General Terms and Conditions for Application Management Services (GTC AMS) of Zühlke Engineering AG

1 Preamble

These Conditions shall govern the performance of Application Management Services by Zühlke Engineering AG (hereinafter "ZÜHLKE"), the rights and obligations of the parties, and the prices and terms of payment.

2 Contractual elements and precedence

The contract consists of the following documents. In the event of any discrepancies, the documents shall be applied in the following order of precedence:

(i) The provisions of the individual contract for Application Management Services

(ii) These General Terms and Conditions

3 Definitions

The following definitions apply:

(a) RESPONSE TIME is the period during the SUPPORT TIME in between receipt of an INCIDENT and its acknowledgement by ZÜHLKE to the customer.

(b) RESTORATION TIME is the period during the SUPPORT TIME in between receipt of an INCIDENT (and delivery of a VERSION, PATCH or acceptable workaround solution (workaround) to repair the ERROR.

(c) INFRASTRUCTURE describes technical components necessary for the provision of SERVICES of the module "Operations", such as hardware or operating software.

(d) CHANGE REQUEST is a request for an amendment by the customer or a request by the customer for ENHANCEMENTS.

(e) PERIOD OF ACTUAL AVAILABILITY is the period of time during which the SOFTWARE or the INFRASTRUCTURE functions without CRITICAL ERRORS. Whereas the maintenance window is not included for calculating ACTUAL AVAILABILITY.

(f) DEVELOPMENT CONTRACT is a contract agreed upon between the parties, according to which SOFTWARE by ZÜHLKE is developed.

(g) ERROR is a significant deviation of the SOFTWARE or of the INFRASTRUCTURE from the product specifications according to the DEVELOPMENT CONTRACT or SCOPE OF WORK or the features expressly agreed upon in the contract, to such an extent that the customer is limited in exercising business-relevant processes. The errors are categorized as CRITICAL, MAJOR and MINOR ERRORS in consultation with the customer.

(h) INCIDENT is when the customer notifies ZÜHLKE of a DISRUPTION or when ZÜHLKE provides an account of a DISRUPTION on the basis of the customer's notification.

(i) MAJOR ERROR is an ERROR that limits the operation or important functionalities of the SOFTWARE and/or the INFRASTRUCTURE for many SOFTWARE users among the customer.

(j) INTERVENTION TIME is the period during the SUPPORT TIME in between receipt of an INCIDENT and the beginning of work.

(k) MINOR ERROR is an ERROR that limits the operation or extended functionalities of the SOFTWARE and/or the INFRASTRUCTURE for a small portion of SOFTWARE users among the customer.

(l) CRITICAL ERROR is an ERROR that significantly limits or renders impossible the operation or basic functionalities of the SOFTWARE and/or the INFRASTRUCTURE for a majority of SOFTWARE users among the customer.

(m) SOLUTION TIME is the period during the SUPPORT TIME in between receipt of an INCIDENT and delivery of final error correction (no workaround) in case of a DISRUPTION or the delivery of a service request.

(n) PATCH is a software component to correct one or more ERRORS in the VERSION of SOFTWARE installed with the customer.

(o) SCOPE OF WORK (SoW) is a performance description by ZÜHLKE with regard to ENHANCEMENTS of a SYSTEM or SOFTWARE.

(p) SERVICE LEVEL are the performance indicators agreed upon between ZÜHLKE and the customer to guarantee the quality of SERVICE.

(q) SERVICE LEVEL TARGET (SLT) comprises of RESPONSE TIME, RESTORATION TIME, INTERVENTION TIME and SOLUTION TIME.

(r) SERVICE MODULE consists of a group of SERVICES provided by ZÜHLKE as agreed upon in the contract.

(s) SERVICES are the Application Management Services provided by ZÜHLKE within the scope of the contract and as defined in the contract.

(t) SOFTWARE is the computer program in source code or machine code and – where ZÜHLKE has provided such to the customer – the accompanying documentation. The SOFTWARE is governed by an individual contract.

(u) DISRUPTION is an irregularity of the functionality of the SOFTWARE, and/or the INFRASTRUCTURE. The DISRUPTION may for example be caused by an ERROR in the Software, a faulty adjacent system or unsuitable use by the user.

(v) SUPPORT TIME is the period during which ZÜHLKE provides SERVICES and the period during which the ZÜHLKE Service Desk is available.

(w) SYSTEM is a technically defined and essentially closed solution.

(x) VERSION designates a specific release of the SOFTWARE that consists of error corrections, substantial improvements or enhanced functionalities.

(y) ENHANCEMENTS are changes to the SOFTWARE extending the functionality that ZÜHLKE performs by implementing new requirements in the source code.

(z) WORKING DAYS are the official business days at the ZÜHLKE offices.

4 Object of the contract

The object of the SERVICES is the SOFTWARE as defined in the individual contract as well as any necessary INFRASTRUCTURE and third-party products. SOFTWARE also includes necessary ENHANCEMENTS pursuant to paragraph 5.5.

5 Service Module

As all other Service Modules are built on the "Core Services" Service Module, the "Core Services" Service Module must be part of every contract. The list of Services in the individual modules in this paragraph or in the individual contract is deemed complete. Zühlke shall not be liable for additional services.

5.1 «Core Services» Service Module

5.1.1 Updating documentation

Where user documentation has been provided to the customer in accordance with the Development Contract, Zühlke shall where necessary update these.

5.1.2 Version control

Zühlke shall systematically record changes to the Software source code and manage these. Software deliveries (Versions and Patches) shall be provided to the customer with definite version numbers and therefore remain replicable at all times.

5.2 "Service Management" Service Module

5.2.1 Service Desk

Zühlke shall make available to the customer a Service Desk, whose service times are defined pursuant to the individual contract.

5.2.2 Coordination meetings

Zühlke shall meet the customer at set intervals as defined in the individual contract to coordinate operational matters.

5.3 "Support" Service Module

5.3.1 Repairing Disruptions

(a) Unless otherwise agreed upon in an individual contract, Zühlke shall endeavor to repair within a reasonable period of time reproducible Software Disruptions if described fully and completely in the customer's Incident. The parties may agree upon a Service Level Target in an individual contract.

(b) Zühlke shall be entitled to repair Disruptions of Software by releasing a Version or Patch or by demonstrating an acceptable workaround solution (workaround).

5.3.2 Preventative error corrections

Zühlke shall be entitled to proactively repair Errors pursuant to the provisions in paragraph 5.

5.4 «Operations» Service Modul

Where agreed upon in the individual contract, Zühlke shall provide the customer with the Services as mentioned in this paragraph 5.4 to operate the Software. The parties shall have agreed to the Service Levels that apply to the performance of these services in the individual contract.

5.4.1 Availability of services

Zühlke operates the Software through the Infrastructure as defined in the individual contract. Responsibility shall rest with the customer to transmit the processed customer data and access commands over the Internet to Zühlke's Internet connection or that of its subcontractors.

5.4.2 Data security and data recovery (restore)

(a) Zühlke shall secure the Software and user data on the Infrastructure at intervals defined in the individual contract and retain it for the duration specified therein. The customer shall be responsible for complying with commercial and tax law retention rules and deadlines.

(b) In the event of loss of data, Zühlke shall restore the last backup of the Software and customer data.

5.4.3 Additional Infrastructure

Zühlke shall be entitled to introduce additional Infrastructure insofar as these are necessary for the performance of services of this Service Module. Zühlke shall invoice the customer for the related additional expenses. If Zühlke has obtained such additional Infrastructure from a subcontractor, Zühlke shall charge the one-time or recurring cost of the subcontractor to the customer plus a 10% handling fee.

5.5 Enhancements and one-time support services

(a) Enhancements and one-time support services are not a part of the contract. Upon a change request of the customer Zühlke shall offer Enhancements with a Scope of Work. Zühlke shall also offer one-time support services, e.g., installation or configuration of Versions or training, or as part of a Scope of Work. The parties shall conclude the contract for the performance of such services as follows provided that the customer does not refuse the Scope of Work:

(i) for services up to five man days pursuant to the Scope of Work, by e-mail from the customer to Zühlke in which the customer acknowledges the Scope of Work;

(ii) for services of more than five man days, by the customer signing the offer and returning it to Zühlke.

(b) With respect to the provision of Enhancements and one-time support services, the provisions in the General Terms and Conditions from Zühlke (for contracts of project and other services) shall apply, with the exception that warranty provisions of the Terms and Conditions of Zühlke shall not apply to Enhancements because such Enhancements shall be supported pursuant to this contract. Zühlke shall be entitled to refuse Enhancements of the Software or one-time support services where good cause exists.

5.6 Additional services

The parties may agree upon Zühlke performing additional services in the individual contract.

6 Excluded services

(a) Repair of Disruptions and Errors caused by operating errors, third party or user interference or otherwise not caused by the software; this includes for example errors caused by third-party programs or by systems installed by the customer are not included in the Service Modules.

(b) In the event that Zühlke at its own discretion provides the services referred to in this paragraph, the provisions of this contract on the performance of services shall apply; Zühlke shall be entitled to invoice additional expenses of this type according to the work performed pursuant to the rates as defined in the individual contract.

7 Rights and obligations of the parties

7.1 Subcontractor

Zühlke shall be entitled to engage subcontractors for the performance of services pursuant to this contract.

7.2 Prices and invoicing

7.2.1 Prices, fees, hourly rates and invoicing

(a) Fees and hourly rates are defined in the individual contract. The prices are net prices without value added tax (VAT) and other charges, taxes and levies. The individual contract defines when Zühlke shall invoice for the services it has provided.

(b) ZÜHLKE shall be entitled to adjust the amount of the hourly rates, the periodic (recurring) fees such as service fees, and the additional expenses at the beginning of each calendar year to changes in cost factors. Such adjustments shall be communicated to the customer in writing no later than three months before they come into effect. In the event that the customer does not agree to the increase, it shall be entitled to terminate this contract and with a three-month notice period. Such termination must be issued in writing within 30 days of receiving notification. The provisions shall not apply to changes to the additional INFRASTRUCTURE pursuant to paragraph 5.4.3.

7.2.2 Customer defaults on payment of prices and fees

In the event that the customer is in default regarding the payment of prices or fees, ZÜHLKE shall be entitled to discontinue its services until the customer has paid the fees in full. ZÜHLKE furthermore reserves the right to exercise statutory default rights.

7.2.3 Settlement

The customer shall not settle its own claims against ZÜHLKE without ZÜHLKE's prior written consent.

7.3 Duties to cooperate

7.3.1 General

(a) The customer shall undertake in particular to perform the following duties to cooperate:

  (i) Provide any and all necessary information concerning its objectives and organizational data required for ZÜHLKE to perform its services;

  (ii) Appoint all points of contact with the skills needed to execute the contract;

  (iii) Provide without delay notification and documentation of DISRUPTIONS to the Service Desk referred to in paragraph 5.2.1;

  (iv) Support ZÜHLKE in the analysis of the DISRUPTION, or respectively search for causes of errors as far as reasonably practical;

  (v) Implement ZÜHLKE's workaround recommendations;

  (vi) Coordinate the suppliers of services of third-party products as referred to in the individual contract and the customer's technical system environment (e.g., clarification of the compatibility of these products and systems with the SOFTWARE or involvement of these suppliers to determine the causes of DISRUPTIONS); and

  (vii) License the third-party products which are integrated in the SOFTWARE pursuant to the individual contract.

(b) In the event that the customer does not comply with its duties to cooperate through no fault of ZÜHLKE, then the deadlines dependent on the performance of these duties to cooperate shall be postponed without further notice for the period during which the duties to cooperate are not provided; in addition, ZÜHLKE shall be entitled to claim the expenses incurred by non-compliance with the duties to cooperate.

7.3.2 Special additional duties to cooperate on the part of the customer without a "Operations" SERVICE MODULE

In addition to the duties to cooperate set out in paragraph 7.3.1, the customer shall comply with the following:

(a) Provide and operate the technical system environment (eg. Hardware, operating system, network, backup);

(b) Grant access to the customer's premises and provide an internal workspace with standard equipment as required;

(c) Grant ZÜHLKE remote access to the customer's SOFTWARE and provide communication links, to the extend of being legally permissible;

(d) Use the SOFTWARE in accordance with the agreed upon configuration;

(e) Regularly backup the customer data;

(f) Thoroughly test the VERSIONS and PATCHES provided by ZÜHLKE to the customer, prior to the customer using it for productive purposes; and

(g) Install the latest VERSIONS supplied by ZÜHLKE pursuant to paragraph 5.3.1. within two week of being notified that they have been provided.

7.3.3 Special additional duties to cooperate on the part of the customer with a "Operations" Service Module

Beyond the duties to cooperate set out in paragraph 7.3.1, the customer shall comply with the following duties to cooperate:

(a) Take the necessary precautions to ensure security on the systems used by the customer to access the Software (e.g., confidentiality and regularly changing passwords, use of anti-virus software);

(b) Use the Software only for its intended use;

(c) Administer the customer's users that access the Software; and

(d) Not use the Software or customer data stored on the server in an unlawful manner or in a way which infringes statutory regulations.

7.4 Blocking customer access

In the event that the customer uses the SOFTWARE or stores customer data in an unlawful manner or ZÜHLKE believes in good faith that it has done so, ZÜHLKE shall be entitled to block access to the SOFTWARE and customer data and erase such data.

7.5 Rights to work results of services

Unless otherwise agreed upon in the SCOPE OF WORK, the intellectual property rights for the work results arising from the SERVICES remain with ZÜHLKE, or with third-party licensors as the case may be. If ZÜHLKE uses open source software when providing SERVICES, then the respective open source software licenses apply. The customer acquires the non-exclusive right for the use and application of these work results to the intended extent. The customer's right to use includes the right to adapt insofar as it is necessary for the customer's intended purposes. The right to use is transferrable. However, the customer does not have the right to distribution. The right to adapt is non-transferrable. The customer shall be entitled to the source code provided that the work results form a part of the SOFTWARE. ZÜHLKE shall be free in the use of know-how gained from the development process, provided that the business secrets of the customer remain protected.

7.6 Escalation and dispute resolution process

In the event that differences of opinion arise between the parties in connection with this contract, the parties shall make all reasonable efforts, in particular through an escalation process, to achieve an out-of-court settlement. However, both parties shall be entitled start legal proceedings at any time. The escalation levels are set out in the individual contract.

7.7 Exclusion of warranty

The warranty for SERVICES and work results arising from such services (including VERSIONS) are fully excluded, insofar as is legally permissible.

7.8 Third Party Intellectual Property Rights

(a) If the customer is sued by a third party for an alleged violation of intellectual property rights while using the service in a manner consistent with the Contract (the "Infringement of Rights"), the customer shall be entitled to a warranty of title in accordance with these provisions as long as the following criteria are met:

(i) the Service has not been modified by the customer or a third party engaged by the customer;

(ii) the asserted claim is notified to ZÜHLKE in writing without delay;

(iii) the instructions of ZÜHLKE are followed in connection with defending against the third-party claim and no negotiations or promises are entered into with or made to the third party without the consent of ZÜHLKE.

(b) This clause does not apply to patent infringements. ZÜHLKE does not carry out patent research and cannot be held liable for patent infringements.

(c) The customer shall not be entitled to a warranty of title if an Infringement of Rights was not evident to ZÜHLKE despite due care having been exercised.

(d) The term of the warranty of title is 12 months. It shall commence upon delivery.

(e) ZÜHLKE may decide at its own discretion to conduct the legal dispute with the third party or to recognise the claim of the third party and either by replacing or modifying the work result ensure that the INFRINGEMENT OF RIGHTS no longer exists, or to withdraw the work results and reimburse the client the payments received for it.

(f) If ZÜHLKE decides to continue the legal dispute, the customer shall leave ZÜHLKE in charge of the proceedings and the negotiations aimed at reaching an amicable settlement to the legal dispute. Furthermore, it shall provide ZÜHLKE with the necessary information and provide ZÜHLKE with reasonable support.

7.9 General warranty for open source and third-party products

No warranties of any kind are provided for open-source software or third-party products. The warranty rights of the customer for open-source software and third-party products exist exclusively vis-à-vis the third-party developers and are subject to their terms of warranty.

7.10 Limitation of liability

(a) Regardless of the legal grounds, the liability of ZÜHLKE is limited to CHF 100,000 for damage suffered by the customer due to a culpable breach of Contract by ZÜHLKE.

(b) All liability for data losses, lost profits, unrealised savings, third-party recourse claims, damage caused by business interruptions and all indirect damage and consequential damage is excluded.

(c) The liability limit set out in this section does not apply to personal injuries or damage caused through intent or gross negligence. The liability of ZÜHLKE for such damage is unlimited.

(d) If the Parties have agreed a reduction in fees for a failure to adhere to the Response or Solution Time in an Individual Contract all damage resulting from failure to adhere to the Response or Solution Time shall be considered covered by the agreed fee reduction by ZÜHLKE.

7.11 Obligation to maintain secrecy and return property

(a) The customer and ZÜHLKE shall maintain secrecy on all information about the other party deemed to be confidential by that party to which they become privy during tendering and during the term of the contract. This obligation applies in particular to business and manufacturing secrets. This obligation expires five years after the termination of the contractual relationship. All documentation, whether in the form of paper, electronic material or in any other form, whether in copy or original, containing information concerning the other party that falls under this obligation to maintain secrecy shall be returned in its entirety after completion of this contract. The party under a duty to return material shall however be entitled to keep safely, under lock and key, single copies of the documentation to be returned. Such single copies may only be employed for compliance with statutory obligations or used in cases of legal disputes.

(b) The parties agree to absolute confidentiality towards third parties. Parent companies and subsidiary companies as well as affiliated companies of a party are not considered as third parties.

(c) ZÜHLKE uses cloud services (e.g. Microsoft Office 365) as well as data center services of third Parties for internal and external communication and for the provision of services. The Parties agree that this does not constitute a breach of confidentiality obligations. The obligation to maintain confidentiality shall also apply beyond the termination of the agreement.

7.12 Data protection

(a) The customer acknowledges that subcontractors engaged by ZÜHLKE for the performance of services of the SERVICE MODULE "Operations" may provide services abroad and in accordance with their own data protection policies. The customer confirms that he is aware of these data protection policies and he is in agreement with them.

(b) ZÜHLKE shall commit itself to treat personal data, and in particular that which concerns the customer's employees, customers or business partners, with the greatest of care and confidentiality, to use the personal data only for the purpose of fulfilling this contract in accordance with the instructions provided to it by the customer for this purpose, and in no way or form, neither wholly or in part, to make this available to third parties that are not required to fulfil this contract. ZÜHLKE shall comply with the provisions of the Swiss Data Protection Act when dealing with personal data and in particular take appropriate organizational and technical measures to prevent accidental alteration, destruction or disclosure of personal data.

(c) The customer shall comply independently with the information of the Federal Data Protection Officer (EDÖB), insofar as they relate to the processing of the personal data of the customer.

7.13 Prohibition on soliciting, hiring or otherwise engaging personnel

During the term of the contract and for a period of one year thereafter, solicitation, direct or indirect employment or use of the services in any form of any employees of ZÜHLKE or agents entrusted by ZÜHLKE to carry out the SERVICES requires the prior written consent of ZÜHLKE. In the event that the prohibition on soliciting, hiring or otherwise engaging personnel is violated, then the customer shall pay ZÜHLKE a contractual penalty amounting to CHF 50,000. Payment of the contractual penalty shall not release from further compliance with the infringed duty and shall not exclude the assertion of other damage claims.

7.14 Termination of the contract

7.14.1 Duration and termination of the contract or an individual Service Module

This contract shall be fixed for the minimum term agreed on in the individual contract. The contract may be terminated as a whole or for the individual SERVICE MODULES by either party for the first time at the end of the minimum term. In the event that the contract as a whole or for the individual SERVICE MODULES is not terminated in writing within a three-month notice period, it shall be extended without further notice for an additional 12 months. Termination of only the SERVICE MODULES "Core Services" is not permissible. Where the customer terminates the contract with respect to one or more SERVICE MODULES, ZÜHLKE shall be entitled to adjust the service fees for the SERVICE MODULES that remain in effect.

7.14.2 Extraordinary termination

(a) Either party shall have the right to terminate this contract in writing without complying with the notice period if the other party

(i) becomes insolvent;

(ii) applies for debt restructuring proceedings or concludes a debt restructuring contract or goes through a similar proceeding under bankruptcy law or insolvency law;

(iii) ceases their business activities.

(b) Furthermore, either party shall be entitled to withdraw from the contract or waive subsequent performance pursuant to the provisions of Art. 107 ff. CO in the event that the other contractual party commits a breach of contract and this breach is not resolved during a period of time of a minimum of 30 days appointed in writing. Other provisions in the contract with respect to breach of contract (as defined in paragraph 7.8) take precedence over this provision.

(c) The customer shall in any case remunerate ZÜHLKE for all services rendered under the contract up to and including cancellation of the contract.

7.14.3 Acquisition of software and customer data

In the event that the parties agreed on the SERVICE MODULE "Operations", the customer shall commit to downloading the SOFTWARE and customer data no later than expiry of the notice period for termination of this SERVICE MODULE. Upon expiry of the notice period for termination, ZÜHLKE shall be entitled to erase without further notice the SOFTWARE and customer data, as well as all backup copies from the INFRASTRUCTURE.

7.14.4 Migration support

ZÜHLKE shall support the customer with migration of customer data upon completion of the contract pursuant to paragraph 7.13.1. ZÜHLKE shall offer the customer corresponding services within the framework of a SCOPE OF WORK; the customer's engagement of ZÜHLKE shall take place pursuant to the provisions in paragraph 5.5.

8 Final conditions

8.1 Assignment and transfer

The contract or the individual rights and duties arising thereof may only be assigned or transferred to third parties (incl. affiliates) with the prior written consent of the other contractual party, whose consent shall not be unreasonably withheld.

8.2 Written form

Any changes in and additions to the contract and all other additional agreements must be rendered in writing and signed by both parties to be valid.

8.3 Applicable law and place of jurisdiction

(a) The contract shall be subject exclusively to the laws of Switzerland under the exclusion of the Convention of the United Nations Convention dated April 11, 1980 on the International Sale of Goods and the Swiss Federal Statute on Private International Law.

(b) The ordinary courts of Zurich, Switzerland, shall have exclusive jurisdiction with respect to any and all disputes arising from or in connection with a contract.