

## JIMTEN TERMS AND CONDITIONS FOR PURCHASING EQUIPMENT

### 1. DEFINITIONS

- 1.1 In these terms and conditions (hereafter the “*Terms and Conditions*”) the following terms shall have the following meaning:

**Certificate of Acceptance:** means the written certificate issued by the Company to acknowledge that the Equipment has been successfully commissioned and passed the performance & production tests and has thereby been accepted.

**Company:** means the company that issues the Purchase Order.

**Contract:** means any Framework Agreement in force on the date of the Purchase Order, the Purchase Order, the Specification, any other documents to which the Purchase Order refers, the Seller’s Quotation and acceptance of the Purchase Order (excluding any terms of sale that may be contained therein). In the event of any inconsistency or discrepancy between the above documents the order of precedence shall be as listed in this definition.

**Contract Price:** means the price paid by the Company to the Seller for the design, manufacture, delivery and commissioning of the Equipment and the provision of all work required to complete the Contract.

**Equipment:** means the Equipment agreed in the Contract to be bought by the Company from the Seller (including any part or parts of them).

**Framework Agreement:** means any agreement signed by or on behalf of the Company with the Seller or on behalf of the Seller, covering the supply of Equipment to the Company or other companies within the Company’s group.

**Intellectual Property Rights:** means all patents, designs and trade marks (whether registered or unregistered), copyright, know-how, database rights and all other intellectual property rights and similar or equivalent rights anywhere in the world which currently exist or are recognised in the future; and applications, extensions and renewals in relation to such rights.

**Purchase Order:** means the Company's written instruction to buy the Equipment, incorporating these Terms and Conditions and where applicable the Specification and any other associated document.

**Seller:** means the person, firm or company who accepts the Company's Purchase Order.

**Seller’s Quotation:** means the quotation issued by the Seller in respect of the Equipment.

**Specification:** means the document so titled produced by the Seller and reviewed, possibly amended, and subsequently accepted by the Company as the technical and performance requirements in respect of the Equipment.

- 1.2 A reference to one gender includes a reference to the other gender and terms defined in singular include the plural and vice versa.
- 1.3 Headings herein are for convenience only and do not affect the interpretation of these Terms and Conditions.

### 2. APPLICATION OF TERMS & ENTIRE AGREEMENT

- 2.1 These Terms and Conditions shall be deemed to be automatically incorporated and shall apply to any and all Contracts whether expressly referenced or attached therein or not. No standard terms or conditions endorsed upon, delivered with or contained in the Seller's quotation,

acknowledgement or acceptance of order, specification or similar document shall form part of the Contract.

- 2.2 The Contract shall, unless otherwise agreed in writing by the parties, comprise the entire agreement between the parties in relation to any Purchase Order and shall supersede all previous arrangements, discussions or agreements between the parties, but for the avoidance of doubt, any representations made by the Seller to the Company regarding the quality or specification of the Equipment shall be deemed to form part of the Contract.
- 2.3 Each Purchase Order for Equipment by the Company from the Seller shall be deemed to be an offer by the Company to buy Equipment subject to these Terms and Conditions and no Purchase Order shall be accepted until the Seller either expressly by giving notice of acceptance, or impliedly by fulfilling the Purchase Order, in whole or in part accepts the offer.
- 2.4 No variation to these Terms and Conditions or to the Contract shall have effect unless expressly agreed in writing by the Company.
- 2.5 For the avoidance of doubt these Terms and Conditions shall apply to the Contract irrespective of the language used in the Purchase Order and any associated documentation issued by the parties and the Seller acknowledges and recognises that it has full understanding of the language used in these Terms and Conditions.

### **3. QUALITY AND DEFECTS**

- 3.1 The Equipment is to be new and shall be of sound satisfactory and merchantable quality in accordance with industrial norms and standards for similar products and contracts of a similar nature. The Seller guarantees that it is fit for the particular purpose intended by the Company and in accordance with all Contract requirements. In particular, it must comply with the performance requirements, guarantees and lifetime use as detailed in the Specification and/or as set out by the Company.
- 3.2 The Seller shall comply with all legislation applicable to the Equipment in the country where the Equipment is to be delivered including compliance with any health and safety requirements in respect of the Equipment or policies or procedures operated by the Company.
- 3.3 Prior to delivery of the Equipment to the Company the Company shall have the right and be given the opportunity by the Seller to inspect and test the Equipment.
- 3.4 If the results of such inspection or testing cause the Company to be of the opinion that the Equipment does not conform or is unlikely to conform with the Contract requirements, the Company shall inform the Seller and the Seller shall immediately take such action as is necessary to ensure conformity and in addition the Company shall have the right to require and witness further testing and inspection.
- 3.5 Notwithstanding any such inspection or testing, the Seller shall remain fully responsible for the Equipment and its compliance with the Contract requirements and any such inspection or testing shall not diminish or otherwise affect the Seller's obligations under the Contract and does not imply acceptance of the Equipment by the Company.
- 3.6 If the Equipment fails to comply with the provisions set out in this Article 3 the Company shall be entitled to avail itself by one of the remedies detailed in Article 9 or to get a third party to rectify the defects at the Sellers cost or to reject the Equipment, cancel the Purchase Order and reclaim any monies previously paid.

### **4. INDEMNITY & INSURANCE**

- 4.1 The Seller shall hold the Company harmless and keep the Company indemnified in full against all liabilities loss, damages, injury, costs and expenses (including legal and other professional fees and expenses) awarded against or incurred or paid by the Company as a result of or in connection with:

- (a) defective or non conforming Equipment; and,
- (b) an infringement or alleged infringement of any Intellectual Property Rights caused by the use, manufacture or supply of the Equipment; and
- (c) a breach of confidentiality.

4.2 The Seller shall take out and maintain with a reputable and financially sound insurance company insurance policies sufficient to cover any liability of the Seller towards the Company and third parties in respect of the provision of the Equipment. The Seller shall provide copies of its insurance policies and premium receipts following a request by the Company.

## **5. DELIVERY**

5.1 The Equipment shall be adequately protected against damage and deterioration in transit and delivered, DDP (Incoterms 2010) to the Company's place of business as stated in the Purchase Order.

5.2 The date for delivery shall be specified in the Purchase Order, or as reasonably advised by the Company. Unless otherwise stipulated in the Purchase Order, delivery shall only be accepted by the Company in normal business hours. Time is of the essence.

5.3 The Seller shall ensure that each Equipment delivery is accompanied by a certificate of conformity and a delivery note which shows the Purchase Order number and the date of the Purchase Order.

5.4 If the Equipment is not delivered on the due date then, without prejudice to any other rights which it may have within the Contract or at law, the Company reserves the right to claim liquidated damages for delay at a rate of one per cent (1%) of the Contract Price per week for each week or part thereof during which the delivery has not occurred up to a maximum of five per cent (5%) of the Contract Price. The parties agree that such liquidated damages are a genuine pre-estimate of loss incurred by the Company and are not deemed as a penalty.

## **6. INSTALLATION & COMMISSIONING**

6.1 The Seller shall deliver and commission the Equipment at the site in accordance with the Contract requirements with reasonable skill and care to a standard that can be reasonably expected of an organisation for the supply of this type of and similar equipment.

6.2 The Seller must recognise and accept that the Company site where the Equipment is being installed and commissioned is a fully operational site where operations may continue during the installation, commissioning and inspection phases of the Contract. Subsequently all on-site work on the Contract should be performed with minimal impact to the Company operations and should be co-ordinated with the Company site representative. On occasions when power is required to be switched off, this is to be undertaken only with the permission of the Company site representative. Furthermore, although it is the desire of the Company to progress work on this Contract expediently the Company cannot guarantee full unimpaired total access to the work site, power etc. at any one time.

6.3 Appropriate operator and basic maintenance training shall be provided by the Seller to the Company as part of the commissioning exercise of the Contract. The personnel provided by the Seller to undertake the training shall be suitably qualified and experienced on the Equipment.

6.4 As part of the commissioning phase of the Contract and prior to the commencement of the performance tests the Seller shall supply the Company with:

- (a) two (2) sets of paper manuals, one set in English and the other in the language where the Company is incorporated and one (1) Manual on CD Rom in Adobe Acrobat Reader Format with all assembly drawings;
- (b) a recommended spares list detailing life expectancy for each item; and
- (c) a full maintenance schedule.

## **7. PERFORMANCE TESTS**

- 7.1 When the Equipment has been commissioned at the site, the Company in the presence of representatives from the Seller shall undertake a series of performance & production tests. Such performance tests shall be agreed in advance between the parties and the Company shall, if the Equipment is operating in accordance with the Specification and meets the performance & production test performance criteria, issue a Certificate of Acceptance within seven (7) days of the passing of the appropriate criteria.
- 7.2 Should the Equipment not pass the performance & production tests or not operate in accordance with the Specification, then the Company and the Seller shall, without prejudice to any of the Company's rights under the Contract, consult as to:
- (a) what modifications are necessary to the Equipment to allow it to pass the retaken performance & production tests, or
  - (b) whether the Company is prepared to accept the Equipment with such shortfalls in performance.

All costs involved in modifications to the Equipment necessary to meet the Specification and pass the retaken performance & production tests are to be borne by the Seller.

If such a shortfall in performance is accepted by the Company an appropriate amendment to the Contract Price shall be agreed to reflect such shortfall in performance; such amendment to be reasonable in the circumstances and whereupon it has been agreed a Certificate of Acceptance shall be issued.

- 7.3 When a Certificate of Acceptance has been issued the Equipment shall be deemed accepted by the Company and the warranty period shall commence.

## **8. TRANSFER OF RISK & PROPERTY**

The Equipment shall remain at the risk of the Seller until the issue of the Certificate of Acceptance.

## **9. REMEDIES**

Without prejudice to any other right or remedy which the Company may have, if the Equipment is not supplied in accordance with, or the Seller fails to comply with, any of the terms of the Contract the Company shall be entitled to avail itself of any one or more of the following remedies at its discretion, whether or not the Equipment has been accepted by the Company:

- (a) to rescind the Purchase Order;
- (b) to reject the Equipment and return it to the Seller at the risk and cost of the Seller;
- (c) at the Company's option to give the Seller the opportunity at the Seller's expense either to remedy any defect in the Equipment or to supply a replacement and carry out any other necessary work to ensure that the terms of the Contract are fulfilled; and

- (d) to claim such damages as may have been sustained in consequence of the Seller's breach or breaches of the Contract.

## **10. WARRANTY**

- 10.1 The Equipment supplied and its associated installation and commissioning work shall be subject to a warranty period of two (2) years (or such longer period as may be agreed by the parties and stated on the Purchase Order) commencing from the date of issue of the Certificate of Acceptance.
- 10.2 The Seller shall be responsible for making good by repair or replacement with all possible speed at their expense any non conformity of or defect in or damage to any part of the Equipment which may appear or occur during the warranty period and which arises either from any defective materials, workmanship or design, or from any act or omission of the Seller.
- 10.3 The Seller warrants any replacement part for a period equal to the warranty period from the date of its replacement.

## **11. PRICE**

- 11.1 The Contract Price of the Equipment shall be stated in the Purchase Order and unless otherwise agreed in writing by the Company shall be exclusive of value added tax but inclusive of all other charges and duties.
- 11.2 No variation in the Contract Price or extra charges shall be applicable unless agreed in writing by the Company. No payment will be made for crates or packing material unless agreed by the Company and stated on the Purchase Order.
- 11.3 Unless otherwise stated in the Purchase Order all costs associated with the delivery, installation and commissioning of the Equipment, operator training and operator and maintenance manuals are included within the Contract Price.

## **12. PAYMENT**

- 12.1 Subject to the Seller's compliance with the Contract, the Company shall pay the price of the Equipment within the time period stated on the Purchase Order. If a milestone payment plan has been agreed by the parties this shall be stated on the Purchase Order.
- 12.2 Without prejudice to any other right or remedy, the Company reserves the right to set off any amount owing at any time from the Seller to the Company against any amount payable by the Company to the Seller under the Contract.

## **13. CONFIDENTIALITY**

The Seller shall keep in strict confidence all technical or commercial know-how, specifications, inventions, processes or initiatives which are of a confidential nature and have been disclosed to the Seller by the Company or its agents and any other confidential information concerning the Company's business or its products including a Purchase Order and its subject matter which the Seller may obtain and the Seller shall restrict disclosure of such confidential material to such of its employees, agents or sub-contractors as need to know the same for the purpose of discharging the Seller's obligations to the Company and shall ensure that such employees, agents or sub-contractors are subject to like obligations of confidentiality as bind the Seller. The Seller shall not publicise the fact it is supplying Equipment to the Company without the Company's prior written consent. The Seller shall comply with the provisions of this Article for a period of three (3) years after the Contract has been completed or is terminated for whatever reason.

## 14. TERMINATION

14.1 The Company shall have the right at any time to terminate all or any part of the Contract automatically with or without cause at its convenience by sending a four (4) week prior written notice to this effect to the Seller. Subject to the Seller complying with the provisions of Article 14.3 hereafter, the Company shall pay to the Seller:

- (i) the price of work completed in accordance with the Contract;
- (ii) the cost of any work in progress authorised by the Company subject to such work not being in excess of four (4) weeks of production;

The Seller shall not be entitled to any other payment from the Purchaser due to termination of the Contract by virtue of this Article 14.

14.2 The Company shall have the right at any time by giving notice in writing to the Seller to terminate the Contract immediately without having to request a court order and without liability to the Seller if:

- (a) the Seller fails to or threatens not to fulfil any of the terms and conditions of the Contract; or
- (b) any distress, execution or other process is levied upon any of the assets of the Seller; or
- (c) the Seller has a bankruptcy order made against him or makes an arrangement or composition with his creditors, or otherwise takes the benefit of any statutory provision for the time being in force for the relief of insolvent debtors, or (being a body corporate) convenes a meeting of creditors (whether formal or informal), or enters into liquidation (whether voluntary or compulsory) except a solvent voluntary liquidation for the purpose only of reconstruction or amalgamation, or has a receiver or manager, administrator or administrative receiver appointed of its undertaking or any part thereof, or documents are filed with the court for the appointment of an administrator of the Seller or notice of intention to appoint an administrator is given by the Seller or its directors, or a resolution is passed or a petition presented to any court for the winding-up of the Seller or for the granting of an administration order in respect of the Seller, or any proceedings are commenced relating to the insolvency or possible insolvency of the Seller; or
- (d) in case of merger, spin-off or direct or indirect change of control of the Seller;; or
- (e) the financial position of the Seller deteriorates to such an extent that in the opinion of the Company the capability of the Seller adequately to fulfil its obligations under the Contract has been placed in jeopardy.

14.3 The termination of the Contract, however arising, shall be without prejudice to the rights and duties of the Company accrued prior to termination. The provisions which expressly or impliedly have effect after termination including but not limited to confidentiality, remedies indemnity and guarantee shall continue to be enforceable as long as necessary to give them full force and effect notwithstanding termination.

## 15. ASSIGNMENT & SUBCONTRACTING

15.1 The Seller shall not be entitled to subcontract its rights or obligations in or assign the Contract or any part of it without the prior written consent of the Company.

15.2 The Company may assign the Contract or any part of it to any person firm or company.

**16. FORCE MAJEURE**

- 16.1 Neither party shall be liable for failure to perform its obligations under this Contract if such failure results from circumstances beyond the party's control (wars and hostilities and Acts of God such as fire, flood etc.) (a "*Force Majeure Event*").
- 16.2 If either party is affected by a Force Majeure Event, it will use all best endeavours to avoid or cure the Force Majeure Event and will promptly notify the other party of the nature of the Force Majeure Event, the nature of any actual or anticipated failure, delay or imperfect performance and the anticipated consequence and length of such failure, delay or imperfect performance.
- 16.3 If either party is prevented by Force Majeure Event from performance of its obligations for a continuous period in excess of one month the other party may terminate this Agreement forthwith on service of written notice upon the party so prevented, in which case neither party shall have any liability to the other except that rights and liabilities which accrued prior to such termination shall continue to subsist.

**17. MAINTENANCE & SPARES**

- 17.1 Except as may otherwise be provided for within the Contract, the terms and prices under which the Company may enter into a maintenance contract shall be separately agreed between the Company and the Seller; such a contract will include a recommended spares holding along with their appropriate prices in order for the Company to adequately support the Equipment for a two (2) year period from the date of issue of the Certificate of Acceptance.
- 17.2 The Seller guarantees to make available to the Company the opportunity to purchase consumables, components, spares parts etc., in order for the Company to maintain and support the Equipment for a period of at least ten (10) years from the date of issue of the Certificate of Acceptance. If after this period the Seller elects to cease the manufacture of such items they shall inform the Company at least six (6) months before such stoppage to allow the Company one last life-time purchase.

**18. GENERAL**

- 18.1 If any provision of the Contract is found by any court, tribunal or administrative body of competent jurisdiction to be wholly or partly illegal, invalid, void, voidable, unenforceable or unreasonable it shall, to the extent of such illegality, invalidity, voidness, unenforceability or unreasonableness, be deemed severable and the remaining provisions of the Contract and the remainder of such provision shall continue in full force and effect.
- 18.2 Failure or delay by the Company in enforcing or partially enforcing any provision of the Contract shall not be construed as a waiver of any of its rights under the Contract.
- 18.3 Any waiver by the Company of any breach of, or any default under, any provision of the Contract by the Seller shall not be deemed a waiver of any subsequent breach or default and shall in no way affect the other terms of the Contract.
- 18.4 Each right or remedy available to the Company under the Contract (including warranty) is notwithstanding anything to the contrary without prejudice to any other right or remedy of the Company whether under the Contract or at law.
- 18.5 Notwithstanding anything to the contrary in this Contract no limitation of the Seller's liability shall apply for personal injury or death caused by the Equipment; or for damages for which the Seller is not permitted by law to exclude or limit, or for damages due to gross negligence or wilful misconduct or to any infringement of any third party intellectual property rights, or to any breach of confidentiality undertaking.

- 18.6 Any notice to be served under these Terms and Conditions must be in writing and may be delivered by prepaid first class post or by fax. Delivery shall be deemed to have taken place immediately in the case of fax transmission or forty-eight (48) hours after posting.
- 18.7 The Contract and any part thereof shall be governed and construed in accordance with the laws of the country where the Company has its registered office, excluding the provisions of the United Nations Convention on Contracts for the International Sale of Equipment, Vienna dated 11 April 1980, any statute implementing that convention and any conflict of law provisions.
- 18.8 Any differences or disputes arising out of or in connection with the Contract and any part thereof shall be brought exclusively in the court(s) having jurisdiction over the location where the Company has its registered office.

\*\*\*