

SUPPLEMENTARY CONDITIONS OF SALE AND TENDER FOR USE WHERE GOODS ARE TO BE DELIVERED TO AND ERECTED ON SITE – ACT/2021

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.