

## NEC3 Supply Contract (SC3)

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

**and**  
**(Reg No.**

**for The Supply, Delivery and Offloading of Screened River**  
**Sand at ERI Construction Services P20A Kusile Power**  
**Station on as and when needed basis for a period of 2**  
**years**

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**Contract No:**

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THE SUPPLY, DELIVERY AND OFFLOADING OF SCREENED RIVER SAND AT ERI CONSTRUCTION SERVICES P20 KUSILE POWER STATION ON  
AS AND WHEN NEEDED BASIS FOR A PERIOD OF 2YEARS

**Documentation prepared  
by:**

**Eskom RoteK Industries SOC Limited Procurement  
Heritage Office Park  
Lower Germiston Road  
Rosherville**

## Part C1: Agreements & Contract Data

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## C1.1 Form of Offer & Acceptance

### Offer

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

### **The Supply, Delivery and Offloading of Screened River Sand at ERI Construction Services P20A Kusile Power Station on as and when needed basis for a period of 2 years**

The tenderer, identified in the Offer signature block, has

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

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

	The offered total of the Prices exclusive of VAT is	
	Value Added Tax @ 15% is	
	The offered total of the amount due inclusive of VAT is <sup>1</sup>	

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

Signature(s)

Name(s)

Capacity

**For the  
tenderer:**

(Insert name and address of organisation)

Name &  
signature of  
witness

Date

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

## Acceptance

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

The terms of the contract, are contained in:

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

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

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

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

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

Signature(s)

Name(s)

Capacity

**for the  
Purchaser**

**ESKOM ROTTEK INDUSTRIES SOC LIMITED**

*(Insert name and address of organisation)*

Name &  
signature of  
witness

Date

Note: If a tenderer wishes to submit alternative tenders, use another copy of this Form of Offer and Acceptance.

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

Note:

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

No.	Subject	Details
1		
2		
3		
4		

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

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

### For the tenderer:


### For the Purchaser

Signature	_____	_____
Name	_____	_____
Capacity	_____	_____
On behalf of	_____	_____
Name & signature of witness	_____	<b>ESKOM ROTEK INDUSTRIES SOC LIMITED</b>
Date	_____	_____

## C1.2 SC3 Contract Data

### Part one - Data provided by the *Purchaser*

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

Clause	Statement	Data
1	<b>General</b>	
	The <i>conditions of contract</i> are the core clauses and the clauses for Options and secondary Options	<p>X1: Price Adjustment for inflation</p> <p>X2: Changes in the law</p> <p>X7: Delay damages</p> <p>Z: <i>Additional conditions of contract</i></p>
	 of the NEC3 Supply Contract (April 2013)	
10.1	The <i>Purchaser</i> is (name):	Eskom Rotek Industries SOC Ltd (Reg no: 1990/006897/30), a state-owned company incorporated in terms of the company laws of the Republic of South Africa
	Address	Roshland Office Park Lower Germiston Road Rosherville
	Tel No.	011 629 8000
10.1	The <i>Supply Manager</i> is (name):	Stephen
	Address	Roshland Office Park Lower Germiston Road Rosherville
	Tel	013 699 7700
	e-mail	<a href="mailto:BesterSt@eskom.co.za">BesterSt@eskom.co.za</a>
11.2(13)	The <i>goods</i> are	Screened River Sand
11.2(13)	The <i>services</i> are	The Supply, Delivery and Offloading of Screened River Sand at ERI Construction Services P20A Kusile Power Station on as and when needed basis for a period of 2 years
11.2(14)	The following matters will be included in the Risk Register	<ul style="list-style-type: none"> <li>Late Deliveries</li> <li>Screened River Sand not to specification</li> </ul>

11.2(15)	The Supply Requirements as part of the Goods Information is in	<b>Annexure A to this Contract Data</b>	
12.2	The <i>law of the contract</i> is the law of	<b>the Republic of South Africa</b>	
13.1	The <i>language of this contract</i> is	<b>English</b>	
13.3	The <i>period for reply</i> is	<b>5 to 7 working days</b>	
2	<b>The Supplier's main responsibilities</b>	<b>Data required by this section of the core clauses is provided by the <i>Supplier</i> in Part 2 and terms in italics used in this section are identified elsewhere in this Contract Data.</b>	
3	<b>Time</b>		
30.1	The <i>starting date</i> is.	<b>After the contract award</b>	
30.1	The Supply Period is	<b>24 months (as and when required basis)</b>	
30.1	The <i>delivery date</i> of the goods and services is:	<b>Goods and services</b>	<b><i>delivery date</i></b>
	<b>As and when required</b>	<b>As per the draw down Purchase Order (PO)</b>	<b>As per the draw down Purchase Order (PO)</b>
30.2	The <i>Supplier</i> does not bring the goods to the Delivery Place more than one week before the Delivery Date.		
31.1	The <i>Supplier</i> is to submit a first programme for acceptance within	<b>Receiving the draw down Purchase Order</b>	
32.2	The <i>Supplier</i> submits revised delivery schedule at intervals no longer than	<b>weekly</b>	
4	<b>Testing and defects</b>		
40.1	The <i>Supplier</i> submits the following tests and inspections	<b>TEST CERTIFICATES FOR SCREENED RIVER SAND AS PER SANS 5832,SANS5833,SANS5850-1,SANS202 and SANSS6243</b>	
40.2	The <i>Supplier</i> will provide; records, datasheets, materials, facilities and samples for all tests and inspections	<b>TEST CERTIFICATES FOR SCREENED RIVER SAND AS PER SANS 5832,SANS5833,SANS5850-1,SANS202 and SANSS6243</b>	
40.3	The notification period for test and inspections	<b><i>Supplier</i> will notify the <i>Supply Manager</i> five days after contract starting date</b>	
40.4	Correction of a defect	<b>Defects will be corrected by the <i>Supplier</i> and Clauses 40.1 and 40.2 will apply</b>	
40.6	The costs for the correction of defects will be	<b>For the <i>Supplier's</i> account – inclusive of delivery and off-loading costs</b>	
41.1	The <i>Supplier</i> does not bring the goods to the Delivery Place	<b>Before inspections and testing.</b>	



42	The <i>defects date</i> is	<b>52 weeks after delivery of goods and services</b>
43.2	The <i>defect correction period</i> is	<b>2 weeks after delivery of goods and services</b>
43.2	The <i>defects access period</i> is	<b>1 Week</b>
45.1	The costs for correcting defects not corrected by the <i>Supplier</i>	<b>Will be for the <i>Supplier's</i> account – inclusive of delivery and off-loading costs</b>
<b>5</b>	<b>Payment</b>	
50.1	The <i>assessment interval</i> is	<b>Between the 25<sup>th</sup> day of each successive month</b>
51.1	The <i>currency of this contract</i> is the	<b>South African Rand</b>
<b>51.2</b>	<b>The period within which payments are made is</b>	<b>30 Days</b>
51.4	The <i>interest rate</i> is	<p>the publicly quoted prime rate of interest (calculated on a 365 day year) charged from time to time by the Standard Bank of South Africa Limited (as certified, in the event of any dispute, by any manager of such bank, whose appointment it shall not be necessary to prove) for amounts due in Rands and</p> <p>(ii) the LIBOR rate applicable at the time for amounts due in other currencies. LIBOR is the 6 month London Interbank Offered Rate quoted under the caption “Money Rates” in The Wall Street Journal for the applicable currency or if no rate is quoted for the currency in question then the rate for United States Dollars, and if no such rate appears in The Wall Street Journal then the rate as quoted by the Reuters Monitor Money Rates Service (or such service as may replace the Reuters Monitor Money Rates Service) on the due date for the payment in question, adjusted <i>mutatis mutandis</i> every 6 months thereafter and as certified, in the event of any dispute, by any manager employed in the foreign exchange department of The Standard Bank of South Africa Limited, whose appointment it shall not be necessary to prove.</p>
<b>6</b>	<b>Compensation events</b>	<b>There is no reference to Contract Data in this section of the core clauses and terms in italics used in this section are identified elsewhere in this Contract Data.</b>
<b>7</b>	<b>Title</b>	<b>There is no reference to Contract Data in this section of the core clauses and terms in italics used in this section are identified elsewhere in this Contract Data.</b>
<b>8</b>	<b>Risks, liabilities, indemnities and insurance</b>	

80.1	These are additional <i>Purchaser's</i> risks	<b>Not Applicable</b>
84.1	The <i>Supplier</i> provides these insurances from the Insurance Table	<b>See notes about <i>Purchaser</i> provided insurance in Annexure B to this Contract Data</b>
	1. Insurance against	<b>Loss of or damage to the <i>goods</i>, plant and materials.</b>
	2.The deductibles are	<b>See notes in data for clause 88.2 below and Annexure B</b>
84.1	The <i>Supplier</i> provides these additional insurances	<b>See notes in Annexure B</b>
84.2	The minimum limit of indemnity for insurance in respect of loss of or damage to property (except the <i>goods</i> , plant and materials and equipment) and liability for bodily injury to or death of a person (not an employee of the <i>Supplier</i> ) caused by activity in connection with this contract for any one event is:	<p><b>Whatever the <i>Supplier</i> deems necessary in addition to that provided by the <i>Purchaser</i> for any one event with cross liability so that the insurance applies to the Parties separately.</b></p> <p><b>However, if the <i>Supplier</i> is exposed to damage to the <i>Purchaser's</i> property the cover limit amount is not less than</b></p> <ul style="list-style-type: none"> <li>• <b>R15 million (fifteen million Rand) for exposure to Generation Division property.</b></li> <li>• <b>R7.5 million (seven million five hundred thousand Rand) for exposure to Transmission Division property and.</b></li> <li>• <b>R1 million (one million Rand) for exposure to Distribution Division and all other <i>Purchaser's</i> property</b></li> </ul> <p><b>for any one occurrence or series of occurrences arising out of one event but unlimited during the period of insurance.</b></p>
84.2	The minimum limit of indemnity for insurance in respect of death of or bodily injury to employees of the <i>Supplier</i> arising out of and in the course of their employment in connection with this contract for any one event is:	<b>As prescribed by the Compensation for Occupational Injuries and Diseases Act No. 130 of 1993 and the <i>Contractor's</i> common law liability for people falling outside the scope of the Act with a limit of Indemnity of not less than R500 000 (five hundred thousand Rand).</b>
88.1	The <i>Supplier's</i> liability to the <i>Purchaser</i> for indirect or consequential loss, including loss of profit, revenue and goodwill is limited to	<b>(Zero Rand)</b>
88.2	For any one event, the <i>Supplier's</i> liability to the <i>Purchaser</i> for loss of or damage to the <i>Purchaser's</i> property is limited to	<p><b>(1) for the <i>Purchaser's</i> existing and surrounding property in the care, custody and control of the <i>Supplier</i> the amount of the deductible (first amount payable) relevant to the event described in the "Format A" / "Format B" / "Format Dx" insurance policy available on</b></p> <p><b><a href="http://www.eskom.co.za/Tenders/InsurancePoliciesProcedures/Pages/EIMS_Policies_">http://www.eskom.co.za/Tenders/InsurancePoliciesProcedures/Pages/EIMS_Policies_</a></b></p>

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and

**(2) for all other existing *Purchaser's* property, the highest applicable deductible (first amount payable) namely:**

- R15 million (fifteen million Rand) for Generation Division property.
- R7.5 million (seven million five hundred thousand Rand) for Transmission Division property and;
- R1 million (one million Rand) for Distribution Division and all other *Purchaser's* property

See notes in Annexure B

<b>9</b>	<b>Termination and dispute resolution</b>	
94.1	The <i>Adjudicator</i> is	The person selected from the ICE-SA Division (or its successor body) of the South African Institution of Civil Engineering Panel of Adjudicators by the Party intending to refer a dispute to him. (see <a href="http://www.ice-sa.org.za">www.ice-sa.org.za</a> ). If the Parties do not agree on an Adjudicator the Adjudicator will be appointed by the Arbitration Foundation of Southern Africa (AFSA).
94.2(3)	The <i>Adjudicator nominating body</i> is:	the Chairman of ICE-SA, a Division of the South African Institution of Civil Engineering, or its successor body (See <a href="http://www.ice-sa.org.za">www.ice-sa.org.za</a> )
94.4(2)	The <i>tribunal</i> is:	Arbitration
94.4(5)	The <i>arbitration procedure</i> is	the latest edition of Rules for the Conduct of Arbitrations published by The Association of Arbitrators (Southern Africa) or its successor body.
94.4(5)	The place where arbitration is to be held is	South Africa
	The person or organisation who will choose an arbitrator	
	- if the Parties cannot agree a choice or	the Chairman for the time being or his nominee
	- if the arbitration procedure does not state who selects an arbitrator, is	of the Association of Arbitrators (Southern Africa) or its successor body.
<b>10</b>	<b>Data for Option clauses</b>	
<b>X1</b>	Price Adjustment for inflation	
X1.1	The <i>base date</i> for indices is	
	The proportions used to calculate the Price Adjustment Factor are:	As per CPA table spreadsheet attached

<b>X2</b>	Changes in the Law		
<b>X2.1</b>	A Change in the law in	<b>South Africa, this is a compensation event if the change happens after the Contract Date</b>	
<b>X7</b>	Delay damages		
<b>X7.1</b>	Delay damages for Delivery are	<b>Delivery of</b>	<b>amount per day</b>
		<b>Per Purchase Order (PO)</b>	<b>R 5000.00 – up to a maximum of <u>10%</u> of the PO value</b>
<b>Z</b>	<b>The <i>additional conditions of contract</i> are</b>	<b>Z1 to Z12 always apply for Eskom</b>	

## **Z1 Cession delegation and assignment**

- Z1.1 The *Supplier* does not cede, delegate or assign any of its rights or obligations to any person without the written consent of the *Purchaser*.
- Z1.2 Notwithstanding the above, the *Purchaser* may on written notice to the *Supplier* cede and delegate its rights and obligations under this contract to any of its subsidiaries or any of its present divisions or operations which may be converted into separate legal entities as a result of the restructuring of the Electricity Supply Industry.

## **Z2 Joint ventures**

- Z2.1 If the *Supplier* constitutes a joint venture, consortium or other unincorporated grouping of two or more persons or organisations then these persons or organisations are deemed to be jointly and severally liable to the *Purchaser* for the performance of this contract.
- Z2.2 Unless already notified to the *Purchaser*, the persons or organisations notify the *Supply Manager* within two weeks of the Contract Date of the key person who has the authority to bind the *Supplier* on their behalf.
- Z2.3 The *Supplier* does not alter the composition of the joint venture, consortium or other unincorporated grouping of two or more persons without the consent of the *Purchaser* having been given to the *Supplier* in writing.

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

- Z3.1 Where a change in the *Supplier's* legal status, ownership or any other change to his business composition or business dealings results in a change to the *Supplier's* B-BBEE status, the *Supplier* notifies the *Purchaser* within seven days of the change.
- Z3.2 The *Supplier* is required to submit an updated verification certificate and necessary supporting documentation confirming the change in his B-BBEE status to the *Supply Manager* within thirty days of the notification or as otherwise instructed by the *Supply Manager*.
- Z3.3 Where, as a result, the *Supplier's* B-BBEE status has decreased since the Contract Date the *Purchaser* may either re-negotiate this contract or alternatively, terminate the *Supplier's* obligation to Provide the Goods and Services.

- Z3.4 Failure by the *Supplier* to notify the *Purchaser* of a change in its B-BBEE status may constitute a reason for termination. If the *Purchaser* terminates in terms of this clause, the procedures on termination are P1, P2 and P3 as stated in clause 92, and the amount due is A1 and A3 as stated in clause 93.

## **Z4 Confidentiality**

- Z4.1 The *Supplier* does not disclose or make any information arising from or in connection with this contract available to Others. This undertaking does not, however, apply to information which at the time of disclosure or thereafter, without default on the part of the *Supplier*, enters the public domain or to information which was already in the possession of the *Supplier* at the time of disclosure (evidenced by written records in existence at that time). Should the *Supplier* disclose information to Others in terms of clause 23.1, the *Supplier* ensures that the provisions of this clause are complied with by the recipient.
- Z4.2 If the *Supplier* is uncertain about whether any such information is confidential, it is to be regarded as such until notified otherwise by the *Supply Manager*.
- Z4.3 In the event that the *Supplier* is, at any time, required by law to disclose any such information which is required to be kept confidential, the *Supplier*, to the extent permitted by law prior to disclosure, notifies the *Purchaser* so that an appropriate protection order and/or any other action can be taken if possible, prior to any disclosure. In the event that such protective order is not, or cannot, be obtained, then the *Supplier* may disclose that portion of the information which it is required to be disclosed by law and uses reasonable efforts to obtain assurances that confidential treatment will be afforded to the information so disclosed.
- Z4.4 The taking of images (whether photographs, video footage or otherwise) of the *goods* or any portion thereof, in the course of Providing the Goods and Services and after Delivery, requires the prior written consent of the *Supply Manager*. All rights in and to all such images vests exclusively in the *Purchaser*.
- Z4.5 The *Supplier* ensures that all his subcontractors abide by the undertakings in this clause.

## **Z5 Waiver and estoppel: Add to core clause 12.3:**

- Z5.1 Any extension, concession, waiver or relaxation of any action stated in this contract by the Parties, the *Supply Manager* or the *Adjudicator* does not constitute a waiver of rights and does not give rise to an estoppel unless the Parties agree otherwise and confirm such agreement in writing.

## **Z6 Health, safety and the environment: Add to core clause 25.4**

- Z6.1 The *Supplier* undertakes to take all reasonable precautions to maintain the health and safety of persons in and about the provision of the *goods* and execution of the *services*.

Without limitation the *Supplier*:

- warrants that the total of the Prices as at the Contract Date includes a sufficient amount for proper compliance with all applicable health & safety laws and regulations and the health and safety rules, guidelines and procedures provided for in this contract and generally for the proper maintenance of health & safety in and about the execution of supply and
- undertakes, in and about the execution of the supply, to comply with all applicable health & safety laws and regulations and rules, guidelines and procedures otherwise provided for under this contract and ensures that his Subcontractors, employees and others under the

*Supplier's* direction and control, likewise observe and comply with the foregoing.

- Z6.2 The *Supplier*, in and about the execution of the supply, complies with all applicable environmental laws and regulations and rules, guidelines and procedures otherwise provided for under this contract and ensures that his Subcontractors, employees and others under the *Supplier's* direction and control, likewise observe and comply with the foregoing.

## **Z7 Provision of a Tax Invoice and interest. Add to core clause 51**

- Z7.1 Within one week of receiving a payment certificate from the *Supply Manager* in terms of core clause 51.1, the *Supplier* provides the *Purchaser* with a tax invoice in accordance with the *Purchaser's* procedures stated in the Goods Information, showing the amount due for payment equal to that stated in the payment certificate.
- Z7.2 If the *Supplier* does not provide a tax invoice in the form and by the time required by this contract, the time by when the *Purchaser* is to make a payment is extended by a period equal in time to the delayed submission of the correct tax invoice. Interest due by the *Purchaser* in terms of core clause 51.2 is then calculated from the delayed date by when payment is to be made.
- Z7.3 The *Supplier* (if registered in South Africa in terms of the companies Act) is required to comply with the requirements of the Value Added Tax Act, no 89 of 1991 (as amended) and to include the *Purchaser's* VAT number 4740101508 on each invoice he submits for payment.

## **Z8 Notifying compensation events**

- Z8.1 Delete from the last sentence in core clause 61.3 the words, "unless the event arises from the *Supply Manager* giving an instruction, changing an earlier decision or correcting an assumption".

## **Z9 Purchaser's limitation of liability**

- Z9.1 The *Purchaser's* liability to the *Supplier* for the *Supplier's* indirect or consequential loss is limited to R0.00 (zero Rand)
- Z9.2 The *Supplier's* entitlement under the indemnity in 83.1 is provided for in 60.1(12) and the *Purchaser's* liability under the indemnity is limited.

## **Z10 Termination: Add to core clause 91.1, at the second main bullet point, fourth sub-bullet point, after the words "against it":**

- Z10.1 or had a business rescue order granted against it.

## **Z11 Addition to secondary Option X7 Delay damages (if applicable in this contract)**

- Z11.1 If the amount due for the *Supplier's* payment of delay damages reaches the limits stated in this Contract Data for Option X7, the *Purchaser* may terminate the *Supplier's* obligation to Provide the Goods and Services using the same procedures and payment on termination as those applied for reasons R1 to R15 or R18 stated in the Termination Table.

## **Z12 Ethics**



**For the purposes of this Z-clause, the following definitions apply:**

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

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

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

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

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

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

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

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

- Z 12.1 A Committing Party may not take any Prohibited Action during the course of the procurement of this contract or in execution thereof.
- Z 12.2 The Purchaser may terminate the Supplier's obligation to Provide the Goods and Services if a Committing Party has taken such Prohibited Action and the Supplier did not take timely and appropriate action to prevent or remedy the situation, without limiting any other rights or remedies the Purchaser has. It is not required that the Committing Party had to have been found guilty, in court or in any other similar process, of such Prohibited Action before the Purchaser can terminate the Supplier's obligation to Provide the Goods and Services for this reason.
- Z 12.3 If the Purchaser terminates the Supplier's obligation to Provide the Goods and Services for this reason, the procedures and amounts due on termination are respectively P1, P2 and P3, and A1 and A3.
- Z 12.4 A Committing Party co-operates fully with any investigation pursuant to alleged Prohibited Action. Where the Purchaser does not have a contractual bond with the Committing Party, the Supplier ensures that the Committing Party co-operates fully with an investigation.

## Annexure A: Supply Requirements

### The Supply Requirements for this contract are based on the use of INCOTERMS:

The *Supplier* supplies the *goods* in accordance with INCOTERMS 2010<sup>2</sup> as follows:

Group	Category	Term	Delivery Place
D	arrival	DCI – Delivery Costs Included	ERI Construction Services P20A Kusile Power Station Project Site

The Parties obligations described in Incoterms for the category and term selected are now incorporated into this contract as part of the Supply Requirements and hence the Goods Information.

The obligations of seller and buyer for the selected Incoterm determine each Party's costs, risks and insurance requirements incidental to the supply and transport of the *goods* from *Supplier* to *Purchaser*.

For each of the thirteen terms, Incoterms set out obligations of the seller (the *Supplier*) in ten paragraphs identified as A1 to A10 and the corresponding obligations of the buyer (the *Purchaser*) in paragraphs B1 to B10. These obligations cover the following subjects:

A	The <i>Supplier's</i> obligations	B	The <i>Purchaser's</i> obligations
A1	Provision of goods in conformity with contract	B1	Payment of the price
A2	Licences, authorisations and formalities	B2	Licences, authorisations and formalities
A3	Contracts of carriage and insurance	B3	Contracts of carriage and insurance
A4	Delivery	B4	Taking delivery
A5	Transfer of risks	B5	Transfer of risks
A6	Division of costs	B6	Division of costs
A7	Notice to the buyer	B7	Notice to the seller
A8	Proof of delivery, transport document or equivalent electronic message	B8	Proof of delivery, transport document or equivalent electronic message
A9	Checking - packing – marking	B9	Inspection of goods
A10	Other obligations	B10	Other obligations

All other information NOT pertinent to the above is given in the balance of the Goods Information

<sup>2</sup> International Chamber of Commerce, Incoterms 2010, Paris, January 2011



## The Supply Requirements for this contract are as follows:

[Use these when INCOTERMS do not apply].

<b>1. The requirements for the supply are</b>	<i>Supplier</i> supplies, Screed River Sand - Grain particle size between 1,5 mm to 3 mm	
<b>2. The requirements for transport are</b>	The Supplier is responsible for transporting the goods to site. The Supplier takes responsibility of the goods while in transit i.e. insurances etc.	
<b>3. The delivery place is</b>	ERI Construction Services P20A Kusile Power Station Project Site	
<b>4. Actions of the Parties during supply</b>	<b>Action</b>	<b>Party which does it</b>
	Giving notice of Delivery	Supplier
	Checking packing and marking before dispatch	Supplier/ Employer/ Purchaser
	Contracting for transport	Supplier
	Pay costs of transport	Supplier
	Arrange access to delivery place	Purchaser
	Loading the <i>goods</i>	Supplier
	Off-loading the <i>goods</i>	Supplier
<b>5. Information to be provided by the Supplier</b>	<b>Title of document</b>	
	Packing lists for cases and their contents	
	Copy of invoice for the <i>goods</i>	
	Delivery Note	

All other information NOT pertinent to the above is given in the balance of the Goods Information

## **Annexure B: Insurance provided by the Purchaser**

*These notes are provided as guidance to tendering Suppliers and the Supplier about the insurance provided by the Purchaser. These notes are not part of this contract. The Supplier must obtain its own advice.*

### **Transit insurance of goods originating from outside the borders of the Republic of South Africa**

For the purpose of supply contracts, the only insurance provided by Eskom (the *Purchaser*) is transit shipment cover, commonly known as Marine Insurance for air, sea, rail and road freight (including local land arrangements) for conveyance of *goods* originating outside RSA. Please consult the website stated below to ascertain whether Format A, Format B or Format Dx is applicable to this contract and then the

- Marine Insurance Policy wording.
- Eskom Shipment Policies and Procedures – note a pre-shipment survey form has to be completed under certain circumstances.
- Marine Claims Handling Procedures – for important shipment actions and claims forms in event of damages to cargo freight via sea, barge, air, road or rail.

For EXW (Ex Works collections) this is of no concern to the *Supplier* but for any other Supply Requirement (such as CIF, DDU, or DDP) the *Supplier* need not provide such insurance even if the INCOTERM requires it and tendering Suppliers should 'discount' their prices when tendering to allow for this provision by the *Purchaser* (Eskom).

### **Supplier's liability for damage to the Purchaser's property**

Whilst this is a liability the *Supplier* carries and should cover (if he is required to deliver the *goods* to the *Purchaser's* premises) his liability is limited to the amount of cover provided to the *Purchaser* within his assets policy. This amount varies depending on the Division within Eskom to which the *Supplier* is making the delivery. For any one occurrence or series of occurrences arising out of one event but unlimited during the period of insurance the *Supplier's* liability would be:

- R15million for Generation Division projects,
- R7.5million for Transmission Division projects or
- R1.0million for Distribution Division projects

### **All other insurance**

As required by clause 84, the *Supplier* provides all other insurance for his risks. The *Supplier* should give further consideration to providing for these additional insurance concepts [for amounts and periods of insurance the *Supplier* deems fit and necessary].

Professional Indemnity: The insurance provided shall indemnify the *Supplier* (and/or his professional consultant) for those sums which the *Supplier* or his consultant shall become legally liable to pay as damages arising from any claim first made against the *Supplier* / consultant and reported to their insurers during the Period of Insurance, directly arising out of any negligent act, error or omission committed or alleged to have been committed by the *Supplier* / consultant in the conduct of **professional services** (for example, design) in connection with this contract.

Products Liability: A special General Liability extension for liability arising out of the *Supplier's* **defective**:

- production and manufacturing process (workmanship or material), or
- product design, or
- warnings, instructions, usage and maintenance manuals and specifications.

For any further explanation of insurance requirements tendering Suppliers are advised to consult their brokers or insurers who may in turn contact Eskom Insurance Management Services per contact details provided on the following website:

[http://www.eskom.co.za/Tenders/InsurancePoliciesProcedures/Pages/EIMS\\_Policies\\_From\\_1\\_April\\_2014\\_To\\_31\\_March\\_2015.aspx](http://www.eskom.co.za/Tenders/InsurancePoliciesProcedures/Pages/EIMS_Policies_From_1_April_2014_To_31_March_2015.aspx)

## C1.2 Contract Data

### Part two - Data provided by the *Supplier*

#### Notes to a tendering Supplier:

1. Please read both the NEC3 Supply Contract (SC3)<sup>3</sup> and the relevant parts of its Guidance Notes (SC3-GN)<sup>4</sup> in order to understand the implications of this Data which the tenderer is required to complete.
2. The number of the clause which requires the data is shown in the left hand column for each statement however other clauses may also use the same data
3. Where a form field like this [ ] appears, data is required to be inserted relevant to the option selected. Click on the form field **once** and type in the data. Otherwise complete by hand and in ink.

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

Clause	Statement	Data
10.1	The <i>Supplier</i> is (Name): Address Tel No. Fax No.	
11.2(8)	The Goods Information is in:	
11.2(11)	The tendered total of the Prices is	
11.2(12)	The <i>price schedule</i> is in:	
11.2(14)	The following matters will be included in the Risk Register	
25.2	The restrictions to access for the <i>Supply Manager</i> and Others to work being done for this contract are	
31.1	The programme identified in the Contract Data is contained in:	
63.2	The <i>percentage for overheads and profit</i> added to the Defined Cost is	

<sup>3</sup> April 2013 Edition as stated by *Purchaser* in Contract Data part 1.

<sup>4</sup> Available from Engineering Contract Strategies Tel 011 803 3008, Fax 086 539 1902, or [www.ecs.co.za](http://www.ecs.co.za)

Part 2: Pricing Data

**NEC3 Supply Contract**

Document reference	Title	No of pages
C2.1	Pricing assumptions	
C2.2	The <i>price schedule</i>	

## C2.1 Pricing assumptions

### How *goods* and *services* are priced and assessed for payment

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

<b>Identified and defined terms</b>	11	
	11.2	(11) The Prices are the amounts stated in the price column of the Price Schedule. Where a quantity is stated for an item in the Price Schedule, the Price is calculated by multiplying the quantity by the rate.
		(12) The Price Schedule is the <i>price schedule</i> unless later changed in accordance with this contract.
<b>Assessing the amount due</b>	50.2	The amount due is
		<ul style="list-style-type: none"> <li>the Price for each lump sum item in the Price Schedule which the <i>Supplier</i> has completed,</li> <li>where a quantity is stated for an item in the Price Schedule, an amount calculated by multiplying the quantity which the <i>Supplier</i> has completed by the rate,</li> <li>plus other amounts to be paid to the <i>Supplier</i>,</li> <li>Less amounts to be paid by or retained from the <i>Supplier</i>.</li> </ul> <p>Any tax which the law requires the <i>Purchaser</i> to pay to the <i>Supplier</i> is included in the amount due.</p>

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

### Function of the Price Schedule

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

### Preparing the *price schedule*

Items in the *price schedule* may have been inserted by the *Purchaser* and the tendering Supplier should insert any additional items which he considers necessary. Whichever party provides the items in the *price schedule* the total of the Prices is assumed to be fully inclusive of everything necessary to Provide the Goods and Services as described at the time of entering into this contract.

It will be assumed that the tendering Supplier has

- Read Pages 8, 11, 12 and Appendix 5 of the SC3 Guidance Notes before preparing the *price schedule*;
- Included in his Prices and rates for correction of Defects (core clause 43.1) as there is no compensation event for this unless the Defect is due to a *Supplier's* risk;

- All inspections and testing is included in the prices
- Spread the cost of doing work he chooses not to list as separate items in the *price schedule* across other Prices and rates in order to fulfil the obligation to Provide the Goods and Services for the tendered total of the Prices;
- Understood that there is no adjustment to lump sum prices in the *price schedule* if the amount, or quantity, of work within that lump sum item later turns out to be different to that which the *Supplier* estimated at time of tender. The only basis for a change to the Prices is as a result of a compensation event per clause 60.1;
- Understood that the *Supplier* does not have to allow in his Prices and rates for matters that may arise as a result of a compensation event.

### **Format of the *price schedule***

Entries in the first four columns in the *price schedule* in section C2.2 are made either by the *Purchaser* or the tendering Supplier.

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

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

If the *Supplier* is to be paid an amount for an item proportional to the length of time for which the *goods* and *services* are provided, a unit of time is stated in the Unit column and the length of time (as a quantity of the stated units of time) is stated in the Quantity column.

## C2.2 the *price schedule*

Item No	Description	Unit of measurements	Total Qty	Rate	Total
0001	Grain particle size between 1,5 mm to 3 mm	m3	7500		
0002	Transportation, delivery and offloading of the material at Kusile Power Station	item	1		

## PART 3: SCOPE OF WORK

Document reference	Title	No of pages
C3.1	<p>This cover page</p> <p><i>Purchaser's Goods Information</i></p> <p>Confidentiality Agreement</p>	
	Total number of pages	



## C3.1: Purchaser's Goods Information

### 1 Overview and purpose of the *goods* and *services*

#### Logistics and Delivery to Site

The *Supplier* must prior to the commencement of deliveries, must provide a safety file for the transport service provider, safety file must include inter alia; medical certificates, drivers licence of driver.

- Vehicle roadworthy certificate
- Competence certificate to be provided (for all drivers/operators)
- Valid medical certificates

The Screened River Sand will be Visually Inspected and will be reconciled to the delivery notes and price schedule

### 2 Specification and description of the *goods*

The supply of Screened River Sand - Grain particle size between 1,5 mm to 3 mm

### 3 Supply Requirements

The Supply requirements for this contract are in Annexure A to the Contract Data provided by the *Purchaser*.

### 4 Specification of the *services* to be provided

*The supply of Screened River Sand - Grain particle size between 1,5 mm to 3 mm*

### 5 Constraints on how the *Supplier* Provides the Goods

#### 5.1 Programming constraints

*Supplier* must deliver as per the agreed final delivery schedule which will be negotiated on an as and when required basis

## 5.2 Constraints at the delivery place and place of use

*Supplier* must notify the *Purchaser* a week prior to delivery to site, in order for the *Purchaser* to arrange permits and access to the project site.

The *Supplier* must provide a safety file for the transport service provider, including details of the Driver and the Vehicle registration number.

## 5.3 Cooperating with Others

The *Supplier* must fully co-operate with the *Purchaser's* team during off-loading at the project site.

The *Supplier* must fully co-operate with the *Purchaser's* team during testing and inspection, the *Purchaser's* team will comprise of the following.

- ERI/ESKOM Engineers
- ERI/ESKOM Quality Inspectors
- ERI Technical Manager
- ERI Project Manager

## 5.4 Services & other things to be provided by the *Purchaser* or *Supplier*

The *Supplier* must provide, truck for the loading of the Screened River Sand at the *Supplier's* premises

The *Supplier* must provide, truck for the offloading of Screened River Sand at the *Purchaser's* stores yard at the project site.

## 5.5 Management meetings

Meetings of a general nature will be convened and chaired by the *Supply Manager* as follows:

Title and purpose	Approximate time & interval	Location	Attendance by:
Risk register and compensation events	Bi-Weekly	<i>Purchaser's</i> Offices at the Kusile Power Station	<i>Purchaser, Supplier</i>
Overall contract progress	Weekly	<i>Purchaser's</i> Offices at	<i>Purchaser, Supplier</i>

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

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

## 5.6 Documentation control

All documentation from the *Supplier* must be provided in hard copy and must also be emailed to the *Service Manager*, as per the communication process agreed after contract award:

## 5.7 Health and safety risk management

The *Supplier* shall comply with the health and safety requirements contained the Kusile SHE Specification - 203-5467

## 5.8 Environmental constraints and management

The *Supplier* shall comply with the health and safety requirements contained the Kusile SHE Specification - 203-5467

## 5.9 Quality

*Supplier* must comply with QM58 – Quality Assurance Tender Evaluation Data Provided by the *Supplier*.

## 5.10 Invoicing and payment

- Assessment is created by Site QS, it is then sent to the Contractor through the CMF.
- As soon as Site receives the fully approved Assessment, The invoice can be created with the information as attached above.
- Then invoice is then sent to the Commercial department for capturing, the GRN ((Migo/workflow number) will then be sent to the Contractor.

- Only after receiving the GRN number, the Contractor can send the Invoice to the Eskom email as explained in the attached.

It is the responsibility of the *Supplier* to ensure that the invoices are sent electronically to Accounts Payable at [invoiceserilocal85@eskom.co.za](mailto:invoiceserilocal85@eskom.co.za), and a copy must also be sent to the *Purchaser's* Commercial Department at the Kusile Power Station.

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

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

- Name and address of the *Supplier* and the *Supply Manager*;
- The contract number and title;
- *Supplier's* VAT registration number;
- The *Purchaser's* VAT registration number 4330196330
- Description of *goods* and *services* provided for each item invoiced based on the Price Schedule;
- Total amount invoiced excluding VAT, the VAT and the invoiced amount including VAT;
- (add other as required)
- Kindly ensure that the following appear on all invoices:
  - a) Eskom RoteK Industries SOC Ltd
  - b) Registration No. 1990/006897/30
  - c) VAT number: 4330196330
  - d) Purchase order number – tax invoices without the correct purchase order number will be rejected
  - e) Physical address: ERI P20A Kusile Power Station Project Site
  - f) Postal address: PO Box 40698  
Cleveland  
2022  
Lower Germiston Road  
Rosherville  
Johannesburg
  - g) Telephone number – 011 629 4000

### 5.11 Insurance provided by the *Purchaser*

Refer to Annexure B – Insurance to be provided by the *Purchaser*

## 5.12 Contract change management

Clause 6 – Compensation Events of the NEC3 Supply Contract will apply to all changes in this contract.

## 5.13 Provision of bonds and guarantees

Not applicable

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

All records and quality documentation must be provided in hard copy and must be electronically emailed to the *Supply manager*

# 6 Procurement

## 6.1 Subcontracting

### 6.1.1 Preferred subcontractors

Not applicable

### 6.1.2 Limitations on subcontracting

- The *Supplier* must align to sub-clause 24.2 of the Supply Contract.
- Declaration certificate for local production and content

### 6.1.3 Spares and consumables

Not applicable

## CONFIDENTIALITY AGREEMENT

This Confidentiality Agreement ('Agreement') is entered into between the *Purchaser* and the *Supplier*.

WHEREAS, the *Purchaser* and the *Supplier* (the Parties) desire to exchange certain confidential information; and consider further business dealings with each other.

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

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

1. The parties contemplate an exchange, either orally, in writing or by inspection, of certain confidential proprietary information possessed or owned separately by them and not readily available or otherwise known to the public and which may be helpful in evaluating further business dealings. Such confidential information (the 'Subject Information') may include but not be limited to the parties' inventions, trade secrets, know-how, technical information on products and manufacturing processes, and information concerning their business assets, financial condition, operations, plans and prospects.
2. The purpose of the exchange of Subject Information is to enable the parties to evaluate the Subject information for the purpose only of considering further business dealings with each other.
3. The parties each agree that they shall maintain in secrecy in accordance with the terms of this Agreement all of the Subject Information each party receives (the 'Receiving Party') from the other party (the 'Proprietor') and shall not disclose or use other than for the purpose specified herein the Subject Information without the written consent of the Proprietor of the Subject Information. All Subject Information communicated from one party to the other shall be deemed to be proprietary and confidential to the Proprietor whether marked or identified as such or not.
4. The duty of care to safeguard Subject Information shall be the same as that which the parties each use to safeguard their own respective proprietary and confidential information.
5. The Receiving Party of Subject Information shall not be obligated to maintain Subject Information received from its Proprietor in secrecy or refrain from using it to the extent that any such information is or rightfully becomes publicly available information other than through a

breach of this Agreement, or which the Receiving Party later obtains lawfully from anyone else who is not known by the Receiving Party to be obligated under any secrecy agreement with Proprietor to maintain the information in secrecy. The Receiving Party also shall not be obligated to maintain in secrecy any information it receives from the Proprietor which it can demonstrate was already in its possession when the information was disclosed to the Receiving Party by the Proprietor.

6. The Receiving Party shall promptly return to its Proprietor any Subject Information in tangible form it has received from the Proprietor immediately upon the Proprietor's request, without retaining any copies, summaries, analyses or extracts thereof. All documents, memoranda, notes and other writings prepared by the parties, or their advisors, based on the Subject Information of each other, shall be destroyed, and such destruction shall be certified in writing by an authorised officer supervising such destruction.
7. If a party, with the written consent of the Proprietor of Subject Information, discloses any Subject Information received from its Proprietor to any third party, it shall do so only under a secrecy agreement having a scope similar to and which is consistent with this Agreement, and the disclosing party shall be primarily responsible for any compromise of the secrecy of Subject Information by such third party
8. Each party agrees that it shall not, while and for so long as it is obligated to maintain Subject Information in secrecy, use for its own benefit, or for the benefit of others or exploit, commercialise, develop, test promote, sell, lease, market or otherwise dispose of any products or services using, incorporating or relying on Subject Information received from its Proprietor without the written consent of the Proprietor.
9. The obligations of the party receiving Subject Information pursuant to this Agreement shall be effective with respect of each item of Subject Information for a term of five (5) years from the date of submission of the Subject Information to the Receiving Party by its Proprietor, unless the Proprietor agrees otherwise in writing.
10. For purposes of this Agreement, each party shall include (to the extent applicable) the officers, directors, employees, agents, representatives, attorneys, joint ventures, partnerships, affiliates, subsidiaries, and divisions of the party, and any other entity or entities which such party controls or which controls it, and, further, shall include any transferee, successor and assign of the assets of the party.
11. This Agreement shall be construed (both as to validity and performance) and enforced in accordance with, and governed by, the laws of Republic of South Africa.

12. Neither this Agreement nor the exchange of Subject Information between the parties shall create or be relied on by either party as a basis for creating any license between the parties under any patent, or other industrial or intellectual property rights of the Proprietor of the Subject Information, or any other license between the parties in the absence of any express written license agreement between them
13. The parties agree that no contract or agreement providing for a transaction shall be deemed to exist between them unless and until a definitive agreement has been executed and delivered, the parties hereby waive, in advance, any claim (including, without limitation, breach of contract) in connection with a possible transaction with each other unless and until they shall have entered into a definitive agreement. The parties also agree that unless and until a definitive agreement between them has been executed and delivered, neither party has any legal obligation of any kind whatsoever with respect to any such transaction by virtue of this Agreement or any other written or oral expression with respect to such transaction, except, in the case of this Agreement, for the matters specifically agreed to herein. For purposes of this paragraph, the term 'definitive agreement'; does not include an executed letter of intent, memorandum of understanding.

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