreement shall remain unaffected and valid.

Research grant

PROFACTOR reserves the right to claim the research grant, if, by the end of the current calendar year, the Client has not informed PROFACTOR in writing of its own intention to use said grant.

Place of performance, legal venue, applicable law

Place of performance for all obligations subject to this agreement is PROFACTOR's company offices in Steyr, Austria.

The legal venue for any and all disputes arising from this agreement shall be the court of jurisdiction on the grounds of factual connection at PROFACTOR's company offices. Austrian law applies. The United Nations Convention On Contracts For The International Sale Of Goods is herewith excluded.

Special provisions for software deliveries

1. Software license: Every software delivery shall exclusively serve as a transfer of rights of use (license). A purchase of the software is excluded.

The use of the software and potentially agreed maintenance may be restricted by the issued license (e.g. to certain locations, to a certain number of users, to a certain number of cases, etc.). Circumventing these restrictions is not permitted.

2. Scope of license: Unless expressly agreed otherwise, PROFACTOR shall retain ownership rights to the supplied software. The issued license does not comprise the right to decompile, modify or reverse-engineer the software into individual components. Unless expressly agreed otherwise, a transfer of the source code and all usage and exploitation rights to same shall be excluded. Unless expressly agreed otherwise, there shall be no right to sublicense or resell the supplied software.

3. Libraries: If the software contains (external) libraries/components ("DLL files"), no sublicense shall be granted for these software components. The licensing terms and conditions of the respective software manufacturer of the libraries/components shall apply and these are referred to in the licensing terms or the text file of the software itself.

4. Scope of service: Certain software features and functions can only be guaranteed if these have been expressly agreed in writing and approved by PROFACTOR. The scope of the software functionality is restricted to the specific offer or the definitions contained in the functional specifications. Any further functionalities do not fall within the scope of this contract, even if these would otherwise be available or are considered as standard.

5. Limitation of liability: Unless expressly agreed otherwise in a corresponding agreement, PROFACTOR shall provide no guarantees of any sort with regard to the software and all services associated with the use thereof; it shall particularly not grant any implicit guarantees of a certain functionality, quality or standard features or its suitability for a certain purpose. Such guarantees are excluded. The compatibility of software with a certain software and/or hardware environment shall only be guaranteed if this has been expressly approved in writing. Client shall be responsible for the compatibility of the software with his existing hardware or software environment, provided responsibility therefor has not been expressly assumed by PROFACTOR. PROFACTOR shall not be liable for any losses of data resulting from use of the software. Client shall be responsible for backing-up his own data before using the software. Otherwise, liability for damages resulting from use of the PROFACTOR software shall be limited to software components which have been independently developed by PROFACTOR as well as damages which have been intentionally caused as a result of gross negligence despite exclusively using the software according to the intended use and purpose and despite using it in an up-to-date hardware and software environment. The liability amount shall also be limited to the previously paid license fee amounts. Liability shall further be limited to positive damages and shall exclude any loss of earnings, indirect damage, incidental or consequential damage or lost savings caused by software defects.

6. Maintenance, support, etc.: Services going above and beyond the licensing of the software, i.e. software support, maintenance services, the creation of updates for the further development of the product with regard to ongoing developments in the IT infrastructure, shall not be considered as contractually binding unless expressly agreed otherwise. If maintenance of the software has been agreed, willingness to perform said maintenance shall solely apply for the most recent version of the software, not for earlier versions.

7. File formats, data carriers: The methods by which the software is supplied shall solely be decided upon by PROFACTOR. The supply of the software in a certain file format or on a certain data carrier shall only be permitted if this has been expressly agreed.

8. Copies: Unless expressly agreed otherwise, any form of copying the supplied software is prohibited, excluding copies and back-up copies which are necessary for the agreed service. PROFACTOR shall be free to copy-protect its supplied software.

9. Updates: During the ongoing licensing period, PROFACTOR shall be authorized to request that the license holder perform a software update at PROFACTOR's request, provided this is necessary for security reasons or for compliance with the contractual provisions.