

## C1.2 Contract Data (TSC)

### Part one - Data provided by the Employer

Please read the relevant clauses in the conditions of contract before you enter data. The number of the principal clause is shown for each statement however other clauses may also use the same data.

Rows containing the statement and data for options in the core clauses and for main & secondary option clauses, according to the options chosen, are identified by shading in the left-hand column.

Completion of this data in full, according to the Options chosen, is essential to create a complete contract.

Clause	Statement	Data
PART 1	<b>General</b>	
	The <i>conditions of contract</i> are the core clauses and the clauses for main Option: dispute resolution Option and secondary Options of the NEC3 Term Service Contract (June 2005)	<b>A: Priced contract with price list</b> <b>W1: Dispute resolution procedure</b> <b>X1: Price adjustment for inflation</b> <b>X13: Performance bond</b> <b>X17: Low service damages</b> <b>X18: Limitation of liability</b> <b>Z: Additional conditions of contract</b>
10.1	The <i>Employer</i> is (name): Address  Tel No. Fax No.	<b>Transnet Freight Rail, A Division of Transnet Ltd.</b> <b>49<sup>th</sup> Floor, Carlton Centre, 150 Commissioner Street, Johannesburg</b> <b>(011) 3082435</b> <b>(011) 3082430</b>
10.1	The <i>Service Manager</i> is (name): Address  Tel Fax  e-mail	<b>Mr Jan Homan</b> <b>Room 1203, 138 Eloff Street, Braamfontein</b> <b>(011) 773-3250</b> <b>(011) 773-9068</b> <b>Jan.Homan@transnet.net</b>
11.2(2)	The Affected Property is	<b>Yards / Areas in the geographical area controlled by the Infrastructure Depot; Polokwane and as listed in the Price List.</b>
11.2(13)	The <i>service</i> is	<b>The chemical control of vegetation in yards by means of herbicides on Transnet property.</b>



- 11.2(14) The following matters will be included in the Risk Register
- i. ***The shortage of wagons, locomotives and locomotive driver crews may disrupt logistics on railway lines.***
  - ii. ***Staged trucks and rolling stock in yards hindering herbicide applications.***
  - iii. ***Indiscriminate herbicide usage causing damage to vegetation on adjacent properties.***
  - iv. ***The contractor shall take the presence of drainage works within yards and adjacent area into account and shall ensure that no waterborne movement of herbicides is possible.***
  - v. ***Work on railway track near live OHTE electrical equipment holds a danger of electrocution for workers.***
  - vi. ***Working on a railway lines adjacent to lines on which rail traffic continue to run holds the risk of injury or death to workers.***
  - vii. ***Dry vegetation at or near most worksites is a fire hazard.***
  - viii. ***Limited availability of water suitable for herbicidal application. TFR water replenishing points could be up to 200km apart.***
  - ix. ***Road vehicle accessibility to the work site via service roads is not always possible.***
- 11.2(15) The Service Information is in **Part C3 : Service Information (Works Information)**
- 12.2 The *law of the contract* is the law of **The Republic of South Africa subject to the jurisdiction of the Courts of South Africa.**
- 13.1 The *language of this contract* is **English**
- 13.3 The *period for reply* is **2 weeks**
- PART 2 **The Contractor's main responsibilities** **Refer to part C3**
- PART 3 **Time**
- 30.1 The starting date is **The Contract date**
- The *service period* is **As stated in the service information.**
- PART 4 **Testing and defects** **No data is required for this section of the conditions of contract.**
- PART 5 **Payment**
- 51.1 The *currency of this contract* is the **South African Rand (ZAR).**

- 51.2 The period within which payments are made is **Payment will be made 30 days from invoice date. The assessment interval is as stipulated in Pricing Data.**
- 51.4 The *interest rate* is **2% Per annum above the prime lending rate of the Standard Bank of South Africa Ltd as determined from time to time.**
- PART 6 **Compensation events** **No data is required for this section of the conditions of contract.**
- PART 7 **Use of Equipment Plant and Materials** **No data is required for this section of the conditions of contract.**
- PART 8 **Risks and insurance**
- 8.3.1 The *Employer* provides these insurances
- (a) The minimum limit of indemnity for insurance in respect of loss of or damage to property (except the works, Plant and Materials and Equipment) and liability for bodily injury to or death of a person (not an employee of the Contractor) caused by activity in connection with this contract for any one event is **whatever the Contractor deems desirable in addition to that provided by the Employer.**
- (b) The minimum limit of indemnity for insurance in respect of death of or bodily injury to employees of the Contractor arising out of and in the course of their employment in connection with this contract for any one event is that **which is prescribed by the Compensation for Occupational Injuries and Diseases Act No. 130 of 1993 as amended.**

**Indemnities and insurance**

- i. The Contractor shall take every precaution not to cause damage to property or injury to any person as a result of his execution of the work.
- ii. Transnet will insure in the joint names of Transnet Freight Rail and the Contractor against all legal liabilities which may arise from the accidental death of or injury to third party persons and/or accidental loss of, or damage to third party property in the course of the Contractor's execution of the Work.
- iii. The insurance policy will be for an indemnity limit as stated in the policy and will be maintained in force during the entire period of the Contract.
- iv. The Contractor shall in the case of a liability arising out of a negligent act or omission on the part of the Contractor be responsible for payment of the amount(s) stated in the policy as being the deductible.
- v. The insurance to be provided in terms of clause 83.1(ii) will have a cross liabilities cover in respect of which each party shall be separately indemnified in respect of claims made by any one of them against the other as though a separate policy has been issued to each of them.
- vi. The Contractor shall insure against loss of or damage to his own machinery, tools, equipment, materials and site establishments and any consequential financial losses arising from such damage. This insurance is to be maintained in force during the entire period of the Contract. The Contractor shall likewise arrange his own insurances in respect of motor vehicle liabilities and employer's common law liabilities of the Contractor.

**PART 9 Termination**

Refer to part C3

**Dispute Resolution: Option W1**

W1.1	The <i>Adjudicator</i> is (Name)	<b>Will be mutually agreed upon by the parties if a dispute arises.</b>
W1.2(3)	The <i>Adjudicator nominating body</i> is:	<b>The Association of Arbitrators (Southern Africa)</b>
W1.4(2)	The <i>tribunal</i> is:	<b>Arbitration</b>
W1.4(5)	The <i>arbitration procedure</i> is	<b>The Rules for the Conduct of Arbitrators of the Association of Arbitrators (Southern Africa)</b>
	The place where arbitration is to be held is	<b>Johannesburg</b>
	The person or organisation who will choose an arbitrator	<b>The Chairman of the Association of Arbitrators (Southern Africa)</b>
	- if the Parties cannot agree a choice or	
	- if the arbitration procedure does not state who selects an arbitrator, is	

**DATA FOR SECONDARY OPTION CLAUSES**

**1 OPTION X1: PRICE ADJUSTMENT FOR INFLATION:**

1.1. A contract price adjustment factor to be determined in accordance with the formula described in 2.1.2 will be applied to allow for all increases or decreases in costs, from any cause whatsoever, which may occur after the closing date of the submission of tenders and before the date of completion. **The factor shall be rounded off to six decimal places.**

1.2. The contract price adjustment factor shall be -

$$(1 - x) \left( 0.20 \frac{Lt}{Lo} + 0.05 \frac{Pt}{Po} + 0.70 \frac{Mt}{Mo} + 0.05 \frac{Dt}{Do} - 1 \right)$$

where **x = 0.15** and

*Lo, Po, Mo* and *Do* are respectively labour, machinery, material and diesel fuel indices ruling for the calendar month four (4) months prior to closing date of the tender;

*Lt, Pt, Mt* and *Dt* are respectively labour, machinery, material and diesel fuel indices ruling for the calendar month four (4) months prior to the date of measurement.

1.3. The indices to be used shall be those for the Consumer Price Index and Production Price Index as obtained from the monthly Statistical News Release published by STATS South Africa.

- o *Lo* and *Lt* shall be the labour indices for Metropolitan Areas (P0141.1 Table 7.1).
- o *Po* and *Pt* shall be the average of the price indices of Non-Electrical Machinery and Transport Equipment in the ratio of 1:1 (P0142.1 Table 8 item 2.16 and 2.21 respectively).
- o *Mo* and *Mt* shall be the price indices of Chemical and Chemical herbicides used in table 8 of the PO142.1 item 2.11 Basic Chemicals
- o *Do* and *Dt* shall be the price indices of "Diesel Oil –Coast & Witwatersrand" (P0142.1 Table 12).

1.4. When the value of an index at the time of calculation is not known the latest available index shall be used and any correction necessary shall be made by addition or subtraction in subsequent monthly payment certificates.



- 1.5. The amounts to be added to or subtracted from the monthly payment certificates shall be calculated by multiplying the amount certified for payment for that month (but excluding amounts not subject to price adjustment) by the contract price adjustment factor for that month.
- 1.6. Adjustment to measurements of previous months' quantities will be included in calculation of the amount certified for payment and will therefore be subject to the price adjustment factor of the current measurement month.
- 1.7. Any additions to or deductions from the amount payable, brought about by the application of the contract price adjustment factor, shall be deemed to have made full allowance for all increases or decreases in cost from any cause whatsoever, including all overhead costs as well as any increases and decreases therein, and profit.
- 1.8. Value added tax shall be excluded from individual payment item rates and price adjustment indices as it will be added to the total of the month's measurement, after price adjustment have been made in terms hereof.
- 1.9. The Price Adjustment Factor calculated at the completion of the works is used for calculating price adjustment after this date.

## 2. **OPTION X13: PERFORMANCE BOND:**

- 2.1. Transnet Freight Rail requires a Performance Bond of **10%** of the total value of the Contract as security for the due and faithful performance by the Contractor of all the duties and obligations resting upon and assumed by him in terms of the Contract.
- 2.2. The Performance Bond is to be returned to the Contractor upon completion of the contract after certification from the Service Manager that all contract requirements have been met.

## 3. **OPTION X17: LOW SERVICE DAMAGES:**

### 3.1. **REMEDIAL WORK**

- 3.1.1. The Contractor shall carry out remedial work to all worklots where control has not been achieved, prior to the official inspections taking place. Such remedial work shall include the removal of dry or dead growth with any dimensions in excess of 150mm and forming a nuisance or hazard to Transnet Freight Rail operations, from the treated worklots.
- 3.1.2. The Service Manager's Deputy may, at any time after the first measurement order the Contractor to carry out remedial action, to commence within 2 weeks after being so ordered. Prior to the commencement of this proposed remedial action an envisaged remedial work program must be submitted to the Service Manager's Deputy for his/her approval. Failing to do so the Service Manager's Deputy may arrange for such action to be carried out by others at the cost of the Contractor.
- 3.1.3. Hoeing (skoffel) will not be allowed on its own as a remedial action.
- 3.1.4. Fire may not be used as a method of vegetation control or as a method of remedial action.

### 3.2. **OVERALL CONTROL**

- 3.2.1. The overall standard of control to be achieved by the Contractor over the contract area, defined as "Overall Control" and expressed as a percentage, will be determined by application of the following formula;

$$\text{Overall Control} = \frac{(\text{Worklots treated} - \text{Worklots rejected})}{\text{Worklots treated}} \times 100$$

3.2.2. The standard of “Overall Control” (service level table) to be provided on each district by the Contractor shall be:

YEAR	1	2 and Consecutive years
Minimum % of the total work, which shall comply, with the standard of control for individual work-lots.	80	90

3.2.3. Failure by the Contractor to achieve the standard of “Overall Control” shall constitute a material breach of contract by the Contractor, which will entitle the Employer to act in terms of clause 91(Core Clauses) of the TSC3 General Conditions of Contract.

#### 4. OPTION X18: LIMITATION OF LIABILITIES

- 4.1 The Contractor's liability to the Employer for indirect or consequential loss is limited to 10% of the total contract value or R1,000,000.00 (One million Rand), whichever is the higher amount.
- 4.2 For any one event, the Contractor's liability to the Employer for loss of or damage to the Employer's property is limited to the deductible in terms of the Employers arranged insurance as set out in the contract.
- 4.3 The Contractor's liability for Defects due to his design of an item of Equipment is limited to R1,000,000.00 (One million Rand).
- 4.4 The Contractor's total liability to the Employer for all matters arising under or in connection with this contract, other than the excluded matters is limited to 10% of the total value of the contract at time of contract award or R1,000,0000 (One million Rand) whichever is the higher amount.
- 4.5 The end of liability date is two months after the end of the service period.

#### Option Z Additional conditions of contract

Z1 The Additional conditions of contract are Definitions:

##### Z1.1 DAY

Day is a calendar day and where a specific number of days is allowed in the Contract for the performance of any act or is stipulated for the extinction of any right or the duration of any event or circumstance, public holidays and the annual Christmas break from 20 December to 4 January (both days included) is excluded from the calculation of the number of days concerned.

##### Z1.2 ASSIGNMENT & CESSION

Neither the Contractor nor the Employer may, without the written consent of the other, assign the Contract or any part thereof or any obligation under the Contract or cede any right or benefit there under.

##### Z1.3 NON-WAIVER

No grant by the Employer or the Contractor to the other of any concession, waiver, condonation or allowance is, in respect of any specific event or circumstance other than that in respect of which the grant was made to constitute a waiver of the rights of the grantor in terms of the Contract or an estoppel of the grantor's right to enforce the provision of the Contract.

##### Z1.4 LIMITATION OF THE AUTHORITY OF THE PROJECT MANAGER

The Project Manager is authorised to agree increases to the contract value to a maximum of **R2,000,000.00 or 10%** of the contract amount (excluding VAT) whichever is the lesser amount without referring it to the management of the Employer. If referral to management is necessary, a period of 8 weeks over and above any times allowed in the Contract is to be provided.

- Z1.5 **SERVICE MANAGER'S DEPUTY** means the person appointed by the Service Manager to administer the Contractor's performance and execution of Works according to the powers and rights held by and obligations placed upon the Service Manager's Deputy in terms of the Contract and the appointment.
- Z1.6 **BACKGROUND INTELLECTUAL PROPERTY** means all Intellectual Property introduced and required by either Party to give effect to their obligations under this Agreement owned in whole or in part by or licensed to either Party or their affiliates prior to the Commencement Date or developed after the Commencement Date otherwise pursuant to this Agreement.
- Z1.7 **CONFIDENTIAL INFORMATION** means any information or other data, whether in written, oral, graphic or in any other form such as in documents, papers, memoranda, correspondence, notebooks, reports, drawings, diagrams, discs, articles, samples, test results, prototypes, designs, plans, formulae, patents, or inventor's certificates, which a Party discloses or provides to the other Party (intentionally or unintentionally, or as a result of one Party permitting the representative of the other Party to visit any of its premises), 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 –
- (a) information relating to methods of operation, data and plans of the disclosing Party;
  - (b) the contents of this Agreement;
  - (c) 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;
  - (d) any information disclosed by either Party and which is clearly marked as being confidential or secret;
  - (e) information relating to the strategic objectives and planning of the disclosing Party relating to its existing and planned future business activities;
  - (f) information relating to the past, present and future research and development of the disclosing Party;
  - (g) information relating to the business activities, business relationships, products, services, customers, clients and Subcontractors of the disclosing Party where an onus rests on the disclosing Party to maintain the confidentiality of such information;
  - (h) information contained in the software and associated material and documentation belonging to the disclosing Party;
  - (i) technical and scientific information, Know-How and trade secrets of a disclosing Party including inventions, applications and processes;
  - (j) Copyright works;
  - (k) commercial, financial and marketing information;
  - (l) data concerning architecture, demonstrations, tools and techniques, processes, machinery and equipment of the disclosing Party;
  - (m) plans, designs, concepts, drawings, functional and technical requirements and specifications of the disclosing Party;
  - (n) information concerning faults or defects in goods, equipment, hardware or software or the incidence of such faults or defects; and information concerning the charges, Fees and / or costs of the disclosing Party or its authorised Subcontractors, or their methods, practices or service performance levels actually achieved;
- Z1.8 **“FOREGROUND INTELLECTUAL PROPERTY”** means all Intellectual Property developed by either Party pursuant to this Agreement;
- Z1.9 **“INTELLECTUAL PROPERTY”** means Patents, Designs, Know-How, Copyright and Trade Marks and all rights having equivalent or similar effect which may exist anywhere in the world and includes all future additions and improvements to the Intellectual Property

Z1.10 **“TRADE MARKS”** mean registered Trade Marks and trade mark applications and includes any sign or logo, or combination of signs and/or logos capable of distinguishing the goods or services of one undertaking from those of another undertaking.

Z1.11 **INTELLECTUAL PROPERTY RIGHTS**

**Title to Confidential Information**

- a) Transnet will retain all right, title and interest in and to its Confidential Information and Background Intellectual Property and the Supplier acknowledges that it has no claim of any nature in and to the Confidential Information and Background Intellectual Property that is proprietary to Transnet. For the avoidance of doubt, all the Supplier's Background Intellectual Property shall remain vested in the Supplier.
- b) Transnet shall grant to the Supplier an irrevocable royalty free non-exclusive license to use Transnet's Background Intellectual Property only for the Permitted Purpose. This license shall not permit the Supplier to sub-license to other parties.
- c) The Supplier shall grant to Transnet an irrevocable, royalty free, non-exclusive license to use the Supplier's Background Intellectual Property for the Permitted Purpose. This license shall not permit Transnet to sub-license to other parties.

The Supplier shall grant Transnet access to the Supplier's Background Intellectual Property on terms which shall be bona fide negotiated between the Parties for the purpose of commercially exploiting the Foreground Intellectual Property, to the extent that such access is required.

Z1.12 **TITLE TO INTELLECTUAL PROPERTY**

- a) All right, title and interest in and to Foreground Intellectual Property prepared conceived or developed by the Supplier, its researchers, agents and employees shall vest in Transnet and the Supplier acknowledges that it has no claim of any nature in and to the Foreground Intellectual Property. The Supplier shall not at any time during or after the termination or cancellation of this Agreement dispute the validity or enforceability of such Foreground Intellectual Property, or cause to be done any act or anything contesting or in any way impairing or tending to impair any part of that right, title and interest to any of the Foreground Intellectual Property and shall not counsel or assist any person to do so.
- b) Transnet shall be entitled to seek protection in respect of the Foreground Intellectual Property anywhere in the world as it shall decide in its own absolute discretion and the Supplier shall reasonably assist Transnet in attaining and maintaining protection of the Foreground Intellectual Property.
- c) Where the Foreground Intellectual Property was created by the Supplier or its researchers, agents and employees and where Transnet elects not to exercise its option to seek protection or decides to discontinue the financial support of the prosecution or maintenance of any such protection, Transnet shall notify the Supplier who shall have the right of first refusal to file or continue prosecution or maintain any such applications and to maintain any protection issuing on the Foreground Intellectual Property.
- d) No consideration shall be paid by Transnet to the Supplier for the assignment of any Foreground Intellectual Property from the Supplier to Transnet, over and above the sums payable in terms of this Agreement. The Supplier undertakes to sign all documents and do all things as may be necessary to effect, record and perfect the assignment of the Foreground Intellectual Property to Transnet. Subject to anything contrary contained in this Agreement and/or the prior written consent of Transnet (which consent shall not be unreasonably be withheld), the Supplier shall under no circumstances be entitled as of right, or to claim the right, to use Transnet's Background Intellectual Property and/or Foreground intellectual Property.



**Z1.13 TITLE TO IMPROVEMENTS**

Any improvements, developments, adaptations and/or modifications to the Foreground Intellectual Property, and any and all new inventions or discoveries, based on or resulting from the use of Transnet's Background Intellectual Property and/or Confidential Information shall be exclusively owned by Transnet. The Supplier shall disclose promptly to Transnet all such improvements, developments, adaptations and/or modifications, inventions or discoveries. The Supplier hereby undertakes to sign all documents and do all things as may be necessary to effect, record and perfect the assignment of such improvements, developments, adaptations and/or modifications, inventions or discoveries to Transnet and the Supplier shall reasonably assist Transnet in attaining, maintaining or documenting ownership and/or protection of the improved Foreground Intellectual Property.

**Z1.14 UNAUTHORISED USE OF CONFIDENTIAL INFORMATION**

The Supplier shall not authorise any party to act on or use in any way any Confidential Information belonging to Transnet whether or not such party is aware of such Confidential Information, and shall promptly notify Transnet of the information if it becomes aware of an party so acting, and shall provide Transnet the information with such assistance as Transnet reasonably requires, at Transnet's cost and expense, to prevent such third party from so acting y

**Z1.15 UNAUTHORISED USE OF INTELLECTUAL PROPERTY**

The Supplier agrees to notify Transnet in writing of any conflicting uses of, and applications of registrations of Patents, Designs and Trade Marks or any act of infringement, unfair competition or passing off involving the Intellectual Property of Transnet of which the Supplier acquires knowledge and Transnet shall have the right, as its own option, to proceed against any party infringing its Intellectual Property.

- a) It shall be within the discretion of Transnet to determine what steps shall be taken against the infringer and the Supplier shall co-operate fully with Transnet, at Transnet's cost, in whatever measure including legal action to bring any infringement of illegal use to an end.
- b) The Supplier shall cooperate to provide Transnet promptly with all relevant ascertainable facts.
- c) If proceedings are commenced by Transnet alone, Transnet shall be responsible for all expenses but shall be entitled to all damages or other award arising out of such proceedings. If proceedings are commenced by both Parties, both Parties will be responsible for the expenses and both Parties shall be entitled to damages or other award arising out of proceedings.

**Z1.16 CONFIDENTIALITY**

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

- a) 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;
- b) 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 this 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 this Agreement;
- c) not to make any notes, sketches, drawings, photographs or copies of any kind of any part of the disclosed Confidential Information, without the prior written consent of such other Party, except when reasonably necessary for the purpose of this Agreement, in which case such copies shall be regarded as Confidential Information;



Z1.16

- d) not to de-compile, disassemble or reverse engineer any composition, compilation, concept application, item, component de-compilation, including software or hardware disclosed and shall not analyze any sample provided by Transnet, or otherwise determine the composition or structure or cause to permit these tasks to be carried out except in the performance of its obligations pursuant to this Agreement:
- i. not to exercise less care to safeguard Transnet Confidential Information than the Party exercises in safeguarding its own competitive, sensitive or Confidential Information;
  - ii. 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 this 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;
  - iii. 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 this Agreement, unless written authorization to do so has first been obtained from the Party first disclosing such information;
  - iv. each Party shall be entitled to disclose such aspects of Confidential Information as may be relevant to one or more technically qualified employees or consultants of the Party who are required in the course of their duties to receive the Confidential Information for the Permitted Purpose provided that the employee or consultant concerned has a legitimate interest therein, and then only to the extent necessary for the Permitted Purpose, and is informed by the Party of the confidential nature of the Confidential Information and the obligations of the confidentiality to which such disclosure is subject and the Party shall ensure such employees or consultants honour such obligations;
  - v. each Party shall notify the other Party of the name of each person or entity to whom any Confidential Information has been disclosed as soon as practicable after such disclosure;
  - vi. each Party shall ensure that any person or entity to which it discloses Confidential Information shall observe and perform all of the covenants the Party has accepted in this Agreement as if such person or entity has signed this Agreement. The Party disclosing the Confidential Information shall be responsible for any breach of the provisions of this Agreement by the person or entity; and
  - vii. Each Party may by written notice to the other Party specify which of the Party's employees, officers or agents are required to sign a non-disclosure undertaking.
  - viii. a Party can demonstrate that such information is already in the public domain or becomes available to the public through no breach of this Agreement by that Party, or its Personnel.
  - ix. 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
  - x. 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
  - xi. is independently developed by a Party as proven by its written records.
- e) This clause Z1.16 shall survive termination for any reason of this Agreement and shall remain in force and effect from the Commencement Date of this Agreement and 5 (five) years after the termination of this Agreement. Upon termination of this Agreement, all documentation furnished to the Supplier by Transnet pursuant to this Agreement shall be returned to Transnet including, without limitation all corporate identity equipment including dies, blocks, labels, advertising matter, printing matter and the like.

Z1.17 **FORCE MAJEURE**

- a) 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 this 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, suppliers, 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.
- b) 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 this Agreement in order to accommodate the new circumstances caused by the act of force majeure. If a Party fails to agree to such modifications proposed by the other Party within 90 (ninety) days of the act of force majeure first occurring, either Party may thereafter terminate this Agreement with immediate notice.

Z1.18 **EQUALITY AND DIVERSITY**

- a. The Supplier will not victimise, harass or discriminate against any employee of either Party to this Agreement or any applicant for employment with either Party to this 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 and selection for training.
- b. Both Parties to this Agreement undertake that they will not, and shall procure that its employees, agents and Subcontractors will not breach any applicable discrimination legislation and any amendments and re-enactments thereof.

Z2 **THE CONTRACTOR'S GENERAL OBLIGATIONS**

Z2.1 The following information in addition to Core Clause 2 of the Schedule of Options will apply:

Z2.1.1 The Contractor's general obligations under the Contract comprise: -

- maintenance of railway track and the provision of on-track maintenance machinery and all accessory tools and equipment of the types and nature stipulated in the Particular Specifications and
- the provision of all labour, Service Manager's Deputy personnel and specialised tradesman required to undertake the duties and functions required in terms of the Contract and everything, whether of a temporary or permanent nature, required for performance of the Work and services to be provided in terms of the Contract.

Z2.1.2 Transnet Freight Rail shall, in the case of a breach of contract by the Contractor in terms of clause Z2.9, have a lien over the Contractor's machines and accessory tools and equipment and all temporary buildings of the Contractor used for carrying out the Work.

Z2.1.3 The clause headings in these conditions of contract are not deemed to be part thereof and will not be taken into consideration in the interpretation of the Contract.

Z2.1.4 Any grant by Transnet Freight Rail or the Contractor (the Grantor), or by any of the persons authorised to act on their behalf to the other, of any concession, waiver, condonation or allowance shall not, in respect of any specific event or circumstance other than that in respect of which the grant was made, constitute a waiver of the rights of the grantor in terms of the Contract or an estoppel of the grantor's right to enforce the provisions of the Contract.

Z2.1.5 Value-added tax in terms of the Value-added Tax Act No. 89 of 1991 shall be dealt with as follows: -

- In Tendering; Value-added tax shall not be included in the tendered rates and prices. In payment; Value-added tax shall not be reflected on monthly contract payment

- certificates, but paid separately on the presentation of a tax invoice by the Contractor. The value of the work reflected on the tax-invoice must correspond with the netto amount indicated on the contract payment certificate.
- Changes to the VAT rate will be dealt with in terms of sections 67 and 67A of the Act.

Z3 **CESSION, ASSIGNMENT AND SUBCONTRACTING**

Z3.1 The Contractor shall not cede or assign the Contract or any part thereof without the prior written approval of the Service Manager.

Z3.2 The Contractor shall not enter into any subcontract without the prior written approval of the Service Manager which approval shall not unreasonably be withheld. The subcontractor, in respect of whom approval is so granted and his employees or workmen shall for all the intentions and purposes of the Contract, be deemed to be workmen of the Contractor, as provided in clause Z3.1 hereof.

Z3.3 Approval given in terms of clauses Z3.1 and Z3.2 hereof shall not relieve the Contractor of any responsibility, duty or obligation imposed upon him by the Contract, and the Contractor shall in particular be and remain solely liable and responsible for all acts, omissions, negligence or breaches of contract on the part of the assignee or any of his employees, and for all acts, omissions or negligence of any subcontractor or any of his employees.

Z4 **SUFFICIENCY OF TENDER**

Z4.1 The Contractor shall be deemed to have satisfied himself before tendering as to the correctness and sufficiency of his tender and of the rates and prices stated in the Price List. These rates shall be sufficient to cover his obligations under the Contract and everything necessary for the proper performance of the Work and services specified here in.

Z5 **COMPLIANCE WITH STATUTES AND SAFETY RULES**

Z5.1 The Contractor shall comply with all applicable legislation and the Transnet safety requirements. The cost of such compliance shall be borne by the Contractor and shall be deemed to have been allowed for in the rates and prices in the Contract.

Z5.2 The Contractor shall, in particular, comply with the following Acts: -

The Compensation for Occupational Injuries and Diseases Act, (Act 130 of 1993); The Contractor shall produce proof of his registration and good standing with the Compensation Commissioner in terms of the Act.

- The Occupational Health and Safety Act (Act 85 of 1993); The Contractor is in terms of section 37(2) of Act 85 of 1993, deemed to be an employer in his own right with duties as prescribed in the Act and agrees to ensure that all work will be performed or machinery and plant used in accordance with the provisions of the Act in respect of all persons in his employ, other persons on the premises or the site or place of the Work or on the Work to be executed by him and under his control in terms of the Contract. The agreements in this Contract and all documents attached or referred to, form an integral part of the arrangements and procedures stipulated in the aforementioned section.
- the Contractor shall comply with the current Transnet Specification E.4E, Safety Arrangements and Procedural Compliance with the Occupational Health and Safety Act, Act 85 of 1993 and Regulations as applicable, and shall, before commencement with the execution of the Contract, submit to the Service Manager's Deputy, documentary proof of his procedural compliance with the Act and particulars of his Health and Safety Policy and Programme to be implemented on the Work in accordance with Specification E.4E.
- The Contractor's Health and Safety Policy and Programme will be subject to the agreement of the Service Manager's Deputy, who may order supplementary and/or additional safety arrangements and/or different safe working methods to ensure compliance by the Contractor with his obligations as an employer in terms of the Act.
- The Contractor shall comply with the current Specification for Work On, Over, Under or Adjacent to Railway Lines and near High Voltage Equipment - E7/1, where applicable, and shall take particular care of the safety of his employees working on or in close proximity to a railway line during track occupations as well as under normal operational conditions.

- He shall also comply with all other safety requirements, regulations and guidelines of Transnet applicable to the nature of Work carried out under the Contract and shall obtain the particulars thereof from the Service Manager's Deputy.
- In addition to compliance with clause Z5.2 hereof, the Contractor shall report all incidents contemplated by Section 24 of the Act in writing to the Service Manager's Deputy. Any incident resulting in the death of or injury to any person on the WORK shall be reported within 24 hours of its occurrence and any other incident shall be reported within 48 hours of its occurrence.
- The term "safety rules" is used in a generic sense and refers to all Transnet arrangements, procedures and requirements, pertaining to safety, specified or incorporated by reference in the contract documents, such as the Specification for Work On, Over, Under or Adjacent to Railway Lines and near High Voltage Equipment, E7/1, the Electrical Safety Instructions - High Voltage Equipment. (Copies of these documents are available for inspection at the offices of Transnet Freight Rail.

## Z6 BREACHES AND REMEDIES

Z6.1 Should the Contractor commit any breach or default of any kind mentioned in clause Z6.2 hereof, the Employer may exercise, subject to the provisions as stated in Option W1 as well as clause Z6.3, for and on behalf of Transnet, immediately, in whole or in part and consecutively or concurrently, all or any of the options, rights and powers set out in clause Z6.3 hereof.

Z6.2 Breaches or defaults entitling the Employer to act in terms of clause Z.6.3 hereof shall be the following:

- Z6.2.1 • insolvency of the Contractor or an act of insolvency comprising inter alia, the following:
  - Z6.2.1.1 • liquidation or sequestration of the Contractor's estate (provisionally or finally); or
  - Z6.2.1.2 • the Contractor publishing a notice of surrender of his estate as insolvent; or
  - Z6.2.1.3 • the Contractor entering into a compromise with the general body of his creditors; or
  - Z6.2.1.4 • the Contractor having an execution levied on his goods.
- Z6.2.2 • material breach of the Contract by the Contractor comprising inter alia;
  - Z6.2.2.1 • the abandonment or repudiation of the Contract;
  - Z6.2.2.2 • suspension of progress of the Work without contractual cause;
  - Z6.2.2.3 • assigning of the Contract without the consent in writing of the Employer having first being obtained
- Z6.2.2.4 • subcontracting any part of the Contract without the Service Manager's approval;
- Z6.2.2.5 • failing to provide the performance bond in terms of option X13 hereof;
- Z6.2.2.6 • failing to satisfy any judgment or arbitrator's award entered against him within 7 days after such judgment or award is so entered; or to satisfy any attachment order against property within 3 days of its issue;
- Z6.2.2.7 • failure, after he has been notified in terms of Option X17 clause 4.1.3 to achieve the specified output and/or availability of the machinery; or to rectify defective performance; or
- Z6.2.2.8 • conviction of the Contractor or any of his employees in a court of law for any offence which adversely affects the interests of Transnet

Z6.3 In the event of any breach or default mentioned in clause Z.2.9.2 hereof, the Employer may exercise any of the following options, rights and powers: -

Z6.3.1 To cancel the Contract and to invoke the lien over the Contractor's machines, equipment, tools and temporary buildings, and any indemnities or safeguards in favour of Transnet in terms of the Contract.

Z6.3.2 To take over full possession and control of the whole or any portion of the Work and the Contractor's machinery equipment, tools and material used thereon, and control of any or all of the Contractor's employees (with or without accepting any liability for arrear salaries or wages, or for any contracts of personal service) and to continue and complete the Work, by employment of such of the Contractor's employees and using such of his site establishment, temporary buildings, machinery equipment tools and materials, as is necessary in the discretion of the Service Manager, all for the account of and at the cost and risk of the Contractor.

- Z6.3.3 To remove and dismiss any person employed by the Contractor and, for the account of and at the cost and risk of the Contractor, to engage or appoint any other person under such conditions and to pay him such salary or wage as the Service Manager may deem fit.
- Z6.3.4 To obtain from any source whatsoever, at the cost of the Contractor, tools, equipment and material as are necessary, in the opinion of the Service Manager, for the proper completion of the Contract.
- Z6.3.5 To dismiss the Contractor from any further control of the execution of the Contract, and thereafter to take over full control of and to utilise the whole or any portion of the machinery, equipment, tools and material belonging to the Contractor, and to employ any person other than the Contractor to complete the Contract, in each case for the account of and at the risk and cost of the Contractor, after or without offering such work for tender and without the interference or intervention in any way by the Contractor. After the said work has been completed by such other person and such other person has been paid therefore, the Service Manager shall issue the Final Certificate when so authorised by the Employer.
- Z6.3.6 To reduce, in the case where the Contractor's defective workmanship and/or performance is accepted by Transnet, any one or all of the rates and prices in the Contract by the amounts of Transnet's losses or the costs of rectifying the defective workmanship and/or performance of the Contractor, or by the amounts that the Contract Work is reduced in value as a consequence of the deficiencies.
- Z6.4 Should any money as shown by the final certificate be due by the Contractor to Transnet, the Contractor and/or his guarantor shall forthwith pay such money to Transnet, failing which Transnet may recover the said amount from the Contractor.
- Z6.5 All wages, salaries, costs, expenses and damages paid, incurred or sustained by Transnet for which the Contractor is liable in terms of the Contract, shall be paid by the Contractor on demand or shall be recovered from monies owing to the Contractor or by legal action in a court of appropriate jurisdiction.
- Z6.6 In any action taken or instituted by Transnet in terms of clauses Z6.1 to Z6.4 hereof or any clause of the Contract read alone or in conjunction with these clauses, a certificate issued by the Service Manager shall be deemed to be proof of any amount due by the Contractor to Transnet or by Transnet to the Contractor.
- Z6.7 No action taken or instituted by Transnet in terms of clauses Z6.1 to Z6.4 hereof or any clause of the Contract read alone or in conjunction with these clauses shall prejudice or detract from Transnet's right to recover damages for any other breach or default committed by the Contractor in respect of the Contract. The remedies provided under clauses Z6.3 and Z6.4 hereof are additional to any other rights, claims or remedies that Transnet may have in law or under the Contract against the Contractor.