



AGREEMENT

FOR THE

SUPPLY OF GOODS

PART E - JURISDICTIONAL

CONDITIONS

SOUTH AFRICAN JURISDICTIONAL CONDITIONS

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1. DEFINITIONS

- 1.1 In addition to, and where applicable, in supplementation of, the definitions contained in Part C of this Agreement, the following terms have the meanings given when used in this Agreement, unless the context otherwise requires:

‘Anti-Corruption Laws’ means, in addition to those conventions, acts and laws specified in Part C, the Prevention and Combating of Corrupt Activities Act, No. 12 of 2004.

‘BBBEE Act’ means the latest version of the Broad-Based Black Economic Empowerment Act, No. 53 of 2003 and the Broad Based Black Economic Empowerment Amendment Act, No. 46 of 2013.

‘BEE entity’ has the meaning as defined in the Mining Charter.

‘DTI Codes of Good Practice’ means the latest version of the Codes of Good Practice on Black Economic Empowerment, issued under section 9(1) of the BBBEE Act.

‘Fronting’ means the offense provided for in section 130(1) of the BBBEE Act.

‘Hazardous Materials’ includes, in supplementation of this defined term in Part A, all substances, emissions and materials regulated under the Hazardous Substances Act, No. 15 of 1973.

‘Inclusive Procurement Plan’ means the written inclusive procurement plan to be provided for the Company’s approval by the Supplier in the form and within the time required by the Company.

‘Insolvency Event’ means, in addition to the definition stated in Part C, if a Party commits an act of insolvency under section 8 of the Insolvency Act, No. 24 of 1936.

‘Mining Charter’ means the charter referred to in section 100(2)(a) of the Mineral and Petroleum Resources Development Act, No. 28 of 2002.

‘OHSA’ means the Occupational Health and Safety Act, No. 85 of 1993.

‘SMMs’ has the meaning as defined in the DTI Codes of Good Practice.

2. PENALTIES

- 2.1 Any provision in this Agreement in relation to an act or omission by the Supplier that qualifies as a penalty in terms of the Conventional Penalties Act, No. 15 of 1962 (including the Supplier’s liability for Liquidated Damages) shall not preclude the Company from:

- (a) recovering damages instead of the relevant penalty or Liquidated Damages; or
- (b) exercising its other rights and remedies under this Agreement or Relevant Law.

3. INSURANCE

3.1 In addition to the insurances required in G.C.16, the Supplier must:

- (a) effect and maintain public and product liability insurance in respect of loss or damage that may occur to any physical property, or death or bodily injury to any person that arises out of or in connection with the performance of this Agreement for a limit of indemnity of not less than the amount specified in the Agreement Particulars per claim; and
- (b) ensure that at all times, it is registered in terms of the Compensation for Occupational Injuries and Diseases Act, No. 130 of 1993 and Regulations in relation to its employees and that all assessments are paid when due.

4. COMPLIANCE WITH POLICIES AND LEGISLATION

4.1 Legislation

Without limiting the Supplier's obligations under the Agreement, the Supplier warrants that it is and shall remain compliant with all Relevant Laws, including:

- (a) the Mineral and Petroleum Resources Development Act, No. 28 of 2002 ('**MPRDA**'); and
- (b) the Mine Health and Safety Act, No. 29 of 1996 ('**MHSA**').

4.2 Assistance to Company

The Supplier:

- (a) acknowledges that certain Relevant Laws (including the MHSA and, where applicable, the OHSA) impose obligations on the Company which may require the Supplier's compliance or assistance whilst on Site for the Company to achieve compliance;
- (b) shall comply with such of the Company's Corporate Policies, SHE Policies and/or such instructions as the Company may require or give from time to time, orally or in writing, to enable the Company and the Supplier to comply with their respective duties under Relevant Laws; and
- (c) undertakes to do all such things as shall be necessary to enable the Company to comply with Relevant Laws.

4.3 Release of Liability

Where the OHSA is applicable to the performance of this Agreement by the Supplier, the Supplier will, in addition to this Agreement, enter into an agreement in terms of section 37(2) of the OHSA with the Company, which will include arrangements and procedures to ensure that the Supplier complies with the OHSA. Accordingly, the Parties agree that the Company is relieved of its liabilities in terms of section 37(1) of the OHSA as regards the Supplier and

any employee, representative, consultant, contractor, invitee or otherwise of the Supplier.

4.4 Undertaking in terms of employment law

- (a) The Supplier agrees to notify the Company of any disciplinary, incapacity and/or operational-requirement-related proceedings against any of its employees who are rendering services to the Company, prior to the institution thereof. The Supplier further agrees to notify the Company of the outcome of such proceedings.
- (b) Without in any way detracting from the rights of the Company in terms of the Agreement, the Supplier hereby indemnifies and holds the Company harmless against all:
 - (i) claims by the Supplier's employees against the Company, and in the event of an award or determination being made against the Company, the Supplier shall pay any amount ordered to be paid by the Company. Should the Company be compelled to pay any such amount, the Supplier shall pay that amount to the Company;
 - (ii) Losses which the Company may suffer or be exposed to as a result of, or which may be attributable to, any liability of the Supplier for tax in respect of payments made in terms of the Agreement. For the purposes of this J.C.4.4, 'tax' includes Pay As You Earn and all other forms of duties or taxation, and any penalties or interest; and
 - (iii) without derogating from the generality of the aforesaid:
 - (A) claims made in consequence of any termination of the employment of the Supplier's employees for any reason; and
 - (B) claims made by the Commissioner for the South African Revenue Service in respect of a failure by the Supplier to deduct, or to pay over, employees' tax (sufficiently or at all).
- (c) If a claim is instituted against the Company, arising from (an) alleged contravention(s) of any employment law in respect of the Supplier's employees, the Company may, in its sole discretion, and at the expense of the Supplier, either:
 - (i) request that the Supplier deal with such a claim in such a manner as to avoid all prejudice to the Company and keep the Company fully informed, and to the extent that relevant legislation allows, this may include that the Supplier shall take all necessary steps to have the claim abandoned against the Company and redirected to the Supplier; or
 - (ii) the Company may deal with such a claim at its discretion, in which event the Supplier will render to the Company all necessary assistance.

- (d) In the event of any claims being instituted against either Party, the Supplier shall not be entitled to enter into any settlement or similar agreements without the Company's prior written consent.
- (e) These obligations in terms of employment law shall remain in force notwithstanding the termination of this Agreement.

5. DISPUTE RESOLUTION

5.1 Mediation

- (a) Where the Dispute cannot be resolved by negotiation as described in G.C.25.3(a) above, any Party may refer the Dispute to mediation by way of written notice to the other Party ("**Notice of Referral to Mediation**") within 5 (five) Business Days after the second mentioned 10 (ten) Business Day period referred to in G.C.25.3(c) has lapsed.
- (b) Should neither of the Parties have delivered a Notice of Referral to Mediation, then the Dispute shall be submitted to, and finally decided by, arbitration in accordance with J.C.5.2.
- (c) If a Notice of Referral to Mediation is issued in terms of J.C.5.1(a), but the Parties cannot agree on the appointment of a qualified mediator within 5 (five) Business Days of the delivery of the Notice of Referral to Mediation, any Party may approach the Legal Practice Council ("**LPC**"), or its successor body, to appoint a mediator with not less than 5 years' experience.
- (d) All communications made by the Parties to the mediator or to each other during or in connection with the mediation are made without prejudice to any rights which they may have and the mediation proceedings shall be held on a confidential basis.
- (e) The mediator shall not make any decision which is binding upon the disputants, the resolution of the dispute depending entirely upon the disputants achieving agreement in respect thereof.
- (f) Where the Parties are unable to resolve the Dispute by way of mediation within 20 (twenty) Business Days from the date of the appointment of the mediator by the Parties or the LPC, as the case may be, the Dispute shall then be submitted to, and finally decided by, arbitration in accordance with J.C.5.2.

5.2 Arbitration

- (a) If the Dispute has not been settled by negotiation in terms of G.C.25.3(a) or mediation in terms of J.C.5.2 above, then the Dispute must be resolved by arbitration.
- (b) Where the total claim in respect of the Dispute is less than ZAR2,000,000, the Company may in its sole discretion elect to resolve the dispute in terms of the Rules

for Expedited Arbitration attached as Annex 1 of this Part E or to elect that the dispute be resolved by arbitration in accordance with J.C.5.2(c). The Company must notify the Supplier of its election by written notice within 5 Business Days after the lapse of the period referred to in J.C.5.1(a) if no Notice of Referral to Mediation was delivered (i.e. 5 (five) Business Days) or within 5 (five) Business Days after the lapse of the period referred to in J.C.5.1(f) if a Notice of Referral to Mediation was delivered (i.e. 20 (twenty) Business Days) (whichever may be applicable), failing which the dispute shall be resolved by arbitration in accordance with J.C.5.2(c).

- (c) Subject to G.C.25.3, J.C.5.1 and J.C.5.4, all Disputes shall be finally resolved in accordance with the applicable rules of the Arbitration Foundation of Southern Africa (“AFSA”) or its successor body.

5.3 The Arbitration Proceedings

- (a) A sole arbitrator must be selected by agreement between the Parties within 5 (five) Business Days after the lapse of the period within which the Company has to make its election in terms of J.C.5.2(b) (i.e. 5 (five) Business Days), or if the Parties fail to agree, the arbitrator, being a practicing attorney or advocate with at least 10 (ten) years' experience, shall be appointed by the President of the LPC, or its successor body.
- (b) The Parties shall at any time during the arbitration proceedings, without termination of such proceedings and as an interlocutory process, be entitled to refer and have any particular portion of the subject matter of the dispute that requires specialist knowledge settled by expert determination.
- (c) The arbitration shall be held in Sandton, Gauteng, South Africa and the proceedings shall be conducted in English.

5.4 Appeal

- (a) In the case of an arbitration held under the auspices of AFSA (or its successor body) in terms of J.C.5.2(c), the award made by the arbitrator shall be subject to a Party's right of appeal. The applicable rules of AFSA dealing with appeals shall apply to the appeal. The Appeal Tribunal will consist of three appeal arbitrators, with each Party nominating, within 10 (ten) Business Days after the notice of appeal has been delivered, one appeal arbitrator after which those appeal arbitrators will nominate the third appeal arbitrator in accordance with the following:
 - (i) within the same foresaid 10 (ten) Business Days, each Party shall nominate 3 appeal arbitrators and provide its nominees to the other Party, who shall have the right to reject any one of such nominees without cause (the Parties agreeing that any conflicted nominees will be further excluded) after which the Parties will, without indicating the nominating

Party of any nominee, provide the shortlist of nominees to the two appeal arbitrators appointed by each Party under J.C.5.4(a); and

- (ii) the two appeal arbitrators shall then nominate a third appeal arbitrator from the shortlist received from the Parties.
- (b) The Appeal Tribunal's determination will be final and binding and there will be no further right of appeal.

6. CONFIDENTIALITY

Notwithstanding anything in the Agreement:

- (a) a Disclosing Party will not be deemed to have granted its consent to the Receiving Party to disclose the whole or any part of the Disclosing Party's Confidential Information:
 - (i) pursuant to a request to the Receiving Party from a third party for the whole or any part of the Confidential Information in terms of the provisions of the Promotion of Access to Information Act, No. 2 of 2000 ('**PAIA**'); or
 - (ii) notwithstanding that the Disclosing Party has previously disclosed any of its Confidential Information to a third party in terms of the provisions of the PAIA or any other law or court order; and
- (b) the provisions in Part C relating to Confidential Information do not exclude the applicability of any ground of refusal contained in the PAIA.

7. PROTECTION OF PERSONAL INFORMATION

- (a) For the purposes of this J.C.7, the words "**data subject**", "**Information Regulator**", "**personal information**", "**process**" and "**responsible party**" have the meanings given to them in the Protection of Personal Information Act, No. 4 of 2013 ('**POPI**').
- (b) To the extent that the Supplier processes personal information for or on behalf of the Company in performing its obligations under this Agreement, the Supplier must:
 - (i) only process personal information for the purposes of performing its obligations under this Agreement or as otherwise authorised by the Company in writing;
 - (ii) not disclose personal information without the Company's prior written consent, except as required by law;
 - (iii) not subcontract the processing of personal information to a third party, or transfer the personal information outside of South Africa, without the Company's prior written authorisation;

- (iv) take appropriate and reasonable technical and organisational measures to protect personal information against loss, damage, unauthorised destruction and unlawful access or processing;
- (v) immediately notify the Company where there are reasonable grounds to believe that personal information has been lost, damaged, accessed or acquired by any unauthorised person ('**Data Breach**');
- (vi) assist the Company to comply with any of its obligations under POPI in relation to personal information processed by the Supplier, including notification of Data Breaches, request by data subjects for access to, or correction or deletion of, their personal information and any investigation or assessment conducted, or direction given by, the Information Regulator; and
- (vii) except as required by law or agreement between the Parties, the Supplier must return or destroy (at the Company's direction) all personal information when it is no longer required for purposes of this Agreement, on termination of this Agreement for any reason, if required by law; or at the Company's request at any time.

8. SOUTH AFRICAN TRANSFORMATION

8.1 Supplier's warranty relating to transformation

- (a) The Supplier warrants that it has read and fully understands:
 - (i) the Mining Charter and its implications on the Company and its suppliers;
 - (ii) section 100(2) of the MPRDA, and the Supplier fully understands that its value proposition to the Company is to perform under this Agreement as an empowered Supplier, such that the Company will attain the highest level of recognition;
 - (iii) the BBBEE Act and DTI Codes of Good Practice and their implications and follows these where appropriate; and
 - (iv) the implications of Fronting. All representations related to South African transformation requirements, whether made by the Supplier or by any other person are material representations, on which the Company relies in entering into this Agreement.
- (b) The Company may at any time during the Term, on 60 (sixty) days' written notice, and for any reason which need not be disclosed, require the Supplier, at the Supplier's own cost, to:

- (i) provide the Company with an up to date and valid verification certificate, held by the Supplier and/or its subcontractors, as issued by an accredited BBBEE verification professional as provided for in the BBBEE Act; and
- (ii) provide any other information reasonably requested by the Company for the purposes of verifying the Supplier's compliance with this J.C.8.

8.2 **Supplier's BBBEE obligations**

The Supplier shall, for the Term of the Agreement:

- (a) maintain or improve its black ownership as at the time of concluding this Agreement or as set out in the Inclusive Procurement Plan;
- (b) maintain (as a minimum) a level 4 (four) or better rated BBBEE contributor in accordance with the DTI Codes of Good Practice, or as otherwise agreed;
- (c) notify the Company in writing within 14 (fourteen) days of any occurrence which affects, will affect, or would be reasonably likely to affect its compliance with respect to J.C.8.2(a) and/or its BBBEE rating; and
- (d) notify the Company in writing within 30 (thirty) days of the occurrence as to what steps have been and/or will be taken to restore its compliance with respect to J.C.8.2(a) and/or its BBBEE rating.

8.3 **Supplier's failure to comply**

- (a) Without prejudice to the Company's other rights under this Agreement, in the event that the Supplier fails to comply with the provisions of J.C.8.2, the Parties shall negotiate and agree on a time plan within which the Supplier shall become compliant.
- (b) The Company shall be entitled to suspend the Parties' performance of this Agreement and if applicable, remove the Supplier from the Site, at the Supplier's expense, while the negotiations are ongoing.
- (c) If the Parties do not agree a date by which the Supplier must become compliant or if the Company otherwise becomes aware or has a reasonable suspicion that any Fronting occurring or has occurred, then notwithstanding any other provision in this Agreement, the Company shall be entitled to terminate the Agreement with immediate effect on written notice to the Supplier.
- (d) If the Agreement is terminated in terms of J.C.8.3(a), then the Supplier shall as its sole remedy, be entitled to amounts due and payable under the Agreement at the date of termination, except where the Company becomes aware, or has a reasonable suspicion, that any Fronting is occurring or has occurred, in which event the Supplier and its Personnel shall not be entitled to any compensation of whatsoever nature by the Company.

9. SOCIAL IMPACT AND INCLUSIVE PROCUREMENT

9.1 Without limiting the Supplier's further obligations under this J.C.9, the Supplier shall from the earlier occurrence of either the Signature Date or Commencement Date, implement and, for the Agreement's Term, maintain social and inclusive procurement initiatives in accordance with the Inclusive Procurement Plan.

9.2 Host Community employment

- (a) The Supplier warrants that its primary source of labour shall be the host community identified within the Company's social and labour plan of the relevant Site ('**Host Community**').
- (b) The Supplier shall implement skills development programs, which should identify supervisory and management characteristics available in the Host Communities, and skills transfer plans to ensure that labour recruited from the Host Communities are able to perform tasks safely and efficiently.

9.3 Host Community procurement

- (a) The Supplier undertakes to commit to purchase goods and services required for performance under this Agreement from Host Community businesses, focusing on SMMEs, in order to contribute to economic development of the Host Community. All goods and services procured from Host Community businesses must meet all safety, technical capability and delivery requirements.
- (b) The Supplier shall embark and demonstrate evidence of enterprise and supplier development activities consistent with the requirements of the BBBEE Act, aimed at improving the capacity of Host Community businesses.

9.4 Reporting

The Supplier shall on a quarterly basis, or when requested by the Company, provide the Company with reports in the requisite format detailing information requested from the Company, including:

- (a) the number of employees recruited from the Host Communities;
- (b) details on the skills transfer plan and skills development programs referred to in J.C.9.2(b);
- (c) the number of Host Community businesses from which goods and services are procured by the Supplier and total spend with Host Community businesses; and
- (d) details related to enterprise and supplier development activities undertaken by the Supplier and the number of tenders issued to Host Community businesses.

9.5 Social investment partnering

- (a) The Supplier shall use its best endeavours to work in partnership with the Company in order to identify, participate and co-invest in social development projects which shall include enterprise and supplier development programmes, charitable, education, health, skills building and other types of development activity.
- (b) The Supplier shall use reasonable endeavours to mitigate potential negative social impacts, utilising at minimum the guidance outlined in the Thungela Social Way Policy.

10. ADDITIONAL COMPANY TERMINATION RIGHT

The Company may suspend and/or terminate this Agreement immediately by written notice to the Supplier if:

- (a) the Supplier, or any of its directors or officers, are convicted of a serious criminal offence, or a law enforcement investigation or prosecution is initiated against them in relation to a serious criminal offence; or
- (b) the Supplier is, or is accused on reasonable grounds of being, fraudulent in connection with its obligations under J.C.8 or its BEE status (in any respect).

11. COSTS

In the event that the Company incurs any legal costs as a result of a breach by the Supplier in connection with this Agreement, then the Supplier shall be liable for all such legal costs on an attorney and client basis.

12. INCOME TAX

12.1 For the purpose of this J.C.12:

‘Income Tax Act’ means the South African Income Tax Act, No. 58 of 1962.

12.2 The Supplier:

- (a) warrants that it understands the criteria that apply to distinguish independent contractors from personal service providers as envisaged in the Income Tax Act;
- (b) warrants that it is not a personal service provider as envisaged in the Income Tax Act; and
- (c) will immediately notify the Company in writing should the Supplier’s warranty in J.C.12.2(b) change during the Term.

12.3 The Supplier shall absolve the Company of any liability on its part should the Supplier’s warranty under J.C.12.2(b) be found to be false or incorrect.

ANNEX 1

RULES FOR EXPEDITED ARBITRATION

RULES FOR AN EXPEDITED ARBITRATION PROCESS FOR CLAIMS UNDER ZAR2,000,000.00.

Electronic communications

1. The Parties agree (and the arbitrator shall be instructed accordingly) to electronic service and filing of documents.

Pleadings

2. Within 10 (ten) calendar days from the appointment of the arbitrator, the relevant Party must serve and file a statement of claim and attach, along with annexures in support of its claims, its discovery affidavit listing a disclosure of documents on which it relies in support of its claim.
3. Within 10 (ten) calendar days from the service of the statement of claim, the responding Party must serve its statement of defence and counterclaims (if any), along with annexures in support of its defence and counterclaim, as well as a discovery affidavit listing a disclosure of all documents on which it relies in support of its defence to the claim and any counter claims it raises.
4. Within 10 (ten) calendar days from said date the relevant Party must file a replication and statement of defence to any counterclaims (if any), annexing documents in support of the replication and statement of defence along.
5. Within 5 (five) calendar days, the relevant Party must file a replication to any statement of defence to any counterclaims (if any), annexing documents in support of the replication along.
6. The arbitrator may, upon written request by a Party which shall include justification for its request and after providing the other Party with an opportunity to respond to the first mentioned Party's request:
 - (a) allow the first mentioned Party to supplement its discovery affidavit as the arbitrator may determine having regard to the relevance of the particular documentation, in which event the Party must file its supplementary discovery affidavit within 3 (three) calendar days; and
 - (b) compel the second mentioned Party to produce documents or copies of documents specified by the first mentioned Party in its request and/or which the arbitrator determines to be relevant, in which event the second mentioned Party must comply with such order within 3 (three) calendar days,as the case may be.
7. In the event that either Party wishes to amend their pleadings, the notice of intention to amend must be filed and the arbitrator will then decide upon a process to finalise and decide up on

the amendment, should an objection to the amendment be filed, and this to be done within 3 (three) calendar days of receipt of the notice of intention to amend.

8. Pleadings are to be considered closed upon the filing of the replication to the relevant statement of defence; no further pleadings may be filed without the approval of the arbitrator.

Pre-arbitration processes

9. Within 5 (five) calendar days from the close of pleadings, the arbitrator and Parties shall hold a telephonic conference to agree the following:
 - (a) whether either Party is willing to settle the matter. In this regard, the terms of settlement, which are to be incorporated into a written agreement, must be provided to the opposing Party at least 3 (three) calendar days before the call, and the receiving Party shall, prior to or at the end of the call, notify the proposing Party of its agreement or rejection of same. In the event that the settlement terms are agreed, the settlement agreement must be signed by each Party by a person authorised to do so;
 - (b) timelines for requests for further particulars or admissions, inspections or, in accordance with paragraph 6 above (except the period of time referenced in that paragraph), further disclosures if permitted by the arbitrator upon proper motivation;
 - (c) whether expert testimony is required;
 - (d) possibility of waiving a hearing and having the arbitrator decide the matter on the papers;
 - (e) timelines for exchange of witness statements and heads of argument where the hearing is waived;
 - (f) dates for filing of witness summaries and exhibits (at least 10 (ten) calendar days before the hearing should it not be waived);
 - (g) dates and venue for hearing of the arbitration should the hearing not be waived; and
 - (h) any other administrative aspects relating to the arbitration which the arbitrator may deem necessary.
10. Exchange of papers described above must be concluded within 30 (thirty) calendar days from the close of pleadings.
11. All pleadings, witness statements and expert reports (with the exclusion of annexures to statements and reports) are limited to a total of 300 A4 pages of evidence per Party.

The Hearing

12. The Parties agree to limit expert witnesses to one per Party.

13. Witness statements will be provided no later than 10 (ten) calendar days prior to commencement of hearing and shall serve as evidence in chief.
14. The Parties agree to limit factual witnesses for cross-examination to 2 (two) per Party.
15. The Parties agree that each time period for cross-examination of factual witnesses shall be limited to 3 (three) hours per witness.
16. Closing arguments by the Parties are limited to 2 (two) hours per Party.
17. Heads of argument shall be filed by each Party within 5 (five) calendar days of the close of the hearing.
18. The Parties shall endeavour to conclude the arbitration within 40 (forty) calendar days from the close of pleadings.
19. The arbitrator shall be entitled to dispense with such rules of evidence as he deems reasonable however the arbitration must be concluded and an award given within 6 (six) months from the appointment of the arbitrator.

The Award

20. The arbitrator's award is due within 20 (twenty) calendar days from the filing of heads of argument and will be handed down electronically.
21. The decision of the arbitrator shall be final and binding on both Parties.
22. The costs of the arbitration shall be awarded in favour of the substantially successful Party, alternatively the arbitrator shall have the right to award costs on such basis as he deems fit having regard to the circumstances of the arbitration.
23. The arbitrator may award punitive costs against a Party who fails to comply with the timelines and limitations for evidence set out in the rules.

Arbitrator's Fees

24. The Parties agree to pay the arbitrator's fees due upfront in equal shares pending any award as to costs given by the arbitrator.

Taxation

25. At the request of any Party and within 3 (three) calendar days from the handing down of the award, the arbitrator may select a cost consultant to tax any bill of costs relating to any costs order given in the arbitration. The arbitrator shall direct which Party shall pay the fee of the cost consultant taxing the bill. The taxed bill shall thereafter become part of the award.