

## TOOLBOX SOFTWARE NORTH AMERICA INC.

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### **General Terms and Conditions of Sale, Delivery and Performance of Services**

These General Terms and Conditions ("Terms") are applicable to all U.S. customers (the "Customers" and each, individually, a "Customer") of Toolbox Software North America Inc., a Delaware corporation (the "Company").

#### **1. Terms and Conditions of Sale:**

1.1. Company shall sell and deliver to Customer and/or perform installation and software programming services (the "Services") for Customer, and Customer shall purchase and accept from Company the products (herein, the "Products") and Services described on or in any confirmed order, agreement or quotation, or any combination thereof (the "Order"), pursuant to the terms and conditions of the Order and those specified below, which taken together shall constitute the entire agreement between Company and Customer regarding the Products and Services (herein, this "Agreement").

1.2. No other terms or conditions shall be of any effect unless otherwise specifically agreed to by Company in a separate written agreement duly signed by an officer of the Company. Customer will be deemed to have assented to all Terms if any part of the Products or Services is accepted by the Customer. If Customer finds any Term not acceptable, Customer must so notify the Company at once and must reject the Products or Services delivered under this Agreement. Any additional or different terms or conditions contained in Customer's order or response hereto shall be deemed objected to by Company and shall be of no effect. No general terms and conditions of a Customer shall at any time form a part of the content of any contract or agreement between the Customer and the Company, even if they are not further expressly rejected by the Company.

1.3. Toolbox Software GmbH's Manufacturer's Representations and Warranties shall apply to all Products manufactured by Toolbox Software GmbH.

1.4. Unless otherwise agreed in writing, all quotations for Products or Services are valid for a period of one (1) month from the date of issue. Subsequent modifications in quantity or quality, if such are requested by Customer, generally will cause a modification of the quoted price. Drawings and samples enclosed with any quotation remain the property of Company. All drawings and samples shall be treated confidentially by Customer and must be returned to Company after usage.

1.5. No Order is binding upon the Company until the earlier of acceptance of the Order in writing or the delivery of the Products to the Customer or Performance of Services for the Customer. Notwithstanding any prior acceptance of an Order by Company, Company shall have no obligation if the Customer is in breach of any of its obligations hereunder, or any other agreement between the Customer and Company, at the time Company's performance was due.

1.6. All verbal agreements concerning the terms of any Order, including agreements made by telephone, shall have no force and effect unless and until acknowledged by the Company in writing.

1.7. Customer shall bear all costs associated with the cancellation or modification of the Order.

## **2. Prices:**

2.1. All Products shall be sold DELIVERED DUTY PAID (per Incoterms 2000) to Customer's facilities.

2.2. Unless otherwise agreed upon in writing, the price of the Products and Services shall be the Company's current prices in effect from time to time. A price list is available on request.

2.3. Company may, without notice to Customer, increase the price of the Products or Services by the amount of any new or increased tax or duty (excluding franchise, net income and excess profits taxes) which Company may be required to pay on the manufacture, sale, transportation, delivery, export, import or use of the Products, the materials required for their manufacture or which affects the cost of such materials or the Services.

## **3. Terms of Payment:**

3.1. Unless otherwise agreed to in writing by the Company, the amount invoiced shall be due and payable within eight (8) days from the invoice date. In the event that Company and Customer have agreed on the delivery of a complete system (the "System"), including both the delivery of Products and the performance of Services, a final installment of ten percent (10%) of the amount invoiced shall only become due after Customer has tested the System and has signed an acceptance protocol ("Acceptance Protocol"). The contents of the Acceptance Protocol shall be set forth in a separate document and shall be agreed upon between Company and Customer prior to the confirmation of any Order. The System shall be deemed accepted if the Customer uses the System for a term of six (6) months following installation and programming.

3.2. Customer shall make payments by check or wire transfer to the account indicated on the invoice without a cash discount or offset and the Company shall not be required to incur any expense to receive timely payment in full as required by this Agreement.

3.3. Company may, without notice, change or withdraw extensions of credit at any time. If Company ceases to extend credit terms before shipment, Customer's sole remedy shall be cancellation of its order. If Customer does not receive notice before shipment, its sole remedy shall be rejection of the Products immediately upon delivery.

3.4. If the Customer fails to make payment on or before the date required, Customer shall pay interest to the Company at the rate of one and one-half percent (1.5%) per month or such lesser amount permitted by law. The specification or charging of interest shall not be deemed an agreement to extend credit.

3.5. If Customer fails to observe these Terms or the terms of any other agreements between Company and Customer, or if Customer becomes insolvent, all balances then due and owing to the Company shall become due immediately, notwithstanding any agreed upon payment periods. Any Orders that have been confirmed by the Company, but not yet filled, shall in such cases become cancelable at the sole discretion of Company.

3.6. Customer does not enjoy a right of set-off under any circumstances.

**4. Delivery Terms:**

4.1. Company shall use its reasonable efforts to provide the Products for Customer by the agreed upon date. However, time shall not be of the essence, and except in cases of Company's willful misconduct or gross negligence, Company shall not be liable to Customer for delays in delivery.

4.2. In cases of deliveries of Products manufactured to Customer's specification ("Special Orders"), and unless otherwise agreed upon in writing, all tools, models, plans, blueprints or other devices and/or documents used and/or developed by Company (the "Tools") in order to fulfill any Order or Special Order are the property of the Company, even if the cost of development and/or manufacturing of such Tools was wholly or partially borne by the Customer.

**5. Security Interest:**

5.1. As security for the timely payment and performance of all Customer's indebtedness to Company, Customer hereby grants to the Company a first priority security interest in the Products following delivery thereof to Customer ("Security Interest"). Such Security Interest shall remain in force until payment in full of the entire purchase price for the Products and Services has been received by Company.

5.2. If so requested by Company, Customer shall deliver to Company, in form and substance satisfactory to Company, and duly executed as required by Company, financing statements and other security interest perfection documentation, duly filed under the UCC in all jurisdictions as may be necessary, or in Company's opinion, desirable, to perfect Company's security interest and lien in the Collateral, in order to establish, perfect, preserve and protect Company's security interest as a legal, valid and enforceable security interest and lien, and all property or documents of title, in cases in which possession is required for the perfection of Company's security interest.

**6. Limitation of Liability:**

6.1. IN NO EVENT SHALL COMPANY BE LIABLE FOR ANY INDIRECT, INCIDENTAL, PUNITIVE, SPECIAL OR CONSEQUENTIAL DAMAGES, INCLUDING BUT NOT LIMITED TO, DAMAGES FOR LOSS OF PROFITS, REVENUE, GOODWILL OR USE, INCURRED BY CUSTOMER OR ANY THIRD PARTY, WHETHER IN AN ACTION IN CONTRACT, TORT, STRICT LIABILITY, OR IMPOSED BY STATUTE, OR OTHERWISE, EVEN IF ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

6.2. NOTWITHSTANDING THE TERMS AND CONDITIONS SET FORTH IN SECTION 6.1., COMPANY'S LIABILITY – WHETHER BASED UPON CONTRACT, TORT, EQUITY, NEGLIGENCE OR ANY OTHER LEGAL CONCEPT – SHALL IN NO EVENT EXCEED THE VALUE OF CUSTOMER'S ORDER OR THE ORDER VALUE FOR (1) CALENDER YEAR, WHICHEVER AMOUNT IS LOWER. IT IS AGREED AND ACKNOWLEDGED THAT THE PROVISIONS OF THIS AGREEMENT ALLOCATE THE RISKS BETWEEN COMPANY AND CUSTOMER, THAT COMPANY'S PRICING REFLECTS THIS ALLOCATION OF RISK, AND BUT FOR THIS ALLOCATION AND LIMITATION OF LIABILITY, COMPANY WOULD NOT HAVE ENTERED INTO THIS AGREEMENT.

6.3. IN JURISDICTIONS THAT LIMIT THE SCOPE OF OR PRECLUDE LIMITATIONS OR EXCLUSION OF REMEDIES OR DAMAGES, OR OF LIABILITY, SUCH AS LIABILITY FOR GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OR DO NOT ALLOW IMPLIED WARRANTIES TO BE EXCLUDED, THE LIMITATION OR EXCLUSION OF REMEDIES, DAMAGES OR LIABILITY SET FORTH ABOVE ARE INTENDED TO APPLY TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW. CUSTOMER MAY ALSO HAVE OTHER RIGHTS THAT VARY BY STATE, COUNTRY OR OTHER JURISDICTION.

**7. Force Majeure:**

7.1. Company shall not be liable to Customer or any other person for any failure or delay in the performance of any obligation under this Agreement due to events beyond its reasonable control, including, but not limited to, fire, storm, flood, earthquake, explosion, accident, acts of the public enemy, wars, riots and public disorder, sabotage, strikes, lockouts, labor disputes, labor shortages, work slowdown, stoppages or delays, shortages or failures or delays of energy, materials, supplies or equipment, transportation embargoes or delays, acts of God, breakdown in machinery or equipment, and, except as otherwise set forth in this Agreement, acts or regulations or priorities of the federal, state or local governments.

7.2. When the event operating to excuse performance as set forth in Section 7.1 shall cease, this Agreement shall continue in full force until all deliveries have been completed.

**8. Performance of Services:**

8.1. Services shall be provided by Company in a professional manner and by personnel carefully selected by Company for the task at hand.

8.2. Services are being provided during regular business hours only.

8.3. The Service fee charged by Company includes all travel and living expenses, as well as insurance coverage for Company's personnel.

8.4. Except in cases of gross negligence and willful misconduct, Company shall be liable for proper selection and supervision only. The terms and conditions set forth in Section 6 shall apply to the Services as well.

**9. Miscellaneous Terms:**

9.1. This Agreement and all claims arising out of or related to this Agreement, including tort claims, shall be governed by and construed in accordance with the laws of the state of New York, without giving effect to any choice or conflict of law provision or rule that would cause the application of the laws of any jurisdiction other than New York. The application of the Convention on Contracts for the International Sale of Goods (CISG) is hereby excluded.

9.2. Any controversy or claim arising out of or relating to this Agreement, or the negotiation or breach thereof, shall be exclusively settled by arbitration in accordance with the International Arbitration Rules of the American Arbitration Association ("AAA"). The award shall be final and binding. Judgment upon the award rendered by the arbitrator or the arbitrators may be entered in any court having jurisdiction thereof. The arbitration shall be held in New York, New York, shall be conducted in the English language, and shall be conducted (i) if the amount in dispute is less than two hundred fifty thousand dollars (\$250,000), before a single arbitrator mutually agreeable to Company and Customer, or if no agreement can be reached, then selected by the AAA, or (ii) if the amount in dispute is two hundred fifty thousand dollars (\$250,000) or more, before three (3) arbitrators. The arbitrator(s) shall make detailed findings of fact and law in writing in support of his, her or their decision, and shall award reimbursement of attorney's fees and other costs of arbitration to the prevailing party, in such manner as the arbitrator shall deem appropriate. In addition, the losing party shall reimburse the prevailing party for reasonable attorneys' fees and disbursements, the costs of the arbitration (including but not limited to the fees and expenses of the arbitrator and expert witnesses) and the costs incurred by the prevailing party in successfully seeking any preliminary equitable relief or judicially enforcing any arbitration award.

9.3. If any provision contained in this Agreement is held by final judgment of a court or tribunal of competent jurisdiction to be invalid, illegal or unenforceable, such invalid, illegal or unenforceable provision shall be severed from the remainder of this Agreement, and the remainder of this Agreement shall be enforced. In addition, the invalid, illegal or unenforceable provision shall be deemed to be automatically modified, and, as so modified, to be included in this Agreement, such modification being made to the minimum extent necessary to render the provision valid, legal and enforceable. Notwithstanding the foregoing, however, if the severed or modified provision concerns all or a portion of the essential consideration to be delivered under this Agreement by one party to the other, the remaining provisions of this Agreement shall also be modified to the extent necessary to equitably adjust the parties' respective rights and obligations hereunder.

9.4. In the event of a violation or threatened violation of Company's proprietary rights, Company shall have the right, in addition to such other remedies as may be available pursuant to law or this Agreement, to temporary or permanent injunctive relief enjoining such act or threatened act. The parties acknowledge and agree that legal remedies for such violations or threatened violations are inadequate and that Company would suffer irreparable harm.

9.5. The parties hereto are independent contractors and nothing in this Agreement will be construed as creating a joint venture, employment or agency relationship between the parties.

9.6. This Agreement shall apply to all sales of the Products and performance of Services for Customer.

9.7. This Agreement, including any Schedules attached hereto, contains the entire agreement of the parties with respect to the subject matter of this Agreement, and supersedes all prior agreements between them, whether oral or written, of any nature whatsoever with respect to the subject matter hereof. This Agreement is binding upon the parties hereto, their successors and permitted assigns.

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