



FIZYR



Report

# General Terms and Conditions

May 2020

# The Fizyr deal

These general terms and conditions express how we do business with you as a customer. They describe what we do for you during our engagement, what standards you can expect from us and what we may expect from you in return. In these terms and conditions “we” or “us” or “our” refers to Fizyr B.V. with registered offices at Julianalaan 67A 2628 BC DELFT the Netherlands. “You” is the (potential) customer that has received an offer from us or with whom we have entered into a subsequent agreement.

## Article 1. Definitions

- 1.1 **“Agreement”**: this term is defined in article 2.2 below.
- 1.2 **“Automated System”**: the (semi) autonomous system for which you have identified a Vision Challenge.
- 1.3 **“Business Hours”**: 0900-17.30 hours on a regular business day in the Netherlands. Regular business days exclude statutory holidays and weekends.
- 1.4 **“Confidential Information”**: proprietary information, in whatever form or medium, disclosed by you to us or vice versa, including commercial or technical know-how.
- 1.5 **“Consultancy Services”**: assisting you with the installation and implementation of the Software on Automated System(s).
- 1.6 **“Defect”**: an error in the trained Software which, if it would have been present in the Project Phase, would have most likely caused the Software to fail its acceptance test. By definition, Defects can only occur in the Production Phase.
- 1.7 **“Deliverable”**: the trained Software, our validation reports and other agreed outputs of the Services that we provide to you.
- 1.8 **“Good Industry Practice”**: the exercise of that degree of skill, care, prudence, efficiency, foresight and timeliness as would be expected from a leading company within the relevant industry or business sector.
- 1.9 **“Intellectual Property Rights” or “IPR”**: patents, rights to inventions, copyright and related rights, rights in (semiconductor) designs, database rights, trade secrets and all other intellectual property rights, in each case whether registered or unregistered and including all applications and rights to apply for and be granted, renewals or extensions of, and rights to claim priority from, such rights

and all similar or equivalent rights or forms of protection.

- 1.10 **“Invention”**: an invention as defined by article 2(1) of the Dutch Patent Act 1995 (Rijksoctrooiwet 1995).
- 1.11 **“Maintenance- and Support Services”**: the services whereby we correct Defects and assist you in providing first line support to your customers.
- 1.12 **“Offer”**: our written offer for the provision of Services and/or the grant of a license for our Software.
- 1.13 **“Open Source Software”** any software programs licensed under any form of open-source license meeting the Open Source Initiative’s Open Source Definition (<http://www.opensource.org/docs/definition.php>).
- 1.14 **“Phase”**: the Phases identified in article 2.2.
- 1.15 **“Services”**: the combination of Consultancy Services, Training Services and Maintenance- and Support Services described in our Offer.
- 1.16 **“Site”**: the geographic location at which an Automated System has been installed.
- 1.17 **“Software”**: our algorithmic software that applies machine learning/deep learning techniques to visually recognize and locate objects.
- 1.18 **“Source Materials”**: the images that we use as input for the Training Materials. Source

Materials can be provided by both you and us.

- 1.19 **“Training Materials”**: annotated visual representations of the objects that are the subject of the Vision Challenge.
- 1.20 **“Training Services”**: the services we provide to you during the Proof of Concept Phase, as described in article 2.2(1).
- 1.21 **“Vision Challenge”**: a predefined intended improvement of the computer vision capability of your Automated System, including but not limited to enabling your Automated System to recognize specific objects and handle these objects in a physical environment.

## **Article 2. Our way of working**

- 2.1 These terms and conditions apply to any Offer and are a part of any agreement that we have subsequently entered into with you.
- 2.2 We generally work with you in three distinct and subsequent Phases:
  - 1. Proof of Concept; we create the Training Materials, train our Software with the Training Materials and validate whether the Software, after having been trained, is capable of meeting the Vision Challenge.

2. Project; the trained Software is tested on 1 Automated System; and
3. Production: you start installing, implementing, and using the trained Software on Automated Systems for production purposes.

For each Phase we will provide you with an Offer. When you accept our Offer in writing, there will be a binding agreement between you and us (“**Agreement**”). Each Offer expires 30 days after the date on which we have provided it to you.

- 2.3 Each Agreement will be only be made up solely out of our Offer, these terms and conditions and any other document which has been specifically included in our Offer by us. Your standard terms and conditions shall not be a part of our agreement. As far as required and legally possible, your standard terms and conditions are hereby refuted by us explicitly.
- 2.5 Each Agreement that follows upon a previous agreement for a specific Phase incorporates these general terms and conditions, irrespective of whether they have been made applicable in our Offer.
- 2.6 We are always willing to oblige you with an amendment of a current Agreement. You accept however that our acceptance of such an amendment may be

subject to an increase in fees or a change in applicable timetable. An amendment will need to be signed by the authorized representatives of you and us.

### **Article 3. The Services**

- 3.1 We shall provide the Services in accordance with the terms of each Agreement.
- 3.2 In providing the Services and performing our other obligations under an Agreement, our employees shall make reasonable efforts and perform their duties and obligations with appropriate care in a professional and ethical manner and in accordance with guidelines agreed by you and us from time to time. We may employ a sub-contractor at any time without your prior approval.
- 3.3 We will do our best to meet any agreed timetable or similar overview of dates that applies to our provision of the Services. You accept that any listed date shall be indicative only and does not automatically constitute our default (verzuim). If reasonably needed you and we shall work together to adjust dates in good faith.
- 3.4 You will provide us with the reasonable help that we need to be able to perform our obligations. This obligation incorporates amongst other things, that you shall:

- a) promptly and fully respond to all our communications relating to the provision of the Services and liaise with us on matters relevant to the provision of the Services;
- b) afford us with such access to your information, records, and other materials as we may require in connection with or to provide the Services; and
- c) make available and continue to make available sufficiently skilled personnel capable in the operation of the Automated System, and
- d) assume responsibility for complying with all laws and regulations in connection with the provision of the Services.

#### **Article 4. Fees and payment**

- 4.1 You shall pay us the fees that we have specified in the Offer.
- 4.2 All of our fees are net of tax. You shall, in addition to our fees, pay to us the amount of any tax, duty or assessment, including any applicable VAT, which we are obliged to pay and/or collect from you in respect of any supply under the Agreement (other than tax on our income).
- 4.3 Fees for Services are invoiced in accordance with the invoice schedule described in our Offer.

License fees are invoiced on a monthly basis at the end of each calendar month.

- 4.4 You shall pay our invoice within 30 days of the date of your receipt of the invoice. If you fail to make a timely payment, we may charge you statutory commercial interest (*wettelijke handelsrente*) over the overdue amount from the date of expiration of the payment term. When we need to collect the invoice amount, we may also charge actual and reasonable out of court collection costs to you.
- 4.5 We may increase our fees for Maintenance- and Support services at any annual anniversary of Agreement by giving you at least 3 months' written notice before such anniversary. If you object to the increase you may terminate the relevant Agreement at the anniversary date provided you give us 1-month prior written notice.

#### **Article 5. Source- and Training Materials**

- 5.1 To be able to create the Training Materials, we will work with you to prepare an agreed volume and quality of Source Materials in accordance with the agreed timetable. Prior to the start of the training of the Software we will ask you to validate and confirm to us that the Source Materials that you and we have

prepared, accurately represent the objects that are in scope of the Vision Challenge. You will not withhold this confirmation from us on the basis of unreasonable grounds. Without your written confirmation we shall not be required to start training our Software and subsequently complete the performance of the Training Services.

- 5.2 By your delivery of the Source Materials to us, you provide us with a license to use the Source Materials for the creation of Training Materials and for other reasonable business purposes that we may have from time to time. These reasonable business purposes include but are not limited to using the Source Materials to train the Software for the benefit of other customers or to use the Source Materials in publications. You accept that the Source Materials are not your Confidential Information. The license that you grant to us has a worldwide scope, is not limited in time, and can't be revoked by you.
- 5.3 Any Intellectual Property Rights that may apply to the Training Materials exclusively vest in us.

#### **Article 6. Acceptance Testing**

- 6.1 For each Phase you and we will agree to what acceptance test and related acceptance criteria each Deliverable will be subjected to. The acceptance criteria for the trained Software shall be such as are reasonably required to demonstrate that the Software is likely to address the Vision Challenge in a satisfactory manner.
- 6.2 In the Project Phase you shall complete the agreed acceptance test of the Software as installed on the Automated System within 14 days of its installation and implementation date. You shall give us at least 24 hours' notice of the start of the acceptance test and will permit us to observe how you conduct it.
- 6.3 If the Automated System fails the acceptance test of the Project Phase, you shall inform us in writing within 7 days from the date of completion of the test. Your notice will list the probable and reproducible errors that have caused the failure. If the error(s) lie in the Software and these errors can be verified by us, we will fix the errors at our own costs within 14 days of your notification, unless the errors are attributable to the quality of the Source Materials or, if you have installed and implemented the Software, the quality of your own work, in which case you will need to pay for our work.
- 6.4 If the "fixed" Software is responsible for a second failed acceptance test, you may choose not to enter into an

Agreement for the Production Phase, e.g. stop working with us. We are not liable for any of your costs that relate to your decision not to proceed to the Production Phase. You will still be required to pay all of our fees for the Project Phase.

#### **Article 7. Software**

- 7.1 In the Project Phase we deliver the trained Software to you by installing and implementing the Software on the test Automated System. In the Production Phase the Software will be delivered by providing you with access to an image of Software which you can use to install and implement the Software on licensed Automated Systems.
- 7.2 Each license for the Software entitles you to install the Software on 1 Automated System. The license is worldwide, sub-licensable to your customers and limited in duration. You may make copies of the Software for back-up and continuity purposes, provided these purposes exclusively serve the Automated System for which the Software has been licensed. Unless specifically allowed by applicable mandatory law you are not entitled to reverse engineer or decompile the Software for any purpose whatsoever. You may not use the Software outside of the scope of the Vision Challenge.

- 7.3 In the Project Phase you will timely identify the test Automated System to us and make sure it is pre-configured in accordance with our instructions. If we feel that this is needed we may do an advance inspection of the Site and specify to you, within a reasonable time before the Software is scheduled to be installed, any corrections or modifications to the Automated System that are required. Provided you have taken care of the corrections and modifications we shall then install and implement the Software on the Site on the scheduled delivery date.
- 7.4 If our delivery of the Software in the Project Phase is delayed because of circumstances attributable to you, our agreed timetable shall be amended accordingly. We can charge any related costs directly to you.

#### **Article 8. Maintenance- and Support Services**

- 8.1 Maintenance- and Support Services are provided solely in the Production Phase. If we provide these Services to you, we will support you during Business Hours by helping you to remedy Defects in the Software and by providing second line support to you in relation to the Software. Our support will be available by e-mail or by telephone.

- 8.2 When you notify us of a Defect we will determine with you how seriously the Defect impairs the operation of the Automated System(s). If a Defect halts or substantially impairs the operation of at least 2 Automated Systems, we will; (i) start working on the remedying the Defect within 4 Business Hours of your notification, (ii) use all reasonable efforts to correct the Defect as soon as possible and (iii) keep you informed of our progress towards the correction of the Defect. For any other Defects we shall commence correcting the Defect as soon as our workload allows it.
- 8.3 Our correction of the Defect may require that that the Software on the Automated System is updated or a work-around is created. You are responsible for ensuring that we can remotely access the Automated System to install the update or create the work-around.
- 8.4 The fee for Maintenance- and Support Services takes account of an estimated spend of time and materials on our side over a specific amount of time. If we exceed this estimate over a period of 6 months, we readjust our estimate and agree a new applicable fee with you. If you do not agree to this fee, we are entitled to terminate our obligation to provide you with Maintenance- and Support Services.
- Article 9. IPR and indemnification**
- 9.1 All of our IPR shall remain with us or with our licensors. You will not be entitled to use it except if we explicitly provide you with a license to do so pursuant to an Agreement. We retain the right to grant any license to use our IPR to any third party.
- 9.2 You acknowledge that during a Phase we may create an Invention that is specific to the combination of our Software and the Automated System. If this happens you accept that we shall be the sole inventor and shall have the exclusive right to apply for a patent right with respect to such Invention. If we are granted a patent right, you are entitled to receive a royalty free worldwide license to use the patent for as long as there is a valid Agreement.
- 9.3 We shall indemnify you against all liabilities, costs, expenses, damages and losses suffered or incurred by you arising out of or in connection with any claim made against you for actual or alleged infringement of a third party's copyright and Dutch patent right arising out of or in connection with the use of the Software and or the technology that is covered by the patent that we licensed to you, provided that, if any third party makes a claim, or notifies an



intention to make a claim, against you which may reasonably be considered likely to give rise to a liability under this indemnity (“**Claim**”), you will immediately inform us, will not admit liability for the Claim and will enable us to defend ourselves against it. When needed you will provide us with reasonable cooperation to assist us in our defense.

- 9.4 Our obligation to indemnify you pursuant to article 9.3 shall not apply: (i) if the Claim relates to the combination of the Software with the Automated System, (ii) the Claim has been caused by a combination of our Software with third party software not previously authorized by us, or (iii) you have used the Software in violation of the Agreement and our written instructions.

#### **Article 10. Confidentiality**

10.1 You and we agree that we shall not use Confidential Information otherwise than in the exercise and in any other manner than to performance our mutual rights and obligations under this Agreement (“Permitted Purposes”).

10.2 In relation to your Confidential Information:

- a) we shall treat as confidential all of your Confidential Information. We shall not divulge any

such Confidential Information to any person, except to our own employees and then only on a need to know basis as applicable for the Permitted Purpose. We shall ensure that our employees are aware of, and comply with, this article 10; and

- b) we may provide any of our subcontractors with such amount of your Confidential Information as it needs to know for the Permitted Purposes, provided that such sub-contractor has first entered into a written obligation of confidentiality owed to the Supplier in terms similar to this article 10.

10.3 In relation to our Confidential Information:

- a) You shall treat as confidential all our Confidential Information contained or embodied in the Software and Deliverables, or communicated to you otherwise supplied to you by us during the performance of this agreement;
- b) you shall not, without our prior written consent, divulge any part of our Confidential Information to any person other than

your employees who need to know it for the Permitted Purposes.

10.4 You will ensure that your employees are specifically made aware, before the disclosure of any part of our Confidential Information, of the confidential nature of the Confidential Information and our entitlement thereto.

10.5 The restrictions imposed by article 10.1 - 10.4 shall not apply to the disclosure of any Confidential Information which:

- a) is now in or hereafter comes into the public domain otherwise than as a result of a breach of this article 10;
- b) before any negotiations or discussions leading to an Agreement was already known by the receiving party and was obtained or acquired in circumstances under which the receiving party was not bound by any form of confidentiality obligation; or
- c) was independently developed by the receiving party without the use of Confidential Information of the disclosing party.

10.6 Our employees may use and continue to use any knowledge which is contained in their unaided memory developed or disclosed under an Agreement, provided that in doing so we do

not breach our obligations of confidentiality under this article 10. An employee's memory is only "unaided" with respect to any information if he/she has not retained a copy of the information and has not intentionally memorized that information other than is required to perform the Services.

10.7 This article 10 shall remain in full force and effect for a period of no less than 5 years after the termination of an Agreement.

#### **Article 11. Warrantees**

11.1 We warrant that:

- a) the Software is proprietary to us and our licensors and we have the right to license it to you and provide the Maintenance- and Support Services with respect to the Software.
- b) the Software does not contain any Open-Source Software licensed under the General Public Licence or similar "copyleft" license terms. Nor does the Software operate in such a way that it is compiled with or linked to such Open-Source Software; and
- c) we will perform the Services quickly and in a reliable and professional manner, in conformity with Good Industry

Practice, by a sufficient number of competent personnel with appropriate skills, qualifications and experience.

11.2 We are not responsible for the integration of the Software with the Automated System.

11.3 We do not warrant that we will always be able to take away Defects or that a Defect is taken away within a specific time frame. We shall not be obliged to take away a Defect if you have first tried to take it away yourself without involving us.

#### **Article 12. Limitation of Liability**

12.1 Our total liability out of each Agreement, including our indemnification obligations, shall be limited to 150% of the fees that you have actually paid to us pursuant to that Agreement during the twelve months immediately preceding the month in which the first claim arose.

12.2 We shall not be liable for:

- a) any indirect or consequential damage, including but not limited to loss of profits, loss of goodwill or missed opportunities;
- b) damages caused by any loss of productivity of the Automated System, including downtime of the Automated System.

c) any damages that have occurred because of incorrect interpretation or handling of objects by the Automated System, and/or

d) any damages attributable to your failure to provide correct and complete information or instructions to us.

and any other non-performance of the Automated System that will cause you to be in default pursuant to your obligations under the agreement that you have with your customer.

12.3 You shall indemnify and hold us harmless for any claims made by your customers directed to us that relate to the Software and your use of the Software in an Automated System.

12.4 We do not exclude or limit our liability for damages caused by our own gross negligence or willful misconduct (opzet of bewuste roekeloosheid) or other damages for which we cannot exclude liability under applicable law.

#### **Article 13. Term and Termination**

13.1 Each Agreement starts on the date of your acceptance of our Offer and will run for the term specified in our Offer. If no term is specified it will run for a period of 12 months.

13.2 You and we may (partially) terminate an Agreement with immediate effect by giving

written notice to the other party if:

- a) the other party fails to pay any amount due on the due date for payment and remains in default not less than 14 days after being notified in writing to make such payment;
  - b) the other party commits a breach of any term of an Agreement (other than failure to pay any amounts due under an Agreement) and (if such breach is remediable) fails to remedy that breach within a period of 30 days after being notified in writing to do so, provided the nature of the breach merits a termination of the Agreement;
  - c) an application is made to court to declare the other party to be in a state of bankruptcy or grant it a moratorium on payments (*surceance van betaling*);
- 13.3 Termination of the Agreement shall not affect your license for the Software unless you have failed to pay for the license fee, in which case your license rights terminate on the date of termination of the Agreement.

If your license terminates you shall immediately discontinue any use of the Software as of the date of termination.

- 13.4 Other than as specifically set out in these terms and conditions, neither you nor we shall have any further obligation under the Agreement after its termination.
- 13.5 On termination of an Agreement for any reason, all outstanding invoices will become due immediately.

#### **Article 14. Dispute Resolution**

- 14.1 The parties irrevocably agree to submit to the exclusive jurisdiction of the courts of The Hague, the Netherlands for the purpose of hearing and determining any dispute arising out of the Agreement and for the purpose of enforcement of any judgment against their respective assets.

#### **Article 15. Applicable Law**

- 15.1 Each Agreement shall be governed by and construed in accordance with the law of the Netherlands.