

TRANSNET



STANDARD TERMS AND CONDITIONS OF CONTRACT

FOR THE SUPPLY OF GOODS TO TRANSNET

FORM US7 – GOODS

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ANNEXURE A - SCHEDULE OF REQUIREMENTS

1. INTRODUCTION

When an Agreement is entered into between Transnet and the Supplier of Goods to Transnet, these Standard Terms and Conditions of Contract, the technical specifications for the Goods, the General Tender Conditions, a Schedule of Requirements including such special conditions as applicable, and any terms in the associated tender documents, exclusively govern the supply of Goods and provision of ancillary 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 and its associated schedules and/or annexures and/or appendices, including the Schedule of Requirements, the technical specifications for the Goods and such special conditions as shall apply to the Agreement, together with the General Tender Conditions and any additional provisions in the associated bid documents tendered by the Supplier (as agreed between the Parties), which collectively and exclusively govern the supply of Goods and provision of ancillary Services by the Supplier to Transnet;
- 2.3. **"Background Intellectual Property"** means all Intellectual Property introduced and required by either Party to give effect to their obligations under the 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 the Agreement;
- 2.4. **"Business Day(s)"** means Mondays to Fridays between 07:30 and 16:00, excluding public holidays;
- 2.5. **"Commencement Date"** means the effective date at which time the Supplier's provision of Goods and associated ancillary Services to Transnet in terms of the Agreement shall commence, as detailed in Annexure A hereto (SCHEDULE OF REQUIREMENTS);
- 2.6. **"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

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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 the 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

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- (o) 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;
- 2.7. **“Copyright”** means the right in expressions, procedures, methods of operations or mathematical concepts, computer program codes, compilations of data or other material, literary works, musical works, artistic works, sound recordings, broadcasts, program carrying signals, published editions, photographic works, or cinematographic works of the copyright owner to do or to authorise the doing of certain acts specified in respect of the different categories of works;
- 2.8. **“Designs”** mean registered Designs and/or Design applications and will include the monopoly right granted for the protection of an independently created industrial design including designs dictated essentially by technical or functional considerations as well as topographies of integrated circuits and integrated circuits;
- 2.9. **“Foreground Intellectual Property”** means all Intellectual Property developed by either Party pursuant to the Agreement;
- 2.10. **“Goods”** mean the material / products as specified in the Schedule of Requirements in Annexure A hereto;
- 2.11. **“ICC Incoterms 2000”** means the set of commercial trade terms as published by the International Chamber of Commerce, Paris (ICC), which are otherwise referred to as purchase terms and which define precisely the responsibilities, costs and risks of the buyer (“Transnet”) and the seller (“the Supplier”). Incoterms are only applicable to contracts involving the import or export of Goods from one country to another and for the purpose of the Agreement, if applicable, shall mean the designated Incoterm as stipulated in Annexure A hereto. Further details of the Incoterm (purchase terms) for the Agreement, if applicable, can be viewed at the International Business Training website - <http://www.i-b-t.net/incoterms.html>;
- 2.12. **“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;
- 2.13. **“Know-How”** means all Confidential Information of whatever nature relating to the Intellectual Property and its exploitation as well as all other Confidential Information generally relating to Transnet's field of technology, including technical information, processing or manufacturing techniques, Designs, specifications, formulae, systems, processes, information concerning materials and marketing and business information in general;

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- 2.14. **"Parties"** mean the Parties to the Agreement together with their subsidiaries, divisions, business units, successors-in-title and assigns;
- 2.15. **"Party"** means either one of these Parties;
- 2.16. **"Patents"** mean registered Patents and Patent applications, once the latter have proceeded to grant, and includes a right granted for any inventions, products or processes in all fields of technology;
- 2.17. **"Permitted Purpose"** means any activity or process to be undertaken or supervised by a Staff member of one Party during the term of the Agreement, for which purpose authorised disclosure of the other Party's Confidential Information or Intellectual Property is a prerequisite in order to enable such activity or process to be accomplished;
- 2.18. **"Price(s)"** means the agreed Price(s) for the Goods to be purchased from the Supplier by Transnet, as detailed in the Schedule of Requirements, 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;
- 2.19. **"Purchase Order(s)"** means official orders issued by an operating division of Transnet to the Supplier for the supply of Goods or ancillary Services;
- 2.20. **"Services"** means Services provided to Transnet including activities such as consultation, advisory services, implementation services and day-to-day assistance provided by the Supplier, pursuant to the Schedule of Requirements in terms of the Agreement;
- 2.21. **"Staff"** means any partner, employee, agent, consultant, independent associate or contractor, Subcontractor and the staff of such Subcontractor, or other authorised representative of either Party;
- 2.22. **"Schedule of Requirements"** means Annexure A hereto;
- 2.23. **"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 Goods or related Services or any part thereof or material used in the manufacture of the Goods or any part thereof;
- 2.24. **"Subcontractor"** means the third party with whom the Supplier enters into a Subcontract;
- 2.25. **"Tax Invoice"** means the document as required by Section 20 of the Value-Added Tax Act, 89 of 1991;

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2.26. **“Trade Marks”** mean registered Trade Marks and Trade Mark applications and include 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; and

2.27. **“VAT”** means Value-Added Tax in terms of the Value-Added Tax Act, 89 of 1991.

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 either Party hereto by reason of such Party having or being deemed to have structured or drafted such provision.

3.2. Any term, word 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 supply to Transnet of the Goods which meet the requirements and specifications of Transnet, the delivery of which is controlled by means of Purchase Orders to be issued by Transnet and executed by the Supplier in accordance with the Agreement.

4.2. Such Purchase Orders and deliveries to Transnet shall be agreed between the Parties from time to time, subject to the terms of the Schedule of Requirements.

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 in accordance with procedures set out in clause 28 (AMENDMENT AND CHANGE CONTROL). A Party will advise the other Party within 14 (fourteen) Business Days, or such other period as mutually agreed, whether the amendment is acceptable.

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- 4.5. Insofar as any term, provision or condition in the Schedule of Requirements 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 or provision or condition in the Schedule of Requirements shall prevail.

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 -
- (a) enter into an agreement in the name of the other; or
 - (b) give any warranty, representation or undertaking on the other's behalf; or
 - (c) create any liability against the other or bind the other's credit in any way or for any purpose whatsoever.

6. DURATION AND CANCELLATION

- 6.1. Notwithstanding the date of signature hereof, the Commencement Date and duration of the Agreement will be as specified in the Schedule of Requirements appended hereto, unless the Agreement is terminated by either Party in accordance with the provisions incorporated herein or in any schedules or annexures appended hereto.
- 6.2. Notwithstanding clause 16 (BREACH AND TERMINATION), either Party may cancel the Agreement with 30 (thirty) days prior written notice thereof to the other Party, provided that in such instance, the Agreement will nevertheless be applicable in respect of all Purchase Orders which have been placed prior to the date of such cancellation.

7. GENERAL OBLIGATIONS OF THE SUPPLIER

- 7.1. The Supplier shall –
- (a) respond promptly to all complaints and enquiries from Transnet;
 - (b) inform Transnet immediately of any dispute or complaint arising in relation to the storage or delivery of the Goods;
 - (c) conduct its business in a professional manner which will reflect positively upon the Supplier and the Supplier's products;

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- (d) keep full records clearly indicating all transactions concluded by the Supplier relating to the delivery of the Goods and keep such records for at least 5 (five) years from the date of each such transaction;
- (e) 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 Goods and ancillary Services and the conduct of the business and activities of the Supplier;
- (f) observe and ensure compliance with all requirements and obligations as set out in the labour and related legislation of South Africa, including the Occupational Health and Safety Act, 85 of 1993; and
- (g) comply with all applicable environmental legislation and regulations, demonstrate sound environmental performance and have an environmental management policy which ensures that its products, including the Goods or ancillary Services are procured, produced, packaged, delivered and are capable of being used and ultimately disposed of in a way that is environmentally appropriate.

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

- (a) render the supply of the Goods and ancillary Services and perform all its duties with honesty and integrity;
- (b) communicate openly and honestly with Transnet regarding the supply and performance of the Goods and demonstrate a commitment to effecting the supply and performing ancillary Services timeously, efficiently and at least to the required standards;
- (c) endeavour to provide the highest possible standards of service and workmanship, with a reasonable degree of care and diligence;
- (d) use its best endeavours and make every diligent effort to meet agreed deadlines;
- (e) treat its own Staff, as well as all Transnet's Staff, with fairness and courtesy and respect for their human rights;
- (f) practice and promote its own internal policies aimed at prohibiting and preventing unfair discrimination;
- (g) treat all enquiries from Transnet in connection with the supply of the Goods and/or ancillary Services with courtesy and respond to all enquiries promptly and efficiently. Where the Supplier is unable to comply with the provisions of this sub-clause, the Supplier will advise Transnet of the delay and the reasons therefor and will keep Transnet informed of progress made regarding the enquiry;

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- (h) when requested by Transnet, provide clear and accurate information regarding the Supplier's own policies and procedures, excluding Know-How and other Confidential Information, except where a non-disclosure undertaking has been entered into between the Parties;
 - (i) 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;
 - (j) 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;
 - (k) not mislead Transnet or its officers, employees and stakeholders, whether by act or omission;
 - (l) 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
 - (m) immediately report to Transnet any unethical, fraudulent or otherwise unlawful conduct of which it becomes aware in connection with Transnet or the supply of Goods or ancillary Services to Transnet.
- 7.3. In compliance with the National Railway Safety Regulator Act, 16 of 2002, the Supplier shall ensure that the Goods and ancillary Services, to be supplied to Transnet under the terms and conditions of the Agreement, comply fully with the Specifications as set forth in Annexure A hereto, and shall thereby adhere to railway safety requirements and/or regulations. Permission for the engagement of a Subcontractor by the Supplier, as applicable, shall be subject to a review of the capability of the proposed Subcontractor to comply with the specified railway safety requirements and/or regulations. The Supplier and/or its Subcontractor shall grant Transnet access, during the term of the Agreement, to review any safety-related activities, including the coordination of such activities across all parts of its organisation.

8. INVOICES AND PAYMENT

- 8.1. Transnet shall pay the Supplier the amounts stipulated in each Purchase Order, subject to the terms and conditions of the Agreement.
- 8.2. Transnet shall pay such amounts to the Supplier upon receipt of a correct and undisputed Tax Invoice together with the supporting documentation, as specified in the Schedule of Requirements appended hereto, once the undisputed Tax Invoices or such portions of the Tax

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Invoices which are undisputed become due and payable to the Supplier for the delivery of the Goods ordered, in terms of sub-clause 8.4 below.

- 8.3. All Prices set out in the Agreement and the Schedule of Requirements hereto are exclusive of VAT.
- 8.4. Unless otherwise provided for in the Schedule of Requirements appended to the Agreement, Tax Invoices shall be submitted together with a month-end statement. Payment against such month-end statement shall be made by Transnet within 30 (thirty) days after date of receipt by Transnet of the Supplier's statement together with the relevant undisputed Tax Invoice(s) and supporting documentation.
- 8.5. Where the payment of any Tax Invoice, or any part of a Tax Invoice which is not in dispute, is not made in accordance with this clause 8, the Supplier shall be entitled to charge interest on the outstanding amount, at The Standard Bank of South Africa's prime rate of interest in force, for the period from the due date of payment until the outstanding amount is paid.
- 8.6. The Supplier shall remain the owner of all plant, material, machinery, equipment and the like (collectively, "the Supplier's Goods") provided to Transnet until Transnet has paid in full for the Supplier's Goods, it being specifically agreed that Transnet shall acquire no rights (including liens and rights of use) of whatsoever nature in such Supplier's Goods until date of final payment by Transnet. Subject to the foregoing, all risk and benefit to the Supplier's Goods shall pass from the Supplier to Transnet on delivery of the Supplier's Goods by the Supplier to Transnet.

9. PRICE ADJUSTMENTS

- 9.1. Prices for Goods supplied in terms of the Agreement shall be subject to review as indicated in the Schedule of Requirements annexed hereto.
- 9.2. No less than 2 (two) months prior to any proposed Price adjustment, the Parties shall commence negotiations for Prices for the next period or as otherwise indicated in Annexure A hereto. The Parties shall have regard for market-related pricing of equivalent goods, continuous improvement initiatives, costs (including raw materials and transport/delivery), order size and frequency and changes to the specification of the Goods.
- 9.3. Should Transnet and the Supplier fail to reach an agreement on Price for the successive period, either Party shall be entitled to terminate the Agreement after giving 30 (thirty) days written notice to the other, except for any Purchase Order accepted by the Supplier which shall be binding on the Parties and shall survive such termination.

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- 9.4. Neither Party shall have any claim against the other of whatsoever nature by reason of such cancellation as envisaged in sub-clause 9.3 above.
- 9.5. If during the period of the Agreement Transnet can purchase similar Goods of a like quality from another supplier at a total delivered cost to a Transnet facility that is lower than the total delivered cost of the Goods purchased hereunder from the Supplier, Transnet may notify the Supplier of such total delivered cost and the Supplier shall have an opportunity to adjust the Price of the Goods purchased hereunder, on such a basis as to result in the same total delivered cost to Transnet, within 30 (thirty) calendar days of such notice. If the Supplier fails to do so or cannot legally do so, Transnet may (i) purchase the Goods from such other supplier in which case the obligations, including, but not limited to, any purchase and sale requirements and/or commitments, if any, of Transnet and the Supplier hereunder shall be reduced accordingly; (ii) terminate the Agreement without any penalty, liability or further obligation; or (iii) continue purchases under the Agreement.
- 9.6. If during the period of the Agreement the Supplier sells any materials which are the same as, equivalent to, or substantially similar to the Goods herein, at a total delivered cost to a third party lower than the total delivered cost to a Transnet facility, then the Supplier has an opportunity to adjust its Price for the Goods purchased hereunder within 30 (thirty) calendar days so that the Price is the same or lower than the total delivered cost of such third party. If the Supplier fails to do so or cannot legally do so, Transnet may (i) purchase the Goods from any other such supplier, in which case the obligations, including, but not limited to, any purchase and sale requirements and/or commitments, if any, of Transnet and the Supplier hereunder shall be reduced accordingly; or (ii) terminate the Agreement without any penalty, liability or further obligation. Within 30 (thirty) calendar days of the Commencement Date of the Agreement or at any time Transnet so requests, the Supplier shall certify in writing to Transnet that it is in compliance with this clause and shall provide all information that Transnet reasonably requests in order to verify such compliance.

10. WARRANTIES

10.1. The Supplier warrants that -

- (a) Pursuant to sub-clause 7.3 (GENERAL OBLIGATIONS OF THE SUPPLIER), the Goods will be manufactured in accordance with the specifications appended hereto at Annexure A, or the manufacturer's specifications, as agreed in writing by both Parties;
- (b) that the execution and performance of the Agreement by the Supplier does not infringe any rights of a third party or breach any obligation of the Supplier to any third party; and

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- (c) 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.

11. THIRD PARTY INDEMNITY

The Supplier hereby indemnifies and shall hold Transnet harmless against any direct damages suffered by or claims arising against Transnet in respect of sub-clause 10.1(b) above.

12. INSPECTION

- 12.1. Transnet reserves the right to arrange for the inspection of all Goods forming the subject of any Purchase Order, at any stage before final acceptance and by any means it may think fit, and when such inspection is to be carried out, the relevant Purchase Order(s) shall be endorsed accordingly.
- 12.2. When inspection at the Supplier's works or warehouse is specified, Transnet's authorised inspector shall have free access to the premises of the Supplier at all times during working hours on a Business Day; shall have liberty to inspect work which is the subject of the Purchase Order at any stage of manufacture, and may reject any Goods which are found to be incomplete, defective or in any way not in conformity with the terms and specifications of the Agreement; and the Supplier shall afford all reasonable facilities for such access and inspection.
- 12.3. The Supplier shall provide inspection gauges, measuring and test equipment to ensure that the requirements of the Agreement are satisfied. All gauges, templates, tools and other equipment required to check the accuracy of the work shall be calibrated at regular and reasonable intervals by a laboratory which has been approved in writing by Transnet. This certificate shall not be more than 12 (twelve) months old.
- 12.4. The Supplier shall prepare and supply, without charge to Transnet, all test pieces, samples and specimens; shall provide all labour and apparatus for carrying out tests and analyses in accordance with the terms of the Agreement or Purchase Order, and render all reasonable assistance in making such tests and analyses.
- 12.5. All special rules governing gauging, testing, analysis and other inspection procedures shall be adhered to strictly in accordance with the terms of the Agreement or Purchase Order and the conditions of any specifications and drawings quoted therein.
- 12.6. Inspection will be arranged by the Staff of Transnet, as indicated in the Purchase Order(s).

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- 12.7. When Goods are ready for inspection, the Supplier shall apply promptly to the appropriate authority for instructions regarding such inspection. All applications for inspection shall quote Transnet's Agreement or Purchase Order number. 7 (seven) Business Days' notice of readiness from the Supplier shall be given to the authorised inspector appointed by Transnet to carry out such inspection.
- 12.8. Transnet shall have the right to recover from the Supplier the cost of inspection of any Goods that have been rejected by its authorised inspector in terms of this clause 12.

13. DEFECTIVE GOODS

Notwithstanding any certificate and/or receipt that may have been issued by or on behalf of Transnet either in South Africa or overseas, Goods will be accepted at the place of delivery or at the port of shipment, as specified in the Agreement, only as regards outward condition of packages and Transnet retains the right to reject the Goods supplied, on or after arrival at the place to which they are consigned, or after they have been placed in use in South Africa, should they be found defective.

- 13.1. If Goods are rejected owing to latent defects becoming apparent during machining operations or other preparation necessary on the part of Transnet before they can be put into use, the Supplier shall bear all expenses incurred by Transnet in carrying out such necessary operations.
- 13.2. If such Goods are rejected, the Supplier will pay the following costs -
- (a) for Goods purchased in South Africa on an ex works basis, the cost of transport from the Supplier's works in South Africa to the named destination where the Goods have been rejected by Transnet, plus handling charges and storage, if leviable; or
 - (b) for Goods manufactured overseas, the Supplier shall pay all replacement costs including the overseas inland transport cost, freight and insurance charges incurred plus railage or other inland transport costs from the South African port to the place where the Goods have been rejected by Transnet, including handling charges, storage, landing charges, customs duty and surcharges, if leviable.
- 13.3. If Transnet requires rejected Goods to be replaced, the Supplier shall, when called upon to do so, arrange prompt replacement of the Goods within the prescribed manufacturing lead times for such Goods, as indicated in Annexure A.
- 13.4. If Goods are found to be defective but the defects are, in the opinion of Transnet, not of so serious a nature as to warrant total rejection of the Goods, the Supplier shall, when called upon

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to do so, remedy or make good such defects at its own cost, or Transnet may remedy or make good such defects at the request of the Supplier and recover from the Supplier all costs or expenses reasonably incurred by it in doing so.

- 13.5. Should the Supplier fail, when called upon to remedy or make good such defects within a reasonable time or to request Transnet to do so, Transnet may proceed to remedy or make good such defects and thereafter recover from the Supplier all such costs and expenses as aforementioned.
- 13.6. Any amount recoverable from the Supplier in terms of this clause may, without prejudice to any other legal remedies available to Transnet, be deducted in whole or in part from any monies in the hands of Transnet which are due for payment to the Supplier.

14. TOTAL OR PARTIAL FAILURE TO PERFORM THE SCOPE OF SUPPLY

- 14.1. In the case of Goods to be specially manufactured for it, if Transnet at any time ascertains that
- (a) no manufacturing of the Goods specified in a Purchase Order has commenced and there is little or no prospect, in Transnet's opinion, that manufacturing will commence within a reasonable time; or
 - (b) delivery of any of the Goods is being or is likely to be delayed beyond the promised delivery date(s), and there is little or no prospect of the Purchase Order(s) being carried out within reasonable adherence to the promised delivery rate(s) or time(s);

then Transnet may, irrespective of the cause of the delay, by notice to the Supplier, cancel as from a future date specified in such notice the whole or any part of the Agreement or Purchase Order in respect of which the Goods to be supplied have not been completed by that date, without incurring any liability by reason of such cancellation except as provided in this clause.

- 14.2. The Supplier shall thereupon, as soon as possible after such date, deliver to Transnet the Goods (if any) already completed, and payment for the part performance shall be made on a "pro rata" basis, provided the uncompleted part is not an integral or essential part of the completed Goods. Where an integral or essential part of the work has not been completed, the amount to be paid to the Supplier will be calculated on the basis of Transnet's enrichment. The Supplier shall, wherever practicable, supply Transnet with the necessary drawings and/or specifications to enable it to complete the work.

- 14.3. Whenever, in any case not covered by sub-clause 14.1 above, the Supplier fails or neglects to execute the work or to deliver any portion of the Goods as required by the terms of the Agreement or Purchase Order, or if any Goods are rejected on any of the grounds mentioned in clause 13 (DEFECTIVE GOODS), Transnet may cancel the Agreement or Purchase Order in so

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far as it relates to the unexecuted work or the undelivered or rejected portion of the Goods, and in such event, the supply of the remaining portion shall remain subject in all respects to these conditions.

15. RIGHTS ON CANCELLATION

- 15.1. If the Agreement or Purchase Order is cancelled in whole or in part in terms of clause 14 (TOTAL OR PARTIAL FAILURE TO PERFORM THE SCOPE OF SUPPLY), Transnet may execute or complete the Agreement with any other entity and do so on such terms as it may deem proper, or may procure other comparable Goods in substitution for those neglected to be manufactured or supplied or rejected as aforesaid, and may recover from the Supplier the difference between the cost of such Goods and the Price (if the latter was lower) as well as any costs and expenses (including any additional transport costs) which Transnet may have had to incur in consequence of the Supplier's default.
- 15.2. Any amount which may be recoverable from the Supplier in terms of sub-clause 15.1 above, without prejudice to any other legal remedies available to Transnet, may be deducted in whole or in part from any monies in the hands of Transnet and due for payment to the Supplier.

16. BREACH AND TERMINATION

- 16.1. 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.
- 16.2. 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 action, application or proceeding is made with regard to it for -
- (a) a voluntary arrangement or composition or reconstruction of its debts;
 - (b) the presentation of an administrative petition;
 - (c) its winding-up or dissolution;
 - (d) the appointment of a liquidator, trustee, receiver, administrative receiver or similar officer;
- or

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- (e) any similar action, application or proceeding in any jurisdiction to which it is subject.
- 16.3. 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 purposes 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.
- 16.4. The provisions of clauses 2 (DEFINITIONS), 10 (WARRANTIES), 15 (RIGHTS ON CANCELLATION), 19 (CONFIDENTIALITY), 21 (LIMITATION OF LIABILITY), 22 (INTELLECTUAL PROPERTY RIGHTS), 25 (DISPUTE RESOLUTION) and 29.1 (GOVERNING LAW) shall survive termination or expiry of the Agreement.

17. CESSATION

- 17.1. Upon written notice to the Supplier, Transnet shall be entitled –
- (a) to appoint Transnet's financier of the Goods as first payer under the Agreement, without transferring the ultimate responsibility for payment which will remain with Transnet; and
 - (b) to cede, assign and transfer its right, title and interest in the Goods to such financier as part of the funding consideration for the Goods.
- 17.2. The Supplier is not entitled to cede, delegate, assign, Subcontract or in any other manner dispose of any of its rights or obligations in terms of the Agreement without the prior written consent of Transnet, which consent shall not be withheld unreasonably.

18. FORCE MAJEURE

- 18.1. 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.
- 18.2. 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 a Party fails to agree with such modifications proposed by the other Party

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within 90 (ninety) days of the act of force majeure first occurring, either Party may thereafter terminate the Agreement with immediate notice.

19. CONFIDENTIALITY

19.1. 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 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;
- (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 the Agreement, in which case such copies shall be regarded as Confidential Information;
- (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 analyse 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 the Agreement;
- (e) not to exercise less care to safeguard Transnet Confidential Information than the Party exercises in safeguarding its own competitive, sensitive or Confidential Information;
- (f) 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;

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- (g) 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;
 - (h) 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;
 - (i) 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;
 - (j) 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 the Agreement as if such person or entity has signed the Agreement. The Party disclosing the Confidential Information shall be responsible for any breach of the provisions of the Agreement by such person or entity; and
 - (k) 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.
- 19.2. The duties and obligations with regard to Confidential Information in this clause 19 shall not apply where -
- (a) 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 Staff; or
 - (b) 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
 - (c) 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
 - (d) is independently developed by a Party as proven by its written records.

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19.3. This clause 19 shall survive termination for any reason of the Agreement and shall remain in force and effect from the Commencement Date of the Agreement and 5 (five) years after the termination of the Agreement. Upon termination of the Agreement, all documentation furnished to the Supplier by Transnet pursuant to the Agreement shall be returned to Transnet including, without limitation, all corporate identity equipment including dies, blocks, labels, advertising matter, printing matter and the like.

20. INSURANCES

- 20.1. 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, loss of or damage to Goods, 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.
- 20.2. The Supplier shall arrange insurance with reputable insurers and will produce to Transnet evidence of the existence of the policies on an annual basis within 30 (thirty) days after date of policy renewals.
- 20.3. Subject to sub-clause 20.4 below, if the Supplier fails to effect adequate insurance under this clause 20, 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 liability.
- 20.4. In the event that the Supplier receives written notice from its insurers advising of the termination of its insurance cover referred to in sub-clause 20.1 above 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 either 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.

21. LIMITATION OF LIABILITY

- 21.1. The Supplier's liability under this clause 21 shall be in addition to any warranty or condition of any kind, express or implied by law or otherwise, relating to the Goods or ancillary Services,

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including the quality of the Goods or ancillary Services or any materials delivered pursuant to the Agreement.

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

- (a) death or personal injury caused by its negligence, (including its employees', agents' or Subcontractors' negligence); or
- (b) fraud.

21.3. Neither Party accepts liability for damages and claims of a special, indirect or consequential nature arising as a result of the performance or non-performance of the Agreement, provided that such loss, damages or claims are not the direct result of the willful acts or omissions and/or negligence or of any event which could reasonably have been foreseen and avoided on the part of the other Party. The phrase, "special, indirect or consequential" is deemed to include economic loss, loss of opportunity, loss of profit or revenue, and loss or damage in connection with claims against the principal by third parties.

21.4. Nothing in this clause 21 shall be taken as limiting the liability of the Parties in respect of clauses 19 (CONFIDENTIALITY) and 22 (INTELLECTUAL PROPERTY RIGHTS).

22. INTELLECTUAL PROPERTY RIGHTS

22.1. 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 licence to use Transnet's Background Intellectual Property only for the Permitted Purpose. This licence shall not permit the Supplier to sub-license to other parties.
- (c) The Supplier shall grant to Transnet an irrevocable, royalty free, non-exclusive licence to use the Supplier's Background Intellectual Property for the Permitted Purpose. This licence shall not permit Transnet to sub-license to other parties.
- (d) 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

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of commercially exploiting the Foreground Intellectual Property, to the extent that such access is required.

22.2. 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 the 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 the 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.
- (e) Subject to anything contrary contained in the 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.

22.3. 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

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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.

22.4. **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 any 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.

22.5. **Unauthorised Use of Intellectual Property**

- (a) 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.
- (b) 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.
- (c) The Supplier shall cooperate to provide Transnet promptly with all relevant ascertainable facts.
- (d) 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.

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23. NON-WAIVER

- 23.1. 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.
- 23.2. 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.

24. 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.

25. DISPUTE RESOLUTION

- 25.1. 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.
- 25.2. 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.
- 25.3. Such dispute shall be finally resolved in accordance with the rules of AFSA by an arbitrator or arbitrators appointed by AFSA.
- 25.4. 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 25.
- 25.5. This clause 25 is severable from the rest of the Agreement and shall remain in effect even if the Agreement is terminated for any reason.
- 25.6. This clause 25 shall not preclude either Party from seeking urgent relief in a court of appropriate jurisdiction, where grounds for urgency exist.

26. ADDRESSES FOR NOTICES

- 26.1. The Parties to the Agreement select the physical addresses and facsimile numbers, detailed in Annexure A 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 facsimile number, as may be, by written notice to the other.

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26.2. 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 facsimile.

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

- (a) if posted by prepaid registered post, 10 (ten) days after the date of posting thereof;
- (b) if hand delivered, on the day of delivery; or
- (c) if sent by facsimile, on the date and time of sending of such facsimile, as evidenced by a facsimile confirmation printout, provided that such notice shall be confirmed by prepaid registered post on the date of dispatch of such facsimile, or, should no postal facilities be available on that date, on the next Business Day.

27. WHOLE AND ONLY AGREEMENT

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

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

28. AMENDMENT AND CHANGE CONTROL

Any amendment or change of any nature made to the Agreement and the Schedule of Requirements thereof shall only be valid if it is in writing, signed by both Parties and added to the Agreement as an addendum hereto.

29. GENERAL

29.1. **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.

29.2. **Change of Law:** In the Agreement, unless the context otherwise requires, references to a statutory provision include references to that statutory provision as from time to time amended, extended or re-enacted and any regulations made under it, provided that in the event that the amendment, extension or re-enactment of any statutory provision or introduction of any new statutory provision has a material impact on the obligations of either Party, the Parties will negotiate in good faith to agree such amendments to the Agreement as may be appropriate in the circumstances. If, within a reasonable period of time, the Supplier and Transnet cannot reach agreement on the nature of the changes required or on modification of Prices, delivery

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schedules, warranties, or other terms and conditions, either Party may seek to have the matter determined in accordance with clause 25 (DISPUTE RESOLUTION) above.

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

"Preview Copy Only"

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