

## TERMS AND CONDITIONS OF TENDER



## INDEX

NO	CLAUSE HEADING	PAGE
1	DEFINITIONS AND INTERPRETATION.....	3
1.1	Definitions.....	3
1.2	Interpretation .....	4
2	RECITAL .....	5
3	DISCLAIMER OF RIGHTS.....	6
4	DISPUTES .....	7
5	BREACH	9
6	NOTICES AND <i>DOMICILIA</i> .....	10
7	WHOLE AGREEMENT .....	11
8	RELAXATION.....	11
9	SEVERABILITY .....	12

The Parties agree as follows:

## 1 DEFINITIONS AND INTERPRETATION

### 1.1 Definitions

In this Agreement unless clearly inconsistent with or otherwise indicated by the context -

- 1.1.1 **“Agreement”** means the agreement as is created or deemed to exist as a result of any response by an Tenderer to a Tender / Request For Quotation issued by Samancor Chrome or any of its Business Units or relevant joint venture, together with the Terms and Conditions of Tender as set out in this document;
- 1.1.2 **“Business Day”** means a day, other than a Saturday, a Sunday or public holiday in the Republic of South Africa;
- 1.1.3 **“Business Unit(s)”** means Eastern Chrome Mines, Western Chrome Mines, Ferrometals, Tubatse Ferrochrome and Middelburg Ferrochrome, each being operational divisions of Samancor Chrome and enjoying no separate legal personality in law;
- 1.1.4 **“Contract”** means the written contract entered into between the Successful Tenderer and Samancor Chrome or any of its Business Units or relevant joint venture, whether on the acceptance by Samancor Chrome or any of its Business Units or relevant joint venture of the Tender Response, or as varied by subsequent negotiations between the Successful Tenderer and Samancor Chrome or any of its Business Units or relevant joint venture, and shall, unless expressly varied in writing be deemed to incorporate Samancor Chrome’s Master Terms and Conditions;
- 1.1.5 **“Invitation to Tender”** means an invitation to compete for Samancor Chrome’s business strictly subject to these Terms and Conditions of Tender and Tender Instructions, whether such Invitation to Tender is made by

Samancor Chrome orally or in writing, which shall include, without limitation, faxed or electronic correspondence;

- 1.1.6 "Laws" means all legislation, ordinances and by-laws and any regulations, proclamations, notices and any other subordinate legislation promulgated or issued thereunder and in force at the time and from time to time in South Africa;
- 1.1.7 "Parties" means Samancor Chrome and the Tenderer and "Party" shall mean either one of them as the context may indicate;
- 1.1.8 "Request for Quotation" means an Invitation to Tender;
- 1.1.9 "Samancor Chrome" means Samancor Chrome Limited (Registration Number 1926/008883/06), a public company incorporated under and in accordance with the company laws of the Republic of South Africa;
- 1.1.10 "Samancor Chrome Master Terms and Conditions" means Samancor Chrome's Master Terms and Conditions as posted on its official website [www.samancorcr.com](http://www.samancorcr.com) from time to time;
- 1.1.11 "Successful Tenderer" means the Tenderer(s) who receives a Tender Award from Samancor Chrome or any of its Business Unit(s) or relevant joint venture;
- 1.1.12 "Tender Award" means the acceptance of Tender Response by Samancor Chrome or any of its Business Unit(s) or relevant joint venture, as initially provided by the Successful Tenderer or as modified by subsequent negotiation between the Parties, on these Terms and Conditions of Tender and the Tender Instructions;
- 1.1.13 "Tenderer" means any person or entity responding to a tender / Request For Quotation issued by Samancor Chrome or any of its Business Units or relevant joint venture;

1.1.14 “**Tender Instructions**” means the further terms and conditions on which the Tenderer is invited to provide a Tender Response, which may include but is not limited to, instructions as pertain to time limits, format specifications, assurances and all information and pricing breakdowns as may be required by Samancor Chrome or any of its Business Unit(s) or relevant joint venture;

1.1.15 “**Tender Response**” means any response, always provided strictly subject to these Terms and Conditions of Tender and any Tender Instruction, by the Tenderer to Samancor Chrome or any of its Business Unit(s) or relevant joint venture in order to compete for the business detailed in the Invitation to Tender, such response being an irrevocable offer made by the Tenderer to Samancor Chrome or any of its Business Unit(s) or relevant joint venture, which may be accepted as offered by Samancor Chrome or any of its Business Unit(s) or relevant joint venture or subjected to further negotiation at Samancor Chrome’s sole and absolute discretion; and

1.1.16 “**Terms and Conditions of Tender**” means the terms and conditions of tender as set out in this document.

## 1.2 Interpretation

1.2.1 In this Agreement, unless clearly inconsistent with or otherwise indicated by the context -

1.2.1.1 any reference to the singular includes the plural and *vice versa*;

1.2.1.2 any reference to natural persons includes legal persons and *vice versa*;  
and

1.2.1.3 any reference to a gender includes the other gender.

1.2.2 Where appropriate, meanings ascribed to defined words and expressions in 1.1, shall impose substantive obligations on the Parties.

1.2.3 The clause headings in this Agreement have been inserted for convenience only and shall not be taken into account in its interpretation.

- 1.2.4 Words and expressions defined in any sub-clause shall, unless the contrary is indicated by the context, bear the meanings assigned to such words and expressions in this Agreement, notwithstanding that such term has not been defined in 1.1.
- 1.2.5 Where this Agreement requires a Party to use "**Best Endeavours**" in relation to an obligation, that Party shall do all things as are or may be necessary or desirable so as to comply with or satisfy that obligation unless the Parties agree that it is not reasonable to take the action or assume that obligation.
- 1.2.6 This Agreement shall be governed by and construed and interpreted solely in accordance with the Laws of the Republic of South Africa.
- 1.2.7 In the event of a conflict between the Tender Instructions and/or Tender Award, and these Terms and Conditions of Tender, these Terms and Conditions of Tender shall take precedence, save in the instance where the clause contained in these Terms and Conditions of Tender is specifically referenced as not being of application by Samancor Chrome in the Tender Instruction and/or Tender Award.

## 2 **RECITAL**

All Invitations to Tender, whether included in such tender document in full or by reference, and all responses and any and all interaction between Samancor Chrome or any of its Business Units or relevant joint venture and the Tenderer, is strictly subject to these Terms and Conditions of Tender.

## 3 **DISCLAIMER OF RIGHTS AND LIMITATION OF LIABILITY**

- 3.1 The Tenderer provides the Tender Response at its sole and absolute risk.
- 3.2 By submission of its tender, the Tenderer shall be deemed:-
- 3.2.1 to have satisfied itself with all conditions / circumstances affecting its tender;

- 3.2.2 to have fully acquainted itself with and to have accepted, where appropriate, the Samancor Chrome Master Terms and Conditions for:
  - 3.2.2.1 the Supply of Goods and Services;
  - 3.2.2.2 Transport;
  - 3.2.2.3 Site Work; and
  - 3.2.2.4 site-specific health, safety, and environment protocols, a copy whereof shall be available on request; and
- 3.2.3 to have accepted that the Samancor Chrome Master Terms and Conditions cancel, supersede and override the Tenderer's terms and conditions whether verbal, written or implied.
- 3.3 Terms and conditions provided by the Tenderer in the Tender Response shall have no force and effect and shall never be taken as operative, whether so as to override or supplement any term or condition, as may pertain to this Agreement or any subsequent Contract.
- 3.4 Samancor Chrome or any of its Business Units or relevant joint venture does not bind itself to accept the lowest or any tender and reserves the right to accept the tender wholly or in part.
- 3.5 Save as expressly provided herein, no rights whatsoever are granted whether in terms of the common law or as may arise from any written or oral undertakings provided by Samancor Chrome or any of its Business Units or relevant joint venture to the Tenderer. Without limiting the generality of the foregoing, Samancor Chrome or any of its Business Units or relevant joint venture shall not and does not undertake to:
  - 3.5.1 issue the Tender Award to the most competitively priced Tenderer or issue the Tender Award at all;

- 3.5.2 provide details as to the Tender Response scoring mechanism and the Tenderer waives any right it may have to claim any information, other than which has been provided to it by Samancor Chrome or any of its Business Units or relevant joint venture, under the Promotion of Access to Information Act 2 of 2000 or any other law;
- 3.5.3 provide reasons for the Tender Award, whether to the successful or unsuccessful Tenderer;
- 3.5.4 reimburse the Tenderer for costs incurred in providing the Tender Response to Samancor Chrome or any of its Business Units or relevant joint venture whether claimed by the successful or unsuccessful Tenderer;
- 3.5.5 warrant the correctness of any information provided, whether included as part of the Invitation to Tender, or otherwise;
- 3.5.6 keep any information (howsoever provided to Samancor Chrome or any of its Business Units or relevant joint venture) confidential, save where the information imparted:
  - 3.5.6.1 if provided electronically, is marked “confidential” in bold on the disc cover, or covering email; or
  - 3.5.6.2 if provided in hard copy, is marked boldly “confidential” on each page.
- 3.6 Samancor Chrome or any of its Business Units or relevant joint venture shall use its reasonable endeavours to keep such information confidential, but no claim or right of action may be brought against Samancor Chrome or any of its Business Units or relevant joint venture in the event that it fails in such undertaking, save in the instance that the Applicant can demonstrate that:
  - 3.6.1 it complied in every instance with the provisions of 3.5.6;
  - 3.6.2 the failure to maintain confidentiality was occasioned by an employee of Samancor Chrome or any of its Business Units or relevant joint venture acting in the course and scope of his / her employment; and



- 3.6.3 the failure to maintain confidentiality was as a result of gross negligence or *mala fides* on the part of the Samancor Chrome or any of its Business Units or relevant joint venture employee.

The Tenderer's claim for damages in the event of a breach of any term of this Agreement and/or the Contract by Samancor Chrome and/or any of its Business Units and/or relevant joint venture shall be limited to its direct and proved damages only and shall exclude claims for all indirect damages or consequential losses (howsoever arising) including without limitation a claim for punitive damages.

- 3.7 In the event of a Tender Award being granted, no agreement shall exist or be deemed to exist by any oral or written statement made by Samancor Chrome or any of its Business Units or relevant joint venture or implied by the conduct of Samancor Chrome or any of its Business Units or relevant joint venture so as to bind Samancor Chrome or any of its Business Units or relevant joint venture, unless and until the terms of the agreement are reduced to writing and signed by the duly authorised representatives of both Parties in the Contract.

- 3.8 In the event that any purchase order or instruction to work is issued by Samancor Chrome or any of its Business Units or relevant joint venture to the Successful Tenderer ("**Instruction**"), a contract shall be deemed to exist which would be strictly limited to the scope of the Instruction ("**Limited Contract**"). Such a Limited Contract shall be subject to the Samancor Chrome Master Terms and Conditions (as posted at [www.samancorcr.com](http://www.samancorcr.com)) at all times. No obligations outside of the Limited Contract shall be incurred by Samancor Chrome or any of its Business Units or relevant joint venture whatsoever.

## 4 DISPUTES

- 4.1 In this 4 ,the following expressions shall bear the following meanings -

- 4.1.1 "**Dispute**" means a dispute or difference between the Parties of any kind whatever in connection with or arising out of this Agreement.

- 4.1.2 "the **Dispute Date**" means the date of written notice from either Party to the other declaring a dispute in terms of this clause and detailing briefly therein the nature of the dispute.
- 4.2 All Disputes between the Parties shall be determined in accordance with the provisions of this 4.
- 4.3 Within a period of 14 (fourteen) days after the Dispute Date the Parties shall meet to discuss the Dispute and shall endeavour to resolve the Dispute amicably and each party undertakes at such meeting to make full disclosure to the other of all information and documentation relating to the Dispute.
- 4.4 Should the Parties be unable to resolve the Dispute in terms of clause 4.3 within 30 (thirty) days from the Dispute Date the Dispute shall be referred to the Chief Executive of Samancor Chrome and the Chief Executive of the Successful Tenderer or their duly appointed representatives, who shall use their Best Endeavours to resolve the Dispute. Their determination shall be final and binding and shall be carried into effect by the Parties.
- 4.5 Should the said Chief Executives or their representatives be unable to resolve the Dispute within a period of 30 (thirty) days after the same has been referred to them, ("**Dead-lock Date**"), either party may within 21 (twenty one) days from the Dead-lock Date refer the Dispute to an independent expert ("**Expert**") for determination.
- 4.6 The following provisions shall apply to the referral to the Expert -
- 4.6.1 the Expert shall be appointed by agreement between the Parties within 14 (fourteen) days from the Dead-lock Date, failing which the Expert shall be appointed by the President for the time being of the Law Society of the Northern Provinces (or any body taking its place) or his nominee from a list of four candidates of which two shall have been nominated by Samancor Chrome and two by the Successful Tenderer. Such nomination shall be made by the Parties within 30 (thirty) days from the Dead-lock Date, failing which the President of the said Law Society shall make an appointment from candidates nominated, or if none have been nominated by the Parties, in his discretion, an Expert whom he deems fit;

- 4.6.2 the Chief Executives of the Parties or their representatives shall endeavour to agree on the matters to be referred to the Expert, failing which they shall independently refer such matters to the Expert for determination as they may deem necessary;
- 4.6.3 the Expert shall act in accordance with the spirit and principles of this Agreement as an Expert and not an arbitrator, and his determination on any issue referred to him hereunder shall, in the absence of manifest error or bias, be final and binding on the Parties and may be made an order of any competent court at the instance of the Parties;
- 4.6.4 the Expert's costs shall be borne equally by the Parties; and
- 4.6.5 all proceedings shall be conducted informally and as inexpensively and expeditiously as possible at Sandton or such other place as the Expert may determine.
- 4.7 This 4 is severable from the rest of this Agreement and, therefore, will remain effective between the Parties even if this Agreement is terminated.
- 4.8 Unless and until otherwise ordered by the Expert or agreed between the Parties, the performance of this Agreement shall continue during the proceedings and no payments due under this Agreement may be retained or suspended due to the referral of any matter to the said Chief Executives of the Parties or the Expert.

## 5 BREACH

- 5.1 Should any Party (the "**Defaulting Party**") commit a breach of any of the provisions of this Agreement, then the other Party (the "**Aggrieved Party**") shall be obliged to give the Defaulting Party, 10 (ten) Business Day's written notice of such breach, calling on the Defaulting Party to remedy the breach within the notice period.
- 5.2 If the Defaulting Party fails to comply with such notice, the Aggrieved Party shall be entitled to cancel this Agreement against the Defaulting Party or to claim immediate payment and/or specific performance by the Defaulting Party of all the Defaulting Party's obligations whether or not the due date for payment and/or performance

shall have arrived, in either event without prejudice to the Aggrieved Party's rights to claim damages. The foregoing is without prejudice to such other rights as the Aggrieved Party may have at law; provided always that, notwithstanding anything to the contrary contained in this Agreement, the Aggrieved Party shall not be entitled to cancel this Agreement for any breach by the Defaulting Party unless such breach is a material breach going to the root of this Agreement and is incapable of being remedied by payment in money, or if it is capable of being remedied by payment in money, the Defaulting Party fails to pay the amount concerned.

## 6 NOTICES AND DOMICILIA

6.1 The Parties choose as their *domicilia citandi et executandi* their respective addresses set out in this 6 for all purposes arising out of or in connection with this Agreement at which addresses all the processes and notices arising out of or in connection with this Agreement, its breach or termination may validly be served upon or delivered to the Parties.

6.2 For the purpose of this Agreement, the Successful Tenderer chooses as its *domicilium citandi et executandi* the address reflected in the Award of Tender document.

6.3 Samancor Chrome's address shall be First Floor, Block B, Cullinan Place, Cullinan Close, Morningside, Sandton,

facsimile number: 011 245 1200,

Attention: Group Legal Counsel, Samancor Chrome Limited;

or such other address, not being a post office box or *poste restante*, or other facsimile number of which the Party concerned may notify the other in writing.

6.4 Any notice given in terms of this Agreement shall be in writing and shall -

6.4.1 if delivered by hand, be deemed to have been duly received by the addressee on the date of delivery;

- 6.4.2 if delivered by recognised international courier service, be deemed to have been received by the addressee on the first Business Day following the date of such delivery by the courier concerned; and
- 6.4.3 if transmitted by facsimile, be deemed to have been received by the addressee on the date of despatch (unless the time of despatch of any facsimile is after close of business in which case it shall be deemed to have been received at the opening of business on the next Business Day).
- 6.5 Notwithstanding anything to the contrary contained in this Agreement, a written notice or communication actually received by one of the Parties from another shall be adequate written notice of communication to such Party.

## **7 WHOLE AGREEMENT**

This Agreement constitutes the whole agreement between the Parties as to the subject matter hereof and no agreement, representations or warranties between the Parties other than those set out herein are binding on the Parties.

## **8 RELAXATION**

No latitude, extension of time or other indulgence which may be given or allowed by any Party to any other Party in respect of the performance of any obligation hereunder or enforcement of any right arising from this Agreement and no single or partial exercise of any right by any Party shall, under any circumstances, be construed to be an implied consent by such Party or operate as a waiver or a novation of, or otherwise affect any of that Party's rights in terms of or arising from this Agreement or estop such Party from enforcing, at any time and without notice, strict and punctual compliance with each and every provision or term hereof.

## **9 SEVERABILITY**

If any provision of this Agreement is in violation of the Laws of the Republic of South Africa, such provision shall be deemed to be deleted from this Agreement and the remaining provisions of this Agreement shall continue in full force and effect and the Parties hereto shall use their Best Endeavours to procure that any such

provision is replaced by a provision which is valid and enforceable and which gives effect to the spirit of this Agreement.