

## **HESPER ENGINEERING**

(A DIVISION OF NOVATECH (PTY) LTD)

(REGISTRATION NUMBER 1975/001613/07)

### **STANDARD TERMS AND CONDITIONS**

#### **1. DEFINITION:-**

- 1.1. Hesper means Hesper Engineering, a division of Novatech (Pty) Limited, a Company with share capital registered as such under registration number 1975/001613/07 with its principal place of business at Verbena Street, Paarden Eiland, Cape Town.
- 1.2. Customer shall mean the owner of the vessel which forms the subject matter of an agreement between Hesper and the Customer, and unless the context indicates or requires otherwise, shall also mean the owner's representative, agent and the Master, mate and Chief Engineer of the vessel in question.

#### **2. APPLICABILITY OF TERMS AND CONDITIONS:-**

- 2.1. All work undertaken by Hesper, whether directly or indirectly, is undertaken subject to these terms and conditions.
- 2.2. Any contract between Hesper and a Customer shall only bind Hesper once Hesper has provided the Customer with a written quotation and such quotation has been accepted in writing by the Customer.

- 2.3. These terms and conditions supersede all previous negotiations, terms, conditions and agreements between Hesper and the Customer in relation to the services and / or goods to be supplied by Hesper to the Customer and all other terms and conditions, express or implied are hereby excluded.
- 2.4. Any variations or amendments to orders or work between Hesper and the Customer shall be binding on Hesper only once it has been reduced to writing and signed by duly authorised representatives of the Customer and Hesper.

3. **APPLICABILITY OF LAWS AND CHANGES THEREIN:-**

- 3.1. If any legislation is compulsory applicable to any business undertaken by Hesper on a Customer's behalf, these conditions shall as regards such business be read as subject to such legislation. Nothing in these conditions shall be construed as a surrender by Hesper of any of its rights or amenities or as an increase of any of its responsibilities or liabilities under such legislation and if any part of these conditions is repugnant to such legislation to any extent, such part shall be deemed to be void to that extent but no further. The other terms and conditions shall remain operative and applicable.
- 3.2. If any law comes into operation subsequent to the conclusion of a contract between Hesper and a Customer that affects any aspect or matter or issue contained in the contract between Hesper and the Customer the parties shall attempt to vary their agreement to ensure that its implementation does not constitute a contravention of such new law.
- 3.3. If Hesper is prevented from performing any of its obligations in terms of its contract with the Customer as a result of any new law

coming into operation or as a result of any event beyond its reasonable control, whether or not foreseeable, including general power failures, breakdown of telecommunication networks or computers, political intervention, imposition of sanctions, riot or insurrection, it shall not be liable for any failure to perform its obligations in terms of the contract with the Customer while such event persists and shall have the right (unless such event has or is likely to persist for a period of less than 30 days) to terminate the contract with the Customer at any time after the intervention of or becoming aware of such event.

- 3.4. If Hesper terminates its contract with the Customer in accordance with the provisions of this clause, the Customer shall not have any claim or obligation in respect of any loss suffered or damages incurred as a result of such cancellation.

#### 4. **WITHDRAWAL:-**

- 4.1. Hesper shall have the right to withdraw from this quote at any stage prior to its acceptance. Acceptance shall be delivered to Hesper in writing, and shall only be binding to Hesper if delivered within the period stipulated in the quote.
- 4.2. Hesper shall also have the right, before commencing work on any contract, to withdraw from the same if Hesper shall not be satisfied as to a customer's financial standing or with financial arrangements made for payment to the contract price, which shall be at Hesper's discretion. In the event of such withdrawal prior to any work having been effected by Hesper, then and in such event neither party shall have any liability.
- 4.3. Should Hesper be unable at the date of the contract to acquire any material or any item of material (the lack of which would

substantially affect the completion of the work), it shall be entitled to withdraw from the contract by notice in writing to the customer, and shall not be liable for any damages to the Customer as a result of such cancellation.

5. **CANCELLATION:-**

Should Hesper or the customer commit any breach of the contract or should Hesper without reasonable cause wholly suspend work or fail to proceed with same with reasonable diligence, and should such party fail to remedy such breach within three days of written notice from the other party, then the other party may forthwith by notice in writing cancel the contract, which cancellation be without prejudice to any claim for damages arising out of such breach.

6. **PAYMENT:-**

6.1. Unless otherwise stipulated on the face hereof, progress payments shall be made by the Customer from time to time as agreed in the quote and the balance shall be paid on completion of the contract.

6.2. Where by agreement with Hesper or by reason of any law or regulation or trade custom or under the rules and regulations of the customer or its agent's business, or by agreement between the customer and its agent, or other person charged with the duty of paying Hesper, or for any other reason whatsoever, any payment whatever to Hesper is conditional upon the signature by any person to any certificate or other documents relating to the work or otherwise, the customer undertakes that such document or certificate shall be signed upon completion of the work notwithstanding that any dispute may exist in relation thereto or that any claim may be made that the work is defective or that any

other cause may exist entitling the withholding of that payment or any part thereof, provided always that such document or certificate may contain a statement to the effect that such dispute may exist or claim may be made, and provided that the fact that such document or certificate is signed (whether with or without such statement) or that Hesper obtains payment hereunder shall in no way prejudice the owner's right under this contract.

6.3. All unpaid amounts shall be subject to interest at the prime rate plus 2% per annum from the due date to date of payment.

7. **INSTRUCTIONS:-**

Hesper shall perform the contract in accordance with the reasonable instructions of the customer, and if the customer shall have the services of a Surveyor Hesper shall be entitled to regard the Surveyor's instructions as those of the customer.

8. **MATERIALS, ETC:-**

Should the cost to Hesper of any material (which includes any substance or thing but excludes tools and equipment) required for the execution of the contract exceed the current market price of that material at the date of the quote's acceptance, the contract price shall be increased by the amount of the excess. For the purposes of this clause the current market price of any material shall be the price at which Hesper under the conditions of supply and the laws prevailing at the date of contract, could reasonably have acquired such material.

9. **LABOUR:-**

If during, the period of the contract, Hesper by virtue of the coming into operation of any Law of Regulation or Wage regulating instrument binding under any Law, is legally obliged or entitled to increase or reduce

the remuneration (which term, for the purposes of this clause, includes wages, costs of living allowances, bonuses, leave pay and other benefits whatsoever) of any employee engaged on work under this contract, the contract price shall be increased or reduced, as the case may be, by the total amount by which Hesper is legally obliged or entitled to increase or reduce such remuneration during and in respect of the period that such employee is engaged on work under the contract.

10. **SUSPENSION OF WORK:-**

Should extra costs be incurred by Hesper owing to suspension of work on the Customer's instructions, or lack of instructions, such extra cost and also the cost of keeping men on the job shall be added to the contract price.

11. **LIMITATION OF CONTRACTOR'S LIABILITY:-**

11.1. Throughout the contract the vessel shall be at the risk of the owner. Hesper shall not, save as is hereinafter provided, be responsible for any damage, injury or loss whatsoever which may occur to the Owner or to the vessel or parts thereof, or its cargo, or to any person, nor for the results of such damage, from any cause whatsoever, and whether caused by or due to Hesper, their servants or any other person including sub-contractors.

11.2. When Hesper is for any reason whatsoever executing, has been executing or is still to execute any work, or when it has any object, either a vessel, a building or any other object whatsoever, in its custody and irrespective as to whether said object has been entrusted to it for said purpose or not it shall not be liable for any damage which might be caused to said object or to its contents or parts, or to persons (inclusive of fatal accident) being in, on or near the said object or on their way to or from same, irrespective

as to whether said damage was caused by persons in the employment of Hesper or used by it, or in any other way.

11.3. Hesper shall not be liable for damage as mentioned hereinbefore when, after the work is finished, the object remains in its care, either because the amount due by the Customer has not entirely been paid, or for whatsoever reason it may be, or when the object remains with Hesper or on or in their plant.

11.4. Provided always, however, that Hesper shall be liable for any loss or damage suffered by the Owner and directly due to the negligence of Hesper, or their servants, agents of sub-contractors, acting within the course and scope of their employment or authority subject always to the following limitations and exceptions.

11.4.1. the total liability of Hesper to the Owner (over and above any liability under clause 18 hereof) shall be limited in respect of any defect or event (and a series of accidents arising out of the same defect or even shall constitute one defect or event) to the sum of R3,000.000.00 (three million rand).

11.4.2. In no circumstances whatsoever shall the liability of Hesper include any sums in respect of loss of profit or loss of use of the vessel or damages consequential on such loss of use.

## 12. **TRIALS AND MOVEMENTS OF VESSEL:-**

Notwithstanding the provision of clause 11 any trials or movements of the vessel, or any part thereof arising out of the work effected to the vessel by Hesper shall be at the Customer's sole risk in every respect and neither Hesper, nor any sub-contractor, shall be under liability

whatsoever to the Customer for any act or default in or arising out of such trials or movements.

13. **THIRD PARTIES:-**

Nothing in clauses 11 and 12 shall be construed as giving or be deemed to give any indemnity by the Customer to Hesper or any sub-contractor in respect of claims brought by the third parties against Hesper or any sub-contractor.

14. **PERIOD OF CONTRACT:-**

14.1. In the event of the supply and / or delivery of any goods or of the execution of any work and or repairs being delayed by any cause whatsoever other than the negligence of Hesper, including inter alia any fire and / or accident and / or by any strike, lock-out of combination of, or dispute with the workmen of Hesper of any other company or firm who may be subcontractors to Hesper or of any carrying company, undertaking or concern of Hesper in the steel, iron, coal, electric power of any other trade involving either a total or a partial stoppage of work or by storm, bad weather, or war, rebellion, civil commotion or by any additions or alterations ordered or any delay in issuing instructions of final approval if default by the owners of Customers or their representatives, or by any breakdown of machinery or plant, or by the time occupied in loading any vessel or by any defects in materials or any delay in delivery of materials or by reduction in the number of working hours after the date of the contract, limitation or restriction of work by the workmen, regulations of Governments or by any cause of any nature or description whatsoever beyond the contract of Hesper, whether of a kind similar to those specifically set out or of a different kind then and in such cases, provided that a written notification be given by

Hesper to the customer, time allowed for supply or delivery of the said goods and / or the completion of the said work and / or repairs shall be extended by the number of days lost to Hesper owing to any such cause and / or causes and any such delay in completion shall not constitute any default of breach or contract on the part of Hesper and no damage or additional wet-or-dry-dock dues shall be payable by it in respect thereof.

- 14.2. Provided that the owners or Customers upon receipt of the notice abovementioned shall have the option of cancelling this contract by notice in writing to Hesper without liability for anything beyond the payments for the work done, material supplied and disbursements incurred in the period prior to the aforesaid cancellation.
- 14.3. In the event of the contract being so cancelled all liability of Hesper shall cease. Notwithstanding anything in this clause contained, Hesper accepts no liability whatever to execute work or supply goods or materials by a fixed date or time, unless it shall have given such undertaking in writing.
- 14.4. The terms of this clause shall apply and be in force and the time for supply and / or delivery of the said goods and / or completion of the said work and / or repairs shall be extended, notwithstanding the fact that there shall have been a previous breach of the contract on the part of Hesper.

15. **BONUS:-**

Where Hesper has undertaken in writing to execute work or supply goods or materials by a fixed date or time (which shall notwithstanding the working of the undertaking, mean the date or time as extended under clause 14) and executed such work or supplies such goods or materials

before such date or time (as so extended) the contract price shall be increased by an amount equal to one-tenth per cent ( $1/10^{\text{th}}\%$ ) therefore for each full working day by which execution or supply is completed earlier than the fixed date or time (as so extended).

16. **DELAYS:-**

16.1. Where Hesper has undertaken in writing herein to execute work or supply goods or materials by a fixed date or time (which shall, notwithstanding the wording the undertaking mean the date or time as extended under clause 14).

16.1.1. If any amount has been agreed in writing herein by both Customer and Hesper as liquidated damages for delay in such execution or supply, such amount shall be full and final and no further or other compensation or damages shall be claimable or payable.

16.1.2. If there is no such written agreement, Hesper shall pay or allow the Customer as liquidated and ascertained damages an amount equal to one half per cent ( $1/2\%$ ) of the contract price for each full week of five working days by which the fixed time has been exceeded, provided that the total payable shall not exceed in any case ten per cent ( $10\%$ ) of the contract price, and the said amount shall be full and final and no further or other compensation or damages shall be claimable or payable.

Provided always that Hesper shall only be liable for damages as aforesaid if the delay is due to Hesper's own neglect.

17. **ARISINGS:-**

All and any materials coming from the craft, vessel or other object on which repair work is performed by Hesper in the course of such repair shall be the property of Hesper without any payment being made for same, unless the contrary has been agreed in writing.

18. **DEFECTS:-**

18.1. On delivery by Hesper of any goods or materials, or on completion of repairs or work, all responsibility on the part of Hesper shall cease except in respect of any goods or materials supplied or workmanship found to be defective owing to negligence of Hesper, their agents sub-contractors or employees, which shall have been discovered and written notification whereof shall have been delivered to Hesper within sixty (60) days after the delivery of the goods or materials or completion of the repairs or work.

18.2. In such expected case Hesper will supply and / or fit in the Cape Town docks new goods or materials or workmanship to replace such defective goods or materials or workmanship, or at the option of the Customer will allow a sum of money equivalent to the cost of Hesper of supplying or doing the same in such port and this shall be the full extent of Hesper's liability for the said defective goods, materials and workmanship. But Hesper shall not be liable except to the extent above provided for, and shall not in any case be liable for any detention or delay or other consequential damage or other expense however arising in respect of original or substituted goods or materials or workmanship.

18.3. Hesper shall be under no greater liability in respect of any substituted good, materials or workmanship than it was under in respect of the original goods, material or workmanship and the

provision of this clause in regard to liability in respect of the original goods, materials or workmanship shall apply in all respect *mutatis mutandis* to any substituted materials or workmanship.

18.4. This clause takes the place of any conditions or warranty implied or imposed by any Statute or Act or Law for the time being in force or by Common Law or otherwise and any such condition or warranty is hereby excluded.

19. **LIEN:-**

All goods that form the subject matter of the contract between Hesper and The Customer shall be subject to a lien in favour of Hesper until such time as the contract price has been paid in full.

20. **CHOICE OF LAW & JURISDICTION:-**

20.1. The operation of this Agreement and the interpretation thereof shall be governed by the law of the Republic of South Africa.

20.2. The parties hereby consent to the jurisdiction of the High Court of South Africa (Western Cape High Court, Cape Town).

21. **ARBITRATION:-**

21.1. Should any dispute arise between the parties in connection with the formation or existence of this Agreement, the implementation of, the interpretation or application of the provisions of, the parties' respective rights and obligations in terms of, any documents furnished by the parties pursuant to the provisions of or any action by a party contrary to the provisions of this Agreement, such dispute shall, unless resolved between the parties to the dispute, be referred to and be determined by arbitration in terms of this clause.

21.2. Any party to this Agreement may demand that a dispute be determined in terms of this clause by written notice given to the other party.

21.3. The arbitration shall be held:-

21.3.1. in Cape Town;

21.3.2. with only the legal and other representative of the parties to the dispute present;

21.3.3. subject to the provisions of this clause under the provisions of the Arbitration Laws enforced at the time in the Republic of South Africa.

21.4. It is the parties that the Arbitration shall be held and completed as soon as possible and with due regard to the commercial intent of this Agreement.

21.5. The Arbitrator shall be, if the matter in dispute is principally:-

21.5.1. a legal matter, a practising Advocate or Attorney of at least 15 years standing;

21.5.2. an accounting matter, a practising Chartered Accountant of at least 15 years standing;

21.5.3. any other matter an independent person;

agreed upon between the parties to the dispute.

21.6. Should the parties to the dispute fail to agree whether the dispute is primarily a legal, accounting or other matter, the matter shall be deemed to be a legal matter.

- 21.7. Should the parties fail to agree on the identity of the Arbitrator within seven (7) days of the Arbitration being demanded in terms of clause ..... above, the Arbitrator shall be appointed, at the request of any party to the dispute, by the President for the time being of the Law Society of the Cape of Good Hope, according to the provisions above.
- 21.8. The Arbitration shall be held in accordance with the formalities and / or procedures determined by the Arbitrator, which may be an informal and summary manner and on the basis that it shall not be necessary to observe or carry out either of the usual formalities or procedures or the strict rules of evidence.
- 21.9. The Arbitrator shall be entitled:-
- 21.9.1. to investigate or cause to be investigated any matter, fact or thing which he or she considers necessary or desirable in connection with any matter referred to him or her for decision and, for that purpose, shall have the widest powers of investigating;
  - 21.9.2. to interview and question under oath any of the parties or their representatives;
  - 21.9.3. to decide the matter submitted to him or her according to what he or she consider just and equitable in the circumstances;
  - 21.9.4. to make such award, including an award for specific performance, and interdict, damages or a penalty as he or she in his or her discretion may deem fit and appropriate.

- 21.10. Immediately after the Arbitrator has been agreed or nominated as provided herein, the parties shall be entitled to call upon the Arbitrator to fix a date and place when and where the Arbitration proceedings shall be held and to settle the procedure and manner in which the Arbitration proceedings will be held.
- 21.11. The parties agree to keep the Arbitration, including the subject matter of the Arbitration and evidence heard during the Arbitration, confidential and not to disclose it to anyone except for the purpose of giving effect to any award of the Arbitrator or for the purposes of an order to be made in terms of clause ..... below.
- 21.12. Each party irrevocably agrees and undertakes that any award which may be made by the Arbitrator:-
- 21.12.1. shall be final and binding upon them;
  - 21.12.2. shall be carried into effect;
  - 21.12.3. shall, if any party so requires be made an Order of the High Court of South Africa.
- 21.13. The provisions of this clause:-
- 21.13.1. Constitute an irrevocable consent by the parties to any proceedings in terms hereof and no party shall be entitled to withdraw therefrom or to claim at any such proceedings that it is not bound by such provision;
  - 21.13.2. are severable from the rest of the Agreement and shall remain in effect despite the determination or invalidity for any reason of the Agreement.

22. **DOMICILIUM CITANDI ET EXECUTANDI:-**

22.1. The parties chose domicilium citandi et executandi for the purposes of giving any notice, the payment of any sum, the serving of any process or for any other purpose arising from the quote at the addresses specified in the quote and its acceptance.