

13.8 Any material or item or thing submitted to the AKA under this Tender document is submitted at the Tenderer's risk and if a Tenderer requires the return of any such material, item or thing submitted, such return is at the Tenderer's sole cost. Any material, item or thing not collected by the Tenderer within 14 days written notice by the AKA to the Tenderer to collect the material, item or thing, shall be deemed abandoned by the Tenderer and on such deemed abandonment, shall become the sole and absolute property of the AKA.

**14. Selection of Tenders After Tyre Testing Procedures**

On completion of the tyre testing procedure and receipt by the AKA of the results, the test results together with the Tenderer's documents will be submitted to the NKC for consideration and subsequent successful Tender selection.

**15. Acceptance Of Tender**

15.1 The AKA reserves the right in its absolute discretion to withdraw from this Tender at any time prior to the Acceptance Date and may refuse to consider and/or accept any Offer without reason and without any reference back to any Tenderer.

15.2 In the event that the AKA abandons the whole of the Tyre Testing procedure and unilaterally withdraws from the Tender process without good reason, it shall refund to Tenderers their Test Fee. Except as provided for in this clause 15.2 the Test Fee is not refundable.

15.3 The AKA shall not be obliged to consider any Tender unless such Tender is in accordance with this Tender document. Notwithstanding, the AKA in its absolute discretion may consider any Offer not in strict accordance with this Tender document where it is just and reasonable to do so for the benefit of AKA competitors.

The AKA shall not be obliged under any circumstance to accept the lowest priced Tender or any Tender at all and shall not be required to give reasons for non acceptance of any Tender or give notice to any Tenderer that its Tender has been rejected or has not been

successful.

- 15.4 The AKA will do all things reasonable to attempt to notify the successful Tenderer on or before 5.00pm on the fifth business day following the Selection Date. The AKA shall notify the successful Tenderer in writing via ordinary prepaid post or facsimile transmission or email transmission and the successful Tenderer shall be bound by its Offer at the time the written notification is placed in a Australia Post letterbox or when the AKA facsimile device shows the facsimile transmission has been completed or when the AKA Email device shows the Email transmission has been completed.

## **16. Lodgment Of Performance Bond**

- 16.1 The successful Tenderer must provide to the AKA an unendorsed bank cheque made payable to the AKA in the sum of \$10,000.00 as a Performance Bond. Such cheque must be received by the AKA no later than 5.00pm on the fifth business day, in which respect time is of the essence, after notification by the AKA that the Tenderer has been successful.
- 16.2 The Performance Bond shall be held for The Term by the AKA in an interest bearing account with the Commonwealth Bank of Australia. The Performance Bond and any interest accrued shall be refunded to the successful Tenderer after the expiration of The Term conditional upon there being no breach of the provisions of this Tender document or any subsequent agreement between the AKA and the successful Tenderer.

## **17. Application Of Bond Monies**

- 17.1 The AKA at its sole and absolute discretion may apply any part or all of the Performance Bond without reference to the successful Tenderer in compensation to the AKA or any other legal entity suffering any loss, damage or inconvenience occasioned as a consequence of any breach or default by the successful Tenderer of any provision of any agreement relating to the supply and sale of The Tyres, the subject of this Tender document.

17.2 The AKA Secretariat shall be entitled to unilaterally determine the amount of loss or damage or inconvenience suffered by the AKA or any other legal entity as a consequence of the Tenderer's breach or default and thereafter, may at its absolute discretion deduct from the Performance Bond such amount and apply such amount by way of compensation for loss, damage or inconvenience to the AKA or other legal entity suffering loss, damage or inconvenience.

17.3 Should the successful Tenderer commit any breach or default of its obligations then the AKA shall not be limited to the sum of the Performance Bond for any claim for loss, damage or inconvenience suffered. The AKA shall be entitled to exercise all its rights whether such rights arise at law or in equity.

**18. Topping up the Bond**

In the event that the AKA uses or otherwise applies all or any part of the Performance Bond to remedy or compensate for any loss, damage or inconvenience suffered as a result of any breach or default by the Tenderer, then within 5 business days of the Tenderer being notified that such monies have been used or applied, the Tenderer shall then pay to the AKA such additional sum of money as may be necessary to reinstate the Performance Bond to its original level of \$10,000.00.

**19. Return of Bond**

At the completion of the Term, the Performance Bond including any interest accrued less any amount used or applied by the AKA shall be returned by the AKA to the successful Tenderer subject always to the successful Tenderer performing its obligations with respect to the matters referred to in this Tender document and any collateral agreement reached between the AKA and the Tenderer.

**20. Bank Guarantee Alternative**

20.1 The Tenderer may at its sole election provide to the AKA a bank guarantee in lieu of a cash Performance Bond provided that:-

- (a) The bank guarantee is provided by an entity approved by the AKA and the bank guarantee is made in favour of the AKA;
- (b) The bank guarantee is irrevocable and is unconditional in all respects including expiry date;
- (c) The form and terms and conditions of the bank guarantee are in all other respects satisfactory to AKA.

20.2 In the event that the AKA calls upon the bank guarantee, then the Tenderer shall forthwith provide to the AKA a further bank guarantee or guarantees in such amounts that the bank guarantee at all times remains in the sum of \$10,000.00.

## **21. Failure to pay Performance Bond**

21.1 In the event that the successful Tenderer fails to pay the Performance Bond or fails to provide a bank guarantee acceptable to the AKA, or fails to top up the Performance Bond or replace the bank guarantee, then the AKA may in its absolute discretion by notice in writing, waive the default by the Tenderer in which event, the tender agreement will be deemed to be amended accordingly; or the AKA may terminate the tender agreement in which circumstance the AKA shall be entitled inter alia, without limiting the AKA's other rights and remedies to forfeit to it any valuable consideration in whatever form which the Tenderer may have provided to the AKA under this Tender Agreement.

21.2 In the event that the AKA for whatever reason terminates its agreement with the Tenderer, the AKA may without limiting any other rights and remedies available to it negotiate an agreement with any other entity in substitution of the terminated agreement.

## **22. Variation to Tender Price**

**The Tender Price shall remain fixed for The Term subject only to the following:-**

- (a) In the event that there is an **increase** in GST or other government charge or levy or like impost (“the Charge”) which has the direct effect of bona fide increasing

the successful Tenderer's cost of supplying The Tyres, then the successful Tenderer shall be entitled to increase the Fixed Price by the same amount that the Charge increased, such increase to be applied only to sales of The Tyres made after the successful Tenderer has:-

- (i) Notified the AKA of the increase in writing. Such notice must be given within 7 days of the Tenderer becoming aware of the increase in the Charge;
  - (ii) Provided to the AKA documentary evidence of the increase in the Charge, such evidence to be to the reasonable satisfaction of the AKA;
- (b) In the event that there is an increase in the Royalty payable to the AKA, which the AKA may apply at any time in its absolute discretion, the successful Tenderer shall be entitled to increase the Fixed Price by the same amount that the AKA Royalty increased, such increase to be applied only to sales of The Tyres made after the Tenderer has been notified in writing by the AKA that the Royalty sum is increased.
- (c) In the event that there is an increase of more than five percent (5%) in the exchange rate between the Australian Dollar and the Currency that the successful Tenderer is required to use to purchase The Tyres, then the successful Tenderer shall be entitled to increase the Fixed Price by the same amount of the increase in the exchange rate above five percent (5%), such increase to be applied only to sales of The Tyres made after the successful Tenderer became aware of the increase, provided however:-
- (i) The Currency shall be limited to Euros, US Dollars, and Japanese Yen. If the successful Tenderer is required to use a Currency other than Euros, US Dollars, or Japanese Yen, then the exchange rate of the Currency shall be referenced to US Dollars.
  - (ii) The successful Tenderer has notified the AKA in writing within 7 days of

the increase occurring;

- (iii) Any increase in the exchange rate shall be calculated by reference to the exchange rate applicable at 5pm on the date of the Acceptance Notice referred to in Schedule 5 herein;
  - (iv) No increase shall be made for a period of 365 days from the date of the Acceptance Notice referred to in Schedule 5 herein;
  - (v) The successful Tenderer may only increase the Fixed Price once in any 180 day period thereafter.
- (d) In the event that there is any **decrease** in the Charge, the AKA Royalty or the exchange rate, then the Tenderer shall decrease the Fixed Price, such decrease to be applied only to sales of Tyres made after the Tenderer receives written notice from the AKA that there has been a said decrease in the Charge, the AKA Royalty or the exchange rate.

The successful Tenderer shall notify the AKA within 7 days of it becoming aware of any decrease in the Charge or decrease in the exchange rate. The successful Tenderer shall be deemed to be aware of any decrease in the Charge or decrease in the exchange rate in circumstances where it is reasonable where a person in the successful Tenderer's position ought reasonably be aware of such decrease.

In the event that the successful Tenderer fails to notify the AKA of any decrease in the Charge or the exchange rate, then the AKA shall be entitled to demand that the successful Tenderer adjust its sale price retrospective to the date of the decrease and pay to the AKA a sum equivalent to the decrease times the number of Tyres sold by the Tenderer from the effective date of the decrease to the date of demand by the AKA to reduce the sale price or to the date on which the successful Tenderer reduces the sale price to take into account the decrease, whichever is the earlier.