



ARMSCOR'S GENERAL CONDITIONS OF CONTRACT

SUMMARY: THIS DOCUMENT SETS OUT THE GENERAL TERMS AND CONDITIONS APPLICABLE TO ARMSCOR'S ORDERS AND CONTRACTS.

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APPROVAL PAGE



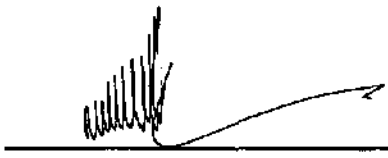
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


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15/05/2014
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**SUBMISSION APPROVED
BY THE MANAGEMENT BOARD**

ON 23 April 2014



SECRETARY - ARMSCOR

TO BE APPROVED BY
ARMSCOR MANAGEMENT BOARD

AMENDMENT HISTORY

Doc Issue	Date	Amendments	Doc change proposal No.	CM Conformance	
				Name	Initials
001	13 March 2000	Release	N/a	Phiri	MO
002	20 April 2009	Update	DCP000165	Phiri	MO
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PART A - GENERAL CONDITIONS APPLICABLE TO ALL CONTRACTS

1 APPLICABILITY OF DOCUMENT

- 1.1 This document consists of two parts, Part A and Part B, which together form the General Conditions of Contract (A-STD-0020), hereinafter referred to as ("these conditions"). Part A of these conditions applies to all orders/contracts which are placed by Armscor. Part B of these conditions applies in addition to Part A only to orders/contracts that involve supplies or work imported specifically for those orders/contracts.
- 1.2 Where any of these conditions have been specifically excluded from application in the order/contract, either in full or in part, or where other terms and conditions have been substituted for them, the terms and conditions so excluded or substituted shall not apply.
- 1.3 Where any of these conditions are in conflict with any special terms or conditions incorporated in the order/contract, the said special terms or conditions shall take precedence.
- 1.4 Where the terms and conditions of any applicable document listed in the order/contract conflict with any of these conditions, these conditions shall take precedence.

2 APPLICABILITY OF ARMSCOR'S STANDARD CONDITIONS OF ORDER/CONTRACT, TECHNICAL (A-STD-0061)

Any order/contract that provides for the definition, development, industrialisation, series production and/or maintenance of work or supplies shall – unless specifically excluded in the order/contract – be subject to the terms and conditions (as applicable) of that issue of document A-STD-0061 that is specified for the order/contract at the time the order/contract is placed, unless specifically tailored for or excluded in the order/contract.

3 DEFINITIONS

In these conditions the expressions defined below have the meaning assigned to them, unless contrary to or inconsistent with the context of the order/contract:

- 3.1 **Approval** means authorisation in writing by Armscor, and "approved" has a corresponding meaning.
- 3.2 **Armscor** means the Armaments Corporation of South Africa SOC Limited, established by the Armaments Corporation of South Africa Limited Act, 2003 (Act 51 of 2003), as amended.
- 3.3 **Background intellectual property** is intellectual property that is used by a contractor or his subcontractor in the execution of an order/contract placed by Armscor, which intellectual property was not created through Defence funding and ownership of which is vested in industry, or, alternatively, where the right to use such intellectual property was obtained from a third party by the contractor.
- 3.4 **Classified matter** means any instrument, document, matter or anything whatsoever relating to or arising from an offer or from the execution of the order/contract, as the case may be, which has been designated by Armscor as "top secret", "secret", "confidential" or "restricted".

- 3.5 **Contractor** means the party with whom the order/contract has been placed by Armscor, and includes the contractor's successors and permitted assigns.
- 3.6 **Cost and Freight** or **CFR** means the seller delivers the goods on board the vessel or procures the goods already so delivered. The seller must contract for paying the costs and freight necessary to bring the goods to the named port of destination. (Incoterms 2010.)
- 3.7 **Cost, Insurance and Freight** or **CIF** means the seller delivers the goods on board the vessel or procures the goods already sold. The seller also contracts for insurance cover against the buyer's risk of loss or damage to the goods during the carriage. (Incoterms 2010.)
- 3.8 **Delivery** means delivery of the supplies and/or completion of the work in compliance with the conditions of the order/contract at the specified point of delivery and within the delivery period.
- 3.9 **Delivery basis** determines the contractor's obligations and, unless otherwise provided for in the order/contract, the passing of risk and ownership as set out in Incoterms 2010 or in these conditions.
- 3.10 **Delivery into store** or **free into store** means delivery in compliance with the conditions of the order/contract to the specified store, depot or office, the contractor bearing all risks and charges involved until the supplies have been so delivered and valid proof of delivery for the quantities delivered has been obtained from the recipient as specified in the order/contract.
- 3.11 **Document** includes the reports, specifications, plans, drawings, photographs, catalogues, manuals and handbooks relating to the order/contract.
- 3.12 **Foreground intellectual property** is any intellectual property that is created or obtained exclusively or partially through Defence funding, and includes intellectual property that is created through indirect contracting, such as orders/contracts concluded by a contractor with a subcontractor, as well as intellectual property that is obtained or created exclusively or partially through the Defence Industrial Participation (DIP) programme or other orders/contracts, or through Armscor's cooperation with foreign entities or countries, where Armscor or the contractor is, or Armscor and the contractor are legally entitled to the intellectual property.
- 3.13 **Free Alongside Ship** or **FAS** means that the seller delivers when the goods are placed alongside the vessel nominated by the buyer at the named port of shipment. (Incoterms 2010.)
- 3.14 **Free Carrier** or **FCA** means the seller delivers the goods to the carrier or another person nominated by the buyer at the seller's premises or another named place, where applicable; the seller must clear the goods for export. (Incoterms 2010.)
- 3.15 **Free on Board** or **FOB** means the seller delivers the goods on board the vessel or procures goods already so delivered for shipment. (Incoterms 2010.)
- 3.16 **Free on Rail** or **FOR** or **Free on Truck** or **FOT** means delivery in railway trucks at the despatching station, with the contractor bearing all risks and charges incurred until such time as the supplies have actually been placed in the railway trucks. In the case of supplies railed FOR from a private siding, the term is interpreted as implying in addition that the contractor has obtained the necessary signed and stamped certificates from the South African Transport Services regarding quantity loaded, packing, lashing, etc. Delivery free on rail is also interpreted as including free delivery within the free delivery area of the despatching station.

- 3.17 **Imported content** means that portion of the price of equipment, systems, units, components, parts or materials that has been or is to be imported, whether by the contractor, his suppliers or his subcontractors, plus direct importation costs, such as landing charges, dock dues, customs and ad valorem duties, etc at the South African port of entry, as well as transport costs and handling costs to the factory where the supplies are to be produced, manufactured or assembled.
- 3.18 **Inspection release certificate** means the document which is prescribed by Armscor (K225) and is signed by an authorised representative of Armscor's Quality Department to indicate acceptance of the supplies or work and, where prescribed, proof of delivery in terms of the conditions of the order/contract.
- 3.19 **Institution** means:
- (i) Any higher education institution contemplated in the definition of "higher education" contained in section 1 of the Higher Education Act
 - (ii) Any statutory institution listed in Schedule 1; and
 - (iii) Any institution identified by the Minister under section 3(2) of the Intellectual Property Rights from Publicly Financed Research and Development Act No. 51 of 2008.
- 3.20 **Intellectual property** is a generic term for the outcome of human creative effort and includes but is not limited to registered patents, designs and trademarks, as well as copyright and common law rights, know-how, confidential information and the like.
- 3.21 **Jointly owned (shared) intellectual property** is the intellectual property generated through co-investment by the contractor or subcontractor during the execution of an order/contract. Joint ownership can only be established if:
- (i) the contractor can prove or provide reasonable evidence of relevant investment before the award of the order/contract; or
 - (ii) the contractor and Armscor agree formally in writing on an auditable co-investment plan as part of the proposed order/contract; and
 - (iii) the contractor and Armscor agree formally on the parties' respective rights and responsibilities with respect to the jointly owned intellectual property generated should an order/contract be awarded.
- 3.22 **Local content** in respect of supplies being assembled or manufactured in the Republic of South Africa means that portion of the price quoted which is not included in the definition "imported content" and includes the contractor's profit on the supplies.
- 3.23 **Order/contract** or **scope of order/contract** means an official order/contract issued by Armscor for the supplies or the work, which is subject to these conditions and includes any amendment of the order/contract.
- 3.24 **Legal person** means any natural person, firm, trust, corporation, company or other entity, whether with legal personality or not.
- 3.25 **Price adjustment** means the amount in the currency stated in the order/contract, which may be fixed or not fixed.
- 3.26 **Ceiling price / budgetary price** means the price used where the exact scope of work is not determined and which is further subject to either a fixed hourly rate or actual costs of the contractor and a reasonable handling fee. Such a price will be adjusted once the extent of the work has been determined.
- 3.27 **Fixed price** means the price cannot be changed and is not subject to adjustment.

- 3.28 **Price basis** determines which cost elements are included in the price, as set out in Incoterms 2010 or in these conditions.
- 3.29 **Publicly financed research and development** means research and development undertaken using any funds allocated by a funding agency but excludes funds allocated for scholarships and bursaries.
- 3.30 **Supplies** means the items, goods, materials or software to be supplied by the contractor in terms of the order/contract.
- 3.31 **Work** means the services to be rendered and the work to be done by the contractor in terms of the order/contract.

4 APPLICABLE LAWS AND INTERPRETATION

- 4.1 These conditions or any terms or conditions incorporated in the order/contract shall be subject to and interpreted in accordance with the laws of the Republic of South Africa.
- 4.2 Terms contained in Incoterms 2010 but not defined in paragraph 3 shall have the meaning as defined in Incoterms 2010.
- 4.3 The headings of the paragraphs of these conditions are used for the sake of convenience only and shall not be taken into consideration in interpreting the meaning and effect of any paragraph.
- 4.4 Words purporting the singular shall also include the plural, and vice versa, where the context so requires.
- 4.5 The true intent and meaning of these conditions is that the contractor shall in all respects perform and complete the order/contract in a workmanlike and cost-effective manner in accordance with the requirements of the order/contract.

5 DISCREPANCIES

Should there be any discrepancy or uncertainty regarding any aspect of the order/contract, or should Armscor make a counteroffer to the contractor, the contractor must within 14 (fourteen) days after the receipt of the order/contract refer the matter to Armscor in writing for a decision before commencing with the execution of the order/contract. Failure by the contractor to do so shall absolve Armscor from all liability resulting from any incorrect interpretation of the order/contract and the contractor shall be responsible for any deviation from the order/contract resulting from any misunderstanding. Should the contractor fail to object in writing to a counteroffer made by Armscor within 14 (fourteen) days of receipt of such counteroffer, the contractor shall be regarded to have accepted the counteroffer.

6 ADJUSTMENT OF PRICES WHERE PRICES ARE NOT FIXED

- 6.1 **Prices subject to changes in the rate of exchange**
- 6.1.1 Where the date of delivery is not fixed, the actual delivery date shall be taken as the contractual delivery date. In all cases where supplies bought have to be imported, the contractor shall not be entitled to benefit and profit from any change in the rate of exchange of the currencies concerned. Similarly, the contractor is not expected to bear any loss caused by a change in the rate of exchange, unless such loss is incurred as a result of the contractor's negligence or non-compliance with the provisions set out hereunder.

- 6.1.2 The total amount of the order/contract to be transferred abroad shall be adjusted only as a result of change in the rate of exchange which ruled on a given date (the "base date" specified in the order/contract) between such foreign exchange amount and another currency referred to in the order/contract and the rate of exchange which ruled on another date (the "end date" determined by Armscor) between the said two currencies.
- 6.1.3 Where payment to a foreign supplier is effected before the contractor is paid by Armscor, the rate of exchange applicable to such payment is taken for the purposes of the adjustment, provided that the foreign supplier is paid within the contractual delivery period. Should payment occur after the contractual delivery period, the provisions of paragraph 6.1.7 apply.
- 6.1.4 Where payment to a foreign supplier (the "first-mentioned payment") is effected after the contractor has been paid by Armscor –
- 6.1.4.1 and delivery takes place before the contractual delivery date, the rate of exchange applicable on the date of the first-mentioned payment or on the thirtieth day after the date appearing on Armscor's official remittance advice, whichever is the earlier, is used for the purposes of the adjustment;
- 6.1.4.2 and delivery takes place after the contractual delivery date, the rate of exchange applicable on the date of the first-mentioned payment, or which ruled on the contractual delivery date or on the actual delivery date, whichever is to the best advantage of Armscor, is taken for the purposes of the adjustment.
- 6.1.5 In the case of an advance payment the conditions set out in 6.1.5.1 above shall apply *mutatis mutandis*.
- 6.1.6 The contractor must, after having paid the amount abroad, submit the relevant invoice from the foreign supplier, accompanied by supporting documentary proof from the contractor's bank as to when the foreign currency amount was paid and the rate of exchange at which payment was effected, in order to enable Armscor to verify the particulars.
- 6.1.7 If payment was made from the contractor's South African resident bank account, supporting documentary proof from the bank must be submitted, indicating the foreign currency of the transaction, the foreign currency amount remitted, the actual date of remittance, the rate of exchange used, and the South African rand amount of the transaction.
- 6.1.8 If payment was made from any of the contractor's Customer Foreign Currency (CFC) accounts or any other offshore account abroad, supporting documentation from the contractor's foreign currency bankers must be submitted, indicating the foreign currency of the transaction, the foreign currency amount paid, and the actual date of the transaction.
- To determine the South African rand value of the transaction, the rate of exchange to be used for calculating purposes shall be the selling rate of the customer's bank on the date of the transaction and the claim must also be supported by documentary proof of this rate.

6.2 Escalation adjustments

- 6.2.1 The basic sum or tariff in the currency stated in the order/contract shall be subject to amendment only in accordance with adjustments that appear in specified indices, subject to the following being contained in the order/contract:
- 6.2.1.1 the respective percentages of the total order/contract price that are subject to adjustment in accordance with changes in the specified indices;

- 6.2.1.2 the title of the official bulletin or other document in which the specified indices are published;
- 6.2.1.3 the method of calculating such sum(the total escalation percentage shall be round off to the sixth decimal);
- 6.2.1.4 the dates or periods pertaining to the contractual term to be used for determining the final indices: provided that such dates or periods may not be later than the contractual delivery date, whichever is the earlier.
- 6.2.2 Where an order/contract makes provision for escalation, such escalation shall be calculated per deliverable item as follows:
- 6.2.2.1 in the case of a fixed delivery date, by taking the index or rate which in terms of the order/contract is applicable on such fixed delivery date or on the actual delivery date, whichever is the earlier; or
- 6.2.2.2 in the case of a delivery date which is not fixed (whether or not the delivery of such item is at the same time subject to a further fixed delivery date), by taking the index or rate which in terms of the order/contract is applicable on such not fixed delivery date, or on the actual delivery date, whichever is the earlier.
- 6.2.3 Should the delivery date of any item be changed in any way, the index or rate according to which escalation is calculated in terms of the order/contract shall be amended only if expressly provided for in a written amendment of the order/contract.
- 6.3 Exchange rate as well as escalation adjustments**
- The provisions of paragraphs 6.1 and 6.2 are applied on the basis that the currency and indices according to which such adjustments are calculated, at all times apply to the same country.
- 6.4 Statutory cost adjustments**
- The basic sum, or any specified portion thereof, in the currency stated in the order/contract shall be subject only to statutory cost adjustments determined by the Government of the Republic of South Africa or by any other competent authority by way of promulgation in the Government Gazette or any other official document, provided the following is contained in the order/contract:
- the nature of the statutory costs;
 - the sum which is subject to statutory cost adjustments;
 - the method of calculating such sum;
 - the dates or periods pertaining to the contractual terms to be used for determining the final date on which statutory cost adjustments shall apply: provided that such dates or periods shall not be later than the contractual or actual delivery date, whichever is the earlier. Value-added tax (VAT) must be invoiced as a separate item on the invoice at the ruling rate.
- 6.5 All claims for adjustments in the prices of supplies or work where the price is not fixed must be accompanied by documentary proof of rates of exchange, escalation indices, and such other proof as may be determined in the order/contract: provided that Armscor reserves the right to request audited statements or certificates instead of the said documentary proof as proof of any claim for adjustment in terms of paragraph 6. All costs in connection with obtaining such statements are for the contractor's account. Such documentary proof must be submitted to Armscor by the contractor within the period prescribed in paragraph 25.
- 6.6 Unless otherwise specified in the order/contract, adjustments due to changes in rate of exchange shall be determined in accordance with paragraph 6.1.

7 PRELIMINARY EXCHANGE RATE ADJUSTMENTS

- 7.1 Any exchange rate adjustments made by Armscor must be furnished to the contractor in writing.
- 7.2 If the invoice for the supplies or work which is subject to exchange rate adjustments in terms of paragraph 6.1 is not accompanied by the prescribed documentary proof, Armscor reserves the right, save as provided by the conditions of paragraph 6, to make a preliminary exchange rate adjustment, based on one of the following rates which is to the best advantage of Armscor:
- 7.2.1 the rate stated in the order/contract;
- 7.2.2 the rate which ruled on the date of Armscor's payment to the contractor;
- 7.2.3 the rate which ruled on the contractual delivery date;
- 7.2.4 the rate which ruled on the actual delivery date.

8 LIABILITY FOR STATUTORY DUTIES

All statutory duties (excluding value-added tax) or other similar charges which may be payable in respect of an order/contract, must be paid by the contractor.

9 SUBSISTENCE & TRAVELLING EXPENSES

Where the order/contract makes provision for payment of the contractor's actual travelling expenses by Armscor, the contractor must make use of Armscor's nominated travel office and car hire services, unless the contractor submits documentary evidence to the reasonable satisfaction of Armscor that the contractor's services are equal to or cheaper than those provided by Armscor. In the event that the contractor elects to use other travel services, the quote(s) from such other travel services should be of the same date as the quote(s) of Armscor's nominated travel office, and such quotes should be submitted as proof with the invoices to Armscor.

10 PROGRAMMES FOR EXECUTION OF ORDER/CONTRACT

The contractor must from time to time, as determined in the order/contract, furnish Armscor with a descriptive statement, in such form as may be required by Armscor, of the planning for the execution of the order/contract and the proposed timeframes for the execution of the various elements of the order/contract. Provided that such statement may not affect, prejudice or be deemed to have amended the order/contract or any of the parties' rights in terms thereof. In addition, the contractor must supply periodic progress reports as detailed in the order/contract.

11 COMMENCEMENT AND PROGRESS OF WORK

The contractor must, subject to the timeous delivery of customer furnished equipment (CFE), proceed with the activities required for the execution of the order/contract at such a rate so as to ensure the completion of each part of the order/contract on or before the contractual delivery date. If the contractor fails to do so, Armscor is entitled, without prejudice to or waiver of its rights under the provisions of paragraph 32 and subject to the provisions of paragraph 35, to call on the contractor to take such corrective action as may reasonably be required by Armscor.

12 APPOINTMENT OF REPRESENTATIVES

- 12.1 Armscor is entitled to appoint or nominate representatives to carry out quality assurance services as provided for in or in connection with the order/contract, or to liaise between Armscor and the contractor.

12.2 Armscor is entitled to request the contractor to appoint a representative at a particular place where work is or will be performed for Armscor, or to render such services as may be required by Armscor in terms of the order/contract. The contractor is only responsible for appointing representatives to the extent specified in the order/contract.

12.3 One party shall timeously notify the other of their appointed representatives in terms of paragraphs 12.1 and 12.2, as the case may be.

13 DEVIATIONS AND SUBSTITUTIONS BY CONTRACTOR

13.1 The contractor must adhere strictly to the provisions of the order/contract and may not deviate from them without first obtaining written approval from Armscor.

13.2 Subject to paragraph 14, the contractor may not deviate from the requirements of the order/contract in respect of samples, patterns, drawings, specifications, processes or procedures, or from any approved prototype, without first obtaining written approval from Armscor.

14 AMENDMENT OF ORDER/CONTRACT

14.1 No amendment of any order/contract or of these conditions is valid or in force unless such amendment has been put in writing and has been signed by a duly authorised representative of Armscor.

14.2 Should the contractor fail to object to the amendment of an order/contract within 14 (fourteen) days after receiving the amendment from Armscor, the order/contract shall be deemed to be amended accordingly.

14.3 Armscor is entitled, from time to time during the execution of the order/contract, to require the contractor, by notice in writing, to alter, amend, omit, add to, or otherwise vary any of the supplies and/or work, without invalidating the order/contract.

The contractor must carry out such amendments and is bound by the same applicable conditions as though the said amendments originally formed part of the order/contract.

14.4 If in the opinion of the contractor such amendments to the order/contract, if carried out, would involve an increase in costs or prevent him from fulfilling any of his obligations or guarantees under the order/contract, the contractor must notify Armscor accordingly in writing at least 14 (fourteen) days before proceeding, and Armscor shall decide within a reasonable period whether or not the amendments are to be carried out.

14.5 Should Armscor confirm its instructions, the contractor's obligations and guarantees shall be amended to such an extent as may be agreed upon in writing between Armscor and the contractor. The difference in cost occasioned by such amendment, if any, shall, subject to the provisions of paragraph 14.6, be either added to or deducted from the order/contract price.

14.6 If amendments are required by Armscor, the contractor must quote a price for the amendments, and if Armscor and the contractor fail to reach agreement on the price, the value of such changes shall be determined by Armscor in accordance with the rates (if any) specified in the order/contract in as far as the same may be applicable, and in the absence of an applicable rate the value of such amendments shall be deemed to be the reasonable cost of wages and material for carrying out the amendments, plus such additional amount as is reasonable under the circumstances to cover supervision and other expenses, as well as a reasonable profit. The price

quoted for amendments may, at the discretion of Armscor, be subjected to investigation in terms of paragraph 24.

15 QUALITY OF SUPPLIES

- 15.1 Subject to paragraphs 13 and 14, the supplies must in all respects be in accordance with the samples, patterns, drawings, specifications and other requirements stipulated in the order/contract. All supplies, including the components and parts thereof, must be new and unused, unless otherwise specified in the order/contract.
- 15.2 The contractor must maintain a quality system in accordance with the order/contract.
- 15.3 Armscor is entitled to make any inspection release certificate subject to:
- (a) written confirmation (certificate of compliance) by the contractor that the work or the supplies meet the requirements of the order/contract in every respect; and/or
 - (b) an audit, at Armscor's expense, to determine the effectiveness of the contractor's control of his subcontractor's activities; and/or
 - (c) observation of the contractor's activities (such observation and/or audit shall extend to subcontractors where appropriate); and/or
 - (d) inspection or testing of the work or the supplies on a continuous or statistical basis: provided that reasonable advance notice is given to the contractor of such audit, observation and/or inspection, and that the extent and process of such audit, observation and/or inspection is agreed on beforehand.
- 15.4 Where the order/contract calls for inspection of the work or the supplies by a person or body not connected to Armscor or the South African National Defence Force, and the work or the supplies are rejected by such inspecting person or body on reasonable grounds, the contractor shall bear the actual cost of such inspection. Where Armscor is the acceptance authority, Armscor reserves the right to recover its actual costs from the contractor for all subsequent inspections where the work or the supplies are rejected more than once.

16 ACCESS TO AND USE OF CONTRACTOR'S FACILITIES

- 16.1 Armscor, its contractors or agents shall be granted access to the contractor's facilities at all pre-arranged times. The contractor must further ensure that Armscor, its contractors or agents are granted access to the facilities of the contractor's subcontractors. Access is restricted to the facilities that relate to the execution of the order/contract and to prior arrangement with, and being accompanied by, the contractor.
- 16.2 The contractor shall allow the use of his facilities and give such assistance reasonably necessary to enable Armscor, its contractors or agents or their employees to carry out any work or task in connection with the order/contract. Where Armscor must use the contractor's equipment, it must be without interruption to the business of the contractor.

17 SUBCONTRACTS

- 17.1 If so requested by Armscor, and only in exceptional circumstances, the contractor must timeously and in writing submit to Armscor for its approval the names of the proposed subcontractors, and the contractor may not enter into any subcontract for the execution of the order/contract or any part thereof, or for the manufacture or supply of materials to be used in the execution of the order/contract, with any person other than the subcontractors named in the approved list, unless the contractor obtained the written consent of Armscor beforehand.

- 17.2 Should Armscor take over the order/contract or any part of it from the contractor, Armscor may take over any subcontract between the contractor and any subcontractor for the supply of labour, materials, plant, construction and erection, at the same price as such labour, materials, plant, construction and erection would have been supplied to and executed for the contractor; and this shall be a condition of and be embodied in any subcontract and be binding on any subcontractor. Armscor may require the submission of any subcontract before such subcontract or the subcontractor is approved.
- 17.3 The contractor must include his obligations under the order/contract in his contracts with his subcontractors and in such subcontracts: provided that such obligations must be fulfilled in the same manner and to the same extent as the contractor is obliged to do, except in so far as Armscor may approve that the subcontractor be exempted from the obligations.
- 17.4 The contractor shall not be released from his liabilities or obligations under the order/contract by any arrangement whatsoever with his subcontractors in cases where the subcontractors have breached any of the provisions of the order/contract or of these conditions.
- 17.5 The contractor must keep such records of his subcontractors and their capabilities and submit them as may reasonably be required by Armscor so as to ensure proper and accurate performance in the execution of the order/contract.

18 PROGRESS REPORTS

The contractor must, when so requested in writing, submit to Armscor written reports giving full details of the work carried out in connection with the order/contract, the total quantities of the supplies delivered, and any other information as may be reasonably requested. Such reports shall be for such periods and contain such additional information as stipulated by Armscor.

19 PASSING OF OWNERSHIP AND SAFEGUARDING OF ARMSCOR PROPERTY

- 19.1 All rights in respect of materials, equipment or special moulds, jigs and tools purchased by the contractor as deliverable supplies in terms of the order/contract and paid for by Armscor for the purposes of and in terms of the order/contract, shall upon delivery to the contractor and payment by Armscor immediately vest in Armscor.
- 19.2 The contractor guarantees that materials and/or equipment will be purchased by him on a cash or credit basis only, and that if on a credit basis, all materials will be paid for within 30 (thirty) days of delivery to Armscor. The contractor may not purchase any materials and/or equipment subject to a condition that ownership of the materials and/or the supplies is reserved by the suppliers thereof, except where intellectual property rights are specifically reserved.
- 19.3 Subject to the provisions in paragraph 19.1, the contractor indemnifies Armscor and holds Armscor free and harmless against any act by any third party, which act may have the effect of repossessing and therefore denying Armscor's ownership of such purchased materials and/or equipment by such third party. Armscor shall be deemed as possessing the *corpus* of such materials and/or equipment at all times, and is entitled to repossess and remove such materials and/or equipment. The conditions in this paragraph 19.3 must be incorporated as a condition in all contracts for materials and/or equipment from suppliers, and suppliers must signify to the contractor in advance that they accept this condition.

- 19.4 Subject to the provisions of paragraph 19.1, any benefit arising from work or improvement by way of labour that has been expended on or applied to the materials and/or equipment, as well as from any moulds, jigs and tools made by the contractor for the purpose of carrying out the order/contract, vests in Armscor immediately, and should Armscor's rights be at risk, Armscor has the right to remove the improved product and place it elsewhere.
- 19.5 All equipment, supplies, models, samples, materials and articles issued to the contractor or paid for by Armscor, or purchased by the contractor on behalf of Armscor and subsequently paid for by Armscor, remain the property of Armscor, are free from any contractor's retention, and must be kept separate from other goods delivered to the contractor by any subcontractor or suppliers in terms of paragraph 19.1 for use in the execution of the order/contract. Such items must furthermore be kept in a safe place, may be inspected by Armscor at any reasonable time and must, on completion of the order/contract, unless they are intended to be incorporated in the supplies or to be consumed, be returned at the contractor's expense to a place designated by Armscor: provided that Armscor and the contractor had mutually agreed on such place of delivery before the order/contract was placed and accepted.
- 19.6 Unless otherwise specified in the order/contract, the contractor is, until acceptance of delivery by Armscor in accordance with these conditions, solely responsible for any loss of or damage to materials and/or equipment purchased by him, or for any loss of or damage to equipment, supplies, models, samples, materials and articles issued to him, reasonable wear and tear excluded, and the contractor indemnifies Armscor against loss of or damage to any of the aforesaid. The contractor must immediately inform Armscor in writing of any such loss or damage.
- 19.7 The provisions of paragraphs 19.5 and 19.6 also apply to equipment, supplies, models, samples, materials and articles that remain in the contractor's possession on completion of the order/contract.
- 19.8 Armscor may require proof that adequate steps have been taken for the safekeeping of the items referred to in paragraph 19, and the contractor is obliged to complete such forms and to follow such procedures as may be introduced by Armscor for purposes of control. Should Armscor later require additional measures for the safekeeping of such items, i.e. over and above those agreed on in the order/contract, the costs resulting from the provision of such measures are for Armscor's account.
- 19.9 Where the order/contract is carried out on premises rented by the contractor, the landlord must be informed beforehand by the contractor which of the items on the premises are Armscor's property, and the contractor must submit written proof to Armscor that such notice has been received by the landlord.

20 MARKING OF SUPPLIES

All supplies and packaging shall be marked in accordance with the instructions given in the order/contract or as advised by Armscor before despatch to the place of delivery. Costs resulting from additional instructions not agreed on in the order/contract will be for Armscor's account.

21 PACKAGING, PACKAGING MATERIALS AND CONTAINERS

- 21.1 The contractor is responsible for the packaging of supplies in such a manner as to prevent loss or damage in transit and in compliance with the requirements applicable to the mode of transport concerned. The contractor indemnifies Armscor against any losses, costs and damages caused by or resulting from faulty, incorrect or inadequate packaging.

- 21.2 Packaging materials or containers, excluding ISO containers, will not be returned to the contractor, except where specifically so provided in the order/contract. Where provision is made in the order/contract for the return of the packaging materials or containers, such packaging materials or containers will be returned at the contractor's risk and expense. Armscor shall, on receipt of a claim supported by a copy of a consignment note, be allowed full credit for materials and containers returned to the contractor or a third party, at prices quoted for such items.
- 21.3 No allowance may be made for the mass of bags, containers or packaging materials when determining the mass of supplies delivered.

22 CONSIGNMENT OF SUPPLIES AND ITEMS

- 22.1 All supplies and other items which are to be sent to Armscor must be consigned to the address indicated in the order/contract or to any other address subsequently notified to the contractor in writing by Armscor. Should a change in the delivery address result in a change in delivery cost, such cost or saving, providing the amount is reasonable, must be passed on to Armscor.
- 22.2 Armscor reserves the right to reject any supplies not consigned in the name of the contractor or his stated representative.
- 22.3 Where the order/contract provides for despatch by rail from two or more railway stations or sidings, Armscor reserves the right to choose the station or siding and shall advise the contractor of its decision before the scheduled consignment date(s).

23 DELIVERY PERIODS

- 23.1 Subject to any contrary provisions in the order/contract, an order/contract is deemed to have been received by a contractor at the latest 21 (twenty-one) days after the date stamped on the order/contract if the order/contract/amendment has been posted in terms of paragraph 42, or on the date of confirmation of delivery by fax, hand or e-mail, and timescales for the delivery of supplies and work are calculated with effect from such date.
- 23.2 In the absence of an express indication to the contrary, the delivery period or date stated in the order/contract is regarded as fixed, and is binding on the contractor. Delivery dates which are not fixed shall become fixed six (6) months after the provisional delivery dates, unless otherwise provided for in the order/contract. In such case Armscor is entitled to exercise its remedies under paragraph 32.
- 23.3 Subject to the provisions of paragraph 23.2, if delivery is not completed within the indicated provisional delivery period in the case where the delivery period is not fixed, Armscor is entitled to call upon the contractor by notice in writing to furnish a reasonable extended date acceptable to Armscor. This extended date shall be regarded as a fixed delivery date. If agreement cannot be reached on the extended period, or if delivery is not completed within this extended period, Armscor is entitled to exercise its options in terms of paragraph 32. In the event of cancellation, Armscor shall not be liable for any expenditure incurred by the contractor, except as specifically provided for in the order/contract.
- 23.4 In the event that the contractor is prevented from achieving the specified dates directly due to the non-performance of Armscor/SANDF or their nominated subcontractors or services, or any obligation in terms of the order/contract, the contractor is entitled to negotiate the delivery period and the additional expense of the item(s) adversely affected as a result of those delays.

24 INSPECTION OF BOOKS OF ACCOUNT AND RECORDS

- 24.1 Where the order/contract provides for a price that is not fixed, Armscor reserves the right to inspect the books of account pertaining to the order/contract and the cost-accounting and production records of the contractor or any subcontractor, or to have them inspected, at any time in order to evaluate any claims resulting from the cancellation of the order/contract, as well as claims for price adjustments or changes to the order/contract. Armscor has the right to make copies of such books and records for these purposes.
- 24.2 Armscor reserves the right to obtain from the contractor approved audited financial statements, for any financial year during the validity period of the order/contract. The fact that the financial statements requested have not yet been completed or approved shall be no defence against any request by Armscor in terms of this paragraph 24.2 if a period of more than nine (9) months has passed after the end of the financial year concerned.
- 24.3 Armscor is entitled to inspect the contractor's financial and accounting systems and procedures relating to the order/contract at any time during the term of the order/contract, or to have them inspected.
- 24.4 The contractor or the subcontractor who is required to make available the books and records specified in paragraphs 24.1, 24.2 and 24.3 for inspection, must, within the time stated in the notice or such reasonable time as may be agreed to, detail the aforesaid books and records in a statement specifying the following separately, as may be required by Armscor:
- (a) such documents and records in their or their agents' possession, other than the documents or record mentioned in paragraph (b);
 - (b) such documents and record in respect of which there is a valid objection to produce;
 - (c) such documents and records which they or their agents had but no longer have in their possession at the date of the statement, and stating their whereabouts; and
 - (d) such other documents and records that may be relevant to the evaluation that are in the possession of the party required to produce, subject to paragraph (b) and (c).
- 24.5 If the contractor fails to comply with any of the provisions of this paragraph 24, Armscor is entitled, without waiver of its rights under paragraph 32, to withhold payment due and payable in terms of the order/contract until such failure has been remedied by the contractor.

25 TIME FOR SUBMISSION OF CLAIMS

In the absence of any other arrangements, all claims must be submitted in the prescribed manner within 90 (ninety) days after the final delivery date of the order/contract, or, in the case where escalation is applicable, the date of the publication of the final indices, whichever date is the latest. Should the contractor be unable to comply with this requirement within the stated period, he must notify Armscor in writing before the expiry of the 90 (ninety) day period, stating the reasons for the delay and a date when such claims can be expected, which date shall not be later than 90 (ninety) days from the date of the notice. Should the contractor fail to submit his claims or to inform Armscor of any delay before expiry of the 90 (ninety) day period, Armscor may, at its discretion, refuse to accept any further claims, in which event the contractor shall be deemed to have waived any claim still outstanding in terms of the order/contract.

26 PAYMENT

Payment by Armscor is effected electronically. Locally payment is made either through the Automated Clearing Bureau (ACB) system or direct through a bank by means of an electronic transfer, direct into the contractor's nominated bank account. Payment abroad is made either direct through a bank by means of electronic transfer, direct into the foreign contractor's nominated bank account, or by means of a letter of credit established with the foreign contractor's bank.

27 SET-OFF

Armscor is entitled to set off any amount owing to Armscor by the contractor against any amount owed to the contractor by Armscor. Where the amounts used for such set-off are in different currencies, the rate of exchange applied for converting the amount concerned into the appropriate currency shall, at the discretion of Armscor, be that which applies at 11:00 in London or 11:00 in New York, as the case may be, as determined by Armscor's commercial bank on the date of set-off. Should the amount which is owed by Armscor not have been determined or liquidated, Armscor may suspend all further payments to the contractor in respect of the affected order/contract and estimate, in good faith, the amount that is owing and set off the estimated amount, subject to adjustment and settlement once the amount has been determined or liquidated by way of arbitration or agreement.

28 INTELLECTUAL PROPERTY RIGHTS

28.1 Ownership of intellectual property rights

- (a) Where the order/contract calls for the design or development of any item, process or service, the intellectual property rights arising from such development or design, as well as any rights which may in future arise from any improvements thereto, shall be deemed to be foreground intellectual property, and all rights thereto shall be vested in Armscor, unless there is a co-ownership agreement.
- (b) Intellectual property may be found in or take the form of books, manuscripts, reports and notes, computer software, inventions, drawings and designs, technical data and specifications, models, photographs, trademarks, and other graphical images.
- (c) Armscor will accept the contractor's rights to background intellectual property only if the contractor can prove or provide reasonable evidence that the background intellectual property was established before the order/contract was awarded, and/or that such intellectual property was established with investment/co-investment from the contractor.
- (d) Should a contractor significantly modify, alter, amend and/or enhance background intellectual property (defined below) as part of an Armscor order/contract, for example a manufacturing process, the significantly modified, altered, amended and/or enhanced intellectual property shall be deemed to be owned by Armscor and it becomes foreground intellectual property. To the extent that any such modified, altered, amended and/or enhanced intellectual property rights are owned by the contractor, by operation of law or for any other reason, the contractor shall, if required by Armscor, assign such intellectual property rights in writing to Armscor, at no cost or remuneration. "Significantly modify, alter, amend and/or enhanced background intellectual property" means modification, alteration, amendment and/or enhancement of background intellectual property which the contractor has at his disposal, to the extent where such background intellectual property provides the basis from which intellectual property is created to produce, manufacture, support or suit the product or service to be delivered to Armscor by the contractor.

- (e) Where jointly owned intellectual property is generated, the rights to the jointly owned intellectual property are as defined in the order/contract, or as agreed between the parties.
- (f) If the background intellectual property becomes indivisible from the foreground intellectual property due to the execution of the order/contract, the combined intellectual property shall become jointly owned intellectual property.

28.2 Right to use

- (a) The contractor acknowledges and agrees that Armscor is entitled to use and exploit the foreground intellectual property rights in any manner whatsoever, or to restrict or prohibit the use thereof.
- (b) Armscor and the contractor both have the right to use and exploit jointly owned intellectual property on terms and conditions formally agreed to in writing.
- (c) Armscor has the right to use and exploit background intellectual property for the integration, operation, upgrade and support of the equipment, infrastructure or services pertaining to the order/contract, subject to written approval by the contractor and provided that the exploitation of background intellectual property by Armscor is not detrimental to the contractor's business.
- (d) The contractor undertakes to honour Armscor's intellectual property rights and any future rights by, inter alia, keeping all know-how and undisclosed or unpublished material confidential.
- (e) The contractor undertakes not to, directly or indirectly, use, apply, sell or in any way obtain benefit from the foreground intellectual property rights or jointly owned intellectual property rights or the know-how, either by the contractor or in association with any person, otherwise than in accordance with the terms and conditions of the order/contract or with the written approval of Armscor.
- (f) The contractor accepts that, upon termination of the order/contract for whatever reason, the contractor shall not have the right to use or make available the intellectual property rights relating to the items, and that all authorisations granted in terms of the order/contract shall be terminated. In this regard the contractor undertakes to immediately hand over to Armscor on request all documents, data packs, drawings and technical data, in any medium whatsoever, representing the intellectual property established in terms of the order/contract.

28.3 Control and maintenance of intellectual property

- (a) The contractor must control and maintain the foreground intellectual property and jointly owned intellectual property. The contractor must keep redundant and/or obsolete intellectual property until advised by Armscor of the process to archive it or dispose of it.
- (b) The contractor must inform Armscor of the disposal of any background intellectual property, as this may have an impact on the capabilities of Armscor's clients.
- (c) Armscor is entitled to investigate the loss or misappropriation of foreground intellectual property or jointly owned intellectual property, and the contractor must grant Armscor or its appointed agents reasonable access to facilities and documentation so that such investigations can be carried out.

28.4 Transfer of intellectual property

- (a) Foreground intellectual property can only be transferred from one South African entity to another with the written approval of Armscor.
- (b) Foreground intellectual property can only be transferred to a foreign entity with the written approval of Armscor and the National Conventional Armaments Control Committee (NCACC).

- (c) Armscor reserves the right to transfer to any other entity its rights to foreground intellectual property, from any contractor who fails to comply with the conditions of the order/contract.
- (d) Any transfer of jointly owned intellectual property should be done by formal mutual agreement between Armscor and the contractor before the transfer.
- (e) Commercial background intellectual property that is used by a contractor of Armscor in the delivery of services and/or products to Armscor may be transferred by the entity that owns it to another South African entity (third party) without the approval of or notification to Armscor: provided such transfer does not affect the right of Armscor to use such intellectual property. Armscor must be notified beforehand of the transfer of such commercial background intellectual property by the third party to any foreign entity.
- (f) Commercial background intellectual property that is used by a contractor of Armscor in the delivery of Defence services and/or products to Armscor may only be transferred to a foreign entity if Armscor was notified beforehand.
- (g) Defence background intellectual property may be transferred by the South African entity that owns it to a foreign entity only with the approval of the National Conventional Arms Control Committee (NCACC).
- (h) The transfer of any background intellectual property that is not completely divisible from any foreground intellectual property must be handled as jointly owned intellectual property.
- (i) Armscor will not transfer background intellectual property that is indivisible from foreground intellectual property to a third party without the agreement of the contractor who owns the background intellectual property.
- (j) Armscor has the right to impose conditions on the transfer of any foreground intellectual property or jointly owned intellectual property or indivisible intellectual property in order to protect South Africa's national interests.

28.5 **Patents, designs and trademarks**

- (a) Armscor has the right to apply for the registration of patents, designs or trademarks of any new device, process, machinery and equipment, or any other item capable of registration, resulting from the application of its foreground intellectual property.
- (b) Armscor has the right to request the contractor to register any patent, design or trademark resulting from the application of jointly owned intellectual property in the name of Armscor or the contractor or, where convenient, in any other name as may be agreed by the parties, provided that the patent, design and trademark is jointly owned by Armscor and the contractor.

28.6 **Joint ventures**

- (a) The contractor must inform Armscor in writing of any envisaged deal which may lead to a joint venture or alliance or change of ownership or shareholding in the contractor's organisation, and which may result in other people or entities gaining access directly or indirectly to foreground intellectual property or jointly owned intellectual property.
- (b) Armscor is entitled to recall all its foreground intellectual property from a contractor and to deny access to such foreground intellectual property to a contractor should the contractor enter into any deal which may lead to a venture or alliance or result in a change of ownership or shareholding in the contractor's organisation in terms of which, in the opinion of Armscor, Armscor's rights to such foreground intellectual property will not be properly safeguarded, and/or where it

will not be in the interest of Armscor and South Africa to provide access to Armscor's foreground intellectual property rights to the contractor.

- (c) Should Armscor decide not to recall its foreground intellectual property rights from such contractor, Armscor shall nevertheless be entitled to require special measures to be adhered to in order to ensure that its foreground intellectual property rights are protected against unlawful use or transfer, and to require that any agreement with a third party that provided intellectual property rights to Armscor is honoured.
- (d) Where a contractor establishes a joint venture or alliance, or in the case of change of ownership or shareholding in the contractor's organisation, Armscor is furthermore entitled to require adherence to special measures concerning:
 - (i) jointly owned intellectual property – to prevent unlawful use or transfer of such intellectual property;
 - (ii) background intellectual property – with a view to ensuring the cost-effective production, construction, integration, test, evaluation and logistic support and/or upgrading of SANDF equipment and infrastructure or equipment, or infrastructure of any other Armscor client.
- (e) The contractor may not declare any foreground intellectual property as a company asset when a deal is discussed or negotiated which may lead to a joint venture or alliance or a change in the ownership or shareholding of the contractor's organisation.
- (f) The contractor must clearly indicate joint ownership (including relevant ownership conditions) when jointly owned intellectual property is declared as a company asset.

28.7 **Business, income and royalties**

- (a) The contractor must inform Armscor timeously of any plans or intentions to use the foreground intellectual property or jointly owned intellectual property for business with third parties. Where foreground intellectual property or jointly owned intellectual property is involved, the contractor may only enter into a business with a third party once written approval has been received from Armscor.
- (b) Armscor further also has the right to claim royalties on foreground intellectual property and jointly owned intellectual property.

28.8 **Subcontractors**

The contractor must incorporate the provisions of this paragraph *mutatis mutandis* in any order/contract with a subcontractor in such a way that any rights of Armscor mentioned in this paragraph are protected and irrevocably vest in Armscor and are directly enforceable against the subcontractor by Armscor.

28.9 **Intellectual Property Rights from Publicly Financed Research and Development**

- (a) In the event that Armscor places an order involving research by an institution as defined in the Intellectual Property Rights from Publicly Financed Research and Development Act 51 of 2008 and such order is not funded on a full-cost basis by Armscor, the intellectual property rights derived from such research shall vest in such institution. However, Armscor retains the right to free exploitation and the right to use the results of publicly financed research and development and any intellectual property derived from such research in the interest of the Republic.
- (b) In the event that such research is funded on a full-cost basis by Armscor, intellectual property rights derived from such research will vest with Armscor,

however where necessary Armscor will consider the prevailing circumstances on a case-by-case basis.

29 LIABILITY FOR ROYALTIES AND INTELLECTUAL PROPERTY RIGHTS

- 29.1 Unless otherwise stated in the order/contract, the contractor must, where applicable, pay all royalties and expenses and is liable for all claims in respect of the use and exploitation of intellectual property rights for or in connection with any item or the integration, operation, support or upgrade of any item supplied or used or exploited under the order/contract, and the contractor indemnifies Armscor against any claims arising from or legal costs and losses resulting from the infringement or the alleged infringement of such rights.
- 29.2 The contractor indemnifies Armscor against any claim for infringement arising from the use or exploitation of third party registered intellectual property supplied in terms of the order/contract, and should any third party claim that the use of any article constitutes an infringement of his registered intellectual property rights, the contractor shall, at his own expense:
- 29.2.1 oppose or settle such claim so as to allow Armscor unimpeded use of the article; or
 - 29.2.2 replace or change the article so as to nullify or remove any infringement; or
 - 29.2.3 obtain unimpeded use of the article for Armscor.
- 29.3 In the event that any claim or application is brought against Armscor or its employees, agents or representatives in respect of any registered intellectual property right supplied by the contractor in terms of the order/contract, the contractor shall, in addition to the provisions of clause 29.2, promptly furnish, on request, adequate security to the satisfaction of Armscor for the payment of all costs, including attorney and own client costs, required to oppose such claim or application. The contractor shall furthermore diligently assist Armscor in opposing or defending such claim or application to the extent required by Armscor.
- 29.4 The contractor must include all costs related to the procurement of third party intellectual property in the price of the order/contract. Armscor shall not be liable for the payment of royalties to the third party for such third party's intellectual property.
- 29.5 Where licence documentation is furnished by Armscor, the contractor may not, without first obtaining the approval of Armscor, use any specification, drawing, description or any other manufacturing data supplied by Armscor for any purpose other than for the manufacture of the work or the supplies.
- 29.6 Where Armscor is bound by any special restriction under specific licence arrangements, Armscor will inform the contractor timeously of such restriction in the order/contract, and such restrictions must be honoured by the contractor in the execution of the order/contract.
- 29.7 The contractor does not have the right to assign the benefit under an Armscor licence, nor to cede, delegate or sublicense any right or obligation under the licence, without first obtaining written approval from Armscor.

30 GUARANTEE OF SUPPLIES AND WORK

- 30.1 The contractor guarantees that the materials, workmanship and design of supplies and the workmanship of the work shall for a period of at least 12 (twelve) months after acceptance thereof by or on behalf of Armscor, or for six (6) months after commissioning thereof, whichever expires last, be free from any material defects if used or applied under normal or specified working conditions or stored under normal

or specified storage conditions: provided that this guarantee shall at the latest terminate 24 (twenty-four) months after acceptance of the supplies or the work.

- 30.2 The guarantee provided for in paragraph 30.1 also applies to repairs or replacements of the supplies or any components or parts thereof, or to the rectification of defective work. The guarantee in respect of defective supplies, components or parts, or work, is suspended on the date that Armscor reports such defects, and recommences on the date of acceptance of the repairs or replacements by or on behalf of Armscor, and covers only the remaining period of the original guarantee period.
- 30.3 It is recorded that the true intention of the parties is that Armscor shall enjoy trouble-free use of the supplies or the work for at least the periods stated in paragraph 30.1.
- 30.4 Should any defect occur, Armscor will inform the contractor in writing, stating the nature of the defect. Should the contractor fail to remedy the defect within 20 (twenty) days after having been notified thereof, or fail to come to an agreement with Armscor on the matter within the said period, Armscor is entitled, without prejudice to any other rights it may have, to rectify the defect itself at the contractor's expense, or to have the defect rectified by a third party at the contractor's expense.
- 30.5 The contractor's obligation under the guarantee covers the collection and delivery of the defective supplies at the delivery point. Where components and parts have to be replaced, the guarantee includes the installation of such replacement components and parts.
- 30.6 Unless otherwise agreed, the contractor – in the case where repairs are undertaken on his premises – is responsible for all costs and the risk connected with the transportation of defective supplies to and from the contractor's premises.
- 30.7 If the contractor becomes aware or reasonably aware of a malfunctioning or dangerous situation, the contractor must inform Armscor of the defect and in addition publish this information in the recognised/standard bulletins.

31 INDEMNITY

The contractor is solely responsible for and indemnifies Armscor and holds Armscor harmless against any losses, expenses, costs, damages, demands or claims arising from or in connection with illness or injury to or the death of any person or employee (including employees of the contractor, employees of subcontractors or employees, agents and representatives of Armscor) and/or damage to the property of any or all such persons, suffered or allegedly suffered in connection with or by reason of the execution of the order/contract, unless such loss, expense, cost, damage, demand or claim was caused by negligence on the part of Armscor, its employees, agents or representatives.

32 NON-COMPLIANCE WITH CONDITIONS OF ORDER/CONTRACT AND DAMAGES

- 32.1 If, subject to the provisions of paragraph 35 –
- (a) the time has expired within which the order/contract or any item thereof should have been completed; or
 - (b) the contractor refuses or fails to carry out the order/contract in accordance with the instructions of Armscor, or is not making such progress with the order/contract as to ensure completion on the contractual delivery date, notwithstanding the provisions of paragraph 23.3, or in the event of any other failure or default of the contractor, Armscor may give notice in writing to the contractor to remedy the

failure default and, should the contractor fail to comply with the notice within 20 (twenty) days after the date thereof; or

- (c) the contractor goes into provisional or final sequestration/liquidation; or
- (d) the contractor goes into voluntary liquidation or, if he is an individual, voluntarily surrenders his estate; or
- (e) the contractor is dissolved, in the case of a partnership; or
- (f) the contractor makes an offer of compromise to his creditors; or
- (g) the contractor fails to take any steps to have a judgement set aside within seven (7) days after sentence was passed against him; or
- (h) the contractor permits the attachment of any of his assets and fails to uplift such attachment within 14 (fourteen) days after the date of attachment; or
- (i) the company is dissolved in terms of section 82 and 83 of the Companies Act of 2008; or
- (j) in the case of business rescue proceedings instituted in terms of section Chapter 6 of the Companies Act of 2008; or
- (k) should there be any change as regards:
 - the controlling shareholding in the contractor, where the contractor is a company; or
 - the members, where the contractor is a close corporation; or
 - the contractor's form of business;

Arm Scor may in any such event, without prejudice to any of its rights under the order/contract, allow the contractor to proceed with the order/contract in whole or in part, or cancel the order/contract in whole or in part, and

- 32.2 claim from the contractor, in respect of an order/contract with a fixed delivery date, as liquidated and pre-estimated damages an amount equal to 1/14% (one fourteenth per cent) of the price(s) of the item(s) and or milestone(s) delivered late, as expressed in the currency stated in the order/contract, for every day, including Sundays and public holidays, that such work or supplies are delayed, up to a maximum of 10% (ten per cent) of the value of the order/contract; or
- 32.3 cancel the order/contract in whole or in part and direct the contractor by notice in writing to suspend or discontinue work in connection with the order/contract in whole or in part on the day stated in the notice, and Arm Scor may itself execute or complete the order/contract or conclude an order/contract with any other person for the execution or completion of the order/contract, or procure other supplies or work in substitution for those neglected to be manufactured or supplied, or for those rejected, and Arm Scor may recover from the contractor the difference in the cost of such procured supplies or work and the price indicated in the order/contract (if the latter is lower) as well as any other costs and expenses which Arm Scor incurred or may incur consequent upon the contractor's default; or
- 32.4 claim such other damages as may have been suffered by Arm Scor as a result of the contractor's failure or default; or
- 32.5 where the order/contract calls for the delivery of spare parts lists, catalogues, technical manuals or any other documentation, withhold payments of any amount due to the contractor until such lists, catalogues, manuals and other documents are delivered.
- 32.6 In the event that the contractor is unable to complete an item because Arm Scor, the SANDF or any other party as specified in the order/contract has failed to carry out their obligations as specified in the order/contract (including the delivery of customer

furnished equipment (CFE)), the contractor must inform Armscor in writing of this situation before the contractual completion date of the affected item(s), and the contractor is entitled to renegotiate the price and/or the delivery period of the item(s) affected as a result of these delays.

- 32.7 If any scheduled working group, review, inspection, event, demonstration or acceptance test is delayed or postponed by Armscor, the SANDF or any other party as specified in the order/contract, after the requisite notice period specified in the order/contract has been given, the contractor must inform Armscor in writing of this situation before the contractual completion date of the affected item(s), and the contractor is entitled to renegotiate the price and/or delivery period of the item(s) affected as a result of these delays.

33 BRIBERY AND PROHIBITION OF EMPLOYMENT

- 33.1 Should Armscor conclude on reasonable grounds -
- 33.1.1 that the contractor has promised or caused to be promised on his behalf, offered or given a bribe, commission, gift, loan, benefit or other consideration of whatever nature to an official, employee or any other person in the course of obtaining or executing the order/contract; or
- 33.1.2 that the contractor has acted fraudulently or in bad faith in obtaining or executing any order/contract with Armscor, any public body, company, firm or person, or has in the conduct of his business failed to observe statutory requirements, resulting in a criminal conviction;
- Armscor may summarily cancel the order/contract and:
- (a) claim damages occasioned by such cancellation; or
- (b) claim an amount equal to 10% (ten per cent) of the price as cancellation costs.
- 33.2 The contractor may not, for the duration of the order/contract and for a period of 12 (twelve) months after its completion, employ any employee or former employee of the SA National Defence Force or Armscor who is or was in any way involved with the order/contract, without first obtaining the written consent of the Chief of the SA National Defence Force or the Chief Executive Officer of Armscor respectively, or their deputies.

34 REMEDIES FOR FRAUDULENT CLAIMING OF BEE POINTS

Where an order/contract has been awarded to a contractor by virtue of a statement made by the contractor in terms of BEE preference points and such preference is granted by Armscor, and it is subsequently shown to the satisfaction of Armscor that such preference was false, Armscor may, in addition to any other remedy it may have

- 34.1 cancel the order/contract and:
- (a) claim damages occasioned by such cancellation; or
- (b) claim an amount equal to 10% (ten per cent) of the price as cancellation costs; or
- 34.2 disqualify the person from the tendering process; or
- 34.3 restrict the contractor, its shareholders and directors, or only the shareholders and directors who acted on a fraudulent basis, from obtaining business from any organ of state for a period not exceeding 10 (ten) years after the *audi alteram partem* rule (hear the other side) has been applied and refer the matter to the Department of Trade and Industry; or
- 34.4 forward the matter for criminal prosecution.

35 FORCE MAJEURE

- 35.1 The time for completion of the order/contract will be extended in respect of any period of delay that is directly due to fire, flood, tempest, political and civil unrest or other similar cause which could not have been foreseen or prevented by reasonable care and caution on the part of the contractor. In the event of such delay, the time for completion of the order/contract or of that part of the order/contract that is affected by the delay will be extended for such period as may be reasonably required to remove the causes of delay. The contractor must inform Armscor in writing of the cause of any such delay within seven (7) days after having become aware of such cause and indicate the extension required, providing documentary proof. If the contractor fails to notify Armscor as required above, the contractor will not be entitled to an extension of the completion date. The contractor must do his utmost to avoid or remove any cause of delay, and must continue to perform those parts of the order/contract not affected by the delay. The contractor must continue with that part of the order/contract that was delayed as soon as the causes for the delay have been removed.
- 35.2 Should any delay referred to in paragraph 35.1 continue for a total period of six (6) months, Armscor is entitled to cancel the order/contract, in which event Armscor will pay only the actual costs incurred by the contractor and his subcontractor(s) up to the date of cancellation upon submission of documentary proof of such costs: provided that the total amount shall not exceed the total outstanding amount of the order/contract at the time of termination. Without prejudice to the generality of the foregoing, Armscor is under no circumstances obliged to compensate the contractor or his subcontractor(s) for loss of profit or any other damage.

36 EARLY TERMINATION

- 36.1 Armscor has the right to terminate the order/contract in full or in part for reasons of, *inter alia*, change of requirement, change of funding, or any other reason, other than the contractor's breach of contract and force majeure: provided that:
- (a) Armscor gives at least 90 (ninety) days' notice in writing of its intention to terminate the order/contract and gives reasons for the termination;
 - (b) the said notice must indicate the extent to which the order/contract is terminated;
 - (c) the contractor must cease work on the order/contract on the date and to the extent specified;
 - (d) the contractor must cancel or attempt to cancel all commitments that are no longer required.
- 36.2 Armscor is responsible for paying the contractor's cost resulting from the non-commitment to the full order/contract value and/or the early termination of the order/contract, but only as follows:
- (a) the costs of all work and items that have already been completed and delivered in terms of the order/contract when the said notice is received;
 - (b) expenses which the contractor has already reasonably incurred and which cannot be recovered due to non-commitment to the full order/contract value and/or early cancellation and where such costs cannot be limited by the contractor (proof of such costs must be submitted to Armscor's satisfaction);
 - (c) under no circumstances will Armscor be liable for paying any loss in profit possibly suffered by the contractor;
 - (d) these costs may not exceed the outstanding value of the order/contract.

37 ARBITRATION AND DISPUTES

- 37.1 If any dispute or disagreement arises between the contracting parties in connection with the order/contract or in connection with carrying out the terms of the order/contract or any other matter arising from the terms, such dispute must, if it cannot be settled by mutual agreement, be submitted to and decided by arbitration in terms of the Arbitration Act, 1965 (Act 42 of 1965) as amended.
- 37.2 Any decision given or award made as a result of the arbitration proceedings shall be final and binding on Armscor and the contractor.
- 37.3 Nothing contained in this clause, however, precludes either party from obtaining intermediate relief on an urgent, interlocutory or other basis by way of arbitration or from a court of competent jurisdiction pending the final decision of the arbitrator.

38 SECURITY MEASURES AND DISCLOSURE OF INFORMATION

- 38.1 The contractor must apply and adhere to the security measures as set out in Armscor's Industrial Security Manual, as amended. Should the contractor fail to comply with such security measures or requirements, Armscor is entitled to take the necessary steps to rectify the matter and to recover from the contractor any resultant costs. Armscor is, at its own expense, also entitled to request the contractor, which must be in writing, to introduce additional security measures or requirements as Armscor may prescribe from time to time.
- 38.2 The contractor must ensure that the provisions of paragraph 38.1 are applied and adhered to by his subcontractor(s), to whom the said provisions shall apply *mutatis mutandis*.

39 WAIVER OF RIGHTS AND RETENTION OF SECURITIES

- 39.1 No latitude, extension of time or any other indulgence which may be given or allowed by either party to the other in respect of any payment or extension of time provided for in these conditions or the performance of any other obligation shall under any circumstances be construed to be an implied consent by such party or operate as a waiver or novation of that party's rights in terms hereof, or prevent such party from imposing, at any time, strict and punctual compliance with each and every provision of these conditions.
- 39.2 Payment by Armscor shall not incur a liability for Armscor to pay for alterations, amendments or additional work not contracted in writing by Armscor, and such payment shall not release the contractor of his obligations regarding the payment of damages, whether due, ascertained, liquidated or not.
- 39.3 Armscor may retain any part of the securities and retention money held by it in respect of a specific order/contract for as long as such order/contract is not completed in accordance with the stipulations, terms and conditions of the order/contract, or for as long as any amount is owing to Armscor by the contractor in respect of that order/contract.

40 TRANSFER OF RIGHTS AND OBLIGATIONS

Neither party may cede, delegate, assign or transfer its rights or obligations under the order/contract to any other person without first obtaining the consent of the other party, which consent shall not be unreasonably withheld.

41 LANGUAGE

Arm Scor and the contractor shall use English for and in connection with the order/contract. Documents that are in other languages are valid only if they are accompanied by an English translation of the order/contract, certified as correct by a sworn translator. The party submitting a translation is responsible for any damages resulting from a mistake in such translation. Should the interpretation of the documents differ, the interpretation of the document in the original language shall take precedence over the translated document.

42 SERVICE OF NOTICES AND ADDRESSES

- 42.1 Any written notice required by these conditions or the order/contract must be posted by prepaid registered post, faxed, e-mailed or delivered by hand: in the case of the contractor to the address, e-mail address or fax number appearing in the contractor's offer or to the address, e-mail address, or fax number notified to Arm Scor in writing; and in the case of Arm Scor to ARMSCOR, Private Bag X337, Pretoria 0001, or to the address, e-mail address or fax number notified to the contractor in writing.
- 42.2 Where written notice is, in terms of these conditions –
- 42.2.1 posted to the contractor by pre-paid registered post, it shall be deemed to have been received 21 (twenty-one) days after such notice was posted;
- 42.2.2 faxed to the contractor, it shall be deemed to have been received on the first business day after such notice was faxed;
- 42.2.3 delivered by hand to an authorised representative of the contractor, it shall be deemed to have been received on the date it was so delivered;
- 42.2.4 sent by e-mail, it shall be deemed delivered on the date shown on the e-mail confirmation of delivery.
- 42.3 For the purpose of any legal proceedings the contractor elects as his *domicilium citandi et executandi* the address, not being a post box number or private bag, appearing in the offer or notified to Arm Scor in writing. Arm Scor's *domicilium citandi et executandi* is Arm Scor Building, 370 Nossob Street, Erasmuskloof Ext 4, Pretoria.

PART B - SPECIAL CONDITIONS RELATING TO SUPPLIES TO BE IMPORTED SPECIFICALLY FOR AN ORDER/CONTRACT

43 EXPORT LICENCE, EXPORT PERMIT OR IMPORT PERMIT

- 43.1 Arm Scor is not liable for any losses suffered or expenditure incurred by the contractor or any other person (including losses suffered or expenditure incurred in respect of the manufacture, supply, transport or delivery of supplies) due to the government of the country of origin or any other government failing or refusing to grant, on the grounds of existing legislation, an export licence or export permit or cancelling an export permit or export licence that has been issued. In such event Arm Scor is entitled to cancel the order/contract without any cost implication for Arm Scor. All payments already effected by Arm Scor must be repaid to Arm Scor on return of the supplies that have been delivered.

43.2 The provision of paragraph 43.1 shall apply *mutatis mutandis* where the South African Government refuses to issue an export or import permit or cancels an export or import permit that has been issued.

44 IMPORT REGULATIONS TO BE COMPLIED WITH

The contractor must ensure that the provisions of any Act or regulations prohibiting the importation into the Republic of South Africa of certain insects, fungi, diseases or pests by way of certain types of packing materials and containers are complied with, and that any such guarantee or certificate that may be required in terms of such Act or regulations is obtained and provided at his own expense. Where the contractor fails to comply with the provisions of such Act or regulations and the consignments are as a result seized, destroyed or delayed at the port of entry or elsewhere in South Africa, the contractor is liable for any delays, demurrage or any other loss arising from such seizure, destruction or delay.

45 SUPPLIES TO BE IMPORTED IN THE NAME OF THE CONTRACTOR

All supplies that are to be imported must be imported in the name of the contractor/subcontractor and be reconsigned by the contractor/subcontractor to the delivery address stated in the order/contract.

46 INSURANCE

Where supplies are to be imported on a basis of Cost, Insurance and Freight to a port in South Africa or for delivery to or installation at a place in South Africa, or if supplies are to be imported on the basis of a Free on Board order/contract which provides for additional services to be rendered by the contractor (to insure the supplies), the contractor must take out valid and effective insurance for the order/contract with a reputable insurance company that is registered in South Africa in terms of the Insurance Act, 1943 (Act 27 of 1943), as amended, upon acceptable terms, covering the supplies for the whole transport contemplated and for the reasonable value of the supplies.