

TRANSNET



**STANDARD TERMS AND CONDITIONS OF CONTRACT
FOR THE PROVISION OF SERVICES TO TRANSNET**

**FORM US7 – SERVICES
Revised October 2007**

“PREVIEW COPY ONLY”

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SCHEDULE 1 - SCHEDULE OF REQUIREMENTS and / or WORK ORDERS/S

SCHEDULE 2 - ADDRESSES FOR NOTICES

SCHEDULE 3 - NON-DISCLOSURE AGREEMENT

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Respondent's signature

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1. INTRODUCTION

When an Agreement is entered into between Transnet and the Supplier of Services to Transnet, these Standard Terms and Conditions, the Scope of Requirements for the Services to be rendered, the General Tenders Conditions and any terms and / or special conditions in the associated tender documents, exclusively govern the provision of Services by the Supplier to Transnet.

2. DEFINITIONS

Where the following words or phrases are used in the Agreement, such words or phrases shall have the meaning assigned thereto in this clause, except where the context clearly requires otherwise:

- 2.1. **“AFSA”** means the Arbitration Foundation of South Africa;
- 2.2. **“Agreement”** means the Agreement together with any schedules or annexures, signed by both Parties and attached thereto from time to time;
- 2.3. **“Business Days”** means Mondays to Fridays between 07:30 and 16:00, excluding public holidays;
- 2.4. **“Confidential Information”** means any information or other data, whether in written, oral, graphic or in any other form, which a Party discloses or provides to the other Party, or which otherwise becomes known to a Party, and which is not in the public domain and includes, without limiting the generality of the term -
 - 2.4.1. information relating to methods of operation, data and plans of the disclosing Party;
 - 2.4.2. the contents of the Agreement;
 - 2.4.3. private and personal details of employees or clients of the disclosing party or any other person where an onus rests on the disclosing Party to maintain the confidentiality of such information;
 - 2.4.4. any information disclosed by either Party and which is clearly marked as being confidential or secret;

- 2.4.5. information relating to the strategic objectives and planning of the disclosing Party relating to its existing and planned future business activities;
- 2.4.6. information relating to the past, present and future research and development of the disclosing Party;
- 2.4.7. information relating to the business activities, business relationships, products, services, customers, clients and sub-suppliers of the disclosing Party where an onus rests on the disclosing Party to maintain the confidentiality of such information;
- 2.4.8. information contained in the software and associated material and documentation belonging to the disclosing Party;
- 2.4.9. technical, scientific, commercial, financial and market information, know-how and trade secrets of a disclosing Party;
- 2.4.10. data concerning architecture, demonstrations, tools and techniques, processes, machinery and equipment of the disclosing Party;
- 2.4.11. plans, designs, concepts, drawings, functional and technical requirements and specifications of the disclosing Party;
- 2.4.12. information concerning faults or defects in goods, equipment, hardware or software or the incidence of such faults or defects; and
- 2.4.13. information concerning the charges, fees and / or costs of the disclosing Party or its authorised sub-suppliers, or their methods, practices or service performance levels actually achieved;

2.5. **“Default”** means any breach of the obligations of either Party (including but not limited to fundamental breach or breach of a fundamental term) or any default, act, omission, negligence or statement of either Party, its employees, agents or sub-suppliers in connection with or in relation to the subject of the Agreement and in respect of which such Party is liable to the other;

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Respondent’s signature

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- 2.6. **“Deliverable(s)”** means any and all works of authorship, products and materials developed, written, prepared, assembled, integrated, modified or provided by the Supplier in relation to the Services;
- 2.7. **“Fee(s)”** shall mean the agreed fees for the Services to be procured from the Supplier by Transnet, as detailed in the Schedule of Requirements or Work Order(s), issued in accordance with the Agreement, as amended by mutual agreement between the Parties and in accordance with the terms and conditions in the Agreement from time to time;
- 2.8. **“Intellectual Property”** means all rights to and ownership of any idea, discovery, design, concept, technique or improvement, know-how, or invention (whether or not patented), trademark, or copyright material;
- 2.9. **“Intellectual Property Rights”** include any patents or patent applications, trade and service marks whether registered or unregistered, registered design, design rights, copyright, rights in databases, domain names, trade or business names and any other similar protected rights in any country (together with the right to apply for any of the above, if applicable);
- 2.10. **“Materials”** means the Deliverables, the Supplier Materials and the Third Party Material;
- 2.11. **“Parties”** means the Parties to the Agreement, together with their subsidiaries, divisions, business units, successors-in-title and their assigns;
- 2.12. **“Party”** means either one of these Parties;
- 2.13. **“Personnel”** means any partner, employee, agent, consultant, independent associate or supplier, sub-supplier and the staff of such sub-supplier, or other authorised representative of the Supplier;
- 2.14. **“Purchase Order(s)”** means an official order(s) issued by an operational division of Transnet to the Supplier for the provision of Services;
- 2.15. **“Rate(s)”** shall mean the agreed Rate(s) for the Services to be procured from the Supplier by Transnet, as detailed in the Schedule of Requirements or Work Order(s), issued in accordance with the Agreement, as amended by mutual agreement between the Parties and in accordance with the terms and conditions in the Agreement from time to time;

- 2.16. **“Schedule of Requirements”** means Schedule 1 hereto, unless substituted by a Work Order or Work Orders, as defined;
- 2.17. **“Service(s)”** means the Service(s) provided to Transnet by the Supplier, pursuant to the Schedule of Requirements or Work Order(s) in terms of the Agreement;
- 2.18. **“Service Level Agreement”** or **“SLA”** means the processes, deliverables, key performance indicators and performance standards relating to the Services to be rendered by the Supplier;
- 2.19. **“Subcontract”** means any contract or agreement or proposed contract or agreement between the Supplier and any third party whereby that third party agrees to provide to the Supplier the Services or any part thereof;
- 2.20. **“Supplier Materials”** means all works of authorship, products and materials (including, but not limited to, data, diagrams, charts, reports, specifications, studies, inventions, software, software development tools, methodologies, ideas, methods, processes, concepts and techniques) owned by, or licensed to the Supplier prior to the commencement date or independently developed by the Supplier outside the scope of the Agreement at no expense to Transnet, and used by the Supplier in the performance of the Services;
- 2.21. **“Third Party Material”** means software, software development tools, methodologies, ideas, methods, processes, concepts and techniques owned by, or licensed to a third party and used by the Supplier in the performance of the Services;
- 2.22. **“VAT”** means Value-Added Tax in terms of the Value-Added Tax Act, No 89 of 1991; and
- 2.23. **“Work Order(s)”** means a detailed scope of work for a Service required by Transnet, including timeframes, deliverables, fees and costs for the supply of the Service to Transnet, which may be appended to the Agreement from time to time.

3. INTERPRETATION

- 3.1. Clause headings in the Agreement are included for ease of reference only and do not form part of the Agreement for the purposes of interpretation or for any other purpose. No provision shall be construed against or interpreted to the disadvantage of any Party hereto by reason of such Party having or being deemed to have structured or drafted such provision.

- 3.2. Any term, word, acronym or phrase used in the Agreement, other than those defined under the clause heading "DEFINITIONS" shall be given its plain English meaning, and those terms, words, acronyms, and phrases used in the Agreement will be interpreted in accordance with the generally accepted meanings accorded thereto.
- 3.3. A reference to the singular incorporates a reference to the plural and vice versa.
- 3.4. A reference to natural persons incorporates a reference to legal persons and vice versa.
- 3.5. A reference to a particular gender incorporates a reference to the other genders.

4. NATURE AND SCOPE

- 4.1. The Agreement is an agreement under the terms and conditions of which the Supplier will arrange for the provision to Transnet of the Service which meets the requirements and specifications of Transnet, the delivery of which is controlled by means of a Purchase Order(s) to be issued by Transnet and executed by the Supplier, in accordance with the Agreement.
- 4.2. Such Purchase Order(s) shall be agreed between the Parties from time to time and shall be subject to the terms of the Schedule of Requirement(s) and / or relevant Work Order(s).
- 4.3. Each properly executed Purchase Order forms an inseparable part of the Agreement as if it were fully incorporated into the body of the Agreement.
- 4.4. During the period of the Agreement, both Parties can make written suggestions for amendments to the Schedule of Requirements or Work Orders, in accordance with procedures set out in clause 29 (AMENDMENT AND CHANGE CONTROL) below. A Party will advise the other Party within 14 (fourteen) Business Days, or such other period as mutually agreed, whether the amendment is acceptable.
- 4.5. Insofar as any term, provision or condition in the Schedule of Requirements and / or Work Order(s) conflicts with a like term, provision or condition in the Agreement and / or a Purchase Order, or where the Agreement is silent on the matter, the term, provision or condition in the Schedule of Requirements and / or Work Order(s) shall prevail.
- 4.6. Time will be of the essence and the Supplier will perform its obligations under the Agreement in accordance with the timeframe(s) (if any) set out in the relevant schedule, save that the Supplier will not be liable under this clause if it is unable to meet such obligation within the time required

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Respondent's signature

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as a direct result of any act or omission by Transnet and it has used its best endeavours to advise Transnet of such act or omission. In the event of such delay, any time deadlines detailed in the relevant schedule shall be extended by a period equal to the period of that delay.

5. AUTHORITY OF PARTIES

- 5.1. Nothing in the Agreement will constitute or be deemed to constitute a partnership between the Parties, or constitute or be deemed to constitute the Parties as agents or employees of one another for any purpose or in any form whatsoever.
- 5.2. Neither Party shall be entitled to, or have the power or authority to -
- 5.2.1. enter into an agreement in the name of the other; or
 - 5.2.2. give any warranty, representation or undertaking on the other's behalf; or
 - 5.2.3. create any liability against the other or bind the other's credit in any way or for any purpose whatsoever.

6. WARRANTIES

- 6.1. The Supplier warrants to Transnet that:
- 6.1.1. it has full capacity and authority to enter into and to perform the Agreement and that the Agreement is executed by a duly authorised representative of the Supplier;
 - 6.1.2. it will discharge its obligations under the Agreement and any schedule or Work Order with all due skill, care and diligence;
 - 6.1.3. it will be solely responsible for the payment of remuneration and associated benefits, if any, and for withholding and remitting income tax for its Personnel in conformance with any applicable laws and regulations;
 - 6.1.4. it will license to Transnet or procure licences for Transnet in respect of all Supplier and / or Third Party Material detailed in the schedules or Work Order(s), and will grant to Transnet or procure the right for Transnet to take such copies (in whole or in part) of such Supplier and / or Third Party Material as it may reasonably require for the purposes of back-up for archiving and disaster recovery; and

- 6.1.5. the use or possession by Transnet of any Materials will not subject Transnet to any claim for infringement of any Intellectual Property Rights of any third party.
- 6.2. The Supplier warrants that it will perform its obligations under the Agreement in accordance with the Service Level Agreement as defined in the relevant schedule. Transnet may at its discretion audit compliance with the Service levels, provided that any such audit is carried out with reasonable prior notice and in a reasonable way so as not to have an adverse effect on the performance of the Services. Without prejudice to clause 6.3 below, in the event that the Supplier fails to meet the Service levels, Transnet may claim appropriate service credits or invoke a retention of Fees as detailed in the relevant schedule or Work Order.
- 6.3. The Supplier warrants that for a period of 90 (ninety) days from acceptance of the Deliverables they will, if properly used, conform in all materials respects with the requirements set out in the relevant schedule or Work Order. The Supplier will at its expense remedy any such non-conformance as soon as possible but in any event within 30 (thirty) days of notification by Transnet. In the event that the Supplier fails or is unable to remedy such non-conformance within such time-scale, Transnet will be entitled to employ a third party to do so in place of the Supplier and any excess charges or costs incurred by Transnet as a result shall be paid by the Supplier.
- 6.4. The Supplier will remedy any defect within 14 (fourteen) days of being notified of that defect by Transnet in writing.
- 6.5. The Supplier will not be liable to remedy any problem arising from or caused by any modification made by Transnet to the Deliverables, or any part thereof, without the prior approval of the Supplier.
- 6.6. The Supplier warrants that:
- 6.6.1. it has, using the most up-to-date software available, tested for (and deleted) all commonly known viruses in the Materials and for all viruses known by the Supplier at the date of the relevant schedule or Work Order; and
- 6.6.2. at the time of delivery to Transnet, the Materials do not contain any trojan horse, worm, logic bomb, time bomb, back door, trap door, keys or other harmful components.

- 6.6.3. The Supplier agrees that, in the event that a virus is found, it will at its own expense use its best endeavours to assist Transnet in reducing the effect of the virus and, particularly in the event that a virus causes loss of operational efficiency or loss of data, to assist Transnet to the same extent to mitigate such losses and to restore Transnet to its original operating efficiency.
- 6.7. The Supplier shall advise Transnet of the effects of any steps proposed by Transnet pursuant to clause 6.5 above, including but not limited to any cost implications or any disruption or delay in the performance of the Services. The Parties agree that any changes to the Services, including the charges for the Services or any timetables for delivery of the Services, will be agreed in accordance with the change control procedure, as set out in clause 29 (AMENDMENT AND CHANGE CONTROL).
- 6.8. The Supplier undertakes to comply with South Africa's general privacy protection in terms of the Bill of Rights (Section 14) in connection with the Agreement and shall procure that its Personnel shall observe the provisions of such Act (as applicable) or any amendments and re-enactments thereof and any regulations made pursuant thereto.
- 6.9. The Supplier warrants that it has taken all reasonable precautions to ensure that, in the event of a disaster, the impact of such disaster on the ability of the Supplier to comply with its obligations under the Agreement will be reduced to the greatest extent possible, and that the Supplier shall ensure that it has appropriate, tested and documented recovery arrangements in place.

7. TRANSNET'S OBLIGATIONS

- 7.1. Transnet undertakes to promptly comply with any reasonable request by the Supplier for information, including information concerning Transnet's operations and activities, that relate to the Services as may be necessary for the Supplier to perform the Services, but for no other purpose. However, Transnet's compliance with any request for information is subject to any internal security rules and requirements and subject to the observance by the Supplier of its confidentiality obligations under the Agreement.
- 7.2. The Supplier shall give Transnet reasonable notice of any information it requires in accordance with clause 7.1 above.
- 7.3. Subject to clause 14 (SUPPLIER'S PERSONNEL), Transnet agrees to provide the Supplier or its Personnel such access to and use of its facilities as is necessary to allow the Supplier to perform its obligations under the Agreement.

8. GENERAL OBLIGATIONS OF THE SUPPLIER

8.1. The Supplier shall –

- 8.1.1. respond promptly to all complaints and enquiries from Transnet;
- 8.1.2. conduct its business in a professional manner that will reflect positively upon the Supplier and the Supplier's Services;
- 8.1.3. keep full records clearly indicating all transactions concluded by the Supplier relating to the delivery of the Services and keep such records for at least 5 (five) years from the date of each such transaction;
- 8.1.4. obtain, and at all times maintain in full force and effect, any and all licenses, permits and the like required under applicable laws for the provision of the Services and the conduct of the business and activities of the Supplier;
- 8.1.5. demonstrate sound environmental performance and have an environmental management policy; and
- 8.1.6. inform Transnet immediately of any dispute or complaint arising in relation to the delivery of the Service.

8.2. The Supplier acknowledges and agrees that it shall at all times -

- 8.2.1. render the Service(s) and perform all its duties with honesty and integrity;
- 8.2.2. communicate openly and honestly with Transnet and demonstrate a commitment to performing the Services timeously, efficiently and to the required standards;
- 8.2.3. endeavour to provide the highest possible standards of Service and professionalism, with a reasonable degree of care and diligence;
- 8.2.4. use its best endeavours and make every diligent effort to meet agreed deadlines;
- 8.2.5. treat its own Personnel, as well as all Transnet's officers, employees, agents and consultants, with fairness and courtesy and respect for their human rights;

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Respondent's signature

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Date

- 8.2.6. practice and promote its own internal policies aimed at prohibiting and preventing unfair discrimination (clause 23 refers – EQUALITY AND DIVERSITY);
- 8.2.7. treat all enquiries from Transnet in connection with the supply of the Services with courtesy and respond to all enquiries promptly and efficiently. Where the Supplier is unable to comply with the provisions of this clause, the Supplier will advise Transnet of the delay and the reasons therefore and will keep Transnet informed of progress made regarding the enquiry;
- 8.2.8. when requested by Transnet, provide clear and accurate information regarding the Supplier's own policies and procedures, excluding trade secrets and other Confidential Information;
- 8.2.9. not allow a conflict of interest to develop between its own interests (or the interests of any of its other customers) and the interests of Transnet;
- 8.2.10. not accept or offer, nor allow, induce or promote the acceptance or offering of any gratuity, enticement, incentive or gift that could reasonably be regarded as bribery or an attempt to otherwise exert undue influence over the recipient;
- 8.2.11. not mislead Transnet or its officers, employees and stakeholders, whether by act or omission;
- 8.2.12. not otherwise act in an unethical manner or do anything which could reasonably be expected to damage or tarnish Transnet's reputation or business image; and
- 8.2.13. immediately report to Transnet any unethical, fraudulent or otherwise unlawful conduct of which it becomes aware in connection with Transnet or the provision of the Services.

9. RATES, FEES AND EXPENSES

- 9.1. In consideration of the provision of the Services, Transnet will pay to the Supplier the Rates and / or Fees as detailed in the relevant schedule or Work Order.
- 9.2. Transnet will not be invoiced for materials used in the provision of the Services save for those materials (if any) set out in a schedule or Work Order and accepted by Transnet, which will be invoiced to Transnet at cost.

9.3. Unless otherwise agreed in a Work Order, Transnet will reimburse to the Supplier all reasonable and proper expenses incurred directly and solely in connection with the provision of the Services, provided that all such expenses:

9.3.1. are agreed by Transnet in advance;

9.3.2. are incurred in accordance with Transnet's standard travel and expenses policies;

9.3.3. are passed on to Transnet at cost with no administration fee; and

9.3.4. will only be reimbursed if supported by relevant receipts.

9.4. All invoices relating to Fees, out of pocket expenses and, if applicable, travel and accommodation costs, will provide the detail for each of the Personnel carrying out the Service and incurring the expenses, and the invoice will, where appropriate, include VAT as a separate item.

10. INVOICING AND PAYMENT

10.1. Transnet shall pay the Supplier the amounts stipulated in the relevant schedule or Work Order, subject to the terms and conditions of the Agreement.

10.2. Transnet shall pay such amounts to the Supplier (upon receipt of a correct and undisputed invoice together with the supporting documentation as specified in the Schedule of Requirements or Work Orders appended hereto) once the undisputed invoices or such portion of the invoice which is undisputed become due and payable to the Supplier in terms of clause 10.4 below.

10.3. All Fees, Rates and other sums payable under the Agreement are exclusive of VAT, which will be payable at the applicable rate.

10.4. Unless otherwise provided for the Schedule of Requirements or Work Orders appended hereto, invoices shall be submitted at month end together with a monthly statement. Payment against such monthly statement shall be made by Transnet within 30 (thirty) days after date of receipt by Transnet of the statement together with all invoices and relevant supporting documentation.

10.5. Where the payment of any invoice or any part of an invoice is not made in accordance with this clause 10, the Supplier shall be entitled to charge interest on the outstanding amount at the rate

of 1½ % per annum above Transnet's bankers base rate in force for the time from the due date until the outstanding amount is paid.

11. ADJUSTMENT OF FEES OR RATES

- 11.1. Fees or Rates for Services rendered in terms of the Agreement shall be subject to review as indicated in the Schedule of Requirements or Work Orders annexed hereto from time to time.
- 11.2. No less than 2 (two) months prior to any proposed Fee or Rate adjustment, the Parties shall commence negotiations for Fees or Rates payable for the next period or as otherwise indicated and appended hereto.
- 11.3. Should Transnet and the Supplier fail to reach an agreement on Fees or Rates for the successive period, either Party shall be entitled to terminate the Agreement and /or the relevant Work Order after giving 30 (thirty) days written notice to the other.
- 11.4. Neither Party shall have any claim against the other of whatsoever nature by reason of such cancellation as envisaged in clause 11.3 above.

12. INTELLECTUAL PROPERTY

- 12.1. Subject to clauses 12.2 and 12.3, the Deliverables and all Intellectual Property Rights therein shall be and remain the exclusive property of Transnet.
- 12.2. All Intellectual Property Rights in the Supplier Materials and Third Party Material vest in the Supplier or the third party as appropriate. The Supplier hereby grants or will procure a grant to Transnet of an irrevocable, royalty-free, non-transferable licence to use such Supplier Materials and/or Third Party Material for its own business purposes
- 12.3. Where there are modifications to pre-existing Material, which are inseparable from the pre-existing Material, the owner of the pre-existing Material will own the modifications. However, the Supplier will use its best endeavours to procure from the owner for Transnet the grant of an irrevocable, royalty free, fully transferable licence to use such modifications as Transnet in its absolute discretion thinks fit.
- 12.4. All rights in the Transnet name and logo remain the absolute property of Transnet.

13. INTELLECTUAL PROPERTY RIGHTS INDEMNITY

- 13.1. The Supplier shall promptly notify Transnet of any infringement or apparent or threatened infringement (or any circumstances which may potentially give rise to an infringement) of, or any actions, claims or demands in relation to any Intellectual Property Rights (whether occurring during or after the termination of the Agreement) and shall provide to Transnet all assistance which Transnet may reasonably require in connection herewith including, but not limited to, the prosecution of any rights in relation to such Intellectual Property Rights.
- 13.2. The Supplier shall at all times, whether during or after termination or expiry of the Agreement, indemnify and keep Transnet indemnified against all losses, claims, damages and expenses (including all reasonable legal fees) in relation to any infringement or alleged infringement of any Intellectual Property Rights suffered by Transnet as a result of Transnet's use or possession of the Materials or any part thereof.
- 13.3. The Supplier shall be entitled to conduct all negotiations and proceedings in relation to any such claims brought against Transnet, but shall not be entitled to settle or compromise any claim without Transnet's prior written consent (not to be unreasonably withheld).
- 13.4. If at any time an allegation of infringement of Intellectual Property Rights is made, the Supplier may, at its own expense and sole option, either:
- 13.4.1. procure for Transnet the right to continue using the relevant Materials; or
 - 13.4.2. replace or modify the Materials with non-infringing substitutes, provided that any substitute shall not materially prejudice Transnet's beneficial use of the Materials or the Services, or cause the Supplier no longer to comply with the Work Order, and that such substitution will be carried out so as to avoid or reduce insofar as possible any interruption to Transnet's business operations; or
 - 13.4.3. failing 13.4.1 or 13.4.2 above, without prejudice to the indemnity in clause 13.2, refund in full all Fees paid by Transnet under the Agreement in relation to such Materials, and Transnet will return such Materials to the Supplier.

14. SUPPLIER'S PERSONNEL

- 14.1. The Personnel shall be regarded at all times as employees, agents or sub-contractors of the Supplier and no relationship of employer and employee shall arise between Transnet and any Personnel under any circumstances regardless of the degree of supervision that may be exercised over the Personnel by Transnet.
- 14.2. The Supplier warrants that all Personnel will be entitled to work in South Africa or any other country in which the Services are performed.
- 14.3. The Supplier will ensure that its Personnel comply with all reasonable requirements made known to the Supplier by Transnet concerning conduct at any Transnet Premises or any other premises upon which the Services are to be performed (including but not limited to security regulations, policy standards and codes of practice and health and safety requirements). The Supplier will ensure that such Personnel at all times act in a lawful and proper manner in accordance with these requirements.
- 14.4. Transnet reserves the right to refuse to admit or to remove from any premises occupied by or on behalf of it, any Personnel whose admission or presence would, in the reasonable opinion of Transnet, be undesirable or who represents a threat to confidentiality or security or whose presence would be in breach of any rules and regulations governing Transnet's own staff, provided that Transnet notifies the Supplier of any such refusal (with reasons why). The reasonable exclusion of any such individual from such premises shall not relieve the Supplier from the performance of its obligations under the Agreement.
- 14.5. The Supplier agrees to use all reasonable endeavours to ensure the continuity of the Personnel assigned to perform the Services. If any re-assignment by the Supplier of those Personnel is necessary, or if Transnet advises that any Personnel assigned are in any respect unsatisfactory, including where any such personnel are, or are expected to be or have been absent for any period, then the Supplier will promptly supply a replacement of equivalent calibre and experience, and any such replacement shall be approved by Transnet prior to commencing provision of the Services, such approval not to be unreasonably withheld.

15. LIABILITY

- 15.1. Neither Party excludes or limits liability to the other Party for -

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Respondent's signature

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Date

- 15.1.1. death or personal injury due to negligence; or
- 15.1.2. fraud.
- 15.2. The Supplier shall indemnify and keep Transnet indemnified from and against liability for damage to any Transnet property (whether tangible or intangible) or any other loss, costs or damage suffered by Transnet to the extent that it results from any act of or omission by the Supplier or its Personnel in connection with the Agreement. The Supplier's liability arising out of this clause 15.2 shall be limited to a maximum amount payable in respect of any one occurrence or a series of related occurrences in a single calendar year, such amount to be agreed in writing by the Parties.
- 15.3. Subject always to clauses 15.1 and 15.2, the liability of either the Supplier or Transnet under or in connection with the Agreement, whether for negligence, misrepresentation, breach of contract or otherwise, for direct loss or damage arising out of each Default or series of related Defaults shall not exceed 100% (one hundred percent) of the fees paid under the schedule or Work Order to which the Default(s) relates.
- 15.4. Subject to clause 15.1 above, and except as provided in clauses 15.2 and 15.3, in no event shall either Party be liable to the other for indirect or consequential loss or damage or including indirect or consequential loss of profits, business, revenue, goodwill or anticipated savings of an indirect nature or loss or damage incurred by the other Party as a result of third party claims.
- 15.5. If for any reason the exclusion of liability in clause 15.4 above is void or unenforceable, either Party's total liability for all loss or damage under the Agreement shall be as provided in clause 15.3.
- 15.6. Nothing in this clause 15 shall be taken as limiting the liability of the Supplier in respect of clause 13 (INTELLECTUAL PROPERTY RIGHTS INDEMNITY), or clause 17 (CONFIDENTIALITY).

16. INSURANCES

- 16.1. Without limiting the liability of the Supplier under the Agreement, the Supplier shall take out insurance in respect of all risks for which it is prudent for the Supplier to insure against, including any liability it may have as a result of its activities under the Agreement for theft, destruction, death or injury to any person and damage to property. The level of insurance will be kept under review by Transnet, on an annual basis, to ensure its adequacy, provided that any variation to the level of such insurance shall be entirely at the discretion of the Supplier.

- 16.2. The Supplier shall arrange insurance with reputable insurers and will produce to Transnet evidence of the existence of the policies and the receipts for payment of the current premiums, on an annual basis within 30 (thirty) days after date of policy renewals.
- 16.3. Subject to clause 16.4, if the Supplier fails to effect adequate insurance under this clause 16, it shall notify Transnet in writing as soon as it becomes aware of the reduction or inadequate cover and Transnet may arrange or purchase such insurance. The Supplier shall promptly reimburse Transnet for any premiums paid provided such insurance protects the Supplier's liability. Transnet assumes no responsibility for such insurance being adequate to protect all of the Supplier's liabilities.
- 16.4. In the event that the Supplier receives written notice from its insurers advising of the termination of its insurance cover referred to in clause 16.1 or if the insurance ceases to be available upon commercially reasonable terms, the Supplier shall immediately notify Transnet in writing of such termination and / or unavailability, whereafter the Supplier or Transnet may terminate the Agreement on giving the other Party not less than 30 (thirty) days prior written notice to that effect.

17. CONFIDENTIALITY

17.1. The Parties hereby undertake the following, with regard to Confidential Information -

17.1.1. not to divulge or disclose to any person whomsoever in any form or manner whatsoever, either directly or indirectly, any Confidential Information of the other, without the prior written consent of such other Party, other than when called upon to do so in accordance with a statute, or by a court having jurisdiction, or by any other duly authorised and empowered authority or official, in which event the Party concerned shall do what is reasonably possible to inform the other of such a demand and each shall assist the other in seeking appropriate relief or the instituting of a defensive action to protect the Confidential Information concerned;

17.1.2. not to use, exploit, permit the use of, directly or indirectly, or in any other manner whatsoever apply the Confidential Information, disclosed to it as a result of the Agreement, for any purpose whatsoever other than for the purpose for which it is disclosed or otherwise than in strict compliance with the provisions in the Agreement;

- 17.1.3. Confidential Information disclosed by either Party to the other or by either Party to any other party used by such Party in the performance of the Agreement, shall be dealt with as "restricted" or shall be dealt with according to any other appropriate level of confidentiality relevant to the nature of the information concerned, agreed between the Parties concerned and stipulated in writing for such information in such cases;
- 17.1.4. the Parties shall not make or permit to be made by any other person subject to their control, any public statements or issue press releases or disclose Confidential Information with regard to any matter related to the Agreement, unless written authorisation to do so has first been obtained from the Party first disclosing such information; and
- 17.1.5. each Party shall ensure that Confidential Information is disclosed to its Personnel or staff or to any other person, on a strictly need to know basis, and that, when such disclosure is made, the Personnel or staff or person to whom such disclosure is made is admonished and formally undertakes to comply with the terms and conditions of confidentiality stipulated herein.
- 17.2. The duties and obligations with regard to Confidential Information in this clause 17 shall not apply where -
- 17.2.1. a Party can demonstrate that such information is already in the public domain or becomes available to the public through no breach of the Agreement by that Party, or its Personnel or staff; or
- 17.2.2. was rightfully in a Party's possession prior to receipt from the other Party, as proven by the first mentioned Party's written records, without an infringement of an obligation or duty of confidentiality; or
- 17.2.3. can be proved to have been rightfully received by a Party from a third party without a breach of a duty or obligation of confidentiality; or
- 17.2.4. is independently developed by a Party as proven by its written records.

17.3. This clause 17 shall survive termination for any reason of the Agreement and shall remain in force and effect from the commencement date of the Agreement and for 5 (five) years after the termination of the Agreement.

18. TOTAL OR PARTIAL FAILURE TO PERFORM THE SCOPE OF SERVICES

Should the Supplier fail or neglect to execute the work or to deliver any portion of the Service, as required by the terms of the Agreement, Schedule or Requirements or Work Order(s), Transnet may cancel the Agreement or Schedule or Requirements or Work Order in so far as it relates to the unexecuted work or rejected portion of the Service, and in such event, the provision of any remaining commitment shall remain subject in all respects to these conditions.

19. TERM AND TERMINATION

19.1. The Agreement shall commence on the commencement date, as specified in the schedules hereto, and shall continue subject to termination in accordance with the provisions of the Agreement or otherwise in accordance with law or equity.

19.2. Transnet may terminate the Agreement without cause by giving the Supplier 30 (thirty) days notice in writing.

19.3. If either Party (the "Defaulting Party") commits a material breach of the Agreement and fails to remedy such breach within 10 (ten) Business Days of written notice thereof, the other Party (hereinafter the "Aggrieved Party"), shall be entitled, in addition to any other rights and remedies that it may have in terms of the Agreement, to terminate the Agreement forthwith without any liability and without prejudice to any claims which the Aggrieved Party may have for damages against the Defaulting Party.

19.4. Either Party may terminate the Agreement forthwith by notice in writing to the other Party when the other Party is unable to pay its debts as they fall due or commits any act or omission which would be an act of insolvency in terms of the Insolvency Act, 1936 (as amended), or if any actions, application or proceeding are made in this regard for -

- 19.4.1. a voluntary arrangement or composition or reconstructions of its debts;
- 19.4.2. the presentation of an administrative petition;
- 19.4.3. its winding-up or dissolution;
- 19.4.4. the appointment of a liquidator, trustee, receiver, administrative receiver or similar officer; or
- 19.4.5. any similar action, application or proceeding in any jurisdiction to which it is subject.

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Respondent's signature

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Date

- 19.5. Transnet may terminate the Agreement at any time within 2 (two) months of becoming aware of a change of control of the Supplier, by notice in writing to the Supplier. For the purpose of this clause, "control" means the right to direct the affairs of a company whether by ownership of shares, membership of the board of directors, agreement or otherwise.
- 19.6. Transnet may cancel any schedule or Work Order hereto at any time on giving the Supplier 30 (thirty) days notice to this effect.

20. CONSEQUENCE OF TERMINATION

- 20.1. Termination in accordance with clause 19 above shall not prejudice or affect any right of action or remedy which shall have accrued or shall thereafter accrue to either Party and all provisions which are to survive the Agreement or impliedly do so shall remain in force and in effect.
- 20.2. On termination of the Agreement or a schedule or Work Order, the Supplier will immediately deliver up, and procure that its Personnel will immediately deliver up to Transnet, all Deliverables and property belonging to Transnet (or, in the event of termination of a Work Order, such as is relevant to that Work Order) which may be in the possession of, or under the control of the Supplier, and certify to Transnet in writing that this has been done.
- 20.3. To the extent that any of the Deliverables and property referred to in clause 20.2 above are in electronic form and contained on non-detachable storage devices, the Supplier will provide Transnet with unencrypted copies of the same on magnetic media and will irretrievably destroy and delete copies so held.
- 20.4. In the event that the Agreement is terminated by the Supplier under clause 19.3 (material breach), or in the event that a Work Order is terminated by Transnet under clause 19.6 (cancellation at any time), Transnet will pay to the Supplier all outstanding Fees (apportioned on a daily basis if appropriate) or Rates relating to the work undertaken by the Supplier up until the date of such termination. Transnet will also pay the costs of any materials ordered by the Supplier in relation to the such work for which the Supplier has paid or is legally obliged to pay, in which case, on delivery of such goods or materials, the Supplier will promptly deliver such materials to Transnet or as it may direct.
- 20.5. The provisions of Clauses 2 (DEFINITIONS), 6,(WARRANTIES), 12 (INTELLECTUAL PROPERTY), 13 (INTELLECTUAL PROPERTY RIGHTS INDEMNITY), 15 (LIABILITY), 17 (CONFIDENTIALITY), 20 (CONSEQUENCE OF TERMINATION), 26 (DISPUTE RESOLUTION) and 30 (GOVERNING LAW) shall survive termination or expiry of the Agreement.

21. ASSIGNMENT

Neither Party may assign the benefit of the Agreement or any interest hereunder except with the prior written consent of the other. Further, in the event that Transnet wishes to assign or novate the Agreement to any third party, the Supplier agrees that it shall not unreasonably withhold or delay its consent to such assignment or novation and that it shall only be entitled to recover from Transnet any reasonable legal costs incurred by it as a direct result of such assignment or novation.

22. FORCE MAJEURE

22.1. Neither Party shall have any claim against the other Party arising from any failure or delay in the performance of any obligation of either Party under the Agreement, caused by an act of force majeure such as acts of God, fire, flood, war, strike, lockout, industrial dispute, government action, laws or regulations, riots, terrorism or civil disturbance, defaults, delays or discontinuance on the part of independent contractors, or other circumstances or factors beyond the reasonable control of either Party, and to the extent that the performance of obligations of either Party hereunder is delayed by virtue of the foregoing, any period stipulated for any such performance shall be reasonably extended.

22.2. Each Party will take all reasonable steps by whatever lawful means that are available, to resume full performance as soon as practicable and will seek agreement to modification of the relevant provisions of the Agreement in order to accommodate the new circumstances caused by the act of force majeure. If the Parties fail to agree within 30 (thirty) days of the act of force majeure first occurring, either Party may thereafter terminate the Agreement with immediate notice.

23. EQUALITY AND DIVERSITY

23.1. The Supplier will not victimise, harass or discriminate against any employee of either Party to the Agreement or any applicant for employment with either Party to the Agreement due to their gender, race, disability, age, religious belief, sexual orientation or part time status. This provision applies, but is not limited to employment, upgrading, work environment, demotion, transfer, recruitment, recruitment advertising, termination of employment, rates of pay or other forms of compensation including selection for training.

23.2. Both Parties to the Agreement undertake that they will not, and shall procure that their employees, agents and subcontractors will not breach any applicable discrimination legislation and any amendments and re-enactments thereof.

24. NON WAIVER

24.1. Failure or neglect by either Party, at any time, to enforce any of the provisions of the Agreement, shall not, in any manner, be construed to be a waiver of any of that Party's rights in that regard and in terms of the Agreement.

24.2. Such failure or neglect shall not, in any manner, affect the continued, unaltered validity of the Agreement, or prejudice the right of that Party to institute subsequent action.

25. PARTIAL INVALIDITY

If any provision of the Agreement shall be held to be invalid, illegal or unenforceable, or shall be required to be modified, the validity, legality and enforceability of the remaining provisions shall not be affected thereby.

26. DISPUTE RESOLUTION

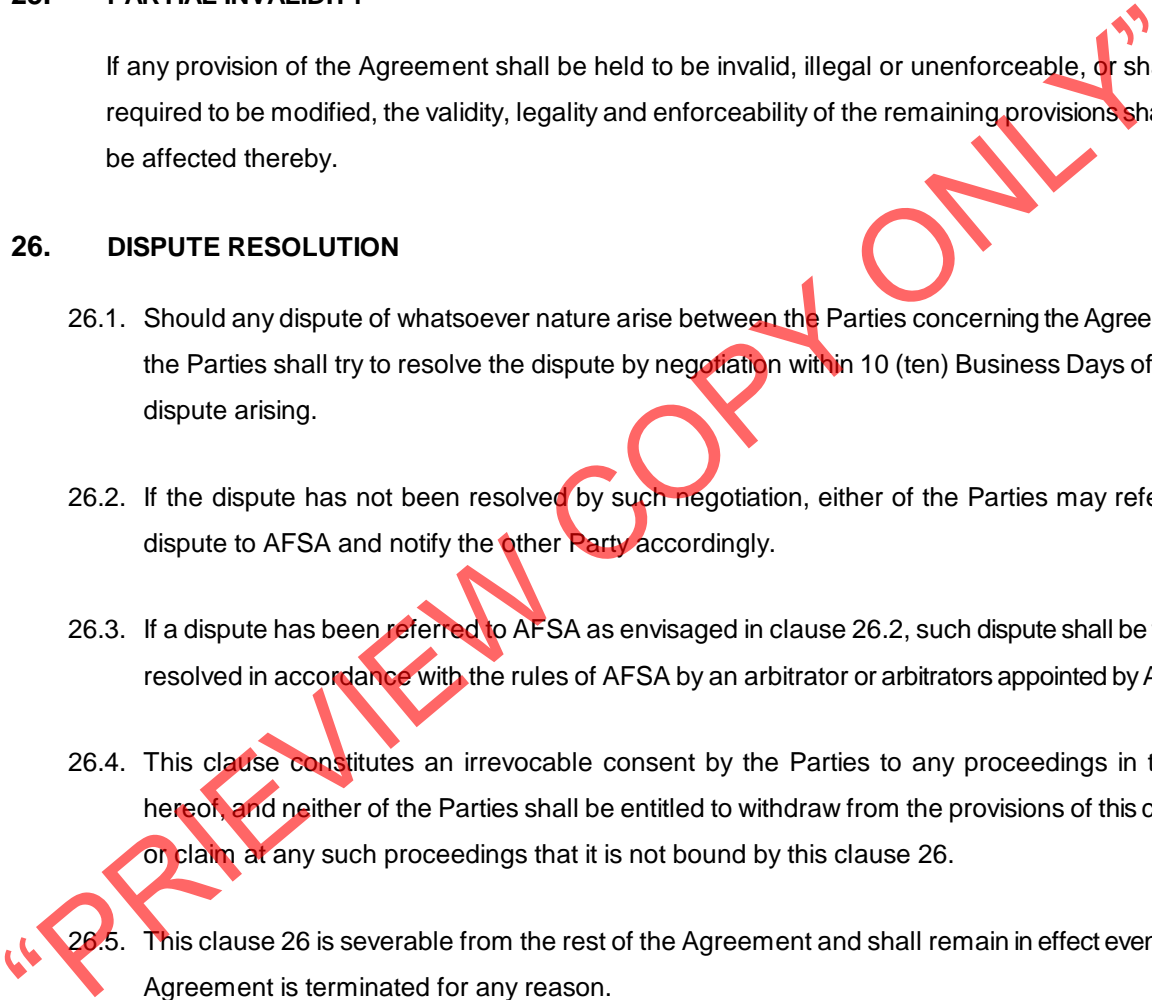
26.1. Should any dispute of whatsoever nature arise between the Parties concerning the Agreement, the Parties shall try to resolve the dispute by negotiation within 10 (ten) Business Days of such dispute arising.

26.2. If the dispute has not been resolved by such negotiation, either of the Parties may refer the dispute to AFSA and notify the other Party accordingly.

26.3. If a dispute has been referred to AFSA as envisaged in clause 26.2, such dispute shall be finally resolved in accordance with the rules of AFSA by an arbitrator or arbitrators appointed by AFSA.

26.4. This clause constitutes an irrevocable consent by the Parties to any proceedings in terms hereof, and neither of the Parties shall be entitled to withdraw from the provisions of this clause or claim at any such proceedings that it is not bound by this clause 26.

26.5. This clause 26 is severable from the rest of the Agreement and shall remain in effect even if the Agreement is terminated for any reason.



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Respondent's signature

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Date

26.6. This clause 26 shall not preclude either Party from seeking urgent relief in a court of appropriate jurisdiction, where grounds for urgency exist.

27. ADDRESSES FOR NOTICES

27.1. The Parties to the Agreement select the physical addresses and facsimile (“fax”) numbers, detailed in Schedule 2 hereto, as their respective addresses for giving or sending any notice provided for or required in terms of the Agreement, provided that either Party shall be entitled to substitute such other address or fax number, as may be, by written notice to the other.

27.2. Any notice addressed to a Party at its physical or postal address shall be sent by prepaid registered post, or delivered by hand, or sent by fax.

27.3. Any notice shall be deemed to have been given -

27.3.1. if posted by prepaid registered post, 10 (ten) days after the date of posting thereof;

27.3.2. if hand delivered, on the day of delivery; or

27.3.3. if sent by fax, on the date and time of sending of such fax, as evidenced by a fax confirmation printout, provided that such notice shall be confirmed by prepaid registered post on the date of dispatch of such fax, or, should no postal facilities be available on that date, on the next Business Day.

28. WHOLE AND ONLY AGREEMENT

28.1. The Parties hereby confirm that the Agreement constitutes the whole and only agreement between them with regard to the subject matter of the Agreement.

28.2. The Parties hereby confirm that the Agreement replaces all other agreements which exist or may have existed in any form whatever between them, with regard to the subject matter dealt with in the Agreement, any annexures appended hereto, and the Schedule of Requirements.

29. AMENDMENT AND CHANGE CONTROL

Any amendment or change of any nature made to the Agreement, and / or the Schedule of Requirements and / or Work Order(s) appended hereto, shall only be valid if it is in writing, signed

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Respondent’s signature

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Date

by both Parties and added to the Agreement as an addendum hereto.

30. GOVERNING LAW

The Agreement is exclusively governed by and construed in accordance with the laws of the Republic of South Africa and is subject to the jurisdiction of the courts of the Republic of South Africa.

31. COUNTERPARTS

The Agreement may be signed in any number of counterparts, all of which taken together shall constitute one and the same instrument. Any Party may enter into the Agreement by signing any such counterpart.

“PREVIEW COPY ONLY”

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Respondent's signature

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Date