

Supply and Delivery of modular buildings and facilities for ERI – BMS sites at various power stations and head office



NEC3 Supply Contract (SC3)

**Between ESKOM ROTEK INDUSTRIES SOC LIMITED
(Reg No. 1990/006897/30)**

**and (PTY) Ltd
(Reg No.)**

**for SUPPLY AND DELIVERY OF MODULAR BUILDINGS AND
FACILITIES FOR ERI – BMS SITES AT VARIOUS POWER
STATIONS AND HEAD OFFICE**

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CONTRACT No.

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PART C1: AGREEMENTS & CONTRACT DATA

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| C1.1 Form of Offer & Acceptance |
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Offer

The Purchaser, identified in the Acceptance signature block, has solicited offers to enter into a contract for the procurement of:

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The tenderer, identified in the Offer signature block, has

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| <i>either</i> | examined the documents listed in the Tender Data and addenda thereto as listed in the Returnable Schedules, and by submitting this Offer has accepted the Conditions of Tender. |
| <i>or</i> | examined the draft contract as listed in the Acceptance section and agreed to provide this Offer. |

By the representative of the tenderer, deemed to be duly authorised, signing this part of this Form of Offer and Acceptance the tenderer offers to perform all of the obligations and liabilities of the *Supplier* under the contract including compliance with all its terms and conditions according to their true intent and meaning for an amount to be determined in accordance with the *conditions of contract* identified in the Contract Data.

| | |
|--|----------|
| The offered total of the Prices exclusive of VAT is | R |
| Value Added Tax @ 15% is | R |
| The offered total of the amount due inclusive of VAT is ¹ | R |
| (in words) | |

This Offer/s may be accepted by the Purchaser by signing the Acceptance part of this Form of Offer and Acceptance and returning one copy of this document including the Schedule of Deviations (if any) to the tenderer before the end of the period of validity stated in the Tender Data, or other period as agreed, whereupon the tenderer becomes the party named as the *Supplier* in the *conditions of contract* identified in the Contract Data.

Signature(s)

Name(s)

Capacity

For the tenderer:

.....

Name & signature of witness

Date

¹ This total is required by the *Purchaser* for budgeting purposes only. Actual amounts due will be assessed in terms of the *conditions of contract*.

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Acceptance

By signing this part of this Form of Offer and Acceptance, the Purchaser identified below accepts the tenderer’s Offer. In consideration thereof, the Purchaser shall pay the Supplier the amount due in accordance with the *conditions of contract* identified in the Contract Data. Acceptance of the tenderer’s Offer shall form an agreement between the Purchaser and the tenderer upon the terms and conditions contained in this agreement and in the contract that is the subject of this agreement.

The terms of the contract, are contained in:

- Part C1 Agreements and Contract Data, (which includes this Form of Offer and Acceptance)
- Part C2 Pricing Data
- Part C3 Scope of Work: Goods Information including Supply Requirements

and drawings and documents (or parts thereof), which may be incorporated by reference into the above listed Parts.

Deviations from and amendments to the documents listed in the Tender Data and any addenda thereto listed in the Returnable Schedules as well as any changes to the terms of the Offer agreed by the tenderer and the Purchaser during this process of offer and acceptance, are contained in the Schedule of Deviations attached to and forming part of this Form of Offer and Acceptance. No amendments to or deviations from said documents are valid unless contained in this Schedule.

The tenderer shall within two weeks of receiving a completed copy of this agreement, contact the Purchaser’s agent (whose details are given in the Contract Data) to arrange the delivery of any securities, bonds, guarantees, proof of insurance and any other documentation to be provided in terms of the *conditions of contract* identified in the Contract Data at, or just after, the date this agreement comes into effect. Failure to fulfil any of these obligations in accordance with those terms shall constitute a repudiation of this agreement.

Notwithstanding anything contained herein, this agreement comes into effect on the date when the tenderer receives one fully completed original copy of this document, including the Schedule of Deviations (if any).

Signature(s)

Name(s) _____

Capacity _____

for the Purchaser **Eskom Rotek Industries SOC Ltd, Lower Germiston Road, Rosherville, Johannesburg, 2094**

Name & signature of witness _____

Date _____

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Schedule of Deviations to be completed by the *Purchaser* prior to contract award

Note:

1. This part of the Offer & Acceptance would not be required if the contract has been developed by negotiation between the Parties and is not the result of a process of competitive tendering.
2. The extent of deviations from the tender documents issued by the Purchaser prior to the tender closing date is limited to those permitted in terms of the Conditions of Tender.
3. A tenderer’s covering letter must not be included in the final contract document. Should any matter in such letter, which constitutes a deviation as aforesaid be the subject of agreement reached during the process of Offer and Acceptance, the outcome of such agreement shall be recorded here and the final draft of the contract documents shall be revised to incorporate the effect of it.

| No. | Subject | Details |
|-----|---------|---------|
| 1 | [•] | [•] |
| 2 | [•] | [•] |
| 3 | [•] | [•] |
| 4 | [•] | [•] |

By the duly authorised representatives signing this Schedule of Deviations below, the Purchaser and the tenderer agree to and accept this Schedule of Deviations as the only deviations from and amendments to the documents listed in the Tender Data and any addenda thereto listed in the Tender Schedules, as well as any confirmation, clarification or changes to the terms of the Offer agreed by the tenderer and the Purchaser during this process of Offer and Acceptance.

It is expressly agreed that no other matter whether in writing, oral communication or implied during the period between the issue of the tender documents and the receipt by the tenderer of a completed signed copy of this Form shall have any meaning or effect in the contract between the parties arising from this Agreement.

| | For the tenderer: | | For the Purchaser |
|-----------------------------|--------------------------|-------|--|
| Signature | | | |
| Name | | | |
| Capacity | | | |
| On behalf of | | | Eskom Rotek Industries SOC Ltd, Lower Germiston Road, Rosherville, Johannesburg, 2094 |
| Name & signature of witness | | | |
| Date | | | |

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C1.2 SC3 Contract Data

Part one - Data provided by the *Purchaser*

Completion of this data in full, according to the Options chosen, is essential to create a complete contract.

| Clause | Statement | Data |
|----------|--|---|
| 1 | General | |
| | The <i>conditions of contract</i> are the core clauses and the clauses for Options | |
| | dispute resolution Option | A: Priced contract with price list W1: Dispute resolution procedure |
| | and secondary Options | X2: Changes in the law X7: Delay Damages X17: Low service damages Z: Additional conditions of contract |
| | of the NEC3 Supply Contract (December 2013) ² | |
| 10.1 | The <i>Purchaser</i> is (name): | Eskom Rotek Industries SOC Limited (Reg No. 1990/006897/30), a juristic person incorporated in terms of the company laws of the Republic of South Africa |
| | Address | Eskom Rotek Industries SOC Ltd, Lower Germiston Road, Rosherville, Johannesburg, 2094 |
| | Tel No. | 011 629 8000 |
| 10.1 | The <i>Supply Manager</i> is (name): | |
| | Address | |
| | Tel | |
| | e-mail | |
| 11.2(13) | The <i>goods</i> are | Supply and Delivery of modular buildings and facilities for ERI – BMS sites at various power stations and head office. |
| 11.2(13) | The following matters will be included in the Risk Register | <ul style="list-style-type: none"> - Service/maintenance plans - OEM manual - Warranty certificates |

² Available from Engineering Contract Strategies Tel 011 803 3008 Fax 011 803 3009, www.ecs.co.za.

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- COC's for all utility installations
- Design drawings/plans

| | | |
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| 11.2(14) | The Goods Information is in | Part 3: Scope of Work and all documents to which it makes reference. |
| 11.2(15) | The Supply Requirements as part of the Goods Information is in | Part 3: Scope of Work and all documents to which it makes reference. |
| 11.2(15) | The <i>law of the contract</i> is the law of | the Republic of South Africa |
| 12.2 | The <i>language of this contract</i> is | English |
| 13.1 | The <i>period for reply</i> is | 3 days |
| 13.3 | The <i>Supplier's</i> main responsibilities | Data required by this section of the core clauses is provided by the <i>Supplier</i> in Part 2 and terms in italics used in this section are identified elsewhere in this Contract Data. |
| 2 | Time | |
| 3 | The <i>starting date</i> is. | TBC |
| 30.1 | The <i>delivery date</i> of the <i>goods</i> and <i>services</i> is: | TBC |
| 31.1 | The <i>Supplier</i> submits revised programmes at intervals no longer than | Tbc (depending on the initial programme submitted) |
| 32.2 | Testing and defects | |
| 4 | The <i>defects date</i> is | 6 months after delivery |
| | | In addition to Sub Cl 4.0, NOTE: <ul style="list-style-type: none"> • A defect caused by the Contractor shall be deemed as rework. • The man hours spend on a Defect caused by the Contractor shall not be assessed for • Equipment issued to the Contractor, or brought by the Contractor, and damaged by the Contractor, shall be assessed, and paid/replaced by the Contractor |
| 42 | The <i>defect correction period</i> is | 24 hours |
| 42.2 | Payment | |
| 5 | The <i>assessment interval</i> is | Payments will be done per delivery item |
| 50.1 | The <i>currency of this contract</i> is the | South African Rand |
| 51.1 | The period within which payments are made is | 30 days. |
| 51.2 | The <i>interest rate</i> is | (i) zero percent above the publicly quoted |

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| | | <p>prime rate of interest (calculated on a 365 day year) charged from time to time by the Standard Bank of South Africa (as certified, in the event of any dispute, by any manager of such bank, whose appointment it shall not be necessary to prove) for amounts due in Rands and</p> <p>(ii) the LIBOR rate applicable at the time for amounts due in other currencies. LIBOR is the 6 month London Interbank Offered Rate quoted under the caption “Money Rates” in The Wall Street Journal for the applicable currency or if no rate is quoted for the currency in question then the rate for United States Dollars, and if no such rate appears in The Wall Street Journal then the rate as quoted by the Reuters Monitor Money Rates Service (or such service as may replace the Reuters Monitor Money Rates Service) on the due date for the payment in question, adjusted <i>mutatis mutandis</i> every 6 months thereafter and as certified, in the event of any dispute, by any manager employed in the foreign exchange department of The Standard Bank of South Africa Limited, whose appointment it shall not be necessary to prove.</p> |
| 6 | Title | There is no reference to Contract Data in this section of the core clauses and terms in italics used in this section are identified elsewhere in this Contract Data . |
| 7 | Risks, liabilities, indemnities and insurance | |
| 8 | These are additional <i>Purchaser’s</i> risks | <p>1. Late deliveries</p> <p>2. Non-conformance to specification</p> <p>3. Additional risks may be managed by Parties as they arise.</p> |
| 80.1 | | |
| 83.1 | The <i>Employer</i> provides these insurances from the Insurance Table | as stated for “ Format TSC3 ” available on http://www.eskom.co.za/Tenders/InsurancePoliciesProcedures/Pages/EIMS_Policies_From_1_April_2014_To_31_March_2015.aspx (See Annexure A for basic guidance). |
| 83.1 | The <i>Employer</i> provides these additional insurances | as stated for “ Format TSC3 ” available on http://www.eskom.co.za/Tenders/InsurancePoliciesProcedures/Pages/EIMS_Policies_From_1_April_2014_To_31_March_2015.aspx (See Annexure A for basic guidance) |

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| 83.1 | The <i>Contractor</i> provides these additional insurances: | Any other insurance that the contractor deems necessary in addition to that provided by the employer. |
| 83.1 | The minimum amount of cover for insurance against loss and damage caused by the <i>Contractor</i> to the <i>Employer's</i> property is | the amount of the deductibles relevant to the event described in the "Format TSC3" insurance policy available on http://www.eskom.co.za/Tenders/InsurancePoliciesProcedures/Pages/EIMS_Policies_From_1_April_2014_To_31_March_2015.aspx |
| 83.1 | The insurance against loss of or damage to the works, Plant and Materials is to include cover for Plant and Materials provided by the <i>Employer</i> for an amount of | None |
| 83.1 | The minimum amount of cover for insurance in respect of loss of or damage to property (except the <i>Employer's</i> property, Plant and Materials and Equipment) and liability for bodily injury to or death of a person (not an employee of the <i>Contractor</i>) arising from or in connection with the <i>Contractor's</i> Providing the Service for any one event is: | Any amount that the <i>Contractor</i> deems necessary in addition to that provided by the <i>Employer</i>. |
| 83.1 | The minimum limit of indemnity for insurance in respect of death of or bodily injury to employees of the <i>Contractor</i> arising out of and in the course of their employment in connection with this contract for any one event is: | As prescribed by the Compensation for Occupational Injuries and Diseases Act No. 130 of 1993 and the <i>Contractor's</i> common law liability for people falling outside the scope of the Act with a limit of Indemnity of not less than R500 000 (Five hundred thousand Rands). |
| 9 | Termination | There is no reference to Contract Data in this section of the core clauses and terms in italics used in this section are identified elsewhere in this Contract Data. |
| 9.0 | Termination | Subclauses 90.1 to 90.5 applies |
| 91 | Reasons for Termination | Subclause 91.1 to 91.7 applies |
| | | Notwithstanding the delay damages indicated in X7, the Employer may terminate this contract agreement due to the following: <ul style="list-style-type: none"> 1. Failure by the <i>Contractor</i> to mobilise resources as stated in the task order within the agreed days after receipt of the task order. 2. Any interruption to operations as a result of supplier failing to meet their contract obligations between the supplier and their employees 3. Supplier failing to meet the required specifications as stated in the scope of work |

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| 94.4(2) | The <i>arbitration procedure</i> is | the latest edition of Rules for the Conduct of Arbitrations published by The Association of Arbitrators (Southern Africa) or its successor body. |
| 94.4(5) | The place where arbitration is to be held is | South Africa |
| 94.4(5) | The person or organisation who will choose an arbitrator - if the Parties cannot agree a choice or if the arbitration procedure does not state who selects an arbitrator, is | the Chairman for the time being or his nominee of the Association of Arbitrators (Southern Africa) or its successor body. |
| 10 | Data for Option clauses | |
| A | Priced contract with price list | |
| 20.5 | The Contractor prepares forecasts of the final total of the Prices for the whole of the service at intervals no longer than | 4 weeks |
| 11 | Data for Option W1 | |
| W1.1 | The <i>Adjudicator</i> | The person selected from the ICE-SA Division (or its successor body) of the South African Institution of Civil Engineering Panel of Adjudicators by the Party intending to refer a dispute to him. (See www.ice-sa.org.za). If the Parties do not agree on an Adjudicator the Adjudicator will be appointed by the Arbitration Foundation of Southern Africa (AFSA). |
| W1.2(3) | The <i>Adjudicator nominating body</i> is: An Adjudicator will be appointed between the Contractor and the Employer should a dispute arises. The costs that the Adjudicator charge will be divided between both Parties at 50% for each parties account. | the Chairman of ICE-SA a joint Division of the South African Institution of Civil Engineering and the Institution of Civil Engineers (London) (see www.ice-sa.org.za) or its successor body. |
| W1.4(2) | The <i>tribunal</i> is: | Arbitration |
| W1.4(5) | The arbitration procedure is | the latest edition of Rules for the Conduct of Arbitrations published by The Association of Arbitrators (Southern Africa) or its successor body. |
| | The place where arbitration is to be held is | Johannesburg, South Africa |
| | The person or organisation who will choose an arbitrator - if the Parties cannot agree a choice or - if the arbitration procedure does not state who selects an arbitrator, is | The Chairman for the time being or his nominee of the Association of Arbitrators (Southern Africa) or its successor body. |

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| | | |
|------------|---|---|
| 12 | Data for secondary Option clauses | |
| X2 | Changes in the law | There is no reference to Contract Data in this Option and terms in italics are identified elsewhere in this Contract Data. |
| X7 | Delay damages | |
| | PLANT ESTABLISHMENT | PENALTY |
| | Failure to respond within 24 hours to a warranty claim | First NCR issued effectively after 24 hrs |
| | Failure to respond within 48 hours to a warranty claim | Second NCR issued effectively after 48 hours |
| | Failure to respond within 72 hours to a warranty claim | Third NCR issued effectively after 48 hours and a Risk reduction meeting |
| | Failure to deliver within the agreed time | Calculated at 0.5% daily, capped at 10% of the total contract/task order value. At 10% the contract shall be terminated. |
| X17 | Low service damages | |
| | PLANT ESTABLISHMENT | PLANT MOBILIZATION |
| | Equipment discovered to have major defect within 30 days of delivery. Major defect is anything that equates to 10% of the Equipment value | Withhold payment until the equipment is replaced. |
| Z | The <i>additional conditions of contract</i> are | Z1 to Z12 always apply for ERI |

Z1 Cession delegation and assignment

Z1.1 The *Supplier* does not cede, delegate or assign any of its rights or obligations to any person without the written consent of the *Purchaser*.

Z1.2 Notwithstanding the above, the *Purchaser* may on written notice to the *Supplier* cede and delegate its rights and obligations under this contract to any of its subsidiaries or any of its present divisions or operations which may be converted into separate legal entities as a result of the restructuring of the Electricity Supply Industry and the Electricity Distribution Industry.

Z2 Joint ventures

Z2.1 If the *Supplier* constitutes a joint venture, consortium or other unincorporated grouping of two or more persons or organisations then these persons or organisations are deemed to be jointly and severally liable to the *Purchaser* for the performance of this contract.

Z2.2 Unless already notified to the *Purchaser*, the persons or organisations notify the *Supply Manager* within two weeks of the Contract Date of the key person who has the authority to bind the *Supplier* on their behalf.

The *Supplier* does not substantially alter the composition of the joint venture, consortium or other unincorporated grouping of two or more persons without the consent of the *Purchaser*

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having been given to the *Supplier* in writing.

Z3 Change of Broad Based Black Economic Empowerment (B-BBEE) status

Z3.1 Where a change in the *Supplier's* legal status, ownership or any other change to his business composition or business dealings results in a change to the *Supplier's* B-BBEE status, the *Supplier* notifies the *Purchaser* within seven days of the change.

The *Supplier* is required to submit an updated verification certificate and necessary supporting documentation confirming the change in his B-BBEE status to the *Supply Manager* within thirty days of the notification or as otherwise instructed by the *Supply Manager*.

Z3.2 Where, as a result, the *Supplier's* B-BBEE status has decreased since the Contract Date the *Purchaser* may either re-negotiate this contract or alternatively, terminate the *Supplier's* obligation to Provide the Goods and Services.

Z3.3 Failure by the *Supplier* to notify the *Purchaser* of a change in its B-BBEE status may constitute a reason for termination. If the *Purchaser* terminates in terms of this clause, the procedures on termination are P1, P2 and P3 as stated in clause 92, and the amount due is A1 and A3 as stated in clause 93.

Z4 Ethics

Z4.1 Any offer, payment, consideration, or benefit of any kind made by the *Supplier*, which constitutes or could be construed either directly or indirectly as an illegal or corrupt practice, as an inducement or reward for the award or in execution of this contract constitutes grounds for terminating the *Supplier's* obligation to Provide the Goods and Services or taking any other action as appropriate against the *Supplier* (including civil or criminal action).

Z4.2 The *Purchaser* may terminate the *Supplier's* obligation to Provide the Goods and Services if the *Supplier* (or any member of the *Supplier* where the *Supplier* constitutes a joint venture, consortium or other unincorporated grouping of two or more persons or organisations) is found guilty by a competent court, administrative or regulatory body of participating in illegal or corrupt practices.

Such practices include making of offers, payments, considerations, or benefits of any kind or otherwise, whether in connection with any procurement process or contract with the *Purchaser* or other people or organisations and including in circumstances where the *Supplier* or any such member is removed from an approved vendor data base of the *Purchaser* as a consequence of such practice.

Z4.3 Notwithstanding the provisions of core clause 90.2, the procedures on termination in terms of this clause are P1, P2 and P3 as stated in the core clause 92 and the amount due is A1 and A3 as stated in core clause 93.

Z5 Confidentiality

Z5.1 The *Supplier* does not disclose or make any information arising from or in connection with this contract available to Others. This undertaking does not, however, apply to information which at the time of disclosure or thereafter, without default on the part of the *Supplier*, enters the public domain or to information which was already in the possession of the *Supplier* at the time of disclosure (evidenced by written records in existence at that time). Should the *Supplier* disclose

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information to Others in terms of clause 23.1, the *Supplier* ensures that the provisions of this clause are complied with by the recipient.

If the *Supplier* is uncertain about whether any such information is confidential, it is to be regarded as such until notified otherwise by the *Supply Manager*.

Z5.2 In the event that the *Supplier* is, at any time, required by law to disclose any such information which is required to be kept confidential, the *Supplier*, to the extent permitted by law prior to disclosure, notifies the *Purchaser* so that an appropriate protection order and/or any other action can be taken, if possible, prior to any disclosure. In the event that such protective order is not, or cannot, be obtained, then the *Supplier* may disclose that portion of the information which it is required to be disclosed by law and uses reasonable efforts to obtain assurances that confidential treatment will be afforded to the information so disclosed.

Z5.3 The *Supplier* ensures that all his subcontractors abide by the undertakings in this clause.

Z6 Waiver and estoppel: Add to core clause 12.3:

Z6.1 Any extension, concession, waiver or relaxation of any action stated in this contract by the Parties, the *Supply Manager* or the *Adjudicator* does not constitute a waiver of rights and does not give rise to an estoppel unless the Parties agree otherwise and confirm such agreement in writing.

Z8 Provision of a Tax Invoice and interest. Add to core clause 51

Z8.1 Within one week of receiving a payment certificate from the *Supply Manager* in terms of core clause 51.1, the *Supplier* provides the *Purchaser* with a tax invoice in accordance with the *Purchaser's* procedures stated in the Goods Information, showing the amount due for payment equal to that stated in the payment certificate.

Z8.2 If the *Supplier* does not provide a tax invoice in the form and by the time required by this contract, the time by when the *Purchaser* is to make a payment is extended by a period equal in time to the delayed submission of the correct tax invoice. Interest due by the *Purchaser* in terms of core clause 51.2 is then calculated from the delayed date by when payment is to be made.

Z8.3 The *Supplier* (if registered in South Africa in terms of the companies Act) is required to comply with the requirements of the Value Added Tax Act, no 89 of 1991 (as amended) and to include the *Purchaser's* VAT number 4740101508 on each invoice he submits for payment.

Z9 Notifying compensation events

Z9.1 Delete from the last sentence in core clause 61.3, "unless the *Supply Manager* should have notified the event to the *Supplier* but did not".

Z10 Purchaser's limitation of liability

Z10.1 The *Purchaser's* liability to the *Supplier* for the *Supplier's* indirect or consequential loss is limited to R0.00 (zero Rand)

Z10.2 The *Supplier's* entitlement under the indemnity in 83.1 is provided for in 60.1(12) and the

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Purchaser's liability under the indemnity is limited.

Z11 Termination: Add to core clause 91.1, at the second main bullet point, fourth sub-bullet point, after the words "against it":

Z11.1 or had a judicial management order granted against it.

Z12 Addition to secondary Option X7 Delay damages

Z12.1 If the amount due for the *Supplier's* payment of delay damages reaches the limits stated in this Contract Data for Option X7, the *Purchaser* may terminate the *Supplier's* obligation to Provide the Goods and Services using the same procedures and payment on termination as those applied for reasons R1 to R15 or R18 stated in the Termination Table.

Z13 SDL&I Undertaking

Z13.1 **N/A – No obligation will be used; this is a once off transaction.**

Z20 **Warranty**
12 Months after delivery

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Annexure A: Insurance provided by the Employer

These notes are provided as guidance to tendering contractors and the Contractor about the insurance provided by the Employer. The Contractor must obtain its own advice. Details of the insurance itself are available from the internet web link given below.

1. Services provided in a TSC3 contract could include some element of construction or refurbishment as well as a continuous maintenance or operational service activity. If an event occurs which causes loss or damage, a claim could be made either against the *Employer's* "works" type policy which may be in place for the *Employer's* portion of the Affected Property concerned or against the *Employer's* assets policy which may be in place for the *Employer's* portion of the Affected Property concerned, or both.
2. The cover provided and the deductibles under the works policy are different to those under the assets policy. Each policy has a range of applicable deductibles depending on the location of the Affected Property and the nature of the insurable event.
3. The *Contractor* is required in terms of Contract Data for clause 83 to provide cover for the deductibles in the insurance provided by the *Employer*. This can be provided from his own resources on a 'self insured' basis or obtained by him from his own insurers. In order to assess the extent of this cover, tendering contractors and their brokers should consult the internet web link given below and scroll to '**Format TSC3**' to establish both the cover and the deductibles in relation to the *service* provided in terms of this contract.
4. Tendering contractors should note that cover provided by the *Employer* is only per the policies available on the internet web link listed below and may not be the cover required by the tendering contractor or as intended by each of the listed insurances in the left hand column of the Insurance Table in clause 83.2. In terms of clause 83.1 "the *Contractor* provides the insurances stated in the Insurance Table except any insurance which the *Employer* is to provide". Hence the *Contractor* provides insurance which the *Employer* does not provide and in cases where the *Employer* does provide insurance the *Contractor* insures for the difference between what the Insurance Table requires and what the *Employer* provides.
5. Further information and full details of all Eskom provided policies and procedures may be obtained from:

http://www.eskom.co.za/Tenders/InsurancePoliciesProcedures/Pages/EIMS_Policies_From_1_April_2014_To_31_March_2015.aspx

C1.2 Contract Data

Part two - Data provided by the *Supplier*

Notes to a tendering supplier:

1. Please read both the NEC3 Supply Contract (December 2009) and the relevant parts of its Guidance Notes (SC3-GN)³ in order to understand the implications of this Data which the tenderer is required to complete.
2. The number of the clause which requires the data is shown in the left-hand column for each statement however other clauses may also use the same data
3. Where a form field like this [] appears, data is required to be inserted relevant to the option selected. Click on the form field **once** and type in the data. Otherwise, complete by hand and in ink.

Completion of the data in full, according to Options chosen, is essential to create a complete contract.

³ Available from Engineering Contract Strategies Tel 011 803 3008 Fax 011 803 3009 www.ecs.co.za

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| Clause | Statement | Data | | | | | | |
|---------------|---|---|--|---------------------------|----------------------|---|---------------------|-----|
| 10.1 | The <i>Supplier</i> is (Name): Address Tel No. Fax No. Email. | | | | | | | |
| 11.2(8) | The Goods Information for the <i>Supplier's</i> design is in: | The document called C3.2 scope of work in Part 3 of this contract | | | | | | |
| 11.2(11) | The tendered total of the Prices is | R. (in words) | | | | | | |
| 11.2(12) | The <i>price schedule</i> is in: | The document called C2.2 Pricing in Part 2 of this contract | | | | | | |
| 11.2(14) | The following matters will be included in the Risk Register | <ul style="list-style-type: none"> - Delivery lead times - Service/maintenance plans - OEM manual - Warranty certificates - COC's for all utility installations - Design drawings/plans | | | | | | |
| 30.1 | The <i>delivery date</i> of the <i>goods and services</i> is: | <table border="1" style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th style="width: 5%;"></th> <th style="width: 70%;"><i>goods and services</i></th> <th style="width: 25%;"><i>delivery date</i></th> </tr> </thead> <tbody> <tr> <td style="text-align: center; vertical-align: top;">1</td> <td style="text-align: center; vertical-align: top;">Supply and Delivery</td> <td style="text-align: center; vertical-align: top;">TBC</td> </tr> </tbody> </table> | | <i>goods and services</i> | <i>delivery date</i> | 1 | Supply and Delivery | TBC |
| | <i>goods and services</i> | <i>delivery date</i> | | | | | | |
| 1 | Supply and Delivery | TBC | | | | | | |

Supply and Delivery of modular buildings and facilities for ERI – BMS sites at various power stations and head office

**PART 2: PRICING DATA
NEC3 Supply Contract**

| Document reference | Title | No of pages |
|---------------------------|---------------------------|--------------------|
| C2.1 | Pricing assumptions | [Page 1-2] |
| C2.2 | The <i>price schedule</i> | [Page 3] |

C2.1 Pricing assumptions

The conditions of contract

How goods and services are priced and assessed for payment

Clause 11 in NEC3 Supply Contract, December 2009 (SC3) core clauses states:

Identified and defined terms 11
11.2 (11) The Prices are the amounts stated in the price column of the Price Schedule. Where a quantity is stated for an item in the Price Schedule, the Price is calculated by multiplying the quantity by the rate.

(12) The Price Schedule is the *price schedule* unless later changed in accordance with this contract.

Assessing the amount due 50.2 The amount due is

- the Price for each lump sum item in the Price Schedule which the *Supplier* has completed,
- where a quantity is stated for an item in the Price Schedule, an amount calculated by multiplying the quantity which the *Supplier* has completed by the rate,
- plus other amounts to be paid to the *Supplier*,
- less amounts to be paid by or retained from the *Supplier*.

Any tax which the law requires the *Purchaser* to pay to the *Supplier* is included in the amount due.

This confirms that the Supply Contract is a priced contract where the Prices are derived from a list of items of *goods* and *services* which can be priced as lump sums or as expected quantities of *goods* and *services* multiplied by a rate, or a mix of both.

Function of the Price Schedule

Clause 53.1 states: “Information in the Price Schedule is not Goods Information”. This confirms that instructions to do work or how it is to be done are not included in the Price Schedule but in the Goods Information. This is further confirmed by Clause 20.1 which states, “The *Supplier* Provides the Goods and Services in accordance with the Goods Information”. Hence the *Supplier* does **not** Provide the Goods and Services in accordance with the Price Schedule. The Price Schedule is only a pricing document.

Preparing the *price schedule*

It will be assumed that the tendering supplier has read Pages 11 and 12 and Appendix 5 of the SC3 Guidance Notes before preparing the *price schedule*. Items in the *price schedule* may have been inserted by the *Purchaser* and the tendering supplier should insert any additional items which he considers necessary. Whichever party provides the items in the *price schedule* the total of the Prices is assumed to be fully inclusive of everything necessary to provide the Goods and Services as described at the time of entering into this contract.

Supply and Delivery of modular buildings and facilities for ERI – BMS sites at various power stations and head office

- 1** As the *Supplier* has an obligation to correct Defects (core clause 43.1) and there is no compensation event for this unless the Defect was due to a *Supplier's* risk, the lump sum Prices and rates must also include for the correction of Defects.
- 2** If the *Supplier* has decided not to identify a particular item in the *price schedule* at the time of tender the cost to the *Supplier* of doing the work is assumed to be included in, or spread across, the other Prices and rates in the *price schedule* in order to fulfil the obligation to Provide the Goods and Services for the tendered total of the Prices.
- 3** There is no adjustment to lump sum prices in the *price schedule* if the amount, or quantity, of work within that lump sum item of *goods* or *services* later turns out to be different to that which the *Supplier* estimated at time of tender. The only basis for a change to the Prices is as a result of a compensation event. See Clause 60.1.
- 4** Hence the Prices and rates tendered by the *Supplier* in the *price schedule* are inclusive of everything necessary and incidental to Providing the Goods and Services in accordance with the Goods Information, as it was at the time of tender, as well as correct any Defects not caused by a *Purchaser's* risk.
- 5** The *Supplier* does not have to allow in his Prices and rates for matters that may arise as a result of a compensation event. It should be noted that the list of compensation events includes those arising as a result of a *Purchaser's* risk event listed in core clause 80.1.

Supply and Delivery of modular buildings and facilities for ERI – BMS sites at various power stations and head office**C2.2 the price schedule****1. Coal Operations 1**

| Item No. | Description | Unit | Quantity | Price | Total |
|-----------------------|-------------------------------|------|----------|-------|------------|
| A1 | | | | | |
| 1 | Ablution Facilities (6m x 3m) | each | 5 | R - | R - |
| 2 | Site Establishment | each | 5 | R - | R - |
| | | | | | |
| | | | | | |
| Total excl vat | | | | | R - |

Note – Coal Ops 1 Sites:

- Grootvlei

2. Coal Operations 2

| Item No. | Description | Unite | Quantity | Price | Total |
|-----------|---|-------|----------|-------|-------|
| A1 | | | | | |
| 1 | Park Homes (Site Office) 3 x 3 | each | 6 | R - | R - |
| 2 | Park Homes with Aircon (Site Office) 3 x 6 | each | 9 | R - | R - |
| 3 | Park Home (Site Office) 3 x 12 | each | 1 | R - | R - |
| 4 | Park Home (Board Room) 6x9 | each | 6 | R - | R - |
| 5 | Park Home (Office, Boardroom & Kitchen Combination)6x9 | each | 3 | R - | R - |
| 6 | VIP Toilets with showers- ablution | each | 19 | R - | R - |
| 7 | Kitchen (Eating Facilities) 3x6 | each | 16 | R - | R - |
| 8 | Kitchen (Eating Facilities) 3x9 | each | 3 | R - | R - |
| 9 | Kitchen (Eating Facilities) 3x12 | each | 1 | R - | R - |
| 10 | Steel Marine Container with shelves and ventilation 3x6 | each | 16 | R - | R - |
| 11 | Steel Marine Container 3x9 | each | 4 | R - | R - |
| 12 | Change Rooms 3 x 3 | each | 4 | R - | R - |
| 13 | Change Rooms 3 x 6 | each | 16 | R - | R - |
| 14 | Change Room 3 x 12 | each | 2 | R - | R - |
| 15 | Gray Water Drainage | each | 19 | R - | R - |
| 16 | Park Home (Office, Boardroom, Kitchen & Toilet Combination)14x8 | each | 1 | R - | R - |
| 17 | Ablution Unisex Male/Female 3x12 | each | 1 | R - | R - |
| 18 | Mobile Toilets (on Trailer) Male & Female | each | 3 | R - | R - |
| 19 | Change Rooms 3 x 3 | each | 4 | R - | R - |
| 20 | Kitchen (Eating Facilities) 3x6 | each | 1 | R - | R - |
| 21 | Kitchen (Eating Facilities) 3x9 | each | 1 | R - | R - |
| 22 | Steel Marine Container 3x9 | each | 1 | R - | R - |

Supply and Delivery of modular buildings and facilities for ERI – BMS sites at various power stations and head office

| | | | | | |
|-----------------------|---|------|-----|-----|------------|
| 23 | Park Homes (Site Office) 3 x 3 | each | 2 | R - | R - |
| 24 | Mobile Toilets (on Trailer) Male & Female | each | 4 | R - | R - |
| 25 | Kitchen (Eating Facilities) 3x9 | each | 3 | R - | R - |
| 26 | Ablution Male 3 x 6 | each | 1 | R - | R - |
| 27 | Ablution Female 3 x 6 | each | 1 | R - | R - |
| 28 | Park Homes (Site Office) 3 x 6 | each | 3 | R - | R - |
| 29 | Park Home (Office, Boardroom, Kitchen & Toilet Combination)14x8 | each | 1 | R - | R - |
| 30 | Ablution Female 3 x 9 | each | 4 | R - | R - |
| 31 | Ablution Unisex Male/Female 3x6 | each | 6 | R - | R - |
| 32 | Change Rooms 3 x 6 | each | 6 | R - | R - |
| 33 | Kitchen (Eating Facilities) 3x12 | each | 2 | R - | R - |
| 34 | Site Establishment | each | 170 | R - | R - |
| Total excl vat | | | | | R - |

Note – Coal Ops 2 Sites:

- Kusile Power Station
- Kriel Power Station
- Majuba Power Station
- Tutuka Power Station

3. Coal Operations 4

| Item No. | Description | Unit | Quantity | Price | Total |
|-----------------------|---|------|----------|-------|------------|
| A1 | | | | | |
| 1 | Park Homes (Site Office) 3 x 3 | each | 3 | R - | R - |
| 2 | Park Homes (Site Office) 3 x 6 | each | 3 | R - | R - |
| 3 | Park Home (Site Office) 3 x 9 (Stores) | each | 2 | R - | R - |
| 4 | Park Home (Board Room) 6x9 | each | 2 | R - | R - |
| 5 | Park Home (Office, Boardroom & Kitchen Combination)14x8 | each | 1 | R - | R - |
| 6 | Ablution Female 3 x 6 | each | 3 | R - | R - |
| 7 | Ablution Male 3 x 3 | each | 1 | R - | R - |
| 8 | Ablution Male 3 x 9 | each | 1 | R - | R - |
| 9 | Change Rooms 3 x 6 | each | 3 | R - | R - |
| 10 | Change Room 3 x 9 | each | 4 | R - | R - |
| 15 | Site Establishment | each | 23 | R - | R - |
| | | | | R - | |
| Total excl vat | | | | | R - |

Note – Coal Ops 4 Sites:

- Arnot Power Station
- Camden Power Station
- Coal Logistics

4. Coal Operations 5

Supply and Delivery of modular buildings and facilities for ERI – BMS sites at various power stations and head office

| Item No. | Description | Unit | Quantity | Price | Total |
|-----------------------|---|------|----------|-------|------------|
| A1 | | | | | |
| 1 | Park Homes (Site Office) 3 x 3 | each | 2 | R - | R - |
| 2 | Park Homes (Site Office) 3 x 6 | each | 6 | R - | R - |
| 3 | Park Home (Board Room) 3x9 | each | 2 | R - | R - |
| 4 | Ablution Male 3 x 6 | each | 3 | R - | R - |
| 5 | Ablution Female 3 x 6 | each | 2 | R - | R - |
| 6 | Mobile Toilets (on Trailer) Male & Female | each | 4 | R - | R - |
| 7 | Change Room 3 x 12 | each | 6 | R - | R - |
| 8 | Kitchen (Eating Facilities) 3x9 | each | 2 | R - | R - |
| 9 | Steel Marine Container 3x6 | each | 5 | R - | R - |
| 10 | Steel Marine Container 3x9 | each | 2 | R - | R - |
| 11 | Showers male 3x6m | each | 4 | R - | R - |
| 12 | Showers female 3x6m | each | 3 | R - | R - |
| 13 | Park Home (Site Office) 3 x 9 (partitioned into three 3x3m offices) | each | 1 | R - | R - |
| 14 | Park Home (Site Office) 3 x 12 (partitioned into four 3x3m offices) | each | 2 | R - | R - |
| 15 | Ablution Male 3x12 (toilets only) | each | 2 | R - | R - |
| 16 | Ablution Female 3 x 9 (toilets only) | each | 4 | R - | R - |
| 17 | Kitchen (Eating Facilities) 3x12 | each | 4 | R - | R - |
| 18 | Site Establishment | each | 54 | R - | R - |
| | | | | | |
| Total excl vat | | | | | R - |

Note – Coal Ops 5 Sites:

- Duvha Power Station
- Ingula Power Station
- Kendal Power Station
- KWS/Kilbarchan

5. Plant and Engineering

| Item No. | Description | Unit | Quantity | Price | Total |
|------------------------------|--|------|----------|-------|------------|
| A1 | | | | | |
| 1 | 12mx 3m Park Home Site Office (divided into 3 office, Change room and kitchen) | each | 11 | R - | R - |
| 2 | 3 x6 Steel Marine Container (Tool Stores) | each | 6 | R - | R - |
| 3 | Park Home (Site Office) 3 x 9 (partitioned into three 3x3m offices) | each | 4 | R - | R - |
| 4 | 3x6 Ladies Changing Room | each | 1 | R - | R - |
| 5 | 3x6 Men changing rooms | each | 1 | R - | R - |
| 6 | 3x6 Ablution Men change room | each | 1 | R - | R - |
| 7 | Site Establishment | each | 24 | R - | R - |
| | | | | | |
| TOTAL COSTS EXCL. VAT | | | | | R - |

Supply and Delivery of modular buildings and facilities for ERI – BMS sites at various power stations and head office

Note – Plant & Engineering Sites:

- Rosherville Workshop (Head Office)

CPART 3: SCOPE OF WORK

Supply and Delivery of modular buildings and facilities for ERI – BMS sites at various power stations and head office

1. Description of the goods

The services required are for the fabrication, supply, assembly and installation of modular unit materials and equipment, for establishment Eskom Rotek Industries – Bulk Materials Services’ site facilities on various Eskom Power Stations, as well as head office.

- Provide all necessary resources and tools.
- Comply with the sites’ specific health, safety, environment and quality requirements.
- Comply with the sites’ specific security and access requirements.
- Maintain high, “Good Housekeeping” standards in and around the work areas

2. Specifications

Below listed are the technical specifications that further describe the required equipment:

As per annexure A – Scope of Work Procurement of modular buildings and facilities for ERI – BMS sites at various power stations and head office.

| Document reference | Title | No of pages |
|---------------------------|--------------------------------------|--------------------|
| | This cover page | |
| C3.1 | <i>Purchaser’s</i> Goods Information | [Page ii-iv] |
| C3.2 | <i>Supplier’s</i> Goods Information | [Page v] |
| | Total number of pages | |

Supply and Delivery of modular buildings and facilities for ERI – BMS sites at various power stations and head office**C3.1: PURCHASER'S GOODS INFORMATION****Contents**

This enquiry calls for the fabrication, supply, assembly and installation of modular unit materials and equipment, for establishment Eskom Rotek Industries – Bulk Materials Services' site facilities on various Eskom Power Stations, as well as head office.

Overview of the goods and services**Executive overview**

The contract covers the fabrication, supply, assembly and installation of modular unit materials and equipment, for establishment Eskom Rotek Industries – Bulk Materials Services' site facilities on various Eskom Power Stations, as well as head office.

- Provide all necessary resources and tools.
- Comply with the sites' specific health, safety, environment and quality requirements.
- Comply with the sites' specific security and access requirements.
- Maintain high, "Good Housekeeping" standards in and around the work areas

Health and safety risk management

The *Supplier* shall comply with the health and safety requirements.

Environmental constraints and management

The *Supplier* shall comply with the environmental criteria and constraints stated in Eskom document 32-245-Eskom Waste Management Standard.

Quality assurance requirements

The supplier shall adhere to the Supplier Contract Quality Requirements Specification QM 58 during the contract execution. The supplier shall also comply to the following:

- The Supplier shall perform an inspection of an off-loading event in the presence of ERI staff at least once a year and shall issue a report to the Contract Manager.
- The Supplier shall provide evidence of the Logistics Management / Quality Management System of the Transporter, providing assurance of on-time delivery of the product of the required quality

Invoicing and payment

Within one week of receiving a payment certificate from the *Supply Manager* in terms of core clause 51.1, the *Supplier* provides the *Purchaser* with a tax invoice showing the amount due for payment equal to that stated in the *Supply Manager's* certificate.

The *Supplier* shall address the tax invoice to *Purchaser* and include on each invoice the following information:

- Name and address of the *Supplier* and the *Supply Manager*.

Supply and Delivery of modular buildings and facilities for ERI – BMS sites at various power stations and head office

- The contract number and title.
- *Supplier's* VAT registration number;
- The *Purchaser's* VAT registration number.
- Description of *goods* and *services* provided for each item invoiced based on the Price Schedule.
- Total amount invoiced excluding VAT, the VAT and the invoiced amount including VAT;

The *method is* Electronic payment in full to supplier's nominated South African Bank Account *and conditions of payment* are: depended on the B-BBEE status of the Supplier after the receipt of an acceptable tax invoice.

The invoices must contain the following additional information:

- Employer's name should be stated Eskom Rotek Industries SOC Limited
- The registered name of the Supplier.
- The VAT registration number of the Supplier.
- The address of the Supplier.
- Invoice number
- Date of invoice
- Supplier's Banking Details
- Copy of Delivery note attached to invoice
- The Purchaser's contract/order number
- Accurate description of the goods, as per the purchase order
- VAT must be shown separately at the bottom of the invoice
- The Purchaser's VAT registration number 4740101508 and company registration number 1990/006897/30.

Contract change management

Any verbal communication must be backed up with a written instruction

Provision of bonds and guarantees

The form in which a bond or guarantee required by the *conditions of contract* (if any) is to be provided by the *Supplier* is given in Part 1 Agreements and Contract Data, document C1.3, Sureties.

The *Purchaser* may withhold payment of amounts due to the *Supplier* until the bond or guarantee required in terms of this contract has been received and accepted by the person notified to the *Supplier* by the *Supply Manager* to receive and accept such bond or guarantee. Such withholding of payment due to the *Supplier* does not affect the *Purchaser's* right to termination stated in this contract.

Records of Defined Cost, payments & assessments of compensation events to be kept by the *Supplier*

Original documents must be kept by the Supplier

Supply and Delivery of modular buildings and facilities for ERI – BMS sites at various power stations and head office**Procurement****Subcontracting****Preferred sub-Suppliers**

All sub-Suppliers need to be approved by ERI. The Supplier shall notify the Contract Manager in writing of any request to change the Transporter or Supplier of the product

Plant and Materials**Plant & Materials provided “free issue” by the Purchaser**

- The Supplier shall provide evidence of the Logistics Management / Quality Management System of the Transporter, providing assurance of on-time delivery of the product of the required quality.
- The Supplier shall notify the Contract Manager in writing of any request to change the Transporter of the product. This shall be assessed after a technical evaluation.

Temporary works, Site services & construction constraints**Purchaser’s Site entry and security control, permits, and Site regulations**

Eskom’s Cardinal Rules shall apply to all Eskom employees, agents, consultants and contractors.

- Rule 1: Open, Isolate, Test, Earth, Bond, and/or Insulate before touch - that is any plant operating above 1 000 V.
- Rule 2: Hook up at heights - no person may work at a height where there is a risk of falling.
- Rule 3: Buckle up - no person may drive any vehicle on Eskom business and/or on Eskom premises unless the driver and all passengers are wearing seat belts.
- Rule 4: Be sober (no person is allowed to work under the influence of drugs and alcohol.
- Rule 5: Use a permit to work - where an authorization limitation exists, no person shall work without the required permit to work.
- Rule 6: Wear correct PPE
- Rule 7: Report all accidents

The supplier will be subjected to a site induction prior to entering site.

Restrictions to access on Site, roads, walkways and barricades

In addition to the above there may be other Site restrictions and or rules relating to roads, walkways and the provision of barricades.

C3.2 SUPPLIER’S WORKS INFORMATION

This section of the Goods Information will always be contract specific depending on the nature of the *goods*.

It is most likely to be required for design and construct contracts where the tendering Supplier will have proposed specifications and schedules for items of Plant and Materials and workmanship, which once accepted by the *Purchaser* prior to award of contract now become obligations of the *Supplier* per core clause 20.1.

Typical subheadings could be

Supply and Delivery of modular buildings and facilities for ERI – BMS sites at various power stations and head office

- a) *Supplier's design*
- b) Plant and Materials specifications and schedules
- c) Other

This section could also be compiled as a separate file

CONFIDENTIALITY AGREEMENT

This Confidentiality Agreement ('Agreement') is entered into between the Employer and the Contractor.

WHEREAS the Employer and the Contractor (the Parties) desire to exchange certain confidential information; and consider further business dealings with each other.

WHEREAS the parties desire to evidence their agreements governing the exchange of certain confidential information as set forth below.

Now therefore, for good and valuable consideration, including the mutual agreements hereinafter recited, the parties hereby agree as follows:

1. The parties contemplate an exchange, either orally, in writing or by inspection, of certain confidential proprietary information possessed or owned separately by them and not readily available or otherwise known to the public and which may be helpful in evaluating further business dealings. Such confidential information (the 'Subject Information') may include but not be limited to the parties' inventions, trade secrets, knowledge, technical information on products and manufacturing processes, and information concerning their business assets, financial condition, operations, plans and prospects.
2. The purpose of the exchange of Subject Information is to enable the parties to evaluate the Subject information for the purpose only of considering further business dealings with each other.
3. The parties each agree that they shall maintain in secrecy in accordance with the terms of this Agreement all the Subject Information each party receives (the 'Receiving Party') from the other party (the 'Proprietor') and shall not disclose or use other than for the purpose specified herein the Subject Information without the written consent of the Proprietor of the Subject Information. All Subject Information communicated from one party to the other shall be deemed to be proprietary and confidential to the Proprietor whether marked or identified as such or not.
4. The duty of care to safeguard Subject Information shall be the same as that which the parties each use to safeguard their own respective proprietary and confidential information.
5. The Receiving Party of Subject Information shall not be obligated to maintain Subject Information received from its Proprietor in secrecy or refrain from using it to the extent that any such information is or rightfully becomes publicly available information other than through a breach of this Agreement, or which the Receiving Party later obtains lawfully from anyone else who is not known by the Receiving Party to be obligated under any secrecy agreement with Proprietor to maintain the information in secrecy. The Receiving Party also shall not be obligated to maintain in secrecy any information it receives from the Proprietor which it can demonstrate was already in its possession when the information was disclosed to the Receiving Party by the Proprietor.
6. The Receiving Party shall promptly return to its Proprietor any Subject Information in tangible form it has received from the Proprietor immediately upon the Proprietor's request, without retaining any copies, summaries, analyses or extracts thereof. All documents, memoranda, notes, and other writings prepared by the parties, or their advisors, based on the Subject

Supply and Delivery of modular buildings and facilities for ERI – BMS sites at various power stations and head office

Information of each other, shall be destroyed, and such destruction shall be certified in writing by an authorised officer supervising such destruction.

7. If a party, with the written consent of the Proprietor of Subject Information, discloses any Subject Information received from its Proprietor to any third party, it shall do so only under a secrecy agreement having a scope similar to and which is consistent with this Agreement, and the disclosing party shall be primarily responsible for any compromise of the secrecy of Subject Information by such third party
8. Each party agrees that it shall not, while and for so long as it is obligated to maintain Subject Information in secrecy, use for its own benefit, or for the benefit of others or exploit, commercialise, develop, test promote, sell, lease, market or otherwise dispose of any products or services using, incorporating or relying on Subject Information received from its Proprietor without the written consent of the Proprietor.
9. The obligations of the party receiving Subject Information pursuant to this Agreement shall be effective with respect of each item of Subject Information for a term of five (5) years from the date of submission of the Subject Information to the Receiving Party by its Proprietor unless the Proprietor agrees otherwise in writing.
10. For purposes of this Agreement, each party shall include (to the extent applicable) the officers, directors, employees, agents, representatives, attorneys, joint ventures, partnerships, affiliates, subsidiaries, and divisions of the party, and any other entity or entities which such party controls or which controls it, and, further, shall include any transferee, successor and assign of the assets of the party.
11. This Agreement shall be construed (both as to validity and performance) and enforced in accordance with, and governed by, the laws of Republic of South Africa.
12. Neither this Agreement nor the exchange of Subject Information between the parties shall create or be relied on by either party as a basis for creating any license between the parties under any patent, or other industrial or intellectual property rights of the Proprietor of the Subject Information, or any other license between the parties in the absence of any express written license agreement between them
13. The parties agree that no contract or agreement providing for a transaction shall be deemed to exist between them unless and until a definitive agreement has been executed and delivered, the parties hereby waive, in advance, any claim (including, without limitation, breach of contract) in connection with a possible transaction with each other unless and until they shall have entered into a definitive agreement. The parties also agree that unless and until a definitive agreement between them has been executed and delivered, neither party has any legal obligation of any kind whatsoever with respect to any such transaction by virtue of this Agreement or any other written or oral expression with respect to such transaction, except, in the case of this Agreement, for the matters specifically agreed to herein. For purposes of this paragraph, the term 'definitive agreement;' does not include an executed letter of intent, memorandum of understanding.

IN WITNESS WHEREOF, and intending to be legally bound, the parties have executed this Agreement as of and effective from the date first written above.