

## 1. INTERPRETATION

1.1 The definitions and rules of interpretation in this condition apply in these Conditions of Purchase.

“**we**” or “**us**” means First Africa Pumps (Pty) Ltd a company incorporated in South Africa (company no. 2005/028528/07) and having a place of business at 18 Bauxite Bay Street, Richards Bay, South Africa.

“**you**” means the person who is party to the Contract with us.

“**Bespoke Goods**” means Goods which are not sold by sample or description and are to be designed, manufactured and/or assembled by you in accordance with an agreed Specification.

“**Business Day**” means, in respect of any notice to be served under or in connection with the Contract, any day (other than a Saturday or a Sunday) on which clearing banks in the town in which the recipient has its principal place of business are open for business.

“**CPA**” means the Consumer Protection Act 68 of 2008.

“**these Conditions**” means these Conditions of Purchase (as varied from time to time).

“**Contract**” means the contract (as varied from time to time) between you and us relating to our purchase of the Goods from you, comprising of the parts described in clause 2.4 below.

“**Goods**” means the goods (or any part of them) to be supplied by you to us under the Contract.

“**Customised Goods**” means Goods sold by sample or description which are to be modified, customized, configured or refurbished in accordance with an applicable Specification.

“**Group Companies**” means the other members of any group of companies to which we belong from time to time.

“**Intellectual Property Rights**” means patents, rights to inventions, copyright and related rights, trademarks, trade names, domain names, rights in get-up, rights in goodwill or to sue for passing off, unfair competition rights, rights in designs, rights in computer software, database rights, topography rights, moral rights, rights in confidential information (including without limitation know-how and trade secrets) and any other intellectual property rights, in each case whether registered or unregistered and including all applications for, and renewals or extensions of, such rights, and all similar or equivalent rights or forms of protection in any part of the world.

“**Materials**” means all materials, equipment, tools, parts, components, drawings, schematics, diagrams, illustrations, specifications (including the Specification), documents and data or any part of them.

“**POPI**” means the Protection of Personal Information Bill [B9D-2009] or any further versions of this bill as may supersede it, provided that all references to POPI in this agreement shall refer to this legislation as finally promulgated as from the date of promulgation.

“**Privacy and Data Protection Conditions**” means the 8 (eight) conditions for the lawful processing of personal information contained in Chapter 3 of POPI.

“**Purchase Order**” means our purchase order or, in the absence of a purchase order, our other written instructions to you to supply the Goods, which (in either case) incorporate these Conditions.

“**Specification**” means, in respect of any Goods, the specification (if any) for such Goods referred to in the Purchase Order or otherwise agreed in writing by the parties.

“**Standard Goods**” means Goods sold by description or sample and which are not Customised Goods.

“**VAT**” means value-added tax as levied in terms of the Value-added Tax Act 89 of t, 1991, as amended from time to time.

1.2 Furthermore:

- (a) the terms “**data subject**”, “**personal information**”, “**processing**” and “**security safeguards**” shall bear the meanings given thereto in POPI;
- (b) the terms “**unsafe**”, “**product failure**”, “**hazard**” and “**defect**” shall bear the meanings given thereto in the CPA;
- (c) a **person** includes a natural person, corporate or unincorporated body (whether or not having separate legal personality);
- (d) by the “**parties**”, we mean you and us and a reference to a party includes its personal representatives, successors or permitted assigns;
- (e) the masculine gender shall import the feminine and the singular shall import the plural and, in both cases, vice versa;
- (f) any phrase introduced by the terms **including**, **include**, **in particular** or any similar expression shall be construed as illustrative and shall not limit the sense of the words preceding those terms;
- (g) a reference to or an obligation upon a party having done or omitted to do some act or thing shall be deemed to include a reference to or an obligation upon a third party doing or omitted to do such act or thing on that party’s behalf; and
- (h) a reference to **writing** or **written** includes faxes.

## 2. APPLICATION OF CONDITIONS

2.1. These Conditions shall:

- (a) apply to and be incorporated in the Contract; and
- (b) prevail over any inconsistent terms or conditions contained in or referred to in your quotation, acceptance, correspondence or elsewhere or implied by law, trade custom, practice or course of dealing.

2.2. No addition to, variation of, exclusion or attempted exclusion of the Purchase Order or these Conditions or any of them shall be effective unless made in writing and signed by one of our duly authorised representatives.

2.3. Where the Purchase Order is for more than one item, the Contract shall (following your acceptance) be regarded as a single contract for all Goods to be supplied pursuant to that Purchase Order.

2.4. The Contract is constituted by:

- (a) the Purchase Order;
- (b) these Conditions;
- (c) the Specification;
- (d) any other documents incorporated into it by reference in the Purchase Order or these Conditions; and
- (e) your acceptance of the Purchase Order in accordance with condition 3.3.

For the purposes of interpretation, the constituent parts of the Contract shall rank in the order above, with the Purchase Order being of the highest rank, these Conditions being of the second highest rank and so on. In the event of any ambiguity or conflict between any term or condition of any of the constituent parts of the Contract, those of the higher ranking part shall prevail over those of the lower ranking part.

### 3. EFFECT OF PURCHASE ORDER

3.1. We shall only be bound by an order if it is issued on our standard Purchase Order form and signed by one of our duly authorised representatives.

3.2. The Purchase Order constitutes an offer by us to purchase the Goods subject to these Conditions. Accordingly, your acceptance of the Purchase Order shall establish a contract for the sale and purchase of the Goods on these Conditions. Any counter-offer made by you to supply the Goods on other conditions shall only be validly accepted if such acceptance is in writing and signed by one of our a duly authorised representatives.

3.3. By signing and returning the acknowledgement copy of the Purchase Order form or by commencement the work or delivery pursuant to the Purchase Order you will be deemed to have accepted the Purchase Order on these Conditions.

### 4. SUPPLIER'S WARRANTY

4.1. You warrant to us, during the period starting on the delivery date and ending 18 (eighteen) months thereafter (the "**Warranty Period**"), that:

- (a) you have the necessary power and legal capacity to perform your obligations under the Contract;
- (b) you have obtained and currently hold any export license, import license or any official authorisation and have carried out all customs formalities necessary for the export of the Goods, and for its transport through any country prior to delivery to us;
- (c) you have the capacity and ability to transport or arrange for the transportation of the Goods as per the delivery envisaged in clauses 7.1 and 7.2 below;
- (d) the Goods are free of all and any encumbrances and the you has the right and title to sell the Goods to us;
- (e) in the case of Standard Goods, the Goods will conform in all respects with the sample or, in the absence of a sample, with any description for them in the Contract or, in the absence of such description, with any description for them given to us (whether in writing or otherwise) by you or, in the absence of such a description, with any description for them in your sales or marketing literature or, where the goods are manufactured by a third party, the manufacturer's sales and marketing literature;
- (f) in the case of Customised Goods, the Goods will conform with the Specification and, to the extent that the Specification is silent on any aspect of the Goods, that the Goods will conform with any description for them in the Contract or, in the absence of such description, with any description for them given to us (whether in writing or otherwise) or, in the absence of such a description, with any description for them in your sales or marketing literature or, where the goods are manufactured by a third party, the manufacturer's sales and marketing literature;
- (g) in the case of Bespoke Goods, the Goods will conform with the Specification in all respects;
- (h) unless we have, before or at the same time as the Purchase Order, agreed in writing with you additional conditions regarding preparation of or environmental requirements at the site at which the Goods are to be installed, the Goods are suitable to be installed and used at the premises at which we intend to install them and that there are no additional conditions regarding site preparation or environmental requirements; and
- (i) the Goods will be of satisfactory quality and fit for any intended uses expressly or impliedly made known to you, and will be free from all defects in design, materials and workmanship

4.2. You further warrant that the Goods will:

- (a) comply with the Standards Act, 2008, if applicable; and

- (b) be usable and durable for a reasonable period of time considering the use of the Goods;
- (c) contain adequate instructions and warnings pertaining to any hazard arising from or associated with the use of the Goods; and
- (d) not be unsafe or defective; or result in a product failure or hazard.

4.3. For the avoidance of doubt, any warranty above requiring the Goods to conform to the Specification or any description shall include a warranty that the Goods will be capable of any standard of performance included in the Specification or such description.

4.4. Any failure of the Goods to comply with the warranties in clauses 4.1 and/or 4.2 shall be known as a "Defect". In the event that we notify you of a Defect within 14 (fourteen) days of the end of the Warranty Period we shall, at our option and without prejudice to any other rights and remedies available to us, be entitled:

- (a) to dispose of the Goods as we see fit and demand a refund of the purchase price; or
- (b) except in the case of Goods which are raw materials, to compel you to repair the Goods to our reasonable satisfaction or to replace them with Goods which meet the conditions of the Contract, in either case within a reasonable timeframe (to be specified by us) of being requested to do so.

4.5. The warranties in clause 4.1 shall apply to any replacement, substitute or remedial equipment provided by you. In the event that you repair the Goods, the Warranty Period shall be renewed from the date on which we confirm in writing that the Goods have been repaired satisfactorily or, in the absence of such confirmation, the date on which the repairs are completed.

4.6. Our rights under the Contract are in addition to any terms implied in our favour by law.

4.7. The provisions in this condition 4 shall survive any delivery, inspection, acceptance, payment or performance pursuant to the Contract and shall extend to any replacement, repaired, substitute or remedial equipment provided by the Supplier.

### 5. QUANTITIES

Unless we agree otherwise in writing, you will deliver the exact specified quantities of items comprised in the Goods in accordance with the Purchase Order. Without affecting our other rights and remedies, we reserve the right to reject incomplete deliveries and to return excess quantities at your risk and expense.

### 6. INSPECTION AND TESTING OF GOODS

6.1. You will:

- (a) carefully test and inspect the Goods before delivery to ensure that they comply with the requirements of the Contract; and
- (b) if we request that you do so, give us reasonable advance notice of such tests (which we shall be entitled to attend).

6.2. We reserve the right to call for certificates or test certificates for the Goods at any stage of manufacture or assembly. Such certificates shall clearly state our order numbers and any item or equipment numbers.

6.3. We also reserve the right to inspect the quantity at the delivery premises immediately after you have delivered the Goods to the delivery premises or as soon thereafter as is reasonably possible.

6.4. At the inspection, we shall be entitled to apply any reasonable tests to the Goods as required to determine the quantity and/or quality of the Goods, including, *inter alia*, whether the Goods meet the Specifications.

6.5. If, as a result of any inspection or test, we find that the Goods or any items comprised within them do not comply with the Contract, or are unlikely to comply with it on completion of manufacture, processing or performance, we may inform you, and you shall take such steps as are necessary to ensure compliance.

## 7. DELIVERY

7.1. Unless otherwise specified in the Purchase Order:

- (a) in the case of Goods being supplied outside South Africa, you shall deliver the Goods to the port at Durban in accordance with the with the INCOTERMS, published by the International Chamber of Commerce, 2010 Edition, DAP (Delivery At Place); or
- (b) in the case of Goods being supplied from within South Africa, you shall deliver the Goods to our premises at the address specified in the Purchase Order in accordance with the INCOTERMS, DDP (Delivery Duty Paid).

7.2. You shall deliver the Goods by the date specified in the Purchase Order or, if no such date is specified, within 28 (twenty eight) days of the date of the Purchase Order. Time is of the essence as to the delivery of the Goods under the Contract.

7.3. You shall ensure that the Goods are properly packed and secured in such manner as to enable them to reach their destination in good condition. No charge shall be made for wrapping, packing, cartons, boxes, crating or containers unless specified in the Purchase Order, and we shall not be responsible for returning any such materials.

## 8. RISK AND PROPERTY

8.1. The Goods shall be at your risk until delivered to us at the place of delivery specified in the Contract. You shall off-load the Goods from any mode of transport upon which they are conveyed to the place of delivery at your own risk.

8.2. Ownership of the Goods shall pass to us on completion of delivery (including off-loading) in accordance with the Contract, except that if the Goods are paid for before delivery ownership shall pass to us once payment has been made. The passing of ownership in the Goods is without prejudice to any right of rejection to which we may be entitled under the Contract or otherwise.

## 9. PRICES

9.1. All prices shall be as stated in the Purchase Order and shall, unless otherwise stated and subject to the relevant INCOTERMS (see above), be deemed to be inclusive of all costs and expenses incurred by you in connection with the Contract including the costs of labour, materials, intellectual property licences, packaging and shipping.

9.2. Unless the Purchase Order states otherwise, the price is deemed to be inclusive of VAT and all other applicable sales taxes which we will also be liable to pay.

9.3. All prices are fixed and inclusive of delivery, packaging, packing, shipping, carriage, insurance and other charges and dues, and are not subject to adjustment save as specifically provided in these conditions or the Purchase Order.

## 10. PAYMENT

10.1. You may invoice us in respect of any Order at the end of the month in which the Goods are delivered. Unless otherwise stated in the Purchase Order and subject to condition 10.2 below, we will pay your invoices within 30 (thirty) days of receiving them.

10.2. Without prejudice to any other right or remedy available to us, we reserve the right to set off any amount at any time owing to us by you, under this or any other Contract, against any amount payable by us to you under the Contract.

## 11. INDEMNITY

You shall indemnify and hold us and our Group Companies harmless from all claims and all direct, indirect or consequential liabilities (including loss of profits, loss of business, depletion of goodwill and similar losses), costs, proceedings, damages and expenses (including legal and other professional fees and expenses) awarded against, or incurred or paid by us, including any claims under sections 56 and 61 of the CPA as a result or in connection with:

- (a) any breach of the warranties under this Contract;
- (b) any alleged or actual infringement, whether or not under South African law, of any third party's Intellectual Property Rights or other rights arising out of the use, manufacture or supply of the Goods; or
- (c) defects, unsafe Goods, product failure, or hazard in any Goods; and/or
- (d) any claim made against us in respect of any liability, loss, damage, injury, cost or expense sustained by us, our employees, our officers, our directors, our agents or by any of our customers or third party to the extent that such liability, loss, damage, injury, cost or expense was caused by, relates to or arises from the Goods as a consequence of a direct or indirect breach (including breach of any express or implied warranty) or negligent performance or failure or delay in performance of the Goods by you howsoever arising.

## 12. CONFIDENTIALITY, PROPERTY AND INTELLECTUAL PROPERTY RIGHTS, PROTECTION OF PERSONAL INFORMATION

12.1. You shall keep in strict confidence all technical or commercial know-how, specifications (including the Specification), inventions, processes or initiatives which are of a confidential nature and have been disclosed to you by us or our agents, and any other confidential information concerning our business or products (or that/those of our Group Companies) which you may obtain pursuant to or in connection with the Contract. You shall restrict disclosure of such confidential materials to such of your officers, directors, employees, consultants and suppliers as need to know the same for the purpose of discharging your obligations to us and shall ensure that such persons are, prior to disclosure made aware of the confidential nature of such confidential materials and are subject to obligations of confidentiality in respect of same which are at least as stringent as those under these Conditions. You shall be liable to us for the acts and omissions of such persons in respect of such confidential materials as if they were your own acts and omissions.

12.2. All Materials which we or our Group Companies provide to you in tangible form shall at all times be and remain our exclusive property or that of any third party from whom we obtained them. You shall hold them in safe custody at your own risk and you shall maintain them and keep them in good condition until you return them to us. You shall not dispose of them or use them except in accordance with our written instructions or authorisation. You shall return them and all copies of them to us immediately upon our first written request. In this clause an obligation to do or not to do something shall be interpreted as including an obligation to procure that same is done or not done (as the case may be) by your officers, directors, employees, consultants and suppliers.

12.3. We shall own the Intellectual Property Rights in all Materials which we or any of our Group Companies supply to you except to the extent that such Intellectual Property Rights are owned by any third party from whom we licence their use. We hereby grant you a non-exclusive, royalty free, revocable licence to use such Intellectual Property Rights in order to fulfil your obligations to us under the Contract. Such licence shall only be sub-licensable to your suppliers if it is necessary for them to have such rights to enable you to fulfil your obligations to us under the Contract. Except where the Contract expressly states otherwise, no other licence is granted to you in respect of such Intellectual Property Rights.

12.4. The Intellectual Property Rights in any Materials created or supplied by you, or any of your servants, under or in connection with the Contract and which exclusively relate to the Goods or the Contract shall vest in us. You shall retain the Intellectual Property Rights in any Materials created or supplied by you, or any of your servants, under or in connection with the Contract and which do not exclusively relate to the Goods or the Contract but you shall procure that we, our Group Companies and customers are granted, and do hereby grant, a non-exclusive, worldwide, irrevocable, royalty free licence to use such Intellectual Property Rights in connection with our respective businesses.

12.5. Any patents and rights to apply for any patent in respect of any invention, design, improvement, method or process created, invented or conceived of in connection with the manufacture and/or supply of the Goods shall vest in us.

12.6. We shall own any castings, patterns and mouldings that may be created or used by you in the manufacture of any Customised Goods or Bespoke Goods. You shall procure that such items are transferred into our possession upon request.

12.7. You shall do, and shall procure that your officers, directors, employees, consultants and suppliers do, (on demand) all acts and things which are necessary or desirable for us to enjoy the full benefit of the rights granted to us, or to be granted to us, under this condition 12.

12.8. You warrant that you will at all times and in every respect comply with the provisions of POPI and that you will in the processing of personal information relating to any data subject comply with the Privacy and Data Protection Conditions, including the security safeguards, contained in POPI, with which provisions you warrant to be fully acquainted.

12.9. You agree to indemnify us in all circumstances against any costs, claims, proceedings, liabilities or expenses resulting from claims made against us by any third party arising out of any unauthorised disclosure or use of any personal information or breach of the provisions of POPI.

12.10. This condition 12 shall survive the termination of the Contract, however arising.

## 13. CANCELLATION AND DEFAULT

13.1. We may cancel the Contract (for all or part only of the Goods) by giving written notice to you at any time before delivery, in which case our only liability to you shall be to pay you the costs of any materials and labour incurred by you in respect of the cancelled Goods prior to cancellation.

13.2. You will be in default if any of the following occurs:

- (a) you are in breach of the Contract or of any other contract that we may have with you and, in the case of a breach capable of remedy, you fail to remedy same to our reasonable satisfaction within 7 days of being requested to do so;
- (b) you suspend, threaten to suspend, cease or threaten to cease to carry on all or substantially the whole of your business;
- (c) you suspend, or threaten to suspend, payment of your debts, or are unable to pay your debts as they fall due or you admit your inability

to pay your debts, or you are deemed by the law of any applicable jurisdiction to be unable to pay your debts;

- (d) you commence negotiations with all or any class of your creditors with a view to rescheduling any of your debts, or you make a proposal for or you enter into any compromise or arrangement with your creditors, other than where these events take place for the sole purpose of a scheme whereby you will undergo a solvent amalgamation with one or more other companies or you will undergo a solvent reconstruction;
- (e) a petition is filed, a notice is given, a resolution is passed, or an order is made, for or in connection with you being wound up, other than for the sole purpose of a scheme whereby you will undergo a solvent amalgamation with one or more other companies or you will undergo a solvent reconstruction;
- (f) an application is made to court, or an order is made, for the appointment of an administrator over you or if a notice of intention to appoint an administrator over you is given or if an administrator is appointed over you;
- (g) a person becomes entitled to appoint a receiver over you or your assets or a receiver is appointed over you or your assets; or
- (h) any event occurs, or proceeding is taken, with respect to you in any jurisdiction to which you are subject that has an effect equivalent or similar to any of the events mentioned in (b) to (g) above.

13.3. If you default, or we reasonably believe that you are about to default and we notify you accordingly, without limiting any other rights or remedies available to us, we may:

- (a) refuse to accept any further deliveries under the Contract;
- (b) treat the Contract and any other contract we may have with you as having been repudiated by you and terminate the Contract and/or such other contracts immediately upon giving you notice;
- (c) reject any Goods already delivered and return them to you at your risk and expense on the basis that a full refund for the Goods so returned shall be paid immediately by you;
- (d) purchase replacement goods from another source and compel you to reimburse us for all costs and expenses reasonably incurred in doing so; and/or
- (e) in any case, to claim such damages as we may sustain in connection with your default not otherwise covered by this condition.

13.4. Termination of the Contract, however arising, shall not affect or prejudice the accrued rights of the parties as at termination or the continuation of any provision expressly or implicitly stated to survive termination.

## 14. FORCE MAJEURE

We may defer the date of delivery or payment, or cancel the Contract or reduce the amount of Goods ordered, if we are prevented from or delayed in carrying on our business by acts, events, omissions or accidents beyond our reasonable control, including without limitation strikes, lock-outs or other industrial disputes (whether involving our own workforce or that of any other party), failure of a utility service or transport or telecommunication network, act of God, war, riot, civil commotion, malicious damage, compliance with any law or governmental order, rule, regulation or direction, accident, breakdown of plant or machinery, fire, flood, storm or default of suppliers or sub-contractors.

## 15. WAIVER

15.1. A waiver of any right under the Contract is only effective if it is in writing and it applies only to the party to whom the waiver is addressed and the circumstances for which it is given.

15.2. Unless specifically provided otherwise, rights arising under the Contract are cumulative and do not exclude rights provided by law.

## 16. ASSIGNMENT

- 16.1. You shall not, without our prior written consent, assign, transfer, charge, sub-contract or deal in any other manner with all or any of your rights or obligations under the Contract.
- 16.2. We may at any time assign, transfer, charge, sub-contract or deal in any other manner with all or any of our rights or obligations under the Contract.

## 17. THIRD PARTY RIGHTS

The Contract is made for the benefit of the parties to it and (where applicable) their successors and permitted assigns, and is not intended to benefit, or be enforceable by, anyone else, except that our Group Companies may enforce it as if they were party to it.

## 18. NOTICES

Any notice which requires to be given to a party under or in connection with the Contract shall be in writing, addressed to that party at its address specified in the Purchase Order, its principal place of business or such other address as that party may have specified to the other party in writing in accordance with this clause, and shall be delivered personally, sent by pre-paid first class post, recorded delivery, commercial courier or fax. A notice or other communication shall be deemed to have been received: if delivered personally, when left at the appropriate address; if sent by pre-paid first class post or recorded delivery, at 9.00 am on the fifth Business Day after posting; if delivered by commercial courier, on the date and at the time that the courier's delivery receipt is signed; or, if sent by fax, one Business Day after transmission. The provisions of this clause shall not apply to the service of any proceedings or other documents in any legal action.

## 19. GOVERNING LAW AND JURISDICTION

- 19.1. The Contract and any disputes or claims arising out of or in connection with it or its subject matter or formation (including non-contractual disputes or claims) are governed by and construed in accordance with the laws of South Africa.
- 19.2. The parties irrevocably agree that the South African courts shall have exclusive jurisdiction to settle any dispute or claim that arises out of or in connection with the Contractor its subject matter or formation (including non-contractual disputes or claims).

Document control

Version 1.1  
Last updated 22 January 2014