

General Purchasing Conditions for Software Licences

Conditions applicable to the purchase of software licences by European Spallation Source ERIC

1. INTRODUCTION

1.1 These General Conditions for Software Licensing (the "**General Conditions**") apply to the licensing by European Spallation Source ERIC ("**ESS**") of software (the "**Software**") and any related and appropriate documentation (the "**Documentation**"), jointly referred to as the "**Deliverables**", as set out and listed in a confirmed written purchase order, quotation or any other agreement for the provision of Deliverables (collectively with these General Conditions referred to as the "**Agreement**") agreed between ESS and the relevant software licensing company (the "**Licensor**"), unless otherwise agreed in a separate written agreement between ESS and Licensor. No terms or conditions contained in any document issued by Licensor that deviate from these General Conditions shall be binding on ESS unless otherwise expressly agreed in writing by ESS or set out in these General Conditions.

2. GRANT OF LICENCE

2.1 Licensor hereby grants ESS the world-wide, non-assignable (subject to Section 11.2.2) and non-sublicensable (subject to Section 2.2 below), non-exclusive licence to use and have used and/or reproduce and have reproduced the Deliverables, or part thereof, for the following purposes: **(i)** to evaluate, develop, modify, test and demonstrate the Deliverables; **(ii)** to merge and integrate the Deliverables into other software and/or documentation, **(iii)** to carry out the design, construction, completion, testing, operation, maintenance, alteration, renewal and demolition of the ESS facility and any other related activity throughout the lifetime of the ESS, **(iv)** to use internally within ESS and **(v)** to make as many copies of the Deliverables as reasonably required for backup purposes.

2.2 Notwithstanding any other provision of these General Conditions, external business partners and licensors of ESS (e.g., third parties involved directly or indirectly in the ESS project; including, but not limited to, institutes, universities and companies that will be in-kind contributors to the ESS project, etc.) are allowed to utilise the Software when working at ESS' site or with ESS' operations at such business partner's or licensor's site, provided that the permitted number of users for each Software is not exceeded at any time. ESS shall be responsible towards Licensor for such business partner's or licensor's use of the Software as if it was a party to the Agreement.

Licensor accepts and undertakes to ensure that any external business partner or other consultant working with ESS who has been granted a license by the Licensor be allowed to register such licence in the licence manager system provided by Licensor when providing consultancy services to ESS, provided that such licenses are of the same or similar type as the licences for the Software, subject to the relevant

agreement for such licences. Further, to the extent any additional licences are required to be purchased in order to achieve the same functionality as a licence for Software purchased by ESS under the Agreement, ESS shall have to purchase/supplement only the additional licences required to achieve such functionality.

2.3 ESS undertakes to not: **(i)** remove any proprietary marks, copyrights, trade secret or warning labels from the Deliverables or copies thereof, **(ii)** copy the Software other than for backup purposes pursuant to Section 2.2, or **(iii)** modify, decompile, disassemble or reverse engineer the Software except to the extent required in order to obtain interoperability with other independently created software or as required by applicable law.

2.4 ESS is entitled to at its discretion transfer the Software between users, servers, computers and networks within ESS' organisation. The Software shall be provided without any kind of locking mechanism.

2.5 Licensor shall retain on behalf of itself, or the original owner, title to intellectual property rights in the Deliverables and no ownership rights in the Deliverables shall be transferred hereunder to ESS.

3. DELIVERY

3.1 Unless otherwise agreed, Licensor shall electronically deliver the ordered number of copies of the Software to ESS within two (2) Business Days from the date of the Agreement or within two (2) weeks in case delivery of tangible media is agreed. The Deliverables shall be DAP (Incoterms 2010) to the premises of ESS.

4. MAINTENANCE AND SUPPORT SERVICES

4.1 If set out in the Agreement, Licensor shall provide maintenance and support services to ESS for the Deliverables in accordance with Schedule 1 hereto.

5. FEES

5.1 The licence fees, as well as any support and maintenance fees, shall be paid by ESS as set out in the Agreement.

5.2 All taxes, charges and fees of any nature that may be imposed by any authority on the amounts paid to Licensor under the Agreement shall be paid and borne by Licensor.

6. WARRANTY

- 6.1 Licensor warrants to ESS that: **(i)** it has obtained all required resolutions for the execution, delivery and performance of the Agreement, **(ii)** it has and will maintain sufficient rights to the Deliverables (including applicable Licensor and third party intellectual property rights) to grant rights and licence(s) under the Agreement, **(iii)** all deliveries of Deliverables to ESS shall be made in accordance with the Agreement and these General Conditions, **(iv)** the Software and any updates shall, when delivered to ESS, be free from any form of malware or code that may be deemed malicious or may otherwise adversely affect any software, **(v)** any updates provided by Licensor will not have an adverse effect on the overall performance and functioning of the Software, and **(vi)** the Software will perform in accordance with and in conformity to relevant specifications and meet what has otherwise been agreed in writing.
- 6.2 The warranties in subsections 6.1 (v) and (vi) above shall only apply to defects and non-conformities reported by ESS in writing during a period of twelve (12) months from delivery to ESS. During said period, Licensor undertakes to promptly (with consideration to the type of defect and impact on ESS' operations) correct any such defect or non-conformity.

7. INFRINGEMENTS

- 7.1 Licensor shall defend, indemnify and hold harmless ESS from and against any and all claims, damages, costs and expenses (including reasonable fees of attorneys and other professionals) incurred as a result of any claim, suit or proceeding brought against ESS based on the allegation that the use of the Software or Documentation constitutes an infringement of intellectual property rights or its application thereof or unauthorised use of know-how, trade secrets or other proprietary rights, provided that ESS: **(i)** promptly notifies Licensor in writing of any allegations of infringement received by ESS, **(ii)** makes no admission relating to the infringement or the alleged infringement, and **(iii)** allows Licensor the sole control over all negotiations and proceedings and gives Licensor all reasonable assistance in connection therewith.
- 7.2 In the event that the Software or Documentation, or any part thereof, is held to constitute an infringement and/or its further use, sale, distribution or (otherwise) disposal is enjoined, Licensor shall promptly, at its own expense and option, either: **(i)** procure the right to continue to use and otherwise dispose of the Deliverables for ESS, or **(ii)** replace the infringing Deliverables with non-infringing software programs with documentation of its equivalent function and performance, or **(iii)** modify the Deliverables so that they become non-infringing without detracting from function or performance.

8. TERM AND TERMINATION

- 8.1 Unless otherwise expressly set out in the Agreement, the Agreement shall **(i)** come into force when signed by both parties and remain in force for such term as specified in the Agreement, and **(ii)** automatically renew for successive periods of one (1) year each unless a party provides the other party with a written notice of termination at least six (6) months prior to the expiration of the then current term.
- 8.2 Either party may immediately terminate the Agreement if the other party: **(i)** substantially breaches the Agreement without remedying such breach within thirty (30) days of the other party's notice thereof, **(ii)** becomes bankrupt or insolvent, or **(iii)** makes an assignment for the benefit of its creditors or

ceases doing business as a going concern. If so terminated by Licensor, all ESS' rights and licenses in respect of the Deliverables furnished hereunder shall cease. If so terminated by ESS, all such rights and licenses shall continue, provided that ESS' use of the Software is subject to a fully paid-up perpetual license purchased by ESS.

- 8.3 Any expiration or termination of the Agreement shall not affect the rights and obligations of the parties that by their nature or express terms are intended to survive.

9. CONFIDENTIALITY

- 9.1.1 If a party (hereinafter, the "**Receiving Party**") receives any information of a confidential or proprietary nature, regardless of form or media ("**Confidential Information**") from the other party (hereinafter, the "**Disclosing Party**"), the Receiving Party shall: **(i)** keep the Confidential Information strictly confidential; **(ii)** make the Confidential Information available only to officers and employees who need to have access for the purpose of the Agreement, **(iii)** not pass the Confidential Information to any third party (even under a confidentiality agreement) without the prior written consent of the Disclosing Party, and **(iv)** use the Confidential Information only for purposes of the Agreement.
- 9.1.2 The foregoing obligations shall not apply to any portion of Confidential Information which the Receiving Party can establish: **(i)** was known to the Receiving Party prior to its receipt from the Disclosing Party, **(ii)** at the time of disclosure was, or thereafter becomes generally available to the public by publication or otherwise through no fault of the Receiving Party, **(iii)** was received without any obligation of secrecy from a third party who, to the best knowledge of the Receiving Party, had the right to disclose the same, **(iv)** was independently developed by the Receiving Party without access or reference to the Confidential Information of the Disclosing Party, or **(v)** was disclosed in order to comply with applicable laws or regulations or with a court or administrative order.

10. LIMITATION OF LIABILITY

- 10.1 If a party breaches the Agreement, it shall indemnify and hold harmless the other party from all damages, losses and costs caused by the breach.
- 10.2 Save for any claims made by ESS under Sections 7 (*Infringement*) or 8 (*Confidentiality*) (all for which no limitation shall apply), a party's total liability for damages under the Agreement shall be equal to: **(i)** in the case of a fully paid-up licence, the licence fee initially paid for the Software, or **(ii)** in the case of a lease licence, the aggregate licensee fee paid by ESS for such lease licence during the twelve (12) months preceding the event that first gave rise to such liability, or **(iii)** the total amount for (i) and (ii) in the case of a fully paid-up licence that is also subject to a subscription fee.
- 10.3 Neither party shall be liable to the other party for any indirect or consequential damages or losses such as (but not limited to): loss of production, profit or goodwill arising out of or in connection with a contract, tort or otherwise. This limitation shall not apply to claims arising out of fraud, wilful misconduct or gross negligence and shall not limit the scope of Section 7.1.

11. MISCELLANEOUS

11.1 Amendments

11.1.1 In order to be valid, amendments to or changes of the Agreement shall be in writing with a clear statement indicating amendments to or changes of the Agreement and signed by the authorized representatives for each party.

11.2 Assignment

11.2.1 Except with the prior written consent of ESS, Licensor may not assign or transfer partially or totally any of its rights or obligations under the Agreement.

11.2.2 ESS shall have the right to assign or otherwise transfer any or all of its rights and obligations under the Agreement to a successor company or other legal entity established by the Partner States in the ESS project.

11.3 No Waiver

11.3.1 The provisions of the Agreement may not be waived except in writing. The failure of a party to insist upon strict adherence to any provision of the Agreement shall not be construed as a waiver of any right under the Agreement and shall not later deprive that party of the right to insist upon strict adherence to the Agreement.

11.4 Severability

11.4.1 In the event that any provision of the Agreement conflicts with applicable law or if any such provision is held invalid by an arbitrator or a court with jurisdiction, such provision shall be deemed to be restated to reflect as closely as possible the original intentions of the parties in accordance with applicable law. The remainder of the Agreement shall remain in full force and effect.

11.5 Anti-Corruption

11.5.1 Licensor warrants that no offer, payment, consideration, or benefit of any kind, which constitutes an illegal or corrupt practice, has been or shall be made, either directly or indirectly, as an inducement for the award of the Agreement or in the subsequent execution of the Agreement. Any such practice will be grounds for terminating the Agreement without any compensation to Licensor and for such other additional actions, civil and/or criminal, as may be applicable.

11.6 Use of ESS images or logos

11.6.1 Licensor shall not use or make reference to any images or logos of ESS without the prior written consent of ESS.

11.7 Export

11.7.1 Licensor is responsible for obtaining and maintaining the export licences required for delivery of Deliverables to ESS. Licensor shall inform ESS of and issue all documentation required by law, regulation or reasonable request of ESS regarding the export, import or re-export of Deliverables.

11.8 Publicity

11.8.1 Without the prior written consent of ESS, Licensor shall not publicise the Agreement or any part thereof unless it is obliged to do so to comply with applicable laws or regulations or with a court or administrative order.

12. GOVERNING LAW AND RESOLUTION OF DISPUTES

12.1 The Agreement and all rights and obligations of the parties shall be governed by, construed and enforced in accordance with the substantive laws of Sweden without giving effect to any choice of law rules and principles thereof.

12.2 Any dispute, controversy or claim arising out of or in connection with the Agreement, or the breach, termination or invalidity thereof, shall be finally settled by arbitration administered by the Arbitration Institute of the Stockholm Chamber of Commerce (the "SCC"). The Rules for Expedited Arbitrations shall apply, unless the SCC in its discretion determines by taking into account the complexity of the case, the amount in dispute and other circumstances that the Arbitration Rules shall apply. In the latter case, the SCC shall also decide whether the Arbitral Tribunal shall be composed of one or three arbitrators. The seat of arbitration shall be Lund, Sweden.

12.3 The Parties undertake and agree that arbitral proceedings pursuant to this Agreement shall be kept strictly confidential, and all information disclosed in the course of such proceedings, as well as the contents of any decision or award made, shall constitute Confidential Information.

1. SCHEDULE 1 TO GENERAL CONDITIONS

1.1 Maintenance and Support

1.1.1 As set out in the Agreement, Licensor shall provide certain maintenance and support services to ESS pursuant to this Schedule 1, if so ordered and paid for by ESS (as applicable).

1.2 Helpdesk

1.2.1 During regular business hours, Licensor shall provide:
(i) consultation and advice to ESS regarding installation, operation and maintenance of the Deliverables, and
(ii) general advice regarding submitted service requests. The helpdesk services shall be primarily provided by telephone or electronic mail support.

1.3 Updates

1.3.1 Licensor shall continuously develop updates for the Software. As an update is completed and made generally available to Licensor's customers, Licensor undertakes to inform ESS that such update is available and how such update may be obtained (at no extra cost to ESS as long as the Agreement includes maintenance and support services). Licensor shall provide information to ESS on how to install such updates. However, ESS reserves the right to decide if or when an update shall be installed.

1.3.2 Any Software being updated according to this Section 1.3 shall become licensed Software and all updates shall be provided under the terms and conditions set out in the Agreement.

1.4 Additional terms

1.4.1 Reporting and rectification of errors and service requests, as well as response/remedy times and other conditions applicable for the provision of support and maintenance services, shall be provided on the terms agreed between the parties in the Agreement.