

# Free and Open Source Software (FOSS) Terms and Conditions

Version dated November 2019

These Terms and Conditions supplement the \_\_\_\_\_ agreement executed between \_\_\_\_\_ (“Company”) and Detroit Diesel Corporation (including its affiliates “DDC”) with an effective date of \_\_\_\_\_ (the “Agreement”), to include provisions relating to free and open source software that shall supersede the provisions of the Agreement but only with regards to subject matter of this Annex.

## 1. Scope of Application

1.1 None of the goods and services provided by Company under the terms of the Agreement may contain free software or open source software (jointly abbreviated as "FOSS") without the express prior approval of DDC. This applies in particular to software transferred to DDC in any form, whether permanently or for a limited period, on storage media, or as a part of devices or components for devices, irrespective of whether the software is transferred as object or source code. DDC's approval must be obtained in advance in accordance with the procedure described in this Annex.

FOSS encompasses all software that is available at no cost and is subject to a license or other contractual provision ("FOSS License").

FOSS Licenses include, but are not limited to, the following examples of licenses and distribution models: the "Berkeley Software Distribution License" (BSD license), the Apache License Version 2.0, Version 2 of the "GNU General Public License" (GPL V2) and Versions 2 and 2.1 of the GNU Lesser General Public License (LGPL V2, V2.1).

1.2 With respect to FOSS and FOSS Derivatives, this Annex supersedes the Agreement and any other annexes unless the latter contain different content agreed between the Parties with respect to the scope of this Annex and with express reference to the affected provisions of this Annex.

## 2. Approval of the Principal for Use of FOSS or FOSS Derivatives

2.1 If Company wishes to use FOSS and/or FOSS Derivatives for certain goods or services, the prior approval of the DDC must be obtained in each case. The following procedure must be observed.

Such approval must be obtained for each individual case in which Company wishes or intends to use or modify FOSS or FOSS Derivatives as part of the provision of goods and services, or otherwise includes FOSS or FOSS Derivatives in the results of Company's activities that remain with DDC.

2.2 Company shall use the latest form provided by DDC to submit such requests for approval ("FOSS Disclosure Document"). This form must contain all information required by DDC in order to obtain a comprehensive overview of the FOSS to be used and the consequences for both the goods and services provided by Company and for DDC. In particular, the FOSS Disclosure Document must contain:

- a) the exact name (and version) of the FOSS which shall be covered by the approval to be granted by the Principal;
- b) the FOSS itself, including source code and documentation;
- c) the name (and version) of the applicable FOSS License and the text of the license in full;
- d) the source of the FOSS and the FOSS License (e.g. download site);
- e) the obligations arising from the FOSS License for DDC as a result of the use of the unchanged or

modified FOSS, including a proposal as to which obligations should be assumed by Company DDC, respectively;

- f) a presentation of the technical reasons for the use of the FOSS (e.g. quality, security, serviceability, documentation, community). No technical examination of the FOSS shall be performed by DDC; instead, this shall remain the responsibility of Company;
- g) in the case of multiple FOSS Licenses, the results of an examination by Company of the mutual compatibility of the Licenses.

The fully and correctly completed FOSS Disclosure Document must be received by DDC at the same time as the offer on the affected goods or services at the latest.

- 2.3 DDC shall decide on the use of the FOSS at its own discretion. Requests for additional documents or information on the part of DDC must be addressed by Company without delay. Approval shall only be granted expressly and in writing; silence on the part of the DDC shall not constitute approval.

Approval may be made contingent on Company observing certain conditions and obligations for the use of the relevant FOSS or FOSS Derivatives. These shall become part of the Company's obligations in accordance with the Agreement.

- 2.4 The FOSS and Foss Derivatives approved by DDC in each case shall be exhaustively listed in the written declaration of approval by DDC, including any restrictions, conditions and obligations ("Approved FOSS").
- 2.5 When providing goods and services to DDC, Company shall submit the fully and correctly completed FOSS Disclosure Document for the current status of these goods and services to DDC. This is a requirement for the full provision of the goods and services.
- 2.6 This procedure shall apply again in the event of any changes in the FOSS or FOSS Derivatives, even if this change only involves the release of a new version, and case of any changes in the intended use by DDC. This shall be the case even if additional goods and services of Company contain the same FOSS or if the FOSS, FOSS Derivatives or FOSS Licenses were already the subject of this procedure.
- 2.7 DDC shall provide Company the latest version of the form to be used (c.f. section 2.2). Revised versions shall be requested by Company and provided as needed.
- 2.8 Any costs incurred by Company in conjunction with this procedure and the resulting obligations and their fulfilment shall be the sole responsibility of Company.

### **3. Duties of the Contractor**

- 3.1 Company shall fulfil all obligations arising from FOSS Licenses in conjunction with the use, modification, and distribution of Approved FOSS and FOSS Derivatives, and in particular from FOSS Licenses for which Company fulfils the respective obligations for and on behalf of DDC (see also sec. 10), to the extent permitted under the terms of the respective FOSS License. Any restrictions may only be agreed in the FOSS Disclosure Document. Company shall also enable DDC to fulfil all obligations relating to the planned use of the Approved FOSS and FOSS Derivatives and shall ensure strict compliance with the conditions and obligations agreed with DDC.
- 3.2 Company shall design and structure its goods and services, in the case of software developments or modifications also within the software architecture, in accordance with the requirements of DDC such that:

- a) any software developed or modified for DDC is not subject to any so-called "copyleft" or "viral" license or effect under which DDC is required to disclose or license any material proprietary source code that embodies DDC intellectual property for any goods or services, or in a manner that requires any goods or services of DDC to be made available at no charge; and
- b) the license conditions of the FOSS do not require that DDC or its authorized parties provide any authentication information, encryption keys and/or other information concerning the software used in the vehicles.

The technical implementation of the Approved FOSS and FOSS Derivatives within the goods and services must allow for them to be quickly and easily removed and replaced by a different product offering the same functions.

3.3 Company must fulfil all obligations relating to the Approved FOSS, and in particular:

- a) disclose and, where necessary, amend its organizational and technical processes with regard to FOSS (e.g. use of tools to detect FOSS) at DDC's request,
- b) provide DDC Principal with the complete, full and accurate text of the FOSS Licenses, the information to be included in the product documentation and, if modified, the build scripts for the Approved FOSS no later than the date on which the goods and services are transferred in order to enable DDC and its authorized parties to create and use an executable version of the Approved FOSS,
- c) where a FOSS License requires that the source text of FOSS Derivatives be published, provide DDC with this source text, and
- d) acquire and provide, at its own cost, licenses for industrial property rights and/or other third-party rights that are relevant for the use of the Approved FOSS in order to ensure that DDC is granted the rights of use set out in the Main Agreement.

3.4 If several FOSS components are to be used, Company shall examine the mutual compatibility of the individual FOSS Licenses and their compatibility as a whole with any other software to be developed or used, including by designing and structuring the goods and services accordingly.

3.5 To the extent required by the respective FOSS Licenses or distribution models or expressly requested by DDC, Company shall provide the maintainer of the respective FOSS software project with modifications to the FOSS actively and in good time. However, this shall only be done in consultation with DDC and to the extent that these modifications are non-differentiating and are classified as commodities, and there are no confidentiality agreements, patents or other legal obstacles; DDC shall decide on such matters in cases of doubt.

#### **4. Continuous Review**

4.1 Company must continuously review whether the Approved FOSS is being used in accordance with the corresponding FOSS License, DDC's requirements and the conditions of this Annex. In particular, DDC must regularly examine whether:

- a) the FOSS has been published under a new or revised FOSS License;
- b) the FOSS is used in goods or services in accordance with the conditions of the FOSS License, the FOSS Disclosure Document and DDC's requirements;
- c) the FOSS is included in the goods and services in full, unless the partial use of the FOSS is permitted under the corresponding FOSS License;

d) corrections, patches or new versions have been provided for the FOSS; to this end, Company shall examine the websites/forums of the authors and the relevant development group in particular.

Company shall provide DDC with the items required to demonstrate the proper fulfilment of the obligations assumed by Company (e.g. FOSS Disclosure Document, source code, tc.).

4.2 Company shall report to DDC on this matter regularly which means, unless otherwise agreed, every calendar month.

## **5. Liability and Warranty**

5.1 Company assumes the warranty obligations and liability for its goods and services as set out in the Main Agreement even if FOSS or FOSS Derivatives are used.

5.2 Unless not permitted under the conditions of the respective FOSS License, Company shall also be responsible for monitoring and complying with the requirements of FOSS Licenses and FOSS Derivatives used, and in particular for the remediation of defects and disruptions, in accordance with the provisions of the Main Agreement without this restricting Company's duty of continuous review.

5.3 Company shall also provide DDC with the necessary integration support for the FOSS and FOSS Derivatives used in accordance with the provisions of the Main Agreement. This also includes the obligation to examine the FOSS and FOSS Derivatives for potential faults (particularly those relating to security) prior to initial use and continuously thereafter and to remedy such faults, and to remedy any security gaps and faults that it identifies or subsequently becomes aware of in the FOSS (particularly those relating to security) at its own cost or to include such security gaps and faults in the goods and services, providing that DDC grants its consent.

5.4 If Company breaches an obligation arising from this Annex, it shall indemnify DDC and its affiliates and their respective directors, officers, shareholders, employees, customers, and dealers from all claims, losses and costs arising as a result and shall defend the aforementioned parties against third-party claims. DDC may also opt to defend itself. Company shall bear the costs of court and out-of-court proceedings, including appropriate legal fees, even for proceedings relating solely to the defense of a claim or loss.

## **6. FOSS Officer**

Company shall appoint in writing a representative and a surrogate who shall be available to DDC as contact persons for all questions relating to the use of FOSS, as well as preparing reports and ensuring that the fulfilment of the obligations arising from this Annex is properly documented at Company. These persons must be authorized to make all of the day-to-day decisions relating to the use of FOSS and FOSS Derivatives as set out in this Annex and to accept the corresponding declarations from the other party. They must be sufficiently qualified to identify the extent to which FOSS is used and the resulting consequences.

## **7. Changes**

7.1 Any changes to the FOSS must be approved by DDC in accordance with the procedure described in this Annex for the initial use of FOSS. Company shall obtain DDC's approval for changes in good time in and accordance with this procedure, including information on the planned date on which the changes are to be included in the goods or services provided. With regard to the additional consequences of changes to FOSS for the goods and services covered by the Main Agreement, the

procedure for changes described therein shall apply.

- 7.2 DDC may, at its sole discretion, demand and Company agrees to make the requested changes and additions to the use of FOSS at any time until the respective goods and services are delivered or accepted, in consideration of Company's interests.

## **8. Duties of Subcontractors**

- 8.1 With respect to Company's entitlement to involve subcontractors, the provisions of the Agreement apply.
- 8.2 Above and beyond the obligations arising from the Agreement, Company must select any subcontractors carefully with respect to the requirements set out in this Annex, to monitor them and to include them in Company's information and work processes concerning FOSS in a suitable manner. Company shall demonstrate this by suitable documentation, e.g. excerpts from the corresponding agreements. Following notification of Company, DDC shall also be entitled to contact the subcontractor directly in order to clarify queries relating to the FOSS used.
- 8.3 If a subcontractor refuses to agree to be bound by the requirements of this Annex, or to be available to DDC as a contact, or if DDC has good cause to doubt the reliability of the subcontractor in terms of its compliance with DDC's requirements for the use of FOSS, Company shall, at DDC's request, no longer use the respective subcontractor for providing goods and services to DDC in connection with FOSS. Any resulting costs shall be the sole obligation of Company.
- 8.4 In any case, Company's direct legal responsibility to DDC for the performance of the contracted goods and services shall remain unaffected by the commissioning of any third parties, particularly with regard to the granting of rights to use the work results.

## **9. Intellectual Property Rights and Rights to Use Modified Versions of FOSS**

The provisions of the Agreement shall apply to intellectual property rights and rights to use the goods and services, and this also applies to modified versions of FOSS. Any restrictions on the duties of Company arising from the Agreement or this Annex for such FOSS and FOSS Derivatives as a result of the above or for the distribution of unchanged FOSS in accordance with the respective FOSS Licenses shall require express prior consent in writing. Such consent must expressly refer to this Annex and the Agreement.

## **10. Public Dissemination of FOSS**

At DDC's request, Company shall perform all of the measures required to be performed by DDC in order to grant rights to third parties (e.g. customers) in accordance with the respective FOSS License. In particular, this includes the documentation, archiving and version management of the individual FOSS and FOSS Derivatives for the purposes of their clear allocation to individual goods and services and, if necessary, the provision and dissemination of the FOSS and FOSS Derivatives to third parties in accordance with the respective FOSS Licenses for DDC.

## **11. Information and Clarification**

Company shall be available to DDC and third parties authorized by DDC, such as consultants, lawyers, and auditors, for any questions relating to the FOSS covered by this Annex. The nature and extent of the information provided shall be agreed with DDC.

## **12. Remuneration**

It is hereby specified that no separate remuneration shall be paid for the provision of Approved FOSS and FOSS Derivatives covered by the respective FOSS License for the original FOSS due to the "viral effect". Remuneration in accordance with the Agreement for the goods and services, including the procedure set out in this Annex (see sec. 2.8), shall remain unaffected.