

**STANDARD TERMS AND CONDITIONS OF LIMESTONE SUPPLY**

from

**THE SUPPLIER**

to

**ESKOM HOLDINGS SOC LTD**

registration number 2002/015527/30, a company incorporated in terms of the laws of the Republic of  
South Africa with its registered office at Megawatt Park, Maxwell Drive, Sunninghill

**("Eskom")**

**TABLE OF CONTENTS**

	<b>Page</b>
SECTION 1: DEFINITIONS AND INTERPRETATION.....	4
1. Definitions and Interpretation .....	4
SECTION 2: WARRANTIES, UNDERTAKINGS, LEGAL COMPLIANCE AND AUDITS .....	13
2. General .....	13
3. Warranties Applicable to both Parties.....	13
4. Warranties by the Supplier .....	14
5. SDL&I Commitments: Undertakings by the Supplier .....	15
6. Legal Compliance and Audits .....	18
SECTION 3: RISK AND OWNERSHIP OF LIMESTONE .....	20
7. Risk and Ownership of Contract Limestone .....	20
SECTION 4: QUANTITIES, DELIVERY, OFF TAKE AND SUPPLY OF LIMESTONE .....	21
8. Limestone Quantities .....	21
9. Planning and Supply of Contract Limestone .....	21
10. Under Delivery .....	22
11. Under Off Take .....	25
SECTION 5: PRICE ADJUSTMENTS, INVOICING AND PAYMENTS .....	27
12. Price Adjustments .....	27
13. Adjustments of Other Monetary Amounts.....	27
14. Invoicing and Payment.....	28
SECTION 6: QUALITY OF LIMESTONE .....	29
15. Determination of Limestone Quality.....	29
17. Reject Limestone .....	32
18. Foreign Material and Ultra-fines .....	33
SECTION 7: TRANSPORTATION AND DETERMINATION OF CONTRACT LIMESTONE QUANTITY.....	34
19. Modes of Take Off of Contract Limestone .....	34
20. Rail Transportation of Contract Limestone .....	35
21. Road Transportation of Contract Limestone .....	35
22. Mass Determination .....	36
SECTION 8: REPORTING REQUIREMENTS AND PROVISION OF INFORMATION .....	39
23. Appointment of a Contract Manager .....	39
24. Technical Liaison Meetings .....	39
25. Reports .....	40
26. Legislative Submissions associated with Compliance.....	41
SECTION 9: DISPUTE RESOLUTION AND BREACH.....	41
27. Dispute Resolution.....	41

28.	Determination by an Independent Expert .....	44
29.	Termination for Breach .....	47
SECTION 10: FORCE MAJEURE MATTERS .....		48
30.	Force Majeure .....	48
SECTION 11: GENERAL PROVISIONS .....		51
31.	Insolvency .....	51
32.	Limitation of Liability .....	52
33.	Insurance .....	52
34.	Cession and Delegation .....	52
35.	Confidentiality .....	53
36.	Alienation or Disposal of an Interest .....	53
37.	Entire Agreement .....	54
38.	No Stipulation for the Benefit of a Third Person .....	54
39.	No Representations .....	54
40.	Variation, Cancellation and Waiver .....	54
41.	Indulgences .....	54
42.	Applicable Law .....	54
43.	Jurisdiction of South African Courts .....	54
44.	Service of Documents .....	55
45.	Costs .....	55
46.	Signature in Counterparts .....	55
47.	Independent Advice .....	56
48.	Good Faith and Co-Operation .....	56
LIST OF ANNEXES .....		56

## SECTION 1: DEFINITIONS AND INTERPRETATION

### 1. Definitions and Interpretation

1.1 In the Agreement, the following words and

1.2 expressions shall, unless otherwise stated or inconsistent with the context in which they appear, bear the following meanings and other words derived from the same origins as such words (that is, cognate words and expressions) shall bear corresponding meanings:

- |       |  |  |
|-------|--|--|
| 1.2.1 | <b>"Alienate"</b>  | means in relation to the Limestone Resource, any portion thereof or any rights in respect thereof, any transfer, disposal, lease, sub-lease, right to mine, sale, undertaking to do any of the aforesaid, the grant of any portion to acquire or pre-emptive right in respect thereof, |
| 1.2.2 | <b>"Alternative Point of Receipts"</b>                   | means a point of the supply other than the Point of Receipts for the Limestone as the Parties may agree in writing from time to time,  |
| 1.2.3 | <b>"Black"</b>   | is a generic term which means Africans, Coloureds and Indians who are citizens of the Republic of South Africa, by birth or descent or who became citizens by naturalisation before the 27 <sup>th</sup> of April 1994;  |
| 1.2.4 | <b>"Black Designated Groups"</b>                         | means Black youth, Black women and Black people with disabilities (BPwD);  |
| 1.2.5 | <b>"Black Ownership"</b>                                 | means a portion of shares in an entity that is owned by Black people;  |
| 1.2.6 | <b>"Broad-Based Black Economic Empowerment (B-BBEE)"</b> | refers to the economic empowerment of all Black people including women, workers, youth, people with disabilities and people living in rural areas, through diverse but integrated socio-economic strategies as defined in the B-BBEE Act, No 53 of 2003;                               |
| 1.2.7 | <b>"Business Day"</b>                                    | means a day other than a Saturday, Sunday or gazetted public holiday in the Republic of South Africa;  |

- 1.2.8 **"Road Limestone Transport Model"** means the model used by Eskom to determine tariffs applicable to the road transportation of limestone as amended from time to time;
- 1.2.9 **"Codes of Good Practice"** means the Codes of Good Practice as contemplated by section 9 of the Broad-Based Black Economic Empowerment Act 2003 (Act number 53 of 2003);
- 1.2.10 **"Consignment"** means
- 1.2.10.1 in respect of Contract Limestone transported by rail, a train load;
- 1.2.10.2 in respect of Contract Limestone transported by road, the approximate quantity Delivered in any 1 (one) day;
- 1.2.11 **"Container Trains"** means trains consisting of wagon ISO-type 6 (six) meter open top containers on flat bed rail cars;
- 1.2.12 **"Contract Manager"** means the individual appointed to manage the Agreement and as described more fully in clause 22;
- 1.2.13 **"DAT"** means Delivered At Terminal as defined in Incoterms at the Delivery Point;
- 1.2.14 **"Deliver"** means the provision, and where applicable, the off-loading of Contract Limestone by the Supplier at the Delivery Point, and **"Delivery"** shall have a corresponding meaning;
- 1.2.15 **"Delivery Point"** means:
- 1.2.15.1 in respect of Contract Limestone transported by rail, the outbound weighbridge or the handover/departure point situated at the Rail Siding;
- 1.2.15.2 in respect of Contract Limestone, where the Supplier is responsible for road transportation, the outbound weighbridge situated at the Power Station or any other points as contained in a written instruction by Eskom; and

- 1.2.15.3 in respect of Contract Limestone, where Eskom is responsible for the road transportation, the outbound weighbridge situated at the Mine;
- 1.2.16 **"Drawdown Order"** means a written order issued by Eskom to the Supplier for the Delivery of Contract Limestone as further described in clause 9.4;
- 1.2.17 **"FCA"** means Free Carrier as defined in Incoterms at the Delivery Point;
- 1.2.18 **"Foreign Material"** means all extraneous matter, other than limestone, limestone associated material and/or water, including without limitation metal, concrete, wood, plastic, roof bolts, picks from mining equipment, conveyor idlers and oversize stone;
- 1.2.19 **"Holder"** means a holder as defined in the MPRDA;
- 1.2.20 **"Incoterms"** means the standard trade definitions used in sales contracts published by the International Chamber of Commerce as at 2010, as amended or replaced from time to time;
- 1.2.21 **"Jumbo Trains"** means trains capable of being operated on TFR's heavy haul rail system and typically consisting of up to 100 (one hundred) wagons having a rated payload of 83 (eighty three) Tons per wagon and an axle load of no more than 26 (twenty six) Tons per axle;
- 1.2.22 **"Limestone Process Flow"** means the process steps to be followed to produce Contract Limestone, which steps are illustrated in the diagram contained in **Annexe A: The Limestone Quality Management Procedure**;
- 1.2.23 **"Limestone Quality Management Procedure (CQMP)"** means the sampling and analysis principles and procedures set out in Annexe A, as well as the procedures referred to in clause 15.3

- 1.2.24 **"Local Procurement"** means procurement targeted at Black designated groups who are residents of the district municipality where the Mine is located;
- 1.2.25 **"Mining Charter"** means the broad-based socio-economic empowerment charter for the Mining and Minerals Industry, 2018, as amended or replaced from time to time, including guidelines promulgated in terms thereof;
- 1.2.26 **"Mining Right"** means mining right as defined in the MPRDA;
- 1.2.27 **"MJ/kg"** means MegaJoules (being 1,000,000 Joules) per kilogram;
- 1.2.28 **"Month"** means a calendar month;
- 1.2.29 **"MPRDA"** means the Mineral and Petroleum Resources Development Act, No. 28 of 2002, as amended or replaced from time to time, including all regulations promulgated in terms thereof;
- 1.2.30 **"NEMA"** means the National Environmental Management Act, No. 107 of 1998, as amended or replaced from time to time, including all regulations promulgated in terms thereof;
- 1.2.31 **"Nominated Laboratory"**\* means the laboratory appointed by Eskom for the purpose of analysing limestone samples in terms of the Agreement;
- 1.2.32 **"NWA"** means the National Water Act, No. 36 of 1998, as amended or replaced from time to time, including all regulations promulgated in terms thereof;
- 1.2.33 **"Party"** means Eskom or the Supplier, as the context in which the word appears requires and **"Parties"** means both Eskom and the Supplier;

- 1.2.34 **"PPI"** means the producer price index for domestic output in South Africa, Table 1 (which is, at the Signature Date contained in Statistical Release P0142.1) as published by Statistics South Africa. In the event that the above producer price index ceases to be published or is replaced during the currency of the Agreement, then PPI shall mean an alternative index measuring substantially the same elements as that measured by the above mentioned producer price index;
- 1.2.35 **"Pre-Certified Stockpile"** means stockpile(s), approximately equivalent to a day's delivery, unless otherwise agreed which have been sampled, analysed and certified, in accordance with the Agreement (including the Limestone Quality Management Procedure) as meeting the Quality Specifications, or otherwise as accepted by Eskom;
- 1.2.36 **"Prepaid Under Off Take"** means the quantity of Contract Limestone which constitutes an Under Off Take which Under Off Take Eskom failed to make up in terms of clause 11 and for which Eskom paid for in terms of clause 11;
- 1.2.37 **"Progress Reports"** means annual achievements updates that shall be submitted to Eskom;
- 1.2.38 **"Qualifying Alternative Limestone"** means limestone sourced from production facilities other than the Mine, and which complies with the Quality Specifications and which production facilities comply with all legislative requirements contained in the Agreement;
- 1.2.39 **"Quarter"** means a period which consists of 3 (three) consecutive Months, the first of such period to commence on the Commencement Date and thereafter on the anniversary of the Commencement Date;
- 1.2.40 **"Quarterly Quantity"** means the quantity, in Tons, of Contract Limestone specified in the Drawdown Order for that Quarter, determined as set out in clause 9;



- 1.2.41 **"Reject Limestone"** means limestone in respect of which one or more quality parameters does not meet the Quality Specifications, or limestone deemed to be reject limestone in terms of the provisions of clause 16.2 whichever is applicable;
- 1.2.42 **"SAMREC Code"** means the 2007 edition of the South African Code for Reporting of Exploration Results, Mineral Resources and Mineral Reserves prepared by the South African Mineral Resources Committee Working Group under the joint auspices of the South African Institute of Mining and Metallurgy and the Geological Society of South Africa, as amended or replaced from time to time;
- 1.2.43 **"SDL&I Commitments"** means the Local Procurement and skills development targets agreed upon the Parties as contained in **Annexe C: Supplier Development, Localisation and Industrialisation Targets;**
- 1.2.44 **"Signature Date"** means the date on which the Agreement has been signed by both Parties hereto and if signed on different dates, the date of signature of the Party signing last in time;
- 1.2.45 **"Small Trains"** means trains which shall operate primarily on TFR's general freight business rail system and which shall typically consist of up to 100 (one hundred) wagons having a rated payload of no more than 58 (fifty eight) Tons and an axle load of no more than 20 (twenty) Tons per axle;
- 1.2.46 **"Supply"** means both when used as a noun and a verb, means the completed process of Delivery and Off Take which will take place more or less simultaneously, and **"Supplied"** shall have a corresponding meaning;
- 1.2.47 **"Take Off"** when used as a verb, in respect of all Contract Limestone Delivered, means the removal of such limestone from the respective Delivery Points by Eskom in such quantities and at such rates as set out in the Agreement and the noun **"Off Take"**, shall bear a corresponding meaning;

- 1.2.48 **"Technical Liaison Meeting"** means the meeting to be held between the Parties as set out in clause 23;
- 1.2.49 **"TFR"** means Transnet Freight Rail, a division of Transnet SOC Ltd, registered in terms of the company laws of the Republic of South Africa under registration number 1990/000900/30 and having its registered office at 47th floor, Carlton Centre, 150 Commissioner Street, Johannesburg, 2001.
- 1.2.50 **"Titles Office"** means the Mineral and Petroleum Titles Registration Office of South Africa;
- 1.2.51 **"Ton"** means a metric ton of 1 000 (one thousand) kilograms;
- 1.2.52 **"Tonnage Adjustment Factor (TAF)"** means the factor used to adjust the tonnage of any Contract Limestone that exceeds the maximum total moisture content, but which is accepted for Delivery in terms of clause **Error! Reference source not found.**, for the moisture in excess of the Equilibrium Moisture;
- 1.2.53 **"Ultra-fines"** means material below 100 (one hundred) microns resulting from the thickener underflow process recovered either as filter cake, arising from the filter press process or harvested from slimes dams;
- 1.2.54 **"Under Delivery"** means Under Supply caused by the Supplier's failure to Deliver Contract Limestone and/or Qualifying Alternative Limestone for any reason other than *force majeure*;
- 1.2.55 **"Under Off Take"** means Under Supply caused by Eskom's failure to Take Off Contract Limestone Delivered for any reason other than *force majeure*;
- 1.2.56 **"Under Supply"** means:
- 1.2.56.1 in respect of any Month, Supply of less than the Minimum Monthly Quantity applicable to that Month;
- 1.2.56.2 in respect of any Quarter, Supply of less than the Minimum Quarterly Quantity applicable to that Quarter; or

1.2.56.3 in respect of any Year, Supply of less than the Minimum Yearly Quantity applicable to that Year,

as a result of either Under Delivery and/or Under Off Take for any reason other than *force majeure*;

1.2.57 **"Verification"** means the process undertaken by Eskom to verify limestone qualities at the Delivery Point, **"Verify"** and/or **"Verified"** shall have a corresponding meaning;

1.2.58 **"VAT"** means value added tax levied from time to time in terms of the Value Added Tax Act, No. 89 of 1991 or any similar tax levied on the supply of goods imposed in terms of any law passed in substitution of the Value Added Tax Act, No. 89 of 1991 and for which tax a purchaser of such goods will be liable in terms of such substituting law; and

1.2.59 **"Year"** means a 12 (twelve) Month period beginning on the Commencement Date and thereafter, each subsequent period of 12 (twelve) consecutive Months.

### 1.3 In the Agreement:

1.3.1 references to a statutory provision include any subordinate legislation made from time to time under that provision and include that provision as modified or re-enacted from time to time;

1.3.2 notwithstanding anything to the contrary contained herein, all reference to legislation shall include a reference to such legislation as amended or replaced from time to time;

1.3.3 words importing the masculine gender include the feminine and neuter genders and vice versa; the singular includes the plural and vice versa; and natural persons include artificial persons and vice versa;

1.3.4 references to a "person" include a natural person, company, close corporation or any other juristic person or other corporate entity, a charity, trust, partnership, joint venture, syndicate, or any other association of persons;

1.3.5 a range of values indicated by the words "between...and..." or "from...to..." shall include both values that demarcate the range;

- 1.3.6 Any definition, wherever it appears in the Agreement, shall bear the same meaning and apply throughout the Agreement unless otherwise stated or inconsistent with the context in which it appears. If there is any conflict between any definitions in the Agreement then, for purposes of interpreting any clause of the Agreement or paragraph of any Annexe, the definition appearing in that clause or paragraph shall prevail over any other conflicting definition appearing elsewhere in the Agreement;
- 1.3.7 where any number of days is prescribed, those days shall be reckoned exclusively of the first and inclusively of the last day and shall refer to calendar days unless specifically stated otherwise;
- 1.3.8 any provision in the Agreement which is or may become illegal, invalid or unenforceable shall be ineffective to the extent of such prohibition or unenforceability and shall be treated as having not been written (i.e. *pro non scripto*) and severed from the balance of the Agreement, without invalidating the remaining provisions of the Agreement;
- 1.3.9 references to any amount shall mean that amount exclusive of VAT, unless the amount expressly includes VAT;
- 1.3.10 the rule of construction that if general words or terms are used in association with specific words or terms which are a species of a particular genus or class, the meaning of the general words or terms shall be restricted to that same class (i.e. the *eiusdem generis* rule) shall not apply, and whenever the word "including" is used followed by specific examples, such examples shall not be interpreted so as to limit the meaning of any word or term to the same genus or class as the examples given; and
- 1.3.11 each of the provisions of the Agreement has been negotiated by the Parties and drafted for the benefit of the Parties, and accordingly the rule of construction that the contract shall be interpreted against or to the disadvantage of the Party responsible for the drafting or preparation of the Agreement (i.e. the *contra proferentem* rule), shall not apply.

## **SECTION 2: WARRANTIES, UNDERTAKINGS, LEGAL COMPLIANCE AND AUDITS**

### **2. General**

- 2.1 The warranties contained in the Agreement shall be deemed to be representations and undertakings, material to the entering into of the Agreement, by the Supplier in favour of Eskom and by Eskom in favour of the Supplier where applicable;
- 2.2 Each warranty shall be a separate warranty and in no way limited or restricted by reference to, or inference from, the terms of any other warranty.
- 2.3 Each warranty is given as at the Signature Date and shall endure for the duration of the Agreement.
- 2.4 Insofar as any of the warranties are promissory or relate to a future event, they shall be deemed to have been given as at the due date for fulfilment of the promise or the happening of the event, as the case may be.
- 2.5 Where any warranty is qualified by the expression "the Supplier and/or Eskom is not aware", "to the best of the Supplier's and/or Eskom's knowledge and belief" or any similar expression, that expression shall be deemed to include an additional statement that it has been made after due enquiry.
- 2.6 Nothing contained in the Agreement shall relieve a Party from its obligations to make those disclosures which it is in law obliged to make but which are not recorded in the Agreement.

### **3. Warranties Applicable to both Parties**

Each Party hereby warrants unto and in favour of the other Party:

- 3.1 the Party and its representative(s), as applicable, have the requisite power, right and authority to enter into and perform the obligations to be assumed or performed by it in accordance with the Agreement and any other documents to be executed in accordance with the Agreement;
- 3.2 to the best of the Party's knowledge and belief, all facts and circumstances material to this transaction, or which would be material or would be reasonably likely to be material and which may affect the willingness of the Parties to enter into the Agreement or which may affect the Base Price and which are known to the Party, have been disclosed by the Party to the other Party; and

- 3.3 as at the Signature Date, no legal proceedings of any kind or administrative proceedings in terms of any law, and which shall prevent either Party from fulfilling its obligations in terms of the Agreement, have been instituted against such Party, and at all times during the currency of the Agreement neither Party has any obligations/duties to third parties which, if discharged, shall prevent the Party from fulfilling its obligations in terms of the Agreement.

#### **4. Warranties by the Supplier**

The Supplier hereby warrants unto and in favour of Eskom that:

- 4.1 upon Delivery of the Contract Limestone, Eskom will become the owner of the Contract Limestone free of any encumbrances, liens, rights of pre-emption or similar rights in favour of any third party;
- 4.2 as at the Signature Date both the Supplier has complied, and shall continue to comply with all material terms, conditions and obligations, contractual and statutory, which apply to all rights, titles, permits and other authorisations held by it, or applicable to any of its operations;
- 4.3 the Supplier is not aware of any facts or circumstances which may result in the withdrawal, suspension, cancellation, material alteration or non-renewal of any rights, titles, permits and other authorisations held by it or applicable to any of its operations, as such matters relate to the Agreement and/or the Limestone Resource, as the case may be;
- 4.4 the Limestone Resource has sufficient Limestone Reserves to satisfy its Delivery obligations in terms of the Agreement;
- 4.5 the Supplier shall ensure that the existing infrastructure at the Mine is operated and managed in accordance with the environmental laws and regulations as stipulated in clause 6.2;
- 4.6 the Supplier shall co-operate with Eskom's requirements for carrying out a due diligence process over the Limestone Resource and shall grant Eskom and its representatives access to all information and documents forming part of such due diligence process;
- 4.7 the Supplier shall notify Eskom of any changes made to the documentation supplied to Eskom in terms of the Agreement, where such changes have an impact on the warranties provided by the Supplier in terms of the Agreement; and

- 4.8 the Supplier shall ensure that it maintains its B-BBEE status at a level of 1, 2, 3 or 4 for the duration of the Agreement. In the event that, in any annual B-BBEE verification or at Signature Date, the B-BBEE status falls outside the abovementioned required levels, within 30 (thirty) days of issue of that B-BBEE certificate or from Signature Date, a remedial action plan must be submitted by the Supplier to Eskom, for acceptance, detailing how the Supplier shall return to be within the required levels at the next annual B-BBEE verification.

## 5. **SDL&I Commitments: Undertakings by the Supplier**

- 5.1 The Supplier shall adhere to the SDL&I Commitments set out more fully in **Annexe B** of the Agreement.
- 5.2 The Supplier undertakes to achieve and fulfil these SDL&I Commitments during the Contract Period or at an earlier date.

### 5.3 **Black Ownership**

- 5.3.1 The Supplier undertakes to achieve and maintain a direct Black Ownership in accordance with the Mining Charter and applicable legislation. Calculation of Black Ownership must be in compliance with the Codes of Good Practice on B-BBEE issued by the Department of Trade and Industry in terms of the B-BBEE Act, No 53 of 2003.
- 5.3.2 Should the Supplier lose its Black Ownership status as contemplated in clause 5.3.1 during the term of the Agreement, the Supplier will be required within 3 (three) months to submit a rectification plan to Eskom, which plan shall set out in detail the manner and timelines by which the Supplier will re-establish the required Black Ownership status as contemplated in clause 5.3.1.
- 5.3.3 The Supplier shall consult with Eskom on the rectification plan and Eskom undertakes within 7 (seven) Business Days after submission to it of the rectification plan, to advise whether the plan is acceptable which acceptance will not be unreasonably withheld or delayed.
- 5.3.4 On Eskom's acceptance, the Supplier shall implement the rectification plan in the form and on the terms acceptable to Eskom.
- 5.3.5 The Supplier's failure to re-establish its Black Ownership status, as contemplated in clause 5.3.2, within a 12 (twelve) month period shall

constitute a breach of material provisions of the Agreement in terms of clause 34.2.

#### 5.4 Local Procurement

5.4.1 The Supplier shall aim to set aside 30% (thirty percent) of its procurement spend on service providers for Black Designated Groups that are within the district municipality of the Mine, and where such service providers are not available within the district, the entire province will be considered. In order to ensure compliance, Eskom reserves the right, as it deems fit, to request information to check and verify services being provided by the Supplier's service providers.

5.4.2 The Supplier shall provide copies of invoices, proof of payment, B-BBEE certificate of the service provider and proof of address if different from one in the certificate as well as evidence that the service provider is either youth or disabled.

#### 5.5 Skills Development

5.5.1 As part of the Agreement, the Supplier shall train candidates in the skills according to the distribution identified in the skills development matrix of the SDL&I Commitments in **Annexe C** of the Agreement. Candidates shall consist of currently unemployed graduates from universities; Further Education and Training campuses ("FETs") and schools. Candidates should also come from historically disadvantaged communities within the district municipality of the Mine. Candidates may not comprise of individuals who, at Signature Date, are employees of the Supplier.

5.5.2 For the Supplier to fulfil its obligations in respect of skills development, the Supplier shall:

5.5.2.1 provide the specified number of individuals with sufficient on-the-job and other skills training in the specified trade or discipline to reach the level of competence required to pass the level of qualification stated in the SDL&I Commitments and accordingly to be certified to that level; provided that if there is no industry standard test or certification for the trade or discipline in question then the Supplier shall provide sufficient on-the-job and other skills training in that trade or discipline to enable that individual to reach the level of competence stated in the SDL&I Commitments so that that person is generally regarded as being



employable in that trade or discipline. The cost of providing skills development training shall be borne by the Supplier and not passed over to Eskom;

5.5.2.2 register and pay for the testing and evaluation of that individual in the specified trade test (if applicable); and

5.5.2.3 provide the details below in the Progress Reports for each individual in respect of which the Supplier will claim fulfilment of the skills development element of the Supplier's SDL&I Commitments:

5.5.2.3.1 the names of the individuals as well as copies of identity documents and, if applicable, the specified trades in respect of which the individuals are to be trained; and

5.5.2.3.2 details of individuals who have successfully completed the skills development for the relevant period (including details of their personal information and certified copies of their test results and certificates received, if applicable).

## 5.6 Performance Requirements in Respect of SDL&I Commitments

5.6.1 To ensure compliance to the agreed upon SDL&I Commitments, the Supplier shall be required, at Signature Date, to prepare and submit to Eskom a detailed plan ("**the SDL&I Plan**") showing how the Supplier will satisfy its SDL&I Commitments as set out in **Annexe B**.

5.6.2 The Parties shall meet on each anniversary of the Commencement Date, for the duration of the Contract Period, to discuss the SDL&I Commitments in terms of the Agreement, and where appropriate, agree in writing on a set of annual milestones which the Supplier shall satisfy with regard to the SDL&I Commitments. At such meetings, the Parties shall review the Supplier's performance with regard to fulfilling the SDL&I Commitments of the Agreement. The SDL&I Commitments shall be equally weighted between the Local Procurement and the skills development obligations as set out in **Annexe B**, to determine whether the Supplier has fulfilled the SDL&I Commitments of the Agreement for that particular Year.

5.6.3 Without prejudice to any other rights or claims that Eskom may have under the Agreement or otherwise, in the event that the Supplier fails to meet any of the targets set out in the SDL&I Plan within the prescribed timelines or fails to

provide Progress Report(s) as contemplated in clause 24.2, Eskom shall be entitled to withhold an amount equal to 2.5% (two point five percent) from each payment becoming due to the Supplier under the Agreement after the relevant date at which the target(s) should have been met, until the Supplier has met all of its targets as set out in the SDL&I Plan.

- 5.6.4 The Supplier shall notify Eskom of its achievement of the relevant target(s) set out in the SDL&I Plan providing evidence thereof in accordance with the requirements in **Annexe B**. Once Eskom is satisfied with the evidence provided, Eskom shall without undue delay and within 30 (thirty) days release and pay to the Supplier the amounts withheld in respect of the Supplier's failure to meet the target(s) set out in the SDL&I Plan, free of any interest or surcharge. No money withheld shall be paid back to the Supplier if at the end of the Contract Period the Supplier has not met all of its SDL&I Commitments as set out in the SDL&I Plan.

## 6. Legal Compliance and Audits

- 6.1 The Supplier shall ensure compliance with the regulatory requirements of the Department of National Treasury's Central Supplier Database (**CSD**) in accordance with the Public Finance Management Act (**PFMA**). Eskom shall not Off Take Contract Limestone due to the Supplier's non-compliance with CSD requirements, in which event Supply shall be suspended with immediate effect.
- 6.2 The Supplier warrants that it is complying and will continue to comply with all its obligations under all current and future applicable South African and International Regulatory Framework applicable to a Mine and mine associated infrastructures, including but not limited to the Specific Environmental Management Acts (**SEMA**); the Mineral and Petroleum Resources Development Act, No. 28 of 2002 (**MPRDA**); the National Water Act, No. 36 of 1998 (**NWA**); the National Environmental Management Act, No. 107 of 1998 (**NEMA**); the National Environmental Air Quality Act, No. 39 of 2004; the Hazardous Substances Act, No. 15 of 1973; the National Heritage Resources Act, No. 25 of 1999; the Mine Health and Safety Act, No. 29 of 1996; the Occupational Health and Safety Act, No. 85 of 1993 (**OHSA**); and the Compensation for Occupational Injuries and Diseases (**COID**) Act No. 130 of 1993; as amended.
- 6.3 Eskom shall be entitled to conduct audits and inspections in respect of the provisions of this clause 6 to ensure the Supplier's compliance herewith and the Supplier agrees to co-operate with Eskom in this regard. To that end, Eskom and its designated representatives, including without limitation, its attorneys, auditors, safety and health representatives,

environmental representatives, engineers and geologists shall at all reasonable times, with reasonable prior notice to the Supplier, have access to the Mine and facilities utilised for the production and supply of Contract Limestone under the Agreement and to all records, wherever located, pertaining to the supply of Contract Limestone in terms of the Agreement, which access will be at Eskom's expense and risk.

- 6.4 Eskom will provide feedback on outcomes and non-compliances identified from the audit and inspections conducted in 6.3 above. The Supplier shall provide Eskom with an action plan and the Parties shall mutually agree on the action plan, including the timelines, to address the identified risks. Should the parties be unable to agree on the risks and/or the action plan, then the dispute will be resolved in terms of Section 9.
- 6.5 The Supplier shall address the agreed non-compliances as indicated in 6.4 and shall report on progress of addressing such non-compliances during the scheduled technical meetings or as and when required.
- 6.6 In the event that Eskom is approached by the Government of South Africa or any regulatory authority under the SEMA, MPRDA, NEMA and/or NWA with a view to remedying pollution relating to or resulting from the Parties' respective rights and obligations under the Agreement, the Supplier shall assist Eskom by making appropriate representations and taking appropriate steps to mitigate any statutory liability which Eskom may have under that legislation.
- 6.7 Eskom shall not at any time or for any reason be liable for any rehabilitation and/or closure costs incurred in connection with the Mine, save where Eskom caused the pollution, nor the possible cost of remedying pollution under NEMA and the NWA. To the extent that, after taking the steps referred to in clauses 6.2 and 6.6, Eskom incurs any such costs, for which Eskom is not responsible, then the Supplier shall compensate Eskom for all reasonable costs and expenses incurred by it, provided that Eskom shall take all reasonable steps to mitigate its loss and shall be obliged to prove such loss.
- 6.8 The Supplier shall comply with the provisions detailed in **Annexe C: The Safety and Health Requirements** and **Annexe D: The Environmental Legal Requirements**.
- 6.9 Where either Party's employees, agents and/ or its representatives enter the premises of the other Party, they shall comply with any of the applicable legislation set out in clause 6.2 above.
- 6.10 In the event of material changes to the legislation referred to in clause 6.2 or the introduction of new legislation which results in an increase or reduction of the direct cost of producing and Delivering Contract Limestone at the Delivery Point

("the Cost Differential"), the then applicable Price may (subject to clause 6.12 below) be increased or reduced as the case may be, by a pro rata portion of the Cost Differential, and following early notification to, and agreement by Eskom.

- 6.11 Subject to clause 6.10, the pro rata portion shall be equal to the proportion which the value (expressed in Rand) of the sales to Eskom in terms of the Agreement bears to the aggregate of all sales from the Mine(s).
- 6.12 Eskom shall at any time, for the purpose of clause 6.10, upon reasonable notice to the Supplier, be entitled to audit the Supplier's costs related to the production and Delivery of such limestone at the Delivery Point and financial information relating to the Supplier's income as a result of sales of limestone. In the event that Eskom, as a result of its audit, disputes the Cost Differential, Eskom and the Supplier shall attempt to resolve the dispute amicably within 20 (twenty) days after a dispute being declared by either of them in this regard. Where Eskom and the Supplier are unable to resolve the dispute, either Eskom or the Supplier may then refer the dispute to an independent expert for determination in accordance with clause 27.
- 6.13 Where either Party's employees, agents and/ or its representatives enter the premises of the other Party, they shall be required to comply, and each Party shall procure that they comply, with the relevant legislation set out in clause 6.2 above and other health and safety rules applicable to the premises of the other Party. The Parties hereby agree, in terms of section 37(2) of the OHSA (if applicable) that the other Parties are relieved of any of their liabilities in terms of section 37(1) of the OHSA in respect of any act or omissions of either Party's employees, agents and/or its representatives to the extent permitted by the OHSA.

### **SECTION 3: RISK AND OWNERSHIP OF LIMESTONE**

#### **7. Risk and Ownership of Contract Limestone**

- 7.1 The risk in, and ownership of, the Contract Limestone Delivered in terms of the Agreement shall pass to Eskom upon Delivery, notwithstanding the provisions of clause 14.
- 7.2 Eskom shall be entitled to use all Contract Limestone Supplied to it in terms of the Agreement for consumption at any Power Station owned and/or operated by Eskom from time to time and Eskom shall be entitled to use the Contract Limestone in accordance with its sole requirements including selling or disposing of such limestone to any third party.

- 7.3 The Supplier shall Deliver Contract Limestone to the designated Delivery Point in the quantities and at the rates set out in the Agreement for Off Take by Eskom.

#### **SECTION 4: QUANTITIES, DELIVERY, OFF TAKE AND SUPPLY OF LIMESTONE**

##### **8. Limestone Quantities**

- 8.1 The Supplier shall at all times throughout the duration of the Agreement ensure that the Limestone Resource remains sufficient to enable the Supplier to comply with all its obligations in terms of the Agreement.
- 8.2 Any quantities of Contract Limestone not Delivered in a Year and for which the Supplier has paid a penalty in terms of clause 10.3, shall not be carried over to the next Year.

##### **9. Planning and Supply of Contract Limestone**

- 9.1 The Parties shall use their reasonable endeavours to ensure that all Delivery and Off Take of Contract Limestone is spread evenly across each day and Month and so as to comply with the limits stipulated in clause 8.1 above and clause 7 of the Limestone Supply Agreement.
- 9.2 Eskom shall, before the end of the second week of the last Month of each Quarter specify, in the Technical Liaison Meeting, the quantity of Contract Limestone that shall be Supplied for each Month of the subsequent Quarter such that:
- 9.2.1 the quantity specified in respect of each Month will not be:
- 9.2.1.1 less than the Minimum Monthly Quantity; and
- 9.2.1.2 not more than the Maximum Monthly Quantity; and
- 9.2.2 the quantity to be Supplied each Year will not be:
- 9.2.2.1 less than the Minimum Annual Quantity stipulated in Table 1 of the Limestone Supply Agreement; and
- 9.2.2.2 more than the Maximum Annual Quantity stipulated in Table 1 of the Limestone Supply Agreement; and
- 9.2.3 it takes into account the provisions of any rectification plans agreed to by the Parties.

- 9.3 Either Party may request at the Technical Liaison Meeting to Deliver or Take Off less than the Minimum Monthly Quantity and/or Minimum Annual Quantity or in excess of the Maximum Monthly Quantity and/or the Maximum Annual Quantity applicable to any Month or Year, provided that the other Party shall not be obliged to agree to such quantity below the minimum quantities or above the maximum quantities as set out in Table 1 of the Limestone Supply Agreement, save for a Delivery in respect of an Under Supply in terms of a rectification plan approved by the other Party. Should the Parties not agree to a request made in terms of this clause 9.3 the Monthly Quantity and/or Annual Quantity shall apply.
- 9.4 Once the Monthly Quantity for each month of the subsequent Quarter has been determined in terms of clause 9.2, Eskom shall issue a written order for the Delivery of Contract Limestone for each Month in the subsequent Quarter ("**the Drawdown Order**") in respect of the quantities so determined. The Supplier shall Deliver and Eskom shall Take Off:
- 9.4.1 not less than the Minimum Monthly Quantity and not more than the Maximum Monthly Quantity during each Month of the subsequent Quarter; and
- 9.4.2 not less than the Minimum Quarterly Quantity and not more than the Maximum Quarterly Quantity during the subsequent Quarter.
- 9.5 For avoidance of doubt, the quantities set out in each Drawdown Order shall expressly exclude any quantities planned for Supply under any agreed rectification plan. Where applicable, such quantities shall be noted separately in the Drawdown Order.

## 10. Under Delivery

- 10.1 In the event of an actual or expected Under Delivery:
- 10.1.1 the Supplier shall, within 3 (three) Business Days, submit a rectification plan to Eskom, which plan shall set out a schedule of how the Supplier shall make up the actual or expected shortfall in the shortest time reasonably possible, but in any event before the end of the Quarter, or before the expiry of the Agreement where the remaining period of the Agreement is less than a Quarter;
- 10.1.2 the Supplier may Deliver Qualifying Alternative Limestone, subject to Eskom's written approval, which approval shall not be unreasonably withheld or delayed, as part of the rectification plan;

- 10.1.3 the Supplier shall source such Qualifying Alternative Limestone and Deliver it to the Delivery Points or to such other points as approved by Eskom, provided that the Supplier shall be liable for any reasonable additional direct costs which Eskom may have to incur (including all penalties for which Eskom may become liable to its transport contractors as a result of the shortfall). Eskom shall be entitled to the cost savings which may result from the Delivery and/or Take Off of such Qualifying Alternative Limestone;
- 10.1.4 the Supplier shall consult with Eskom on the rectification plan and, Eskom undertakes, within 7 (seven) days after submission to it of the rectification plan, to advise whether the plan is acceptable, which acceptance will not be unreasonably withheld or delayed; and
- 10.1.5 on Eskom's acceptance, the Supplier shall implement the rectification plan in the form and on the terms acceptable to Eskom and make up the actual or expected shortfall in accordance with the rectification plan.
- 10.2 Where, as a result of the Under Delivery, Eskom takes any limestone from its own stockpiles to manage the shortfall, Eskom shall be entitled to recover from the Supplier its reasonably incurred and demonstrable costs for additional direct handling and stockpiling.
- 10.3 In the event of:
- 10.3.1 the Supplier failing to submit and implement the rectification plan in terms of clause 10.1; or
- 10.3.2 Eskom's rejection of the rectification plan; or
- 10.3.3 the Supplier's failure to make up the Under Delivery in another manner acceptable to Eskom, then Eskom shall be entitled to recover from the Supplier a financial penalty calculated as:

$$P_p = (S_p - P) + AT_c + \text{Adm Fee}$$

where:

**P<sub>p</sub>** = Penalty Payable

**S<sub>p</sub>** = Spot price or quoted price for Limestone sourced elsewhere than from the Supplier

**P** = Escalated base price payable by Eskom to the Supplier for Contract Limestone



**ATc** = Additional Transport costs made up of the portion of the transport costs that exceeds the Transport costs payable for the Supplier's Contract Limestone

**Adm Fee** = is the reasonable and necessary costs incurred for arranging alternative source of Limestone and negotiations with the potential new supplier

10.4 The quantity of any Under Delivery shall be measured:

10.4.1 in any Month, as the Minimum Monthly Quantity in respect of that Month less the quantity of Contract Limestone actually Delivered in that Month;

10.4.2 in any Quarter, as the difference between the Minimum Quarterly Quantity in respect of that Quarter and the quantity of Contract Limestone actually Delivered in that Quarter; and

10.4.3 in any Year, as the difference between the Minimum Annual Quantity in respect of that Year and the quantity of Contract Limestone actually Delivered in that Year.

10.4.4 For avoidance of doubt, when calculating the quantity of an Under Delivery, the Supplier must first meet the Minimum Quarterly Quantity each Quarter before any quantity of Contract Limestone Delivered in terms of a Supplier rectification plan is credited against that rectification plan.

10.5 Any Under Delivery shall, unless otherwise agreed to in writing between the Parties, only constitute a material breach of a material term for purposes of clause 28 if such Under Delivery occurred more than 3 (three) times during any rolling 12 (twelve) Months; and:

10.5.1 in any Month, is less than 50% (fifty percent) of the Monthly Quantity in respect of that Month; or

10.5.2 in any Quarter, is less than 60% (sixty percent) of the Minimum Quarterly Quantity in respect of that Quarter; or

10.5.3 in any Year, is less than of 70% (seventy percent) of the Minimum Annual Quantity in respect of that Year.

10.6 Where Eskom is responsible for the transportation of Contract Limestone, Eskom shall be entitled, but not obliged to recover from the Supplier any penalties for the cancellation and/or underutilisation of rail and/or road transport resulting from any rectification plan



accepted by Eskom or any Under Delivery, determined in accordance with **Annexe E: The Rules of Rail Transportation** and **Annexe F: The Rules of Road Transportation**, as the case may be.

## 11. Under Off Take

- 11.1 In the event of an actual or expected Under Off Take, Eskom shall, within 3 (three) Business Days thereof submit a rectification plan to the Supplier, consult with the Supplier thereon and obtain the Supplier's reasonable acceptance of the rectification plan (which may not be unreasonably withheld or delayed), implement the rectification plan and make up the Under Off Take in accordance with the rectification plan by Taking Off additional Contract Limestone in order to make up the Under Off Take within the shortest time reasonably possible, but in any event within the Quarter after the date on which the Under Off Take arose or before the expiry of the Agreement where the remaining period of the Agreement is less than a Quarter.
- 11.2 Should Eskom fail to submit a rectification plan to the Supplier, fail to implement such rectification plan, fail to make up the Under Off Take within a reasonable period pursuant to any of the effort under clause 11.1, Eskom shall make full payment to the Supplier in respect of the quantity of the Under Off Take ("**Prepaid Under Off Take**") not made up within the timelines set out in clause 11.1 without applying premiums or penalties to the Price.
- 11.3 Eskom shall remain entitled to Take Off and the Supplier obliged to Deliver the Prepaid Under Off Take in terms of the Agreement within the applicable quantity limitations, set out in clause 9, unless otherwise agreed. When the Prepaid Under Off Take is Supplied, appropriate adjustments to the Price paid shall be made for quality of the Contract Limestone actually Taken Off.
- 11.4 Eskom shall further be liable for the payment of any reasonable demonstrable additional direct handling and stockpiling costs incurred by the Supplier occasioned by any Under Off Take subsequently made up, provided that the Supplier shall notify Eskom in writing before incurring any additional costs and shall seek Eskom's involvement in minimising such additional costs.
- 11.5 The quantity of any Under Off Take shall be measured:
- 11.5.1 in any Month, as the Minimum Monthly Quantity in respect of that Month less the quantity of Contract Limestone actually Taken Off in that Month;

- 11.5.2 in any Quarter, as the difference between the Minimum Quarterly Quantity in respect of that Quarter and the quantity of Contract Limestone actually Taken Off in that Quarter; and
- 11.5.3 in any Year, as the difference between the Minimum Annual Quantity in respect of that Year and the quantity of Contract Limestone actually taken Off in that Year.
- 11.5.4 For avoidance of doubt, when calculating the quantity of an Under Off Take, Eskom must first meet the Minimum Quarterly Quantity each Quarter before any quantity of Contract Limestone Taken Off in terms of an Eskom Rectification Plan is credited against that Rectification Plan.
- 11.6 Any Under Off Take shall, unless otherwise agreed to in writing between the Parties, and unless paid for in terms of clause 11.2, only constitute a material breach of a material term for purposes of clause 28 if such Under Off Take:
- 11.6.1 has not been made up as set out in clause 11.1 above within 90 calendar days after the Under Off Take first occurred;
- 11.6.2 occurred more than 3 (three) times during any rolling 12 (twelve) Months; and
- 11.6.3 in any Month, is less than 50% (fifty percent) of the Monthly Quantity; or
- 11.6.4 in any Quarter, is less than 60% (sixty percent) of the Minimum Quarterly Quantity; or
- 11.6.5 in any Year, is less than 70% (seventy percent) of the Minimum Annual Quantity.
- 11.7 Where the Supplier is responsible for the transportation of Contract Limestone, the Supplier shall be entitled, but not obliged to recover from Eskom any reasonably demonstrable penalties actually and reasonably incurred for the cancellation and/or underutilisation of road transport resulting from any rectification plan accepted by the Supplier or any Under Off Take, determined in accordance with **Annexe F: The Rules of Road Transportation**.

## SECTION 5: PRICE ADJUSTMENTS, INVOICING AND PAYMENTS

### 12. Price Adjustments

- 12.1 If the published value of any index in the third column of Table 2 of the Limestone Supply Agreement is changed after it has been used in calculating a Price Adjustment Factor, the calculation shall be repeated and a correction included in the Supplier's next invoice.
- 12.2 If the value of any index in the third column of Table 2 of the Limestone Supply Agreement for the applicable Month is not yet published and available for the calculation of the Price Adjustment Factor in any Year, the most recent published index shall be used. The calculation of the Price Adjustment Factor shall then be repeated when the applicable index is published and made available, and a correction shall be included in the Supplier's next invoice.
- 12.3 In the event that any index in the third column of Table 2 of the Limestone Supply Agreement is no longer published and the Parties are unable to agree on a replacement index, the matter shall be referred for expert determination in accordance with clause 27.1.
- 12.4 In the event that the matters referred to in clauses 12.1 to 12.3 are disputed by any Party, the matter shall, notwithstanding the provisions of clause 26, be referred to an independent expert for determination in accordance with clause 27.1 at least 6 (six) Months before the commencement of the next Year.
- 12.5 Should Parties have not resolved any dispute as set out in clause 12.4 above before the commencement of the next Year, the adjustment sources in use before the dispute was declared shall be applied on a provisional basis until the dispute has been resolved, where after the determination of the independent expert as referred to in clause 12.4 shall be applied retrospectively and any necessary adjustment payments shall be made.
- 12.6 For the avoidance of doubt, the annual price adjustment each Year shall be based on the Base Price and disregarding the monthly Price adjustments.

### 13. Adjustments of Other Monetary Amounts

Unless specified otherwise, any other monetary amount used in the Agreement and which is expressed in South African Rand shall also be adjusted annually, by the Price Adjustment Factor, on the Price Adjustment Date.

## 14. Invoicing and Payment

- 14.1 The Supplier shall render a tax invoice to Eskom on or before the third Business Day of each Month together with a statement reflecting the Delivery dates; the mass of the Contract Limestone, the Price in respect of each Consignment and the total Contract Limestone Supplied during the immediately preceding Month.
- 14.2 The amount payable in respect of each invoice shall, in the absence of manifest error and without set off, and provided that it has been timeously rendered, be payable within 30 (thirty) days of receipt of the invoice by Eskom, provided that disputed items or amounts on an invoice shall only be payable when the dispute has been resolved by agreement between the Parties or otherwise, in terms of the Agreement.
- 14.3 Eskom shall be entitled, but not obliged to recover from the Supplier:
- 14.3.1 any additional direct costs and/or any penalties incurred by Eskom as a result of the Delivery of Qualifying Alternative Limestone as contemplated in clause 10.1.3;
  - 14.3.2 any costs incurred by Eskom for additional direct handling and stockpiling as contemplated in clause 10.2;
  - 14.3.3 any penalties for the Supplier's failure to rectify and make up the Under Delivery as contemplated in clause 10.3; and
  - 14.3.4 any penalties for the cancellation and/or underutilisation road transport resulting from any rectification plan accepted by Eskom or any Under Delivery as contemplated in clause 10.6.
- 14.4 In the event that Eskom elects to recover the costs and/or penalties as set out in clause 14.3 above, Eskom shall, notwithstanding the provisions of clause 14.2 above, be entitled to set-off the said costs and/or penalties against any invoice rendered by the Supplier.
- 14.5 Without prejudice to any other of its remedies in law and/or the Agreement, the Supplier shall be entitled to recover interest on any amount payable by Eskom in terms of the Agreement which is overdue, at the prime overdraft lending rate charged from time to time by First National Bank of Southern Africa Limited less 2% (two percent). The amount of such prime rate shall *prima facie* be proved by a certificate signed by any manager or accountant (whose appointment need not be proved) of any branch of such bank.

## SECTION 6: QUALITY OF LIMESTONE

### 15. Determination of Limestone Quality

15.1 The Parties shall implement the provisions of clause 15.2 or clause 15.3, whichever is applicable, for the purpose of determining limestone quality, reporting and resolution of disputes relating to the qualities of limestone Supplied in terms of the Agreement.

#### 15.2 Certification of Limestone at the Power Station or Eskom Nominated Site

15.2.1 Where facilities for the determination of Limestone quality, for payment purposes, are available at the Power Station or Eskom nominated site, Contract Limestone qualities shall be determined at such Power Station or Eskom nominated site.

15.2.2 Eskom undertakes, as soon as reasonably possible but in any event within 30 (thirty) days of Eskom notifying the Supplier, to implement the provisions relating to the determination of limestone quality at the Power Station or Eskom nominated site

15.2.3 In order to ensure compliance with the provisions of clause 15.2.1 Eskom shall ensure that:

15.2.3.1 prior to acceptance by Eskom, limestone contained in each consignment, train and/or truck is determined and certified to meet the Quality Specifications and

15.2.3.2 where the limestone quality determination process indicates that the limestone does not meet any one of the Quality Specifications set out in Table 3 of the Limestone Supply Agreement such limestone may not be accepted by Eskom,

15.2.4 Eskom shall be responsible for the determination and certification of limestone quality at the Power Station or Eskom nominated site and the related costs thereof. In this regard, Eskom shall ensure that acceptable facilities are available for the determination and certification of limestone quality and shall be responsible for the maintenance of the facilities thereof.

15.2.5 Eskom shall ensure that a daily report of the limestone quality results is submitted simultaneously to Eskom and the Supplier.

- 15.2.6 Disputes in respect of the limestone quality results shall, notwithstanding the provisions of clause 26, be dealt with in terms of the dispute resolution procedure.

**15.3 Pre-Certification of Limestone at the Mine**

- 15.3.1 Where facilities for the determination of limestone quality, for payment purposes, are not available at the Power Station or Eskom nominated site, Contract Limestone qualities shall be determined at the Mine.

- 15.3.2 In order to ensure compliance with the provisions of clause 15.3.1 the Supplier shall ensure that:

- 15.3.2.1 prior to Delivery to Eskom, limestone contained in each separate stockpile is sampled and pre-certified to meet the Quality Specifications and is identified as such in accordance with the processes and procedures set out in **Annexe A: The Limestone Quality Management Procedure**;

- 15.3.2.2 only limestone that has been sampled, pre-certified and identified in accordance with the provisions of clause 15.3.2.1, may be placed on the Pre-Certified Stockpile. The Supplier shall only Deliver Contract Limestone to Eskom from Pre-Certified Stockpiles allocated for Delivery to Eskom in terms of the Agreement; and

- 15.3.2.3 where the pre-certification process indicates that a product stockpile does not meet any one of the Quality Specifications set out in Table 3 of the Limestone Supply Agreement such stockpile may not be delivered to Eskom, subject to the provisions of **Annexe A**.

- 15.3.3 The Supplier shall be responsible for the sampling of limestone and associated costs related to pre-certification. In this regard, the Supplier shall ensure that acceptable auto-mechanical sampling equipment is available and used for sampling of limestone and shall be responsible for the maintenance thereof.

- 15.3.4 Eskom shall, at its cost and including the cost of transport, procure the analysis of such samples by the Nominated Laboratory.

- 15.3.5 The Supplier shall submit a daily report to Eskom in the format set out in **Annexe A**. Eskom reserves the right to amend **Annexe A** from time to time in order to align same with its operational arrangements and shall notify the

Supplier in writing of any such amendments within 7 (seven) days of the amendments being effected.

- 15.3.6 Eskom shall procure that the Nominated Laboratory shall submit a daily report simultaneously to Eskom and the Supplier of the analysis results.
- 15.3.7 Eskom may provide on-site representatives to monitor the sampling and pre-certification processes. The Supplier consents that Eskom's on-site representatives shall have full access to the sampling and the pre-certification process.
- 15.3.8 The Supplier undertakes to grant to Eskom and its representatives, on request, access to all available geological information relating to the Limestone Resource.
- 15.3.9 Eskom shall further be entitled to conduct site visits on reasonable notice to the Supplier, to monitor the Supplier's application of effective grade and contamination controls.
- 15.3.10 Disputes in respect of the analytical results shall, notwithstanding the provisions of clause 26, be dealt with in terms of the dispute resolution procedure included in **Annexe A**.
- 15.3.11 In order to ensure assurance of the pre-certification process and that the Contract Limestone Supplied to Eskom is of consistent quality the Supplier shall be required to adhere to the mixing/blending, pre-certification sampling and load-out controls processes and procedures as set out in **Annexe A**. Eskom may provide surveillance and conduct variability tests as set out in **Annexe A**.
- 15.3.12 **Verification of Pre-Certified Stockpiles at the Mine, Power Station or Eskom Nominated Site**
- 15.3.12.1 Eskom shall be entitled, at its own cost and in line with applicable ISO standards, to conduct Verification of the Pre-Certified Stockpiles either at the Mine or upon delivery at the Power Station or any other Eskom nominated site in accordance with the processes and procedures set out in **Annexe A**.
- 15.3.12.2 Where variances occur between the pre-certification results and the Verification results, the remedies stipulated in **Annexe A** shall apply.

## 16. Reject Limestone

16.1 In the event that limestone is Supplied which does not meet any one of the parameters in the Quality Specifications, such limestone shall constitute Reject Limestone. The following price reduction will be applicable to Reject Limestone:

16.1.1 If any quality parameter is within 10% (ten percent) of the applicable reject level for that parameter, Eskom shall pay the Supplier a fixed amount of R30.00 (thirty Rand) per Ton for such limestone, which amount shall be not be adjusted for the duration of the Agreement; or

16.1.2 If any quality parameter deviates from the applicable reject level by more than 10% (ten percent), Eskom shall not be liable to pay the Supplier for such limestone.

16.2 Limestone delivered to Eskom in terms of the Agreement shall also be deemed to be Reject Limestone in the event that:

16.2.1 the Supplier did not adhere to the illustrated Limestone Process Flow;

16.2.2 limestone delivered to it in terms of the Agreement has not been delivered from a Pre-Certified Stockpile; or

16.2.3 during the sampling of the limestone delivered the Supplier did not adhere to the processes set out in **Annexe A: The Limestone Quality Management Procedure**.

16.3 The onus to rebut the deeming provision of this clause 16 shall be on the Supplier.

16.4 Reject Limestone supplied shall not constitute Supply or Delivery and shall not reduce the Monthly, Yearly or Total Tonnage Quantity to be supplied in terms of the Agreement.

16.5 If and to the extent that Reject Limestone is mixed or co-mingled with other limestone so that it is no longer separately identifiable, Eskom may have to burn such Reject Limestone. The Parties record and agree that Reject Limestone will be of no value to Eskom and will adversely affect Eskom in various ways including, without limitation, to:

16.5.1 its limestone handling facilities, pulverisers, boilers and back-end plant;

16.5.2 boiler efficiency;

16.5.3 ash handling facilities;



- 16.5.4 compliance with air emission licence conditions; and
- 16.5.5 load losses in the generation system.
- 16.6 The Parties further agree that the price reduction in clause 16.1 constitutes the agreed reduction or lack of value of Reject Limestone to Eskom and the adverse effects referred to herein. The price reduction and the non-payment of transport costs by Eskom in terms of clauses 16.8 and 20.1.4 will, as between the Parties, not constitute a penalty(ies) as contemplated in the Conventional Penalties Act, No. 15 of 1962.
- 16.7 To the extent that Reject Limestone is not mixed or co-mingled with other limestone, Eskom reserves the right, at its sole discretion, to dispose of the Reject Limestone. The Supplier shall be liable for any demonstrable and reasonable additional costs occasioned by the disposal of such limestone, including the cost of transporting the limestone from the Mine to the Power Station or any other Eskom nominated site.
- 16.8 Eskom shall not be liable to refund any transport costs to the Supplier in respect of Reject Limestone irrespective of the extent to which Reject Limestone deviates from the quality parameters.

## **17. Foreign Material and Ultra-fines**

- 17.1 The Supplier shall ensure that each Consignment of Contract Limestone is substantially free from Foreign Material which does not arise during the proper mining and processing of limestone. The Supplier shall further ensure that no Ultra-fines are added or blended into the Contract Limestone to be Delivered to Eskom.
- 17.2 In the event that the Supplier delivers limestone, from a Pre-Certified Stockpile, that is contaminated with Foreign Material or Ultra-fines, Eskom shall reserve the right to instruct the Supplier to immediately stop the Supply and return the identified contaminated stockpile limestone, until the root cause or lack of quality control is identified and the following shall occur:
  - 17.2.1 Upon identification of Foreign Material or Ultra-fines, Eskom shall provide evidence of the Foreign Material or Ultra-fines, including but not limited to photographic evidence, within 48 (forty eight) hours.
  - 17.2.2 Eskom shall instruct the Supplier to temporarily stop supply from the identified contaminated stockpile and may return limestone from the identified contaminated stockpile.

- 17.2.3 Eskom and the Supplier shall jointly conduct and conclude an investigation of the source and/or the root cause of the Foreign Material or Ultra-fines contamination within 72 (seventy two) hours of stoppage.
- 17.2.4 In the event that during the investigation it is concluded that the other stockpiles may be affected, Eskom reserves the right to extend the stoppage to the entire operation.
- 17.2.5 Upon conclusion of the investigation, the Supplier shall provide Eskom the root cause and the remedial action plan in writing. Eskom undertakes to respond in writing within 24 (twenty four) hours after of submission of the remedial action plan advising if the plan is acceptable.
- 17.2.6 On Eskom's acceptance the Supplier shall implement the remedial action plan on the terms and form as accepted and the Supplier shall resume Supply.
- 17.2.7 In the event that Eskom does not accept the remedial action plan, which acceptance shall not be unreasonably withheld, the Supplier may not resume supply. Either party may declare a dispute and then refer the dispute to an independent to expert for determination in terms of clause 27.
- 17.2.8 In the event that the investigation is inconclusive, the Party responsible for transportation needs to provide evidence of the in-transit vehicle tracking to give assurance that the Contract Limestone was not tampered with. The Supplier may resume Supply following written notification from Eskom to resume Supply. Despite the investigation being inconclusive, there may be a reasonable requirement for additional and/or improved controls to be implemented to prevent a recurrence and the Supplier shall implement such additional and/or improved controls forthwith.

## **SECTION 7: TRANSPORTATION AND DETERMINATION OF CONTRACT LIMESTONE QUANTITY**

### **18. Modes of Take Off of Contract Limestone**

- 18.1 Eskom shall use rail and/or road mode(s) of transport to Take Off Contract Limestone. Eskom shall at its own discretion determine the Party responsible for transportation (i.e. the Incoterm (DAT or FCA) applicable to the selected mode of transport).
- 18.2 Eskom shall, not less than 30 (thirty) calendar days before each anniversary of the Commencement Date for the currency of the Agreement, notify the Supplier in writing of

the provisional estimates of the relevant portions of the Annual Quantity which it requires to be Delivered for Take Off by rail and/or road during each Month of the following Year.

18.3 The Supplier shall Deliver the quantities stipulated by Eskom in the notice contemplated in clause 18.2 at the Delivery Points for Contract Limestone respectively, provided that the Parties shall liaise with each other:

18.3.1 on a Monthly basis at the Technical Liaison Meetings to confirm the quantities Eskom requires to be Delivered for Take Off by rail and/or by road; and

18.3.2 in order to be responsive to Eskom's operational needs which may arise from time to time, Eskom shall vary the transportation previously agreed to by changing the mode and/or Delivery Point. The additional reasonable and demonstrable direct costs which the Supplier may incur to comply with such variation will be borne by Eskom. Eskom shall also be entitled to any reasonable and demonstrable additional savings resulting from such variation.

18.4 The provisions of this clause 18 are subject to the provision that the maximum quantity of Contract Limestone required by Eskom shall not be more than the Maximum Annual Quantity in any Year, unless the Parties agree otherwise.

## 19. Rail Transportation of Contract Limestone

19.1 Eskom shall ensure that locomotives and rail wagons are available at the Delivery Point to Take Off Contract Limestone by rail in accordance with the provisions of this clause 19 and **Annexe E: The Rules of Rail Transportation**.

19.2 Parties shall comply with the provisions of **Annexe E: The Rules of Rail Transportation**, which sets out the detailed procedures for the scheduling and loading of Eskom trains, and details the penalties that shall be payable by the Supplier for incorrect loading of Eskom trains and for cancellations of Eskom trains.

## 20. Road Transportation of Contract Limestone

20.1 **Road Transportation of Contract Limestone by the Supplier (Supply on a DAT Basis)**

20.1.1 Where the Supplier is responsible for the transportation of Contract Limestone by road (i.e. Supply on a DAT basis), the Supplier shall ensure that sufficient road trucks are available to transport limestone from the Mine to the Delivery Point.

- 20.1.2 The Supplier shall be responsible for ensuring that all road transportation under its control complies with the provisions of **Annexe F: The Rules of Road Transportation**.
- 20.1.3 Eskom reserves the right to require the Supplier to Deliver Contract Limestone to any alternative Power Station or any other Eskom nominated site, and the Supplier shall co-operate with Eskom in relation to such alternatives. Unless otherwise provided elsewhere in the Agreement, Eskom shall be liable for any reasonable and demonstrable additional costs incurred by the Supplier as a result of an Eskom request in terms of this clause 20.1.3 and shall be entitled to any reasonable and demonstrable additional savings resulting from such request.
- 20.1.4 The provisions of this clause 20 are subject to the express proviso that no transport costs will be payable in respect of Reject Limestone.

## 20.2 Road Transportation of Contract Limestone by Eskom (Supply on an FCA Basis)

- 20.2.1 Where Eskom is responsible for the transportation of Contract Limestone by road (i.e. Supply on an FCA basis), Eskom will ensure that sufficient road trucks are available at the Delivery Point to Take Off Contract Limestone by road.
- 20.2.2 The Supplier shall ensure that Contract Limestone sufficient for a minimum of 3 (three) days' Delivery is available at all times on Pre-Certified Stockpiles.
- 20.2.3 The Supplier shall comply with Eskom's rules of road transportation pertaining to limestone loading operations, as amended or replaced from time to time, and which, in their present form, are contained in **Annexe F: The Rules of Road Transportation**.

## 21. Mass Determination

### 21.1 general responsibilities

- 21.1.1 Each Party shall ensure that its mass measuring equipment is inspected as sized and certified every 12 (twelve) Months or more regularly if necessary in the case of recurring discrepancies, by a company certified to assize mass measuring equipment in accordance with the Trade Metrology Act, No. 77 of 1973, as amended or replaced from time to time and prevailing South African Bureau of Standards specifications. Each Party shall procure that a certificate

signed by the assizing company which is no more than 12 (twelve) Months old is available for inspection by the other Party at all times.

- 21.1.2 In the event that the Supplier's mass measuring equipment is not operational, the Supplier must inform Eskom within 24 (twenty four) hours of becoming aware of any such problems and Eskom's mass measurements shall be used for invoicing purposes until such time as the Supplier's mass measuring equipment has been repaired.

**21.2 mass determination of Contract Limestone transported by rail**

- 21.2.1 The Supplier shall measure the mass of Contract Limestone Delivered by rail at the load out flask or in-line/in-motion rail weighbridge situated at the Rail Siding.
- 21.2.2 The mass of each rail wagon load of Contract Limestone shall be determined by the Supplier's load out flask or in-line/in-motion rail weighbridge, and the mass thereof shall be recorded on a waybill issued in triplicate, which recorded mass shall be applicable to the Agreement.
- 21.2.3 The Supplier shall deliver the original waybill to Eskom with every train load, retain one copy, and forward one copy to TFR. The Supplier shall on a daily basis, forward to Eskom, a schedule depicting the waybills, the train number, dispatch and delivery time, total number of rail wagons loaded and the mass of each rail wagon together with the said waybill.
- 21.2.4 The Supplier shall on a daily basis, forward to Eskom a schedule depicting the waybills for that day.
- 21.2.5 Eskom shall be entitled to weigh each rail wagon received on a full and empty basis and the Parties shall reconcile their respective mass measurements on a weekly basis or no later than the date of the next Technical Liaison Meeting and the following shall apply:
- 21.2.5.1 in the event of a discrepancy of less than 1% (one percent) between the Supplier's mass determination and that of Eskom, the mass recorded on the waybill and/or the tonnage information supplied by the Supplier in terms of clause 21.2.3, shall be accepted as final and binding.
- 21.2.5.2 in the event of a discrepancy of 1% (one percent) or more, and if the Parties agree that such discrepancy is due to a mass determination fault of either Party, the lesser the two masses shall temporarily be used for

the purposes of the Agreement, until the source of the fault has been identified and corrective measures implemented, which shall not be for a period of more than 30 (thirty) days, subject to clause 21.4.

**21.3 mass determination of Contract Limestone transported by road**

- 21.3.1 The Supplier shall measure the mass of Contract Limestone Delivered by weighing same at the Mine. Each truck transporting the Contract Limestone shall be weighed empty and full at the relevant weighbridge or using front-end loader(s), and the mass thereof shall be recorded on a waybill issued in triplicate.
- 21.3.2 The Supplier shall deliver the original waybill to Eskom with every truck load, retain 1 (one) copy, and forward 1 (one) copy to the transport contractor. The Supplier shall on a daily basis, forward to Eskom, a schedule depicting the waybills, the waybill number, vehicle registration number, dispatch and delivery time, total number of trucks loaded and the mass of each truck, and stockpile reference number (as further detailed in the LQMP), together with the said waybill.
- 21.3.3 Eskom shall weigh each truck received on a full and empty basis and the Parties shall reconcile their respective mass measurements on a weekly basis or no later than the date of the next Technical Liaison Meeting and the following shall apply:
- 21.3.3.1 in the event of a discrepancy of less than 1% (one percent) between the Supplier's mass determination and that of Eskom, the mass recorded on the waybill and/or the tonnage information supplied at the Delivery Point will be accepted as final and binding, subject to clause 21.4; and
- 21.3.3.2 in the event of a discrepancy of 1% (one percent) or more, and if the Parties agree that such discrepancy is due to a mass determination fault of either Party, the lesser of the two masses will temporarily be used for the purposes of the Agreement, until the source of the fault has been identified and corrective measures implemented, which shall, in any event, not be for a period of more than 30 (thirty) days, subject to clause 21.4.

#### 21.4 disputes regarding mass measurement

- 21.4.1 Where there are persistent discrepancies or other disputes regarding mass or the mass measurement of Contract Limestone, the Parties shall ensure that they use their best efforts to reach agreement within 20 (twenty) days after a dispute being declared by either Party in this regard.
- 21.4.2 Where the Parties are unable to reach agreement within the time period set out in clause 21.4.1 above either Party may then refer the dispute for an independent expert determination in terms of clause 27.
- 21.4.3 The Parties shall retain records of all printouts in respect of mass measurement for a period of at least 3 (three) years after the date of Delivery, or any legislated period, whichever is the greater. In the event that there is an unresolved dispute between the Parties, the records in respect of a mass determination that is the subject of the dispute shall be retained until such time as the dispute has been resolved.

### SECTION 8: REPORTING REQUIREMENTS AND PROVISION OF INFORMATION

#### 22. Appointment of a Contract Manager

Prior to the Commencement Date or as necessary thereafter, each Party shall appoint an individual, who shall be referred to as the “**Contract Manager**”, to manage the Agreement on its behalf. The Contract Manager shall be the first and single point of contact between Eskom and the Supplier during the implementation of the Agreement. The Contract Manager shall be replaced at the appointing Party's sole discretion.

#### 23. Technical Liaison Meetings

At least once per Month during the term of the Agreement, a Technical Liaison Meeting shall be held and be attended by authorised representatives of Eskom and the Supplier to report on, *inter alia*:

- 23.1 the Delivery and Take Off of Contract Limestone (including Under Delivery/Under Off Take and planning of the Monthly Quantity, Quarterly Quantity and Yearly Quantity);
- 23.2 any incident where Delivery or Off Take deviated from the Drawdown Order and/or from the quantities set out in clause 9;
- 23.3 safety and health matters;
- 23.4 environmental and water related matters;

- 23.5 quality matters;
- 23.6 weight/mass determination matters;
- 23.7 transport and mode of transport of Contract Limestone;
- 23.8 general information sharing; and
- 23.9 any other material matter not referred to herein and/or referred to in **Annexe H: The Technical Liaison Meeting Agenda**.

## 24. Reports

- 24.1 The Supplier shall within 3 (three) days of the end of each Month, provide Eskom on a Monthly basis with a summary of the qualities, quantities and dates of dispatch of each Consignment of limestone Delivered in the previous Month.
- 24.2 The Supplier shall, during the term of the Agreement, provide Eskom with Progress Reports on compliance to the SDL&I Commitments on a Yearly basis.
- 24.3 The Supplier shall provide Eskom with the following information on an annual basis, within 30 (thirty) days after publication of the Suppliers annual and/or financial report and upon renewal for documents that have expiry dates:
  - 24.3.1 summary of the qualities, quantities and periods (Month and Quarter) of dispatch of Contract Limestone Delivered during the previous Year;
  - 24.3.2 the reserve and resource statements, in accordance with the SAMREC Code, relating to the remaining limestone to be mined at the Mine;
  - 24.3.3 progress on long term issues dealt with in the Agreement;
  - 24.3.4 latest tax clearance certificate;
  - 24.3.5 its valid B-BBEE certificate;
  - 24.3.6 its employment equity report status;
  - 24.3.7 its COID letter of good standing; and
  - 24.3.8 its latest audited financial statements.



## 25. Legislative Submissions associated with Compliance

The Supplier will provide Eskom, upon Eskom's request, with copies of all legislated submissions submitted by the Supplier to all competent authorities required pursuant to legislation aimed at protecting the environment and water resources, and regulating health and safety, prospecting and mining and black economic empowerment, including but not limited to, submissions made to the competent authorities in respect of the Mine Mining Right, the related Mining Work Program, Environmental Management Programme, compliance submissions in respect of the said programmes and legislative black economic empowerment compliance.

## SECTION 9: DISPUTE RESOLUTION AND BREACH

### 26. Dispute Resolution

26.1 This clause is a separate, divisible agreement from the rest of the Agreement and shall:

26.1.1 not be or become void, voidable or unenforceable by reason only of any alleged misrepresentation, mistake, duress, undue influence, impossibility (initial or supervening), illegality, immorality, absence of consensus, lack of authority or other cause relating in substance to the rest of the Agreement and not to this clause. The Parties intend that any such issue shall at all times be and remain subject to arbitration in terms of this clause;

26.1.2 remain in effect even if the Agreement terminates or is cancelled.

26.2 If a dispute (hereinafter collectively referred to as a ("**Dispute**") has arisen between the Parties out of, in relation to, or in connection, with the Agreement, or in regard to:

26.2.1 the existence of, apart from this clause;

26.2.2 the interpretation and meaning of;

26.2.3 the effect of;

26.2.4 the rectification of;

26.2.5 the respective rights or obligations of the Parties under;

26.2.6 the breach, termination or cancellation of;

26.2.7 any matter arising out of or following the breach, termination or cancellation of; and/or;

26.2.8 damages arising in delict, compensation for unjust enrichment or whether any other claim is valid and enforceable in terms of, the Agreement then and in such event the Dispute will be settled in accordance with the following procedures:

26.2.8.1 **step one**

The Disputing Party must give a written notice ("**the Dispute Notice**") to the other Party ("**the Receiving Party**") recording the nature of the Dispute as perceived by the Disputing Party, the performance required by the Disputing Party from the Receiving Party in order to resolve the Dispute and/or the manner in which the Disputing Party believes the Dispute must be resolved, and the time period within which such performance is required. The time period, which may not be shorter than seven days and not longer than 14 (fourteen) days, is referred to herein as the "**First Period**".

26.2.8.2 **step two**

In the event of the Receiving Party not performing in a manner demanded in the Dispute Notice or the Dispute not being resolved within the first period (or such further period as may be agreed to in writing by the Parties), then authorised representatives of the Parties will meet within a period ("**the Second Period**") of no more than 7 (seven) days after the end of the first period to attempt to settle such dispute in an amicable manner, the outcome of which meeting will be reduced to writing.

26.2.8.3 **step three**

If, irrespective of whether the Parties have met or concluded any meeting, no written agreement recording the resolution of the Dispute is signed by the Parties within the Second Period, then the Dispute shall within a period of 7 (seven) days calculated from the end of such Second Period, be referred in writing by the Disputing Party to each of the senior managers of the Supplier and Eskom.

26.2.8.4 **step four**

If, irrespective of whether the senior managers (or their appointed nominee) have met or concluded any meeting, no written agreement is signed by the Parties resolving the Dispute within a period of 15 (fifteen) days calculated from the day upon which the Dispute was

referred to the senior managers, or within such an extended period as may be agreed to in writing by the Parties, then:

- 26.2.8.4.1 either Party may refer the Dispute to be finally resolved in accordance with the Uniform Rules of Court by an arbitrator appointed by the Chairman of the Johannesburg Bar Council. "Refer" in this sub-clause means delivering or transmitting electronically a written notice to the Chairman of the Johannesburg Bar Council requesting the appointment of an arbitrator to determine the Dispute. Referral of the Dispute shall be completed on delivery to and acknowledgement of receipt by the Chairman of the Johannesburg Bar Council of the notice. The Party referring the Dispute shall thereafter deliver or electronically transmit a copy of the referral notice to the other Party;
- 26.2.8.4.2 the arbitration will be held in Johannesburg in private at a venue as determined by the arbitrator appointed as envisaged in clause 26.2.8.4.1;
- 26.2.8.4.3 the arbitrator will have regard to the desire of the Parties to dispose of such Dispute expeditiously, economically and confidentially and shall be obliged to provide written reasons for his/her decision, together with reasons for such decision which shall be delivered in writing to the Parties within 21 (twenty one) days after the conclusion of the arbitration hearing;
- 26.2.8.4.4 the arbitrator will determine the liability for his/her charges and the costs of the arbitration will be paid accordingly by the Parties;
- 26.2.8.4.5 subject to the provisions of clause 26.3, the Parties irrevocably agree that the decision in any such arbitration proceedings will be final and binding on them, will forthwith be put into effect and may be made an order of any court of competent jurisdiction.

- 26.3 Either Party has the right to appeal against the decision of the arbitrator appointed in terms of clause 26.2.8.4.1 provided that this is done within 21 (twenty one) days of receipt by the Parties of the arbitrator's award. The appeal shall be heard by three arbitrators, in accordance with a procedure determined by them, who shall be appointed as follows:
- 26.3.1 the Party appealing will appoint 1 (one) arbitrator from the ranks of retired High Court Judges or Senior Advocates;
  - 26.3.2 the other Party will nominate 1 (one) arbitrator from the ranks of retired High Court Judges or Senior Advocates; and
  - 26.3.3 the Chairman of the Johannesburg Bar Council must nominate a third arbitrator from the ranks of retired High Court Judges or Senior Advocates.
- 26.4 Nothing contained in this clause 26 will preclude any Party from applying for, or obtaining, interim relief on an urgent basis from a court of competent jurisdiction pending the decision of the arbitrator on the merits of the Dispute.
- 26.5 The provisions of this clause 26 will continue to be binding on the Parties notwithstanding any termination or cancellation of the Agreement.
- 26.6 Notwithstanding the provisions of clause 26.2.8 a Disputing Party shall be entitled to refer any Dispute to be finally resolved by an arbitrator as contemplated in clause 26.2.8.4 above, without having commenced, or completed, the procedures prescribed in clause 26.2.8 when in the view of the Disputing Party the prescribed procedures may not have been completed before any claim of the Disputing Party may have become prescribed. In this case the other Party shall be precluded from raising in the arbitration and/or any other forum a special plea or defence to the effect that the Disputing Party is precluded from proceeding immediately to arbitration because of the provisions of clause 26.2.8.
- 26.7 The provisions of this clause 26 shall not apply in regard to the matters to be determined by an independent expert in terms of clause 27.

## **27. Determination by an Independent Expert**

### **27.1 applicability of indices to measure changes in cost factors**

The resolution of any Dispute between the Parties arising from the Agreement and relating to the applicability of the indices stipulated in Table 2 of the Limestone Supply Agreement as actual measurement of the actual cost movement in respect of that cost

element in the South African limestone mining industry and if necessary an appropriate replacement index, must be determined by an independent expert who must:

- 27.1.1 have at least a bachelors degree in statistics, economics or equivalent qualifications; and
- 27.1.2 have proper practical knowledge and at least 10 (ten) years' experience of statistics, indexing, finance and economics and application in South African Mining Industry.

#### **27.2 quality and quantity disputes**

The resolution of any Dispute between the Parties arising from the Agreement and which is of a technical nature relating to limestone qualities and quantities, must be determined by an independent expert who must:

- 27.2.1 have a bachelors degree in metallurgy or equivalent qualifications; and
- 27.2.2 have proper practical knowledge and at least 10 (ten) years' experience of limestone mining, limestone processing, quality and quantity determination and the use of limestone in heat generation applications.

#### **27.3 mining related disputes**

The resolution of any Dispute between the Parties arising from the Agreement and which is of a technical nature relating to limestone mining and the limestone resources in terms of the Mine Mining Right, including the information furnished by the Supplier in respect of the limestone resources, all warranties furnished by the Supplier and a replacement code for reporting reserves if the SAMREC Code no longer exists, must be determined by an independent expert who must:

- 27.3.1 have a bachelors degree in Geology and/or Mining Engineering; and
- 27.3.2 have proper practical knowledge and at least 10 (ten) years' experience of limestone geology, reserve determination and limestone mining.

#### **27.4 disputes relating to nature of dispute**

Should the Parties be unable to reach agreement on the nature of a Dispute in terms of this clause 27 the Chairperson for the time being of the South African Institute of Mining and Metallurgy, or its successor body, may, at the request of either of the Parties,

determine in his/her absolute discretion the nature of the Dispute for purposes of this clause 27.

#### 27.5 **appointment of expert**

If the Parties are unable to agree upon an acceptable independent expert pursuant to this clause 27 within 15 (fifteen) Business Days after a request by a Party for the appointment of such expert then, within 5 (five) Business Days after the lapse of such period, the Parties shall jointly request the head of the relevant professional body under which the independent expert falls, or if such professional body does not exist, the Chairman of the Johannesburg Bar Council or its successor body to appoint an independent person, who satisfies the requirements of an expert, to act as an independent expert to make the relevant expert determination in terms of this clause 27.5.

#### 27.6 **procedure**

The independent expert shall determine the procedures to be followed, including the manner in which the expert shall receive written, and if so required by the expert, oral submissions on behalf of each Party. The independent expert shall likewise determine the place where the expert shall meet the Parties, provided that such place must be in Johannesburg or Pretoria. The independent expert may, if the expert deems this necessary, conduct an inspection of any plant, mine, facilities and/or other area that is the subject of the Dispute. The independent expert shall act as an expert and not as an arbitrator or mediator.

#### 27.7 **costs**

The Parties shall share the costs of the independent expert equally, unless otherwise directed by the expert.

#### 27.8 **reasons**

The independent expert shall in each case be obliged to give written reasons and motivation for his/her determination within 15 (fifteen) Business Days after the conclusion of the procedure referred to in clause 27.6.

#### 27.9 **binding effect**

In the absence of grounds for review, the relevant expert's determination shall be binding on both Parties.

## **27.10 review**

- 27.10.1 Subject to the provisions of clause 27.9, any Party may take the independent expert's determination on review.
- 27.10.2 In the event that any Party wishes to take the independent expert's determination on review in terms of clause 27.10.1 above, the said Party must notify the other Parties and the independent expert thereof in writing within 15 (fifteen) Business Days after receipt of the independent expert's determination and reasons failing which the right to review shall lapse.
- 27.10.3 In the event of a review, the independent expert's determination shall be suspended, pending finalisation of the review procedure.
- 27.10.4 Any review as envisaged must be conducted by a practising senior advocate with not less than 10 (ten) years standing or a retired High Court Judge agreed between the Parties.
- 27.10.5 If the Parties cannot agree upon a particular person to conduct the review within 7 (seven) Business Days after notice has been given in terms of clause 27.10.2, then either Party may request, within 7 (seven) Business Days after the Parties have so failed to agree, the Chairperson of the Johannesburg Bar Council (or any replacement body) to appoint a person to conduct the review.
- 27.10.6 The person conducting the review shall determine the procedures to be followed, provided that such proceedings must be held in Johannesburg or Pretoria. The powers of the person conducting the review shall be those of the High Court conducting a review as envisaged in Rule 53 of the High Court rules, as amended or replaced from time to time.

## **28. Termination for Breach**

### **28.1 breach of a warranty**

If a Party breaches a warranty under clauses 3, 4 or 5, and remains in breach of such warranty for 30 (thirty) Business Days after written notice to that Party requiring that Party to rectify that breach of warranty, the aggrieved Party shall be entitled, without derogating from any of its other specific rights or remedies provided for under the Agreement or which it is entitled to in law, at its option:

- 28.1.1 to sue for immediate specific performance of any of the defaulting Party's obligations under the Agreement; or

- 28.1.2 to cancel the Agreement in which case written notice of the cancellation must be given to the defaulting Party, and the cancellation shall take effect from the date of the notice.

**28.2 breach of other material provisions**

If a Party breaches any other material provision of the Agreement and remains in breach of such material provision for 30 (thirty) Business Days after written notice to that Party requiring that Party to rectify that breach, the aggrieved Party shall be entitled, without derogating from any of its other specific rights or remedies provided for under the Agreement, at its option:

- 28.2.1 to sue for immediate specific performance of any of the Defaulting Party's obligations under the Agreement; or
- 28.2.2 to cancel the Agreement in which case written notice of the cancellation must be given to the defaulting Party, and the cancellation shall take effect from the date of the notice.

**28.3 breach of general provisions**

If a Party breaches any other general provision of the Agreement and remains in breach of such general provision for 30 (thirty) Business Days after written notice to that Party requiring that Party to rectify that breach, the aggrieved Party shall be entitled, without derogating from any of its other specific rights or remedies provided for under the Agreement to sue for immediate specific performance of any of the Defaulting Party's obligations under the Agreement.

**SECTION 10: FORCE MAJEURE MATTERS**

**29. Force Majeure**

**29.1 general**

- 29.1.1 For the purposes of the Agreement, an exceptional event or circumstance:

29.1.1.1 which prevents or restricts either Party directly or indirectly from performing all or any of that Party's ("**the Affected Party**") obligations in terms of the Agreement;

29.1.1.2 beyond the reasonable control of the Affected Party;



- 29.1.1.3 not the direct or indirect result of a breach by the Affected Party of any of its obligations under the Agreement; and
- 29.1.1.4 could not have been (including by reasonable anticipation) avoided or overcome by the Affected Party, acting reasonably and prudently,
- subject to clause 29.1.2 shall constitute a **"Force Majeure Event"** for the purposes of the Agreement.
- 29.1.2 A "Force Majeure Event" shall, subject to the conditions in clause 29.1.1 being satisfied, include, without limitation:
- 29.1.2.1 war, hostilities (whether war to be declared or not), invasion, act of foreign enemies;
- 29.1.2.2 rebellion, terrorism, revolution, insurrection, military or usurped power or civil war;
- 29.1.2.3 riot, commotion, disorder, any blockade or embargo, strikes or lock outs that are on a national scale and directly affects the construction, energy and limestone mining industry of South Africa, but shall not include any such action that is solely by the Supplier's personnel and other employees of the Supplier or its subcontractors;
- 29.1.2.4 natural catastrophes such as earthquake, hurricane, typhoon, volcanic activity floods (other than heavy rains), fire, 'Acts of God', or explosions."
- 29.1.3 An event which satisfies the requirements of clause 29.1, but is the direct or indirect result of any third party fulfilling contractual, statutory or other obligations to the Affected Party (for reasons which would not in themselves constitute a "Force Majeure Event") shall not constitute a "Force Majeure Event" for purposes of the Agreement.
- 29.1.4 The Affected Party shall be relieved of performance of its obligations in terms of the Agreement during the period that a Force Majeure Event occurs and its consequences continue (but only to the extent it is so delayed or prevented from performing partially or at all by the Force Majeure Event), and, provided that notice has been given in terms of clause 29.1.5, shall not be liable for any delay or failure in the performance of any of its obligations in terms of the Agreement or losses or damages whether general, special or consequential which the other

Party ("the Unaffected Party") may suffer due to or resulting from any such delay or failure.

29.1.5 The Affected Party shall give written notice to the Unaffected Party at the earliest possible opportunity in writing of the occurrence of the event constituting the Force Majeure Event, together with details thereof and a good faith estimate of the period of time for which it shall endure.

#### 29.2 **proportionate reduction**

Should a Force Majeure Event affect the production capacity of the Mine and/or the Supplier's ability to Deliver limestone for Supply to Eskom in terms hereof or should such Force Majeure Event affect Eskom's ability to Take Off limestone in terms of the Agreement, each of the Parties' respective obligations to Deliver and to Take Off limestone in terms hereof shall be reduced in proportion to the reduction in the capacity to Deliver or capacity to Take Off as the case may be.

#### 29.3 **consequences**

At all times whilst a Force Majeure Event continues, the Parties shall meet at regular intervals to discuss and investigate, and if possible, to implement other practical ways and means to overcome the consequences of such a Force Majeure Event, with the objective of achieving the import and intent of the Agreement without unreasonable delay. In this regard the Parties shall explore the possibility of concluding alternative arrangements for the supply or purchase of limestone as the case may be. These alternative arrangements may include but are not limited to quantity, quality and penalty amendments; and supply from any source for such periods of time as may be reasonable under the circumstances with due regard to the nature and anticipated duration of the Force Majeure Event.

#### 29.4 **termination of Force Majeure Event**

The Affected Party shall use all reasonable endeavours to mitigate the effects of the Force Majeure Event on its ability to perform under the Agreement and to terminate the circumstances giving rise to a Force Majeure Event as soon as reasonably possible (provided that nothing in this clause shall require the Affected Party to settle any strike, lock-out or other industrial or labour dispute, whether it is a party thereto or not) and upon termination of the event giving rise thereto, shall forthwith give written notice thereof to the Unaffected Party.

## **29.5 extension of the Agreement**

- 29.5.1 In the event that a Force Majeure Event occurs as contemplated herein, the Parties shall, on cessation of the Force Majeure Event, or prior thereto, agree on the period, if any, by which the duration of the Agreement should be extended to take account of interruptions caused by such Force Majeure Event. The price payable for Contract Limestone during such extension shall be the Price determined under the Agreement as being that applicable for the period in which Contract Limestone is actually Supplied, taking into account all adjustments as set out in the Agreement.
- 29.5.2 In the event of a Force Majeure Event affecting Eskom in terms of the Agreement which is expected to endure for a period of more than 30 (thirty) days, the Supplier may sell Contract Limestone, to third Parties for as long as such Force Majeure Event continues. In this event the Agreement shall be extended in terms of clause 29.5.1 above.
- 29.5.3 In the event of that the Supplier is prevented by a Force Majeure Event from Delivering Contract Limestone to Eskom in terms of the Agreement and for as long as such Force Majeure Event continues, Eskom shall not be under any obligation pursuant to the Agreement to purchase limestone for use from the Supplier exclusively. Without derogating from that principle, Eskom shall be entitled to source all limestone or any shortfall of limestone from other sources.

## **29.6 termination of the Agreement due to Force Majeure Events**

Unless otherwise unanimously agreed to in writing between the Parties, the Agreement shall be terminable by either Party if either Party is wholly prevented by a Force Majeure Event from fulfilling its obligations in terms of the agreement and where such prevention endures for a continuous period of at least 24 (twenty four) Months. Neither Party shall have any claim against the other for any loss suffered as a result of such termination.

# **SECTION 11: GENERAL PROVISIONS**

## **30. Insolvency**

Should either Party commit an act of insolvency, make an offer of compromise or composition, become the subject of a liquidation or business rescue proceedings order then the other Party shall be entitled, but not obliged, without prejudice to any other rights which it may have, to terminate the Agreement.

### 31. Limitation of Liability

Notwithstanding any other provision in the Agreement, neither Party shall be liable in contract or in law or otherwise for any indirect, consequential, punitive and/or special damages or loss of profits or anticipated savings, whether foreseeable or not, and even if a Party has been advised of the possibility of such damages arising, incurred by the other Party arising out of or in connection with the Agreement.

### 32. Insurance

In order for it to fully comply with its obligations under the Agreement, for the duration of the Contract Period, the Supplier shall:

32.1 adequately insure, and keep insured, itself and, *inter alia*, the Mine (including the equipment acquired, and to be acquired, and the infrastructure established and to be established to enable the Supplier to comply with its obligations in terms of the Agreement) against the risks which are in line with, and on terms which are in line with, common mining practice in South Africa;

32.2 forthwith apply the proceeds of any insurance policy to replace or repair, as is reasonable in the circumstances, the Mine (including the equipment acquired, and to be acquired, and the infrastructure established and to be established to enable the Supplier to comply with its obligations in terms of the Agreement) in the event of an insurable incident which may cause it to be damaged, lost or destroyed; and

32.3 to provide written proof of such insurance at the written request of Eskom.

### 33. Cession and Delegation

33.1 The Agreement shall be binding upon and shall be for the benefit of the Parties and, to the extent permitted by the provisions of this clause 33, their respective successors and assigns.

33.2 Neither Party may cede nor delegate the Agreement including to its holding company, an affiliated company, another company wholly and or partially owned by the Parties, to an entity acquiring all or substantially all of the assets of that Party, or for purposes of securing indebtedness and no such cession nor assignment shall release the delegating or ceding Party from the obligation to perform in terms of the Agreement unless the other Party consents thereto in writing. A Party requesting such consent shall provide the other Party with all the necessary information to conduct a reasonable assessment of the request.

### **34. Confidentiality**

- 34.1 The Parties acknowledge that any information supplied in connection with the Agreement or in connection with each other's technical, industrial or business affairs which has or may in any way whatsoever be transferred or come into the possession or knowledge of any other of them ("the Receiving Party") may consist of confidential or proprietary data, disclosure of which to or use by third parties might be damaging to the Party concerned.
- 34.2 The Receiving Party therefore agrees to hold such material and information in the strictest confidence, to prevent any copying thereof by whatever means and not to make use thereof than for the purposes of the Agreement and to release it only to such properly authorised directors, employees or third parties requiring such information for the purposes of the Agreement and agree not to release or disclose it to any other Party who has not signed an agreement expressly binding himself not to use or disclose it other than for the purposes of the Agreement.
- 34.3 The undertaking and obligations contained in this clause 34 do not apply to information which is publicly available at the date of disclosure or thereafter becomes publicly available from sources other than the Parties.
- 34.4 The Receiving Party demonstrates that if was already in its possession prior to its receipt by or disclosure to such Receiving Party; is required by law or any regulatory authority to be disclosed after being disclosed to the Receiving Party is disclosed by any other person to the Receiving Party otherwise than in breach of any obligation of confidentiality.
- 34.5 The Parties shall take such precautions as may be necessary to maintain the secrecy and confidentiality of such material and information in respect of its directors, employees, agents, and/or director or employees or agents of any assignee, sub-contractor or distributor or any other person to whom any such confidential or proprietary data may have been or shall be disclosed.
- 34.6 Save as may be required by law or any regulatory authority, no announcement or publicity of the existence of the Agreement or its content or transaction embodied in the Agreement shall be made or issued by or on behalf of any Party without the prior written agreement of the other Party.

### **35. Alienation or Disposal of an Interest**

Where any proposed transaction shall result in a change in control and ownership of the Holder and the Supplier, Eskom shall forthwith be notified in writing within 7 (seven) days of such decision and provided with a copy of the application to amend the Mine Mining Right, in terms of

the provisions of the MPRDA and written confirmation that the intended transaction shall not affect the Supplier's ability to carry out and comply with the obligations of the Agreement and the terms and conditions of the right as conferred.

**36. Entire Agreement**

The Agreement contains all the express provisions agreed on by the Parties with regard to the subject matter of the Agreement and supersedes and novates in its entirety any previous understandings or agreements between the Parties in respect thereof, and the Parties waive the right to rely on any alleged provision not expressly contained in the Agreement.

**37. No Stipulation for the Benefit of a Third Person**

Save as expressly provided for in the Agreement, no provision of the Agreement constitutes a stipulation for the benefit of a third person (i.e. a *stipulatio alteri*) which, if accepted by the person, would bind any Party in favour of that person.

**38. No Representations**

A Party may not rely on any representation which allegedly induced that Party to enter into the Agreement, unless the representation is recorded in the Agreement.

**39. Variation, Cancellation and Waiver**

No contract varying, adding to, deleting from or cancelling the Agreement, and no waiver of any right under the Agreement, shall be effective unless reduced to writing and signed by or on behalf of all the Parties.

**40. Indulgences**

The grant of any indulgence, extension of time or relaxation of any provision by a Party under the Agreement shall not constitute a waiver of any right by the grantor or prevent or adversely affect the exercise by the grantor of any existing or future right of the grantor.

**41. Applicable Law**

The Agreement is to be governed, interpreted and implemented in accordance with the laws of the Republic of South Africa.

**42. Jurisdiction of South African Courts**

The Parties consent to the non-exclusive jurisdiction of the High Court of South Africa, for any proceedings arising out of or in connection with the Agreement.

#### **43. Service of Documents**

43.1 Any legal or other notice shall be deemed to have been duly given:

- 43.1.1 on the fifth Business Days after posting (14 (fourteen) Business Days if the address is not in the Republic of South Africa), if posted by registered post (airmail, if available) to the Party's address in terms of this clause 43;
- 43.1.2 on delivery, if delivered to the Party's physical address in terms of this clause 43 between 08h30 and 17h00 on a Business Day (or on the first Business Day after that if delivered outside such hours);
- 43.1.3 on despatch, if sent to the Party's then fax number or e-mail address between 08h30 and 17h00 on a Business Day (or on the first Business Day after that if despatched outside such hours) in terms of this clause 43;
- 43.1.4 unless the addressor is aware, at the time the notice would otherwise be deemed to have been given, that the notice is unlikely to have been received by the addressee through no act or omission of the addressee.

43.2 A Party may change that Party's address or fax number or e-mail address for this purpose by notice in writing to the other Party, such change to be effective only on and with effect from the seventh Business Day after the giving of such notice.

43.3 Notwithstanding anything to the contrary herein contained, a written notice or communication actually received by a Party shall be an adequate service of such written notice or communication to that Party notwithstanding that it was not sent to or delivered or served at that Party's chosen *domicilium citandi et executandi*.

#### **44. Costs**

44.1 Each Party shall bear that Party's own legal costs and disbursements of and incidental to the negotiation, preparation, settling, signing and implementation of the Agreement.

44.2 Any costs, including all legal costs on an attorney and own client basis and VAT, incurred by a Party arising out of or in connection with a breach by another Party shall be borne by the Party in breach.

#### **45. Signature in Counterparts**

The Agreement may be executed in counterparts, each of which shall be deemed to be an original and which together shall constitute one and the same agreement.

#### **46. Independent Advice**

Each of the Parties hereby respectively agrees and acknowledges that:

- 46.1 it has been free to secure independent legal advice as to the nature and effect of each provision of the Agreement and that it has either taken such independent legal advice or has dispensed with the necessity of doing so; and
- 46.2 each provision of the Agreement (and each provision of the Annexes) is fair and reasonable in all the circumstances and is part of the overall intention of the Parties in connection with the Agreement.

#### **47. Good Faith and Co-Operation**

- 47.1 The Parties shall, at all times, act in good faith towards each other and shall not bring any of the other Parties into disrepute.
- 47.2 Each of the Parties undertakes at all times to do all such things, perform all such acts and take all such steps, and to procure the doing of all such things, within its power and control, as may be open to it and necessary for and incidental to the putting into effect or maintenance of the terms, conditions and import of the Agreement.

#### **LIST OF ANNEXES**

- i. **Annexe A:** The Limestone Quality Management Procedure
- ii. **Annexe B:** Supplier Development Localisation and Industrialisation Targets
- iii. **Annexe C:** The Safety and Health Requirements
- iv. **Annexe D:** The Environmental Legal Requirements
- v. **Annexe E:** The Rules of Rail Transportation
- vi. **Annexe F:** The Rules of Road Transportation
- vii. **Annexe G:** Example Calculations of Price Adjustment Factor
- viii. **Annexe H:** Technical Liaison Meeting Agenda