

Ablution/Facilities and Maintenance for 11 Coal fire Power Station “*an as and when required basis*”

NEC3 Term Service Contract (TSC3)

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

and [Insert at award stage]
(Reg No. _____)

for **Ablution/Facilities and Maintenance for 11 Coal fired
Power Station “*an as and when required basis*”**

| Contents: | No of pages |
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| Part C1 Agreements & Contract Data | [•] |
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CONTRACT No. [Insert at award stage]

Ablution/Facilities and Maintenance for 11 Coal fire Power Station “*an as and when required basis*”**PART C1: AGREEMENTS & CONTRACT DATA**

| Contents: | No of pages |
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| C1.1 Form of Offer and Acceptance | [•] |
| [to be inserted from Returnable Documents at award stage] | |
| C1.2a Contract Data provided by the <i>Employer</i> | [•] |
| C1.2b Contract Data provided by the <i>Contractor</i> | [•] |
| [to be inserted from Returnable Documents at award stage] | |
| C1.3 Proforma Guarantees | [•] |

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C1.1 Form of Offer & Acceptance

Offer

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

Appointment for a service provider for Ablution/Facilities and Maintenance for different Coal fire Power Station for BMS Coal Logistics (Arnot, Grootvlei, Camden, Hendrina, Majuba, Kriel, Matla, Kusile, Kendal and Tutuka)

The tenderer, identified in the Offer signature block, has examined the documents listed in the Tender Data and addenda thereto and by submitting this Offer has accepted the Conditions of Tender.

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 *Contractor* 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.

| Options A | The offered total of the Prices exclusive of VAT is | Rate based |
|-----------|--|------------|
| | Sub total | R [•] |
| | Value Added Tax @ 15% is | R [•] |
| | The offered total of the amount due inclusive of VAT is ¹ | R [•] |
| | (in words) [•] | |

This Offer may be accepted by the Employer 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 *Contractor* in the *conditions of contract* identified in the Contract Data.

Signature(s)

Name(s)

Capacity

For the tenderer:

(Insert name and address of organisation)

Name &
signature of
witness

Date

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

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Ablution/Facilities and Maintenance for 11 Coal fire Power Station “*an as and when required basis*”**Acceptance**

By signing this part of this Form of Offer and Acceptance, the Employer identified below accepts the tenderer's Offer. In consideration thereof, the Employer shall pay the Contractor 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 Employer 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: Service Information |

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 Employer 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, including the Schedule of Deviations (if any), contact the Employer's agent (whose details are given in the Contract Data) to arrange the delivery of any, 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 and signed original copy of this document, including the Schedule of Deviations (if any).

Signature(s)

Name(s)

Capacity

**for the
Employer**

Eskom Rotek Industries

Name &
signature of
witness

Date

Note: No alternative tenders will be entered into by ERI

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Schedule of Deviations to be completed by the *Employer* 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 Employer 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 | [•] | [•] |
| 5 | [•] | [•] |
| 6 | [•] | [•] |
| 7 | [•] | [•] |

By the duly authorised representatives signing this Schedule of Deviations below, the Employer 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 Employer 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 Employer

Signature

Name

Capacity

On behalf
of

(Insert name and address of organisation)

Eskom Rotek Industries

Name &
signature
of witness

Date

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C1.2 TSC3 Contract Data

Part one - Data provided by the *Employer*

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 main Option: | |
| | | A: Priced contract with price list |
| | dispute resolution Option | W1: Dispute resolution procedure |
| | and secondary Options | |
| | | X1: Not Applicable |
| | | X2: Changes in the law |
| | | X3: Not Applicable |
| | | X4: Not Applicable |
| | | X12: Not Applicable |
| | | X13: Not Application |
| | | X17: Low service damages |
| | | X18: Limitation of liability |
| | | X19: Task Order |
| | | X20: Key performance indicators |
| | | Z: <i>Additional conditions of contract</i> |
| | of the NEC3 Term Service Contract April 2013 ² (TSC3) | |
| 10.1 | The <i>Employer</i> is (name): | Eskom RoteK Industries SOC Ltd (Reg no: 1990/006897/30), a state owned company incorporated in terms of the company laws of the Republic of South Africa |
| | Address | Roshland Office Park Lower Germiston Road Rosherville |
| | Tel No. | Entered at Award |

² Available from Engineering Contract Strategies Tel 011 803 3008 Fax 086 539 1902 www.ecs.co.za

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| | Fax No. | Entered at Award |
|----------|--|--|
| 10.1 | The <i>Service Manager</i> is (name): | Entered at Award |
| | Address | Entered at Award |
| | Tel | Entered at Award |
| | Fax | Entered at Award |
| | e-mail | Entered at Award |
| 11.2(2) | The Affected Property is | Various Sites in South Africa |
| 11.2(13) | The <i>service</i> is | Ablution/Facilities and Maintenance enabling contract at Different Power Station “<i>at an as and when required basis</i>” |
| 11.2(14) | The following matters will be included in the Risk Register | Standing time, Inclement weather, Strikes, and Stoppages |
| 11.2(15) | The Service Information is in | Part 3: Scope of Work and all documents and drawings to which it makes reference. |
| 12.2 | The <i>law of the contract</i> is the law of | the Republic of South Africa |
| 13.1 | The <i>language of this contract</i> is | English |
| 13.3 | The <i>period for reply</i> is | 1 week |
| 2 | The Contractor’s main responsibilities | Data required by this section of the core clauses is also provided by the <i>Contractor</i> in Part 2 and terms in italics used in this section are identified elsewhere in this Contract Data |
| 21.1 | The <i>Contractor</i> submits a first plan for acceptance within | 1 week of the Contract Date |
| 3 | Time | |
| 30.1 | The <i>starting date</i> is. | Entered at Award |
| 30.1 | The <i>service period</i> is | Entered at Award |
| 4 | Testing and defects | 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 |
| 5 | Payment | |
| 50.1 | The <i>assessment interval</i> is | Between the 25th and 26th day of each successive month. |
| 51.1 | The <i>currency of this contract</i> is the | South African Rand |
| 51.2 | The period within which payments are | |

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| | made is | 4 weeks. |
| 51.4 | The <i>interest rate</i> is | the publicly quoted prime rate of interest (calculated on a 365 day year) charged by from time to time by the Standard Bank of South Africa Limited (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 |
| 6 | Compensation events | 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 | Use of Equipment Plant and Materials | 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 |
| 8 | Risks and insurance | |
| 80.1 | These are additional <i>Employer's</i> risks | <p>Local Communities (different stakeholder in the same community)</p> <p>Site remote conditions (Power stations are situated in different municipal district)</p> <p>Late payments (salary payment of employees if not made on that can lead to labour unrest)</p> |
| 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/InsurancePolicies/Procedures/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/InsurancePolicies/Procedures/Pages/EIMS_Policies_From_1_April_2014_To_31_March_2015.aspx (See Annexure A for basic guidance) |
| 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 | <p>the amount of the deductibles relevant to the event described in the “Format TSC3” insurance policy available on http://www.eskom.co.za/Tenders/InsurancePolicies/Procedures/Pages/EIMS_Policies_From_1_April_2014_To_31_March_2015.aspx</p> |
| 83.1 | The insurance against loss of or damage to the <i>works</i> , Plant and Materials is to | |

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| | 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. |
| 10 | Data for main Option clause | |
| A | Priced contract with price list | |
| 20.5 | The <i>Contractor</i> 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). |
| | Address | [•] |
| | Tel No. | [•] |
| | Fax No. | [•] |
| | e-mail | [•] |
| W1.2(3) | The <i>Adjudicator nominating body</i> is: An Adjudicator will be appointed between the Contractor and the Employer should a | 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. |

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dispute arises.
The costs that the Adjudicator charge will be divided between both Parties at 50% for each parties account.

| | | |
|---------|---|---|
| W1.4(2) | The <i>tribunal</i> is: | Arbitration |
| W1.4(5) | 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. |
| | 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 | The Chairman for the time being or his nominee of the Association of Arbitrators (Southern Africa) or its successor body. |
| | - if the arbitration procedure does not state who selects an arbitrator, is | |

12 Data for secondary Option clauses

| X1 | Price adjustment for inflation | | | | | | | | | | | | | | | | |
|--|---|---|--|--------------|---------------------------|---------|-------------|------------------------|--------|--------|------------|-----|-------|--|-------|---|--|
| X1.1 | The <i>base date</i> for indices is | 28 February 2025 (must be the month before submission of tender) | | | | | | | | | | | | | | | |
| | The proportions used to calculate the Price Adjustment factor for the BOQ are stated below. Increase percentages are to be calculated on a yearly basis on the anniversary of the beginning of the contract. As prices are fixed for the duration of the contract CPA will be billed separate to the main assessment. | <table> <tr> <th>Proportion</th><th>Proportion</th><th>Linked to index for</th></tr> <tr> <td>53.03 %</td><td>Maintenance</td><td>STATSSA (CPI Headline)</td></tr> <tr> <td>31.97%</td><td>Labour</td><td>SEIFSA C3a</td></tr> <tr> <td>15%</td><td>Fixed</td><td></td></tr> <tr> <td>=100%</td><td>1</td><td></td></tr> </table> | Proportion | Proportion | Linked to index for | 53.03 % | Maintenance | STATSSA (CPI Headline) | 31.97% | Labour | SEIFSA C3a | 15% | Fixed | | =100% | 1 | |
| Proportion | Proportion | Linked to index for | | | | | | | | | | | | | | | |
| 53.03 % | Maintenance | STATSSA (CPI Headline) | | | | | | | | | | | | | | | |
| 31.97% | Labour | SEIFSA C3a | | | | | | | | | | | | | | | |
| 15% | Fixed | | | | | | | | | | | | | | | | |
| =100% | 1 | | | | | | | | | | | | | | | | |
| X2 | Changes in the law | There is no reference to Contract Data in this Option and terms in <i>italics</i> are identified elsewhere in this Contract Data. | | | | | | | | | | | | | | | |
| X3 | Multiple currencies | Not Applicable | | | | | | | | | | | | | | | |
| X3.1 | The <i>Employer</i> will pay for these items or activities in the currencies stated | <table> <tr> <td>Only South African Rands to be used for</td><td>Other</td><td>Maximum payment in</td></tr> </table> | Only South African Rands to be used for | Other | Maximum payment in | | | | | | | | | | | | |
| Only South African Rands to be used for | Other | Maximum payment in | | | | | | | | | | | | | | | |

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| | | the contract Items & activities | currency | other currency |
|----------|--|---|----------|-------------------|
| | | [•] [•] [•] [•] | | |
| X3.1 | The <i>exchange rates</i> are those published in | Not applicable | | |
| | | The items & activities will be paid in the other currency - to a foreign Bank account nominated by the <i>Contractor</i> - to a valid SARB approved CFC account in South Africa - In accordance with an alternative payment method agreed with the <i>Employer</i> before the Contract Date. (select one of the three methods as agreed with the successful tenderer prior to contract award and delete the others and this note) | | |
| X4 | Parent company guarantee | Not Applicable | | |
| X12 | Partnering | Not Applicable | | |
| X12.1(1) | The <i>Client</i> is (Name): | [•] | | |
| | Address | [•] | | |
| | Contact details | [•] | | |
| | Telephone: | [•] | | |
| | Fax | [•] | | |
| | e-mail | [•] | | |
| X12.1(4) | The Partnering Information is in | Part 3 Scope of Work, section C3. [•] | | |
| X12.2(1) | The <i>Client's objective</i> is: | [•] | | |
| X13 | Performance bond | Not applicable | | |
| X13.1 | The amount of the performance bond is | R [•] | | |
| X17 | Low service damages | <ul style="list-style-type: none"> The Service Manager will notify the contractor in writing of any Low service damages The Service Manager will also notify the contractor of any claims directed and incurred by ERI BMS as a result | | |

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| | <p>of the contractor failure of duties, this will be for the account of the contractor.</p> <ul style="list-style-type: none">The sources of the information shall be all reports and <p>Audit reports which the infrastructure is subjected to (e.g. any authorized ERI BMS employees and any internal and external audits)</p> <ul style="list-style-type: none">ERI BMS will notify the contractor in writing of its intentions <p>to claims a Low service damages within the duration of the signed partnership.</p> <ul style="list-style-type: none">Should ERI BMS not claim a Low service damages for an event <p>it shall not be interpreted that the level of performance is acceptable</p> <p>or that ERI BMS shall not be entitled to claim Low service damages</p> <p>for similar future events.</p> <ul style="list-style-type: none">Under no circumstances shall a Low service damages <p>be regarded as the only action ERI BMS may take against</p> <p>the Contractor or the only amount it may claim from the Contractor.</p> <ul style="list-style-type: none"><u>Low service damages tables</u> <table><tr><td><ul style="list-style-type: none">Item No.</td><td><ul style="list-style-type: none">Payment Presentence</td></tr><tr><td><ul style="list-style-type: none">1</td><td><ul style="list-style-type: none">100% Full fixed cost billed, minus any other low service damages included in this contract.</td></tr></table> | <ul style="list-style-type: none">Item No. | <ul style="list-style-type: none">Payment Presentence | <ul style="list-style-type: none">1 | <ul style="list-style-type: none">100% Full fixed cost billed, minus any other low service damages included in this contract. |
| <ul style="list-style-type: none">Item No. | <ul style="list-style-type: none">Payment Presentence | | | | |
| <ul style="list-style-type: none">1 | <ul style="list-style-type: none">100% Full fixed cost billed, minus any other low service damages included in this contract. | | | | |
| X17.1 | The <i>service level table</i> is in | [•] | | | |
| X18 | Limitation of liability | | | | |
| X18.1 | The <i>Contractor's</i> liability to the <i>Employer</i> for indirect or consequential loss is limited to | R0.0 (zero Rand) | | | |
| X18.2 | For any one event, the <i>Contractor's</i> liability to the <i>Employer</i> for loss of or damage 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 | | | |

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| | limited to | http://www.eskom.co.za/Tenders/InsurancePoliciesProcedures/Pages/EIMS_Policies_From_1_April_2014_To_31_March_2015.aspx |
| X18.3 | The <i>Contractor's</i> liability for Defects due to his design of an item of Equipment is limited to | <p>The greater of</p> <ul style="list-style-type: none"> the total of the Prices at the Contract Date and the amounts excluded and unrecoverable from the <i>Employer's</i> insurance (other than the resulting physical damage to the <i>Employer's</i> property which is not excluded) plus the applicable deductibles in the <i>Employer's</i> assets and works / maintenance policies available on http://www.eskom.co.za/Tenders/InsurancePoliciesProcedures/Pages/EIMS_Policies_From_1_April_2014_To_31_March_2015.aspx |
| X18.4 | The <i>Contractor's</i> total liability to the <i>Employer</i> , for all matters arising under or in connection with this contract, other than the excluded matters, is limited to | <p>The total of the Prices other than for the additional excluded matters.</p> <p>The <i>Contractor's</i> total liability for the additional excluded matters is not limited.</p> <p>The additional excluded matters are amounts for which the <i>Contractor</i> is liable under this contract for</p> <ul style="list-style-type: none"> Defects due to his design, plan and specification, Defects due to manufacture and fabrication outside the Affected Property, Loss of or damage to property (other than the <i>Employer's</i> property, Plant and Materials), Death of or injury to a person and Infringement of an intellectual property right. |
| X18.5 | The <i>end of liability date</i> is | The end of the <i>service period</i> . |
| X19 | Task Order | |
| X19.5 | The <i>Contractor</i> submits a Task Order programme to the <i>Service Manager</i> within | 7 days of receiving the Task Order |
| X20 | Key Performance Indicators | |
| X20.1 | The <i>incentive schedule</i> for Key Performance Indicators is in | Not Applicable |
| X20.2 | A report of performance against each Key Performance Indicator is provided at intervals of | Monthly |

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| Z | The <i>additional conditions of contract</i> are | Z1 to Z11 always apply. |
|----------|---|--------------------------------|

Z1 Cession delegation and assignment

- Z1.1 The *Contractor* does not cede, delegate or assign any of its rights or obligations to any person without the written consent of the *Employer*.
- Z1.2 Notwithstanding the above, the *Employer* may on written notice to the *Contractor* 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.

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

- Z3.1 Where a change in the *Contractor's* legal status, ownership or any other change to his business composition or business dealings results in a change to the *Contractor's* B-BBEE status, the *Contractor* notifies the *Employer* within seven days of the change.
- Z3.2 The *Contractor* is required to submit an updated verification certificate and necessary supporting documentation confirming the change in his B-BBEE status to the *Service Manager* within thirty days of the notification or as otherwise instructed by the *Service Manager*.
- Z3.3 Where, as a result, the *Contractor's* B-BBEE status has decreased since the Contract Date the *Employer* may either re-negotiate this contract or alternatively, terminate the *Contractor's* obligation to Provide the Service.
- Z3.4 Failure by the *Contractor* to notify the *Employer* of a change in its B-BBEE status may constitute a reason for termination. If the *Employer* terminates in terms of this clause, the procedures on termination are P1, P2 and P4 as stated in clause 92, and the amount due is A1 and A3 as stated in clause 93.

Z4 Ethics

- Z4.1 For the purposes of this Z-clause, the following definitions apply:

Affected Party means, as the context requires, any party, irrespective of whether it is the Contractor or a third party, such party's employees, agents, or Subcontractors or Subcontractor's employees, or any one or more of all of these parties' relatives or friends,

Coercive Action means, to harm or threaten to harm, directly or indirectly, an Affected Party or the property of an Affected Party, or to otherwise influence or attempt to influence an Affected Party to act unlawfully or illegally,

Collusive Action means, where two or more parties co-operate to achieve an unlawful or illegal purpose, including to influence an Affected Party to act unlawfully or illegally,

Committing Party means, as the context requires, the Contractor, or any member thereof in the case of a joint venture, or its employees, agents, or Subcontractors or the Subcontractor's employees,

Corrupt Action means, the offering, giving, taking, or soliciting, directly or indirectly, of a good or service to unlawfully or illegally influence the actions of an Affected Party,

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Fraudulent Action means, any unlawfully or illegally intentional act or omission that misleads, or attempts to mislead, an Affected Party, in order to obtain a financial or other benefit or to avoid an obligation or incurring an obligation,

Obstructive Action means, a Committing Party unlawfully or illegally destroying, falsifying, altering or concealing information or making false statements to materially impede an investigation into allegations of Prohibited Action and

Prohibited Action means, any one or more of a Coercive Action, Collusive Action Corrupt Action, Fraudulent Action or Obstructive Action.

- Z4.2 A Committing Party may not take any Prohibited Action during the course of the procurement of this contract or in execution thereof.
- Z4.3 The Employer may terminate the Contractor's obligation to Provide the Service if a Committing Party has taken such Prohibited Action and the Contractor did not take timely and appropriate action to prevent or remedy the situation, without limiting any other rights or remedies the Employer has. It is not required that the Committing Party had to have been found guilty, in court or in any other similar process, of such Prohibited Action before the Employer can terminate the Contractor's obligation to Provide the Service for this reason.
- Z4.4 If the Employer terminates the Contractor's obligation to Provide the Service for this reason, the procedures and amounts due on termination are respectively P1, P2, P3 and P4, and A1 and A3
- Z4.5 A Committing Party co-operates fully with any investigation pursuant to alleged Prohibited Action. Where the Employer does not have a contractual bond with the Committing Party, the Contractor ensures that the Committing Party co-operates fully with an investigation.

Z5 Confidentiality

- Z5.1 The *Contractor* 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 *Contractor*, enters the public domain or to information which was already in the possession of the *Contractor* at the time of disclosure (evidenced by written records in existence at that time). Should the *Contractor* disclose information to Others in terms of clause 25.1, the *Contractor* ensures that the provisions of this clause are complied with by the recipient.
- Z5.2 If the *Contractor* is uncertain about whether any such information is confidential, it is to be regarded as such until notified otherwise by the *Service Manager*.
- Z5.3 In the event that the *Contractor* is, at any time, required by law to disclose any such information which is required to be kept confidential, the *Contractor*, to the extent permitted by law prior to disclosure, notifies the *Employer* 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 *Contractor* 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.
- Z5.4 The taking of images (whether photographs, video footage or otherwise) of the Affected Property or any portion thereof, in the course of Providing the Service and after the end of the *service period*, requires the prior written consent of the *Service Manager*. All rights in and to all such images vests exclusively in the *Employer*.
- Z5.5 The *Contractor* ensures that all his subcontractors abide by the undertakings in this clause.

Ablution/Facilities and Maintenance for 11 Coal fire Power Station “an as and when required basis”**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 *Service 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.

Z7 Health, safety and the environment: Add to core clause 27.4

- Z7.1 The *Contractor* undertakes to take all reasonable precautions to maintain the health and safety of persons in and about the execution of the *service*. Without limitation the *Contractor*:
- accepts that the *Employer* may appoint him as the “Principal Contractor” (as defined and provided for under the Construction Regulations 2014 (promulgated under the Occupational Health & Safety Act 85 of 1993) (“the Construction Regulations”) for the Affected Property;
 - warrants that the total of the Prices as at the Contract Date includes a sufficient amount for proper compliance with the Construction Regulations, all applicable health & safety laws and regulations and the health and safety rules, guidelines and procedures provided for in this contract and generally for the proper maintenance of health & safety in and about the execution of the *service*; and
 - undertakes, in and about the execution of the *service*, to comply with the Construction Regulations and with all applicable health & safety laws and regulations and rules, guidelines and procedures otherwise provided for under this contract and ensures that his Subcontractors, employees and others under the *Contractor*’s direction and control, likewise observe and comply with the foregoing.
- Z7.2 The *Contractor*, in and about the execution of the *service*, complies with all applicable environmental laws and regulations and rules, guidelines and procedures otherwise provided for under this contract and ensures that his Subcontractors, employees and others under the *Contractor*’s direction and control, likewise observe and comply with the foregoing.

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 *Service Manager* in terms of core clause 51.1, the *Contractor* provides the *Employer* with a tax invoice in accordance with the *Employer*’s procedures stated in the Service Information, showing the amount due for payment equal to that stated in the payment certificate.
- Z8.2 If the *Contractor* does not provide a tax invoice in the form and by the time required by this contract, the time by when the *Employer* 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 *Employer* in terms of core clause 51.2 is then calculated from the delayed date by when payment is to be made.
- Z8.3 The *Contractor* (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 *Employer*’s VAT number 4330196330 on each invoice he submits for payment.

Z9 Notifying compensation events

- Z9.1 Delete the last paragraph of core clause 61.3 and replace with:

If the *Contractor* does not notify a compensation event within eight weeks of becoming aware of the event, he is not entitled to a change in the Prices.

Ablution/Facilities and Maintenance for 11 Coal fire Power Station “*an as and when required basis*”**Z10 *Employer’s limitation of liability***

- Z10.1 The *Employer’s* liability to the *Contractor* for the *Contractor’s* indirect or consequential loss is limited to R0.00 (zero Rand)
- Z10.2 The *Contractor’s* entitlement under the indemnity in 82.1 is provided for in 60.1(12) and the *Employer’s* liability under the indemnity is limited to compensation as provided for in core clause 63 and X19.11 if Option X19 Task Order applies to this contract.

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 business rescue order granted against it.

Ablution/Facilities and Maintenance for 11 Coal fire Power Station “an as and when required basis”**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](http://www.eskom.co.za/Tenders/InsurancePoliciesProcedures/Pages/EIMS_Policies_From_1_April_2014_To_31_March_2015.aspx)

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C1.2 Contract Data

Part two - Data provided by the *Contractor*

Notes to a tendering contractor:

1. Please read both the both the NEC3 Term Service Contract April 2013 and the relevant parts of its Guidance Notes (TSC3-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.

| Clause | Statement | Data |
|----------|---|------|
| 10.1 | The <i>Contractor</i> is (Name): Address Tel No. Fax No. | |
| 11.2(8) | The <i>direct fee percentage</i> is | % |
| | The <i>subcontracted fee percentage</i> is | % |
| 11.2(14) | The following matters will be included in the Risk Register | |
| 11.2(15) | The Service Information for the <i>Contractor's</i> plan is in: | |
| 21.1 | The plan identified in the Contract Data is contained in: | |
| 24.1 | The key people are: 1 Name: Job: Responsibilities: Qualifications: Experience: 2 Name: Job | |

³ Available from Engineering Contract Strategies Tel 011 803 3008 Fax 086 5391902 or www.ecs.co.za

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Responsibilities:

Qualifications:

Experience:

CV's (and further key person's data including
CVs) are in _____.

| | |
|----------|--|
| A | Priced contract with price list |
| 11.2(12) | The <i>price list</i> is in _____ |
| 11.2(19) | The tendered total of the Prices is R _____ |

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| Document reference | Title | No of pages |
|---------------------------|-------------------------------|----------------------|
| C2.1 | Pricing assumptions: Option A | Refer to BOQs |
| C2.2 | The <i>price list</i> | |

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C2.1 pricing assumptions: Option A

How work is priced and assessed for payment

Clause 11 in NEC3 Term Service Contract (TSC3) core clauses and Option a states:

| | | |
|-------------------------------------|------|---|
| Identified and defined terms | 11 | |
| | 11.2 | (12) The Price List is the <i>price list</i> unless later changed in accordance with this contract. |
| | | (17) The Price for Services Provided to Date is the total of <ul style="list-style-type: none">• The Price for each lump sum item in the Price List which the <i>Contractor</i> has completed and• Where a quantity is stated for an item in the Price List, an amount calculated by multiplying the quantity which the <i>Contractor</i> has completed by the rate.• A CPA on labour rates will apply when the for the second and third year |
| | | (19) The Prices are the amounts stated in the Price column of the Price List. Where a quantity is stated for an item in the Price List, the Price is calculated by multiplying the quantity by the rate. |

This confirms that Option A is a priced contract where the Prices are derived from a list of items of service which can be priced as lump sums or as expected quantities of service multiplied by a rate or a mix of both.

Function of the Price List

Clause 54.1 in Option A states: “Information in the Price List is not Service Information”. This confirms that instructions to do work or how it is to be done are not included in the Price List but in the Service Information. This is further confirmed by Clause 20.1 which states, “The *Contractor* Provides the Service in accordance with the Service Information”. Hence the *Contractor* does **not** provide the Service in accordance with the Price List. The Price List is only a pricing document.

Link to the *Contractor’s* plan

Clause 21.4 states “The *Contractor* provides information which shows how each item description on the Price List relates to the operations on each plan which he submits for acceptance”. Hence when compiling the *price list*, the tendering contractor needs to develop his first clause 21.2 plan in such a way that operations shown on it can be priced in the *price list* and result in a satisfactory cash flow in terms of clause 11.2(17).

Preparing the *price list*

Before preparing the *price list*, both the *Employer* and tendering contractors should read the TSC3 Guidance Notes pages 14 and 15. In an Option A contract, either Party may have entered items into the *price list* either as a process of offer and acceptance (tendering) or by negotiation depending on the nature of the *service* to be provided. Alternatively the *Employer*, in his Instructions to Tenderers or in a Tender Schedule, may have listed some items that he requires the *Contractor* to include in the *price list* to be prepared and priced by him.

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It is assumed that in preparing or finalising the *price list* the *Contractor*:

- Has taken account of the guidance given in the TSC3 Guidance Notes relevant to Option A;
- Understands the function of the Price List and how work is priced and paid for;
- Is aware of the need to link operations shown in his plan to items shown in the Price List;
- Has listed and priced items in the *price list* which are inclusive of everything necessary and incidental to Providing the Service in accordance with the Service Information, as it was at the time of tender, as well as correct any Defects not caused by an *Employer's* risk;
- Has priced work he decides not to show as a separate item within the Prices or rates of other listed items in order to fulfil the obligation to complete the *service* for the tendered total of the Prices.
- Understands there is no adjustment to items priced as lump sums if the amount, or quantity, of work within that item later turns out to be different to that which the *Contractor* estimated at time of tender. The only basis for a change to the (lump sum) Prices is as a result of a compensation event.

Format of the *price list*

(From the example given in an Appendix within the TSC3 Guidance Notes)

Entries in the first four columns in the *price list* in section C2.2 are made either by the *Employer* or the tendering contractor.

If the *Contractor* is to be paid an amount for the item which is not adjusted if the quantity of work in the item changes, the tendering contractor enters the amount in the Price column only, the Unit, Expected Quantity and Rate columns being left blank.

If the *Contractor* is to be paid an amount for an item of work which is the rate for the work multiplied by the quantity completed, the tendering contractor enters the rate which is then multiplied by the Expected Quantity to produce the Price, which is also entered.

If the *Contractor* is to be paid a Price for an item proportional to the length of time for which a service is provided, a unit of time is stated in the Unit column and the expected length of time (as a quantity of the stated units of time) is stated in the Expected Quantity column.

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C2.2 the *price list*

The price list as per respective sites BOQ attached with the contract.

| Document reference | Title | No of pages |
|---------------------------|---|--------------------|
| | This cover page | 1 |
| C3.1 | <i>Employer's Service Information</i> | |
| C3.2 | <i>Contractor's Service Information</i> | |
| | Total number of pages | |

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See attached detailed Scope of Work

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C3.1: EMPLOYER’S SERVICE INFORMATION

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1 Description of the service

1.1 Executive overview

The Operation is on a twenty four hour per day, seven days per week basis. The contract is on an as and when basis supply of services.

- The scope of work will include all **Ablution/Facilities and Maintenance** at eleven different Power Station.
- Comply with sites specific requirements as clearly displayed by the site management including but not limited to SHEQ requirements

The successful cleaning service provider shall supply, deliver specific plant cleaning service as agreed upon in the contract.

The successful service provider shall provide all labour, administration and management to perform the plant cleaning service as required at all times.

Labour recruitment shall follow established recruitment protocols at that particular operating site

1.2 Employer’s requirements for the service

The Employer’s objectives are to:

- Obtain asset maintenance service for the operations of the system as required to be completed in a specific period.
- Manage and control the risks associated with the plant maintenance and operation at different operating sites for Ash Handling Operations.

1.2.1 Maintenance of plant Specifications

1.2.1.1. The successful cleaning plant service provider is responsible to provide the cleaning service as per bill of quantities supplied on an as and when required basis.

1.2.1.2 The successful service provider shall **provide, tools, equipment and** facilities for the activities including vehicles for performing the cleaning tasks and thus needs to bear that in mind when pricing.

1.2.2. Sourcing conditions

1.2.2.1 services working shifts.

- There shall be resources working shifts as required by the project manager on site
- The minimum activities paid per week day for the maintenance activities shall be on a 24 hour cycle for all shifts broken down into 12 hour shifts (including Saturdays and Sundays); overtime will only be worked upon written instruction from the project manager.
- The number of employees to undertake the activities shall be determined by the contractor
- Transportation and accommodation must be provided by the contractor if required.
- Resource mobilisation will not be included in the rate the employer shall provide the facilities.
- The costs for activities shall be re-measurable after the completion of the activities.
- Any service provider that is involved in unsafe act or environmental contravention will have to be stopped until an improvement plan is approved by the ERI BMS site management.

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2.4. Deliverables

2.4.1 See attached detailed Scope of work

2 Management strategy and start up.

2.1 The *Contractor’s* plan for the service

The contractor is required to submit plan for service within 7 days after receiving a work instruction from the service manager

2.2 Management meetings

Regular meetings of a general nature may be convened and chaired by the *Supply Manager* as follows:

| Title and purpose | Approximate time & interval | Location | Attendance by: |
|--|-----------------------------|-----------------------------|---------------------------------------|
| Risk register and compensation events | As and When Required | Site offices or Head Office | <i>Employer</i> and <i>Contractor</i> |
| Overall contract progress and feedback | As and When Required | Site offices or Head Office | <i>Employer</i> and <i>Contractor</i> |

Meetings of a specialist nature may be convened as specified elsewhere in this Service Information or if not so specified by persons and at times and locations to suit the Parties, the nature and the progress of the *service*. Records of these meetings shall be submitted to the *Service Manager* by the person convening the meeting within five days of the meeting.

All meetings shall be recorded using minutes or a register prepared and circulated by the person who convened the meeting. Such minutes or register shall not be used for the purpose of confirming actions or instructions under the contract as these shall be done separately by the person identified in the *conditions of contract* to carry out such actions or instructions.

2.3 Invoicing and payment

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

The *Contractor* shall address the tax invoice to
Eskom Rotek Industries,
And include on each invoice the following information:

- Name and address of the *Contractor* and the *Service Manager*;
- The contract number and title;
- *Contractor’s* VAT registration number;
- The *Employer’s* VAT registration number 4330196330;
- Description of service provided for each item invoiced based on the Price List;
- Total amount invoiced excluding VAT, the VAT and the invoiced amount including VAT;
- (add other as required)

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Add procedures for invoice submission and payment (e. g. electronic payment instructions)

3 Health and safety, the environment and quality assurance

3.1 Health and safety risk management

The Cleaning Service provider complies with the requirements of the OHS Act 85 of 1993 as well as the Employer's Standards and Procedures regarding 'Health and Safety at Eskom Power Stations'

Note: Requirements to be met by Coal Truck Management Service provider "Contractor SHE Specifications.

The coal trucks management provider co-operates fully with the Employer's accident prevention procedure Document 32-95 as provided to coal truck management service provider on site by site management.

Note: The Coal Truck management service provider adheres to any additional safety requirements of the Employer on site as specified by site management.

3.2 Quality assurance requirements

The Ablution/Facilities and Maintenance Service provider conforms to the Quality Management requirements as stipulated in the User Requirement specification.

The quality requirements are as per ISO 9001 and Eskom Standard QM-58 Quality Requirements for Engineering and Construction works (Annexure A and B for the applicable section)

All work carried out must have a quality control plan completed

All employer quality requirements to be adhered to by the contractor.

The service provider submits the following items when changes occur:

- Resources on site (no changes are allowed prior to the Project Manager's acceptance)
- Copy of risk management associated with cleaning services of plant including all work instructions or procedures

4 Working on the Affected Property

4.1 Employer's site entry and security control, permits, and site regulations

The service provider applies for access permits at the security gate when access to Eskom Power Stations/Construction sites is required.

The service provider's personnel are in the possession of their access permits at all times when on the Site.

The service provider provides security for protection of construction their equipment and Materials required in providing the Works.

4.2 Records of Contractor's Equipment

The Maintenance service provider keeps records of all tasks executed by the service provider as specified by the original equipment manufacturers.

5 List of drawings

5.1 Drawings issued by the Employer

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This is the list of drawings issued by the *Employer* at or before the Contract Date and which apply to this contract.

| Drawing number | Revision | | Title |
|----------------|----------|-----|-------|
| TBC | TBC | TBC | |

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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, know-how, 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 of 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

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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 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, this Agreement has been executed by the parties as of and effective from the date first written above.