1. CONTRACT. These terms and conditions, together with the terms set forth in the Purchase Order (collectively, this “Agreement”), (a) constitute the entire contract between the seller / service provider named in the Purchase Order (“Seller”) and TMS Industrial Mill Services Namibia Proprietary Limited (“TMS”) with respect to the transaction (whether for sale of goods and / or performance of services) described in the Purchase Order, regardless of whether Seller has acknowledged or accepted the terms and conditions of this Agreement or / and these terms and conditions are not expressly limited in the terms and conditions of this Agreement. If the Purchase Order is constituted as an acceptance or a confirmation acting as an acceptance, then TMS’s acceptance is EXPRESSLY CONDITIONAL ON SELLER’S ACCEPTANCE TO ANY TERMS AND CONDITIONS CONTAINED HEREIN THAT ARE DIFFERENT FROM THOSE CONTAINED IN SELLER’S WRITING. In the event that the Purchase Order is constituted as the offer, acceptance thereof is EXPRESSLY LIMITED TO THE TERMS AND CONDITIONS CONTAINED HEREIN AND ANY ADDITIONAL OR INCONSISTENT TERMS OR CONDITIONS; NO SUCH ADDITIONAL OR INCONSISTENT TERMS OR CONDITIONS SHALL BE CONSTRUED AS BINDING ON TMS UNLESS AGREED TO IN WRITING BY TMS. The acceptance of Seller’s sales confirmation or other writing, or commencement of performance (including payment for goods or services) shall not constitute acceptance of any of Seller’s terms and conditions. Any use of Seller’s documentation to administer the sale of goods and / or performance of services hereunder shall be for convenience only and all terms and conditions set forth on such documentation shall be null and void and not binding on TMS unless agreed to in writing by TMS. TMS’s failure to object to any terms contained in any subsequent communication from Seller will not be a waiver or modification of the terms set forth herein. In any event, Seller’s assent to the terms of this Agreement shall be conclusively presumed from Seller’s: (a) delivery to TMS of a signed copy of this Agreement incorporating the terms of this Agreement and all applicable Law; (b) commencement of performance or delivery of any of the goods to be sold hereunder and / or preparation for or commencement of any of the services to be provided hereunder, in either case, after receipt of the Purchase Order; or (c) acceptance of any or all of TMS’s payment for said goods or services under said orders.

2. REPRESENTATIONS & WARRANTIES. Seller represents and warrants that all goods sold, and / or delivered hereunder (including goods purchased / delivered in the performance of services) shall: (a) be conveyed with good title and free of any liens or encumbrances; (b) be merchantable and of first grade quality; (c) be free of defects in design, workmanship and material; (d) be fit for the purposes for which they are purchased; (e) strictly conform with (i) TMS’s specifications and specifications incorporated herein; and (ii) all applicable laws, ordinances, regulations, orders, bylaws, rules and administrative orders (each and all a “Law”); and (f) be free of hazardous materials, including, without limitation, radioactive substances, toxic substances, chemical, biological, radioactive and other similar materials, asbestos or any material containing asbestos, or any other substance or material that may be defined or listed as a hazardous or toxic substance, or otherwise regulated by any Law, except to the extent that any of the foregoing hazardous materials are known to TMS as being essential to the sale of goods. Seller further represents and warrants that all services performed hereunder shall be performed in a skillful and workmanlike manner, with the highest degree of skill and care, in accordance with generally recognized commercial practices and standards for similar services, and in compliance with all Laws. If Seller, its employees, subcontractors, agents, or any other party under Seller’s control (collectively, “Seller Parties”) deliver goods and / or perform services hereunder at TMS premises or the premises of a third party as directed by TMS (in either case, the “TMS Site”), Seller represents, warrants, and agrees that Seller shall, and shall cause all Seller Parties to, at all times comply with all Laws and building codes that are applicable to the operation of its business, this Agreement, and its services hereunder. Seller shall furnish certificates evidencing the insurance required hereby satisfactory in form and substance to TMS, naming TMS and its customer for the TMS Site as additional insureds, with a waiver of subrogation, if any, to the extent required hereby.

3. PRICING; SHIPPING & DELIVERY; TAXES. Prices for goods and / or services shall be as set forth on the Purchase Order; the Purchase Order shall not be filled at higher prices than last quoted or charged to TMS, without prior written approval from TMS. Prices include all costs and expenses (including, without limitation, labor, materials, taxes, duties, labor costs, insurance fees, overhead, and profit) and are firm and non-cancelable. Seller’s liability for failure to deliver or perform may include, but shall not be limited to, any costs and expenses resulting from Seller’s failure to deliver or perform, including, but not limited to, costs and expenses resulting from: (a) loss of anticipated profit on such order; (b) loss of anticipated profit on other orders; (c) additional costs, expenses, or taxes incurred; (d) expenses incurred in connection with the performance of the order or contract; or (e) penalties or other losses incurred by TMS. All prices are FOB (TMS Site). Unless progress payments are agreed to by TMS, payment of undisputed amounts due hereunder shall be made within forty-five (45) days after receipt of Seller’s invoice, provided that no claim or dispute shall be made or held by Seller as a defense for the non-payment of any such claim or dispute. In the event that any order, contract or purchase agreement incorporates or references the TMS Site, it is expressly understood and agreed that all such order, contract or purchase agreement is intended to, and is hereby applied, incorporated, and made a part of this Agreement in its entirety, and all such terms and conditions of such order, contract or purchase agreement shall be deemed to be terms of this Agreement.

4. INSPECTION & ACCEPTANCE. All goods and services furnished hereunder are subject to inspection and testing by TMS, and if applicable, its ultimate purchaser, at manufacturer’s plant. Final payment shall not be due until inspection and acceptance or a confirmation acting as an acceptance, then TMS’s acceptance is EXPRESSLY CONDITIONAL ON SELLER’S ACCEPTANCE TO ANY TERMS AND CONDITIONS CONTAINED HEREIN THAT ARE DIFFERENT FROM THOSE CONTAINED IN SELLER’S WRITING. Any dispute as to the quality or quantity of any goods or services furnished hereunder shall be resolved by independent testing at TMS or by TMS’s inspector. Seller shall furnish certificates evidencing the insurance required hereby satisfactory in form and substance to TMS, naming TMS and its customer for the TMS Site as additional insureds, with a waiver of subrogation, if any, to the extent required hereby.

5. INDEMNITY. Seller agrees that it shall, and shall cause all Seller Parties to, indemnify, defend, hold harmless, and hold TMS and its customer harmless from and against any and all actions, losses, liabilities, damages, costs (including attorney’s fees), charges, expenses, penalties, fines, or demands of any nature that arise out of, relate to or in connection with: (a) any breach of the terms of this Agreement by Seller; (b) any personal injuries (including death) or property damage (including contamination) arising from Seller’s performance under this Agreement; (c) any claim by an employee or agent of Seller or any Seller Party, or Seller’s or Seller Party’s products, equipment, and related materials; (d) death, personal injury, or property damage arising out of or in connection with any performance hereunder; or (e) any other harm or injury to any person or property caused by the negligence of any of the Indemnified Parties, except that Seller shall have no liability for damages caused by the sole negligence of any of the Indemnified Parties.

6. COMPLIANCE WITH LAWS. Seller agrees that it shall, and shall cause all Seller Parties to, at all times comply with all Laws and building codes that are applicable to the operation of its business, this Agreement, and its services hereunder. Seller shall furnish certificates evidencing the insurance required hereby satisfactory in form and substance to TMS, naming TMS and its customer for the TMS Site as additional insureds, with a waiver of subrogation, if any, to the extent required hereby. 

TMS INDUSTRIAL MILL SERVICES NAMIBIA (PTY) LTD.
TERMS AND CONDITIONS FOR THE PURCHASE OF GOODS AND SERVICES (12.18.18)

10. AMENDMENT; NON-WAIVER. This Agreement and all related documents (including any quotation or any other document submitted in connection therewith), and all matters arising out of or relating to this Agreement or any such documents, shall be governed by, and construed in accordance with, the laws of the Republic of Namibia without regard to the conflicts of laws provisions thereof to the extent such principles or rules would require, or permit the application of any other laws of any other jurisdiction, and excluding the United Nations Convention on Contracts for the International Sale of Goods. Any controversy or claim directly or indirectly arising out of or relating to this Agreement, or in any way connected with, or arising from, this Agreement shall be finally settled by arbitration in accordance with the UNCITRAL Arbitration Rules in force at the time of the dispute.

TMS Industrial Mill Services Namibia (Pty) Ltd. – Terms and Conditions for the Purchase of Goods and Services Page 1 of 2
The appointing authority in terms of the UNCITRAL Arbitration Rules shall be the Saw Society of Namibia. Judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof. Claims shall be heard by a single arbitrator. The place of arbitration shall be Windhoek, Namibia. The arbitrator shall award to the prevailing party, if any, as determined by the arbitrator, all of such party’s costs and fees (including attorney’s fees). Nothing in this clause 13 shall preclude any party from seeking interim and/or urgent relief from a court of competent jurisdiction and to this end the parties hereby consent to the jurisdiction of the High Court of Namibia, Main Division, Windhoek.