

AIF GENERAL CONDITIONS (Commercial Projects)

1. Definitions

For the purposes of this Agreement,

“Agreement” means the agreement to which these General Conditions relate, consisting of Articles of Agreement and the Schedules referred to in these Articles.

“Background Intellectual Property” means the intellectual property rights in the technology developed prior to the beginning of the Project and required for the carrying out of the Project or the exploitation of the Foreground Intellectual Property.

“Contribution” means the funding, in Canadian dollars, payable by ACOA under the Agreement.

“Eligible Costs” means the Project cost elements specified in the Statement of Work in Schedule 2 and incurred by the Proponent in accordance with Schedule 3, Section B, AIF Project Cost Principles, excluding but not limited to those Project cost elements that may be specifically mentioned in the Statement of Work as not being supported by ACOA.

“Equity” means the aggregate of:

- (i) Proponent’s share capital;
- (ii) The Proponent’s retained earnings, contributions or other surpluses;
- (iii) The Proponent’s deficit accounts not considering operational losses allowed by ACOA;
- (iv) Loans to the Proponent by the shareholders if the loans are subordinated to all other liabilities for a period specified by ACOA;
- (v) Where ACOA agrees, loans to the Proponent by parties other than shareholders, if the loans are subordinated to all other liabilities for a period specified by ACOA;
- (vi) Less advances to shareholders; and,
- (vii) Less any amounts included (i) to (v) that in the opinion of ACOA inflate net worth.

“Fiscal Year” means the Proponent’s fiscal year as set out in Article 5, subsection 5.3.

“Foreground Intellectual Property” means all technical data, including without limitation, all designs, specifications, software, data, drawings, plans, reports, patterns, models, prototypes, demonstration units, practices, inventions, methods, applicable special purpose equipment and related technology, processes or other information conceived, produced, developed or reduced to practice in carrying out the Project, and all rights therein, including without limitation, patents, copyrights, industrial designs, trademarks, and any registrations or applications for the same and all other rights of

intellectual property therein, including any rights which arise from the above items being treated by the Proponent as trade secrets or confidential information.

“Gross Revenues” means all revenues, receipts, monies and other considerations of whatever nature earned or received by the Proponent, whether in cash, or by way of benefit, advantage, or concession, and without deductions of any nature, net of any returns or discounts actually credited and any sales, excise, ad valorem or similar taxes paid but without deduction for bad debts or doubtful accounts, as determined in accordance with generally accepted accounting principles, applied on a consistent basis. Transactions with related persons (as that term is defined in the *Income Tax Act*) will be deemed made in an amount equal to the fair market value for a similar product at the time of the transaction.

“Interest Rate” means the rate of interest equal to a rate three percent (3%) higher than the average Bank of Canada discount rate for the previous month.

“Key Project Collaborators” means a person or persons listed in section 3 of Schedule 2.

“Project” means the project described in Schedule 2.

“Project Completion Date” means the date set in the Articles of Agreement for the completion of the Project.

“Quarterly” means where documents are required to be submitted on a quarterly basis pursuant to this Agreement, they shall be submitted in accordance with the dates set out in Schedule 5, section 2.

“Resulting Products” mean the Foreground Intellectual Property and/or any products resulting from the use of the Foreground Intellectual Property.

“Schedule” means a schedule to the Agreement.

“Statement of Work” refers to the document in Schedule 2 containing the description of the Project.

2. Material Changes

No material changes will be made to the estimated total scope or nature of any element of the Project without the prior written consent of ACOA. Without limiting the generality of the foregoing, a material change will have occurred if:

- (a) a Project performance milestone is not expected to be achieved within six (6) months of the projected completion date mentioned in the Statement of Work for that element;

- (b) the estimated Eligible Costs and/or the total Project costs mentioned in the Statement of Work are expected to be exceeded by 20% or more;
- (c) the Project is carried out at locations other than those mentioned in the Statement of Work;
- (d) a change to key Project personnel, key Project collaborators or partners, Project financing, or ownership of the Proponent has occurred;
- (e) a change in respect of any other aspect of the Project which has been specifically identified in another part of the Agreement as a “material change” for the purpose of this provision, has occurred.

3. Disposal of Assets

The Proponent shall retain possession and control of the Project assets, the cost of which has been contributed to by ACOA under the Agreement, and shall not dispose of the same without the prior approval of ACOA. In the event disposal is approved, it shall be conducted in accordance with the Special Purpose Equipment Schedule 7 of this Agreement.

4. Claims for Payment

4.1 Overpayment by Minister

Where for any reason:

- (a) the Proponent is not entitled to the Contribution; or
- (b) ACOA determines that the amount of the Contribution disbursed exceeds the amount to which the Proponent is entitled,

the Proponent will repay to ACOA, promptly and no later than thirty (30) days from notice from ACOA, the amount of the Contribution disbursed or the amount of the overpayment, as the case may be, together with interest at the Interest Rate from the date of the notice to the day of repayment to ACOA in full. Any such amount is a debt due to Her Majesty in Right of Canada and is recoverable as such.

4.2 Set-off Rights of Minister

Without limiting the scope of the set-off rights provided for under the *Financial Administration Act*, it is understood that ACOA may set off against any amounts that may be payable to the Proponent pursuant to this Agreement, any amounts owed by the Proponent to Her Majesty in Right of Canada under legislation or contribution agreements and the Proponent shall declare to ACOA any such amounts outstanding in that regard when making a claim for payment under Schedule 3.

5. Monitoring

5.1 Minister's Right to Audit Accounts and Records

The Proponent will, at its own expense, preserve and make available for audit and examination by ACOA or ACOA's representatives the books, accounts and records of the Project and the information necessary to ensure compliance with the terms and conditions of this Agreement, including payment of amounts to ACOA and to assess the success of the Project and the AIF Program. ACOA will have the right to conduct such additional audits at ACOA's expense as may be considered necessary using the audit staff of ACOA, the Audit Services Group of Consulting and Audit Canada, an independent auditing firm or the Proponent's external auditors. The Proponent will ensure that any licence agreement it enters into for the exploitation of the Foreground Intellectual Property will contain provisions to enable the Proponent to obtain audit certificates from the licencees' accounts and records in respect of amounts that may be used by the Proponent to calculate the payment due to ACOA under this Agreement.

5.2 Access to Premises

The Proponent will provide the representatives of ACOA reasonable access to the Proponent's premises to inspect and assess the progress of the Agreement or any element thereof and supply promptly on request such data as ACOA may reasonably require for statistical or project evaluation purposes.

5.3 Access to Third-Party Information and Premises

The Proponent will assist ACOA with the implementation of the Agreement and facilitate access by ACOA to information from third parties and to the premises of third parties, relating to the Agreement.

6. Representations, Warranties and Undertakings

6.1 Power and Authority of Proponent

The Proponent represents and warrants that it is duly incorporated and validly existing and in good standing and has the power and authority to carry on its business, to hold property and to enter into this Agreement and undertakes to take all necessary action to maintain itself in good standing and to preserve its legal capacity.

6.2 Authorized Signatories

Each party represents and warrants that the signatories to the Agreement have been duly authorized to execute and deliver the Agreement.

6.3 Binding Obligations

Each party represents and warrants that the execution, delivery and performance of the Agreement have been duly and validly authorized and that when executed and delivered, the Agreement will constitute a legal, valid and binding obligation enforceable in accordance with its terms.

6.4 No Pending Suits or Actions

The Proponent warrants that it is under no obligation or prohibition, nor is it subject to or threatened by any actions, suits or proceedings which could or would prevent compliance with the Agreement. The Proponent will advise ACOA forthwith of any such occurrence during the term of the Agreement.

6.5 No Gifts or Inducements

The Proponent represents and warrants that it has not, nor has any person offered or promised to any official or employee of Her Majesty the Queen in Right of Canada, for or with a view to obtaining the Agreement, any bribe, gift or other inducement, and it has not nor has any person on its behalf employed any person to solicit the Agreement for a commission, contingency fee or any other consideration dependant upon the execution of the Agreement.

6.6 Intellectual Property

The Proponent shall provide ACOA, prior to first disbursement of funds, a certificate of a knowledgeable and authorized officer of the Proponent setting out the following representations and warranties and certifying that they are true and correct:

- (a) that it has taken appropriate steps to ensure that the Proponent either owns the Background Intellectual Property or holds sufficient rights in the same to permit the Project to be carried out and the Foreground Intellectual Property to be exploited.
- (b) that the title to the Foreground Intellectual Property is to be vested and, unless otherwise agreed to in writing by ACOA, to remain exclusively with the Proponent.
- (c) that it shall take appropriate steps to protect the Foreground Intellectual Property and shall, upon request, provide information to ACOA in that regard.

6.7 Compliance with Environmental Protection Requirements

The Proponent shall apply, in relation to the Project, in all material respects, the requirements of all applicable environmental laws, regulations, orders and decrees and regulatory bodies having jurisdiction over the Proponent or the Project.

6.8 Other Agreements

The Proponent represents and warrants that it has not entered, and undertakes not to enter, without ACOA's written consent, into any agreement that would prevent the full implementation of the Agreement by the Proponent.

6.9 Dividend Restriction

The Proponent will not make any dividend payments or other shareholder distributions that would prevent it from implementing the Project and other Proponent's obligations under the Agreement, including the making of payments to ACOA as required under the Agreement.

6.10 Other Financing

The Proponent remains solely responsible for providing or obtaining the funding, in addition to the Contribution, required for the carrying out of the Project and the fulfilment of the Proponent's other obligations under the Agreement.

6.11 Lobbyist Act

The Proponent represents and warrants that any person that has lobbied, or who lobbies on its behalf to obtain the Agreement, or any benefit thereunder, and who is required to be registered pursuant to the *Lobbyists Registration Act*, R.S.C. 1985, c. (4th Supp.), is registered pursuant to that Act.

7. Term of Agreement

7.1 Commercialization

- (a) The Agreement will terminate when all amounts due by the Proponent to ACOA under this Agreement have been paid in full or until that obligation is otherwise discharged to the satisfaction of ACOA.
- (b) In the event all of the Proponent's undertakings in regard to commercialization mentioned in Schedule 4 have been fulfilled and the Proponent has demonstrated to the satisfaction of the Agency that Gross Revenues have not been or will not continue to be generated, notwithstanding 7.1(a), the Agreement will terminate.

7.2 Audit

The audit rights of ACOA under section 5 above will survive for three years following the termination date established under subsection 7.1 above.

8. Default and Recovery

8.1 Events of Default

The following constitute Events of Default:

- (a) the Proponent is adjudged or declared bankrupt or if it goes into receivership or takes the benefit of any statute from time to time in force relating to bankrupt or insolvent debtors;
- (b) an order is made or appealed by the Proponent or a resolution is passed for the winding-up of the Proponent or it is dissolved;
- (c) the Proponent has intentionally submitted false or misleading information to ACOA or intentionally made a false or misleading representation;
- (d) any term, condition or undertaking in the Agreement is not complied with in any material respect;

- (e) the Proponent neglects or fails to pay to ACOA any amount due in accordance with this Agreement; or
- (f) in the opinion of ACOA the Proponent ceases to carry on business,

provided that ACOA will not declare an event of default has occurred by reason of subsections 8.1 (c), (d) or (e) unless ACOA has given notice to the Proponent of the condition or event which in ACOA's opinion constitutes an event of default and the Proponent has failed, within thirty (30) days of receipt of the notice, either to correct the condition or event complained of or to demonstrate, to the satisfaction of ACOA, that it has taken such steps as are necessary to correct the condition, and has notified ACOA of the rectification.

8.2 Remedies on Default

If an Event of Default has occurred, or in the opinion of ACOA is likely to occur, ACOA may exercise one or more of the following remedies:

- (a) suspend any obligation by ACOA to contribute or continue to contribute to the Eligible Costs, including any obligation to pay any amount owing prior to the date of such suspension;
- (b) terminate any obligation of ACOA to contribute or continue to contribute to the Eligible Costs, including any obligation to pay any amount owing prior to the date of such termination;
- (c) require the Proponent to repay to ACOA all or part of the Contribution paid by ACOA to the Proponent, and pay ACOA any amounts due under the Agreement, together with interest at the Interest Rate. The interest, calculated daily and compounded monthly, shall accrue commencing upon the date which, in the opinion of ACOA, the Event of Default occurred.

8.3 Remedies Fair and Reasonable

The Proponent acknowledges that in view of the policy objectives served by ACOA's agreement to make the Contribution, the fact that the Contribution comes from public monies, and that the amount of damages sustained by the Crown in the event of default is difficult to ascertain, that it is fair and reasonable that ACOA be entitled to exercise any or all of the remedies provided for in this section 8 and to do so in the manner provided for in this section if an event of default occurs; provided that in exercising any remedy in accordance with subsection 8.2(c) other than for a breach of subsection 8.1(e), ACOA will credit the Proponent for any amounts paid to ACOA pursuant to Article 5 Repayment of this Agreement.

8.4 No Waiver

The fact that ACOA refrains from exercising a remedy it is entitled to exercise under the Agreement will not constitute a waiver of such right and any partial exercise of a right

will not prevent ACOA in any way from later exercising any other right or remedy under the Agreement or other applicable law.

9. Indemnity

The Proponent shall indemnify and save harmless, ACOA from and against all liability, actions, claims, losses, damages, costs and expenses which may be brought against or suffered by ACOA and which ACOA may incur, sustain or pay arising out of or relating to any injury to, or death of, a person or loss or damage to property or other loss or damage caused or alleged to be caused by the Proponent or its servants, agents, subcontractors, or independent contractors in the course of carrying out the obligations of the Agreement.

10. Repayment

10.1 Application of Payment

When any payment is received from the Proponent on account of a repayable Contribution or an Event of Default, ACOA shall apply that payment first to reduce any accrued interest owing and then, if any part of the payment remains, to reduce the outstanding principal balance.

10.2 Prepayment

The Proponent may, at any time, make prepayments on account of repayment installments and each such prepayment will be applied first to interest owing and secondly to repayment installments in reverse order of maturity.

10.3 Overdue

The Proponent shall pay, where the account is overdue, and in addition to any amount payable, interest on that amount at the Interest Rate. The interest, calculated daily and compounded monthly, shall accrue from the due date until payment is received.

10.4 Fee

A \$15 (fifteen) administration fee will be charged on every payment for which insufficient funds were available in the account identified for payment.

11. Force Majeure

11.1 Event of Force Majeure

The Proponent will not be in default by reason only of any failure in performance of the Project in accordance with Schedule 2 if such failure arises without the fault or negligence of the Proponent and is caused by any event of force majeure.

11.2 Definition of Force Majeure

Force majeure means any cause which is unavoidable or beyond the reasonable control of the Proponent, including war, riot, insurrection, orders of government, strikes or any Act of God or other similar circumstance which is beyond the Proponent's control, and which could not have been reasonably circumvented by the Proponent without incurring unreasonable cost.

12. Communications

12.1 Consent to Public Announcements

The Proponent hereby consents to public announcements by or on behalf of ACOA containing any of the information contained in Schedule 6 entitled "Project Fact Sheet for News Release".

12.2 Confidentiality Obligation

ACOA will inform the Proponent of the date on which the first public announcement is to be made and the Proponent will not disclose the existence of this Agreement until such date.

12.3 Public Domain

After official announcement of the Project by the ACOA, or sixty (60) days after execution of this Agreement by the Proponent, whichever is earlier, information appearing on the Project Fact Sheet, as attached hereto, will be considered to be in the public domain.

12.4 Public Communications

The Proponent shall acknowledge ACOA's contribution in any public communication of the Project and shall obtain the approval of ACOA before preparing any announcements, brochures, advertisements or other materials that will display the ACOA logo or otherwise make reference to ACOA.

12.5 Reporting under Security Laws

Nothing in this Agreement shall be interpreted as preventing the fulfilment by the Proponent of its reporting obligations under applicable security laws.

13. Notice

13.1 Form and Timing of Notice

Any notice, information or document provided for under the Agreement shall be effectively given if delivered or sent by letter or facsimile, postage or other charges prepaid. Any notice that is delivered shall have been received on delivery; any notice sent by facsimile shall be deemed to have been received one working day after having been sent, and any notice mailed shall be deemed to have been received eight (8) calendar days after being mailed.

13.2 Change of Address

A party may change the address which that party has stipulated in the Agreement by notifying in writing the other party of the new address.

14. Compliance with Laws

In implementing the Agreement, the Proponent will comply with all applicable federal, provincial and municipal laws, including but not limited to statutes, regulations, by-laws, ordinances and decrees.

15. Members of Parliament

No member of the House of Commons will be admitted to any share or part of this Agreement or to any benefit to arise therefrom. No person who is a member of the Senate will, directly or indirectly, be a party to or be concerned in the Agreement.

16. Annual Appropriations

16.1 Parliamentary Allocation

Any payment by ACOA under this Agreement is subject to there being an appropriation for the fiscal year of ACOA, beginning on April 1 and ending on the following March 31, in which the payment is to be made and to cancellation or reduction in the event that departmental funding levels are changed by Parliament.

16.2 Lack of Appropriation

In the event that ACOA is prevented from disbursing the full amount of the Contribution due to a lack or reduction of appropriation or departmental funding levels, the parties agree to review the effects of such a shortfall in the Contribution on the implementation of the Agreement and to adjust, as appropriate, the Commercialization requirements specified in Schedule 4.

17. Confidentiality

17.1 Consent Required

Subject to section 12 and the *Access to Information Act*, each party shall keep confidential and shall not without the consent of all parties disclose the contents of the Agreement and the documents pertaining thereto, whether provided before or after the Agreement was entered into, or of the transactions contemplated herein.

17.2 International Dispute

ACOA is hereby authorized to disclose any of the information referred to in subsection 17.1 above where, in the opinion of ACOA, such disclosure is required to an international

trade panel for the purposes of the conduct of a dispute in which Canada is a party or a third party intervener. ACOA shall give prior notice to the Proponent of such disclosure.

18. Consent of ACOA

Whenever the Agreement provides for the Proponent obtaining the consent or agreement of ACOA, it is understood that such consent or agreement shall not be unreasonably withheld and that ACOA may make the issuance of such consent or agreement subject to reasonable conditions.

19. No Assignment of Agreement

The Proponent shall not assign the Agreement nor any part thereof without the prior written consent of ACOA.

20. Compliance with Post-Employment Provisions

The Proponent confirms that no individual for whom the post-employment provisions of the Conflict of Interest and Post-Employment Code for Public Office Holders or the Conflict of Interest and Post-Employment Code for the Public Service apply, will derive a direct benefit from this Agreement unless that individual is in compliance with the applicable post-employment provisions.

21. Contribution Agreement Only

The Agreement is a contribution agreement only, not a contract for services or a contract of service or employment, and nothing in the Agreement, the parties relationship or actions is intended to create, nor shall be construed as creating, a partnership, employment or agency relationship between them. The Proponent is not in any way authorized to make a promise, agreement or contract and to incur any liability on behalf of Canada, nor shall the Proponent make a promise, agreement or contract and incur any liability on behalf of Canada, and shall be solely responsible for any and all payments and deductions required by the applicable laws. The recipients shall indemnify and save harmless the Minister in respect of any claims arising from failure to comply with the foregoing.

22. Binding Agreement

This Agreement is binding on the parties and their successors and permitted assigns.

23. Severability

Any provision of this Agreement prohibited by law or otherwise ineffective will be ineffective only to the extent of such prohibition or ineffectiveness and will be severable without invalidating or otherwise affecting the remaining provisions of the Agreement.

24. Applicable Law

The Agreement shall be interpreted in accordance with the laws in force in the province from which the contract is issued.

25. Insurance Coverage

The Proponent shall obtain appropriate insurance coverage until the completion of the Project.

26. Signature in Counterparts

This Agreement may be signed in counterparts, each of which when taken together, will constitute an original Agreement.