General Terms and Conditions
for Deliveries and Services
of Flexus AG

From: January 1st 2020

1. Scopes of application

1.1. Scope of application

In all contractual relationships in which FLEXUS AG (hereafter referred to as "FLEXUS") provides services to Customers (hereafter referred to as "Customer"), the contractual and licensing conditions contained herein will apply exclusively. In all other respects, the statutory provisions will apply. This will also apply if reference to this is no longer expressly made in ongoing business relations. Conflicting or supplementary conditions of the Customer will not become subject matter of the contract - except in case of a prior written agreement by FLEXUS - even if FLEXUS executes a contract or provides a service without expressly objecting to such conditions. These contractual and licensing conditions also apply to the pre-contractual obligation, especially with regard to the limitation of liability and non-disclosure obligations. The special terms and conditions, contractual and licensing conditions of FLEXUS and the manufacturer of the third party software will take precedence in the provision, maintenance and servicing of third party software and data.

1.2. Services

These contractual and licensing conditions cover the services offered by FLEXUS, such as the provision of standard software, the creation of individual software solutions, software maintenance and servicing, technical support and installation works, the selling of hardware with or without individual consulting or customizing, general consulting or other IT services as well as the training of the employees of the Customer.

2. Initiation and conclusion of contract

2.1. Offers

Offers made by FLEXUS are non-binding and subject to confirmation unless expressly declared as binding offer. FLEXUS can accept orders placed by the Customer within 4 weeks. In case of doubt, the content of the order confirmation of FLEXUS will be authoritative for the content of the contract, provided the Customer has not immediately objected to the content of the order confirmation.

2.2. Written form

All notices of termination, setting of deadlines and reminder notices of the Customer must be in writing to become effective. Contractual warranties and commitments, especially if they go beyond the scope of these terms and conditions, require the express and written confirmation by FLEXUS AG.

2.3. Pre-contractual information provided

Items and documents (e.g. software, physical and non-physical presentations and proposition) provided to the Customer in advance of the agreement are intellectual property of FLEXUS AG; they may not be duplicated or made accessible to third parties. If software is provided to the Customer for test purposes, the right to use this software expires after an adequate or specifically agreed test phase. In particular, if no contract is concluded, all items and documents provided must be returned or their deletion proven to FLEXUS. In all other respects, the non-disclosure obligations in accordance with Clause 13.1 will apply.

3. Time of service

Appointed dates and fulfillment dates are non-binding unless they are expressly declared by FLEXUS to be binding as such in writing. If the Customer sets deadlines or grace periods for the fulfillment, subsequent fulfillment or elimination of a circumstance, these deadlines must be set adequately, that means at least 5 working days. If the unsuccessful expiration of a deadline or grace period is to result in the cancellation of the contractual binding or a reduction in payment, this must be expressly threatened by the Customer at the time of setting the deadline. The aforementioned declarations must be made in writing to be effective. The obligation of FLEXUS for implementation only starts with the acceptance of the concept by the Customer. If FLEXUS waits for cooperation or information from the Customer or is hindered in the execution of the order by strike, lockout or other circumstances for which FLEXUS is not at fault, delivery and service deadlines will be prolonged by the duration of the hindrance and by an appropriate start-up period after the end of the hindrance.

4. Terms of payment
4.1. Payment, purchase price

Payment and prices are based on the order confirmation. If the parties agree to invoice based on expenses, the expenses will be listed in the invoice or in a separate annex to the invoice. The annex is presented in a comprehensible and sufficiently detailed form for the inspection of the services. If the Customer does not object to the listing in writing within 2 weeks, the Customer will bear the burden of proof for its incorrectness. Additional services requested by the Customer will be invoiced according to the price list of FLEXUS. In the absence of any other written agreement, prices will be in accordance with the current price list of FLEXUS AG, according to which invoicing is based on man-days and hours plus expenses incurred, and will take place on a monthly basis. All prices are exclusive of the respective applicable statutory value added tax, unless the revenue is exempt from value added tax, plus any customs duties and taxes.

4.2. Travel costs

If no lump sum is agreed with the Customer, travel times and costs will be calculated according to expenses and depending on the distance from Würzburg according to the following guidelines.

- 0.59 €/km for travelling by car
- other means of transportation and hotel accommodation costs according to expenses
- Statutory daily expenses
- Travel times are charged at 50% of the hourly rate plus any night, holiday or weekend surcharges. Train rides can be booked in 1st class for a duration of 2 hours or more, otherwise in 2nd class, while flights can be booked in business class for 5 hours or more, otherwise in economy class.

All business trips require a prior written order by the Customer. FLEXUS does not charge the Customer for any travels required to fulfill warranty obligations. A calculation of travel costs in a FLEXUS project offer is merely a non-binding estimation, its basis will be disclosed to the Customer on his request. To reduce travel costs, the Customer can agree to set up a remote access to his IT infrastructure.

4.3. Due date

Unless stated otherwise in an order confirmation, invoices issued by FLEXUS are payable immediately upon receipt without deduction. Discount will not be granted.
The Customer will be in delay of payment if he does not pay after a reminder notice which has been issued after expiration of the due date. Delay of payment occurs 30 days after the due date and receipt of invoice at the latest, even without a reminder notice.
A claim to interest for delay, in the amount of the respectively valid statutory default interest rate, will apply from 30 days after the due date.

4.4. Partial services

FLEXUS is allowed to invoice partial services before completion of the overall project on a monthly basis or after acceptance of the partial service segment by the Customer. In case of acceptances under constraints, the Customer can only make an appropriate withholding.

4.5. Installment payments

FLEXUS has the right to invoice appropriate installment payments. If the fulfillment of payment claims is at risk due to a significant deterioration of the financial situation of the Customer that has become known after the conclusion of contract, FLEXUS can demand an installment payment, withhold software or other services that have not yet been provided and stop further work. FLEXUS is also entitled to these rights if the Customer is in delay of payment due to other reasons. FLEXUS can demand full installment payments if the provision of services is to be rendered abroad or if the Customer is based abroad.

4.6. Reservation of ownership

FLEXUS reserves ownership and rights of the contractual service until full settlement of its claims under the contract. In case of resale, transfer or sublicensing, the Customer already now cedes all claims arising from this to FLEXUS, in particular payment claims but also other claims which are connected with the resale, transfer or sublicensing, to the amount of the outstanding gross invoice amount of FLEXUS AG, irrespective of whether the service has been resold, transferred or sublicensed without or after modification/processing. The Customer is authorized by us to collect the ceded claims fiduciary until revocation which is admissible due to a good reason. The resale of the claims within the scope of a genuine factoring requires the prior consent of FLEXUS AG. With a good reason, FLEXUS is also authorized to announce the cession of claims to the third party debtors on behalf of the Customer. Upon announcement of the cession to the third party debtor, the authority of the Customer to collect will be forfeited. In case of revocation of the collection authority, FLEXUS can demand that the Customer discloses the ceded claims and their debtors, provides all information required for collection, hands over the documents pertaining to this, and notifies the debtors of the cession. An important reason within the meaning of these provisions, in particular, is the delay of payment, cessation of payments, initiation of insolvency proceedings or justified indications for over-indebtedness or imminent insolvency of the Customer.

4.7. Offsetting

The Customer can only offset claims that are undisputed by FLEXUS or have become final. The Customer is only authorized to a right of retention or the plea of non-fulfillment of the contract within the respective contractual relationship. The Customer is only authorized to withhold payment in event of undisputed or legally binding counterclaims.

5. Rights to the Contract Software

5.1. Content of service and scope of license

The software owed under the contract (hereafter referred to as "Contract Software") can be handed over to the Customer by FLEXUS either electronically or on data storage devices directly, depending on its availability, and has, at the time of handover, the status as specified in the service description. The scope of the license is determined by order calculation. FLEXUS only owes the delivery of the Contract Software in form of the machine-readable object code. The Customer has no right to receive the source code; the Customer can negotiate with FLEXUS on the possibility of providing the source code. In addition to the Contract Software, FLEXUS shall provide the service description, if available, in electronic or printed form as documentation and accompanying material. The service description may also contain user instructions. If available, an installation guide can be provided to the Customer on request. No further accompanying material is owed.

5.2. Rights of use

A) Purchase: FLEXUS grants the Customer a simple, non-exclusive right to use the Contract Software. The Customer is only authorized to process his own data with the Contract Software in his own company for his own purposes. The license granted only authorizes the use of the Contract Software to the scope specified in the contractual agreement. For any further use beyond this, a new contractual agreement must be concluded. The scope of services and use is also determined from the license calculation/contractual agreement. The right of use is limited to the contractual use by the Customer and all companies affiliated with the Customer in accordance with § 16 AktG (German Stock Corporation Act). The right of use is unrestricted in terms of location and time.

B) Rent: If a rental model is offered for a specific software, the specific agreements in the contractual agreement apply also.

5.3. Testing of the Contract Software

The Contract Software must be tested adequately by the Customer before use in the productive system. The Contract Software and the documentation, if applicable, must be inspected immediately after delivery and any deficiencies identified must be reported as objection in detail and in writing. § 377 HGB (German Commercial Code) will apply. If no such immediate objection is made, the service will be deemed to have been accepted, except in cases of non-recognizable deficiencies. If such a deficiency is discovered later, the objection must be made immediately after the discovery of such a deficiency, otherwise the service will be deemed to have been accepted even on account of this deficiency. If FLEXUS fraudulently concealed the deficiency, it cannot invoke a neglected or delayed objection by the Customer.

5.4. License exceedance

As soon as the actual use of the Contract Software exceeds this scope, the Customer must inform FLEXUS of this in writing and acquire the licenses required for this. The current price list of FLEXUS AG is therefore authoritative. Further claims of FLEXUS remain unaffected. Upon request by FLEXUS, the respective user of the Contract Software shall enable FLEXUS to check the software for proper use, in particular whether the Contract Software is used qualitatively and quantitatively within the scope of the licenses acquired. The respective Customer shall therefore provide FLEXUS with information upon its request, allow inspection of relevant documents and records as well as make it possible to check the hardware and software environment used.

5.5. Error elimination, backup copies, interoperability

In addition to the simple right of use, a right for error elimination is granted. The Customer is allowed to make backup copies of the Contract Software to the extent necessary, which must, however, all be marked with the copyright notice in favor of FLEXUS and then stored safely. The service description and any other documentation provided may only be reproduced for company-internal purposes. The Customer is only allowed to decompile the Contract Software, and parts of it (such as interface information), within the confines of § 69e UrhG (German Copyright law) and only if this intention is communicated to FLEXUS in writing with a reasonable deadline for the provision of the necessary information. Information about the source code is subject to non-disclosure in accordance with Clause 13.1, regardless of whether it was provided by FLEXUS or a third party or became known by way of decompilation. Furthermore, changes and modifications of the Contract Software (modification, reworking, decryption, decoding, translation, etc.) require the prior written consent of FLEXUS AG.

5.6. Transfer to third parties

If the Contract Software has been provided to the Customer electronically, any transfer of the Contract Software by the Customer to third parties, whether against payment or free of charge, is not permitted, especially acts of exploitation such as resale, sublicensing, renting, lending, wired or wireless public display or making accessible, the use of the Contract Software by and for third parties (e.g. outsourcing, data center activities, application service providing) without the prior written consent of FLEXUS. In other respects, the transfer of the Contract Software requires at least prior written notification to FLEXUS AG. In case of software solutions created for a Customer individually, FLEXUS can object to the transfer of the individual part of the software.

5.7. Rights to the Contract Software and to work results

All intellectual property rights of the Contract Software and the work results including documentation (e.g. copyright, trademark rights, technical protective rights) are owned by FLEXUS in relation to the Customer, even if and inasmuch as the work results were produced according to specifications or in cooperation with the Customer.

5.8. Third party software

If FLEXUS uses third party software within the scope of contract fulfillment or leaves it to the Customer, FLEXUS will inform about this. The Customer undertakes to comply with the license terms of the third party software and to use it only in accordance with the purpose of the contract. The special terms and conditions, contractual and licensing conditions of FLEXUS as well as the licensing conditions of the third-party software provider will take precedence for the provision, servicing and maintenance of third-party software.

5.9. Revocation of rights of use

When the Contract Software is provided, a license key limited to the term of payment can be set. FLEXUS initially grants the rights of use to the Contract Software only on a revocable basis under the suspensory condition of full compensation or payment and can revoke the rights of use granted to the extent to which no compensation or payment has been made in the event of a delay of payment after futile expiration of an adequate period of grace. In case of full payment, the Customer will be provided with an activated license key.

5.10. Handling of updates

These rights to the contractual software will also be applicable with later versions (updates) and extensions of the software (upgrades), which will be provided to the Customer by FLEXUS during the term of the license, as long as no deviating agreements are made when a respective later version or extension is provided.

6. Creation of custom software

6.1. Service content

The Customer specifies the task, whereas the solution and the detailed contentual and technical implementation are worked out jointly by the parties. The details are contained in the individual contract and its annexes (e.g. Customer requirements specifications, functional requirements specifications), and in the absence of a written individual contract in the order correspondence. The Customer bears the risk that the tasks formulated by him, or services specifically ordered, meet his actual expectations and requirements.

6.2. Change request procedure and changes

If changes are requested during an ongoing project, the Customer can request FLEXUS to check the technical feasibility of the change within a reasonable period of time and to inform the Customer of its effect on the content of the contract, the schedule and the agreed payment. FLEXUS will start with the implementation of the change request only after the acceptance or the order of the Customer. If FLEXUS proposes a necessary or expedient change to the functional requirements specifications, the Customer can only object to the change if a legitimate interest is presented. The objection must be made without delay. If the contracting parties do not establish, or expressly exclude, the change request procedure, FLEXUS may invoice changes or later order extensions requested by the Customer on the basis of the currently valid price list on a time basis separately.

6.3. Instructional authority

FLEXUS decides how many and which employees - including freelancers and subcontractors at its own discretion - are employed or which services are assigned to third parties. The Customer is not authorized to give instructions to employees of FLEXUS. The contact person is always the project manager or the management on part of FLEXUS AG. At contract initiation already, both parties appoint their responsible contact persons who coordinate the cooperation of both parties and who can make the decisions necessary or bring about them immediately.

6.4. Acceptance

After all services or partial services, FLEXUS can demand a written declaration of acceptance from the Customer or the creation of a joint acceptance protocol. In particular, FLEXUS can make the continuation of a project dependent on acceptance of the specification sheet or other service specifications. The Customer is not allowed to refuse the acceptance due to minor deficiencies, but can declare the acceptance with reservation. Acceptance will be implied in fact at the latest when the Customer has been using the Contract Software in operational business for 14 days.

6.5. Inspection

Regardless of the contractual acceptance, the Customer shall, within a reasonable and technically feasible scope, immediately inspect the delivered work results and preliminary results (including the functional requirements specification) for completeness and flawless condition, especially before the work results are used in his operative business.

7. Other services

7.1. Service content

FLEXUS offers consulting and training for the conceptual design and operation of software, FLEXUS AG software as well as customizing, installation and programming services and system support. The exact content and scope is determined by the service ordered by the Customer and confirmed by FLEXUS or by the Service Level Agreement that has been reached.

7.2. Customer cooperation

The Customer shall support FLEXUS in the provision of the services owed to the extent reasonable, necessary and expedient. The Customer will follow the professional instructions of FLEXUS and provide the necessary information and devices (specification of hardware or software, network capacity and lines, telecommunications equipment).

7.3. Training

For training courses, the Customer shall provide appropriate premises and technical equipment in consultation with FLEXUS. The Customer can only cancel an agreed training session with a good reason. In the event of legitimate dissatisfaction on the part of the Customer, FLEXUS has the ability to remedy the circumstance by repeating the training course.

7.4. Payment

Payment is determined on the basis of the Service Level Agreement reached with the Customer, or the written order confirmation on the basis of the offer, otherwise on the basis of the currently valid FLEXUS AG price list.

The Customer confirms the provision of the respective service by signing a proof of service presented at the request of FLEXUS or its employee.

8. Customer obligations to cooperate

8.1. Data backup

The Customer is responsible for regular data backup and EDP protection measures (including anti-virus solutions) in accordance with the current state of technology. FLEXUS may assume that all data with which employees or agents of FLEXUS come into contact has previously been secured in some way by the Customer.

8.2. Software protection

The Customer is obliged to protect the Contract Software against access by unauthorized third parties (anti-virus solutions, firewall, etc.) by taking appropriate measures, and in particular to store all copies of the software in a protected environment.

8.3. IT infrastructure

The Customer shall provide the documents and information required for the performance of the services as well as the IT infrastructure required for the Contract Software (sufficient computer and storage capacities, Internet connection, operating systems, software as well as trained employees) and is exclusively responsible for their operation and maintenance. Requirements of FLEXUS must be followed. The material deficiency warranty and liability do not extend to deficiencies or damages caused by the fact that the Contract Software is used in a hardware and software environment that does not meet the requirements formulated in the service description.

8.4. Other duties to cooperate

Further obligations of the Customer to cooperate arise from the individual contract as well as the general obligations of traffic and diligence. In the event of a breach of the obligation to cooperate, the Customer will be held liable for the risk of damage. FLEXUS is not obliged to check whether the Customer complies with its duties to cooperate.

8.5. Costs of cooperation

The entire cooperation of the Customer is free of charge.

9. Material and legal deficiencies

9.1. Material deficiencies

As long as the parties do not agree on a specific condition of services or partial services, the liability for deficiencies is limited to the fact that the service or partial service is eligible for the contractually required, otherwise usual use and is common for services of this type. In case of material deficiencies, FLEXUS may first, at its discretion, provide the Customer with a new, non-defective service or eliminate the deficiency by means of subsequent fulfillment.

9.2. Legal deficiencies

In the event of legal deficiencies, subsequent fulfillment will be achieved by granting a legally perfect opportunity to use the delivered service or, at the discretion of FLEXUS, by granting the right of use to a modified but equally valuable service. If a third party asserts claims against the Customer due to a violation of rights in relation to the contractual service, the Customer shall immediately inform FLEXUS of this in writing and in detail. The Customer already now authorizes FLEXUS to settle the dispute with the third party in and out of court alone. If FLEXUS makes use of this authorization, which is at its discretion, the Customer will not be allowed to accept the claims of the third party without consent of FLEXUS. Furthermore, FLEXUS is obliged to defend against the claims at its own costs, and in doing so exempts the Customer from costs and damages that are exclusively attributable to the legal defense by FLEXUS. The statute of limitations for liability of claims for legal deficiencies remains unaffected by this.

9.3. Rights of the Customer

If the subsequent fulfillment ultimately fails after expiration of a reasonable deadline to be set by the Customer, which allows for at least two attempts of subsequent fulfillment, the Customer can reduce payment, withdraw from the contract or (in case of a continuing obligation) declare the termination of contract. FLEXUS is liable for compensation of damages or compensation of futile expenses in accordance with Clause XII. Further claims due to material and legal deficiencies are inadmissible.

9.4. New software version

If FLEXUS provides the Customer with a new software version (e.g. update) for the elimination of material or legal deficiencies after the provision of services, the Customer shall adopt this new software version in order to preserve the warranty rights, provided that the adoption is not unconscionable.

9.5. Unfounded notification of deficiencies

In the event of an unfounded notification of deficiencies, FLEXUS is allowed to invoice the costs for troubleshooting based on expenditure of time, especially if a reported material deficiency cannot be demonstrated or reproduced or is not attributable to FLEXUS.

10. Liability

FLEXUS is liable without limitation in the event of willful intent or gross negligence, for injury to life, limb or health in accordance with the provisions of the "Produkthaftungsgesetz" (Product Liability Act) and to the extent of a warranty assumed by FLEXUS. In the event of a breach of an obligation which is essential for the fulfillment of the contract purpose, FLEXUS is liable in case of minor negligence, insofar as the damage is foreseeable and typical according to the nature of the business in question, whereby liability is limited to a maximum of € 25,000 for each individual case of damage and € 50,000 per year. A further liability on the part of FLEXUS does not exist. The above mentioned limitation of liability also applies to the personal liability of the employees, agents, representatives and organs of FLEXUS AG.

11. Statute of limitations

In the event of claims for compensation of damages or expenses arising from willful intent, gross negligence, warranty, fraudulent intent as well as personal damage and claims arising from the Produkthaftungsgesetz (Product Liability Act), the statutory limitation periods will always apply. In all other cases, the statute of limitations amounts to - for claims for repayment of the purchase price arising from withdrawal or reduction 1 year from delivery of the Contract Software, but in case of deficiencies for which objections were properly lodged not less than 3 months from submission of the effective declaration of withdrawal or reduction; - for other claims arising from material deficiencies 1 year; - for claims arising from legal deficiencies 2 years, unless the legal deficiency is due to a material right of a third party on the basis of which it can demand the surrender of the items (Contract Software, documentation) provided within the scope of the contract;
- for other claims for compensation of damages or compensation of futile expenses 2 years, starting from the time at which the Customer has become aware of the circumstances substantiating the claim or, except in the event of gross negligence, would have become aware of them. The limitation will take effect at the latest upon expiration of the maximum periods specified in § 199 BGB (German Civil Code). The statute of limitations will be suspended in the event of a material or legal deficiency being examined, or during subsequent fulfillment, until the subsequent fulfillment is completed or ultimately refused or if it ultimately fails. The statute of limitations will then take effect 3 months after the end of the suspension at the earliest.

12. Data protection

The Customer processes data required for business processing in compliance with data protection regulations. The Customer ensures to have created all necessary conditions so that FLEXUS can also provide the agreed services without violation of data protection regulations.

13. Final provisions

13.1. Non-disclosure

The Customer is obliged to treat confidential all information received or made known by FLEXUS before or during the execution of the contract which contains business or company secrets, or which is designated as confidential, even beyond the end of contract unless - it is or becomes known publicly or is demonstrably known to the Customer upon initiation of the business relationship or is made known to the Customer subsequently by third parties without this violating any non-disclosure agreement, statutory regulations or administrative order; - it must be disclosed due to legal obligations or at the order of a court or an administrative authority. To the extent permissible and possible, the Customer shall inform FLEXUS in advance of any obligation of disclosure and give FLEXUS the opportunity to take action against such disclosure. The Customer shall store and secure information which is to be treated confidentially in such a way that access by third parties is impossible. The Customer shall make the information which is to be treated confidentially accessible only to employees and other third parties who require access for the execution of their duties. He informs these persons about the need for confidentiality and requires these persons in writing to comply with the confidentiality obligation. Each culpable breach of confidentiality obligations which is not only insignificant results in a contract penalty ranging between € 10,000.00 and € 50,000.00. The amount can be set by FLEXUS and checked for adequacy by the competent district court. This does not affect any further claims; the contract penalty is, however, set off against the actual damage.

13.2. Documents provided

Items provided by the Customer, such as templates or data storage devices, will only be stored or archived after express prior agreement and against special payment beyond the time of service provision. If items to be archived are to be insured, this must be arranged by the Customer or agreed with FLEXUS.

13.3. Reference

After successful completion of the services, FLEXUS is allowed to mention the Customer publicly as a reference Customer.

13.4. Choice of law, place of jurisdiction, place of fulfillment

The entire business relationship between FLEXUS and the Customer will be governed by the law of the Federal Republic of Germany excluding the United Nations Convention on Contracts for the International Sale of Goods and the provisions of the private international law. The place of fulfillment and place of jurisdiction for all disputes arising from and in connection with this contract is the registered office of FLEXUS AG. In the event of legal disputes, FLEXUS can also choose the place of general jurisdiction of the Customer.

13.5. Changes and Amendments

Changes and amendments to the contracts between FLEXUS and the Customer must be made in writing. This also applies to the amendment of the requirement for the written form.

13.6. Severability

If any of these provisions are found to be invalid, this will not affect the validity of the remaining provisions. The contracting parties will strive to replace the invalid provision with a valid one which comes as close as possible to the economic importance of the invalid provision. The same applies to loopholes in the contract.