



## **TERMS & CONDITIONS**

**for**

### **SUPPLY OF PRODUCTION-EQUIPMENT**

(Electrical, electronic or mechanical plant and machinery)

## Table of contents

<b>1. Definitions.....</b>	<b>3</b>
<b>2. Supply Agreement .....</b>	<b>4</b>
2.1 Order.....	4
2.2 Assignment - Subcontractors and Sub-Suppliers.....	4
<b>3. Scope of Supply.....</b>	<b>4</b>
<b>4. Obligation to inspect, to inform and to warn .....</b>	<b>5</b>
<b>5. Variations, Cancellation.....</b>	<b>5</b>
<b>6. Contract Price and Terms of Payment .....</b>	<b>6</b>
6.1 Contract Price .....	6
6.2 Payment Terms .....	6
6.3 Securities .....	6
<b>7. Milestones and Penalty for Late Performance.....</b>	<b>7</b>
7.1 Milestones .....	7
7.2 Impediment / Delay / Suspension .....	7
7.3 Penalty for Late Performance .....	8
7.4 Termination / Substitute Performance .....	8
<b>8. Work on premises of Purchaser .....</b>	<b>8</b>
<b>9. Factory Acceptance, Tests on Completion, R-F-O, Performance Test and Final Acceptance.....</b>	<b>9</b>
9.1 Factory Acceptance .....	9
9.2 Commissioning and the Tests on Completion .....	9
9.3 Ready for Operation (“R-F-O”).....	9
9.4 Final Acceptance .....	10
9.5 Costs .....	10
9.6 Transfer of Risk.....	11
<b>10. Warranty and Spare Parts Supply.....</b>	<b>11</b>
10.1 General .....	11
10.2 Remedies .....	11
10.3 Warranty Period.....	11
10.4 Examination and Notice of Non-Conformity .....	12
10.5 Spare Parts Supply.....	12
<b>11. Penalty for Insufficient Availability.....</b>	<b>12</b>
<b>12. Liability and Insurance.....</b>	<b>12</b>
12.1 Liability .....	12
12.2 Insurance .....	13
<b>13. Right of Inspection .....</b>	<b>13</b>
13.1 Scope .....	13
13.2 Exercise of Inspections .....	13
<b>14. Patents and other rights .....</b>	<b>13</b>
<b>15. Confidentiality .....</b>	<b>14</b>
<b>16. Applicable Law and Dispute Resolution.....</b>	<b>14</b>
16.1 Applicable Law .....	14
16.2 Dispute Resolution .....	15
<b>17. Final Clauses .....</b>	<b>15</b>
17.1 Miscellaneous .....	15
17.2 Project Representative .....	15
17.3 Severability.....	15
17.3 Waiver .....	15

## 1. Definitions

The terms defined in this Article shall have the meaning indicated hereunder:

- **"Acceptance Date"** means the date specified on the Order, or in any Attachment, by which it is intended that the Final Acceptance Certificate will be signed by Purchaser.
- **"Availability"** means the ratio of the expected value of the uptime of the plant to the aggregate of the expected values of up and down time as defined more precisely in the VDI 3432, which shall be considered as a part of the respective Supply Agreement.
- **"Commissioning"** means the installation and commissioning by Supplier of the Equipment in the Premises and the training of Purchaser's staff in the operation of the Equipment, more particularly detailed in the respective Supply Agreement.
- **"Contract Price"** means the price set out in the Order for the provision of the Plant (including the supply of all the equipment and services which are indicated in the Order and/or the Attachments thereto), subject to such additions or deductions as may be made under the provisions of the Supply Agreement.
- **"Cycle Time"** means the pace for the industrial manufacturing of a work piece with the plant.
- **"Durability"** means the period of time, during which the plant is supposed to perform under production conditions in accordance with the specifications set forth in the respective Supply Agreement.
- **"Factory-Acceptance"** means the procedure of verification of the contractual conformity of the Plant at the Supplier's factory and the declaration made by Purchaser that the Plant has been released for dispatch.
- **"Final Acceptance"** means the procedure of verification of the contractual conformity of the Plant at the Purchaser's site and the declaration made by Purchaser that the Plant has been accepted in compliance with the respective Supply Agreement.
- **"Guaranteed Performance"** means the production parameters of the Plant specified in the Supply Agreement and its Attachments; such production parameter will include, but not be limited to, Availability, Cycle times and Durability etc.
- **"Intellectual Property Rights"** shall mean patents, copyright, registered and unregistered design rights, utility models, trade marks (whether or not registered), database rights, rights in know-how and confidential information and all other intellectual and industrial property rights and similar or analogous rights existing under the laws of any country, and all rights to apply for or register such rights.
- **"Order"** means the Purchase Order (including attachments and amendments) issued by Purchaser to Supplier subject to these terms and conditions, which imposes on supplier the obligation to plan, develop, design, manufacture, deliver, install and commission the plant including additional service and work as the case may be (e.g. operator training); hereinafter also referred to as **"Supply Agreement"**.
- **"Party"** means either the Supplier or the Purchaser, and together the „Parties“.
- **"Performance Tests"** means the tests detailed in the Supply Agreement and/or the attachments thereto to be made after R-F-O to demonstrate the performance of the Plant; during such Performance Tests Supplier shall also carry out the training of Purchaser's staff.
- **"Plant"** means the production unit which is the subject matter of the respective Supply Agreement; the term **"Equipment"** will synonymously used, and both terms describe any or all of the items (machinery, materials, components, spare parts, etc.) which Supplier undertakes to supply to Purchaser under the respective Supply Agreement.
- **"Project Representative"** means the representative of either Party nominated in accordance with Article 16.2.
- **"Purchaser"**: Engel Machinery Korea Ltd. .
- **„Ready to Operation“** or **„R-F-O“** means the hand over of the plant to Purchaser (including the Technical Documentation) after Commissioning and Tests on Completion.
- **"R-F-O-Date"** means the date specified on the Order, or in any Attachment, by which it is intended that the R-T-O Certificate will be signed by Purchaser.
- **"Site"** means the location(s) for the Delivery and Installation of the Plant as specified in the Order and/or Attachment thereto.
- **"Supplier"** means the company which is assigned by Purchaser with the planning, development, design, manufacture and delivery, installation and commissioning of the plant.
- **"Supply Agreement"** or **"Agreement"** means the purchasing terms agreed between Purchaser and Supplier as set forth in the respective purchase order and any attachments thereto as well as these terms and conditions.
- **"Technical Documentation"** means the documentation regarding the Equipment, Erection, operation and maintenance of the Plant, to be provided by the Supplier in accordance with the Order and its Attachments.
- **"Terms and Conditions"** means the legal terms set forth in this document, which are an integral part of the Agreement between Purchaser and Supplier.
- **"Tests on Completion"** means the tests specified in the Supply Agreement (or otherwise agreed by Purchaser and Supplier) which are to be made by Supplier upon completion of commissioning before the Plant is handed over to Purchaser.
- **"Underperformance"** means that the Plant fails to reach the Guaranteed Performance.
- **"Work Piece"** means a piece of metal or other material that is machine worked by the plant; also used as a term to define the master part for the purpose of the Final Acceptance.

## **2. Supply Agreement**

### **2.1 Order**

2.1.1 By issuing an Order to Supplier Purchaser shall contract Supplier with (i) the planning, development, design, manufacture, delivery, installation and commissioning of the Plant (ii) the handover of the Technical Documentation and (iii) other Services or additional supplies.

2.1.2 These Terms and Conditions form an integral part of the Order issued by Purchaser. A description of the characteristics, technical specifications and Guaranteed Performance of the plant will be specified in the Supply Agreement and the Attachments thereto, especially in the "Technical Delivery Specification".

2.1.3 For the purpose of interpretation, the priority of the documents forming the Agreement shall be in accordance with the following sequence:

- 1.) The Order (purchase order / order confirmation)
- 2.) The Attachments to the Order
- 3.) The Terms & Conditions set forth herein

2.1.4 General terms and conditions or forms of Supplier shall by no means be accepted or become part of the Purchase Agreement, irrespective of whether we knew them or not, whether we have contradicted their validity or not and irrespective of whether they are in opposition to the purchasing terms or not. Even the unopposed acceptance of the delivery or performance activities by us shall not be construed to indicate a submission to Supplier's terms and conditions. In case of continuous business transactions, the general terms and conditions set forth herein shall be applicable even without special reference to said.

### **2.2 Assignment - Subcontractors and Sub-Suppliers**

2.2.1 Supplier is not entitled to assign any or all of its obligations under the Order without the previous written agreement of Purchaser.

2.2.2 Supplier shall not engage sub-suppliers with the production of, or buy from Sub-Suppliers, parts, which are critical for the function or safety of the plant without our prior written approval.

## **3. Scope of Supply**

3.1 Subject matter of the Supply Agreement is the supply of the Plant and the performance of any other services as set out in the Order and Attachments thereto, which shall be free from defects in design (except to the extent design is supplied by Purchaser), materials and workmanship, is merchantable, fit for the purpose indicated by Purchaser, and shall conform in all respects to the requirements of the Order and Attachments thereto. Supplier guarantees that the Plant has been designed with due care and that it includes everything which is necessary for the Plant to provide the operating characteristics as defined in the Order and/or any Attachment. Machine elements and parts shall be designed and arranged in order to ensure easy inspection and maintenance of the same. Parts subject to wear and tear shall be of a long life time.

3.2 The Scope of Supply shall also include (unless otherwise stated in the Purchase Order or its Attachments) the preparation, compilation and handover of (i) the Technical Documentation including a complete technical documentation of the Equipment at least in English and the local language at site, operating and maintenance manuals for production equipment; as build drawings and a list of consumables (ii) the documents, which shall comply with the requirements of the laws, rules and regulations set out in Section 3.4 (as amended from time to time), (iii) the operating, assembly and maintenance instructions and (iv) a parts list for all parts with particular identification of spare parts and wear parts. Supplier shall also issue a "Supplier's Declaration" for the Plant and any other declarations in accordance with the laws, rules and regulations set out in sub-item (ii).

3.3 The Plant shall be considered to be in compliance with the Supply Agreement, if and when the plant is in conformity with all requirements mentioned in Section 3.1. The Plant shall particularly conform with all the agreed specifications (including, but not limited to Cycle Time, Availability and Durability) and safety requirements of Purchaser in terms of protection of life and limb, health and property, and it shall be in

accordance with state-of-the-art of science and technology; furthermore the Plant shall be in compliance with the statutory requirements for the protection of consumers, employees or the environment and neither the Plant nor the use thereof or any of the applications, processes or designs employed in the manufacture thereof shall infringe or otherwise misappropriate any Intellectual Property Rights.

3.4 The Cycle Time, the Availability and Durability will be defined in the Purchase Order or its Attachments, as the case may be. The statutory requirements set forth in Section 3.3 include, but are not limited to any technical standards and harmonised regulations of the European Community, which are intended to protect employees, users and consumers, including, but not limited to Directive 2006/42/EC ("Machinery Directive"), Directive 2006/95/EC ("Low Voltage Directive") and Directive 2004/108/EC "(Electromagnetic Compatibility Directive)".

## **4. Obligation to inspect, to inform and to warn**

4.1 Supplier shall diligently check all data furnished by Purchaser, including but not limited to the technical requirements and conditions, other descriptions, specifications and data with respect to the technical feasibility and fitness for the intended purpose, and shall inform Purchaser without delay of any circumstances which could frustrate, aggravate or delay the execution of the Supply Agreement and/or the intended use of the Plant. This shall also apply to any subsequent modification or amendment of the Supply Agreement in accordance with Section 5 and in connection with any of Purchaser's obligations to cooperate.

4.2 Supplier covenants that the Contract Price set out in the Order is fix and considered full compensation for all Equipment supplied and services performed under the respective Supply Agreement. Supplements or changes of the scope of supply after formation of the Supply Agreement due to any cause other than a change request made by Purchaser in accordance with Section 5 will by no means entitle Supplier to claim additional costs or a prolongation of milestones.

4.3 Unless otherwise specified the respective Supply Agreement or an Attachment thereto, Supplier shall be required to undertake a visit to the Site and shall:

- (i) issue a report detailing work to be carried out to prepare the Site for the Delivery and/or Installation of the Goods in the designated place; or
- (ii) issue a certificate, stating that the Site is suitable and acceptable for the Delivery and/or Installation or use of the Equipment in the designated place to commence and proceed with the Delivery and Installation.

4.4 The report issued by Supplier in accordance with Section 4.3 must supply adequate information in sufficient time to enable Purchaser to prepare the Site for the Installation, and enable Purchaser to provide:

- (i) a suitable supply of electric current and such other mains services as maybe required;
- (ii) all other required electrical and mechanical items and fittings, as specified by Supplier at the time of awarding the Supply Agreement;
- (iii) such facilities and environmental conditions as defined on the Order and/or in any Attachment; and
- (iv) access to, and egress from, the Site and/or the designated place for the delivery and installation of the Equipment to enable the delivery, off-loading and placing in position of the Equipment (including, without limitation, appropriate access and egress that enables Supplier to deliver and remove any equipment, tooling or other facilities required for the purposes of undertaking and completing the delivery and installation of the Equipment) which complies with any specific requirements set out in the report.

## **5. Variations, Cancellation**

5.1 Purchaser may at any time before R-F-O require alterations or additions to the Plant notifying Supplier thereof in writing. If any such alteration or addition will cause an increase or decrease in the Contract Price or has an impact on the time of performance, or both, Supplier shall so advise Purchaser within one (1) week of receipt of the change request, and an equitable adjustment shall be made in the Contract Price or the time schedule or both, and the adjustment shall be incorporated in a change order. If Supplier fails to so advise Purchaser within one (1) week, Purchaser's change request in the Specifications shall be deemed to be incorporated as part of the Supply Agreement and shall supersede any inconsistent

provision of, or be in addition to, the Specifications originally incorporated by reference in the Purchase Agreement and there shall be no corresponding change in Contract Price or time of performance.

5.2 Purchaser may at any moment before R-F-O terminate the Supply Agreement without cause. In the event of such termination, Purchaser shall pay Supplier in complete satisfaction of any obligation hereunder and within ninety (90) days of receipt of a complete and proper invoice, all necessary costs and expenses already incurred or uncancellable commitments made by Supplier as documented and subject to audit by Purchaser less any amounts already paid by Purchaser in accordance with the Supply Agreement through the date of notice of termination. In the event of such termination and upon payment in accordance with this paragraph, Purchaser shall have the immediate right to take possession of the Plant (in whatever state of design or manufacture the Plant exists at such time) and of all related parts, drawings and all other documentation related to the Plant. Supplier shall grant to Purchaser a royalty free, non-exclusive, worldwide license to obtain, manufacture, fabricate or take whatever actions are necessary to complete the Plant, or to authorize third parties to do so on Purchaser's behalf.

## **6. Contract Price and Terms of Payment**

### **6.1 Contract Price**

6.1.1 Terms of payment will be defined in the Supply Agreement and/or the Attachments thereto. Payment terms, including cash discount periods, shall not start to run before receipt of the respective invoice. The payment shall not indicate the acknowledgement of the correctness of deliveries or services, and thus it does not operate as a waiver of any of Purchaser's rights and remedies, it may have hereunder or at law. Except as expressly otherwise agreed, the Contract Price shall be considered inclusive of all duties, customs and incidental expenses.

6.1.2 The Contract Price is a comprehensive lump sum, which may be changed only by a written change order in accordance with the provisions of Section 5.1. Therefore the Contract Price will be deemed to take into account all circumstances and particularities of the respective Supply Agreement.

6.1.3 If Purchaser requests alterations or additions to the Plant in accordance with Section 5.1, any price adjustment shall be made on the same basis of calculation as it applied to the Contract Price.

### **6.2 Payment Terms**

6.2.1 Provided the Equipment and/or Services have been properly delivered and installed; are compliant with the requirements of the Supply Agreement and have been accepted by Purchaser in accordance with the same, Supplier shall be entitled to claim payment of the Price or the percentage of the Price, stated on the Purchase Order or in any Attachment. Payment shall be due thirty (30) days from the date of the invoice. Any payment made shall be without prejudice to Purchaser's rights should the Equipment or Services and/or Installation prove unsatisfactory or not in accordance with the Supply Agreement.

6.2.2 If at any time there is a defect due to the fault of Supplier in or affecting any part or portion of the Equipment and/or the Installation and/or Services in respect of which such payment is claimed, Purchaser shall have the right to retain the whole of such payment, provided that in the event of such defect being of minor character, and not such as to affect the use of the Equipment and/or the Installation and/or Services, or said part thereof for the purpose intended without serious risk, Purchaser shall not retain a greater amount than represents the cost of making good said defect. Any amounts retained by Purchaser under this Clause shall be paid to Supplier upon the defect being made good, subject to the provisions of Section 6.2.1 above.

### **6.3 Securities**

6.3.1 To secure the proper performance of the Supply Agreement, Supplier shall, within two weeks after closing of the Supply Agreement, obtain at its cost, from a first-class international bank in the Supplier's country, a first demand bank guarantee amounting to twenty percent (20%) of the Contract Price, unless otherwise agreed, which shall be subject to the Uniform Rules for Demand Guarantees published by the International Chamber of Commerce (URDG), or a standby L/C subject either to such Rules or to the Uniform Customs and Practice for Documentary Credits published by the International Chamber of Commerce issued by a first-class international bank. Such performance guarantee shall have an

expiration date not earlier than three (3) months after the Final Acceptance Date. In case of a postponement of the actual Acceptance Date for more than two (2) months, Supplier shall issue an adequate extension of the performance guarantee.

6.3.2 Supplier shall be entitled to deduct ten percent (10%) of the Contract Price, dischargeable against issuance by Supplier of an irrevocable and unconditional warranty guarantee in the same amount to guarantee the compliance by Supplier of its warranty obligations under the Supply Agreement. This guarantee shall be subject to the URDG or in any other form satisfactory to Purchaser. This guarantee shall be valid during the warranty period plus additional two (2) months.

## **7. Milestones and Penalty for Late Performance**

### **7.1 Milestones**

7.1.1 The milestones and final deadlines will be defined in the Supply Agreement and/or the Attachments thereto.

7.1.2 Unless expressly otherwise agreed to the contrary, time is of the essence. If the Seller fails to complete: (i) any specific part or stage of the installation by the date(s) specified in the Order, an Attachment or a Variation; (ii) the Delivery and/or Installation of the Equipment and/or Services by the Acceptance Date, Supplier shall pay to Purchaser a contractual penalty as set forth in the Order or in any Attachment thereto.

### **7.2 Impediment / Delay / Suspension**

7.2.1 If Supplier recognises that there is a risk of a delay or if Supplier becomes aware of a possible impediment of the performance of its contractual obligations, Supplier shall notify Purchaser without undue delay. If Purchaser fails to do so, it will be precluded from claiming such late performance otherwise considered as an Excusable Delay pursuant to Article 7.2.3.

7.2.2 Any extension of time shall require Purchaser's written consent. Unless otherwise stated expressly to the contrary, an extension of time shall not affect the original deadlines for the purpose of penalties. In case the parties expressly agree on new deadlines for penalties, those penalties shall remain unaffected thereby, which have already accrued at the time of closing of such an agreement; in this case these penalties will be incurred in addition to the penalties possibly resulting from Supplier's failure to meet the new deadlines.

7.2.3 If a delay or impediment is not due to Supplier's default ("Excusable Delay"), Purchaser may extend or postpone the milestones, or the final deadlines, as the case may be. For the purpose of this Agreement, an Excusable Delay shall be any delay or impediment due to an event, which is not within the reasonable control of Supplier, but only if and to the extent that (i) such event, despite the exercise of reasonable diligence, cannot be, or be caused to be, prevented, avoided or removed by Supplier, and (ii) such event materially and adversely affects the ability of Supplier to perform its obligations under the Supply Agreement, and Supplier has taken all reasonable precautions, due care and reasonable alternative measures in order to avoid the effect of such event on Suppliers ability to perform its obligations under this Agreement and to mitigate the consequences thereof.

7.2.4 Acts and/or omissions by Subcontractors or Sub-Suppliers shall be attributed to Supplier in the same way as an act and/or omission by Supplier.

7.2.5 Purchaser may request the interruption of manufacturing, delivery and/or installation of the Equipment by Supplier at any time; payment deadlines shall be extended according to the change in the respective milestones. In this case, Supplier shall provide Purchaser with details of the consequences, particularly with regard to necessary amendment of costs and deadlines. If Purchaser requests the interruption of manufacturing, delivery and/or installation for a period of less than three months, Supplier shall not be entitled to claim compensation for any expenses or loss of interests incurred thereby.

### **7.3 Penalty for Late Performance**

7.3.1 In case of late performance by the Supplier of any of its obligations under the respective Supply Agreement (excluding delays solely attributable to Purchaser and Excusable Delay as defined herein), Supplier shall pay to Purchaser a contractual penalty (the "Penalty") amounting to one per cent (1%) of the Contract Price for each week of the delay, however not exceeding ten per cent (10%) of the Contract Price per occurrence.

7.3.2 Purchaser shall be entitled to set off and to deduct the Penalty from any amounts payable to Supplier; otherwise, Purchaser's failure to set-off the Penalty or the acceptance of any late performance without claiming the Penalty shall not operate as a waiver of Purchaser's right to claim such Penalty later on. The Penalty shall accrue irrespective of the existence and extent of actual damages. Neither failure nor delay on the part of Purchaser to exercise its right to deduct or claim the Penalty at any time before time lapse shall operate as a waiver thereof.

### **7.4 Termination / Substitute Performance**

7.4 If Supplier fails to complete (i) any specific part or stage of the Installation by the date(s) specified in the Order, an Attachment or a Variation; or (ii) the delivery and/or Installation of the Equipment and/or Services by the R-F-O-Date or Acceptance Date (or such revised dates as may be agreed in accordance with the terms and conditions herein); Purchaser shall have the right exercisable by giving notice to Supplier, at its sole discretion, either to terminate the Supply Agreement or any part thereof or to proceed with the fulfilment of the Supply Agreement whereupon Purchaser shall also have the right to carry out outstanding works by itself or have such work done by a third party at Supplier's risk and cost (the "Substitute Performance"); Purchaser shall have the right to deduct from the Contract Price any costs incurred thereby. Such Substitute Performance shall not relieve Supplier from its responsibility under the Supply Agreement; Purchaser shall cooperate with Purchaser and shall provide parts, drawings and all other documentation and shall grant to Purchaser a royalty free, non-exclusive, worldwide license to obtain, manufacture, fabricate or take whatever actions are necessary to carry out the Substitute Performance or to authorize third parties to do so on Purchaser's behalf.

## **8. Work on premises of Purchaser**

8.1 Any work carried out by Supplier on premises of Purchaser shall not interfere with plant operations and/or any third party beyond what is inevitable due to the nature of the work and service.

8.2 The progress of the work is to be coordinated in time with the Project Representative of Purchaser. At the latest prior to the start of work the purchaser provides Supplier with the safety sheet for contractors which the contractor has to comply with. Supplier shall demonstrably inform its subcontractors thereof and ensure compliance therewith.

8.3 The Project Representative or its substitute shall have the authority to give instructions on the Purchaser's Site. The safety coordinator and the fire prevention coordinator will have special authorities. Instructions from other departments of Purchaser may only be followed after consultation with the Project Representative.

8.4 Supplier shall submit to the Project Representative a list of names of workers that he intends to employ in the work area at Site as well as their specific working hours. The list is to be kept constantly up to date. Changes need to be provided a week prior to them becoming effective. Upon request, Supplier must prove that for all workers the mandatory social insurance coverage as well as all applicable work and residence permits are in place (work- and residence permit, transfer permit or EU-transfer confirmation). For important reasons (e.g. in case of non-compliance with any provision of this Section 8) workers sent by Supplier can be denied access to the Purchaser's premises.

8.5 All items that are moved on to the premises of Purchaser or to a location of a third party are subject to plant inspection. Before delivery and removal a list of all items is to be submitted to the Project Representative for approval and filing. Supplier and its subcontractors have their tools and equipment and assembly equipment to be marked clearly and unalterably beforehand with their name and logo. Rail cars and other means of transport are handled only during normal working hours.



8.6 To the maximum extent permitted by law, there shall be no liability of Purchaser for any loss or damage incurred by Supplier's Representative, sub-contractors, employees or agents on the premises of Purchaser.

8.7 Purchaser is authorized (but not obligated) to receive components shipped by Supplier or its subcontractors to the construction site. Acceptance of such components by Purchaser will be at the risk and expense of Supplier. No inspection of delivered parts will be carried out by Purchaser.

8.8 Even if the Parties agreed that Purchaser shall provide Supplier with machine components (e.g. vacuum) to be incorporated in the Plant, such a provision shall not release Supplier from its responsibility for the Availability and CE compliance of the entire Plant.

## **9. Factory Acceptance, Tests on Completion, R-F-O, Performance Test and Final Acceptance**

### **9.1 Factory Acceptance**

9.1.1 Notwithstanding the requirement of a Final Acceptance, Supplier shall, before delivery of the plant, demonstrate that said is in conformity with the Supply Agreement. For such purpose Supplier shall carry out certain tests with the Plant and give Purchaser sufficient opportunity to inspect the Plant. Unless otherwise specified in the Supply Agreement and/or its Annexes, such tests shall be carried out in accordance with general practice in the appropriate branch of industry concerned.

9.1.2 Supplier shall agree with Purchaser the date on which the Plant will be ready for testing and inspection early enough in order to remedy any defects that might occur *before* the delivery of the Plant without jeopardizing the milestone plan.

9.1.3 The Parties shall take minutes of the Factory Acceptance (the "FA-Report"), which shall be duly signed at the end; any defects and non-conformities recorded in such FA-Report shall be remedied by Supplier as soon as possible; thereafter, Supplier shall issue to Purchaser a notice of conformity.

9.1.4 When Purchaser is satisfied that the Plant has passed the test or inspection referred to in this Section 9.1, Purchaser shall forthwith issue to Supplier a certificate to that effect and release the Plant for dispatch. Supplier shall not deliver the Plant or any part of the Equipment before the Purchaser released the dispatch of the same, otherwise the latter is entitled to reject the delivery.

### **9.2 Commissioning and the Tests on Completion**

9.2.1 Unless otherwise agreed by the Parties, Supplier shall be responsible for (i) the reception and unloading on Site of all Suppliers' Equipment delivered for the purposes of the Supply Agreement; (ii) installation and commissioning of the Plant after delivery; and (ii) testing of the Plant on Completion.

9.2.2 In the first instance Supplier shall test the aggregates and other units, wherever technically possible and appropriate. In case of a positive result, Purchaser shall proceed with the tests of the Plant to determine the compliance of the same with the Supply Agreement, especially with the requirements set forth in Section 3.3 above. Supplier shall remedy any defects and non-conformities, if any, and shall carry out improvements and optimisation measures where appropriate. The Plant shall not be handed over in accordance with Section 9.3, before said is not in compliance with the Supply Agreement.

### **9.3 Ready for Operation ("R-F-O")**

9.3.1 When Commissioning is completed and the results of the Tests on Completion are satisfactory, Supplier shall hand over the Plant to Purchaser, which shall be in good order and safe condition (CE-certified) and Purchaser shall forthwith issue to Supplier a certificate to that effect.

9.3.2 Should above Tests on Completion reveal defects or non-conformities which are still uncured at the date of R-F-O, Purchaser shall make a reservation in the certificate. Notwithstanding Supplier's obligation to cure such defects or non-conformities, R-F-O shall be deemed accomplished, if the Plant is demonstrably safe to operate and only minor deficiencies remain which will not affect the efficiency of the Plant.

9.3.3 At the R-F-O-Date, Supplier shall also hand over the documents mentioned in Section 3.2 to Purchaser. Unless otherwise agreed, such documents shall be provided in triplicate in hard copy and in an electronic version.

9.3.4 R-F-O shall indicate the start of the Performance Test and training of Purchaser's personnel; upon the same time Purchaser shall be entitled to put the Plant into operation and to make use thereof as intended. For the avoidance of doubt, putting into use does not constitute acceptance of the Plant or part thereof.

9.3.5 Between R-F-O and Final Acceptance, the Parties shall test the Availability of the Plant in accordance with the Supply Agreement and/or the Attachments thereto. Purchaser will record the relevant data and analyse the same in accordance with the VDI 3423 (or any other standard defined in the Order); Purchaser will provide Supplier with the results after expiration of the agreed evaluation period.

9.3.6 Should above Performance Test reveal the failure of the Plant to achieve the guaranteed Availability, the Parties may by mutual agreement decide the interruption of the Performance Test in order to grant Supplier the opportunity to carry out improvements and optimisation measures, and, thereafter, to start the Performance Test again. Such interruption(s) shall not have any affect on the agreed Acceptance Date.

9.3.7 The Performance Test shall not be considered passed before the guaranteed Availability is verified and the Plant is completely in conformity with the Supply Agreement.

## **9.4 Final Acceptance**

9.4.1 Final Acceptance requires the successful completion of the Performance Test in accordance with Section 9.3 and full compliance of the Plant with the Supply Agreement. Final Acceptance shall be made in form of a certificate signed by both parties, which shall certify the date upon which the Plant passed all Tests and Milestones as defined in this Section 9.

9.4.2 In case the Plant is demonstrably free from any defects and non-conformities, the Final Acceptance and the issuance of the certificate shall not be denied by Purchaser; otherwise Supplier may notify Purchaser and provide written evidence that all the requirements for the Final Acceptance are met. If Purchaser fails to rebut Supplier's evidence within two weeks, Final Acceptance shall be deemed to be given without any further formality or action.

9.4.3 Unless otherwise specified in the Supply Agreement, Final Acceptance shall have the following consequences: (i) maturity of the Contract Price or any portion thereof; (ii) transfer of title in the Plant to Purchaser; and (iii) start of the warranty period (Section 10.3).

9.4.4 Final Acceptance shall not be construed as a waiver by Purchaser of any of its rights or remedies it may have hereunder or at law in connection with the non-conformity of the Plant, if any.

9.4.5 In case that the Plant is in conformity with the Supply Agreement, but else fails to meet any of the Guaranteed Performance parameters, then, without prejudice to Purchaser's other rights and remedies it may have hereunder or at law, Purchaser shall have the right to: (i) accept and retain the Plant at such reduced Price as set forth in the Purchase Agreement and/or the Attachments thereto; (ii) contract with a third party to enable the Plant to gain Final Acceptance (in such circumstances any costs incurred shall be for Supplier's account, and shall be deducted from any amounts due under the Supply Agreement, or shall otherwise be recoverable from Supplier); or (iii) reject the Plant.

## **9.5 Costs**

Any costs incurred in connection with the performance of the Milestones and tests defined in this Section 9, shall be allocated to either Party in accordance with the Supply Agreement and/or the Attachments thereto. For the lack of a detailed allocation in the Supply Agreement, Supplier shall bear all costs for work and material (including the Work Piece) and, as the case may be, any costs for the delay or repetition of a Test or any other process step (including extra costs for personnel and resources incurred by Purchaser thereby), if such delay or repetition was attributable to Supplier; otherwise, costs and expenses shall be borne by the Party, by which such costs and expenses are actually incurred.

## **9.6 Transfer of Risk**

The risk as to price and performance shall pass to Purchaser upon Final Acceptance of the Plant.

## **10. Warranty and Spare Parts Supply**

### **10.1 General**

Supplier warrants and covenants that the Plant, including all Equipment and sub-components as well as the documentation, is (and so it shall remain during the warranty period) free from defects in design, materials and workmanship, is merchantable, fit for the purpose indicated by Purchaser, and is in compliance with the Specifications set forth in the Supply Agreement and the Attachments thereto.

### **10.2 Remedies**

10.2.1 During the warranty period, Supplier shall, upon notice thereof from Purchaser at any time, promptly repair, replace or otherwise satisfactorily deal with the same in a manner so as to bring the Plant into conformity, all at Supplier's expense and without limiting or affecting Purchaser's other rights or remedies available hereunder or at law. Supplier must respond within a maximum of 8 working hours or such other period as specified in the Purchase Order or any Attachment to a notice of non-conformity issued by Purchaser hereunder, and must, wherever possible effect a repair within a maximum of a further 8 working hours. Notwithstanding the foregoing, Supplier shall use best efforts to remedy any defect or non-conformity of the Plant within 48 hours upon notice thereof.

10.2.2 If the remedy of the defect (or the replacement of the defective part) is not possible within a period of time deemed reasonable for Purchaser, Supplier shall at least develop a work-around (in order to enable Purchaser to use the Plant efficiently). If a work-around is not possible within the time specified by Purchaser, Supplier shall at least provide Purchaser with a temporary solution such as a temporary correction of the defect.

10.2.3 If any defect or non-conformity cannot be remedied within the time scale detailed in Section 10.2.1, or Supplier fails to respond and remedy the defect or non-conformity within a reasonable time, Purchaser may proceed to engage the services of a third party to provide the remedy of the defect or non-conformity (the "Warranty Service"). The same shall apply even without prior notice to Supplier in the event that a defect constitutes or potentially constitutes an operational safety risk or danger of exceptionally high damage, or is required to prevent disruption of Purchaser's production schedule. Any Warranty Service so undertaken shall be at the Supplier's risk and expense, and any costs incurred by Purchaser shall be for the Supplier's account. Should Purchaser exercise its rights under paragraph, the utilisation of a third party services shall not affect or invalidate the Warranty provisions, or relieve Supplier of its obligations to provide the Warranty Service for the remainder of the Warranty Period and Supplier shall be responsible for meeting its obligations thereafter. Should the Buyer exercise its rights under this Section 10.2.3, this shall be without prejudice to any other rights which Purchaser may have against the Seller in respect of Supplier failing to remedy such defect or damage.

10.2.4 If the remedy of a defect or non-conformity is not technically possible or economically unfeasible, or if Supplier fails to respond and remedy the defect or non-conformity within a reasonable time, Purchaser may at its sole discretion either (i) terminate the Supply Agreement without liability to Supplier; (ii) demand an appropriate reduction in price; or (iii) request the replacement of the defective Plant with a new Plant by Supplier.

10.2.5 All services under the provision of this Warranty (including but not limited to the replacement parts and transportation of the same, man-power, travelling and accommodation as well as the discovery of the defect) shall be provided free of all charges, and shall be carried out on the Site. Equipment shall not be removed from the Site for the provision of Warranty Services without the permission of Purchaser.

### **10.3 Warranty Period**

10.3.1 The Warranty Period shall be 24 months upon Final Acceptance (without any work-shift restrictions). Regarding any defect or non-conformity discovered during the Warranty Period there shall apply a reputable presumption that such defect or non-conformity has already been existing at the time

when the risk in the Plant passes to Purchaser.

10.3.3 With respect to corrected and/or substituted parts for the Plant, the Warranty Period shall automatically reset upon correction or replacement, as applicable. With respect to the Equipment or parts and components thereof that cannot remain in operation during the inspection of a defect and/or its correction, the Warranty Period shall be extended for the duration of such interruption.

#### **10.4 Examination and Notice of Non-Conformity**

Any statutory obligation of Purchaser with respect to the examination of the delivery and the obligation to notify defects shall be hereby precluded; particularly § 377 of the Austrian Commercial Code (UGB) shall not apply.

#### **10.5 Spare Parts Supply**

10.5.1 Supply of spare parts is of the essence. Therefore, Supplier grants to Purchaser the option to purchase spare parts for the period of ten (10) years after the Acceptance Date. Supplier represents that the price charged for the spare parts is the lowest price charged by Supplier to other customers. After such period, Supplier may discontinue availability of spare parts by providing Purchaser twelve (12) months prior written notice; provided that at Purchaser's option, Supplier shall sell to purchaser sufficient quantities of spare parts as Purchaser deems necessary.

10.5.2 If Supplier fails to comply with the requirements set forth in the precedent paragraph, Supplier shall grant to Purchaser a royalty-free, non-exclusive, worldwide license to make, have made, use or otherwise dispose of said spare parts, and shall furnish purchaser all necessary documentation, specifications, drawings and other data, including its sources for raw materials necessary to make such spare parts and/or replacements.

### **11. Penalty for Insufficient Availability**

11.1 Without prejudice to any of the Purchaser's other rights and remedies, Purchaser shall be entitled to claim from Supplier a Penalty in case of Underperformance of the Plant regarding the Guaranteed Availability in accordance with the following terms:

11.2 Should the Performance Test carried out in accordance with Section 9.3.6 reveal the failure of the Plant to achieve the Guaranteed Availability, Supplier shall grant to Purchaser an extension of the Warranty Period in the amount of one additional month per each percentage point for which the Availability was actually undershot.

11.3 Should the Plant fail to achieve the guaranteed Availability during the first year of the Warranty Period, Supplier shall pay to Purchaser a Penalty amounting to such percentage of the Contract Price corresponding to the percentage point which the Availability was actually undershot.<sup>1</sup>

11.4 The foregoing provision under Section 11.3 shall apply to each year of the Warranty Period and – if the Parties agreed on a certain Durability of the Plant – shall be extended to any further year of such Durability period. The Penalty shall accrue irrespective of the existence and extent of actual damages.

### **12. Liability and Insurance**

#### **12.1 Liability**

Except as expressly otherwise provided herein to the contrary, Supplier's liability shall be subject to the applicable law. Negligence by subcontractors or sub-suppliers shall be attributed to Supplier in the same way as Suppliers own negligence.

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<sup>1</sup> For illustration purposes:

Purchase Price: € 1 Mio; Guaranteed Availability: 96 %; Actual Availability: 94 %;  
Penalty: 2 per cent of € 1 Mio = € 20,000.00

## 12.2 Insurance

12.2.1 Supplier shall take out and maintain insurance adequate to cover the risks set out in this Clause 12 and its liabilities under the Supply Agreement and in any event, shall take out and maintain:

- (i) First class marine insurance institute to cover 110% (one hundred and ten percent) of the value of the Equipment shipped to and intended to become part of the Plant on a warehouse to warehouse basis; the insurance policy will cover all risks of loss or damages to said cargo, including war, hijacking, explosion etc.;
- (ii) Comprehensive or Commercial General Liability Insurance, in an amount not less than five million Euros (€5,000,000) each occurrence combined single limit for bodily injury and property damage for products / completed operations as otherwise specified in the Order and/or in any Attachment;
- (iii) All Risk Installation Floater Property Insurance in an amount equal to the replacement cost of the Plant to be installed, commissioned and tested by Supplier in accordance with the Supply Agreement insuring against all risks of direct physical loss or damage to materials, equipment, machinery and other property incorporated into or intended to become permanent part of the Plant; and
- (iv) Environmental Insurance.

12.2.2 All insurances shall be effected with an insurer and in terms to be approved by Purchaser (such approval not to be unreasonably withheld) and Supplier shall from time to time, when so required by Purchaser, produce the policy and receipts for the premiums or other satisfactory evidence of insurance cover. Supplier shall promptly notify Purchaser of any alteration to the terms of the policy or in the amounts for which insurance is provided. The policies and certificate(s) of insurance respectively must designate Purchaser as "additional insured" and contain a waiver of subrogation in favour of Purchaser, its agents, sub-contractors and employees (except for intentional misconduct by the latter).

12.2.3 Notwithstanding the foregoing, Purchaser shall be entitled to prohibit Supplier to carry out any work at the Purchaser's Site without liability to Supplier, if Supplier fails to comply with its obligations under Section 12.2.

## 13. Right of Inspection

### 13.1 Scope

13.1.1 Supplier authorises Purchaser to inspect Supplier's work during the performance of the Supply Agreement. Any such Inspection by Purchaser will not limit Supplier's responsibility under the Supply Agreement, nor relieve Supplier of any of its obligations hereunder.

13.1.2 Purchaser's right of Inspection includes, but is not limited to (i) the review and release approval of the design drawings; (ii) access to Supplier's operating facilities and plants; (iii) the inspection of Supplier's records for planning, design, quality assurance and test results (including the inspection of manuals and documentation); (iv) the preparation of copies; (v) the interviewing of staff; and (vi) the taking of samples and models of the products.

### 13.2 Exercise of Inspections

The Inspection by Purchaser may be carried out by Purchaser, its contractors, staff or any third party authorized by Purchaser. Purchaser shall be entitled to carry out such Inspection during normal working hours by notifying Supplier in advance. The inspection shall also include the subcontractors and sub-suppliers mentioned under Section 2.2; Supplier shall ensure that such Inspections can be carried out at the sub-suppliers production plants as well. If Purchaser authorizes any third parties with the Inspection, said shall be bound by the obligation of confidentiality (Section 15).

## 14. Patents and other rights

14.1 Supplier shall fully indemnify Purchaser against all actions, claims, demands, proceedings, damages, costs, charges and expenses arising from or incurred by reason of any infringement or alleged infringement of any Intellectual Property Rights by the use or possession of the Plant and any product which is a tangible output of the Services subject to the following:

- i. the Purchaser shall promptly notify Supplier in writing of any alleged infringement of which they have notice;
- ii. Purchaser must make no admissions without the Supplier's consent;
- iii. Purchaser, at Supplier's request and expense shall allow Supplier to conduct and/or settle all negotiations and litigation, and give Supplier all reasonable assistance. The costs incurred or recovered in such negotiations or litigation shall be for the Supplier's account.

14.2 If at any time any allegation of infringement of any Intellectual Property Rights is made in respect of the Plant and/or Services or in the Supplier's reasonable opinion is likely to be made, the Supplier shall, at its own expense, modify or replace the Plant and/or Services or any part(s) thereof, without detracting from or degrading the overall performance of the Plant and/or any product which is a tangible output of the Services, Supplier making good to Purchaser any loss of use during modification or replacement, so as to avoid the infringement. The provisions of Section 5.1 shall then take effect as if Purchaser had requested an alteration to the Plant save that Supplier shall not be entitled to any increase to the Contract Price.

14.3 Where development forms part of the Supply Agreement Purchaser will own any Intellectual Property Rights arising from such development and in the case of rights which can be prospectively assigned, Supplier hereby assigns those rights to Purchaser. In the case of other rights Supplier agrees to assign them to Purchaser as and when they arise and to do all acts and execute all documents reasonably required by Purchaser at the Purchaser's expense to perfect its title to those rights or to enable their registration anywhere in the world.

14.4 Supplier shall treat all information provided by Purchaser as confidential and use such information only for purposes of performing the Supply Agreement or meeting its obligations under the Supply Agreement. Where drawings or other data are issued by Purchaser or are prepared for Purchaser by Supplier, Supplier shall exercise proper custody and control and return/dispose of such in accordance with the purchaser's instructions. For the avoidance of doubt, nothing contained herein or in any Supply Agreement formed hereunder is intended to confer on Supplier any Intellectual Property Rights in the drawings or data, and their creation constitutes development as set out in Clause 14.3.

## **15. Confidentiality**

15.1 Unless more extensively provided for in a Non-Disclosure-Agreement entered into by and between the Parties separately, each Party shall keep in strict confidence all Confidential Information obtained from the other Party in the course of performance of the Supply Agreement. Each Party shall use Confidential Information of the other party only to the extent necessary to fulfil its obligations under the Purchase Agreement.

15.2 For the purpose of this Agreement, "Confidential Information" shall mean any and all non-public technical, financial or commercial information, whether in written, oral or other tangible or intangible form, that a disclosing party designates as being confidential or which, from all the relevant circumstances should reasonably be assumed by a receiving party to be confidential to the other party.

15.3 The obligations contained in this Section shall survive any termination or expiration of the respective Supply Agreement and shall cease to be binding after 5 years from the date of disclosure of Confidential Information.

## **16. Applicable Law and Dispute Resolution**

### **16.1 Applicable Law**

The Terms & Conditions set forth herein and any Supply Agreement concluded hereunder shall be subject to substantive Korean law to the exclusion of the provisions of the United Nations Convention on Contracts for the International Sale of Goods.

## **16.2 Dispute Resolution**

Any disputes arising out of or in connection with any Supply Agreement concluded hereunder (including any issue regarding its existence or validity) shall be finally settled by arbitration in Seoul in accordance with the International Arbitration Rules of the Korean Commercial Arbitration Board. The number of arbitrators shall be three. The seat, or legal place, of arbitral proceedings shall be Seoul. The language to be used in the arbitral proceedings shall be English.

## **17. Final Clauses**

### **17.1 Miscellaneous**

17.1.1 The Order and the Attachments, exhibits or schedules hereto, all related purchase orders and any items incorporated herein or therein by reference, contain the entire agreement between Supplier and Purchaser.

17.1.2 Any amendment of the Purchase Agreement formed hereunder shall be made by an instrument in writing bearing the legal signatures of the Parties or their respective successors. This applies also to any waiver of the written form requirement. Wherever in this contract the word "agreed" is used, it shall be read as meaning agreed in writing or confirmed in writing.

17.1.3 Except where specifically stated to the contrary, all remedies available to a Party for breach of the Supply Agreement, or at law, are cumulative and may be exercised concurrently or separately, and the exercise of any one remedy shall not be deemed an election of such remedy to the exclusion of other remedies.

### **17.2 Project Representative**

17.2.1 Each Party will nominate within thirty (30) days from the date of closing of the Supply Agreement a Project Representative and a substitute. Nominations of each Party must be notified to the other Party in writing. All correspondence shall be addressed to the Project Representative and all communications and documents including working documents shall be in English and/or other languages, as may be agreed upon between the Parties.

17.2.2 The Project Representative must be fluent in English and/or other languages, as may be agreed upon between the Parties. The Project Representative shall be authorised during the period up to Final Acceptance to take decisions on behalf of the respective Party with regard to the performance of the Supply Agreement; he shall have the authority to take, on behalf of the respective Party, all decisions of a technical nature regarding the activities to be performed on the Site.

### **17.3 Severability**

17.3.1 If any provision herein (or in the Supply Agreement formed hereunder) is held to be invalid or unenforceable, such provision shall be construed in accordance with Section 17.3.2, if possible, or otherwise deemed ineffective and the remaining provisions shall not be affected.

17.3.2 Such invalid or unenforceable provision shall be replaced by provisions that best reflect the content and meaning of the valid provisions hereof and the intention of the Parties. The same shall apply, by analogy, to any gap in the Supply Agreement.

### **17.3 Waiver**

No waiver by Purchaser of any breach of any of the terms or conditions of the Supply Agreement shall be construed as a waiver of any subsequent breach whether of the same or of any other term or condition thereof. No failure or delay on the part of Purchaser to exercise any power, right or remedy under the Supply Agreement shall operate as a waiver thereof nor shall any single or partial exercise by Purchaser of any power, right or remedy preclude any other or further exercise thereof or the exercise of any other power, right or remedy.