

**STANDARD TERMS AND CONDITIONS OF AGREEMENT****1. INTRODUCTION**

- 1.1 The Customer agrees that (a) these standard terms and conditions ("**Agreement**") determine the rights and obligations of Komatsu and of the Customer in respect of every order, purchase and sale, between Komatsu South Africa (Pty) Ltd ("**Komatsu**") and the Customer for any products and/or services supplied and/or rendered by Komatsu (b) this Agreement represents the entire agreement between the Customer and Komatsu and that no alterations or additions to this Agreement may be effected by the Customer unless agreed to by both parties hereto ("**Parties**"), reduced to writing and signed by the Customer and a duly authorised representative of Komatsu; (c) this Agreement will govern all future contractual relationships between the Parties; (d) this Agreement is applicable to all existing debts and future debts between the Parties; (e) this Agreement is final and binding and is not subject to any suspensive or resolutive terms or conditions; (f) any conflicting conditions stipulated by the Customer are expressly excluded; (g) Komatsu hereby expressly objects to and rejects all terms and conditions in the Customer's purchase order, confirmation or other writing, of whatever kind, inconsistent with or in addition to the terms and conditions of this Agreement. Such inconsistent and additional terms and conditions will not bind Komatsu unless expressly approved in writing by Komatsu making specific reference to the inconsistent or additional term or condition; (h) these terms and conditions supersede any terms and conditions of sale, purchase, order or the like, without prejudice to any security or guarantees held by Komatsu; and (i) by placing an order with Komatsu, the Customer accepts the provisions of this Agreement without restriction or limitation, unless expressly agreed in writing by Komatsu when accepting the order.
- 1.2 Subject to clause 1.5, Komatsu reserves the right to unilaterally vary or amend this Agreement from time to time upon written notice to the Customer, in which event any such variation or amendment will take effect from the date of such written notice. In the event that this Agreement has been varied or amended by Komatsu prior to the delivery of any goods and/or services ordered by the Customer, the Customer will be entitled to cancel its order for those goods and/or services if any such variation or amendment will adversely affect the Customer's purchase of the goods and/or services. The Customer will be under no obligation to place any new orders for goods and/or services after notice of any such variation or amendment to this Agreement, provided that any new orders placed by the Customer, or a failure by the Customer to cancel any existing orders, after any such notice of variation or amendment of this Agreement will be deemed to constitute a full acceptance by the Customer of the variations or amendments to this Agreement.
- 1.3 This Agreement applies to the contractual relationship between Komatsu and the Customer and is subject to the –
- 1.3.1 Consumer Protection Act, No 68 of 2008 ("**CPA**"); and/or
- 1.3.2 National Credit Act, No 34 of 2005 ("**NCA**"); and/or
- 1.3.3 Protection of Personal Information Act, No 4 of 2013 ("**POPIA**"),

[VERSION: APRIL 2021]

- where the Customer is a natural person (being a living, identifiable individual acting in his/her own name or operating as a sole proprietor) or a juristic person (being a company, close corporation, body corporate, partnership, or association or trust) who qualifies as a consumer for purposes of the CPA, a consumer or juristic person for purposes of the NCA or a person for the purposes of POPIA.
- Where the Customer is a consumer, a juristic person and/or a person for purposes of the CPA, the NCA and/or the POPIA, it will enjoy the benefit of the CPA, the NCA and/or the POPIA irrespective of whether the rights are explicitly stated in this Agreement or not or whether anything herein provides otherwise.**
- Customer Initials:**  
Where the Customer is not a consumer or juristic person for purposes of the CPA and/or the NCA, it will enjoy only the benefit of the provisions of this Agreement and the application of the entire CPA and/or NCA is not agreed between the Parties.
- 1.4 **Certain provisions of this Agreement which appear in similar text style to this clause (ie bold and red font) ("**Critical Provisions**") –**
- 1.4.1 **may limit the risk or liability of Komatsu;**
- 1.4.2 **may create risk or liability to the Customer;**
- 1.4.3 **may compel the Customer to indemnify Komatsu; and/or**
- 1.4.4 **serves as an acknowledgement of a fact by the Customer.**
- The Customer's attention is specifically drawn to these Critical Provisions because they are important and should be carefully noted.**
- If there is any provision in this Agreement which the Customer does not fully understand, the Customer should ask Komatsu to explain such provision before transacting. By signing this Agreement, the Customer confirms that it fully understands and agrees to all provisions of this Agreement, including the Critical Provisions.**
- Nothing in this Agreement is intended to or must be understood to lawfully restrict, limit or avoid any rights or obligations, as the case may be, created for either the Customer or Komatsu in terms of the CPA, the NCA and/or the POPIA. **Customer Initials:****
- 1.5 Notwithstanding clause 1.2, where the Customer is a consumer or a juristic person for purposes of the NCA, unless specifically stated and agreed in writing between the Parties, no amendment to this Agreement will create a new agreement between the Parties. Any agreed amendments to this Agreement will be made in writing and signed by both Parties. Komatsu will deliver a revised document reflecting the agreed amendments within 20 business days after the date upon which the relevant amendments to this Agreement were agreed. The Parties may only amend this Agreement in terms of this clause if –
- 1.5.1 such amendment reduces the Customer's liabilities;
- 1.5.2 the Customer signs or initials in the margin opposite the amendment;
- 1.5.3 the amendment is recorded in writing and signed by the Customer and Komatsu; and
- 1.5.4 any oral change must be recorded electromagnetically and subsequently reduced to writing.

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- 1.6 Komatsu requires certain information from the Customer in order to give effect to this Agreement, including taking orders, providing quotations, processing payments and awarding an extended payment term. The Customer is obliged to provide the information requested in the Customer Information Form attached to this Agreement on the terms and subject to the provisions of clause 16, to the extent that they are applicable. **Any failure on the part of the Customer to provide complete and accurate information will constitute a material breach of this Agreement. Customer Initials:**
- 2. ORDERS OF GOODS AND/OR SERVICES**
- 2.1 Orders placed by the Customer will not be binding upon Komatsu unless and until accepted in writing or executed upon by Komatsu. Every order placed will be a separate and distinct order subject to the terms and conditions contained in this Agreement. Komatsu need not notify the Customer of such acceptance or execution.
- 2.2 It is the sole responsibility of the Customer to determine that the goods and/or services ordered are suitable for the purposes of intended use by the Customer.
- 2.3 **The Customer agrees to pay all additional costs resulting from any acts or omissions by the Customer including suspension of work, modification of requirements, failure or delay in giving particulars required to enable work to proceed on schedule or requirements that work be completed earlier than agreed. Customer Initials:**
- 2.4 Komatsu reserves the right to offer to provide alternative goods of the same quality and quantity at the prevailing prices to those ordered by the Customer should such goods be superseded, replaced or their manufacture terminated.
- 2.5 Any order is subject to cancellation by Komatsu due to acts of God or any circumstance beyond the control of Komatsu, including (without restricting this clause to these instances): inability to secure labour, power, materials or supplies, war, civil disturbance, riot, state of emergency, strike, lockout, or other labour disputes, fire, flood, drought or legislation.
- 2.6 **Any order is subject to cancellation by Komatsu if the Customer breaches any term of this Agreement or makes any attempt of compromise, liquidation, sequestration, termination or judgement is recorded against the Customer or any of its principals. Customer Initials:**
- 2.7 **The Customer agrees that Komatsu will be immediately and irrevocably released from any contractual damages and penalty obligations should an order be cancelled by Komatsu due to any event in clause 2.5 or 2.6 having occurred. Customer Initials:**
- 3. QUOTATIONS AND DELIVERY OF GOODS AND/OR SERVICES**
- 3.1 Delivery of the goods and/or services to the Customer shall take place at the relevant place of business of Komatsu at or through which the relevant order was placed or is to be executed. All taxes, transport, insurance and other costs incidental to the further movement of the goods, shall be for the Customer's account.
- 3.2 Subject to the provisions of this clause 3 of this Agreement, the Customer agrees to the Standard Rates of Komatsu for any goods and/or services rendered, which rates may be obtained upon written request.
- 3.3 All prices quoted are ex works at the relevant place of business of Komatsu at or through which the relevant order was placed or is to be executed and will remain valid for a period of 30 days from the date of the quotation or until the date of issue of a new Komatsu pricing list, whichever occurs first.
- 3.4 All quotations are subject to –
- 3.4.1 the availability of the goods and/or services;
- 3.4.2 correction of good faith errors by Komatsu; and
- 3.4.3 reasonable variations up to the time of delivery in relation to any fluctuations of the cost price of the goods or forex fluctuations. The amount of the increase shall not be considered unreasonable if it is determined on the basis of Komatsu's standard charges for the work or services rendered or on the basis of labour time and material actually expended plus 25% and/or where quote prices are adjusted for increases or decreases in the cost of materials and labour required for performance by Komatsu in accordance with the applicable Steel & Engineering Industries Federation of South Africa formulae.
- 3.5 If the Customer disputes the amount of the increase referred to in clause 3.4.3, the amount of such increase may be certified by any independent auditor to be appointed by Komatsu and such certificate shall be final and binding on the Customer.
- 3.6 **The Customer has the responsibility to inspect and verify the tax invoice and the prices quoted on such tax invoice received by it upon delivery thereof. The Customer will be entitled to notify Komatsu (for the attention of the designated manager of the relevant Komatsu at which the order was placed), in writing, within 7 days of receipt by the Customer of such tax invoice, of any inaccuracy of the tax invoice which it has identified, failing which the Customer will be deemed to have inspected and verified the tax invoice and the prices quoted on such tax invoice delivered to it and confirmed the accuracy of the tax invoice. To the extent permitted in law, Komatsu's liability to the Customer in respect of any defects notified by the Customer timeously in accordance with this clause shall be limited to the remedies set out in clause 9. Customer Initials:**
- 3.7 To the extent that the CPA is applicable, the Customer has the responsibility to inspect and verify the goods received by it upon delivery thereof. The Customer will be entitled to notify and return to Komatsu (for the attention of the designated manager of the relevant Komatsu at which the order was placed), in writing, –
- 3.7.1 **any goods which are returnable under the CPA, but specifically excluding goods which are defective, within 10 days; or**
- 3.7.2 **any defective goods, within 6 months, of receipt by the Customer of such goods, of any reason for their return in respect of goods referred to in clause 3.7.1 or defects to the quality of the goods in respect of goods referred to in clause 3.7.2, which it has identified, failing which the Customer will be deemed to have inspected and verified the goods delivered to it and confirmed the good quality of the goods free from any and all defects, and the correctness of the order. To the extent permitted in law, Komatsu's liability to the Customer in respect of**

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- any returned goods timeously in accordance with this clause shall be limited to the remedies set out in clause 9.
- 3.8 To the extent that the CPA is not applicable, the same provisions of clause 3.7 shall apply, except that notice to Komatsu and any goods returned to Komatsu, whether defective or not, must be made within 7 days of the receipt by the Customer of such goods.
- 3.9 Notwithstanding the provisions of clause 1, all orders or variations to orders made in accordance with clause 3.4.3 or elsewhere in this Agreement, if in writing and signed by Komatsu, shall be binding and subject to the provisions of this Agreement and may not be revoked by the Customer.
- 3.10 Komatsu shall be entitled in its reasonable discretion to split the delivery / performance of the goods and/or services ordered in the quantities and on the dates it decides.
- 3.11 Komatsu shall be entitled to invoice each delivery / performance actually made separately.
- 3.12 Any delivery note, waybill, time sheet, handover certificate or job card (copy or original) signed by the Customer or a third party engaged to transport the goods and held by Komatsu shall be prima facie proof that delivery was made to the Customer.
- 3.13 **The risk of damage to, destruction or theft of goods shall pass to the Customer on delivery of the goods to the Customer and the Customer undertakes to comprehensively insure the goods until paid for in full. Komatsu may, without any prejudice to its rights arising from the failure by the Customer to insure the goods in terms of this clause 3.13, recover insurance premiums from the Customer for such ordered and uninsured goods. Customer Initials:**
- 3.14 Delivery, installation and performance times quoted are merely estimates and are not binding on Komatsu. Calculations of these times will be determined by Komatsu from the date upon which (i) Komatsu received all technical data or other information required from the Customer; (ii) reasonable access has been received by Komatsu from the Customer to the relevant site or machinery; (iii) any down payment has been agreed upon between the Parties; or (iv) any necessary import or other permits have been granted.
- 3.15 **If Komatsu agrees to engage a third party to transport the goods on the Customer's behalf from the relevant place of business of Komatsu at or through which the relevant order was placed or is to be executed, Komatsu is hereby authorised by the Customer to engage a third party on the Customer's behalf, on the terms deemed fit by Komatsu and at the Customer's cost. Customer Initials:**
- 3.16 **The Customer hereby indemnifies Komatsu against any claims against Komatsu that may arise from such agreement in clause 3.15. Customer Initials:**
- 4. REPAIRS**
- 4.1 **Repair times and repair costs given are merely estimates and are not binding on Komatsu. Should the repair costs exceed the estimated repair cost, Komatsu will inform the Customer of the additional estimated charges and Komatsu will only proceed to continue with the repair once the Customer has**
- authorised the repair to continue based on the increased estimated repair cost. **Customer Initials:**
- 4.2 **Save where the Customer expressly and in writing indicates otherwise, the Customer hereby declines the return of any parts of components removed from the goods in the course of any repairs. Customer Initials:**
- 4.3 **Any item handed in for repair may be sold by Komatsu to defray the cost of such repairs if the item remains uncollected within 30 days after (i) the repairs being completed or (ii) notice being given to the Customer that the repairs have been completed, whichever is the later. Customer Initials:**
- 5. GOODS ON CONSIGNMENT**
- All goods taken, if agreed by Komatsu, on a consignment basis by the Customer, are deemed sold if not returned on demand of Komatsu to the premises of Komatsu, in the original condition, in the original packaging and with all accessories and manuals intact. Customer Initials:**
- 6. COPYRIGHT, PATENT, TRADEMARK OR DESIGN INFRINGEMENT**
- The Customer hereby indemnifies Komatsu against any claims, costs and expenses arising out of the infringement of copyright, patent, trademark or design supplied by the Customer. Customer Initials:**
- 7. SPECIAL INSTRUCTIONS**
- 7.1 Any special packaging instructions given by the Customer shall be for the Customer's account.
- 7.2 In the event that Komatsu undertakes erection, crantage and/or commissioning work the Customer shall –
- 7.2.1 give Komatsu free and unrestricted access at all times to the site;
- 7.2.2 supply suitable and sufficient water, electricity and compressed air free of charge at points within the boundaries of the contract area; and
- 7.2.3 make available a suitable and sufficient storage area adjacent to the contract area.
- 7.3 **Komatsu shall not be responsible for the correctness of the foundations not supplied or erected by Komatsu which must be as specified and completed with holding down bolts. Customer Initials:**
- 7.4 **Komatsu will have no liability for interruption to work flow where tying into existing structure is required. Customer Initials:**
- 7.5 The date of mechanical completion ("**Mechanical Completion Date**") shall be the date upon which Komatsu hands the plant, equipment or works over to the Customer as mechanically complete in accordance with Komatsu's drawings and the Customer's requirements. On this date, payment by the Customer for mechanical completion is due and the Customer shall take possession of the plant, equipment or works and assume responsibility for its maintenance and further commissioning to commencement of commercial operation.
- 7.6 The date of completion of commissioning ("**Commissioning Completion Date**") shall be the date upon which the plant, equipment or works is first brought into commercial operation or is capable of being brought into regular commercial operation, but in any event not later than 10 days after the Mechanical Completion Date. On the Commissioning Completion Date, Komatsu shall

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be entitled to an acceptance certificate from the Customer and such payment as may be due on completion of commissioning or acceptance. **From the Commissioning Completion Date, Komatsu shall have no further responsibility or liability for the plant equipment or works save as set out in clause 8.**

**Customer Initials:**

**8. GUARANTEES AND CLAIMS**

8.1 **To the extent not in conflict with the CPA (if applicable) or any other law –**

8.1.1 **new goods are guaranteed according to the manufacturer's product specific warranties only and all other guarantees, including common law guarantees, warranties of merchantability, fitness for a particular purpose, and non-infringement of third party rights, are hereby specifically excluded. The guarantee shall run from the Commissioning Completion Date; *Customer Initials:***

8.1.2 **services performed directly by Komatsu are guaranteed for a period of (i) 3 months; or (ii) 500 hours, whichever comes first, against faulty workmanship and major components are guaranteed for 1000 hours, alternatively, where such major components are fitted by Komatsu, 12 months; *Customer Initials:***

8.1.3 **liability under clause 8.1.1 is restricted to the cost of repair or replacement of returned goods and/or services or granting of a credit or to refund an equitable portion of the purchase or contract price at the sole discretion of Komatsu; *Customer Initials:***

8.1.4 **no claim under this Agreement shall arise unless the Customer has, within 14 days of an alleged breach of contract and/or defect occurring, given Komatsu written notice by prepaid registered post of such breach or defect, and has afforded Komatsu at least 30 days to rectify such defect or breach; *Customer Initials:***

8.1.5 **to be valid, claims must be supported by the original tax invoice relevant to the goods and/or services in respect of which a claim relates; *Customer Initials:***

8.1.6 **the Customer shall return any defective moveable goods to the premises of Komatsu at Komatsu's own cost, cleaned and sufficiently marked to enable Komatsu to identify it as goods returned by the Customer and packed in the original or suitable packaging. All risks for the duration of repair remain with the Customer; and *Customer Initials:***

8.1.7 **all guarantees are immediately null and void should any goods be tampered with or should the seals on goods be broken by anyone other than Komatsu or should the goods be used or stored outside of the manufacturer's specifications. *Customer Initials:***

8.2 **Any item delivered to Komatsu shall serve as a pledge in favour of Komatsu for present and past debts and Komatsu shall be entitled to retain or realise such pledges as it deems expedient. The sworn or realised value of pledged goods will be offset against the Customer's debts and any excess balance will be paid to the Customer. *Customer Initials:***

8.3 **Nothing in this Agreement should be understood to limit any warranty a Customer may have in terms of the CPA (if applicable). *Customer Initials:***

**9. LIABILITY**

9.1 **To the extent not in conflict with the CPA (if applicable) or any other law and notwithstanding anything herein contained –**

9.1.1 **Komatsu shall not be liable for any special, consequential or indirect damages, nor shall Komatsu be liable to any person for any loss or damage whether to person or property howsoever arising, save where such damage or loss is due to the gross negligence or wilful misconduct of Komatsu, its employees, agents or authorised representatives; *Customer Initials:***

9.1.2 **under no circumstances shall Komatsu be liable for any damage arising from any misuse, abuse or neglect of the goods and/or services by the Customer or any other third party; and *Customer Initials:***

9.1.3 **the Customer hereby indemnifies Komatsu against all and any claims of whatsoever nature which may be made by any person against Komatsu for any loss or damage of any nature arising out of the use of the goods whilst same are at risk of the Customer, save for any claims which arise from the gross negligence or wilful misconduct of Komatsu, its employees, agents or authorised representatives. The aforesaid indemnity includes any legal costs which may be incurred by Komatsu in defending and/or opposing any such claim, calculated on the scale as between attorney-and-own client. Komatsu shall not be liable to the Customer for any loss or damage (including special, indirect or consequential damages) of any nature arising out of the use of the goods, the delivery or supply or failure to deliver or supply the goods, or arising in respect of the goods whilst same are in the Customer's possession, save where such loss or damage is due to the gross negligence or wilful misconduct of Komatsu, its employees, agents or authorised representatives. *Customer Initials:***

**10. PAYMENT**

10.1 **The Customer agrees that the amount contained in a tax invoice issued by Komatsu shall be due and payable unconditionally (i) by way of cash on order; or (ii) if the Customer has been granted an extended payment term in terms of clause 11, within the period specified, and approved in writing by Komatsu, in terms of the application of extended payment terms by the Customer.**

10.2 **The Customer has the responsibility to verify the banking details of Komatsu (with the designated manager of the relevant Komatsu at which the relevant order was placed) prior to any and every payment to be made by it to Komatsu in terms of this Agreement or otherwise and Komatsu shall not be held liable for any payments incorrectly made by the Customer to a bank account, the details of which have not been verified by the Customer prior to such payment. *Customer Initials:***

10.3 **The risk of payment by cheque through the post rests with the Customer. *Customer Initials:***

10.4 **The Customer has no right to withhold payment for any reason whatsoever, save where the Customer is enforcing a legal right in instances where the CPA applies, and agrees that no extension of payment of any nature shall be granted to the Customer and any**

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**such extension will not be applicable or enforceable unless agreed to by Komatsu, reduced to writing and signed by the Customer and a duly authorised representative of Komatsu. Customer Initials:**

- 10.5 All amounts due and payable will be paid by the Customer in full without deduction or set-off.
- 10.6 All discounts shall be forfeited if payment in full is not made on the due date.
- 10.7 The Customer agrees that the amount due and payable to Komatsu may be determined and proven by a certificate issued and signed by any director or manager of Komatsu, whose authority need not be proven, or by any independent auditor appointed by Komatsu. Such certificate shall be binding and shall be prima facie proof of the nature and the amount of the indebtedness of the Customer.
- 10.8 Any printout of computer evidence tendered by either Party shall be admissible evidence and neither Party shall object to the admissibility of such evidence purely on the grounds that such evidence is computer evidence or that the requirements of the Electronic Communications and Transactions Act, No 25 of 2002 have not been met.
- 10.9 The Customer agrees that in the event that it does not make any payment under this Agreement by its due date –
- 10.9.1 where the Customer is a natural person or a juristic person for purposes of the NCA –
- 10.9.1.1 such unpaid amount will accrue interest at a rate equal to 2% per month; and
- 10.9.1.2 once interest has been levied by Komatsu for the first time, a statement of account will be delivered monthly to the Customer's postal address through ordinary mail unless otherwise requested;
- 10.9.2 where the Customer is not a natural person or a juristic person for purposes of the NCA, **such unpaid amount will accrue interest at** the publicly quoted basic rate of interest, compounded monthly in arrears and calculated on a 365-day year irrespective of whether or not the year is a leap year, from time to time published by any of the five major banks in the Republic of South Africa as being its prime overdraft rate, plus 2% above this rate;
- 10.9.3 Komatsu reserves the right to withhold the delivery of any goods not yet delivered until the Customer has paid, in full, all amounts outstanding and to declare, by notice in writing to the Customer, all amounts owing to be due and payable; or
- 10.9.4 to the extent not in conflict with any applicable law, Komatsu may retake possession of the goods delivered under this Agreement for which total payment has not been received according to the terms of this Agreement. **The Customer irrevocably authorises Komatsu to enter its premises (or any premises where the goods are located) upon the order of a competent court to repossess any goods delivered. The Customer hereby indemnifies Komatsu, and/or Komatsu's representatives, and/or the Sheriff and/or the Sheriff's representatives, completely against any damage whatsoever relating to the removal of any such repossessed goods and the Customer further irrevocably agrees to pay Komatsu's costs of transporting and repossessing the goods;** and **Customer Initials:**

- 10.9.5 Komatsu will be entitled to keep any partial payment made by the Customer as liquidated damages (without prejudice to any of its rights to claim any other damages in lieu of such liquidated damages) and Komatsu's exercise of these rights and remedies shall be subject to and exercised in accordance with the provisions of applicable laws (including the CPA and/or the NCA (if applicable)), **and the Customer hereby indemnifies and holds Komatsu harmless against any claim for any loss or damage that it may incur as a result of such action by Komatsu. Customer Initials:**
- 10.10 **The Customer expressly agrees that no debt owed to Komatsu by the Customer shall become prescribed before the passing of a period of six years from the date the debt falls due, subject to applicable law. Customer Initials:**
- 10.11 In addition to the remedies available to Komatsu in terms of clause 10.9, the Customer agrees that if an account is not settled in full (a) against order; or (b) within the period agreed in clause 10.1 in the case of a Customer that has been granted an extended payment term in terms of clause 11; Komatsu is: (i) entitled to immediately institute action against the Customer at the sole expense of the Customer; **in order to enforce any and all of Komatsu's rights under the Agreement,** or (ii) to cancel the Agreement. **In the event of cancellation of the Agreement, Komatsu is entitled not to produce any unmade balance of any order already in process or otherwise accepted by Komatsu and to recover any loss sustained thereby from the Customer. Customer Initials:**
- 10.12 These remedies are without prejudice to any other right Komatsu may be entitled to in terms of this Agreement or in law, and Komatsu's exercise of these rights and remedies shall be subject to and exercised in accordance with the provisions of applicable laws (including the CPA (if applicable)). Komatsu reserves its right to stop supply immediately on cancellation or on non-payment.
- 10.13 A Customer that has been granted an extended payment term in terms of clause 11 will forthwith lose this payment facility when payment is not made according to the conditions of clause 10.1 (ii) and all amounts then outstanding shall immediately become due and payable.
- 11. EXTENDED PAYMENT TERMS / PAYMENT FACILITY**
- 11.1 The Customer may be awarded an extended payment term in terms of which the Customer is entitled to make payment, as set out in clause 10.
- 11.2 Komatsu may, in its sole discretion, award the Customer an extended payment term and may, at any time and within its sole discretion, withdraw this payment facility.
- 11.3 The Customer hereby agrees that this payment facility is a variable facility and that Komatsu shall be entitled to increase its limit from time to time, by providing the Customer with a written notice thereof.
- 12. OWNERSHIP OF GOODS**
- 12.1 Ownership in and to the goods supplied by Komatsu vests in Komatsu until the purchase price for those goods has been paid in full to Komatsu. The Customer shall notify the owner and landlord of the premises on which the goods are located that ownership in the goods vests in Komatsu until paid for in full and the Customer hereby authorises Komatsu to give such notice.

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12.2 The Customer is not entitled to sell or dispose of any goods unpaid for without the prior written consent of Komatsu. The Customer shall not allow the goods to become encumbered in any manner prior to the full payment thereof and shall advise third parties of the rights of Komatsu in the goods.

12.3 If any goods supplied to the Customer are of a generic nature and have become the property of the Customer by operation of law (by mixing or blending) the Customer shall be obliged on notice of cancellation of the Agreement to retransfer the same quantity of goods in ownership to Komatsu.

### 13. REPRESENTATIONS

13.1 **The Customer acknowledges that it does not rely on any representations made by Komatsu in regard to the goods and/or services or any of its qualities leading up to this Agreement other than those contained in this Agreement. All specifications, price lists, performance figures, advertisements, brochures and other technical data furnished by Komatsu in respect of the goods and/or services orally or in writing will not form part of the Agreement in any way unless agreed to in writing by Komatsu.**

#### **Customer Initials:**

13.2 **The Customer agrees that neither Komatsu nor any of its employees will be liable for any misrepresentations made to the Customer which are grossly negligent or constitute wilful misconduct.**

#### **Customer Initials:**

### 14. WHERE THE CUSTOMER IS SPECIFICALLY A CONSUMER OR JURISTIC PERSON FOR PURPOSES OF THE NCA ONLY

#### 14.1 Legal Costs and Charges

##### 14.1.1 Default Administration Charges

If the Customer defaults on any payment obligation under this Agreement, Komatsu will charge the Customer a default administration charge in respect of each letter of demand sent to the Customer. The cost of each registered letter of demand sent to the Customer may not exceed the amount payable for a registered letter of demand as stipulated in the High Court Rules as well as Komatsu's reasonable and necessary expenses incurred to deliver such letter of demand, including but not limited to postage or delivery costs.

##### 14.1.2 Collection Costs

Komatsu will be entitled to charge the Customer, at the maximum permissible rate allowed by law, all costs incurred by Komatsu in collecting any amount due and/or payable by the Customer in terms of this Agreement, Komatsu's legal costs as between attorney-and-own-client and as taxed by the High Court, incurred as a result of any breach of this Agreement by the Customer and/or as a result of Komatsu having to enforce its rights under this Agreement against the Customer in terms of clause 14.2 and all other costs as provided for by the NCA.

#### 14.2 Consequences of Default

14.2.1 Should the Customer not make payment of any amounts due to Komatsu in accordance with this Agreement, the Customer will be in default.

14.2.2 In the event of default, Komatsu may give written notice to the Customer of such default, requesting the Customer to rectify the default and/or propose that the

Customer refers this Agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the Parties resolve any dispute under this Agreement or develop and agree on a plan to bring the Customer's repayments up to date.

14.2.3 Delivery of the written notice referred to in clause 14.2.2 at the address provided by the Customer in the Customer Information Form attached to this Agreement will serve as proof of delivery of such written notice.

14.2.4 The Customer may at any time prior to cancellation of this Agreement by Komatsu, remedy his/her/its default by paying to Komatsu all amounts that are due and owing to Komatsu by the Customer, together with the prescribed default administration charges and collection costs referred to in clause 14.1 incurred by Komatsu to enforce the provisions of this Agreement against the Customer up to the date upon which the Customer's default is remedied.

14.2.5 Komatsu will be entitled, without prejudice and in addition to any other rights which Komatsu may have in terms of law and in terms of this Agreement, to institute legal action against the Customer to enforce the provisions of this Agreement in the event that –

14.2.5.1 the Customer does not respond to the written notice delivered to him/her/it by Komatsu in accordance with clause 14.2.2; or

14.2.5.2 the Customer rejects Komatsu's proposal for referral of this Agreement in accordance with clause 14.2.2; or

14.2.5.3 where 10 business days have lapsed after delivery of such written notice to the Customer; and

14.2.5.4 the Customer has been in default under this Agreement for at least 20 business days.

14.2.6 In the event of default not being rectified, the full outstanding balance of any amount owing to Komatsu by the Customer in terms of this Agreement, will immediately become due and payable and Komatsu may, without affecting any of its other rights in terms of this Agreement or otherwise, recover from the Customer payments of all amounts owing under this Agreement, which payments will include any accrued, but unpaid interest, default administration charges and collection costs, as contemplated in clause 14.1, and/or any reasonable legal costs and charges expended by Komatsu to enforce the provisions of this Agreement.

### 15. WHERE THE CUSTOMER IS CONSUMER OR A JURISTIC PERSON, BUT THE NCA DOES NOT APPLY

15.1 The provisions of clauses 14.1.1, 14.1.2 and 14.2.6 shall still apply *mutatis mutandis* even where the Customer is not a consumer or a juristic person for purposes of the NCA.

### 16. CONSENT TO VERIFICATION OF ACCOUNT DETAILS, DATA PROTECTION AND PRIVACY AND CONFIDENTIALITY

16.1 Personal Information is information relating to an identifiable, natural or juristic person, including but not limited to information relating to race, gender, sex, marital status, nationality, ethnic or social original, colour, sexual orientation, age, physical or mental health, religion, belief, disability, language, birth, education, identity number, telephone number, e-mail, postal or street address, biometric information and financial, criminal or

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- employment history, as well as correspondence sent by the person that is implicitly or explicitly of a private or confidential nature or further correspondence that would reveal the contents of the original correspondence, including any information provided by the Customer in terms of clause 1.6 ("**Personal Information**").
- 16.2 The Customer acknowledges that its Personal Information provided to Komatsu may be protected by data protection legislation such as the POPIA and the NCA and the Customer acknowledges that the conclusion of this Agreement shall create a lawful basis for Komatsu's right to collect, receive, record, organize, collate, store, update, modify, retrieve, alter or process the Customer's Personal Information.
- 16.3 The Customer hereby consents to Komatsu making worldwide transfers of the Customer's Personal Information on Komatsu's corporate systems, to other entities, agents or subcontractors in Komatsu's group, or to other relevant business partners, including without limitation, agents, distributors and third parties who may have incidental access to personal information.
- 16.4 The Customer consents to all communications being monitored or recorded by Komatsu in accordance with the applicable laws, for use in business practices, prevention of unauthorised use of Komatsu's systems and in respect of the detection and prevention of crime.
- 16.5 The Customer will have the right to contact Komatsu regarding any Personal Information that the Customer is entitled to.
- 16.6 The Customer hereby consents to the storage and use by Komatsu of its Personal Information for establishing its credit rating and in providing the goods and/or services to the Customer in terms of this Agreement and to Komatsu disclosing such information to credit control companies, banks and other institutions involved in rating credit. **The Customer agrees that Komatsu will not be held liable for the good faith disclosure of any of this Personal Information to such third parties and that no further specific consent needs to be obtained for the transfer of such information to a specific third party for the purposes of establishing its credit rating and in providing the goods and/or services to the Customer in terms of this Agreement. Customer Initials:**
- 16.7 The Customer hereby consents that Komatsu can also provide its Personal Information to third parties other than those referred to in clause 16.3, if the Customer has indicated Komatsu as a trade reference to third parties and the Customer agrees that Komatsu will not be liable for the good faith disclosure of any of this information to such third parties.
- 16.8 Unless otherwise required for purposes of this clause 16, Komatsu hereby agrees that it will take or cause to be taken such reasonable precautions as may be necessary to prevent the disclosure of any of the Customer's Personal Information made available to Komatsu by, or obtained from, the Customer which are not a matter of public knowledge or lawfully available from any other source.
- ### 17. ENGAGEMENT WITH ANTI-SOCIAL FORCES
- 17.1 The Customer hereby warrants to and in favour of Komatsu that it will not at any time during this Agreement have engaged with any Antisocial Forces. The terms "engage with" and "Antisocial Forces" shall have the meanings ascribed thereto in clause 17.3 below.
- 17.2 If at any time during this Agreement Komatsu has a reasonable basis or suspicion for believing that the Customer is engaging, or has during this Agreement engaged, with an Antisocial Force/s, Komatsu shall be entitled to terminate this Agreement with immediate effect, on notice and in writing to the Customer, without any prejudice to or derogation from any other rights of Komatsu under this Agreement or in law.
- 17.3 For purposes of this clause 17 –
- 17.3.1 "**Antisocial Force/s**" means a person, group or entity –
- 17.3.1.1 which uses violence, intimidation or fraudulent means to pursue economic gains; or
- 17.3.1.2 named on any lists promulgated by the United Nations Security Council or its committees pursuant to any resolution issued under Chapter VII of the United Nations Charter; or
- 17.3.1.3 named on the World Bank Listing of Ineligible Firms (see [www.worldbank.org/debarr](http://www.worldbank.org/debarr)) or any successor website or location); or
- 17.3.1.4 which has been convicted, or subjected to any similar criminal sanction, by any court or governmental body of competent jurisdiction, or who is suspected or under investigation by any governmental body of competent jurisdiction for, engaging in money laundering or financing terrorism or any corrupt or fraudulent practice; or
- 17.3.1.5 which is a successor in interest or ultimate beneficial owner of a person, group or entity described in any of clauses 17.3.1.1 to 17.3.1.4; and
- 17.3.2 "**engage with**" shall include but not be limited to any form of contracting, mutual association, investing or transacting.
- ### 18. GENERAL
- 18.1 The Customer agrees that no indulgence whatsoever by Komatsu will affect the terms of this Agreement or any of the rights of Komatsu and such indulgence shall not constitute a waiver by Komatsu in respect of any of its rights herein. Under no circumstances will Komatsu be estopped from exercising any of its rights in terms of this Agreement.
- 18.2 The Customer hereby consents to the non-exclusive jurisdiction of the High Court of South Africa, Gauteng Local Division, Johannesburg.
- 18.3 **Nothing in this clause 18, or anywhere else in this Agreement, should be understood to prevent Komatsu or the Customer from taking any dispute to any court, tribunal, commission or other body of competent jurisdiction. Customer Initials:**
- 18.4 **The Customer shall be liable to Komatsu for all legal costs and expenses on the attorney-and-own-client scale incurred by Komatsu in the event of (i) any default by the Customer (and any enforcement of Komatsu's rights); or (ii) any litigation in regard to the validity and enforceability of this Agreement. The Customer shall also be liable for any tracing, collection or valuation fees incurred as well as for any costs, including stamp duties, for any form of security that Komatsu may demand. Customer Initials:**
- 18.5 The Customer agrees that Komatsu will not be required to furnish security in terms of Rule 62 of the Rules of Court

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of the Magistrate's Courts or in terms of Rule 47 of the Uniform Rules of the High Court.

- 18.6 Any document shall be deemed duly presented to and accepted by the Customer (i) within 5 days of prepaid registered mail to any of the Customer's business or postal addresses or to the personal address of any director, member or owner of the Customer; or (ii) within 24 hours of being faxed to any of the Customer's fax numbers or any director, member's or owner's fax numbers; or (iii) on being delivered by hand to the Customer or any director, member or owner of the Customer; or (iv) within 48 hours if sent by overnight courier or (v) within 7 days of being sent by surface mail; or (vi) within 24 hours of being e-mailed to any e-mail address provided by the Customer.
- 18.7 The Customer chooses its address for any notification or service of legal documents or processes its business address as provided in the Customer Information Form attached to this Agreement or the physical addresses (domicilium citandi et executandi) of any director (in the case of a company), member (in the case of a close corporation) or of the owner(s) or partner(s).
- 18.8 **The Customer undertakes to inform Komatsu in writing within 7 days of any change of director, member, shareholder, owner or partner or address or 14 days prior to selling or alienating the Customer's business and failure to do so will constitute a material breach of this Agreement. Upon receipt of such written notification, Komatsu reserves the right, to the extent not in conflict with the NCA, at its sole discretion, to cancel this Agreement (including any unfulfilled orders placed with Komatsu prior to the aforementioned change) with the Customer.**  
**Customer Initials:**
- 18.9 The Customer shall not be entitled to cede, assign or transfer any part, share or interest of this Agreement without the prior written consent of Komatsu. Komatsu shall be entitled to cede, assign and transfer its rights and obligations under this Agreement with the Customer to any person upon notice to the Customer. This Agreement shall be binding on the successors in title and permitted assigns of the Parties.
- 18.10 Each provision of this Agreement is severable from the other provisions, notwithstanding the manner in which they have been grouped together or linked grammatically. Should any provision be found to be invalid or unenforceable for any reason, the remaining provisions of this Agreement shall nevertheless remain binding and continue with full force and effect.
- 18.11 Any provision of this Agreement which by its very nature requires or contemplates performance or applicability of such provision after the termination or expiration of this Agreement will survive such termination or expiration.
- 18.12 The Parties do not intend for any of their rights or obligations under this Agreement to benefit any third parties.
- 18.13 This Agreement and its interpretation is governed by the laws of the Republic of South Africa.