

MEMORANDUM OF AGREEMENT

CONTRACT NUMBER:

BETWEEN

.....
Registration number: xxxxxxxxxxxx
("Company")

and

Eskom HOLDINGS SOC LIMITED
Registration number: 2002/015527/30
("Client")

1. Definitions and Interpretation

1.1 In this Agreement, the following words and expressions shall, unless otherwise stated or inconsistent with the context in which they appear, bear the following meaning:

- 1.1.1 **"Agreement"** means this agreement and all Annexes hereto
- 1.1.2 **"Annexe"** means an annexe attached to the Agreement
- 1.1.3 **"Business Day"** means a day other than a Saturday, Sunday or gazetted public holiday in the Republic of South Africa;
- 1.1.4 **"Client"** means Eskom Holdings SOC LTD, a company incorporated in terms of the laws of the Republic of South Africa, under registration number 2002/015527/30 with its registered office at Megawatt Park, Maxwell Drive, Sunninghill, Sandton, Johannesburg;
- 1.1.5 **"Client Data"** means any information, data, records or materials of any kind which have been provided by the Client or its personnel to the Company pursuant to this Agreement, of which the Client has created, acquired or otherwise has rights in, and which is reasonably required of the Client to enable the Company to provide the Service/s, but specifically excluding (i) anything that may be in the public domain, and

- (ii) anything created for or provided to the Client in terms of this Agreement;
- 1.1.6 **"Company"** Means, a company registered under the laws of the Republic of South Africa, under registration number, with its registered office at;
- 1.1.7 **"Companies Act"** means the Companies Act, No. 71 of 2008, as amended or replaced from time to time, including all regulations promulgated in terms thereof;
- 1.1.8 **"Intellectual Property"** means any and all intellectual property rights of any kind or description anywhere in the world (whether registered or unregistered) owned, possessed or controlled by a Party, directly or indirectly, including, without limitation, patents, trademarks, service marks, design rights, rights in know-how and / or trade secrets, copyright (including all copyright in any designs and computer software), source codes, moral rights, databases, trade, domain or business names, whether capable of registration or not, but including any right to register same;
- 1.1.9 **"Law/s"** means any law in the Republic of South Africa including common law, statute, constitution, decree, judgment, treaty, regulation, directive, by-law, order or any other measure of any government, local government, statutory or regulatory body or court having the force of

- law;
- 1.1.10 **"Month"** means a calendar month;
- 1.1.11 **"Party"** means Client or the Company, as the context in which the word appears requires and **"Parties"** means both Client and the Company;
- 1.1.12 **" Reports"** means the Notification Reports and the Monthly Reports referred to in clause 8.5 and clause 10 of the Agreement, which are created by the Company for the Client and which may incorporate Client Data supplied to the Company by the Client;
- 1.1.13 **"Services"** means the services to be provided by the Company to the Client as fully described in **clause 8 and Annexe A** of the Agreement;
- 1.1.14 **"Signature Date"** means the date on which this Agreement has been signed by both Parties and if signed on different dates, the date of signature of the Party signing last in time;
- 1.1.15 **"VAT"** means value added tax levied from time to time in terms of the Value Added Tax Act, No. 89 of 1991 or any similar tax levied on the supply of goods imposed in terms of any law passed in substitution of the Value Added Tax Act, No. 89 of 1991 and for which tax a purchaser of such goods will be liable in terms

of such substituting law; and

- 1.1.16 “Year” means a 12 (twelve) Month period beginning on the Commencement Date and thereafter, each subsequent period of 12 (twelve) consecutive Months.

1.2 In this Agreement:

- 1.2.1 References to a statutory provision include any subordinate legislation made from time to time under that provision and include that provision as modified or re-enacted from time to time;
- 1.2.2 Notwithstanding anything to the contrary contained herein, all reference to legislation shall include a reference to such legislation as amended or replaced from time to time;
- 1.2.3 Words importing the masculine gender include the feminine and neuter genders and vice versa; the singular includes the plural and vice versa; and natural persons include artificial persons and *vice versa*;
- 1.2.4 References to a "person" include a natural person, company, close corporation or any other juristic person or other corporate entity, a charity, trust, partnership, joint venture, syndicate, or any other association of persons;
- 1.2.5 Any definition, wherever it appears in this Agreement, shall bear the same meaning and apply throughout this Agreement unless otherwise stated or inconsistent with the context in which it appears. If there is any conflict between any definitions in this Agreement then, for purposes of interpreting any clause of the Agreement or paragraph of any Annexe, the definition appearing in that clause or paragraph shall prevail over any other conflicting definition appearing elsewhere in the Agreement;

- 1.2.6 Where any number of days is prescribed, those days shall be reckoned exclusively of the first and inclusively of the last day and shall refer to calendar days unless specifically stated otherwise;
- 1.2.7 Any provision in this Agreement which is or may become illegal, invalid or unenforceable shall be ineffective to the extent of such prohibition or unenforceability and shall be treated as having not been written (i.e. *pro non scripto*) and severed from the balance of this Agreement, without invalidating the remaining provisions of this Agreement;
- 1.2.8 References to any amount shall mean that amount exclusive of VAT, unless the amount expressly includes VAT;
- 1.2.9 The rule of construction that if general words or terms are used in association with specific words or terms which are a species of a particular genus or class, the meaning of the general words or terms shall be restricted to that same class (i.e. the *eiusdem generis* rule) shall not apply, and whenever the word "including" is used followed by specific examples, such examples shall not be interpreted so as to limit the meaning of any word or term to the same genus or class as the examples given;
- 1.2.10 Each of the provisions of this Agreement has been negotiated by the Parties and drafted for the benefit of the Parties, and accordingly the rule of construction that the contract shall be interpreted against or to the disadvantage of the Party responsible for the drafting or preparation of the Agreement (i.e. the *contra proferentem* rule), shall not apply;
- 1.2.11 Where there is a conflict between the terms of the main body of this Agreement (excluding the annexures) and the annexures hereto, the terms of the main body of the Agreement will prevail;

- 1.2.12 The expiration or termination of this Agreement does not affect those of its provisions which expressly provide that they will operate after any such expiration or termination, or which of necessity must continue to have effect after such expiration or termination, notwithstanding the fact that the clauses themselves do not expressly provide this;
- 1.2.13 A reference to a Party includes that Party's successors-in-title and permitted assigns;
- 1.2.14 If figures are referred to in numerals and in words, and there is any conflict between the two, the words will prevail; and
- 1.2.15 If any provision in a definition confers rights, or imposes obligations on any Party, effect is given to it as a substantive provision of this Agreement.

2. **General Warranties**

- 2.1 The warranties contained in this Agreement shall be deemed to be representations and undertakings, material to the entering into of this Agreement, by the Company in favour of Client and by Client in favour of the Company where applicable;
- 2.2 Each warranty shall be a separate warranty and in no way limited or restricted by reference to, or inference from, the terms of any other warranty;
- 2.3 Each warranty is given as at the Signature Date and shall endure for the duration of this Agreement;
- 2.4 Insofar as any of the warranties are promissory or relate to a future event, they shall be deemed to have been given as at the due date for fulfilment of the promise or the happening of the event, as the case may be;

- 2.5 Where any warranty is qualified by the expression "the Company and/or Client is not aware", "to the best of the Company's and/or the Client's knowledge and belief" or any similar expression, that expression shall be deemed to include an additional statement that it has been made after due enquiry;
- 2.6 Nothing contained in this Agreement shall relieve a Party from its obligations to make those disclosures which it is in law obliged to make but which are not recorded in this Agreement.

3. **Warranties Applicable to both Parties**

Each Party hereby warrants unto and in favour of the other Party:

- 3.1 The Party and its representative(s), as applicable, have the requisite power, right and authority to enter into and perform the obligations to be assumed or performed by it in accordance with this Agreement and any other documents to be executed in accordance with this Agreement;
- 3.2 To the best of the Party's knowledge and belief, all facts and circumstances material to this transaction, or which would be material or would be reasonably likely to be material and which may affect the willingness of the Parties to enter into this Agreement and which are known to the Party, have been disclosed by the Party to the other Party; and
- 3.3 As at the Signature Date, no legal proceedings of any kind or administrative proceedings in terms of any law, and which shall prevent either Party from fulfilling its obligations in terms of this Agreement, have been instituted against such Party, and at all times during the currency of this Agreement neither Party has any obligations/duties to third parties which, if discharged, shall prevent the Party from fulfilling its obligations in terms of this Agreement.

4. **Legal Compliance**

In the event that the Client is approached by the Government of South Africa or any regulatory authority with a view to remedying non compliance with such legislation or resulting from the Parties' respective rights and obligations under this Agreement, the Company shall assist the Client by making appropriate representations and taking appropriate steps to mitigate any statutory liability which the Client may have under that legislation.

5. **Compliance with Section 3B of The Protected Disclosures Act and All Laws**

5.1 Notwithstanding anything to the contrary in this Agreement, the Client is responsible for full compliance with the Protected Disclosures Act and the Client hereby indemnifies the Company in respect of any and all losses or damage suffered as a result of any claims that may arise from whomsoever, of whatsoever nature, and howsoever arising, in relation to its non-compliance with the Protected Disclosures Act.

5.2 The Client acknowledges that the Service provided by the Company is an anonymous service and the Company has no obligations in relation to section 3B(1)(b) of the Protected Disclosures Act and the Client must ensure that it has an internal procedure in place to deal with its obligations in terms of section 3B(1)(b) of the Protected Disclosures Act and must make such procedures known to its employees.

6. **Commencement of Services**

The provision of the Services shall commence ("**the Commencement Date**") notwithstanding the Signature Date.

7. **Duration**

7.1 The term of this Agreement shall be for a period commencing on the Commencement Date and will remain in effect for a contract period

(“**Contract Period**”), unless extended or terminated earlier in accordance with the terms of this Agreement;

7.2 This Agreement may also be terminated by either Party in writing by **30 (thirty)** days’ notice to the other party to such effect.

8. Services

8.1 The Client appoints the Company to provide the Services as detailed Annexe A hereto.

A 24-hour live service to receive and register actual or suspected incidents of crimes and other irregularities including financial that are committed against Eskom group from employees, suppliers, customers and other stakeholders.

- a) A service to receive and register actual or suspected incidents of crimes and other irregularities including financial that are committed against Eskom from employees, suppliers, customers and other stakeholders.
- b) A 24-hour (toll free telephone line) live call for 24 hours, 7 days a week, 365 days toll free telephone line.
- c) Ability to receive information from individuals who want to remain anonymous.
- d) Ability to provide additional mechanisms including email, website facility.
- e) Ability to assist the callers in all 11 SA official languages.
- f) A pre-consultant screening process that filters calls before they are connected through to the call center agents.
- g) Reference numbering of all calls/call reports in sequential order to follow client specific requirements.
- h) Reference number to be provided immediately to the caller for future correspondence, including feedback to known whistle-blowers.
- i) Preparing and sending a call report to the Forensic Department within 24 hours of receiving the call.
- j) Communicate incident about on-going crime within 24 hours.

- k) Compiling and providing the client with monthly and quarterly statistical reports by:
 - Incident type,
 - Eskom's identified divisions,
 - Date of call,
 - Reference number,
 - Dropped and prank calls,
 - A list of all calls received, and
 - Concept queries.
- l) Record all calls and obtain all critical information from whistle-blowers (who, what, where, when, why, how).
- m) Provide a facility to keep records and copies of incidents submitted to the client and make such copies available on request to the client.
- n) Capacity to identify links between calls (historic) by specific indicators.
- o) Ability to isolate specific call as provided criteria and forwards such to specified person/s in the distribution list.
- p) Available to make presentation on the functioning of the facility as and when required.
- q) Dedicated (not shared) office space with appropriate and secure facility to keep records of all calls.

9. Fees and Invoice Payment

9.1 The Client agrees to pay, free from deduction or set off, to the Company in respect of the aforesaid Services, the fees as further set out in **Annexe B ("Fees")**.

9.2 Invoicing

- 9.2.1 The Company will address the tax invoice to Eskom Holdings SOC Ltd and include on it the following information:
- 9.2.2 Name and address of the Company and the Client
- 9.2.3 The contract number and title;

- 9.2.4 Company's VAT registration number;
- 9.2.5 The Client's VAT registration number 4740101508;
- 9.2.6 Total amount invoiced excluding VAT, the VAT and the invoiced amount including VAT;
- 9.2.7 Date of the invoice
- 9.2.8 Task Order number
- 9.2.9 Description of the services and quantities
- 9.2.10 Purchase Order number
- 9.2.11 Goods Receipt Number
- 9.2.12 The Company (if registered in South Africa in terms of the companies Act) is required to comply with the requirements of the VAT Act.
- 9.2.13 All tax invoices must be submitted to Eskom Shared Services.

10. Reports

- 10.1 For purposes of this clause 10, clause 19 and clause 20, the words "data subject", "operator", "personal information", "process" and "responsible party" have the meanings given to them in the Protection of Personal Information Act 4 of 2013.
- 10.2 All information, data, records or documents contained in the Reports, or provided to the Client in terms of clause 8.5 and 8.6 hereof, will vest in and/or remain the property of the Company and the Company will retain ownership of any such information, of whatever description, received in terms of this Agreement unless it already falls within the public domain, and the onus of proving this will rest with the Client, subject to any rights that a data subject may have in respect of personal information in terms of applicable data protection Laws.

- 10.3 For the avoidance of doubt and subject to the provisions of clause 11 below, the Parties agree that the Company will retain ownership of all Intellectual Property rights vesting in the Report(s) and any material or work of whatsoever nature created or developed by the Company, at any time pursuant to, or in any way related to the Service(s) or this Agreement in general.
- 10.4 The Client acknowledges and agrees that in order for the Company to properly offer the Service/s and to perform its obligations in terms of this Agreement, certain information, including without limitation, anything pertaining to the identity of the individual/s who provided their own information to the Company through the means identified in Table 1 under clause 8.3 above, shall be retained by the Company. In this regard, the Company reserves the right to withhold certain information, subject to any law or regulatory requirement or obligation providing otherwise.
- 10.5 In order to protect any disclosures made to the Company by whistle-blowers in terms of the Protected Disclosures Act, the Company will never explicitly disclose to the Client the identity of the individual who provided the information to the Company, through the means identified in Table 1 under clause 8.3above, unless the individual making the disclosure specifically requests their identity and contact information to be disclosed to the Client.
- 10.6 Generally, all information that the Company makes available to the Client via the Reports or any other information provided to the Client in terms of this clause 10 contains aggregated information only. This means that aggregated information has been derived from the reporting individual's personal information but is not considered personal information in terms of applicable data protection Laws as this information will not directly or indirectly reveal their identity.

10.7 In the event that a Report does contain any personal information of any data subject, this will be included only in terms of applicable data protection Laws. If such personal information is made available to the Client, the Client hereby indemnifies the Company in respect of any losses suffered or claims made against the Company as a result of the Client not complying with applicable data protection Laws or not being authorised to disclose other personal information to a third party.

10.8 The Client will exercise reasonable precaution in the use of the information contained in the Reports and the Client will not be permitted to alter the Reports in any manner whatsoever without the prior written consent of the Company being obtained, which consent will not be unreasonably withheld.

11. Intellectual Property Rights

11.1 The Company and the Client each own Intellectual Property at the Signature Date (**“Background IP”**). Neither Party shall acquire any rights in respect of the Background IP of the other Party, and nothing in this Agreement shall transfer ownership in any Background IP from one Party to the other Party.

11.2 The Parties record and agree that all information (including without limitation drawings, electronically recorded data, computer programs), Reports, documents (in whatever form) and/or data, and any and all intellectual property rights subsisting therein, developed during or ensuing from or in any way related to the performance of the Company of its obligations under the Agreement (**“Rights”**) will belong to the Company. To the extent that any such Rights may vest in the Client by operation of law, the Client hereby cedes, assigns, transfers and makes over to the Company all such Rights from the date of creation thereof, and the Company hereby accepts such assignment of Rights.

11.3 In the event that the Rights contemplated in the above clause 11.2 and the rights of ownership envisaged in clause 10 above include Client

Data, then the Company hereby grants to the Client a non- exclusive license in perpetuity, at no additional cost, to use the information, data, records or Reports and the underlying Intellectual Property Rights subsisting therein, in the course of its business operations, but subject to the terms of this Agreement. The Client hereby accepts this licence at no additional cost.

12. Dispute Resolution

12.1 This clause is a separate, divisible agreement from the rest of this Agreement and shall:

12.1.1 not be or become void, voidable or unenforceable by reason only of any alleged misrepresentation, mistake, duress, undue influence, impossibility (initial or supervening), illegality, immorality, absence of consensus, lack of authority or other cause relating in substance to the rest of the Agreement and not to this clause. The Parties intend that any such issue shall at all times be and remain subject to arbitration in terms of this clause;

12.1.2 remain in effect even if this Agreement terminates or is cancelled.

12.2 If a dispute (hereinafter collectively referred to as a ("**Dispute**") has arisen between the Parties out of, in relation to, or in connection, with this Agreement, or in regard to:

12.2.1 the existence of, apart from this clause;

12.2.2 the interpretation and meaning of;

12.2.3 the effect of;

12.2.4 the rectification of;

12.2.5 the respective rights or obligations of the Parties under;

- 12.2.6 the breach, termination or cancellation of;
- 12.2.7 any matter arising out of or following the breach, termination or cancellation of; and/or;
- 12.2.8 damages arising in delict, compensation for unjust enrichment or any other claim is valid and enforceable in terms of, this Agreement then and in such event the Dispute will be settled in accordance with the following procedures:

12.2.8.1 **Step One**

The Disputing Party must give a written notice ("**the Dispute Notice**") to the other Party ("**the Receiving Party**") recording the nature of the Dispute as perceived by the Disputing Party, the performance required by the Disputing Party from the Receiving Party in order to resolve the Dispute and/or the manner in which the Disputing Party believes the Dispute must be resolved, and the time period within which such performance is required. The time period, which may not be shorter than seven days and not longer than 14 (fourteen) days, is referred to herein as the "first period".

12.2.8.2 **Step Two**

In the event of the Receiving Party not performing in a manner demanded in the Dispute Notice or the Dispute not being resolved within the first period (or such further period as may be agreed to in writing by the Parties), then authorised representatives of the Parties will meet within a period ("**the Second Period**") of no more than 7 (seven) days after the end of the first period to attempt to settle such dispute in an amicable manner, the outcome of which meeting will be reduced to writing.

12.2.8.3 **Step Three**

If, irrespective of whether the Parties have met or concluded any meeting, no written agreement recording the resolution of the Dispute is signed by the Parties within the Second Period, then the Dispute shall within a period of 7 (seven) days calculated from the end of such Second Period, be referred in writing by the Disputing Party to each of the senior executives of the Company and the Client.

12.2.8.4 **Step Four**

If, irrespective of whether the senior executives (or their appointed nominee) have met or concluded any meeting, no written agreement is signed by the Parties resolving the Dispute within a period of 15 (fifteen) days calculated from the day upon which the Dispute was referred to the senior executives, or within such an extended period as may be agreed to in writing by the Parties, then:

- 12.2.8.4.1 either Party may refer the Dispute to be finally resolved in accordance with the Uniform Rules of Court or its successor body by an arbitrator appointed by the Chairman of the Johannesburg Bar Council. "Refer" in this sub-clause means delivering or transmitting electronically a written notice to the Chairman of the Johannesburg Bar Council requesting the appointment of an arbitrator to determine the Dispute. Referral of the Dispute shall be completed on delivery to and acknowledgement of receipt by the Chairman of the Johannesburg Bar Council of the notice. The Party referring the Dispute shall thereafter deliver or electronically transmit a copy of the referral notice to the other Party;

12.2.8.4.2 the arbitration will be held in Johannesburg in private at a venue as determined by the arbitrator appointed as envisaged in clause 12.2.8.4.1;

12.2.8.4.3 the arbitrator will have regard to the desire of the Parties to dispose of such Dispute expeditiously, economically and confidentially and shall be obliged to provide written reasons for his/her decision, together with reasons for such decision which shall be delivered in writing to the Parties within 21 (twenty one) days after the conclusion of the arbitration hearing;

12.2.8.4.4 the arbitrator will determine the liability for his/her charges and the costs of the arbitration will be paid accordingly by the Parties;

12.2.8.4.5 subject to the provisions of clause 12.3, the Parties irrevocably agree that the decision in any such arbitration proceedings will be final and binding on them, will forthwith be put into effect and may be made an order of any court of competent jurisdiction.

12.3 Either Party has the right to appeal against the decision of the arbitrator appointed in terms of clause 12.2.8.4.1 provided that this is done within 21 (twenty-one) days of receipt by the Parties of the arbitrator's award. The appeal shall be heard by three arbitrators, in accordance with a procedure determined by them, who shall be appointed as follows:

12.3.1 the Party appealing will appoint 1 (one) arbitrator from the ranks of retired High Court Judges or Senior Advocates;

- 12.3.2 the other Party will nominate 1 (one) arbitrator from the ranks of retired High Court Judges or Senior Advocates; and
- 12.3.3 the Chairman of the Johannesburg Bar Council must nominate a third arbitrator from the ranks of retired High Court Judges or Senior Advocates.
- 12.4 Nothing contained in this clause 12 will preclude any Party from applying for, or obtaining, interim relief on an urgent basis from a court of competent jurisdiction pending the decision of the arbitrator on the merits of the Dispute.
- 12.5 The provisions of this clause 12 will continue to be binding on the Parties notwithstanding any termination or cancellation of this Agreement.
- 12.6 Notwithstanding the provisions of clause 12.2.8, a Disputing Party shall be entitled to refer any Dispute to be finally resolved by an arbitrator as contemplated in clause 12.2.8.4 above, without having commenced, or completed, the procedures prescribed in clause 12.2.8 when in the view of the Disputing Party the prescribed procedures may not have been completed before any claim of the Disputing Party may have become prescribed. In this case the other Party shall be precluded from raising in the arbitration and/or any other forum a special plea or defence to the effect that the Disputing Party is precluded from proceeding immediately to arbitration because of the provisions of clause 12.2.8.

13. **Breach and Termination**

- 13.1 If either the Company or the Client commits a breach of any of its respective obligations in terms of this Agreement (Defaulting Party) and fails to remedy that breach within a period of seven **(7) days** of being called upon to do so, in writing, by the other Party (Aggrieved Party), then the Aggrieved Party may without prejudice to any rights which it may have in terms hereof or under Law either:

13.1.1 claim specific performance; or

13.1.2 cancel this Agreement upon written notice of cancellation being provided to the Defaulting Party;

in either event without prejudice to the Aggrieved Party's right to claim damages or to exercise any other rights that the Aggrieved Party may have under this Agreement or in Law.

13.2 The Aggrieved Party may summarily cancel this Agreement at any time by giving to the Defaulting Party written notice of the cancellation if:

13.2.1 the Defaulting Party commits a material breach of this Agreement which cannot be remedied;

13.2.2 the Defaulting Party is, other than for the purposes of reconstruction or amalgamation, placed under voluntary or compulsory sequestration, winding-up, business rescue or the equivalent of any of these in any jurisdiction;

13.2.3 a judgment against the Defaulting Party in respect of which no appeal lies or in respect of which the period for lodging an appeal (excluding any period to seek condonation) has expired and remains unsatisfied for a period of at least 20 days; or

13.2.4 the Defaulting Party makes or offers to make a general assignment or any arrangement or composition with or for the benefit of its creditors generally (or any class of its creditors) for releasing it wholly or partially from its debts or the equivalent in any jurisdiction.

14. Force Majeure

14.1 General

14.1.1 For the purposes of this Agreement, an exceptional event or circumstance:

- 14.1.1.1 which prevents or restricts either Party directly or indirectly from performing all or any of that Party's ("**the Affected Party**") obligations in terms of this Agreement;
 - 14.1.1.2 beyond the reasonable control of the Affected Party;
 - 14.1.1.3 not the direct or indirect result of a breach by the Affected Party of any of its obligations under this Agreement; and
 - 14.1.1.4 could not have been (including by reasonable anticipation) avoided or overcome by the Affected Party, acting reasonably and prudently, subject to clause 14.1.2 shall constitute a "Force Majeure Event" for the purposes of this Agreement.
- 14.1.2 A "Force Majeure Event" shall, subject to the conditions in clauses 14.1.1 being satisfied, include, without limitation:
- 14.1.2.1 war, hostilities (whether war to be declared or not), invasion, act of foreign enemies;
 - 14.1.2.2 rebellion, terrorism, revolution, insurrection, military or usurped power or civil war;
 - 14.1.2.3 riot, commotion, disorder, any blockade or embargo, strikes or lock outs that are on a national scale and directly affects the relevant industry of South Africa, but shall not include any such action that is solely by the Company's personnel and other employees of the Company or its subcontractors;
 - 14.1.2.4 natural catastrophes such as earthquake, hurricane, typhoon, volcanic activity floods (other than heavy rains), fire, 'Acts of God', or explosions."

14.1.3 An event which satisfies the requirements of clause 14.1.1, but is the direct or indirect result of any third party fulfilling contractual, statutory or other obligations to the Affected Party (for reasons which would not in themselves constitute a "Force Majeure Event") shall not constitute a "Force Majeure Event" for purposes of this Agreement.

14.1.4 The Affected Party shall be relieved of performance of its obligations in terms of this Agreement during the period that a Force Majeure Event occurs and its consequences continue (but only to the extent it is so delayed or prevented from performing partially or at all by the Force Majeure Event), and, provided that notice has been given in terms of clause 14.1.5, shall not be liable for any delay or failure in the performance of any of its obligations in terms of this Agreement or losses or damages whether general, special or consequential which the other Party ("the Unaffected Party") may suffer due to or resulting from any such delay or failure.

14.1.5 The Affected Party shall give written notice to the Unaffected Party at the earliest possible opportunity in writing of the occurrence of the event constituting the Force Majeure Event, together with details thereof and a good faith estimate of the period of time for which it shall endure.

14.2 Consequences

At all times whilst a Force Majeure Event continues, the Parties shall meet at regular intervals to discuss and investigate, and if possible, to implement other practical ways and means to overcome the consequences of such a Force Majeure Event, with the objective of achieving the import and intent of this Agreement without unreasonable delay. In this regard the Parties shall explore the possibility of concluding alternative arrangements for the provision of the Services

14.3 Termination of Force Majeure Event

The Affected Party shall use all reasonable endeavours to mitigate the effects of the Force Majeure Event on its ability to perform under this Agreement and to terminate the circumstances giving rise to a Force Majeure Event as soon as reasonably possible and upon termination of the event giving rise thereto, shall forthwith give written notice thereof to the Unaffected Party.

14.4 Extension of this Agreement

14.4.1 In the event that a Force Majeure Event occurs as contemplated herein, the Parties shall, on cessation of the Force Majeure Event, or prior thereto, agree on the period, if any, by which the duration of this Agreement should be extended to take account of interruptions caused by such Force Majeure Event.

14.4.2 In the event of that the Company is prevented by a Force Majeure Event from providing the Services to the Client in terms of this Agreement and for as long as such Force Majeure Event continues, the Client shall not be under any obligation pursuant to this Agreement to procure the Services from the Company exclusively. Without derogating from that principle, the Client shall be entitled to procure the Services from other third party service providers.

14.5 Termination of this Agreement due to Force Majeure Events

Unless otherwise unanimously agreed to in writing between the Parties, this Agreement shall be terminable by either Party if either Party is wholly prevented by a Force Majeure Event from fulfilling its obligations in terms of the agreement and where such prevention endures for a continuous period of at least 2 (two) Months. Neither Party shall have any claim against the other for any loss suffered as a result of such termination.

15. Insolvency

Should the Company commit an act of insolvency, make an offer of compromise or composition, become the subject of a liquidation or business rescue proceedings order then the Client shall be entitled, but not obliged, without prejudice to any other rights which it may have, to terminate this Agreement.

16. Limitation of Liability

Notwithstanding any other provision in this Agreement, neither Party shall be liable in contract or in law or otherwise for any indirect, consequential, punitive and/or special damages or loss of profits or anticipated savings, whether foreseeable or not, and even if a Party has been advised of the possibility of such damages arising, incurred by the other Party arising out of or in connection with this Agreement.

18. Cession and Delegation

18.1 This Agreement shall be binding upon and shall be for the benefit of the Parties and, to the extent permitted by the provisions of this clause 18, their respective successors and assigns.

18.2 Neither Party may delegate nor assign this Agreement including to its holding company, an affiliated company, another company wholly and or partially owned by the Parties, to an entity acquiring all or substantially all of the assets of that Party, or for purposes of securing indebtedness and no such assignment shall release the delegating Party from the obligation to perform in terms of this Agreement, unless the other Party consents thereto in writing. A Party requesting such consent shall provide the other Party with all the necessary information to conduct a reasonable assessment of the request.

19. Confidentiality

- 19.1 Each Party (Recipient) undertakes that, for the duration of this Agreement and after its termination, it will keep in the strictest confidence all information, in whatever form, whether oral, documentary, magnetic, electronic, photographic, or in any other medium whatsoever used for the capturing and keeping of information, which is confidential to the other Party (Owner), its clients or employees, including, to the extent that it is not freely and publicly available, commercial, financial, legal, technical, scientific and research information, trade secrets, passwords, or other secret codes, business methods and systems, the structures and operations of either Party, finances and budgets, marketing methods, methodology, intellectual property, projects, technical and process-related information and specifications, information disclosed with the permission of third parties in which the third parties have confidentiality rights, information legally protected from disclosure, any information the unauthorised disclosure of which could reasonably be expected to cause harm or risk to the Owner and any other information designated by the Owner as confidential or which is manifestly confidential (Confidential Information).
- 19.2 In the event that any Confidential Information has been disclosed prior to the Signature Date, the obligations of the Recipient set out in clause 19.1 will apply from the date of such disclosure of the Confidential Information in question.
- 19.3 The prohibition from disclosing information as contemplated in this clause 19 will not apply where a disclosure is made:
- 19.3.1 with the prior written consent of the Owner;

- 19.3.2 as may be ordered by the Court or required by law or the rules of a stock exchange on which the Recipient is listed;
or
- 19.3.3 in the course of sharing information with Recipient's designated persons referred to in this Agreement. A breach of this clause 19 by the Recipient's designated persons will be deemed a breach by the Recipient.
- 19.4 The Parties will use each other's Confidential Information solely for the purpose for which it is disclosed in connection with this Agreement.
- 19.5 If the Recipient becomes aware that the Owner's Confidential Information has been disclosed contrary to the terms of this Agreement, the Recipient must immediately notify the Owner in writing, and co-operate with the Owner to retrieve the Confidential Information from unauthorised persons and to prevent further disclosure of the Confidential Information.
- 19.6 Subject to clause 19.8, upon the request of the Owner, the Recipient will return, destroy or expunge from any storage device all Confidential Information, other than documents prepared by the Recipient, provided that if required by Law or for purposes of the Services, the Recipient may retain one copy of the Confidential Information for the period so required. Where destruction of the Owner's Confidential or Personal Information is requested, the Recipient must certify to the Discloser within 5 Business Days that this has occurred.
- 19.7 The Parties' obligations in terms of clause 19 will continue indefinitely irrespective of the termination of this Agreement.
- 19.8 All Client Data, including that contained in the Reports provided to the Client, is Confidential Information of the Client.

19.9 Notwithstanding anything else in this Agreement, the Company will be entitled to retain any information it has received during the course of performing its obligations set out in clause 8 and it will not be obliged to destroy such information subject to applicable data protection Laws and that such information remains Confidential, subject to any applicable law.

20. DATA PROTECTION

20.1 Each Party is responsible for compliance with its obligations under applicable Laws in respect of any personal information it processes under this Agreement.

20.2 When acting as an operator for the Client, the Company will:

- 20.2.1 process personal information on behalf of the Client for the sole purpose of providing the Services, as directed by the client or unless otherwise permitted by Law;
- 20.2.2 treat all personal information as confidential and not use it for any other purpose and not disclose it;
- 20.2.3 inform persons who use the Reporting Services that aggregated information is reported to the Client and that their identity will not be disclosed by the Company to the Client or any other person unless they specifically request the Company otherwise;
- 20.2.4 implement and maintain appropriate and reasonable technical and organisational measures to protect the personal information loss, damage, unauthorised destruction and unlawful access or processing; and
- 20.2.5 transfer personal information to its third party service providers who provide backup and data storage services. The Company will take reasonable measures to ensure

that the personal information is adequately protected by those third party service providers,

unless required otherwise by Law or for the performance of the Company's obligations under this Agreement.

20.3 The Client indemnifies the Company against any losses, damages, costs, claims or penalties suffered by the Company as a result of the Client's non-compliance with applicable Laws.

20.4 The Company may conduct research and analytical activities using information collected during the course of performance under this Agreement, but all personal information will be de-identified for this purpose.

21. **General**

The Client agrees that neither it, nor its affiliates, agents, representatives, employees, external advisors, suppliers or subcontractors, will publicly disclose or publicise in any manner the nature of this Agreement or the Services provided by the Company, including, without limitation, by using or allowing the use of the trademark - Whistle Blowers Logo - or any other service mark, trademark, copyright or trade name now or which may hereafter be associated with or owned or licensed by the Company, unless the prior written approval of the Company has been obtained, with the Company specifically agreeing in writing to such disclosure or publication prior to the disclosure or publication.

22. **Entire Agreement**

This Agreement contains all the express provisions agreed on by the Parties with regard to the subject matter of the Agreement and supersedes and novates in its entirety any previous understandings or agreements between the Parties in respect thereof, and the Parties waive the right to rely on any alleged provision not expressly contained in this Agreement.

23. No Stipulation for the Benefit of a Third Person

Save as expressly provided for in this Agreement, no provision of this Agreement constitutes a stipulation for the benefit of a third person (i.e. a *stipulatio alteri*) which, if accepted by the person, would bind any Party in favour of that person.

24. No Representations

A Party may not rely on any representation which allegedly induced that Party to enter into this Agreement, unless the representation is recorded in this Agreement.

25. Variation, Cancellation and Waiver

No contract varying, adding to, deleting from or cancelling this Agreement, and no waiver of any right under this Agreement, shall be effective unless reduced to writing and signed by or on behalf of all the Parties.

26. Indulgences

The grant of any indulgence, extension of time or relaxation of any provision by a Party under this Agreement shall not constitute a waiver of any right by the grantor or prevent or adversely affect the exercise by the grantor of any existing or future right of the grantor.

27. Applicable Law

This Agreement is to be governed, interpreted and implemented in accordance with the laws of the Republic of South Africa.

28. Jurisdiction of South African Courts

The Parties consent to the non-exclusive jurisdiction of the High Court of South Africa, for any proceedings arising out of or in connection with this Agreement.

29. **Service of Documents**

29.1 The Parties choose the following addresses at which documents and notices in legal proceedings in connection with this Agreement shall be served (i.e. their *domicilia citandi et executandi*) and at which notices shall be received:

29.1.1 **In the case of the Client to:** The Senior General Manager –
_____ Division

Physical address	Eskom Holdings SOC LTD Megawatt Park Maxwell Drive Sunninghill
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Postal address	PO Box 1091 Johannesburg 2000
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E-mail address: _____

29.1.2 **In the case of the Company to:**

Physical address:
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Postal address
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E-mail address:

Any legal or other notice shall be deemed to have been duly given:

29.1.3 On the fifth Business Day after posting (14 (fourteen) Business Days if the address is not in the Republic of South Africa), if posted by registered post (airmail, if available) to the Party's address in terms of this clause 29;

29.1.4 On delivery, if delivered to the Party's physical address in terms of this Clause 29 between 08h30 and 17h00 on a Business Day (or on the first Business Day after that if delivered outside such hours);

29.1.5 On dispatch, if sent to the Party's then fax number or e-mail address between 08h30 and 17h00 on a Business Day (or on the first Business Day after that if despatched outside such hours) in terms of this clause 29;

29.1.6 Unless the addressor is aware, at the time the notice would otherwise be deemed to have been given, that the notice is unlikely to have been received by the addressee through no act or omission of the addressee.

29.2 A Party may change that Party's address or fax number or e-mail address for this purpose by notice in writing to the other Party, such change to be effective only on and with effect from the seventh Business Day after the giving of such notice.

29.3 Notwithstanding anything to the contrary herein contained, a written notice or communication actually received by a Party shall be an adequate service of such written notice or communication to that Party notwithstanding that it was not sent to or delivered or served at that Party's chosen *domicilium citandi et executandi*.

30. **Costs**

Each Party shall bear that Party's own legal costs and disbursements of and incidental to the negotiation, preparation, settling, signing and implementation of this Agreement.

31. Signature in Counterparts

This Agreement may be executed in counterparts, each of which shall be deemed to be an original and which together shall constitute one and the same agreement.

32. Independent Advice

Each of the Parties hereby respectively agrees and acknowledges that:

32.1 it has been free to secure independent legal advice as to the nature and effect of each provision of this Agreement and that it has either taken such independent legal advice or has dispensed with the necessity of doing so; and

32.2 each provision of this Agreement (and each provision of the Annexes) is fair and reasonable in all the circumstances and is part of the overall intention of the Parties in connection with this Agreement.

Signed at on the day of

.....
For and on behalf of
ESKOM HOLDINGS SOC LTD
(who warrants that s/he is duly authorised hereto)

Name:

Capacity:

Draft



Signed at on the day of
_____ in the presence of the undersigned witnesses.

For and on behalf of
.....
(who warrants that he is duly authorised hereto)

Name:

Capacity:

LIST OF ANNEXES

Annexe A: Services

Personnel

The **company (supplier)** will ensure that the Personnel which it utilises pursuant to this Agreement from time to time shall have the requisite skills and experience for the role which such Personnel are required to perform under this agreement.

The parties agree that the Personnel of either party may be unavailable for short periods of time for reasons such as annual leave and training, and each party shall for these short periods take steps to minimise any disruption to the services.

~~Compliance with Section 3B of The Protected Disclosures Act and All Laws~~

~~5.1 Notwithstanding anything to the contrary in this Agreement, the Client is responsible for full compliance with the Protected Disclosures Act and the Client hereby indemnifies the Company in respect of any and all losses or damage suffered as a result of any claims that may arise from whomsoever, of whatsoever nature, and howsoever arising, in relation to its non-compliance with the Protected Disclosures Act.~~

~~5.2 The Client acknowledges that the Service provided by the Company is an anonymous service and the Company has no obligations in relation to section 3B(1)(b) of the Protected Disclosures Act and the Client must ensure that it has an internal procedure in place to deal with its obligations in terms of section 3B(1)(b) of the Protected Disclosures Act and must make such procedures known to its employees.~~

Annexe B: Fees

Lebohang to add