



**Mineral  
Technologies**  
A Downer Company

# **Commercial Terms and Conditions Equipment Sales**

MD Mineral Technologies SA Pty Ltd

Company Number: 2000/017876/07

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# 1. Definitions

<b>Buyer</b>	means the person or company from whom the Supplier received the Purchase Order.
<b>Delivery</b>	means the time and place for the provision of the Equipment as specified in the Quotation or the accepted Purchase Order.
<b>Commercial Terms and Conditions</b>	means this document.
<b>Equipment</b>	means, without limitation, all goods, chattels, plant, equipment, machinery and services specified in the Purchase Order and/or Quotation.
<b>Price</b>	means the payment schedule set out in the Quotation or accepted Purchase Order for the supply of the Equipment.
<b>Purchase Order</b>	means the commercial document issued to the Supplier by the Buyer, requesting the provision of Equipment and including the Equipment description, quantity, price and requested delivery terms.
<b>Quotation</b>	means a formal document issued by the Supplier to the Buyer offering the supply of Equipment.
<b>Special Terms and Conditions</b>	means any annexures to this document that have been approved by both parties.
<b>Supplier</b>	means MD - Mineral Technologies (Pty) Ltd, carrying on business as Mineral Technologies, 16 Bauxite Bay, Alton, Richards Bay 3900, South Africa, and/or any of its subsidiaries or affiliated companies, acting through their duly authorised representatives.

## **2. Purchase Order, Scope and Acceptance**

- 2.1 The Buyer will provide a Purchase Order to the Supplier requesting the supply of Equipment at and agreed price. Where the Supplier has provided a Quotation for supply of the Equipment, the Purchase Order shall reference the Quotation and shall be supplied within the validity period of the pricing set out in the Quotation.
- 2.2 The Supplier agrees to supply to the Buyer the Equipment specified in the Quotation or the accepted Purchase Order.
- 2.3 The Buyer agrees to purchase the Equipment ordered in accordance with these Commercial Terms and Conditions and any Special Terms and Conditions the parties have agreed to in writing.
- 2.4 The Buyer warrants that there are no specific requirements the Supplier is required to comply with when providing the Equipment, other than those expressly provided in writing to the Supplier at the time the Quotation is provided. To the extent additional requirements do apply, these shall be treated as Variations and all compliance costs shall be to the Buyer's account.
- 2.5 Purchase Orders will only be accepted in writing by the Supplier once all Equipment specifications are known and agreed.

## **3. Technical Documentation**

- 3.1 The applicable drawings and technical documentation supplied with the Equipment, unless otherwise agreed in writing, will be limited to:
  - a. The Equipment general arrangement drawing;
  - b. an installation and operation service manual (Technical Documentation).
- 3.2 The Technical Documentation will be supplied in the English language, unless otherwise agreed in writing.

## **4. Retention of Title and Passing of Risk**

- 4.1 Title to the Equipment will pass to the Buyer upon full payment to the Supplier of all relevant Tax Invoices.
- 4.2 The Equipment is at the Buyer's risk upon Delivery. This risk includes but is not limited to damage, loss or deterioration of the Equipment from any cause whatsoever.

## 5. Equipment Warranty

- 5.1 All Equipment manufactured by the Supplier is warranted free of material and workmanship defects (Defect) for 18 months from the date of Delivery or 12 months from the date of commissioning whichever is the shorter period (Warranty Period).
- 5.2 Warranty does not cover normal wear and tear, and consumable goods.
- 5.3 Metallurgical separation warranties are specifically excluded from any warranty provided by the Supplier.
- 5.4 Where auxiliary Equipment, not manufactured by the Supplier is supplied under these terms, the Supplier will assign to the Buyer its rights under the manufacturer's warranty (if any) applicable to such auxiliary equipment, and the Supplier shall not be liable for any loss or damage arising from any deficiency or defect in such auxiliary equipment except to the extent that the same may be actually recovered from the original manufacturer.
- 5.5 If the Buyer becomes aware of a Defect to the Equipment in the Warranty Period it must notify the Supplier in writing immediately. The Supplier undertakes, at its own expense, within a reasonable time agreed between the Buyer and the Supplier, to repair these Defects at site or replace the defective Equipment. The correction of such Defects by repair or replacement by the Supplier will constitute a fulfilment of its obligation to the Buyer.
- 5.6 The Supplier will not assume any responsibility, expense or liability for repairs made outside its works without prior written consent.
- 5.7 Notwithstanding any other clause of these Commercial Terms and Conditions, the Supplier accepts no responsibility for the Buyer:
- a. Improperly storing or handling the Equipment prior to it being placed in service;
  - b. Failing to follow recommendations or advice provided by the Supplier, including but not limited to the Buyer not installing, operating and or maintaining the Equipment in accordance with the conditions specified in the Technical Documentation; or

## 6. Delivery

- 6.1 The Supplier will endeavour to deliver the Equipment as per the details specified in the Quotation or accepted purchase order, but will not in any event be liable for any loss or damage (direct or indirect) resulting from a failure to deliver in such period.
- 6.2 Delivery specified in the Quotation may vary as a result of other orders being received prior to acceptance of the Purchase Order, in which case the Supplier will revise the Delivery period and notify the Buyer as soon as is reasonably possible. Note that the Supplier's factory will close for three weeks over the Christmas period and deliveries that span this period will be extended accordingly. Also note that multiple deliveries may be necessary for larger orders.
- 6.3 If the Supplier is prevented from Delivering the Equipment by the Buyer, the Supplier will store the Equipment at the Buyer's risk and the Buyer will pay the Supplier for storage at the rate of 0.2% of the Price per week or part thereof.
- 6.4 If the Equipment is bound for export and the export of the Equipment is not affected within ninety (90) days of the final invoice, the Buyer will be liable for Value Added Tax ("VAT") as per Clause 11.4.

## 7. Installation and Commissioning

- 7.1 The Supplier offers the services of staff for on-site installation and commissioning assistance subject to the Buyer agreeing to the payment of airfares, accommodation and sustenance as well as the applicable daily rate for staff time.

## 8. Price

- 8.1 The Buyer agrees to pay the Supplier the Price according to the payment schedule set out in the Quotation. For the avoidance of doubt the Price excludes VAT.
- 8.2 The Price quoted herein is fixed and firm and is not subject to escalation for the duration of the contract providing the Purchase Order is placed and accepted within the validity period as set out in the Quotation and payment is received in accordance with these Commercial Terms and Conditions.
- 8.3 Unless otherwise noted in the Quotation, the Price quoted is fixed and firm in South African Rand. If the Buyer wishes to pay in a different currency, the Supplier reserves the right to alter the Price where the relevant foreign exchange rate differs by more than 3% from the date of Quotation or the acceptance of the Purchase Order (whichever is the earliest).

## 9. Variations

- 9.1 The Buyer will be entitled, by giving notice in writing to the Supplier, to propose any alteration of, addition to, deletion from or modification of the Equipment.
- 9.2 If the Supplier is of the opinion that any such alteration, addition, deletion or modification or any other occurrence would justify a claim for additional payment and/or an extension of time to complete the Equipment and/or prevent it from fulfilling any of its obligations under these Commercial Terms and Conditions, the Supplier will, before proceeding with such alteration, addition, deletion or modification, provide to the Buyer, within seven (7) days of receiving the notice in Clause 9.1, a Change Notice together with an estimate of cost and time, to indicate how, if at all, this affects its obligations under these Commercial Terms and Conditions. The period of response may be altered if agreed between the parties.
- 9.3 The Supplier may from time to time, by issuing a Change Notice to the Buyer, recommend variations in or to the Equipment.
- 9.4 The Buyer will, only after having mutually agreed with the Supplier the change in Price and/or the extension of time applicable to such Change Notice, within seven (7) Days, counter-sign such Change Notice and return it to the Supplier, and said Change Notice will constitute an agreed Variation of the Purchase Order.
- 9.5 If the Buyer and the Supplier fail to reach agreement pursuant to the terms of clause 9.4, then there will be no such Variation.

## 10. Invoice and Payment

- 10.1 The payment terms will be as set out in the Quotation.
- 10.2 Where payments following invoice are required these will be made by the due date shown on the invoice, to the account nominated on the invoice.
- 10.3 If the Buyer fails to make full payment for the Equipment in accordance with these Commercial Terms and Conditions, the Supplier may, at its election:
- Charge the Buyer interest on the unpaid amount at the rate of prime lending rate plus 2% per annum calculated monthly until full payment is made; and or
  - Use any reasonable means to recover the Equipment from the Buyer. The Supplier has the right to resell or otherwise dispose of the Equipment so recovered without reference to the Buyer.
- 10.4 Until the Buyer's total indebtedness to the Supplier is discharged the Buyer shall hold the Equipment as bailee of the Supplier and a fiduciary relationship exists between the Supplier and the Buyer.

## 11. Taxes

- 11.1 Words in this clause have the same meaning as in the Value-Added Tax Act, 1991 (Act No. 89 of 1991), unless defined elsewhere or the context makes it clear that a different meaning is intended.
- 11.2 If any supply made under these Commercial Terms and Conditions is or becomes subject to VAT, the Buyer must pay to the Supplier, as consideration in addition to any consideration payable or to be provided elsewhere in this agreement, subject to issuing a Valid Tax Invoice, an additional amount on account of VAT, such amount to be calculated by multiplying the consideration by the applicable rate of VAT.
- 11.3 If any party is required to reimburse or indemnify the other party for a cost, expense or liability (the Cost) incurred by the other party, the amount of that Cost for the purpose of this agreement is the amount of the Cost incurred less the amount of any credit or refund of taxes to which the party incurring the Cost is entitled to claim in respect of the Cost.
- 11.4 Under South African Government legislation, the VAT-free status is conditional upon the export of the goods or services occurring within ninety (90) days of the date of final invoice or the date of final payment (whichever is the earlier). If export occurs after the ninety (90) day period, VAT will apply and will be charged accordingly.

## 12. Termination

- 12.1 The Buyer may, in writing, terminate a Purchase Order accepted by the Supplier for any reason prior to Delivery however the Buyer is liable to pay the Supplier compensation for any loss or damage sustained, including but not limited to:
- The price for completed Equipment at the point of termination of the Purchase Order;
  - The price to complete Equipment that was partially completed at the point of termination of the Purchase Order;
  - The price of materials which the Supplier is legally liable to accept and cannot otherwise utilise;
  - The costs of complying with the Buyer's direction to terminate the Purchase Order
- For the avoidance of doubt, the price of work completed at the point of termination plus the price of Equipment that was partially completed at the point of termination then subsequently completed will be determined, where possible, according to the itemised breakdown of the Price detailed in the Quotation.
- 12.2 Either party may immediately terminate the Purchase Order by notice in writing to the other party if:
- The other party fails to remedy a breach by it of these Commercial Terms and Conditions within 30 days of notice given to the party to remedy such a breach; or
  - the other party has an administrator, manager, liquidator, receiver or similar officer appointed over it or all or any of its assets, makes any arrangement with its creditors, is unable to pay its debts as they fall due, ceases to carry on business, makes any arrangement for its winding-up (other than for the purposes of a bona fide reconstruction or amalgamation), is the subject of a winding-up order, enters into a voluntary arrangement or is the subject of any similar proceedings.



- 12.3 Termination of the Purchase Order does not relieve either party of their obligations under the Purchase Order prior to termination and it does not affect a party's rights in respect of default under the Purchase Order.

## **13. Force Majeure**

- 13.1 "Force Majeure" shall mean any event or circumstance or combination of events and circumstances, which is beyond the control of the affected party which causes or results in default or delay in the performance by the affected party of any of its obligations in the contract, where both such default or delay (and the occurrence and the effects of such event or circumstances) could not have been prevented, overcome or remedied by the exercise by the affected party of a standard of care and diligence consistent with that of a reasonable and prudent operator.
- 13.2 Neither party is liable for any breach (other than the breach of any obligation to make payment) of the Purchase Order if the breach was caused by Force Majeure and could not reasonably have been avoided by the party in breach.
- 13.3 In the event of Force Majeure the parties shall meet and attempt to agree on reasonable practical steps to remove and resolve the impact of the Force Majeure event.
- 13.4 Either party may terminate the Purchase Order in the event of Force Majeure continuing to prevent performance of the party's obligations under these Commercial Terms and Conditions for more than 30 continuous days.

## **14. Insurance**

- 14.1 The Supplier will insure the Equipment for its market value against loss or damage, including loss or damage in transit, as applicable, to the point of Delivery.
- 14.2 Such insurance cover will be maintained until risk in the Equipment passes to the Buyer.
- 14.3 Where requested in writing by the Buyer, the Supplier will provide the Buyer with a copy of the relevant Certificate of Currency as evidence of insurance being in effect.
- 14.4 The Supplier will insure the Equipment in the name of the Supplier only and the Buyer will not be listed as a co-insured on the policy.

## **15. Indemnity by Supplier**

- 15.1 The Supplier will indemnify, and will keep indemnified, the Buyer against:
- a. any loss of or damage to the property of the Buyer (excluding the Equipment); and
  - b. claims in respect of personal injury or death or loss of or damage to any other property arising out of or as a consequence of the Suppliers supply of the Equipment, but the indemnity shall be reduced proportionally to the extent that the act or omission of the Buyer or its

consultants, employees, agents or other contractors (not being employed by the Supplier) may have contributed to the loss, damage, death or injury.

## 16. Limit of Liability

- 16.1 For the purpose of this clause, the term “Supplier” shall mean the Supplier, its affiliates, subcontractors and suppliers of any tier, and their respective agents and employees, whether individually or collectively.
- 16.2 Notwithstanding any other provision of these Commercial Terms and Conditions, and except to the extent that liability cannot be limited or excluded, the liability of the Supplier to the Buyer, whether arising under or in connection with these Commercial Terms and Conditions or the performance or non-performance thereof or anything incidental thereto, and whether by way of indemnity, by statute, in tort (for negligence or otherwise), or on any other basis in law or equity is hereby limited and excluded as follows:
- a. The Supplier shall have no liability whatsoever to the Buyer for loss of use, data, production, profit, revenue, business, contract or anticipated saving, or for any delay (other than liquidated damages expressly provided for and limited in the contract), financing costs or increase in operating costs or any economic loss or for any special, indirect or consequential loss or damage;
  - b. the total aggregate liability of the Supplier to the Buyer is limited to 25% of the Price.

## 17. Intellectual Property

- 17.1 For the purposes of this clause, “Intellectual Property Rights” means any intellectual or industrial property right anywhere in the world, including, without limitation, any patent, patent application, utility model, copyright (including copyright in manuals, databases, promotional material and other material), registered design and other design rights, rights in integrated circuit chip topography and other similar rights and other rights which may subsist anywhere in the works in inventions, and other manufacturing processes, technical and other information of the Supplier.
- 17.2 Ownership of all Intellectual Property Rights (other than third party intellectual property rights) associated with the Equipment (including but not limited to spare parts and any Technical Documentation provided by the Supplier pursuant to the supply of the Equipment) is vested and will vest in the Supplier. For the avoidance of doubt, the Buyer does not obtain an interest in any of the Suppliers’ Intellectual Property Rights as a result of this contract.
- 17.3 The Supplier grants the Buyer a royalty free, non-exclusive, transferable, perpetual licence to use all its Intellectual Property Rights associated with the Equipment (including but not limited to spare parts and any Technical Documentation provided by the Supplier pursuant to the supply of the Equipment) provided pursuant to these Commercial Terms and Conditions only for the use, repair, maintenance and or support of the Equipment by or on behalf of the Buyer.

## **18. Independent Contractor**

- 18.1 Both parties acknowledge that the Supplier is an independent contractor to the Buyer and not an employee or agent.

## **19. Assignment and Subcontracting**

- 19.1 The rights and liabilities which accrue to each party under these Commercial Terms and Conditions may not be assigned by either party without the prior written consent of the other party. Such consent must not be unreasonably withheld.
- 19.2 Neither party may subcontract its obligations under these Commercial Terms and Conditions without prior written consent of the other party.

## **20. Waiver**

No waiver by either party of any one or more defaults by the other in performance of the Purchase Order will operate or be construed as a waiver of any future default or defaults whether of a like or of a different character.

## **21. Entire Agreement**

- 21.1 These Commercial Terms and Conditions constitute the entire agreement between the parties and supersede any prior negotiations representations, understandings or arrangements made between the parties regarding the subject matter of any Purchase Order, whether orally or in writing.
- 21.2 These Commercial Terms and Conditions are comprised of:
- a. Special Terms and Conditions as agreed in writing between the parties;
  - b. Commercial Terms and conditions; and
  - c. the Purchase order
- 21.3 If there is any inconsistency between the Purchase Order, the Commercial Terms and Conditions and any Special Terms and Conditions, the order of precedence is as listed in Clause 21.2.

## **22. Severance**

If any provision of these Commercial Terms and Conditions is invalid or not enforceable in accordance with its terms all other provisions which are self-sustaining and capable of separate enforcement will be and continue to be valid and enforceable in accordance with their terms.

## 23. Amendment

No amendment or variation of these Commercial Terms and Conditions is valid or binding on a party unless made in writing and executed by both parties.

## 24. Governing Law

These Commercial Terms and Conditions are governed by the law enforced in South Africa and the parties submit to the non-exclusive jurisdiction of the Courts of that State and any other Courts hearing appeals from such Courts.

## 25. Dispute Resolution

- 25.1 A party will not commence court proceedings relating to any dispute arising from these Commercial Terms and Conditions except where that party seeks urgent relief from a court or where dispute resolution has failed under this clause. Where a party fails to comply with this clause the other party is not required to undertake dispute resolution for the dispute in accordance with this clause.
- 25.2 If any issue, dispute or difference arises under these Commercial Terms and Conditions, a party must serve notice to the other in writing setting out the nature of the dispute or difference and its reasons. The parties will attempt to negotiate in good faith an amicable outcome to the dispute in accordance with the following:
- a. within 7 days after the notice is served, a representative from each party will meet and attempt to resolve the dispute;
  - b. If the dispute remains unresolved, it must be escalated to the Chief Executive Officer (or equivalent position) of the parties who must meet and attempt to resolve it within 14 days from the expiration of the period in clause a).
  - c. If the dispute is not resolved by the Chief Executive Officers (or equivalent position), the parties may agree to use an alternative dispute resolution process to attempt to settle the dispute or either party may commence court proceedings.
- 25.3 The parties will at all times during the dispute continue to fulfil their obligations under these Commercial Terms and Conditions.