
	<b>Department/Section:</b>	CONTRACT MANAGEMENT
	<b>Document Type:</b>	CONTROLLED DOCUMENT
	<b>Document number:</b>	VM 026 CD
	<b>Revision number:</b>	0
	<b>Current Revision Date:</b>	2008-02-01
Title/Name: TERMS AND CONDITIONS OF PURCHASE		
Document owner: COMMERCIAL MANAGER		
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## TERMS AND CONDITIONS OF PURCHASE

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## 1. Definitions and Interpretation

1.1 In these Terms and Conditions, unless the context indicates otherwise, the following words or phrases shall have the following meanings:

- 1.1.1 **"Associated Company"** means any company which is a subsidiary of DMS Powders;
- 1.1.2 **"Contract"** means the Purchase Order, together with these Terms and Conditions;
- 1.1.3 **"Contract Specifications"** means the specifications and description of the Goods as indicated in the Purchase Order;
- 1.1.4 **"DMS Powders"** means Dense Media Separation Powders (Proprietary) Limited, registration number 2005/038294/07;
- 1.1.5 **"Goods"** means all goods to be supplied and/or all services to be performed by the Seller in accordance with any Purchase Order;
- 1.1.6 **"Parties"** means the Purchaser and the Seller;
- 1.1.7 **"Purchase Order"** means a purchase order issued by the Purchaser to the Seller, together with any annexures attached thereto;
- 1.1.8 **"Purchase Order Acknowledgment"** means the purchase order acknowledgement appearing on every Purchase Order, to be signed by the Seller;
- 1.1.9 **"Purchase Price "** means the purchase price of and/or rates payable in respect of any Goods;
- 1.1.10 **"Purchaser"** means DMS Powders or any Associated Company on whose behalf DMS Powders has submitted a Purchase Order to the Seller;
- 1.1.11 **"Seller"** means the person or legal entity to whom any Purchase Order is addressed and issued and includes such person or

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entity's employees and/or sub-contractors;

1.1.12        **"Terms and Conditions"**        means these terms and conditions of purchase, as amended from time to time.

1.2        In these Terms and Conditions, unless the context otherwise requires or as otherwise expressly stipulated:

1.2.1        words denoting any one gender include all other genders, words denoting the singular shall include the plural and *vice versa* and natural persons shall include artificial persons and *vice versa*;

1.2.2        "Subsidiary" shall have the meaning ascribed to it in the Companies Act, 1973.

1.3        The rule of construction that if general words or terms are used in association with specific words or terms which are a species of a particular genus or class, the meaning of the general words or terms shall be restricted to that same class (ie the *eiusdem generis* rule) shall not apply, and whenever the word "*including*" is used followed by specific examples, such examples shall not be interpreted so as to limit the meaning of any word or term to the same genus or class as the examples given.

## 2. Application and acceptance by the Seller


2.1        These Terms and Conditions shall apply to every Purchase Order.

2.2        A Purchase Order shall neither be effective nor shall it create any obligations on the Purchaser unless and until the Seller has accepted these Terms and Conditions, by signing and returning the Purchase Order Acknowledgment to the Purchaser.

2.3        Such acceptance shall constitute the Seller's agreement to these Terms and Conditions, which shall supersede, replace and/or override any terms and conditions of the Seller. Any conditions of trade contained on or referred to in any of the Seller's documents submitted to the Purchaser shall not apply and the Seller shall be deemed to have waived such conditions.

## 3. Delivery and packaging

3.1        Subject to the provisions of clause 3.3 below, delivery of the Goods shall be made in the manner and within the time specified in the Purchase Order and time will be of the essence.

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- 3.2 The Seller shall ensure that any Goods which are delivered to the Purchaser are properly packaged, secured and covered to prevent any damage, loss or deterioration of the Goods whilst in transit and during loading and off-loading. Unless otherwise agreed in writing all packaging materials shall become the property of the Purchaser upon Delivery.
- 3.3 All deliveries of Goods shall be routed via the Purchaser's stores department prior to off-loading and shall be accompanied by the Seller's delivery note ("**Delivery Note**"). The Delivery Note must reflect the Purchase Order number, the item or part number where specified in the Purchase Order, the mass, quantities or volumes of the Goods and the number of bags, cartons or other containers in which the Goods are supplied. The receipt of any delivery shall be acknowledged by a duly authorised employee of the Purchaser signing the Seller's Delivery Note and stamping it with the official "Goods Received" stamp of the Purchaser's stores department and the Seller providing such employee with a copy of such Delivery Note.
- 3.4 The Seller shall advise the Purchaser in writing of any anticipated or actual delay or any circumstances which may result in a delay in delivery of the Goods to the Purchaser as soon as it becomes aware thereof. The Purchaser shall be entitled to cancel any Purchase Order in the event of a delay.

#### 4. **Loading and off-loading**


The Seller shall be responsible for the loading and off-loading of all Goods delivered to the Purchaser. The Purchaser may, in its sole and absolute discretion, assist the Seller by making labour available for the loading and off-loading of any Goods, but the Purchaser shall not thereby assume any responsibility whatsoever for any loss or damage caused in any manner during the loading or off-loading of the Goods.

#### 5. **Ownership and risk**

Ownership and risk in and to the Goods shall pass to the Purchaser upon delivery thereof, provided that delivery has been properly acknowledged as provided for in clause 3.3 above.

#### 6. **Purchase price**

- 6.1 The Purchase Price shall be as set out in the Purchase Order and shall, unless otherwise specified in the Purchase Order, exclude value-added tax but include any delivery charges, transportation costs, service charges, the costs of all packaging materials and any other fees or charges.

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6.2 The Purchase Price shall be fixed and firm and not subject to any adjustments, unless otherwise specified in the Purchase Order or unless agreed to in writing by a duly authorised representative of the Purchaser.

## 7. Terms of payment

7.1 Payment for any Goods shall be effected within thirty days from the last day of the month within which the original invoice in respect of the Goods is received by the Purchaser, provided that the amount reflected in the invoice is not disputed by the Purchaser.

7.2 The Purchaser shall be entitled to set off all and any amounts due and payable to it by the Seller, whether in terms of the Contract or otherwise, when effecting payment in respect of any Goods.

## 8. Warranties

8.1 The Seller warrants and represents that the Goods will:

8.1.1 be free from all defects, whether latent or patent, including defects in design, material, workmanship and ownership;

8.1.2 be fit in every respect for the purpose for which they are purchased;

8.1.3 conform in all respects with the Contract Specifications; and

8.1.4 conform with all relevant requirements of any statute, law, regulation or legal requirement which may be in force in the Republic of South Africa.


8.2 Nothing in this clause will be construed as a limitation of any rights to which the Purchaser may be entitled by virtue of any common law warranty against latent defects or otherwise.

## 9. Rejections

9.1 Should any of the Goods delivered to the Purchaser be defective or damaged in any manner whatsoever or do not comply with the Contract Specifications, the Purchaser shall have the right to refuse to accept delivery of the Goods or, having accepted delivery, to reject the Goods at any time thereafter. Such rights shall be in addition to and shall in no way interfere with or prejudice any other rights or remedies available to the Purchaser, whether in law or in terms of the Contract.

9.2 Goods which are rejected shall be held by the Purchaser at the risk and expense of the Seller.

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- 9.3 In the event of such refusal or rejection and upon the request of the Purchaser, the Seller shall be required:
- 9.3.1 to remove the Goods from the Purchaser's premises at its own cost and expense without delay; and
  - 9.3.2 either to replace the removed Goods with Goods that are not defective or damaged or which comply with the Contract Specifications, as the case may be, within [14] days of the said removal; or
  - 9.3.3 in the event that the Purchaser has paid the Seller the Purchase Price, refund the Purchase Price to the Purchaser on demand, together with all other costs and disbursement incurred by the Purchaser in respect of or as a result of the Goods being so refused or rejected.
- 9.4 Acceptance by the Purchaser of any Goods not complying with the Contract Specifications shall not prejudice or affect the Purchaser's right to refuse or reject subsequent deliveries of Goods not complying with the Contract Specifications.

## 10. Patents and trade-marks

The Seller indemnifies the Purchaser against any and all claims of whatsoever nature which may be made against it by any third party for the infringement or unauthorised use of patents, trade marks, copyright, design or other intellectual property rights in respect of the Goods. All royalties and expenses arising from the use of such intellectual property rights shall be payable by the Seller.

## 11. Laws and regulations

- 11.1 In executing any Purchase Order, the Seller shall ensure that it, its employees, sub-contractors and/or representatives, strictly comply with:
- 11.1.1 all legislation and regulations in force from time to time, in respect of any Goods delivered, including without limitation all safety, security and health legislation and regulations;
  - 11.1.2 all of the Purchaser's rules, regulations, policies, codes of practice, standards and instructions of whatsoever nature applicable to the Purchaser's premises and to the supply of the Goods and/or the performance of the Services.

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## 12. Liability of the Purchaser

If the Purchaser consists of more than one entity, each such entity shall be solely liable for its own obligations to the Seller arising out of or in connection with the Contract.

## 13. Insurance and indemnity

13.1 The Seller shall be liable for and indemnifies the Purchaser against all claims, damages, losses or costs whatsoever relating to or as a result of:

13.1.1 the injury or death of any person; and/or

13.1.2 all damages to property whatsoever; and/or

13.1.3 any economic loss sustained by any person

which results from or is due to any act or omission of the Seller, its sub-contractors, employees and/or representatives.

13.2 The Seller indemnifies and holds the Purchaser, its employees, officers and/or agents harmless against any loss, claims, damage or costs, whether direct, indirect, consequential or otherwise, caused to or incurred by the Purchaser as a result of any breach by the Seller of any provision of these Terms and Conditions or of the Purchase Order, including but not limited to a breach of the warranties.

13.3 The Seller shall for the duration of the Contract, take out and maintain insurance at its own expense to cover the normal and usual risks associated with the supply of the Goods, including its potential liability arising from the indemnities given in clauses 13.1 and 13.2 above.


## 14. Breach and termination

14.1 The Purchaser shall be entitled to terminate the Contract as a consequence of a breach by the Seller of any of the terms or provisions of the Purchase Order and/or these Terms and Conditions, provided that:

14.1.1 the breach is a material breach which goes to the root of the Contract and the breach is incapable of being remedied by the payment of compensation or otherwise; or

14.1.2 if the breach is capable of being remedied by payment of compensation or otherwise, the Seller fails to remedy the breach within [ten] days of the receipt of written notice calling upon it to do so or, if the breach is not reasonably capable of being remedied within such [ten] day period, within

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such further period as may be reasonable in the circumstances but which shall not exceed a further [ten] days.

- 14.2 The Purchaser shall further be entitled to terminate the Contract immediately if:
- 14.2.1 the Seller is sequestrated or placed in liquidation or under judicial management, whether provisionally or finally; or
  - 14.2.2 the Seller passes any resolution for its liquidation or winding-up;
  - 14.2.3 the Seller commits any act of insolvency;
  - 14.2.4 the Seller enters into any compromise or attempts to compromise generally with any of its creditors; or
  - 14.2.5 the Seller, being an individual or a member of a partnership or syndicate, dies; or
  - 14.2.6 the Seller has a judgment granted against it which remains unsatisfied for a period of fourteen days.
- 14.3 The above rights of the Purchaser shall be in addition to and shall in no way interfere with or prejudice any other rights or remedies available to the Purchaser, whether in law or in terms of the Contract, including the Purchaser's rights to claim damages from the Seller.

#### 15. Confidential information

- 15.1 The Seller shall during the currency of the Contract and at all times thereafter, keep the contents of the Contract confidential and keep confidential any information of or relating to the Purchaser or its operations or affairs which it has acquired or may acquire prior to or pursuant to the Contract, save for any information:
- 15.1.1 which is publicly available or becomes publicly available through no act or default of the Seller; or
  - 15.1.2 which was in the possession of the Seller prior to its disclosure otherwise than as a result of any breach by the Seller of any obligation of confidentiality owed to any other person whether pursuant to the Contract or otherwise; or
  - 15.1.3 which is disclosed to the Seller by a person which person did not acquire the information under an obligation of confidentiality;

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and the Seller shall not use or disclose such information except with the prior written consent of the Purchaser or in accordance with an order of a court of competent jurisdiction or in order to comply with any law or governmental regulations by which the Seller is bound or as may be lawfully requested in writing by any governmental authority.

## 16. Force majeure

- 16.1 The onus to prove force majeure is on the Party relying thereon.
- 16.2 Should either Party be prevented at any time by force majeure from meeting its obligations in terms of the Contract either totally or partially, then the Party affected thereby will as soon as reasonably possible but not later than seven (7) days after becoming aware of the circumstances giving rise to the force majeure, notify the other of the circumstances constituting the force majeure, the extent to which it will not be able to meet its contractual obligations and the period for which it anticipates such prevention to endure. The Party so affected by the force majeure will upon having given the aforesaid notice to the other be excused from compliance with its contractual obligations to the extent of such prevention or restriction and will promptly and diligently pursue appropriate action to enable it to perform its obligations under the Contract, save that such Party will not be obliged to settle any strike or other labour dispute on terms contrary to its wishes.
- 16.3 An act of force majeure shall include but not be limited to storms, floods, fires, earthquakes, other natural disasters, power failures, unavailability of equipment, strikes, lockouts, boycotts, and actions of the civil and military authorities, changes in laws, rules, regulations or orders which relate to the control or export or re-export of raw materials.
- 16.4 Should the event of force majeure endure for a continuous period of longer than three (3) months, the Party not relying thereon shall be entitled to terminate the Contract upon notice to that effect to the other without payment to the other of any damages whatsoever including, without limitation, consequential damages, loss of business and/or profits resulting from such termination.


## 17. Assignment and sub-contracting

The Seller may not assign, sub-contract or transfer any of its rights or obligations under the Contract without the prior written consent of the Purchaser.

## 18. Jurisdiction and governing law

- 18.1 The Contract shall be governed by and interpreted in accordance with the laws of the Republic of South Africa.

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18.2 The Purchaser shall, at its option and notwithstanding that the amount of its claim of the nature of the relief sought by it exceeds the jurisdiction of the Magistrate's Court, be entitled to institute action out of such court.

**19. Domicilium**

The Purchaser nominates as its domicilium citandi et executandi the physical trading address as reflected on the Purchase Order, for service upon it of all notices and processes in connection with the Contract.

**20. General**

20.1 The Purchase Order and these Terms and Conditions contain all the express provisions agreed on by the Parties with regard to the subject matter of the Contract and the Parties waive the right to rely on any alleged express provisions not contained therein.

20.2 No contract varying, adding to, deleting from or cancelling the Contract, and no waiver of any right under the Contract, shall be effective unless reduced to writing and signed by a director of the Purchaser.

20.3 No warranties, representations or guarantees have been made by the Purchaser or on its behalf which may have induced the Seller to enter into the Contract.

20.4 No relaxation or indulgence which the Purchaser may give at any time in regard to the carrying out of the Seller's obligations in terms of the Contract shall prejudice or be deemed to be a waiver of any of the Purchaser's rights in terms thereof.

20.5 If any provision of the Contract is rendered void, illegal or unenforceable in any respect, the validity, legality and enforceability of the remaining provisions shall not in any way be affected or impaired.