

**STANDARD CONDITIONS
OF SALE AND TENDER
APPENDIX 1
(ACT/2022)**

CONTENTS

1.	DEFINITIONS	3
2.	GENERAL	5
3.	VALIDITY	5
4.	ACCEPTANCE	6
5.	SAMPLES	6
6.	PACKAGING	6
7.	LIMITS OF CONTRACT	6
8.	DRAWINGS, ETC	6
9.	INSPECTION AND TESTS	6
10.	PERFORMANCE	6
11.	OPERATING INSTRUCTIONS AND PROCEDURES	7
12.	DELIVERY	7
13.	LIABILITY FOR DELAY	7
14.	VARIATIONS	8
15.	PAYMENT & TERMS OF PAYMENT	8
16.	WARRANTY	9
17.	CONSUMER PROTECTION ACT	9
18.	PATENTS	10
19.	LIMITATION OF LIABILITY	10
20.	ARBITRATION	10
21.	CARE, CUSTODY AND CONTROL OF PROPERTY OF THE BUYER	10
22.	GENERAL PRICE VARIATION	11
23.	CONSEQUENTIAL DAMAGES	11
24.	SHORTAGE IN DELIVERY	11
25.	PLANS, JIGS, ETC.	11
26.	STOCK	11
27.	FORCE MAJEURE	12
28.	DEFECTS	12
29.	CONFIDENTIALITY	12
30.	DATA PROTECTION	13
31.	JURISDICTION OF THE MAGISTRATE'S COURT	13
32.	BREACH	13
33.	LEGAL CONSTRUCTION	14
34.	AMENDMENTS	14
35.	WHOLE AGREEMENT	14
36.	INTERPRETATION	14
37.	TITLE	14
38.	SAFETY AND HEALTH ENVIRONMENT REQUIREMENTS	14
39.	DOMICILIUM	14

STANDARD CONDITIONS OF SALE AND TENDER – ACT/2022

1. Definitions

For the purposes of these terms and conditions, unless the context indicates otherwise, the words and expressions set out below shall have the meanings assigned to them and cognate expressions shall have a corresponding meaning, namely:

- 1.1 “**ACTOM**” means ACTOM (Pty) Ltd, Reg No. 2008/001863/07, a private company with limited liability incorporated under the laws of the RSA;
- 1.2 “**ACTOM Group**” means all the divisions and subsidiary companies (within the meaning of section 3 of the Companies Act) of ACTOM, from time to time;
- 1.3 “**Affiliate**” means, in relation to any company, any other company that is its subsidiary, holding company or subsidiary of its holding company; and/or any person (including a company), any other person over which, or over the management of which, Control can be or is exercised directly or indirectly by persons who can or do also exercise Control directly or indirectly over that person or its management;
- 1.4 “**Applicable Laws**” means in relation to a particular person or matter, all and any present or future law (including statutory, common or customary law), subordinate legislation, tax law, statute, legislation, constitution, code, authorisation, decree, decision, judgment, treaty, regulation, ruling, practice, concession, request, notice, announcement, guidance, by-law, order, ordinance and rule, directive, requirement or other legislative measure of any government or intergovernmental body (whether supranational, national, provincial or local), agency, department, central bank, statutory, fiscal, regulatory or self-regulatory or similar body or authority or court, as amended, replaced, re-enacted, restated or reinterpreted from time to time (whether or not having the force of law), compliance with which is mandatory for that person or in relation to that matter, and “**Applicable Law**” shall have a corresponding meaning;
- 1.5 “**Auditors**” means the auditors of the Tendering Company from time to time;
- 1.6 “**Authorised Employees**” means employees of either Party who have a 'need to know' or otherwise access Personal Information to perform obligations under the Contract;
- 1.7 “**Authorised Persons**” means (i) Authorised Employees; and (ii) in respect of each Party, a Party's sub-contractors, agents, or professional advisors who have a need to know or otherwise access Personal Information to enable a Party to perform its obligations under the Contract, and who are bound in writing by confidentiality obligations sufficient to protect Personal Information in accordance with the terms and conditions of the Contract;
- 1.8 “**Business Day**” means any day other than a Saturday, Sunday or public holiday in the RSA, within the meaning of the Public Holidays Act, 1994;
- 1.9 “**Buyer**” means the party to whom a Tender is addressed by the ACTOM Group;
- 1.10 “**Buyer Data**” means Personal Information relating to the Buyer, the Buyer's Affiliates, the Buyer's employees, the shareholders or directors of the Buyer, the Buyer's customers or the operations, business or activities of the Buyer;
- 1.11 “**Companies Act**” means the Companies Act, 2008;
- 1.12 “**Computer System**” means any computer, hardware, software, communications system, electronic device (including but not limited to, smart phone, laptop, tablet, wearable device), server, cloud infrastructure or microcontroller including any similar system or any configuration of the aforementioned and including any associated input, output, data storage device, networking equipment or back up facility;
- 1.13 “**Conditions**” means these standard terms and conditions and any appendices hereto;
- 1.14 “**Confidential Information**” means any information or data, including any Personal Information of a Party's employees, agents, customers and vendors, shared by the Disclosing Party which by its nature or content is identifiable as confidential and/or proprietary to the Disclosing Party and/or any third party, or which is provided or disclosed in confidence and which the Disclosing Party or any person acting on its behalf may disclose or provide to the Receiving Party or which may come to the knowledge of the Receiving Party by whatsoever means, including all information relating to the Disclosing Party's current and existing strategic objectives, its business activities, business relationships, technical, scientific, commercial, financial and market information and trade secrets, data concerning its architectural information, demonstrations, processes and machinery, all agreements to which it or its customers is/are

a party, information relating to the Contract and information relating to its customers and facilities, but specifically excluding information or data which (i) is lawfully in the public domain at the time of disclosure thereof, or (ii) subsequently becomes lawfully part of the public domain by publication or (iii) otherwise becomes available from a source other than one of the Parties which is lawfully entitled without any restriction on disclosure to disclose such Confidential Information; or (iv) is disclosed pursuant to a requirement or request by operation of law, regulation or court order;

- 1.15 **"Construction Regulations"** any construction regulations issued by the Minister of Labour from time to time pursuant to section 43 of the OHS Act;
- 1.16 **"Consumer Protection Act"** means the Consumer Protection Act, 2008;
- 1.17 **"Contract"** means collectively the Conditions, the Supplementary Conditions, the Tender, and any other documents which the Parties have agreed in writing shall form part of the contract between them and any amendments or additions to that contract as may be agreed in writing between the Parties from time to time;
- 1.18 **"Contract Price"** means the total contract price for the Products and/or Services, as the case may be, stated in the Tender;
- 1.19 **"Control"** means the ability, by virtue of ownership, right of appointment, right to Control election or appointment, voting rights, the ability to Control the exercise of voting rights, management agreement, or agreement of any kind, to Control or direct, directly or indirectly, the board or executive body or decision making process or management of such entity and the terms **"Control"** and **"Controlled"** shall have corresponding meanings;
- 1.20 **"Cyber Operation"** means the use of a Computer System by or on behalf of a third party to disrupt, deny, degrade, manipulate or destroy information in a Computer System;
- 1.21 **"Data Protection Laws"** means any applicable data protection legislation applicable to the Parties and shall include the Protection of Personal Information Act, 2013;
- 1.22 **"Disclosing Party"** means the Party that has disclosed Confidential Information;
- 1.23 **"OHS Act"** means the Occupational Health and Safety Act, 1993;
- 1.24 **"Parties"** means the Tendering Company and the Buyer collectively and **"Party"** means either one of them as determined by the context;
- 1.25 **"Personal Information"** has the meaning given to it in terms of Protection of Personal Information Act, 2013;
- 1.26 **"Products"** means the goods and/or products supplied or to be supplied by the Tendering Company to the Buyer in terms of a Contract, or any goods and/or products repaired by the Tendering Company in terms of a Contract to the extent that the Tendering Company has rendered Services in connection with those goods and/or products (or parts of those goods and/or products, as the case may be);
- 1.27 **"RSA"** means the Republic of South Africa, comprising the nine provinces identified in section 103 of the Constitution of the Republic of South Africa, 1996;
- 1.28 **"Receiving Party"** means the Party who has received the Confidential Information from the Disclosing Party;
- 1.29 **"Sanctions"** means trade, economic or financial sanctions, laws, regulations, embargoes or restrictive measures imposed, administered or enforced from time to time by any Sanctions Authority;
- 1.30 **"Sanctions Authority"** means:
- 1.30.1 the United Nations;
- 1.30.2 the European Union;
- 1.30.3 the Council of Europe (founded under the Treaty of London, 1946);
- 1.30.4 the government of the United States of America;
- 1.30.5 the government of the United Kingdom;
- 1.30.6 the government of the Republic of France;
- 1.30.7 the government of Switzerland,

and any of their governmental authorities and agencies, including, without limitation, the Office of Foreign Assets Control for the US Department of Treasury (OFAC), the US Department of Commerce, the US State Department or the US Department of the Treasury, Her Majesty's Treasury (HMT), the French Ministry of Finance;

- 1.31 “**Services**” means any work or services provided or rendered or to be provided or to be rendered by the Tendering Company to the Buyer in terms of a Contract;
- 1.32 “**Supplementary Conditions**” means the terms and conditions in **Appendix 2**;
- 1.33 “**Tender**” means any tender or quotation submitted by any Tendering Company to the Buyer in terms of these Conditions;
- 1.34 “**Tendering Company**” means the ACTOM Group entity submitting a Tender;
- 1.35 “**Tendering Company Data**” means Personal Information relating to the Tendering Company, and/or the Tendering Company’s Affiliates, and/or the Tendering Company’s employees, and/or the shareholders or directors of the Tendering Company, and/or the Tendering Company’s customers and/or the operations, business or activities of the Tendering Company.
- 1.36 “**War**” means:
- 1.36.1 the use of physical force by a state against another state or as part of a civil war, rebellion, revolution, insurrection, and/or
- 1.36.2 military or usurped power or confiscation or nationalisation or requisition or destruction of or damage to property by or under the order of any government or public or local authority,
- whether war be declared or not.

2. **General**

- 2.1 These Conditions govern all Tenders made by the ACTOM Group and all contracts and sub-contracts entered into by the ACTOM Group for the sale of any Products and/or the rendering of any Services and accordingly any conditions stipulated by the Buyer are expressly excluded.
- 2.2 In all instances where the Services include the repair of any item (including but not being limited to warranty repairs undertaken by the Tendering Company pursuant to clause 16), the Buyer shall be solely responsible for all costs and expenses associated with the Buyer transporting that item to and from the Tendering Company’s premises unless otherwise agreed in writing by the Parties. Additionally, the Buyer shall be solely responsible for all risks associated in so transporting that item to and from the Tendering Company’s premises.
- 2.3 The Tendering Company shall be entitled to sub-contract any of its obligations under any Contract to a sub-contractor of its choice on written notice to the Buyer provided that the Tendering Company remains jointly and severally liable to the extent provided herein, together with the sub-contractor, for the performance of that sub-contractor under any Contract.
- 2.4 The Tendering Company shall be entitled to decline to recognize or comply with any oral arrangements or instructions from the Buyer not recorded in writing and signed by the Parties, whether such arrangements are made before, at or after the time the Contract is entered into and whether they would have the effect of adding to or amending or canceling the Contract.
- 2.5 Unless otherwise stated in the Contract, the Tendering Company shall:
- 2.5.1 remain entitled at all times to provide Products to, and render any Services to, any third party on such terms and conditions as it may determine without limitation or restriction.
- 2.5.2 be the sole owner of any scrap generated in the provision of Services.
- 2.6 The Buyer shall not offer or give, or agree to give, to any employee, officer, director, sub-contractor or representative of the Tendering Company any gift or consideration of any kind otherwise than in accordance with the Tendering Company’s gift policy (which policy shall be available on written request) as an inducement or reward for doing or refraining from doing or from having done or refrained from having done, any act in relation to the obtaining or execution of this or any other agreement with the Tendering Company or for showing or refraining from showing favour or disfavour to any person in relation to this or any such agreement.
- 2.7 Without prejudice to any other legal remedy or right, the Tendering Company shall be entitled to summarily cancel the Contract in circumstances where the Buyer becomes subject to business rescue proceedings or is placed under a provisional or final order of liquidation or in the case of a change in Control of the Buyer.
- 2.8 The Tendering Company may on written notice to the Buyer cede, assign, novate or delegate its rights and obligations under this Contract to any of its subsidiaries or an unrelated third party.

3. **Validity**

Unless withdrawn prior to acceptance, Tenders are open for acceptance during the period stated therein, or when no period is stated, within 30 (thirty) days after receipt of the Tender by the Buyer provided that no acceptance shall be binding on the Tendering

Company unless issued in writing by the Buyer and received by the Tendering Company within the aforementioned periods and in accordance with the Tender, whichever is applicable.

4. **Acceptance**

The acceptance of any Tender shall be accompanied by sufficient information in writing to enable the Tendering Company, in its reasonable opinion, to proceed with the execution of the Contract forthwith, failing which the Tendering Company shall be entitled to amend the Contract Price to cover any increases in cost to it incurred as a result of such delay.

5. **Samples**

5.1 Any samples submitted by the Tendering Company to the Buyer with any Tender shall at all times remain the property of the Tendering Company and may not be copied, reproduced, sold, disposed of or handed to any third party without the prior written consent of the Tendering Company and shall, whether the Tender is accepted by the Buyer or not, be returned by the Buyer to the works of the Tendering Company, carriage paid, or failing such return, be paid for, within 1 (one) month from date of receipt.

5.2 Any technical specifications or any other information in respect of samples submitted to the Buyer in terms of this clause 5 shall be kept confidential and shall not be disclosed to any third party without the prior written consent of the Tendering Company nor shall such information be used for the Buyer's or anyone else's benefit otherwise than in accordance with the Tender.

6. **Packaging**

Unless otherwise specified in writing, the Contract Price includes packaging in accordance with the standard packaging practices of the Tendering Company.

7. **Limits of Contract**

All Tenders include only such Products, accessories and Services as are specified therein.

8. **Drawings, Etc**

8.1 All descriptive and shipping specifications, drawings, designs, illustrations, models, photographs and particulars of masses, dimensions or other technical data submitted with any Tender by the Tendering Company are approximate only, and the descriptions and illustrations contained in any catalogues, price lists and other advertisement matter of the Tendering Company are intended merely to present a general description of the Products and Services described therein and none of the aforementioned shall form part of the Contract. After acceptance of any Tender by the Buyer, a set of certified outline drawings shall be supplied by the Tendering Company to the Buyer as appropriate in accordance with the contract.

8.2 Any specifications, drawings, designs, illustrations, models, photographs, particulars of masses, dimensions or any other technical data submitted by the Buyer to the Tendering Company in terms of this clause 8 shall be kept confidential and shall not be copied, reproduced, sold, disposed of, disclosed to or handed to any third party without the prior written consent of the Tendering Company nor shall such information be used for the Buyer's or anyone else's benefit.

9. **Inspection and Tests**

9.1 The Products are carefully inspected and, where practicable, submitted to the Tendering Company's standard tests at works before despatch. If tests other than those specified in any Tender or tests in the presence of the Buyer's representative are requested by the Buyer and agreed to in writing by the Tendering Company, the Tendering Company shall be entitled to charge a reasonable amount for of such tests in addition to the Contract Price.

9.2 In the event of any delay or failure on the part of the Buyer in attending any tests referred to in this clause 9 after 3 (three) days prior written notice from the Tendering Company that it is ready to conduct such tests, the tests shall be conducted by the Tendering Company in the Buyer's absence but shall be deemed for purposes of the Contract to have been conducted in the Buyer's presence.

10. **Performance**

10.1 Any performance figures or statistics given by the Tendering Company in any Tender are based upon its experience and are such as it expects to obtain on testing in its works.

10.2 Should any Products fail to satisfy such performance figures, the Tendering Company shall not be liable for any loss or damage thereby sustained by the Buyer as a result of such failure unless the Tendering Company has specifically guaranteed such performance figures (subject to the recognised tolerances applicable to such figures) in an agreed sum as liquidated damages in the Tender, in which case the liability of the Tendering Company shall be strictly limited to the amount so stated in the Tender.

- 10.3 Subject to clause **28**, before the Buyer becomes entitled to reject the Products or raise any claim whatsoever arising from the failure to attain the applicable performance figures referred to in this clause **10**, the Buyer shall afford the Tendering Company reasonable time and opportunity to rectify the performance of the Products and the Tendering Company shall thereafter be entitled, at its option, to replace the affected Products or the defective parts thereof at the initial place of delivery.
- 10.4 The Buyer acknowledges that Products stipulated by the Buyer are sufficient and suitable for the Buyer's purpose save insofar as the Buyer's stipulations are in accordance with the advice of the Tendering Company.
11. **Operating Instructions and Procedures**
- 11.1 The Buyer shall comply with all procedures, steps and instructions specified by the Tendering Company in writing from time to time in connection with the use and operation of the Products to ensure that Products are safe and without risks to health when properly used.
- 11.2 The Buyer acknowledges that such written instructions may be included in any operating manual provided by the Tendering Company to the Buyer from time to time.
12. **Delivery**
- 12.1 Delivery of Products shall be made by the Tendering Company at the place specified in the Tender and excludes offloading unless otherwise agreed in writing between the Parties.
- 12.2 The Tendering Company shall be entitled to effect part-deliveries.
- 12.3 Each delivery or part-delivery of an order shall be deemed to be sold under a separate contract.
- 12.4 Neither failure on the part of the Tendering Company to make any delivery or part-delivery in accordance with the Contract nor any claim by the Buyer in respect of such delivery or part delivery shall entitle the Buyer to reject the balance of the order.
- 12.5 Risk in the Products shall pass from the Tendering Company to the Buyer on delivery but ownership in any Products shall remain vested in the Tendering Company until the whole Contract Price has been paid by the Buyer to the Tendering Company in accordance with clause **15**. The Tendering Company's ownership of the Products shall in no circumstances pass to the Buyer or any third party as a result of the Products acceding or being attached to any land and/or building and/or premises irrespective of the manner of accession or attachment. In circumstances where the land and/or building and/or premises to which the Products are to be affixed is not owned by the Buyer, the Buyer shall inform the owner of the land and/or building and/or premises in writing of the Tendering Company's ownership of the Products until payment is affected therefore in full by the Buyer.
- 12.6 Any Products delivered by the Tendering Company to the Buyer in terms of this clause **12** (whether affixed to immovable property or to other goods or products) shall be deemed to remain movable property and severable without harm to such immovable property or other goods or products, as the case may be.
- 12.7 Should the Buyer fail to give the Tendering Company forwarding instructions in writing within 7 (seven) days after receipt of written notification from the Tendering Company that the Products are ready for dispatch or fail to take delivery after the Buyer has given the Tendering Company written forwarding instructions, all risk in the Products shall immediately pass to the Buyer and the Tendering Company shall be entitled to arrange storage either at its own works or elsewhere on the Buyer's behalf and all charges thereby incurred by the Tendering Company as a result of such failure by the Buyer, including without being limited to, storage costs, insurance or extra delivery charges shall be for the Buyer's account.
- 12.8 Notwithstanding anything to the contrary in this clause **12**, should the Buyer fail to take delivery within a reasonable time after the Tendering Company has by notice in writing requested the Buyer to do so, the Tendering Company shall be entitled to terminate the Contract and recover from the Buyer any loss suffered by reason of such failure.
13. **Liability for Delay**
- 13.1 Any times quoted for delivery of Services or Products in any Tender are dependent upon the Tendering Company receiving all necessary information, drawings and documentation from the Buyer to enable the Tendering Company to commence work in respect of the Tender and to proceed therewith without interruption. The Buyer shall provide the Tendering Company, in a timely manner, with all such information and materials as are necessary for the Tendering Company to carry out the Services and/or provide the Products in accordance with the Contract and the Buyer represents and warrants that all information provided by it or on its behalf to the Tendering Company will be accurate and complete.
- 13.2 Any times quoted for delivery in any Tender are estimates only and the Tendering Company shall only be liable for late deliveries if the Tendering Company has explicitly agreed in the Tender to pay liquidated damages for any loss or damage sustained by the Buyer as a result of such late deliveries, in which event the liability of the Tendering Company shall be limited to the delay portion

only and then also to the amount so stated in the Tender. Should no such amount be stated in the Tender, the liability of the Tendering Company in terms of this clause **13** shall be limited to a maximum of 5% (five percent) of the Contract Price, and the payment of liquidated damages shall be the Buyer's sole remedy for delay.

13.3 Notwithstanding anything to the contrary in this clause **13** and whether a time for delivery is stated in the Tender or not, the time for delivery shall be extended by a reasonable period if delay in deliveries is caused by instructions or lack of instructions from the Buyer or by any cause whatsoever beyond the reasonable control of the Tendering Company.

13.4 The Contract shall not be cancelled by the Buyer for the of delay of the Tendering Company in effecting delivery in terms of the Contract unless the Tendering Company shall first have received written notice of the Buyer's intention to insist on adherence to delivery dates stated in the Tender.

14. **Variations**

14.1 The Tendering Company shall not be obliged to accept any variations, modifications, alterations or additions to any Tender if such variations, modifications, alterations or additions are requested after the date of acceptance of the Tender by the Buyer in terms of clause **4**. No variations, modifications, alterations or additions to any Tender shall be of any force or effect unless agreed to in writing by the Tendering Company.

14.2 Subject to this clause **14**, should any variation or suspension of work result from the Buyer's instructions or lack of instructions, the Tendering Company shall be entitled to increase the Contract Price by a sum of money reasonably sufficient to cover all additional associated costs and expenses thereby incurred or sustained by the Tendering Company as a direct or indirect consequence of such variation or suspension.

15. **Payment & Terms of Payment**

15.1 Unless otherwise stated in any Tender or otherwise agreed by the Parties in writing, (a) the Contract Price shall exclude any value-added tax payable in accordance with the Value Added Tax Act, 1991; (b) the Contract Price shall be paid by the Buyer as follows:

15.1.1 *Cash against invoice:* payment in full in respect of the Products or Services shall be due by the Buyer on presentation of invoices to the Buyer and notification to the Buyer from the Tendering Company that the Products have been delivered or the Services have been rendered, or, if for any cause beyond the reasonable control of the Tendering Company, the Tendering Company is unable to deliver the Products or to provide the Services, as the case may be, then upon presentation of invoices to the Buyer and notification from the Tendering Company to the Buyer that the relevant Products are ready for dispatch or the Tendering Company is in a position to render the Services; or

15.1.2 *Progress payments:* progress payments shall be made in accordance with the Contract.

15.2 Notwithstanding the provisions of this clause **15**, the Tendering Company shall be entitled to call for security of any kind whatsoever in a form reasonably acceptable to the Tendering Company for payment of all amounts payable by the Buyer to the Tendering Company in terms of this clause **15**. If the Buyer fails to make payment in accordance with the Contract or fails to comply with any provisions of the Contract, the Tendering Company shall be entitled to cancel any undelivered portion of the Products or to suspend the provision of Services, and the Buyer shall remain responsible for the completed and partly completed work up to the date of such cancellation.

15.3 Any payments by the Buyer in terms of this clause **15** shall not be set off against or withheld on account of any counterclaims, unless such counterclaims have been admitted by the Tendering Company in writing. Any liability of the Tendering Company in terms of the Contract is subject to the Buyer adhering to the terms of payment of the Tendering Company in terms of the Contract and the fulfillment of all the other obligations of the Buyer in terms of the Contract. Without prejudice to the right of the Tendering Company to payment in terms of this clause **15**, the Buyer shall pay interest on any sum due to the Tendering Company at the ruling prime lending rate as confirmed by the Tendering Company's bankers plus 2% (two percent), from the due date of such payment until payment is actually made.

15.4 The Buyer shall pay any amount due to the Tendering Company in terms of this clause **15**, without set-off or deduction, by way of electronic transfer into the current account designated by the Tendering Company in the Tender for that purpose, unless otherwise agreed to in writing by the Tendering Company.

15.5 Notwithstanding anything to the contrary herein, and without prejudice to any other rights it may have pursuant to the Contract, the Tendering Company shall be entitled to retain possession of any of the Buyer's equipment serviced by the Tendering Company until all of the Tendering Company's fees for such Service have been paid in full by the Buyer. Should such fees not be paid in full within 90 days of presentation of invoice, the Tendering Company shall be further entitled to sell the relevant equipment on such terms and conditions as it may determine to defray any outstanding fees due to it.

16. Warranty

- 16.1 In carrying out the Services, the Tendering Company shall use its reasonable endeavours to undertake the Services in accordance with good market practice and within the time period agreed between the Parties in the Contract and at all times exercising reasonable skill and care.
- 16.2 Subject to what follows in this clause **16**, the Tendering Company shall make good, by repair or, at its option, by the supply of a replacement, defects which, under proper use, appear in the Products and which defects are notified by the Buyer to the Tendering Company in writing within a period of 12 (twelve) months after the Products have been delivered to the Buyer or, if delivery is delayed for any reason other than as a result of default on the part of the Tendering Company, within a period of 18 (eighteen) months after receipt of written notice by the Buyer from the Tendering Company that the Products are ready for despatch (whichever period expires the earlier) and arising solely from faulty materials or workmanship or design (fair wear and tear excluded); provided that should the Tendering Company request the Buyer to do so by notice in writing, the Buyer shall return such defective parts to the Tendering Company within the time period stated by the Tendering Company in such notice.
- 16.3 The Tendering Company shall not be liable for any other costs, expenses, damages or losses, save for the cost of the repair or replacement of the Products, as the case may be, which may be incurred by the Buyer in returning the defective Products to the Tendering Company in terms of clause **16**. Should the Buyer elect to have any third party effect repairs of the Products, it shall forfeit any and all right it might have had in terms of the Contract to have the Tendering Company effect those repairs, and the Tendering Company shall accordingly have no further liability to the Buyer in relation to those Products.
- 16.4 The liability of the Tendering Company in terms of this clause **16** in connection with its Products and the Services shall be *in lieu* of any warranty or condition implied by law as to the quality or fitness for any particular purpose of the Products or Services and, save as provided in this clause **16**, the Tendering Company shall not be under any liability, whether in contract, delict or otherwise, in respect of or for any injury, damage or loss resulting from such defects or from any work done or Services rendered in connection therewith.
- 16.5 Without in any way derogating from the generality of the foregoing, and subject always to the limitations set out in clause **23** and elsewhere in these Conditions, the Tendering Company shall not be liable for any damage or loss arising from or connected to any measurements, calibrations, adjustments, balancing and/or any other tests or Services of whatsoever nature conducted by the Tendering Company on any equipment or materials on the Buyer's instruction otherwise than for claims arising directly from the Tendering Company's willful misconduct or gross negligence in carrying out such Services. In such event, the Tendering Company's sole responsibility shall be to re-perform the Services, repair or, at its option, supply a replacement to the Buyer provided that any such defects are notified by the Buyer to the Tendering Company in writing within a period of 12 (twelve) months after the relevant Services have been rendered by the Tendering Company.
- 16.6 In respect of parts or components not manufactured or designed by the Tendering Company, the Tendering Company guarantees such parts or components provided that such guarantee shall correspond to the guarantee (if any) which the Tendering Company may have received from the supplier or manufacturer of such parts or components in respect thereof and shall not, in respect of such parts or components, impose on the Tendering Company a liability greater than that imposed on the Tendering Company by the provisions of this clause **16**.
- 16.7 Any and all warranties and representations given by the Tendering Company are "personal to the Buyer in that any such warranties and representations may not be sold, ceded or otherwise transferred without the Tendering Company's express prior written consent.
- 16.8 Notwithstanding the commencement date of any warranty offered by the Tendering Company to the Buyer in relation to Products and/or Services, such warranty shall only become enforceable on the condition that the total Contract Price for the Products and/or Services, as the case may be, has been paid in full.

17. Consumer Protection Act

The Buyer shall notify the Tendering Company in writing forthwith should it on-sell or supply any Products supplied by the Tendering Company to it pursuant to the Contract to "consumers" (as that term is defined in the Consumer Protection Act). Notwithstanding anything to the contrary in these Conditions, the Buyer indemnifies and holds harmless the Tendering Company from and against any and all claims, actions, liabilities, damages, costs and expenses (collectively "losses") asserted against, imposed upon or incurred by the Tendering Company (a) as a result of or arising out of the Buyer breaching the aforesaid undertaking, or (b) from any harm alleged or proven by a consumer himself, or other person contemplated in section 4(1) of the Consumer Protection Act, to the extent such harm is attributable to the negligent or intentional conduct of the Buyer or any contravention of the Buyer of any applicable law, where the Buyer is not able to prove that it is not liable for such losses in terms of 61(4) of the Consumer Protection Act.

18. Patents

- 18.1 The Tendering Company indemnifies the Buyer and holds it harmless against any claim of infringement of letters patent, registered design, trade mark or copyright (registered at the date of the Contract) by the use or sale of any Products supplied by the Tendering Company to the Buyer in terms of the Contract and against all costs and damages which the Buyer may incur in any action for such infringement or for which the Buyer may become liable in any such action; provided that: the indemnity of the Tendering Company in terms of this clause **18** shall not apply to any infringement which is due to the Tendering Company having followed a design or instruction furnished or given by the Buyer or to the use or sale of such Products in a manner or for a purpose or in a country not specified by or disclosed to the Tendering Company by the Buyer at the time of tender, or to any infringement which is due to the use or sale of such Products in association or combination with any other Products not supplied by the Tendering Company; the Buyer gives the Tendering Company the earliest possible notice in writing of any claim being made or action threatened or brought against the Buyer in respect of any such infringement and that the Buyer permits the Tendering Company at the Tendering Company's expense to dispute, resist, appeal, compromise or settle such claim; and the Buyer on its part, warrants that any design or instructions furnished or given by the Buyer to the Tendering Company for the purposes of the supply of any Products by the Tendering Company to the Buyer in terms of the Contract shall not be such as will cause the Tendering Company to infringe any letters patent, registered design, trade mark or copyright in the execution of the Buyer's order.
- 18.2 Subject to any third party rights other than those created by virtue of the Contract, to the extent that the provision of the Services and/or Products results in the creation of any intellectual property rights, such rights shall vest in the Tendering Company.

19. Limitation of Liability

- 19.1 Save as otherwise explicitly stated in the Conditions and subject always to clause **23**, in no event, whether as a result of breach of contract, indemnity, warranty, delict (including negligence), strict liability or any other cause arising, shall the Tendering Company's total liability to the Buyer or its insurers for any loss or damage arising out of, or resulting from these Conditions, or any Tender or any Contract or from the performance or breach thereof, or from the Products or Services furnished hereunder, exceed 15% (fifteen percent) of the total Contract Price.
- 19.2 Furthermore, any liability or obligation of the Tendering Company of whatsoever nature (whether in terms of these Conditions or otherwise) shall terminate upon the expiration of the warranty period specified in clause **16**.
- 19.3 For the purpose of this clause **19**, the term "*Tendering Company*" shall include the Tendering Company's sub-contractors, agents and suppliers.

20. Arbitration

- 20.1 Any dispute between the Parties in connection with any matter arising out of the Contract or its interpretation or their respective rights and obligations under the Contract or its cancellation or any matter arising out of its cancellation, shall be submitted to and determined by arbitration in accordance with the Commercial Arbitration Rules of the Arbitration Foundation of Southern Africa. Such arbitration shall be held in Johannesburg unless otherwise agreed to and shall be held in a summary manner with a view to it being completed as soon as possible.
- 20.2 There shall be one arbitrator who shall be agreed to by the Parties in writing, and failing agreement within 5 (five) Business Days of the dispute first arising, shall be appointed by the Chairman for the time being of the Arbitration Foundation of Southern Africa.
- 20.3 The decision of the arbitrator shall be final and binding on the Parties, and may be made an order of any court of competent jurisdiction. Each of the Parties submits itself to the High Court of South Africa, Gauteng Local Division, Johannesburg should the other Party wish to make the arbitrator's decision an order of that Court. Nothing in this clause **20** shall preclude the Tendering Company from seeking interim relief from any competent court having jurisdiction pending the institution of any arbitration proceedings.

21. Care, Custody and Control of Property of the Buyer

Where in terms of the Contract the Tendering Company has taken into its care, custody and control the property of the Buyer for the purpose of working on, or repairing the Buyer's property, the Tendering Company shall be liable to the Buyer for any physical damage, physical destruction, or loss of that property whilst in the care, custody and control of the Tendering Company, provided that:

- 21.1 the Tendering Company's total liability to the Buyer will be limited to the extent stated in clause **19**;
- 21.2 the Tendering Company shall have no liability to the Buyer for any consequential damages caused by, arising out of, or in connection with the physical damage to or physical destruction of that property, as stated in clause **23**.

22. General Price Variation

- 22.1 Any prices quoted in any Tender which are contained in the Tendering Company's official price list at the date of the Tender are subject to adjustment and the prices applicable to such Tender shall be determined by the Tendering Company's official price list in force on the date of delivery. Unless otherwise stated in the Tender, the amount of all insurance, taxation, or other duties applicable to the manufacture and sale of Products or Services shall be borne by the Buyer.
- 22.2 The Contract Price is based on the cost of materials, transport and labour ruling at the date of the Tender and, unless otherwise stated in the Tender, if between that date and the date of delivery, increases occur in these costs, then the Contract Price shall be accordingly increased to accommodate any such increases. Without prejudice to the right of the Tendering Company to claim any increased costs actually incurred by it, the Contract Price shall otherwise be adjusted in accordance with the contract price adjustment formulas specified in the Tender.
- 22.3 In the event of any doubt or dispute regarding the application of any contract price adjustment formula in terms of clause 22 or where no formula is specified the appropriate Price Adjustment Formula of the Steel and Engineering Industries Federation of South Africa, shall apply. Where no formula is applicable, or in the event of any doubt or dispute regarding the application of a formula, either Party shall be entitled by notice in writing to the other Party and the Auditors to request that the Auditors determine the amount of any adjustment of the Contract Price referred to in this clause 22.
- 22.4 The Auditors, in making their determination in terms of this clause 22 shall act as experts and not as arbitrators and shall as soon as reasonably possible after receipt of the notice referred to in this clause 22 issue a certificate to the Parties stating the amount of any adjustment of the Contract Price in terms of clause 22. The decision of the Auditors shall be final and binding on the Parties.

23. Consequential Damages

- 23.1 In no event, whether as a result of breach of contract, indemnity, warranty, delict (including negligence), strict liability or any other cause arising, shall the Tendering Company be liable for any special, consequential, incidental or exemplary damages whether foreseeable or not including, but not being limited to, loss of profit or revenues, loss of use of the Products or any associated equipment, damage to associated equipment, cost of capital, cost of substitute Products and/or Services, facilities, services or replacement power, downtime cost, or claims of customers of the Buyer for such damages. Should the Products and/or Services be provided, sold or otherwise made available by the Buyer to any third party, then the Buyer shall obtain from that third party a provision affording the Tendering Company the protection of this clause 23 vis-à-vis that third party, failing which the Buyer hereby indemnifies the Tendering Company and holds it harmless against any claims brought against it by such third parties.
- 23.2 For the purpose of this clause 23, the term "*Tendering Company*" shall include the Tendering Company's sub-contractors, agents and suppliers.

24. Shortage in Delivery

- 24.1 No claim for shortages in delivery or damages in transit shall be entertained by the Tendering Company unless the Tendering Company receives written notice of such shortages or damages from the Buyer within 7 (seven) days after delivery or, in the event of non-delivery, within ten days of presentation of invoices to the Buyer by the Tendering Company.
- 24.2 Where the Contract Price is stated to include delivery, the Tendering Company shall, at its option, repair or replace free of charge Products damaged in transit to the point of delivery only provided that the Tendering Company receives written notification of such damage from the Buyer within the time periods stipulated in this clause 24, whichever is applicable.

25. Plans, Jigs, Etc.

- 25.1 The ownership of all plans, diagrams, jigs, tools, templates, moulds, models and patterns in respect of the Tender submitted by the Tendering Company to the Buyer in terms of the Contract shall remain vested in the Tendering Company and shall not be copied, reproduced, sold, disposed of or handed to any third party.
- 25.2 Any technical specifications or any other information in respect of any plans, diagrams, jigs, tools, templates, moulds, models and patterns submitted to the Buyer by the Tendering Company in terms of this clause 25 shall be kept confidential and shall not be disclosed to any third party without the prior written consent of the Tendering Company nor shall such information be used for the Buyer's or anyone else's benefit.

26. Stock

Quotations in the Tender for Products stated to be for delivery from stock of the Tendering Company are subject to the Tendering Company not having sold or committed itself to third parties in respect of such stock at the date of acceptance by the Buyer of the Tender in terms of clause 4.

27. Force Majeure

- 27.1 The Tendering Company shall not be liable for any delay in performing or any failure to perform any of its obligations in terms of the Contract due to any cause beyond its reasonable control, including but without being limited to any of the following:
- 27.1.1 strikes, lock-outs, labour disputes, political instability, community disruption or other industrial action, sabotage, terrorism, civil commotion, riot, invasion, War, threat of or preparation of War;
 - 27.1.2 fire, explosion, storm, flood, subsidence, epidemic, pandemic (such as but not limited to COVID-19 related events), or other natural physical disaster or act of God;
 - 27.1.3 impossibility of the use of railways, shipping, aircraft, motor transport or other means of public or private transport;
 - 27.1.4 failure of electricity or any other supplies, failure of telecommunications or failure, theft or default of any computer hardware or software;
 - 27.1.5 Sanctions;
 - 27.1.6 it being the target of or suffering the effects of a Cyber Operation;
 - 27.1.7 any change in law, policy or statutory regulation of any state or government or other authority having jurisdiction over either Party; and
 - 27.1.8 any liability on the part of the Tendering Company to obtain or receive any imported item from any supplier due to any failure on the part of such supplier to deliver the item in question for any reason beyond the reasonable control of the Tendering Company, including without being limited to, any act of such supplier's own government or any boycott or sanction or embargo which such supplier chooses to observe and which is directed at the RSA or its government or any national of the RSA or anyone connection with the RSA.
- 27.2 Upon the occurrence of any delay or failure referred to in this clause **27**, the provisions of the Contract which are affected shall be suspended for as long as the cause in question continues to operate, provided that if the delay or failure referred to in this clause **27**:
- 27.2.1 has not ceased to operate within a period of six months from the date upon which it arose, the Contract may be terminated by either Party;
 - 27.2.2 affects the Buyer and not the Tendering Company, then the Buyer shall pay to the Tendering Company, on written demand, any and all costs and expenses thereby incurred by the Tendering Company during the period in which the Contract is suspended.

28. Defects

- 28.1 In no event shall the Tendering Company be liable for any loss or damage whatsoever arising from its failure to discover or repair latent defects or defects inherent in the design of Products provided or serviced by the Tendering Company in terms hereof (unless such discovery or repair is normally discoverable by tests expressly specified in the scope of work under these Conditions) or caused by the use of Products by the Buyer against the advice of the Tendering Company.
- 28.2 The Buyer may not alter such Products at all or contrary to the instructions of the Tendering Company, or after those Products have left the control of the Tendering Company. If the Tendering Company furnishes the Buyer with advice or other assistance which concerns any product serviced or supplied hereunder or any system or equipment in which any such product may be installed and which is not required pursuant to these Conditions, the furnishing of such advice or assistance will not subject the Tendering Company to any liability, whether in contract, indemnity, warranty, delict (including negligence), strict liability or any other cause arising.
- 28.3 For the purpose of this clause **28**, the term "*Tendering Company*" shall include the Tendering Company's sub-contractors, agents and suppliers.

29. Confidentiality

The Parties agree to keep all Confidential Information supplied to, or acquired by it in connection with the Contract, strictly confidential and shall not use such information or any part thereof for any purpose other than permitted under the Contract and shall not disclose or publish to any third party (except the Authorised Persons) the fact of or any Confidential Information without the other Party's prior written consent. Each Party shall ensure and procure that its employees, agents and duly authorised subcontractors comply with these provisions.

30. **Data Protection**

30.1 It is recorded that each Party may receive and process the Personal Information of the other Party and other data subjects in connection with and for the purposes of the provision of the Products and/or Services pursuant to the Contract.

30.2 Accordingly, each Party shall:

30.2.1 only process the Personal Information provided by the other Party for the purpose(s) connected with the provision of the Products and/or Services and to the extent strictly necessary to perform its obligations under the Contract, except to the extent requested to do otherwise by the other Party in writing or required by Applicable Law;

30.2.2 comply with all directions and instructions which may be given by the other Party regarding the processing of its Personal Information; and

30.2.3 only process Personal Information strictly in compliance with the Data Protection Laws.

30.3 Where the Buyer provides the Tendering Company with Personal Information relating to a third party data subject (including but not limited to the Buyer's employees, suppliers, customers, directors, shareholders and Affiliates), the Buyer represents and warrants that it has obtained all necessary consents from such third party to the extent required by law for the Buyer to share such Personal Information with the Tendering Company to process.

30.4 The Parties specifically record that the Buyer Data and Tendering Company Data shall constitute Confidential Information and agree to comply with clause 29 in this regard. The Tendering Company represents and warrants that it shall secure the integrity of the Buyer Data in its possession or under its control by taking appropriate, reasonable technical and organisational measures to prevent loss of, or damage to, or unauthorised destruction of the Buyer Data and unlawful access to or unlawful processing of the Buyer Data.

30.5 The Tendering Company shall not transfer or authorise a transfer of the Buyer Data outside the RSA without the prior written consent of the Buyer. If the Buyer Data processed under the Contract is transferred outside the RSA, the Tendering Company shall ensure that:

30.5.1 the Buyer Data is adequately protected both during the transfer and in the location where the Buyer Data will ultimately be processed;

30.5.2 the Buyer has enforceable rights and effective legal remedies in the country where the Buyer Data is transferred; and

30.5.3 that the recipient of the Buyer Data has appropriate safeguards in place similar to or better than the safeguards as between the Parties.

30.6 Each Party shall take all reasonable and appropriate precautions necessary having regard to Applicable Laws and the Parties' obligations under the Contract to preserve the integrity of the Personal Information it has in its possession and to prevent any unauthorised access, use, corruption or loss of the Personal Information in its possession or under its control or that of its employees. Each Party must notify the other Party in the event of non-compliance or breach of any applicable Data Protection Laws or the provisions of this clause 30 as soon as reasonably possible after becoming aware of or any actual or suspected breach. The provisions and obligations on each of the Parties under this clause 30 shall survive termination of the Contract for whatever reason.

31. **Jurisdiction of the Magistrate's Court**

The Buyer hereby agrees and consents that the Tendering Company shall be entitled (at its option) to institute any legal proceedings which might arise out of or in connection with the Contract in the Magistrate's Court in which the Buyer resides or carries on business, notwithstanding that the claim or the value of the matter in dispute might exceed the jurisdiction of the Magistrate's Court. Any expenses incurred in the collecting of any overdue amounts, including but not limited to legal charges (on an attorney and customer scale), collection charges, and tracing costs will be payable by the Buyer.

32. **Breach**

32.1 Subject to the other provisions of the Contract, should either Party commit a breach of the Contract and fail to remedy that breach within 30 (thirty) days after receipt from the other party of written notice calling upon him/it to do so, then the party aggrieved by that breach shall be entitled to either to:

32.1.1 enforce the performance of the terms hereof and/or sue for damages suffered thereby by the aggrieved party; or

32.1.2 if the breach is the failure to pay the Contract Price or any other material breach, cancel the Contract and recover such damages as he/it may have sustained.

32.2 The Parties' remedies under this clause shall not be exhaustive and shall be in addition and without prejudice to any other remedies they may have whether for damages or otherwise.

33. **Legal Construction**

Should one or more of the terms of the Contract be invalid, such remaining terms as are applicable, shall remain in force. Unless otherwise agreed in writing between the Parties, the validity of the Contract, its interpretation, the respective rights and obligations of the parties and all other matters arising in any way out of the Contract or their performance shall be determined in accordance with the laws of the RSA.

34. **Amendments**

No alteration or variation or consensual cancellation of the Contract shall be of any force or effect unless recorded in writing and signed by the Parties.

35. **Whole Agreement**

The Contract constitutes the entire contract between the parties in regard to the subject matter contained therein and no other conditions, warranties, guarantees and representations shall be of any force or effect other than those which are included therein.

36. **Interpretation**

36.1 In these Conditions, unless the context requires otherwise:

36.1.1 words importing any one gender shall include the other two genders; the singular shall include the plural and vice versa;

36.1.2 references to natural persons shall include created entities (corporate and unincorporate) and vice versa;

36.1.3 any reference to an enactment is to that enactment as at the date of signature hereof and as amended or re-enacted from time to time; when any number of days is prescribed in the Contract that number of days shall be reckoned exclusively of the first and inclusively of the last day unless the last day falls on a Saturday, Sunday or official public holiday within the meaning of the Public Holidays Act of the RSA, 1994, in which event the last day shall be the next succeeding day which is not a Saturday, Sunday or official public holiday; expressions or words defined in the Contract shall bear the same meaning in the appendices to the Contract which do not themselves contain definitions.

36.2 The headings in these Conditions have been inserted for convenience only and shall not be used for nor assist or affect its interpretation.

37. **Title**

These Conditions may be referred to or cited as the "*Standard Conditions of Sale and Tender*".

38. **Safety and Health Environment Requirements**

38.1 Should a person representing the Buyer be required to visit the site of a Tendering Company for extended periods, the representative shall comply with the requirements of section 37(2) of the OHS Act, and the representative shall further acknowledge and agree to the Tendering Company's requirements with regard to health, safety and environmental issues.

38.2 To the extent that any of the Services constitute "*construction work*" for purposes of the Construction Regulations, the Buyer represents and warrants to the Tendering Company that it shall have procured the issue of any construction work permits required in terms of Regulation 3(1) of the Construction Regulations or otherwise and/or any other consents or permissions required pursuant to the Construction Regulations prior to those Services being rendered by the Tendering Company.

39. **Domicilium**

39.1 The Parties choose the address set out below as the address at which all notices and other communications must be delivered for the purposes of the Contract:

39.1.1 The Tendering Company at:

[•]

[•]

[•]

Attention: [●]

39.1.2 The Buyer at:

[●]

[●]

[●]

Attention: [●]

39.2 Any notice or communication required or permitted to be given in terms of the Contract shall be valid and effective only if in writing but it shall be competent to give notice by electronic mail.

39.3 Any notice to a Party contained in a correctly addressed envelope delivered by hand to a responsible person during ordinary business hours at its chosen address, shall be deemed to have been received on the day of delivery. Any notice by electronic mail to a Party at its electronic email address shall be deemed, unless the contrary is proved, to have been received within 4 (four) hours of transmission where it is transmitted during normal business hours or within 24 (twenty four) hours of the opening of business on the first Business Day after it is transmitted where it is transmitted outside those business hours.

39.4 The Parties choose the physical address set out opposite its name in clause **39** as the address at which legal process must be delivered for the purpose of the Contract.

39.5 The Parties shall be entitled at any time to change their addresses for the purposes of this clause **39** to by giving written notice to that effect to the other.

**SUPPLEMENTARY CONDITIONS
OF SALE AND TENDER
(FOR USE WHERE GOODS ARE TO BE DELIVERED TO
AND ERECTED ON SITE)
APPENDIX 2
(ACT/2022)**

CONTENTS

1.	DEFINITIONS	3
2.	GENERAL / ORDER OF PRECEDENCE	3
3.	DELIVERY (TO SUPERSEDE CLAUSE 12 OF THE CONDITIONS)	3
4.	ERECTION AT SITE	3
5.	ACCESS TO SITE	4
6.	EXTRA COSTS AND/OR EXPENSES	4
7.	TIME OF TAKING OVER	4
8.	TERMS OF PAYMENT (TO SUPERSEDE CLAUSE 15 OF THE CONDITIONS)	4
9.	CARE OF THE WORKS	5
10.	LIABILITY FOR ACCIDENTS AND DAMAGE	6
11.	TESTS ON SITE	6
12.	WARRANTY (TO SUPERSEDE CLAUSE 16 OF THE CONDITIONS)	7
13.	INSURANCE OF THE WORK INCLUDING PLANT DURING ERECTION	7
14.	PENALTIES	7
15.	SUPERVISION OF ERECTION ONLY	7
16.	PRICE VARIATION (TO SUPERSEDE CLAUSE 14 OF THE CONDITIONS)	8

**SUPPLEMENTARY CONDITIONS OF SALE AND TENDER FOR USE WHERE GOODS ARE TO BE DELIVERED TO AND ERECTED ON SITE
– ACT/2022**

1. Definitions

For the purposes of this **Appendix 2**, unless otherwise stated or the context indicates otherwise, the words:

- 1.1 “ACTOM”, “ACTOM Group”, “Auditors”, “Business Day”, “Buyer”, “Conditions”, “Contract”, “Contract Price”, “Parties”, “RSA”, “Tender” and “Tendering Company” shall have the meanings assigned to them in the ACTOM Group Standard Conditions of Sale and Tender to which this document constitutes **Appendix 2**;
- 1.2 Expressions set out below shall have the meanings assigned to them and cognate expressions shall have a corresponding meaning, namely:
- 1.2.1 “**Commencement Date**” means the date stated in the Contract for the commencement of the erection of the Plant by the Tendering Company;
- 1.2.2 “**Completion Date**” means the date on which the Plant is taken over, or is deemed to have been taken over by the Buyer in terms of clause 7;
- 1.2.3 “**Conditions**” means the ACTOM Group Standard Conditions of Sale and Tender (Manufacture and/or Supply ACT12/2015) to which this document constitutes **Appendix 2**;
- 1.2.4 “**Construction Period**” means the period from the Commencement Date to the Completion Date;
- 1.2.5 “**Plant**” means the permanent works described in the Tender to be erected on the Site in terms of the Contract;
- 1.2.6 “**Site**” means the site stated in the Tender on which the Plant is to be erected;
- 1.2.7 “**Supplementary Conditions**” means supplementary conditions stated in this **Appendix 2**;
- 1.2.8 “**Test Date**” means the date on which the Tendering Company shall carry out any Site tests in terms of clause 11;
- 1.2.9 “**Works**” means the Plant, all materials on Site intended for incorporation in the Plant and any other work in progress or goods required for or used in connection with the erection of the Plant.

2. General / Order of Precedence

- 2.1 The Supplementary Conditions are to be read in conjunction with and, except where explicitly stated, are in addition to the Conditions.
- 2.2 Should there be any inconsistency between the Supplementary Conditions and the Conditions, the provisions of this **Appendix 2** shall prevail.

3. Delivery (to supersede clause 12 of the Conditions)

- 3.1 Delivery shall be made at the Site on the Commencement Date and includes offloading unless otherwise stated.
- 3.2 The Tendering Company shall be entitled to effect part deliveries.
- 3.3 Each delivery or part delivery of an order shall be deemed to be sold under a separate contract.
- 3.4 Neither failure on the part of the Tendering Company to make any delivery or part delivery nor any claim by the Buyer in respect of such delivery or part delivery shall entitle the Buyer to reject the balance of any order.

4. Erection at Site

- 4.1 Unless otherwise stated herein, the Contract Price includes the cost of complete erection of the Plant at the Site.
- 4.2 The Tendering Company shall:
- 4.2.1 design (to the extent stated in the Tender), execute and complete the erection of the Plant and remedy any defects in the Plant in accordance with the Contract; and
- 4.2.2 provide all supervision, labour, materials, equipment, transport and all other goods, facilities and services, whether of a temporary or permanent nature, required for the design, execution and completion of the erection of the Plant and the remedying of any defects in the Plant in terms of the Contract, save for any goods, facilities and services to be provided by the Buyer in terms of clause 5.

5. Access to Site

5.1 The Buyer shall during the Construction Period provide the Tendering Company with:

- 5.1.1 access to and possession of so much of the Site;
- 5.1.2 proper foundations ready to receive the Plant or any part thereof as and when delivered to the Site;
- 5.1.3 suitable cranes and other adequate lifting facilities,
- 5.1.4 any lighting, power and water; and
- 5.1.5 any other goods, facilities and services

as is reasonably necessary to enable the complete erection of the Plant to be expeditiously and continuously carried out by the Tendering Company in terms of the Contract.

5.2 All costs incurred by the Buyer in fulfilling its obligations in terms of this clause 5 shall be for the account of the Buyer.

6. Extra Costs and/or Expenses

6.1 The Contract Price is based on the assumption that all civil work or other preparatory work of any nature for which the Buyer is responsible shall be completed by the Buyer on or before the Commencement Date and that the work to be undertaken by the Tendering Company in terms of the Tender can be carried out with continuity on Business Days during normal working hours.

6.2 Should the Tendering Company incur additional costs and/or expenses as a result of interruptions, delays, suspensions, overtime, unusual hours and mistakes not attributable to the Tendering Company or for work for which the Tendering Company is not responsible in terms of the Contract, such extra costs and/or expenses shall be added to the Contract Price, provided that overtime or unusual hours shall not be worked by the Tendering Company without the prior written consent of the Buyer.

7. Time of Taking Over

7.1 Subject to clause 7.2, the Plant shall be deemed to have been taken over by the Buyer when:

- 7.1.1 erection of the Plant has been completed by the Tendering Company, and
- 7.1.2 the Plant has passed tests on site in terms of clause 11.1; and
- 7.1.3 a Taking Over Certificate has been issued in terms of 11.2, or
- 7.1.4 or as soon as the Plant is put into commercial use by the Buyer

(whichever is the earlier); provided that, notwithstanding anything to the contrary in the Contract, the Plant shall be deemed to have been taken over at the expiration of 1 (one) calendar month after receipt by the Buyer of written notice from the Tendering Company that erection of the Plant is complete, unless prior to the receipt by the Buyer of such notice the results of any tests carried out in terms of clause 11.1 fail to fall within the margins specified in the Tender.

7.2 The time of taking over of the Plant in terms of clause 7.1 shall not be delayed on account of alterations, additions, omissions or defects which do not materially affect the commercial use of the Plant.

8. Terms of Payment (to supersede clause 15 of the Conditions)

8.1 Unless otherwise stated in the Tender or otherwise agreed in writing by the Parties, the Contract Price shall be paid by the Buyer as follows:

- 8.1.1 95% (ninety five percent) of the Contract Price of all goods and materials to be supplied by the Tendering Company for incorporation in the Plant shall be paid by the Buyer on the date of delivery of such goods and materials by the Tendering Company to the Site or if for any cause beyond the reasonable control of the Tendering Company, the Tendering Company is unable to dispatch the goods and materials, then upon presentation of invoices to the Buyer and receipt of written notice by the Buyer from the Tendering Company that the goods and materials are ready for dispatch;
- 8.1.2 monthly payments (to be made by the Buyer on the last Business Day of each month) up to 95% (ninety five percent) of the Contract Price of erection of the Plant shall be paid by the Buyer as erection of the Plant proceeds from the Commencement Date. The amount of each payment shall be proportional to the amount of work completed on the Site by the Tendering Company from time to time and the amount of such work completed shall be agreed in writing by the Parties' respective Site representatives on the last Business Day of each month during the Construction Period;
- 8.1.3 the balance of the Contract Price shall be paid by the Buyer on the Completion Date.

- 8.2 Minor defects or shortages in the Plant which do not materially affect its commercial use shall only entitle the Buyer to retain from the payment mentioned in clause **8.1.3** such sum as reasonably represents the value of such defects or shortages provided that the Buyer notifies the Tendering Company in writing of such defects or shortages within 1 month from the Completion Date.
- 8.3 The Tendering Company shall remedy any defects or shortages referred to in clause **8.2** as soon as reasonably possible after receipt of the notice referred to in clause **8.2** and any sum retained by the Buyer in terms of clause **8.2** shall immediately be paid by the Buyer upon the remedy of such defects or shortages by the Tendering Company.
- 8.4 Should:
- 8.4.1 any portion of the Plant be rejected as a result of the failure of any test carried out in respect of the Plant in terms of clause **11**, any sums paid to the Tendering Company by the Buyer in terms of clause **8.1** shall be applied to payments due for the accepted portions of the Plant satisfying any test carried out in terms of clause **9** and the balance shall be refunded by the Tendering Company to the Buyer as soon as reasonably possible after the failure of the Plant to satisfy any test carried out in terms of clause **11**;
- 8.4.2 the whole of the Plant fail to satisfy the tests carried out in terms of clause **11**, all sums paid by the Buyer to the Tendering Company in terms of clause **8.1** shall be refunded by the Tendering Company to the Buyer as soon as reasonably possible after the failure of such tests.
- 8.5 Notwithstanding anything to the contrary in this clause **8**, any obligation of the Tendering Company to refund any sum to the Buyer in terms of this clause **8** is subject to the fulfilment by the Buyer of all its obligations in terms of the Contract.
- 8.6 Should the Buyer fail to fulfil its obligations in terms of clause **12** of the Conditions, the Buyer shall make payment in terms of:
- 8.6.1 clause **8.1.1** as if delivery had been made by the Tendering Company; and
- 8.6.2 clause **8.1.3** within 2 (two) calendar months after receipt by the Buyer of written notification from the Tendering Company that the goods are ready for dispatch.
- 8.7 The Buyer shall pay any outstanding balance of the Contract Price in terms of clause **8.1** in respect of any goods lost or damaged after delivery provided that such loss or damage is not attributable to any fault of the Tendering Company, its agents, employees or subcontractors.
- 8.8 Should the Buyer fail to fulfil its obligations in terms of clause **5.1** or the Tendering Company be unable to commence erection of the Plant on the Commencement Date due to circumstances beyond its reasonable control, the Contract Price less the price of erection stated in the Tender shall immediately be due and payable by the Buyer to the Tendering Company.
- 8.9 Notwithstanding anything to the contrary in this clause **8**:
- 8.9.1 the Tendering Company shall be entitled in its sole discretion to call for security of any kind whatsoever from the Buyer in a form reasonably acceptable to the Tendering Company for payment of all amounts payable by the Buyer to the Tendering Company in terms of clause **8.1**;
- 8.9.2 if the Buyer fails to make payment in accordance with this clause **8** or fails to comply with any provisions of the Contract, the Tendering Company shall be entitled to cancel any undelivered portion of the goods and the Buyer shall remain responsible for the completed and partly completed work in respect of the erection of the Plant up to the date of such cancellation.
- 8.10 Any payments by the Buyer in terms of this clause **8** shall not be set off against or withheld on account of any counterclaims, unless such counterclaims have been admitted by the Tendering Company in writing.
- 8.11 Any liability of the Tendering Company in terms of the Contract is subject to the Buyer adhering to the terms of payment of the Tendering Company in terms of the Contract and the fulfilment of all the other obligations of the Buyer in terms of the Contract.
- 8.12 Without prejudice to the right of the Tendering Company to payment in terms of this clause **8**, the Buyer shall pay interest on any sum due to the Tendering Company at the ruling prime rate as confirmed by the Tendering Company's bankers plus 2% (two percent) from the due date of such payment until payment is actually made.
- 9. Care of the Works**
- 9.1 The Tendering Company be responsible for the care of the Works during the Construction Period.
- 9.2 In the event of any damage to or loss of any of the Works or any part thereof from any cause whatsoever, save for the risks stated in clause **9.3** during the Construction Period, the Tendering Company shall at its own cost repair and make good such damage or loss so that at the Completion Date the Works shall be in good order and condition in conformity with the terms of the Contract.
- 9.3 For the purposes of this clause **9**, risks referred to in clause **9.2** include:

- 9.3.1 war, invasion, act of foreign enemies, hostilities or warlike operations (whether war be declared or not) or civil war;
 - 9.3.2 insurrection, rebellion or revolution;
 - 9.3.3 mutiny, military rising, military or usurped power, martial law or state of siege, or any other event or cause which determines the proclamation or maintenance of martial law or state of siege,
 - 9.3.4 any event which, at the Commencement Date, is defined as a risk in terms of insurance offered by the South African Special Risks Insurance Association;
 - 9.3.5 any occurrence for which a fund has been established in terms of the War Damage Insurance and Compensation Act, 1976;
 - 9.3.6 the impact of meteorites;
 - 9.3.7 pressure waves caused by aircraft or other aerial devices travelling at sonic or supersonic speeds;
 - 9.3.8 ionising radiation or contamination by radioactivity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuels;
 - 9.3.9 the use or occupation by the Buyer or its employees, agents or other contractors (not employed by the Tendering Company) of any part of the Works;
 - 9.3.10 any act or omission of the Buyer, its employees, agents or other contractors (not employed by the Tendering Company) or any defects in any materials supplied by the Buyer for incorporation in the Works;
 - 9.3.11 the confiscation, commandeering, nationalisation, requisition or destruction of or damage to property by an order of any government, public or local authority;
 - 9.3.12 any risk which the Tendering Company could not reasonably have foreseen at the date of the Tender or if foreseeable, against which reasonable measures to prevent loss, damage or injury from occurring could not reasonably have been taken by the Tendering Company.
- 9.4 In the event of any damage to or loss of any of the Works or any part thereof arising from any of the risks stated in clause **9.3**, the Tendering Company shall, if requested to do so in writing by the Buyer, repair and make good such damage or loss provided that the cost of such repair shall be borne by the Buyer.

10. Liability for Accidents and Damage

Subject to the provisions of **clause 21** of the Conditions, the Tendering Company indemnifies the Buyer and holds it harmless against any loss, liability, damage or expense which the Buyer may suffer in respect of the property of any person or the injury or death of any person during the Construction Period as a result of the gross negligence or wilful misconduct of the Tendering Company, its employees, agents or sub-contractors provided that:

- 10.1 the total liability of the Tendering Company to the Buyer in terms of this clause **10** in respect of damage to or loss of property shall not exceed R100 000,00 (one hundred thousand Rand) or 15% (fifteen percent) of the Contract Price, whichever sum is the greater; and
- 10.2 subject to clause **12**, the Tendering Company shall not be liable for any loss or damage or injury occurring after the Completion Date.

11. Tests on Site

- 11.1 Where the Tender provides for tests on Site, the Buyer shall, if requested to do so in writing by the Tendering Company, provide at its own expense, such labour, materials, electricity, gas, fuel, water, stores, apparatus, instruments or other goods, facilities or services as may be reasonably necessary from time to time to enable the Tendering Company to carry out such tests of the Plant or workmanship in accordance with the Tender provided that where the Tender provides for:

11.1.1 *Complete erection of the Plant in terms of clause 4:* Site tests shall be carried out by the Tendering Company within 1 (one) month after completion of erection of the Plant by the Tendering Company. The Tendering Company shall give the Buyer not less than 14 (fourteen) days prior written notice of the Test Date. Should:

- 11.1.1.1 the Buyer fail to attend such tests on the Test Date, the Tendering Company shall proceed with the tests and such tests shall be deemed to have taken place in the Buyer's presence;
- 11.1.1.2 the results of any tests carried out in terms of this clause **11** fail to fall within the margin specified in the Tender, the tests shall, at the election of the Tendering Company, be repeated within a period of 14 (fourteen) days after the date when the Plant is ready for retest; or

11.1.2 *For Supervision of Erection in terms of clause 15:* Site tests shall be carried out by the Buyer within 1 (one) calendar month after completion of erection of the Plant by the Tendering Company. The Buyer shall give the Tendering Company not less than 14 (fourteen) days prior written notice of the Test Date so that a representative of the Tendering Company may be

present during the execution of such tests. Should the result of such tests fail to fall within the margin specified in the Tender, the tests shall, at the election of the Tendering Company, be repeated by the Buyer within 14 (fourteen) days after the date when the Plant is ready for retest.

11.2 The Buyer shall issue a Taking Over Certificate to the Tendering Company as soon as the results of the tests carried out in terms of clauses 11.1.1 or 11.1.2, as the case may be, satisfy the margins specified in the Tender.

12. Warranty (to supersede clause 16 of the Conditions)

12.1 The Tendering Company shall make good, by repair, or at its option, by the supply of a replacement, defects which, under proper use, appear in the Plant within a period of 12 (twelve) months after the Completion Date and arise solely from faulty materials or workmanship or design not in accordance with the terms of the Contract; provided that the Buyer:

12.1.1 notifies the Tendering Company in writing of such defects within the period stated in this clause 12.1; and

12.1.2 returns any defective parts to the Tendering Company if requested to do so by notice in writing by the Tendering Company within the time period stipulated in such notice.

12.2 The Tendering Company shall not be liable for any expenses, apart from the repair or replacement of any defects in the Plant, as the case may be, in terms of clause 12.1 which may be incurred by the Buyer complying with its obligations in terms of clause 12.1.2.

12.3 Any repair or replacement by the Tendering Company in terms of clause 12.1 shall be carried out as soon as reasonably possible after receipt by the Tendering Company of the notice referred to in clause 12.1.1.

12.4 The liability of the Tendering Company in terms of this clause 12 shall be in lieu of any warranty or condition implied by law as to the quality or fitness for any particular purpose of the Plant, and save as provided in this clause 12, the Tendering Company shall not be under any liability, whether in contract, delict or otherwise, in respect of or for any injury, damage or loss resulting from such defects or from any work done in connection therewith.

12.5 In respect of parts or components not manufactured or designed by the Tendering Company, the Tendering Company guarantees such parts or components provided that such guarantee shall be equivalent to the guarantee (if any) which the Tendering Company may have received from the supplier of such parts or components in respect thereof, but not so as to impose in respect of such parts or components a liability greater than that imposed on the Tendering Company by the provisions of this clause 12.

13. Insurance of the Work including Plant during erection

13.1 Subject to clause 13.2 and unless otherwise stated in the Tender, the Tendering Company shall, during the Construction Period, insure the Works, and keep each part thereof insured for its full value against damage, loss or destruction caused by fire, explosion, lightning, earthquake, theft, flood, storm, tempest, aircraft, natural disaster or act of God and such other risks as may reasonably and specifically be requested by the Buyer from time to time during the Construction Period.

13.2 The terms of any insurance policy effected by the Tendering Company in terms of clause 13.1 shall be approved by the Buyer, which approval shall not be unreasonably withheld. The Tendering Company shall, from time to time when requested to do so by the Buyer, provide the Buyer with proof of any policies of insurance effected in terms of this clause 13 as well as proof of the payment by the Tendering Company of any premiums in respect of any policies effected by it in terms of this clause 13.

14. Penalties

14.1 Subject to clause 14.2, the Tendering Company shall not be liable for liquidated damages for failure to complete the erection of the Plant within the period stated in the Tender, unless such delay is attributable solely to the gross negligence or wilful default of the Tendering Company.

14.2 Notwithstanding anything to the contrary in clause 14.1, the liability of the Tendering Company for liquidated damages for late completion of the Plant in terms of the Contract shall be limited to the delay portion only, and to the amount so stated in the Tender. In the event that no such amount is stated in the Tender, the liability of the Tendering Company in terms of this clause 14.2 shall be limited to a maximum of 5% (five percent) of the Contract Price.

15. Supervision of erection only

Where the Tender provides that the Tendering Company shall merely supervise the erection of any Plant, but not undertake the complete erection of such Plant in terms of clause 4, the obligations of the Tendering Company shall be limited to the provision of one or more competent engineers (the precise number to be stated in the Tender) to give any advice reasonably requested from time to time during the period stated in the Tender to the skilled or unskilled personnel of the Buyer, in respect of

- 15.1 the reception and unpacking of machinery/equipment at Site;
- 15.2 the erection of machinery/equipment by the Buyer; and
- 15.3 if the Tender so provides, the checking for accuracy, testing and commissioning of any machinery/equipment referred to in clause 15.2.

16. Price variation (to supersede clause 14 of the Conditions)

The Contract Price is based on the cost of materials, transport and labour ruling at the date of the Tender and, unless otherwise stated in the Tender, if between that date and the date of taking over of the Plant by the Buyer in terms of clause 7, variations occur in these costs, then the Contract Price shall be amended to provide for these variations. Without prejudice to the right of the Tendering Company to claim increased costs actually incurred, the Contract Price shall be adjusted in accordance with the contract price adjustment formulas specified in the Tender.