

TRANSNET



MASTER AGREEMENT

entered into by and between

TRANSNET LIMITED

Registration Number 1990/000900/06
(hereinafter referred to as "Transnet")

and

.....
Registration Number
(hereinafter referred to as the "Contractor")

FOR THE SUPPLY OF

.....

AGREEMENT NO.

PREVIEW COPY ONLY

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ANNEXURE A - SCHEDULE OF REQUIREMENTS

Agreement No GSMbetween Transnet &

for the Supply of

1. INTRODUCTION

This Agreement is entered into by and between **Transnet Limited**, hereinafter referred to as "Transnet," and, hereinafter referred to as "the Contractor."

NOW THEREFORE, IT IS AGREED:

- 1.1. Transnet hereby appoints the Contractor to provide, and Transnet undertakes to accept the supply of Goods provided for herein, as formally agreed between the Parties and in accordance with the Schedule of Requirements issued as an annexure to this Agreement; and
- 1.2. the Contractor hereby undertakes to provide the Goods provided for herein, as formally agreed between the Parties and in accordance with the Schedule of Requirements issued as an annexure to this Agreement,

2. DEFINITIONS

Where the following words or phrases are used in this 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 this Agreement together with any schedules or annexures attached hereto;
- 2.3. "**Business Day/s**" mean Mondays to Fridays between 07:30 and 16:00, excluding public holidays;
- 2.4. "**Confidential Information**" means any information or other data, whether in written, oral, graphic or in any other form, which a Party discloses or provides to the other Party, or which otherwise becomes known to a Party, and which is not in the public domain and includes, without limiting the generality of the term -
 - 2.4.1. information relating to methods of operation, data and plans of the disclosing Party;
 - 2.4.2. the contents of this Agreement;

- 2.4.3. private and personal details of employees or clients of the disclosing party or any other person where an onus rests on the disclosing Party to maintain the confidentiality of such information;
- 2.4.4. any information disclosed by either Party and which is clearly marked as being confidential or secret;
- 2.4.5. information relating to the strategic objectives and planning of the disclosing Party relating to its existing and planned future business activities;
- 2.4.6. information relating to the past, present and future research and development of the disclosing Party;
- 2.4.7. information relating to the business activities, business relationships, products, services, customers, clients and subcontractors of the disclosing Party where an onus rests on the disclosing Party to maintain the confidentiality of such information;
- 2.4.8. information contained in the software and associated material and documentation belonging to the disclosing Party;
- 2.4.9. technical, scientific, commercial, financial and market information, know-how and trade secrets of a disclosing Party;
- 2.4.10. data concerning architecture, demonstrations, tools and techniques, processes, machinery and equipment of the disclosing Party;
- 2.4.11. plans, designs, concepts, drawings, functional and technical requirements and specifications of the disclosing Party;
- 2.4.12. information concerning faults or defects in Goods, equipment, hardware or software or the incidence of such faults or defects; and
- 2.4.13. information concerning the charges, fees and/or costs of the disclosing Party or its authorised subcontractors, or their methods, practices or service performance levels actually achieved;
- 2.5. **“Goods”** mean the material / products as specified in the Schedule of Requirements at Annexure A hereto;

- 2.6. **“ICC Incoterms 2000”** shall mean 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 exactly the responsibilities, costs and risks of the buyer (“Transnet”) and the seller (“the Contractor”). Incoterms are only applicable to contracts involving the import or export of Goods from one country to another and for the purpose of this Agreement, if applicable, shall mean the designated Incoterm as stipulated in Annexure A hereto. Further details of the Incoterm (purchase terms) for this Agreement, if applicable, can be viewed at the International Business Training website; <http://www.i-b-t.net/incoterms.html>
- 2.7. **“Intellectual Property”** means all rights to and ownership of any idea, discovery, design, concept, technique or improvement, know-how, or invention (whether or not patented), trademark, or copyright material;
- 2.8. **“Parties”** means the Parties to this Agreement, namely:
- 2.8.1. **“Transnet”** being **Transnet Limited**, Registration Number 1990/000900/06, together with its subsidiaries, divisions, business units, successors-in-title and its assigns; and
- 2.8.2. the **“Contractor”** being,
Registration Number, together with its successors-in-title and its assigns;
- 2.9. **“Party”** means either one of these Parties;
- 2.10. **“Price/s”** shall mean the agreed Price/s for the Goods to be purchased from the Contractor by Transnet, as detailed in the Schedule of Requirements, issued in accordance with this Agreement, as amended by mutual agreement between the Parties and in accordance with the terms and conditions in this Agreement from time to time;
- 2.11. **“Purchase Order/s”** means official orders issued by an operational division of Transnet to the Contractor for the supply of Goods or ancillary Services;
- 2.12. **“Services”** means Services provided to Transnet including activities such as consultation, advisory services, implementation services and day-to-day assistance provided by the Contractor, pursuant to the Schedule of Requirements in terms of this Agreement;
- 2.13. **“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;

2.14. “**Schedule of Requirements**” means Annexure A hereto; and

2.15. “**VAT**” means Value-Added Tax in terms of the Value-Added Tax Act, No 89 of 1991.

3. INTERPRETATION

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

3.2. Any term, word or phrase used in this 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 this 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. This Agreement is an agreement under the terms and conditions of which the Contractor 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 Contractor, in accordance with this 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 this Agreement as if it were fully incorporated into the body of this Agreement.

4.4. During the period of this Agreement, both Parties can make written suggestions for amendments to the Schedule of Requirements, in accordance with procedures set out in clause 27 (AMENDMENT AND CHANGE CONTROL) below. A Party will advise the other Party within 14 (fourteen) Business Days, or such other period as mutually agreed, whether the amendment is acceptable.

- 4.5. Insofar as any term, provision or condition in the Schedule of Requirements conflicts with a like term, provision or condition in this Agreement and / or a Purchase Order, or where this Agreement is silent on the matter, the term, provision or condition in the Schedule of Requirements shall prevail.

5. AUTHORITY OF PARTIES

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

6. DURATION AND CANCELLATION

- 6.1. Notwithstanding the date of signature hereof, the commencement date and duration of this Agreement will be as specified in the Schedule of Requirements appended hereto, unless this 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 this Agreement with 30 (thirty) days prior written notice thereof to the other Party; provided that in such instance, this 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 CONTRACTOR

- 7.1. The Contractor shall –
- 7.1.1. respond promptly to all complaints and enquiries from Transnet;
 - 7.1.2. conduct its business in a professional manner that will reflect positively upon the Contractor and the Contractor's products;

- 7.1.3. keep full records clearly indicating all transactions concluded by the Contractor relating to the delivery of the Goods and keep such records for at least 5 (five) years from the date of each such transaction;
- 7.1.4. obtain, and at all times maintain in full force and effect, any and all licenses, permits and the like required under applicable laws for the provision of the Goods and ancillary Services and the conduct of the business and activities of the Contractor; and
- 7.1.5. inform Transnet immediately of any dispute or complaint arising in relation to the storage or delivery of the Goods.
- 7.2. The Contractor acknowledges and agrees that it shall at all times -
- 7.2.1. render the supply of the Goods and ancillary Services and perform all its duties with honesty and integrity;
- 7.2.2. communicate openly and honestly with Transnet regarding the supply and performance of the Goods and demonstrate a commitment to affecting the supply and performing the Services timeously, efficiently and at least to the required standards;
- 7.2.3. endeavour to provide the highest possible standards of service and workmanship, with a reasonable degree of care and diligence;
- 7.2.4. use its best endeavours and make every diligent effort to meet agreed deadlines;
- 7.2.5. treat its own personnel, as well as all Transnet's officers, employees, agents and consultants, with fairness and courtesy and respect for their human rights;
- 7.2.6. practice and promote its own internal policies aimed at prohibiting and preventing unfair discrimination;
- 7.2.7. 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 Contractor is unable to comply with the provisions of this clause, the Contractor will advise Transnet of the delay and the reasons therefore and will keep Transnet informed of progress made regarding the enquiry;

- 7.2.8. when requested by Transnet, provide clear and accurate information regarding the Contractor's own policies and procedures, excluding trade secrets and other Confidential Information;
- 7.2.9. not allow a conflict of interest to develop between its own interests (or the interests of any of its other customers) and the interests of Transnet;
- 7.2.10. not accept or offer, nor allow, induce or promote the acceptance or offering of any gratuity, enticement, incentive or gift that could reasonably be regarded as bribery or an attempt to otherwise exert undue influence over the recipient;
- 7.2.11. not mislead Transnet or its officers, employees and stakeholders, whether by act or omission;
- 7.2.12. not otherwise act in an unethical manner or do anything which could reasonably be expected to damage or tarnish Transnet's reputation or business image; and
- 7.2.13. 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.

8. INVOICES AND PAYMENT

- 8.1. Transnet shall pay the Contractor the amounts stipulated in each Purchase Order, subject to the terms and conditions of this Agreement.
- 8.2. Transnet shall pay such amounts to the Contractor, upon receipt of a correct and undisputed invoice together with the supporting documentation as specified in the Schedule of Requirements appended hereto, once the undisputed invoices, or such portion of invoices which are undisputed become due and payable to the Contractor for the delivery of the Goods ordered, in terms of clause 8.4 below.
- 8.3. All Prices set out in this Agreement and the Schedule of Requirements hereto, are exclusive of VAT.
- 8.4. Unless otherwise provided for in the Schedule of Requirements appended to this Agreement, invoices shall be submitted together with a monthly statement. Payment against such monthly statement shall be made by Transnet within 30 (thirty) days after date of receipt by Transnet of the statement together with all relevant documentation.

9. PRICE ADJUSTMENTS

- 9.1. Prices for Goods supplied in terms of this 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 Contractor 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 any Purchase Order accepted by the Contractor shall be binding on the Parties and shall survive such termination.
- 9.4. Neither Party shall have any claim against the other of whatsoever nature by reason of such cancellation as envisaged in clause 9.3 above.
- 9.5. If during the period of this 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 Contractor, Transnet may notify the Contractor of such total delivered cost and the Contractor shall have an opportunity to price 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 Contractor 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 Contractor hereunder shall be reduced accordingly; (ii) terminate this Agreement without any penalty, liability or further obligation; or (iii) continue purchases under this Agreement.
- 9.6. If during the period of this Agreement the Contractor 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 Contractor has an opportunity to adjust its Price for the Goods purchased hereunder within thirty (30) calendar days so that the Price is the same or lower than the total delivered cost of such third party. If the Contractor 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 Contractor hereunder shall be reduced accordingly; or (ii) terminate this Agreement without any penalty, liability or further obligation. Within 30 (thirty) calendar days of the commencement date of this Agreement or at any time Transnet so requests, the Contractor 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 Contractor warrants that -

- 10.1.1. 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; and
- 10.1.2. that the execution and performance of this Agreement by the Contractor does not infringe any rights of a third party or breach any obligation of the Contractor to any third party.

11. INDEMNITY

The Contractor hereby indemnifies and shall hold Transnet harmless against any direct damages suffered by or claims arising against Transnet in respect of clause 10.1.2 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 Contractor's works or warehouse is specified, Transnet's authorised inspector shall have free access to the premises of the Contractor 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 this Agreement; and the Contractor shall afford all reasonable facilities for such access and inspection.
- 12.3. The Contractor 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 Contractor 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.
- 12.7. When Goods are ready for inspection, the Contractor 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 Contractor 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 Contractor 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 Contractor shall bear all expenses incurred by Transnet in carrying out such necessary operations.

13.2. If such Goods are rejected, the Contractor will pay the following costs -

- 13.2.1. for Goods purchased in South Africa on an ex works basis, the cost of transport from the Contractor'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
- 13.2.2. for Goods manufactured overseas, the Contractor shall pay all replacement costs including the overseas inland transport cost, freight and insurance charges incurred plus railage or other inland transport costs from South African ports 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 Contractor 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 Contractor shall, when called upon to do so, remedy or make good such defects at his own cost, or Transnet may remedy or make good such defects at the request of the Contractor, and recover from the Contractor all costs or expenses reasonably incurred by it in doing so.
- 13.5. Should the Contractor 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 Contractor all such costs and expenses as aforementioned.
- 13.6. Any amount recoverable from the Contractor 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 Contractor.

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

- 14.1.1. 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
- 14.1.2. 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 Contractor, 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 Contractor 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 Contractor will be calculated on the basis of Transnet's enrichment. The Contractor 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 clause 14.1, the Contractor 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 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 this Agreement or Purchase Order is cancelled in whole or in part in terms of clause 14 (TOTAL OR PARTIAL FAILURE TO PERFORM....), 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 Contractor 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 Contractor's default.

15.2. Any amount which may be recoverable from the Contractor in terms of clause 15.1 of this clause, 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 Contractor.

16. BREACH AND TERMINATION

16.1. If either Party (the “Defaulting Party”) commits a material breach of this 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 this Agreement, to terminate this Agreement forthwith without any liability and without prejudice to any claims which the Aggrieved Party may have for damages against the Defaulting Party. For the avoidance of doubt, if -

- 16.1.1. the Contractor effects or attempts to effect a compromise or composition with its creditors; or
- 16.1.2. either Party is provisionally or finally liquidated or is placed under judicial management, whether provisionally or finally; or
- 16.1.3. either Party ceases or threatens to cease to carry on its normal line of business or defaults or threatens to default in the payment of its liabilities generally, or commits any act or omission which would be an act of insolvency in terms of the Insolvency Act, 1936 (as amended); then

the other Party shall be entitled, but not obliged, to terminate this Agreement on written notice, in which event such termination shall be without any liability and without prejudice to any claims which either Party may have for damages against the other.

17. CESSION

17.1. Transnet shall be entitled, upon written notice to the Contractor, to –

- 17.1.1. appoint Transnet’s financier of the Goods as first payer under this Agreement, without transferring the ultimate responsibility for payment which will remain with Transnet; and
- 17.1.2. to cede, assign and transfer its right, title and interest in and to the rights to ownership in the Goods to such financier, as part of the funding of the consideration payable for the Goods.

- 17.2. The Contractor is not entitled to cede, delegate, assign or in any other manner dispose of any of its rights or obligations in terms of this 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 this Agreement, caused by an act of force majeure such as acts of God, fire, flood, war, strike, lockout, industrial dispute, utilities, machinery or equipment, transport or facilities, 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 this Agreement in order to accommodate the new circumstances caused by the act of force majeure. If the Parties fail to agree within 90 (ninety) days of the act of force majeure first occurring, either Party may thereafter terminate this Agreement with immediate notice.

19. CONFIDENTIALITY

- 19.1. The Parties hereby undertake the following, with regard to Confidential Information -
- 19.1.1. not to divulge or disclose to any person whomsoever in any form or manner whatsoever, either directly or indirectly, any Confidential Information of the other, without the prior written consent of such other Party, other than when called upon to do so in accordance with a statute, or by a court having jurisdiction, or by any other duly authorised and empowered authority or official, in which event the Party concerned shall do what is reasonably possible to inform the other of such a demand and each shall assist the other in seeking appropriate relief or the instituting of a defensive action to protect the Confidential Information concerned;
- 19.1.2. not to use, exploit, permit the use of, directly or indirectly, or in any other manner whatsoever apply the Confidential Information, disclosed to it as a result of 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;

- 19.1.3. Confidential Information disclosed by either Party to the other or by either Party to any other party used by such Party in the performance of 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;
- 19.1.4. the Parties shall not make or permit to be made by any other person subject to their control, any public statements or issue press releases or disclose Confidential Information with regard to any matter related to this Agreement, unless written authorisation to do so has first been obtained from the Party first disclosing such information; and
- 19.1.5. each Party shall ensure that Confidential Information is disclosed to its Staff or to any other person, on a strictly need to know basis, and that, when such disclosure is made, the Staff or person to whom such disclosure is made is admonished and formally undertakes to comply with the terms and conditions of confidentiality stipulated herein.
- 19.2. The duties and obligations with regard to Confidential Information in this clause 19 shall not apply where -
- 19.2.1. a Party can demonstrate that such information is already in the public domain or becomes available to the public through no breach of this Agreement by that Party, or its Staff; or
- 19.2.2. was rightfully in a Party's possession prior to receipt from the other Party, as proven by the first mentioned Party's written records, without an infringement of an obligation or duty of confidentiality; or
- 19.2.3. can be proved to have been rightfully received by a Party from a third party without a breach of a duty or obligation of confidentiality; or
- 19.2.4. is independently developed by a Party as proven by its written records.
- 19.3. This clause 19 shall survive termination for any reason of this Agreement and shall remain in force and effect from the commencement date of this Agreement and for 5 (five) years after the termination of this Agreement.

20. LIMITATION OF LIABILITY

20.1. The Contractor’s liability under this clause 20 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, including the quality of the Goods or ancillary Services or any materials delivered pursuant to the Agreement.

20.2. The liability of each of the Parties in respect of death or personal injury caused by its negligence, (including its employees’, agents’ or sub-contractors’ negligence), shall not be limited.

20.3. 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 this Agreement, provided that such loss, damages or claims are not the direct result of the wilful 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. INTELLECTUAL PROPERTY RIGHTS

All Intellectual Property owned by the Contractor, as at the commencement date, shall remain the sole and exclusive property of the Contractor, and all intellectual property owned by Transnet shall remain the sole and exclusive property of Transnet.

22. NON WAIVER

22.1. Failure or neglect by either Party, at any time, to enforce any of the provisions of this 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 this Agreement.

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

23. PARTIAL INVALIDITY

If any provision of this 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.

24. DISPUTE RESOLUTION

- 24.1. Should any dispute of whatsoever nature arise between the Parties concerning this Agreement, the Parties shall try to resolve the dispute by negotiation within 10 (ten) Business Days of such dispute arising.
- 24.2. 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.
- 24.3. Such dispute shall be finally resolved in accordance with the rules of AFSA by an arbitrator or arbitrators appointed by AFSA.
- 24.4. 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 24.
- 24.5. This clause 24 is severable from the rest of this Agreement and shall remain in effect even if this Agreement is terminated for any reason.
- 24.6. This clause 24 shall not preclude either Party from seeking urgent relief in a court of appropriate jurisdiction, where grounds for urgency exist.

25. ADDRESSES FOR NOTICES

- 25.1. The Parties to this Agreement select the physical addresses and fax numbers, detailed in Annexure A hereto, as their respective addresses for giving or sending any notice provided for or required in terms of this Agreement, provided that either Party shall be entitled to substitute such other address or fax number, as may be, by written notice to the other.
- 25.2. Any notice addressed to a Party at its physical or postal address shall be sent by prepaid registered post, or delivered by hand, or sent by fax.
- 25.3. Any notice shall be deemed to have been given -
- 25.3.1. if posted by prepaid registered post, 10 (ten) days after the date of posting thereof;
- 25.3.2. if hand delivered, on the day of delivery; or
- 25.3.3. if sent by fax, on the date and time of sending of such fax, as evidenced by a fax confirmation printout, provided that such notice shall be confirmed by prepaid registered post on the date of dispatch of such fax, or, should no postal facilities be available on that date, on the next Business Day.

26. WHOLE AND ONLY AGREEMENT

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

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

27. AMENDMENT AND CHANGE CONTROL

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

28. GOVERNING LAW

This 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. COUNTERPARTS

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

PRIEVIEW COPY ONLY

SIGNED at _____ on _____ 2007

AS WITNESSES:

1. _____

For and on behalf of **Transnet Limited**
duly authorised thereto

2. _____

SIGNED at _____ on _____ 2007

AS WITNESSES:

1. _____

2. _____

For and on behalf of
.....
duly authorised thereto

PREVIEW COPY ONLY