



# General Terms and Conditions of the SVA System Vertrieb Alexander GmbH for the Hosting of zSeries Systems (ISV)

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## Preamble

The SVA System Vertrieb Alexander GmbH (hereafter: "provider") is an IBM Platinum Business Partner. It has access to an IBM mainframe computer incl. storage and backup systems, whose capacity is provided to certified IBM Partner World members, developers of System z software (hereafter: "user"), via data networks for a fee and limited time. The computer is equipped with the IBM z/VM operating system.

## §1 Scope

- (1) All regulations of these GTC for SVA contain the conditions that apply exclusively between the customer and SVA for the customer's use of the services, if these are not altered by individual agreements between the parties. The conditions under Section A apply to all services provided by SVA. The special conditions under Sections B to G apply additionally for the respective individual services. Contracts are concluded exclusively with business customers, i.e. businesses as defined in Section 14 of the German Civil Code [*Bürgerliches Gesetzbuch*, BGB]. No contracts are concluded with consumers as defined in Section 13 of the BGB.
- (2) The GTC for SVA apply exclusively. SVA does not recognize GTCs on the part of the customer that contradict or deviate from or supplement these GTC, unless SVA first expressly accepts their validity in writing.

## §2 Contract conclusion

- (1) The placing of an order by the customer (hereafter: "placing an order") constitutes a binding offer, which SVA can accept within 3 weeks by sending an order confirmation or delivering the merchandise. By placing an order, the customer accepts these and any applicable GTC. On the basis of the offer made by SVA, the contract is only concluded when the customer receives a written order confirmation from SVA (also by fax) and is defined by the content of this confirmation.
- (2) The order confirmation shall describe the service features of the service object conclusively. Offers previously issued by SVA – in particular in terms of technical description, quantity, price, and delivery time – are non-binding.

## §3 Object of the contract, bases

- (1) The provider shall provide central hosting for IBM PartnerWorld members for the use of System z computer services. They shall provide the user with the necessary System z hardware as well as the z/VM software (jointly: "system") for shared use. For the data exchange between the system and the user, the provider shall create the means on the user system side for data transmission and data reception via a secure VPN connection.
- (2) Every user receives their own operating system environment corresponding to the offer or the contractual agreement, where appropriate. They can login and access the services via a user menu and start, administer, and close their operating system environment.
- (3) The provider shall provide a system currently supported by IBM. Hardware and software are regularly updated and maintained by the provider. If this results in changes to individual functions, in particular to their operation, the user hereby consents to the resulting system changes. Should this result in additional costs for the user, they shall be notified of this in good time and in text form. On request of the user, the provider shall provide evidence for the appropriateness of the added costs.
- (4) In addition to the z/VM software, the provider does not provide any other software (application software).
- (5) The provider optionally operates a physical and virtual tape system for the purpose of tape creation and tape processing. Due to the necessary manual intervention, use of this system requires prior coordination on a case by case basis. Usage volume and costs to the user are regulated separately as part of the respective offer.

## §4 Capacity/system performance

- (1) The provider shall provide the user with the necessary logical partitions under the z/VM operating system to achieve the contractual capacity and system performance for the contractually agreed period.
- (2) On request of the user, the partition size and thus the capacity and system performance provided to the user can be changed technically at any time. However, the provider is not obligated – unless expressly agreed otherwise – to meet such a change request submitted by the user. Changes to the provided capacity and system performance as well as possible price changes shall be regulated in a new offer.
- (3) It is the responsibility of the user to estimate the necessary capacity and system performance independently according to their needs. The provider does not verify whether the contractually agreed capacity and system performance meets the technical requirements and needs of

the user. However, according to the specifications of the agreements and the regulations under Section 2 (2), the user has the possibility to test the functionality and performance of the system during a test run and change it where necessary.

#### **§5 Operating times/availability**

- (1) To the extent possible, the system should be available 24 hours a day on all days of the year. No specific availability is owed. The provider shall strive to provide the necessary availability.
- (2) If possible and in line with the extent to which the system availability is affected, regular maintenance and repair measures as well as software updates shall be performed exclusively on Saturdays, Sundays, or German public holidays and only after prior advance notification at least five days. The user shall provide the provider with an e-mail address to be used for this purpose. Unscheduled measures – in particular repairs – may be performed outside of these days and without notification.

#### **§6 Deliveries, service schedule**

- (1) Adherence to delivery times/deadlines for providing services agreed in writing presupposes that the customer provides all information and payments necessary for delivery/provision of service on time, and in particular cooperates in tasks or makes payments as appropriate in each case. Otherwise, the delivery time/deadline for providing the service shall extend accordingly.
- (2) SVA is entitled to perform partial deliveries/services if this is reasonable for the customer.
- (3) Delivery times/deadlines are contingent on SVA receiving the merchandise correctly, without defects, completely, and on time. Events of any kind for which SVA is not responsible and that delay or otherwise impede delivery of the merchandise to and from SVA (e. g. import/export restrictions, military mobilization, war, terror, terror warnings, embargos, strikes, lock-out, complete or partial production stops/delivery restrictions of the manufacturer etc.) free SVA from its duty to provide the service for the duration of its effect. If such events make it permanently impossible for SVA to deliver the merchandise, SVA is entitled to withdraw from the contract if it has not yet been fulfilled. Claims for damages by the customer are expressly ruled out.
- (4) Late delivery for any other reason entitles the customer to withdraw from the contract, if they have given SVA a suitable grace period of at least 30 days without result. The grace period must be set in writing. SVA can also withdraw from the contract if the manufacturer stops production of the contractual product after the contract has been concluded.

#### **§7 Deliveries with an international element**

- (1) Should SVA provide cross-border services, these are contingent on export approval in particular according to German foreign trade law, the provision of which is the responsibility of the customer. The customer shall ensure the legal conditions for permissible export or shipment and demonstrate this on SVA's request; in particular, export or shipment may be subject to approval according to US, EU, or national export regulations. The customer is advised that export regulations also apply if information is transferred abroad via communication networks (e. g. per e-mail or file transfer).
- (2) Contrary to the stipulations given in Section 7, international deliveries of hardware or software are only performed after payment in advance. The customer is invoiced for all charges for shipping and the ordered services.

#### **§8 Start, term, and cancellation of service**

- (1) The services begin at the time specified in the offer or in a separate contract. SVA shall take the customer's desired start time into account as far as possible.
- (2) The contract shall initially be concluded for an agreed fixed basic term. Regular premature cancellation is not possible during this basic term.
- (3) If the contract is not canceled by one party at least three months before the expiration of this basic term, then the contractual term shall automatically be extended by one year.
- (4) If no term was agreed, an open-ended service can be cancelled using regular cancellation of a notice period of 30 days to the respective end of the calendar month.
- (5) The customer may only withdraw from or cancel the contract for a violation of duty that is not a deficiency, if SVA is responsible for the violation of duty. A free right to cancellation on the part of the customer (in particular pursuant to §§ 651, 649 BGB) is ruled out. Otherwise, statutory requirements and legal regulations and consequences apply.
- (6) This does not affect any right to immediate cancellation of the contract for good cause. Good cause applies in particular if the customer does not meet their payment obligations even after two reminders. Good cause also applies in particular if the customer becomes insolvent or their assets have been adjudicated in insolvency or the customer otherwise severely violates their contractual duties.
- (7) Cancellation must be made in writing to be effective. E-mail does not meet this written form requirement.

#### **§9 Remuneration/offsetting**

- (1) The user owes the provider the remuneration agreed in the offer, consisting of a one-time installation fee and ongoing fees.

- (2) All prices are net prices and do not include packaging, freight, insurance, shipping, other expenses, or VAT.
- (3) Once the above payment terms are exceeded, the customer is in default. The payment becomes subject to legal applicable interest charges during default. SVA reserves the right to enforce additional damages due to the default.
- (4) After the conclusion of the contract, SVA is authorized to pass on any additional unforeseeable expenses the contract may incur (e.g. increase of VAT, new or higher customs charges, taxes, countervailing charges, or other official purchase price burdens, increase in shipping prices, exchange rate changes etc.) to the customer if more than four months have passed between the conclusion of the contract and delivery / service provision. The claim may only cover the actual cost increases, which SVA will disclose to the customer on request. In case additional charges apply, SVA shall inform the customer of this before delivery/provision of service. The customer is then entitled to withdraw from the contract. They are entitled to do so immediately after they have been notified of the additional charges.
- (5) Ongoing, monthly remuneration is due and payable in advance, no later than the 3rd business day of the calendar month following the month of the service without a separate invoice. For partial months, payment is owed on a pro-rata basis.
- (6) Other ongoing remuneration/fees are due in full on invoice in advance for the respective invoice period.
- (7) The customer is entitled to enforce retention rights and/or offset with claims not based on the remedy of defects or production costs only if they are enforceable final judgments, undisputed, or recognized by SVA.
- (8) If the customer's economic circumstances deteriorate significantly, SVA is entitled to make approved deliveries dependent on advance payments or collateral. Legal regulations for refusing services and – after setting a deadline – for withdrawing from the contract (§ 321 BGB) remain unaffected.

#### **§10 Warranty, guarantee, duty to notify of defects**

- (1) The customer shall immediately inform SVA in writing of any defects that appear, stating all information available to the customer and that may be useful in remedying the defect.
- (2) As part of its remedy, SVA is entitled to choose between repairing the defect or making replacement delivery.
- (3) SVA's guarantee lapses in all cases in which the defects and other impairments of the services are caused by improper use by the customer, by interference by the customer (e. g. changes to the implementation), by services they are required to provide (in particular data and content), or by their system environment for which SVA is not responsible, unless the customer can demonstrate that these circumstances are not the cause of the defect.
- (4) The customer does not receive guarantees in a legal sense from SVA. SVA passes on any pre-existing manufacturer guarantees to the customer. The extent of the guarantee can be seen in the order confirmation in conjunction with the guarantee conditions of the manufacturer.
- (5) In order to safeguard guarantee claims, when defects arise that are covered by the guarantee, the customer shall contact the manufacturer directly and follow the guarantee conditions stipulated by the manufacturer. In case a claim is asserted against the manufacturer, the customer shall also inform SVA and report on the manufacturer's handling of the guarantee.
- (6) The non-availability of the system due to regular and irregular maintenance and servicing measures as well as software updates shall be limited to no more than 5 % of the total time per calendar year. Any additional system redundancy requires separate express agreement between the parties. However, the user shall not be entitled to a back-up.
- (7) The customer shall immediately inform SVA of incomplete or incorrect deliveries as well as apparent defects of the delivered merchandise, but no later than 7 days after delivery. This notification should be made in writing, if reasonable in a form that is traceable by SVA.

#### **§11 Expiration of claims**

Guarantee claims or damage claims expire after 12 months, except for cases of injury to life, limb, or health, cases of malicious intent, or cases of a guarantee for quality expressly provided by SVA; in these cases, statutory expiration terms apply. The expiration term begins with receipt of merchandise, successful handover, or in case of services, with their provision.

#### **§12 Liability of the provider**

- (1) SVA's liability for intent, gross negligence, claims based on the product liability law, and injury to life, limb, or health is governed by statutory regulations.
- (2) In case of simply negligence, SVA is only liable in case of a violation of essential contractual duties (so-called cardinal duties, i. e. a duty whose fulfillment makes the proper implementation of the contract possible in the first place and which the contractual partner should regularly be able to rely on and trust).
- (3) If SVA violates an essential contractual duty due to simple negligence, in the absence of an individual regulation in the respective order confirmation, the compensation duty is limited to the typical foreseeable damages, however no more than € 100,000 per instance of damage, and in total no more than € 250,000 per year. The total liability limit for all damages that arise in connection with services provided to the customer is € 500,000.
- (4) In case of simple negligence, SVA is not liable for any indirect or secondary damages (in particular loss of profit, savings not realized). The restriction of liability described here and in paragraphs (2) and (3) does not apply in the event of liability on the part of SVA pursuant to paragraph (1).

- (5) Except for services that expressly include the security of data, SVA is not liable for the loss of data if the damage would not have occurred if the customer had performed proper data backups within their areas of responsibility. Proper data backups is assumed if the customer backs their data up in machine-readable form at least once a day and thus ensures that this data can be restored with reasonable effort. The liability of SVA for the loss of data is furthermore limited (except for in cases of intent and gross negligence) to the typical restoration expenses that would apply if the data had been properly backed up.
- (6) If there is a case of force majeure, SVA is not obligated to provide their services. Force majeure are in particular strikes, wars, natural disasters, lock-outs, delays or loss of delivery from suppliers if they were caused by an event of force majeure, official or court orders, attacks via the Internet and by users of the application (e. g. malware, viruses, worms, denial of service attacks, Trojan horses), which SVA could not have prevented even with due diligence reasonable for the circumstances.
- (7) If SVA's liability is excluded, this also applies any personal liability of SVA's employees, representatives, and sub-contractors.
- (8) In cases of multiple clients (natural and/or legal persons), they are jointly and severally liable.

### **§13 Data security/backups, hotline/technical support**

- (1) The provider shall perform a system backup after the initial installation. The provider does not owe additional backups or other data security measures other than those subject to a separate agreement.
- (2) The provider shall install a hotline for user support, in particular to answer any questions concerning service operation and to report malfunctions. Currently, the hotline is available to users via phone and via e-mail from Monday to Friday, 8:00 to 17:00 (CET) (06122/536-0, [hosting\\_support@sva.de](mailto:hosting_support@sva.de)); however, the provider reserves the right to change these hours at any time without prior warning or notification. The user should be aware that the hotline is also available to other customers of the provider, so that waiting times may apply based on capacity.

### **§14 Test run**

- (1) Before signing the contract, the user shall have the possibility to test the system and develop a configuration. They have the choice of using real or simulated data for this purpose. The user has access to the entire system as described in the contract offer; however, the provider may impose reasonable limitations for the test data volume to be processed without significantly impairing the meaningfulness of the test.
- (2) The parties shall agree on a duration of the test run by mutual agreement. The provider is entitled at any time during the test run to ask the user to state within 14 days whether the user accepts the contract offer of the provider or not. If the user does not declare their position in writing within this period, then the provider is no longer bound to their offer and may revoke it. This revocation must be made in writing.
- (3) During the test run, the user verifies whether the ordered capacity and system performance meets their requirements. Should the test result in a change to the capacity and/or system performance, then the provider shall adjust the contract accordingly. With their signature in the contract, the user confirms that they have had sufficient opportunity to test the system. Furthermore, they confirm that the system is in perfect, contractual working order at the time of signing. The state and performance of the system at this time shall thus be considered as approved and contractually agreed, with the exception of the data volume to be processed.
- (4) This is also true if the user waives the test run or interrupts it prematurely.
- (5) The user may not base guarantee or other claims on facts of which they were aware at the time of signing due to the test run or of which they would have been aware if they had performed a test run.
- (6) By performing the test run, the user accepts the validity of these conditions ("GTC") to the extent that their content is applicable to the test run.

### **§15 Prerequisites on the part of the user**

- (1) The offer is only available to users/developers of System z software who are certified in the IBM PartnerWorld program (Partner in Development/PID). It is the sole responsibility of the user to acquire and maintain the appropriate authorization. The user assures that they hold the certification. The provider is released from their service obligation if the user does not have the certification, but reserves their right to claim for payment in full. In this case, the user is free to demonstrate to the provider the amount of expenses saved and offset them against the claims of the provider.
- (2) It is the sole responsibility of the user to acquire and maintain the infrastructure and software required on their side including any necessary rights and licenses. This includes in particular a computer with Internet access and the necessary performance capacity, as well as 3270 emulation software.
- (3) Data exchange shall be initiated solely on the part of the user, who is also responsible for measures to ensure data security during the exchange.

### **§16 Usage rights of the user**

- (1) The user is entitled to use the system provided by provider for their own purposes within the contractually agreed performance and capacity limits, or for purposes typically assumed according within the scope and contents of the contract, any additional use requires the express prior written consent on the part of SVA.
- (2) The user is not entitled to use the system for other purposes than those listed under (1) above or for purposes beyond the contractually agreed performance and capacity limitations. In particular, the user is not authorized to access partitions of the systems that they were not contractually

assigned and is not entitled to access data stored in the system that does not belong to them and/or to which they have no right. In case of violation or attempted violation, without prejudice to further rights, the provider is entitled to extraordinary cancellation of the contract and enforcement of lost income as compensation for damages.

- (3) The user shall only use those application software and other programs, and only transmit those data to the system that are compatible with the system in such a way that the ensures that system performance is not affected more than required for the provision of the contractual services – especially for other customers of the provider. In particular, the user shall not transfer harmful software or harmful data (malware) to the system.
- (4) The provider is entitled to demand the immediate removal of such software or data at any time and reserves the right to delete such software or data from the system, if necessary without the consent of the user, in urgent cases even without prior notification. In such cases, they shall immediately inform the user of the measures undertaken.

### **§17 Third-party use**

- (1) Within the framework of organization n permissions provided by the provider on the system side, the user may grant access to the system and their data to organizational representatives and employees, and freelancers access. Under no circumstances are these third parties authorized to have more extensive access than the user. Other persons may only receive access with the express consent of the provider.
- (2) The user is not entitled to grant third parties access to the system for purposes other than those of the user. In particular, they are not entitled to provide third parties with access for their own purposes or for the purposes of a fourth party, whether in return for payment or free of charge. This does not affect the administration and processing of third-party data by the user as part of their usual and proper business activities.
- (3) Should the user grant a third party access to the system, they will subject the third party to the same obligations that they as the user are subject and shall do so in writing.

### **§18 Access, exchange, and protection of data**

- (1) In the relationship between the parties, the data that the user transfers to the system and processes are solely their property. They remain the sole owner thereof and they alone have the right to dispose of these data.
- (2) The provider is granted access to the data solely for the purpose of contractual data processing. With the exception of agreed backups or other data security measures, they are not entitled to make copies of the data for the duration of the contract unless they consider this necessary for contractual data processing. After the end of the contract, they shall immediately delete any existing copies that may remain.
- (3) The provider is not entitled to transfer the data to third parties without the user's consent, unless they are legally obliged to do so.

### **§19 No contract extension through actual use**

If the provider continues to provide their services after the end of the contractual term, whether partially or in full, and if the user continues to use them, then the duration of this actual use shall be charged at the last agreed remuneration rate. However, this does not result in the extension of the contract beyond this actual use. In particular, in case of doubt, actual availability and actual use cannot be regarded as offer and/or acceptance of the continuation of the previous contract or the initiation of a new contractual relationship.

### **§20 Liability of the user**

- (1) The user is liable to the provider for the compensation of any damages that the provider incurs due to system down-time (partial or total) or due to culpable behavior on the part of the user or their legal representatives or contractors. This applies in particular to damages – including loss of income from other customers – due to harmful software or data introduced by the user or their legal representative or contractors.
- (2) The user is liable to the provider for compensation of any damages that the provider incurs due to unauthorized system access or system use by the user or a third party to which the user has permitted access or use either intentionally or through gross negligence.

### **§21 Privacy protection**

- (1) Pursuant to Art. 6 GDPR, the SVA System Vertrieb Alexander GmbH is entitled to process the personal data of the customer/client for purposes of fulfilling their part of a business relationship. The data are stored by the SVA GmbH. The client is hereby informed of this in accordance with Art. 13, 14 GDPR. The customer/client has a right to information and a right to rectification, restriction, and erasure of their stored data. In addition, the customer/client may object to the processing or use of their personal data pursuant to Art. 21 GDPR. The objection should be directed to the responsible body (SVA System Vertrieb Alexander GmbH, Borsigstraße 26, 65205 Wiesbaden-Nordenstadt, mail@sva.de).
- (2) In addition, the contractual partners undertake to comply diligently with and observe all privacy protection regulations. If the customer violates these regulations, they shall indemnify SVA against all legal consequences of the violation.
- (3) If SVA processes personal data on behalf of the customer, the contractual parties shall conclude an agreement concerning the contractual data processing as defined in Art. 28 GDPR in a timely manner before starting the corresponding activity.

- (4) For all information related to the handling of the customer personal data, SVA System Vertrieb Alexander GmbH refers to their separate privacy protection declaration available via <https://www.sva.de/datenschutz.html>.

## **§22 Changes**

- (1) If, during the provision of services by SVA, the customer subsequently wishes to change the services originally specified, they shall notify SVA of this immediately in writing or via e-mail, stating the reasons. After receipt of the change request, SVA will check whether the desired changes are feasible and then inform the customer which changes are likely to result, in particular regarding remuneration and time scheduling. Any expenses arising from the consideration of the change request and consequences resulting from its implementation shall be paid separately. The parties shall then agree on a process for the implementation of the proposed service changes and possible effects this may have on the service term. SVA is only obliged to make changes to services once this has been agreed in writing. If no written agreement is reached regarding a change request, the contract will be fulfilled without the changes requested in the respective change request.
- (2) SVA is entitled to change these conditions if this is necessary due to developments that were not foreseeable at the time the contract was concluded, which are beyond the influence of SVA, and which SVA has not caused, in order to restore the equivalence between the contractual parties at the time the contract was concluded and if essential regulations of the contract (e.g. type and extent of the contractual services, cancellation) are not affected by this. Changes to these conditions are also possible if difficulties arise in the implementation of the contract that are caused by gaps in these conditions, e.g. because jurisprudence regards a clause to be invalid. The customer shall be informed of any change to the conditions 6 weeks before they become effective. In this case, the customer is entitled to extraordinary cancellation. If the customer does not cancel within four weeks of receiving the change notification, the changes shall be considered to be agreed. The customer will be informed of this as part of the change notification.

## **§23 Confidentiality**

- (1) The contractual parties undertake to treat as confidential all information and other data they receive during the business relationship that is explicitly marked as confidential or clearly recognizable as a company or business secret or is correspondingly marked as such. SVA is entitled to provide the license programs with protective equipment to protect them against misuse.
- (2) The parties shall ensure by means of suitable contractual agreements that their employees affected by this confidentiality agreement are also obliged to confidentiality according to the regulations of these GTC. The same applies if the parties use third parties to provide the services to which they are obligated. On request, the parties shall provide written evidence of their compliance with this obligation and inform each other of disclosure obligations to the extent that this is possible and permissible, in particular in terms of statutory or agency-enforced disclosure obligations, and support each other in fulfilling such obligations.
- (3) For the duration of the project and for 12 months after cancellation or completion, the customer undertakes not to recruit any employees of SVA who are involved in the provision of the services.

## **§24 Concluding provisions**

- (1) Should a regulation of this GTC be or become invalid, this shall not affect the validity of the remainder of the GTC. All contractual relationships are exclusively subject to the laws of the Federal Republic of Germany, excluding the UN Convention on Contracts for the International Sale of Goods and the conflict rules governing international private law.
- (2) The exclusive jurisdiction for any disputes arising from this agreement is Frankfurt am Main. SVA may also file suit with the appropriate jurisdiction for the customer's place of business.