

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 -
 - “**ACTOM**” means ACTOM (Pty) Ltd, Reg No. 2008/001863/07, a private company with limited liability incorporated under the laws of the RSA;
 - “**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;
 - “**Auditors**” means the auditors of the Tendering Company from time to time;
 - “**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;
 - “**Buyer**” means the party to whom a Tender is addressed by the ACTOM Group;
 - “**Companies Act**” means the Companies Act, 2008;
 - “**Consumer Protection Act**” means the Consumer Protection Act, 2008;
 - “**Conditions**” means these standard terms and conditions and any appendices hereto;
 - “**Construction Regulations**” any construction regulations issued by the Minister of Labour from time to time pursuant to section 43 of the OHS Act;
 - “**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;
 - “**Contract Price**” means the total contract price for the Products and/or Services, as the case may be, stated in the Tender;
 - “**OHS Act**” means the Occupational Health and Safety Act, 1993;
 - “**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);
 - “**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;
 - “**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;
 - “**Supplementary Conditions**” means the terms and conditions set out in Appendix 2;
 - “**Tender**” means any tender or quotation submitted by any Tendering Company to the Buyer in terms of these Conditions;
 - “**Tendering Company**” means ACTOM or any of its divisions or subsidiary companies submitting a tender.
2. **General** (i) 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 which are in conflict with these Conditions are expressly excluded, unless otherwise agreed in writing by the parties.
 - (ii) 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 ACTOM'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 ACTOM's premises.
 - (iii) 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.
 - (iv) 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.
 - (v) Unless otherwise stated in the Contract, the Tendering Company shall 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.
 - (vi) Unless otherwise stated in the Contract, the Tendering Company shall be the sole owner of any scrap generated in the provision of Services.
 - (vii) 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.
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** 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.

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** 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 idea 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.

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** The Products are carefully inspected and, where practicable, submitted to that 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 for the cost of such tests in addition to the Contract Price.

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 to have been conducted in the Buyer's presence.
10. **Performance** 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 test in its works. 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.

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 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 be entitled, at its option, to replace the affected Products or the defective parts thereof at the initial place of delivery.

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** The Buyer agrees to 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. 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** 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. The Tendering Company shall have the right to effect part-deliveries. Each delivery or part-delivery of an order shall be deemed to be sold under a separate contract. 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.

Risk in the Products shall pass from the Tendering Company to the Buyer on delivery but ownership in any Products delivered shall remain vested in the Tendering Company until the entire Contract Price has been paid by the Buyer to the Tendering Company in terms of clause 15.

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 injury to such immovable property or other goods or products, as the case may be.

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 despatch 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.

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** 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.

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.

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.

The Contract shall not be cancelled by the Buyer on the ground 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** 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.

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 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** Unless otherwise stated in any Tender or otherwise agreed 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:

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

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

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 reserves the right 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. 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.

The Buyer shall pay any amount due to the Tendering Company in terms of this clause 15 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.

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**

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.

Subject to what follows, 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.

The Tendering Company shall not be liable for any other costs, expenses 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 other 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.

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.

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 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.

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 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. Any and all warranties and representations given by the Tendering Company are "person specific" in that any such warranties and representations are personal and may not be sold, ceded or otherwise transferred without the Tendering Company's express prior written consent.

- 17 **Consumer Protection Act** The Buyer undertakes to 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** 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.

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** 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. 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. [For the purpose of this clause 19, the term "Tendering Company" shall include the Tendering Company's sub-contractors, agents and suppliers].
- 20 **Arbitration** Any dispute between the parties in regard to 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. 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. 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 President for the time being of the South African Institute of Electrical Engineers. The arbitrator shall have the powers conferred upon an arbitrator under the Arbitration Act, 1965, as amended, or re-enacted in some other form from time to time, but shall not be obliged to follow the procedures described in that Act and shall be entitled to decide on such procedures as he may consider desirable for the speedy determination of the dispute, and in particular he shall have the sole and absolute discretion to determine whether and to what extent it shall be necessary to file pleadings, make discovery of documents or hear oral evidence. 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 hereby submits itself to the South Gauteng High Court, Johannesburg should the other party wish to make the arbitrator's decision an order of that Court.
- 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 will 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 : a) The Tendering Company's total liability to the Buyer will be limited as per clause 19 herein; b) 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 is set out in clause 23 herein.
- 22 **General Price Variation** 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. 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. In the event of any doubt or dispute regarding the application of any contract price adjustment formula in terms of 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. 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 both 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** 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 being provided by the Tendering Company in terms of these Conditions 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. [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** 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 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. 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.** 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 be not be copied, reproduced, sold, disposed of or handed to any third party without the prior written consent of the Tendering Company. 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** 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:
- (i) strikes, lock-outs, labour disputes or other industrial action; sabotage, terrorism, civil commotion, riot, invasion, war, threat of or preparation of war;
 - (ii) fire, explosion, storm, flood, subsidence, epidemic or other natural physical disaster or act of God;
 - (iii) impossibility of the use of railways, shipping, aircraft, motor transport or other means of public or private transport;
 - (iv) failure of electricity or any other supplies, failure of telecommunications or failure, theft or default of any computer hardware or software;
 - (v) any act or policy of any state or government or other authority having jurisdiction over either party;
 - (vi) 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.
- 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:
- (i) 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;
 - (ii) 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** 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 in 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. 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. [For the purpose of this clause 28, the term "Tendering Company" shall include the Tendering Company's sub-contractors, agents and suppliers].
- 29 **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.
- 30 **Breach** Subject to the remaining 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 – (a) enforce the performance

of the terms hereof and/or sue for damages suffered thereby by the aggrieved party; or (b) 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. 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.

31 **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, 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.

32 **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.

33 **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.

34 **Interpretation** In these Conditions, unless the context requires otherwise -

- (i) words importing any one gender shall include the other two genders; the singular shall include the plural and vice versa;
- (ii) references to natural persons shall include created entities (corporate and unincorporate) and vice versa;

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.

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

35 **Title** These Conditions may be referred to or cited as the : ACTOM Group Standard Conditions of Sale and Tender.

36 **Safety and Health Environment requirements** Should a person representing the Buyer need to visit the site of a Tendering Company for extended periods, the representative will be required to comply with the requirements of Section 37(2) of the OHS Act, and the representative will further be required to acknowledge the Tendering Company's requirements with regard to health, safety and environmental issues. 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.

37 **Domicilium** 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 -

The Tendering Company at:

[•]

[•]

[•]

Email address: [•]

The Buyer at: [•]

[•]

[•]

Email address: [•]

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.

Any notice to a party contained in a correctly addressed envelope and sent by prepaid registered post to it at its chosen address; or delivered by hand to a responsible person during ordinary business hours at its chosen address, shall be deemed to have been received, if sent by post, on the seventh Business Day after posting (unless the contrary is proved) and, in the case of hand deliver, 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 four hours of transmission where it is transmitted during normal business hours or within 24 hours of the opening of business on the first Business Day after it is transmitted where it is transmitted outside those business hours.

The parties choose the physical address set out opposite its name in clause 37 as the address at which legal process must be delivered for the purpose of the Contract.

The parties shall be entitled at any time to change their addresses for the purposes of this clause 37 to by giving written notice to that effect to the other.