

**Terms and Conditions of Sale and Delivery**  
**aps Solutions GmbH (APS)**  
**Gutenbergstraße 1**  
**D-82178 Puchheim-München**  
as of April 1, 2002

**Preamble**

APS sells products such as interfaces for semiconductor contacts which are produced according to Customer's specifications, as well as standard products such as standard software. Interfaces are delivered according to Customer's specifications. Customer only provides the specifications without informing APS about the intended applications or purpose of the interfaces. The objectives pursued by Customer shall not form part of the contractual relationship between APS and its customer. Interfaces are expensive parts, often subjected to extreme wear and tear which are susceptible to specification errors, operation errors and failure caused by components in the system.

**1. Terms and conditions, offers, conclusion of contract**

**1.1** The following terms and conditions shall apply exclusively to all offers, deliveries and services provided by APS. Terms and conditions of Customer are hereby being opposed.

**1.2** Any order signed by Customer shall be deemed a binding offer which APS can accept by written order confirmation within 10 working days after receipt.

**1.3** Any oral or telephone statements as well as collateral agreements made or concluded by APS's employees who are not authorised representatives of APS shall only be valid if confirmed by APS in writing.

**1.4** Illustrations, drawings, weight specifications, descriptions etc. in offers, price lists, presentations, analyses or, if applicable, other printed information or information provided using electronic media have been compiled and investigated as best as possible but shall only be decisive if expressly designated as binding. APS reserves the title and copyright to preliminary estimates of costs, drawings and other written matter and materials. Same shall not be made available to third parties and shall, upon APS's request, be returned to APS should the contract not be concluded.

**2. Shipment and passing of risk**

**2.1** Shipment shall be effected at Customer's risk. The risk shall pass on to Customer as soon as the goods have been handed to the forwarding agent by APS. If shipment of the goods is delayed by Customer or its agent, the risk of loss or deterioration of the goods shall pass on to Customer upon the date of ASP's readiness to ship same.

**2.2** Upon Customer's request, APS shall insure the delivered goods against theft, transport damage, damage by fire or water and other insurable risks involved in transport.

**3. Prices and terms of payment**

**3.1** Unless agreed otherwise, APS's prices shall be understood ex works, exclusive of the respective value added tax payable for deliveries within Germany. Beyond that, shipping expenses (including postage and packing) as well as customs duties and freight costs, if any, shall be charged to Customer.

Prices for deliveries to member states of the EU are not subject to VAT and are exempt from taxation as so-called inter-community deliveries. Should Customer not be rated as entrepreneur within the meaning of the Federal German Turnover Tax Act, invoices addressed to Customer shall state the prices plus the VAT payable in the respective member state. Same shall apply to export deliveries to other countries.

**3.2** Prices shall generally be calculated in €. If a contract is concluded in foreign currency, same shall be calculated on the basis of the current exchange rate to € within the scope of the respective offer. In case of a difference in exchange rate at the time of payment, the purchase price shall be increased or reduced according to the current rate.

**3.3** Unless agreed otherwise, APS' invoices shall be payable within 30 days of the date of invoice with no discount. All payments shall be effected free of extra charges and exclusively by way of bank transfer to the bank account indicated by APS.

**3.4** All payments effected by Customer shall be applied to the customer's due and valid debts in the following order: costs, interest, compensation for damages, claims from deliveries of goods and services. In case of several similar debts, the least secured debt shall be paid off first, in case of several equally secured debts, the older debt shall be paid off and in case of debts of the same maturity, each debt shall be paid off pro rata.

**3.5** Customer claims may only be set off against APS's claims if such claims have been acknowledged by APS or have been confirmed by legally effective means. Customer shall have no right of retention unless such right is based on the same contractual relationship. In case of a retaining lien, Customer may only withhold payment to the extent deemed adequate with reference to the counterclaims and only until such counterclaims have been settled.

**3.6** If, following the conclusion of the contract, it becomes obvious that APS's claim for remuneration is at risk due to Customer's inadequate ability to pay or readiness to pay, APS shall be entitled to withhold fulfilment of its own contractual obligations until Customer has either effected the requested payment or has provided sufficient security within a period of time set by APS. In particular, APS may presume Customer's inadequate ability to pay or readiness to pay if

- Customer is in default more than 4 weeks with reference to debts that are due, uncontested and not subjected to any plea and that result from the business relationship with APS. or
- a petition in insolvency has been filed with reference to Customer's assets.

This shall not affect any of APS's other claims or rights.

**4. Delivery and default in delivery**

**4.1** Terms of delivery and deadlines for the rendering of services shall only be binding for APS if they have been confirmed by APS separately and in writing and have been fixed conclusively. Terms of delivery and dates given in days or

weeks, i.e. without stating a precise date, shall generally be deemed non-binding delivery terms. In such case, Customer shall be entitled to fix a reasonable time limit after the envisaged deadline has passed and to request performance of the outstanding services from APS in writing; Customer's claim to performance shall become due upon expiration of such time limit. The aforesaid shall not apply if Customer fails to perform the duty of co-operation incumbent upon Customer pursuant to Section 5 hereof.

**4.2** APS shall be entitled to partial deliveries and to charge a proportional amount therefor at any time if such deliveries are acceptable to Customer. APS shall bear any additional delivery expenses unless such partial deliveries have been upon Customer's request.

**4.3** APS shall be entitled to deliver goods that vary slightly in quality compared to the goods ordered (with reference to measurements data and weight) if such difference is acceptable to Customer.

**4.4** Should APS fail to render the services that have been contracted and that are due within a reasonable period of time set by Customer, Customer shall be entitled to withdraw from the contract after such period of time has lapsed and to claim compensation for damages in lieu of performance according to Section 7 hereof or to claim reimbursement of expenses pursuant to Section 284 German Federal Civil Code (BGB) – unless APS proves the absence of fault on its part. The aforesaid shall not apply if APS had no cause for reckoning with the event.

**4.5** Should Customer fail to exercise the rights stated in Section 4.4 in the above within a reasonable period of time that has been set by APS in writing, the exercising of said rights shall be subject to the unsuccessful expiration of an additional reasonable term of performance to be fixed by Customer in writing.

**4.6** Should it become impossible for APS or for everyone else to perform the contractual obligations due, Customer shall be entitled to withdraw from the contract and to claim compensation for damages in lieu of performance according to Section 7 hereof or reimbursement of expenses pursuant to Section 284 German Federal Civil Code (BGB) – unless APS provides proof that APS can not be held liable for such failure to perform. Same shall also apply if an agreed delivery of goods of the same kind or, delivery of part of the goods becomes impossible and Customer does not wish to accept partial performance.

**4.7** Should defaults in delivery occur as a result of impediments that were unforeseeable for APS or that APS could not avert by adequate precautionary measures (e.g. labour conflicts, operating trouble, delays in the procurement of materials, intervention by authorities, etc., impediments in the area of APS's suppliers), the terms of delivery shall be extended reasonably. Should any default in delivery caused by one of the impediments mentioned above exceed a period of 2 months Customer shall be entitled to withdraw from the contract fully or in part. Should delivery become impossible or unacceptable to APS as a result of events of said kind, APS shall also be entitled to withdraw from the contract.

**5. Customer's obligations**

**5.1** Customer is aware that the interfaces delivered by APS are technical products manufactured on the basis of specifications provided by Customer (contractual target quality of the goods). Therefore, Customer shall be obligated to provide APS with the requested specifications in due time and in complete and written form and to furnish further details if requested by APS. In any case, it shall be entirely up to Customer to examine suitability of said specifications for the intended applications in advance. Customer alone shall be responsible for suitability of the provided specifications for the intended applications.

**5.2** Customer shall take out adequate insurance against the typical risks involved in the use of products based on customer specifications and in the use of interfaces in particular (e.g. production failure). APS's liability in case of damages due to slight negligence shall be subject to Section 7.3 hereof.

**5.3** Customer shall at its expense provide the space, equipment and staff necessary for the unpacking and installation of the delivered goods according to Manufacturer's instructions. The goods shall be put into operation by Customer. APS shall not provide instructions.

**5.4** Customer shall test the products/interfaces delivered by APS on the basis of Customer's specifications without delay using the appliances and procedures customary in the respective industry to determine if same comply with the specifications provided. Customer shall report to APS any deviations from the specifications provided that were detected during the inspection within 5 working days following receipt of the goods. Customer shall report deviations that have not been detected during the inspection within 5 working days following their discovery. Should deviations not be reported or not be reported in due time, the delivered goods shall be deemed accepted with reference to such deviations; any warranty claims pursuant to Section 6 hereof on Customer's part shall be excluded.

**5.5** Customer shall take all adequate precautionary measures to avoid the loss of data and programs, e.g. with reference to software, and, in particular, shall make backup copies of all data and programs that are appropriate with reference to the damage that might occur in case of a loss.

**5.6** Should Customer fail to perform or to duly perform the duties stated in Section 5.1 and Section 5.2 in the above within an adequate time limit set by APS in writing, APS shall be entitled to withdraw from the contract after unsuccessful expiration of the time limit if the contract is no longer acceptable to APS.

**6. Warranty**

**6.1** Subject to the following terms, APS warrants that the goods it delivers shall be free of faults for a period of one year following receipt of the delivered goods. The aforesaid shall not apply to possible damage claims on Customer's part resulting from incidents as stated in Section 7.1 hereof and to the extent that longer time limits are requested by the legal provisions of Section 438 Par. 1 No. 2 (buildings and objects pertaining to buildings), Section 479 Par.1 (right of recourse) and Section 634a Par. 1 No. 2 (defects of construction work) Federal German Civil Code (BGB).

**6.2** APS's liability with reference to delivered interfaces shall be limited to APS's fulfilment of promises it has made and compliance with specifications provided.

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In no case shall warranty be extended to the intended applications of the interfaces that have not been included in the Contract.

Warranty shall be limited to reproducible defects with reference to deliveries of software, interfaces and other goods. Any defect must be reproducible at APS's if the delivered goods are returned to APS, or at Customer's in the presence of a APS employee.

- 6.3** Should any deliveries be defective, APS shall, at its dutiful discretion, remedy such defects or effect a new delivery (subsequent performance). APS shall bear all expenses incurred for such subsequent performance. However, Customer shall bear all transportation costs, work expenses and other costs incurred by APS in connection with the testing of the goods reported as defective if the tests show that the defects reported by Customer are not subject to APS's warranty obligations.

If, in the course of subsequent performance, APS substitutes new parts for all or some of the individual parts of a delivery, the replaced parts shall become APS's property.

- 6.4** Should subsequent performance (or multiple subsequent performance as the case may be) fail or should APS allow an appropriate subsequent time limit set by Customer in writing to lapse – at least 6 weeks for interfaces - Customer may, at its discretion, reduce the price to a reasonable degree or withdraw from the contract if the defect in question is material and – unless APS proves the absence of fault on its part with regard to such material defect – to claim compensation for damages in lieu of performance according to Section 7 hereof or reimbursement of expenses pursuant to Section 284 German Federal Civil Code (BGB). This shall not apply if APS had no cause for reckoning with the event.

- 6.5** Should Customer fail to exercise the rights stated in Section 6.4 in the above within a reasonable period of time that has been set by APS in writing, the exercising of said rights shall be subject to the unsuccessful expiration of an additional reasonable period of time to be fixed by Customer in writing.

- 6.6** Any warranty claims on Customer's part shall not apply if

- operation and maintenance instructions provided by APS are not observed by Customer or if the delivered goods are handled improperly or kept in an inappropriate place and not in conformity with Manufacturer's instructions, or
- Customer or a third unauthorised party has interfered with or altered the delivered goods

unless Customer provides proof that the above-mentioned actions will not impede APS's subsequent performance and, in particular, APS's testing and remedying of errors pursuant to Section 6.3. hereof or will only render same more difficult to an insignificant degree.

- 6.7** Suitability of the goods delivered by APS for a certain application shall not be warranted unless the option of such application is stated in the written instructions delivered with the goods or APS has expressly confirmed suitability for a certain application in writing.

- 6.8** Considering the present state of the art, even the most diligent programming procedure can not exclude the possibility of faults in computer programmes for all areas of application. Therefore, APS shall not warrant

- faultlessness of the software distributed by APS with reference to insignificant faults, as well as
- suitability of the software for the application intended by Customer as well as
- the results achieved by applying such software.

- 6.9** Complete technical data shall be provided by Manufacturer and shall not be covered by APS's warranty. In case of a faultiness of same and defects of the delivered goods resulting therefrom, Customer may assert warranty claims against APS pursuant to this Section if and to the extent that APS is the manufacturer of said goods or Customer has already unsuccessfully sued Manufacturer without being liable for such lack of success or if suing Manufacturer is unacceptable to Customer. APS hereby assigns any warranty claims against Manufacturer which it may acquire in the future due to faulty technical data referring to the delivered goods to Customer. Costs that cannot be recovered from Manufacturer shall be borne by APS.

## **7. Liability**

- 7.1** The following provisions concerning APS's liability shall apply to all claims for compensation for damages and all occurrences of liability based on whatever legal grounds (e.g. warranty, default, impossibility of performance, breach of duty in contractual relationships and other relationships under the law of obligations, impediments upon conclusion of the contract, breach of the obligation to show due respect, tort, etc.), with the exception of:

- Customer's claims for damages resulting from the violation of life, body or health,
- Customer's claims and rights in case of APS's malicious concealment of defects or the lack of a quality that APS has guaranteed,
- Customer's claims and rights based on wilful or grossly negligent behaviour on APS's part, or on the part of its legal representatives or subagents, as well as
- Customer's claims pursuant to the Product Liability Act.

The aforementioned exceptions shall be subject to statutory provisions.

- 7.2** In case of damages caused by slight negligence, APS shall only be liable if material duties are violated by APS's legal representatives or subagents; such liability shall be limited to compensation for typical damages that are foreseeable for APS upon conclusion of the contract.

APS's liability shall be excluded in case of damages due to slight negligence or simple negligence.

- 7.3** In case of typical consequential damages (e.g. production failure at Customer's) that are imminent if the interfaces sold by APS are defective – such defects tend to be disproportionately high in comparison to the value of the goods - APS shall only be held liable pursuant to Section 7.2 in the above if and to the extent that

- Customer has suffered more than insignificant nuisance,
- Customer has checked compliance with the specifications of the interfaces provided to an adequate extent by sampling methods, standardised and non-redundant procedures or application of other interfaces if appropriate and has also performed its duty to avoid and limit damages to a reasonable degree,
- Customer can not claim compensation from the insurer despite adequate insurance against the risks typically involved with the operation of interfaces (see Section 5.2).

- 7.4** To the extent that APS is held liable pursuant to Sections 7.2 and 7.3 in the above, such liability shall be limited to the five-fold amount of the net purchase price of the delivered goods to which the breach of duty pertains per damaging event. Should higher damages be imminent, Customer shall provide APS with timely notification thereof – including precise quoting of the respective project - in each individual case.

- 7.5** Customer's claims for damages shall become statute-barred

- one year following receipt of the goods in case of a warranty for defects pursuant to Section 6 hereof;

- after one year commencing the end of the year in which the claims originated and Customer learned or, without gross negligence should have learned about the circumstances giving rise to such claim and about the debtor as such. Regardless of Customer's knowledge or grossly negligent lack of knowledge thereof, the claims shall become statute-barred five years after their emergence or, regardless of their emergence or of a knowledge thereof or grossly negligent lack of knowledge thereof, ten years after the occurrence of the respective act, breach of duty or other damaging event (maximum period).

- 7.6** APS's liability for defects requiring no fault on APS's part that have already existed upon conclusion of the contract and that relate to owner and user relationships under the law of tenancy or to other owner and user relationships is hereby expressly excluded.

## **8. Retention of title**

- 8.1** APS shall retain title to all goods delivered by APS – including goods that have already been paid for – until all of APS's claims resulting from the entire business relationship with Customer have been satisfied.

- 8.2** Customer shall not be entitled to pledge the goods subject to a retention of title or to transfer same as a security. Should a third party acquire any rights to the secured goods, Customer hereby assigns to APS all rights and claims accruing with regard to said event; APS hereby accepts the assignment. Customer shall be obligated to notify APS without delay of any pledge or seizure attachment of the secured goods or of any other disposal of said goods by a third party.

- 8.3** Customer shall be entitled to resell the goods delivered by APS in the course of proper business transactions. With regard thereto, Customer hereby assigns to APS all claims accruing with regard to the resale of the secured goods; APS hereby accepts the assignment. Provided Customer complies with all contractual obligations towards APS, it shall be entitled to collect the claims assigned to APS as a security. APS shall be entitled to request Customer to disclose the assignment by way of security to the third-party purchaser or to hand over all papers and documents required to assert its claims.

- 8.4** In case of a default in payment or any behaviour in violation of the contract on Customer's part or in case of imminent danger for APS's proprietary rights, APS shall be entitled to put the goods in safe custody that are subject to a retention of title and to take possession of same. This shall not be deemed a withdrawal from the contract unless Section 503 Par. 2 German Federal Civil Code (BGB) is applicable.

## **9. Promotional statements**

Customer undertakes to engage in promotional activities for the software delivered by APS only in such manner as agreed upon by APS in advance. In case of a contravention, Customer shall indemnify APS against any and all consequences of its incorrect product-related promotion activities and shall compensate APS for any and all damages incurred by APS due to a breach of said duty.

## **10. Place of performance, place of jurisdiction, applicable law, sundry terms**

- 10.1** Should one of or several of the provisions hereof be or become partly or completely invalid or impracticable, this shall not affect the validity of the remaining provisions.

- 10.2** Munich shall be the exclusive place of performance for all delivery and payment obligations.

- 10.3** Munich shall be the place of jurisdiction for all disputes with merchants, legal entities under public law and persons not having domestic venue. Same shall apply to disputes with persons whose place of residence or permanent address is moved to a place outside of the Federal Republic of Germany after conclusion of the contract or whose place of residence or permanent address is unknown at the date an action is brought. APS shall also be entitled to commence an action at the customer's registered seat.

- 10.4** The laws of the Federal Republic of Germany shall exclusively apply to all legal relations between Customer and APS.

- End of the terms and conditions -