

## **SUBSCRIPTION AGREEMENT**

**Between**

**THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA**

**and**

**BIOVAC CONSORTIUM (PROPRIETARY) LIMITED**

**and**

**THE BIOLOGICALS AND VACCINE INSTITUTE OF  
SOUTHERN AFRICA (PTY) LIMITED**

**DENEYS | REITZ**  
ATTORNEYS

<b>TABLE OF CONTENTS</b>
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1.	<b><u>PARTIES</u></b> .....	3
2.	<b><u>INTERPRETATION</u></b> .....	3
3.	<b><u>PREAMBLE</u></b> .....	8
4.	<b><u>ISSUE OF THE SHARES</u></b> .....	8
5.	<b><u>CONDITIONS PRECEDENT</u></b> .....	9
6.	<b><u>WARRANTIES AND UNDERTAKINGS</u></b> .....	10
7.	<b><u>DOMICILIUM</u></b> .....	10
8.	<b><u>GENERAL</u></b> .....	12
9.	<b><u>DISPUTE RESOLUTION</u></b> .....	13
10.	<b><u>TERMINATION FOR BREACH</u></b> .....	16

## **SUBSCRIPTION AGREEMENT**

### **1. PARTIES**

1.1 **THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA;**

1.2 **BIOVAC CONSORTIUM PROPRIETARY LIMITED (Registration number 2001/010439/07), a company incorporated and registered in accordance with the company laws of the Republic of South Africa;**

1.3 **THE BIOLOGICALS AND VACCINE INSTITUTE OF SOUTHERN AFRICA (PTY) LIMITED (Registration No. 1998/011727/07) a Company incorporated and registered in accordance with the Company laws of the Republic of South Africa (and whose name is in the process of being changed to such other name as is acceptable to the shareholders of the Company and the Registrar of Companies may approve).**

### **2. INTERPRETATION**

2.1 The headnotes to the clauses of this Agreement are inserted for reference purposes only and shall in no way govern or affect the interpretation hereof.

2.2 Unless inconsistent with the context, the expressions set forth below shall bear the following meanings and cognate expressions shall bear the meanings which correspond:

"this Agreement"	this agreement read with any schedules hereto (if applicable);
"Biovac Consortium"	the party named in 1.2 of this Agreement, also referred to as the Strategic Equity Partner or "SEP";
"Business Day"	any day other than a Saturday, Sunday or an official public holiday in the Republic of South Africa, as defined in the Public Holidays Act, 1994, or any successor Act;
"the Company"	the party named in 1.3 of this Agreement, namely, <u>The</u> Biologicals and Vaccine Institute of Southern Africa (Pty) Limited (Registration No. 1998/011727/07) a company registered in accordance with the company laws of the Republic of South Africa (and whose name is in the process of being changed to such other name as is acceptable to the shareholders of the Company and the Registrar of Companies may approve), which is the vehicle for the PPP between the Government and the SEP on the basis contemplated in the

Shareholders' Agreement;

- "Effective Date" the date of fulfilment of the last of the conditions precedent set out in clause 5 hereof or 1 April 2003, whichever is the later;
- "Government" the Government of the Republic of South Africa represented herein by the Director General of the Department of Health in his capacity as the accounting officer of the said department as contemplated in Section 36 of the Public Finance Management Act 1 of 1999;
- "Government's Subscription Price" the amount of R3,500,000 (three million five hundred thousand Rand) payable in cash;
- "Issue Date" the first Business Day following the Effective Date;
- "Party" or "Parties" the Company, Biovac Consortium and the Government or if the context so requires, one or more of them;

“PPP”	a Public Private Partnership as contemplated in Regulation 16 of the Treasury Regulations framed under the Public Finance Management Act 1 of 1999;
“Re-organised Company”	the Company as it will exist after the Effective Date with its entire issued share capital subscribed for and issued in accordance with clause 4 hereof;
“Shareholders Agreement”	the agreement to be concluded amongst the Parties on or about the Signature Date to regulate the Parties’ rights as shareholders in the Company;
“Shares”	100 000 (one hundred thousand) ordinary shares of R0,01 (one cent) each, representing the total issued share capital of the Company;
“Signature Date”	the date of last signature of this Agreement
“Subscription Price”	the amount of R5 250 000 (five million two hundred and fifty thousand) payable by

Biovac Consortium for its proportion of the  
Shares as referred to in 4.4;

- 2.3 If any provision in a definition is a substantive provision conferring rights or imposing obligations on any party, notwithstanding that it is only in the definition clause, effect shall be given to it as if it were a substantive provision of this agreement.
- 2.4 Any reference to an enactment is to that enactment as at the signature date.
- 2.5 Unless inconsistent with the context, an expression which denotes:
- 2.5.1 any gender includes the other genders;
- 2.5.2 a natural person includes an artificial person and vice versa;
- 2.5.3 the singular includes the plural and vice versa.
- 2.6 Where any term is defined within the context of any particular clause in this agreement, the term so defined, unless it is clear from the clause in question that the term so defined has limited application to the relevant clause, shall bear the meaning ascribed to it for all purposes in terms of this agreement, notwithstanding that that term has not been defined in this interpretation clause.

### 3. **PREAMBLE**

- 3.1 The Government wishes to subscribe for and the Company is prepared to allot and issue to the Government 40% (forty percent) of the Shares consisting of 40 000 (forty thousand) Shares in the Company at the premium referred to in 4.3 for the Government Subscription Price.
- 3.2 Biovac Consortium wishes to subscribe for and the Company is prepared to allot and issue to Biovac Consortium 60% (sixty percent) of the Shares consisting of 60 000 (sixty thousand) shares in the Company at the premium referred to in 4.4, in return for the Subscription Price.
- 3.3 The Parties wish to record the terms of their agreement and the basis upon which the Shares will be subscribed for, allotted and issued.

### 4. **ISSUE OF THE SHARES**

- 4.1 On the Issue Date, the Government shall subscribe for 40 % (forty percent) of the Shares and pay, make over and transfer to the Company the Government Subscription Price.
- 4.2 On the Issue Date Biovac Consortium shall subscribe and pay for 60% (sixty percent) of the Shares and pay, make over and transfer to the Company the Subscription Price.
- 4.3 On the Issue Date the Company shall issue 40% (forty percent) of the Shares consisting of 40 000 ordinary shares in the Company of R0,01 (one cent) each,



issued at a premium of R87,49 (eighty seven Rand and forty nine cents) per Share to the Government in return for the Government Subscription Price.

- 4.4 On the Issue Date the Company shall issue 60 000 (sixty thousand ) ordinary shares in the Company of R0,01 (one cent) each, issued at a premium of R87,49 (eighty seven Rand and forty nine cents) per share to Biovac Consortium in return for the Subscription Price.
- 4.5 All Shares issued in terms of 4.3 and 4.4 shall be credited as fully paid up.
- 4.6 All costs in the creation and issue of the Shares shall be borne and paid by the Company.

## 5. **CONDITIONS PRECEDENT**

This Agreement is conditional upon fulfilment of the following conditions precedent:-

- 5.1 signature of the Shareholders Agreement by the Parties;
- 5.2 ~~establishment~~ payment by Biovac Consortium of the amount required to fund guarantee of a financial institution (which guarantee shall be acceptable to the Company in every respect) for payment of the Subscription Price on the Issue Date into the trust account of Moss Morris attorneys in accordance with clause 4.1.5 of the Shareholders Agreement, such payment to be certified in writing by a partner of Moss Morris coupled with an undertaking that the funds will be paid to the Company on the Issue Date,

- 5.3 Treasury approval in writing of the PPP proposed in the Shareholders' Agreement between the Government and Biovac Consortium;

6. **WARRANTIES AND UNDERTAKINGS**

The Company warrants and undertake in favour of the Government and Biovac Consortium that:

- 6.1 the Company has the power to issue the Shares and it does not have any class of shares or other shares which rank in priority to the Shares in any respect;
- 6.2 the directors of the Company have the necessary authority and will have taken all necessary steps to allot and issue the Shares.

7. **DOMICILIUM**

- 7.1 The Parties hereto choose domicilia citandi et executandi for all purposes of and in connection with this Agreement as follows:

the Company: c/o Selwyn Kahanovitz  
1 Manchester Road,  
Wadeville, 1428  
P O Box 14374  
Wadeville, 1422

Facsimile: (011) 827-8688

the Government: c/o The Accounting Officer, National Department  
of Health  
Room 1718  
Hallmark Building  
Proes Street

Pretoria  
Private Bag X828  
Pretoria

Facsimile:

Biovac Consortium: c/o Selwyn Kahanovitz  
1 Manchester Road,  
Wadeville, 1428  
P O Box 14374  
Wadeville, 1422

Facsimile: (011) 827-8688

- 7.2 Any party hereto shall be entitled to change its domicilium from time to time, provided that any new domicilium selected by it shall be a physical address (other than a box number) in the Republic of South Africa, and any such change shall only be effective upon receipt of notice in writing by the other parties of such change.
- 7.3 All notices, demands, communications or payments intended for any party shall be made or given at such party's domicilium for the time being.
- 7.4 A notice sent by one party to another party shall be deemed to be received:
- 7.4.1 on the same day, if delivered by hand;
- 7.4.2 on the same day of transmission if sent by telex or telefax and if sent by telefax with receipt received confirming completion of transmission;
- 7.4.3 on the tenth day after posting, if sent by prepaid registered mail.

7.5 Notwithstanding anything to the contrary herein contained a written notice or communication actually received by a party shall be an adequate written notice or communication to it notwithstanding that it was not sent to or delivered at its chosen domicilium citandi et executandi.

## 8. **GENERAL**

8.1 This Agreement constitutes the sole record of the agreement between the parties in regard to the subject matter thereof.

8.2 No Party shall be bound by any express or implied term, representation, warranty, promise or the like, not recorded herein.

8.3 No addition to, variation or consensual cancellation of this Agreement shall be of any force or effect unless in writing and signed by or on behalf of all the Parties.

8.4 No indulgence which any of the Parties ("the grantor") may grant to any other or others of them ("the grantee(s)") shall constitute a waiver of any of the rights of the grantor, who shall not thereby be precluded from exercising any rights against the grantee(s) which might have arisen in the past or which might arise in the future.

8.5 The Parties undertake at all times to do all such things, to perform all such acts and to take all such steps and to procure the doing of all such things, the performance of all such actions and the taking of all such steps as may be open

to them and necessary for or incidental to the putting into effect or maintenance of the terms, conditions and import of this Agreement.

8.6 Save as otherwise specifically provided in this Agreement, no Party shall be entitled to cede, assign or otherwise transfer all or any of its rights, interest or obligations under and in terms of this Agreement except with the prior written consent of the other Parties.

## 9. **DISPUTE RESOLUTION**

9.1 Any dispute between the Parties in regard to :

9.1.1 the interpretation of;

9.1.2 the effect of;

9.1.3 the respective rights of the Parties and their respective obligations hereunder;

9.1.4 a breach of;

9.1.5 any matter arising out of:

9.1.6 the termination of; and/or

9.1.7 the rectification of;

this Agreement shall in the first instance be referred for consideration and possible resolution to a representative of each Party (designated as such by that Party in writing, and who shall be duly authorised to act in its place in that matter).

- 9.2 Should the officers referred to in clause 9.1 not be able to resolve the dispute within 7 Business Days of it being referred to them, then they shall by agreement, appoint a third party to act as a mediator, and not as an arbitrator, to mediate in the resolution of the dispute on a non-binding basis. Should they not be able to agree on the mediator, then the mediator shall be selected by the Chairman for the time being of the Arbitration Foundation of Southern Africa (“AFSA”).
- 9.3 Should the mediation referred to in clause 9.2 fail to resolve the dispute within 7 days after the appointment of the mediator in terms of clause 9.2, then either Party shall have the right to require that the dispute be referred to arbitration and that Party shall notify the other Party in writing identifying the disputes and setting out the relief required.
- 9.4 Any dispute referred to in clause 9.3, shall be submitted to and determined by arbitration with AFSA rules (“the rules”). Such arbitration shall be held in Sandton unless otherwise agreed and shall be held in a summary manner with a view of it being completed as soon as possible.
- 9.5 There shall be one arbitrator, who shall be, if the question in issue is:

- 9.5.1 primarily an accounting matter, an independent chartered accountant of not less than 10 years standing; and
- 9.5.2 primarily a legal matter, a practising Senior Counsel or Commercial attorney of not less than 10 years standing; and
- 9.5.3 any other matter, a suitably qualified person.
- 9.6 The appointment of the arbitrator shall be agreed upon between the Parties, but failing agreement between them within a period of 14 days after the arbitration has been demanded by either of the Parties by notice in writing to the other in terms of clause 9.3, either of the Parties shall be entitled to request the Chairman for the time being of AFSA to make an appointment of the arbitrator who, in making the appointment, shall have regard to the nature of the dispute, and shall have regard to the Parties' requirement of a speedy arbitration.
- 9.7 The arbitrator shall have powers conferred upon an arbitrator under the rules.
- 9.8 The decision resulting from such arbitration shall be made by the arbitrator and shall be final and binding on the Parties, and may be made an order of any court of competent jurisdiction. Each of the Parties hereby submits itself to the Division of the High Court of South Africa in the area in which the arbitration is held should the other Party wish to make the arbitrator's decision an order of that court.
- 9.9 Proceedings are to be held in camera and are confidential.

9.10 The provisions of this clause 9 shall not preclude any other Party from access to an appropriate court of law for:

9.10.1 interim relief in the form of an interdict, mandamus or order for specific performance pending the outcome of an arbitration in terms hereof or in respect of such arbitration or expert determination, as the case may be;

9.10.2 any other form of relief on the basis of facts which are not disputed, provided that if a *bona fide* dispute arises in the course of the proceedings, they shall be stayed pending arbitration on the dispute in terms hereof; or

9.10.3 an order for the payment of liquidated damages on the basis of facts which are not *bona fide* in dispute at the commencement of such proceedings.

9.11 The provisions of this clause 9 shall survive the invalidity and/or termination from whatever cause arising out of any or all the terms of this Agreement.

9.12 The foregoing provisions of this clause 9 shall not preclude the bringing of any proceedings by a Party in a court having jurisdiction, for urgent relief by way of interdict pending arbitration in terms of this clause.

## 10. **TERMINATION FOR BREACH**

Should any Party breach any material provision of this Agreement and fail to remedy such breach within 21 (twenty one) days after receiving written notice requiring such remedy from any Party aggrieved thereby, then the Party giving such notice shall by further written notice be entitled, without prejudice to its other rights in law including



any right to claim damages, to cancel this Agreement or to claim immediate specific performance of all of the defaulting Party's obligations whether or not otherwise then due for performance.

THUS DONE and SIGNED at ..... on this the ..... day of ..... 2003.

AS WITNESSES:

1. \_\_\_\_\_

2. \_\_\_\_\_

For and on behalf of  
**BIOVAC CONSORTIUM  
(PROPRIETARY) LIMITED**

by

\_\_\_\_\_

who warrants his authority hereto

THUS DONE and SIGNED at ..... on this the ..... day of ..... 2003.

AS WITNESSES:

1. \_\_\_\_\_

2. \_\_\_\_\_

For and on behalf of  
**THE GOVERNMENT OF THE  
REPUBLIC OF SOUTH AFRICA**

by

\_\_\_\_\_

who warrants his authority hereto

THUS DONE and SIGNED at ..... on this the ..... day of ..... 2003.

AS WITNESSES:

1. \_\_\_\_\_

2. \_\_\_\_\_

For and on behalf of  
**THE BIOLOGICALS AND  
VACCINE INSTITUTE OF  
SOUTHERN AFRICA (PTY)  
LIMITED**

by

\_\_\_\_\_  
who warrants his authority hereto