

For the supply and lease of end user computing hardware to Transnet Freight Rail on an as and when required basis for a period of five [5] years

## **MASTER AGREEMENT**

entered into by and between

**TRANSNET SOC LTD**

and

.....

**FOR THE SUPPLY AND LEASE OF END USER COMPUTING HARDWARE  
TO TRANSNET FREIGHT RAIL ON AN AS AND WHEN REQUIRED  
BASIS FOR A PERIOD OF FIVE [5] YEARS.**

**Agreement Number HOAC-HO-37603**

**Commencement Date** .....

**Expiry Date** .....

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ADDENDUMS TO THE MASTER AGREEMENT	

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## 1 PARTIES

1.1 The Parties to this Master Services Agreement are Transnet Freight Rail SOC Limited, a state owned company with registration number 1990/000900/06 trading as Transnet Freight Rail Freight Rail with its registered offices in Inyanda 2, Girton Road, Parktown ("TFR"); and

1.2 [.....], a profit company (private) with registration number [.....] and with its registered offices at [.....]  
[.....]  
[.....] ("Service Provider"). For the avoidance of doubt, the Supplier includes SupplierAffiliates who provides any portion or aspect of the Services in accordance with this Agreement.

1.3 "Party" means any one of them as the context may require.

## 2 DEFINITIONS

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

2.1 **"Acceptance Criteria"** means the criteria to be developed and proposed by the Supplier for review and approval by Transnet Freight Rail and which, if approved in writing by Transnet Freight Rail, is to be used by Transnet Freight Rail for the Acceptance Testing of a Deliverable;

2.2 **"Acceptance Testing Procedures"** mean in relation to a specific Deliverable or set of Deliverables or a category of Deliverables, Acceptance Testing procedures to be prepared and proposed by the Supplier for review and approval by Transnet Freight Rail and which, if approved in writing by Transnet Freight Rail, prescribes the methodology for the implementation of Acceptance Testing (including details of how the Acceptance Testing should be performed, test cases and expected results);

2.3 **"Acceptance Testing"** means the testing by Transnet Freight Rail of a Deliverable delivered by the Supplier to Transnet Freight Rail in terms of a Transaction Document for purposes of determining whether such Deliverable complies with the Documentation, the Relevant Specifications and Acceptance Criteria;

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- 2.4 **"Affiliate"** means (a): a subsidiary or a holding company or a subsidiary of the holding company of any entity. For purposes of this definition the terms "subsidiary" and "holding company" shall have the meaning assigned thereto in Section 1 of the Companies Act, provided that such terms shall also include any foreign entity which, had it been registered in terms of the Companies Act, would fall within the ambit of either of such terms; and/or (b) as to any entity, any other entity that, now or in the future, directly or indirectly, effectively controls, is effectively controlled by, or is under common effective control by another entity together with, such entity. For the purposes of this definition the term "effective control" shall include control of any entity through any voting pool or other arrangement, the right to the exercise of voting rights, directly or indirectly, resulting in effective control of any entity and/or control of its management, and/or the right to appoint the majority of the members of the board of directors of any entity. For this purpose, and without limiting the foregoing, any entity that owns at least 20% (twenty percent) of the voting rights of any other entity shall be deemed to be in effective control of such other entity. The terms "Transnet Freight Rail Affiliate" and "Supplier Affiliate" shall have the rational corresponding meanings;
- 2.5 **"AFSA"** means the Arbitration Foundation of Southern Africa, or its successors in title;
- 2.6 **"Agreement"** means this master services agreement for the provision of end-user computing devices and all Attachments and other documents attached thereto or incorporated herein by reference, as amended from time-to-time.
- 2.7 **"Applicable Law"** means, to the extent it applies to a Party (including, as applicable, Affiliates of a Party), or the Services (including the performance, delivery, receipt or use of the Services, as applicable and wherever occurring), (i) any statute, regulation, notice, policy, directive, ruling or subordinate legislation (including treaties, multinational conventions and the like having the force of law); (ii) the common law; (iii) any binding court order, judgement or ruling; (iv) any applicable industry code, license, policy or standard all of which must be enforceable by law; or (v) any applicable direction, license, policy or order that is given by any regulator, competent authority or organ of state or statutory industry body, and includes (vi) such Applicable Law as may be changed, enacted or repealed from time to time.

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- 2.8 **"B-BBEE"** means broad-based Black Economic Empowerment as set out in the Broad-Based Black Economic Empowerment Act, 53 of 2003 and the 2007 Codes of Good Practice promulgated thereunder, or as amended from time to time.
- 2.9 **"Best Practice"** means a practice that communicates insight on the application of a process or the performance of a task. The Best Practice improves the outcome, diminishes the risk, increases the reliability, or improves the understanding of the process or task.
- 2.10 **"Business Day"** shall bear the meaning given to the term in section 1 of the Companies Act;
- 2.11 **"Change"** means any change to, variation to, substitution to, addition to, or deletion to the Services; shall be deemed to have occurred in circumstances where, subsequent to the Effective Date, any Person acquires the ability, by virtue of ownership, rights of appointment, voting rights, management agreement, or agreement of any kind, to control or direct, directly or indirectly, the board or executive body or decision making process or management of the relevant Party.
- 2.12 **"Change Management Procedure"** means those procedures relating to the control and management of any operational and technical changes to the Services and/or the Deliverables or the deployment of a new Deliverable, as the case may be to be developed by the Supplier in consultation with Transnet Freight Rail, as set out in clause 33 of the Agreement.
- 2.13 **"CMDB"** means the configuration management database;
- 2.14 **"Companies Act"** means the Companies Act, 71 of 2008 of the Republic of South Africa;
- 2.15 **"Confidential Information"** means any information or data of any nature, tangible or intangible, oral or in writing and in any format or medium, which by its nature or content is or ought reasonably to be identifiable as confidential and/or proprietary to the Disclosing Party or which is provided or disclosed in confidence, and which shall include:
- 2.15.1 information relating to the Disclosing Party's business activities, business relationships, products, services, processes, data, and staff, including agreements to which the Disclosing Party is a party;

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2.15.2 information and data relating to the Disclosing Party's clients;

2.15.3 information contained in or constituting or relating to the Disclosing Party's systems, machinery, hardware or software, networks, telecommunications services and facilities, including Third Party products, and associated Material, and information or incidents concerning faults or defects therein;

2.15.4 the Disclosing Party's technical, scientific, commercial, financial and market

2.15.5 information (including valuations and forecasts), methodologies, formulae and trade secrets;

2.15.6 the Disclosing Party's architectural information, demonstrations, plans, designs, drawings, processes, process maps, functional and technical requirements and specifications and the data relating thereto;

2.15.7 Intellectual Property that is proprietary to the Disclosing Party or that is proprietary to a Third Party, including but not limited to Third Party Products and data relating to the customers of the Disclosing Party;

2.16 The Disclosing Party's Data;

2.16.1 any information that the Disclosing Party identifies as confidential by a stamp or other similar notice; and

2.16.2 all other records, data or information collected, received, stored or transmitted in any manner connected with the provision of Services hereunder;

2.17 **"Control"** shall have the meaning given in section 2 (2) of the Companies Act;

2.18 **"Data"** means the data of either Party, including personal information as defined in the PAI Act, and any other applicable legislation in the jurisdiction where the Services are to be provided, supplied, stored, collected, collated, accessed, retained or processed by the Service Provider, irrespective of the media or form and includes: (a) all data that is in the possession of either Party, and all data concerning or indexing such data (regardless of whether or not owned, generated or compiled by such Party); (b) all other records, data, files, input materials, reports, forms and other such items that may be received, computed, developed, used or stored by either Party or any of such Party's Employees, contractors or agents from, for or on



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behalf of such Party, or in connection with the Services, and (c) all Data and Modified Data.

- 2.19 **"Data Subjects"** means either Party's customers, suppliers, Employees and any other Person/s to whom Personal Information relates.
- 2.20 **"Deficiency"** means with respect to a Deliverable: any (i) failure to meet the relevant specifications; (ii) error, Problem, non-conformity or defect resulting in a deviation from the Documentation, Acceptance Criteria, Acceptance Testing Procedures or specifications for such Deliverable; or (iii) incorrect or incomplete Documentation.
- 2.21 **"Deliverable"** means any tangible or intangible materials that are provided by the Supplier to Transnet Freight Rail as part of the Services pursuant to this Agreement.
- 2.22 **"Derivative Works"** means a work which embodies existing material but which has sufficient originality to constitute a new work and which, in terms of Derivative Works created during the Term, shall at all times constitute the Intellectual Property of Transnet Freight Rail;
- 2.23 **"Developed Intellectual Property"** means those intellectual property Deliverables which are developed, created and/or prepared by the Supplier for Transnet Freight Rail at the specific instance and request of Transnet Freight Rail (including as part of a Project) under this Agreement and includes Developed Software. For the avoidance of doubt, Developed Intellectual Property excludes the Supplier Platform.
- 2.24 **"Developed Material"** means any material developed by the Supplier for Transnet Freight Rail at the specific instance and request of Transnet Freight Rail (including as part of a Project) as part of the Services, which for the avoidance of doubt includes training materials, technical and operating manuals, architecture documentation, reports and technical and function specification documentation;
- 2.25 **"Disclosing Party"** means a Party that has disclosed Confidential Information and/or Personal Information to the other Party;
- 2.26 **"Disengagement"** means the complete transition of terminated Services from the Service Provider, its Affiliates and its in respect of Transnet Freight Rail, its Affiliates and any Third Parties as part of the Disengagement Services and in cooperation with

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Transnet Freight Rail so as to not cause any unnecessary interruption of, or cause any unnecessary adverse impact on the Services, any Other Services and/or services provided by Third Parties;

2.27 **"Disengagement Services"** means the provision by the Supplier of all reasonable information and assistance to Transnet Freight Rail to enable Transnet Freight Rail or a Third Party designated by Transnet Freight Rail to take over the Service Provider's obligations under this Agreement in the event of termination or expiration of this Agreement.

2.28 **"Documentation"** means the documentation that Transnet Freight Rail would reasonably require to be provided by the Supplier relating to the Services and/or the Deliverables and includes all materials, documentation, specifications, technical manuals, user manuals, flow diagrams, file descriptions and other written information that describes the function and use of the Services and/or Deliverables.

2.29 **"Effective Date"** means the date on which the Agreement takes effect being the date on which the condition precedent at clause 5 of the Agreement is fulfilled or waived in accordance with its terms. For the avoidance of doubt, this Effective Date applies to the MSA;

2.30 **"End User"** means: (a) all employees of Transnet Freight Rail or any of its Affiliates; and (b) any other Person; designated by Transnet Freight Rail who has access to any of the Services.

2.31 **"End User Computing Devices specification"** means a unit of computing hardware, and/or Equipment and its associated system software, that is used and interacted with by an End-User, including, but not limited to both stationary, mobile, and hand-held computing components, consisting of the desktop or laptop computer itself, as well as the associated peripheral components interconnected electronically via wired or wireless connectivity, including keyboards, mice, monitors, hard drives, CD players, speakers, microphones, scanners, multi-functional devices, smartphones, tablets, and other End-User hardware units as listed in [insert addendum no].

2.32 **"Equipment"** means any hardware supplied to, procured, supported or maintained by the Supplier for Transnet Freight Rail, including the operating system, all other environmental software components necessary for the proper functioning and

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operation of the Equipment (including any firmware) installed upon or contained in such hardware and all relevant Documentation pertaining to such hardware and software;

2.33 **"Event of Default"** occurs if the Service Provider:

2.33.1 has an insolvency event;

2.33.2 fails to comply with any material term or condition of this Agreement;

2.33.3 assigns any of its rights or obligations, except as allowed by this Agreement;

2.33.4 is subject to a change in Control;

2.33.5 does not comply with Applicable Law;

2.33.6 breaches any warranty;

2.33.7 fails to comply with the Remedial Notices

2.33.8 is in breach of this Agreement and fails to rectify the breach within 30 (thirty) days of being notified of the breach by the Transnet Freight Rail;

2.34 **"Fees"** mean the fees and charges payable by Transnet Freight Rail to the Supplier in consideration of the Service Provider's provision of the Services, Projects and any other performance rendered in respect of this Agreement. Rates, costs, price, pricing and charges shall have the corresponding meaning. For the avoidance of doubt, Fees may include monthly unit costs and individual resource rates as defined in [insert addendum no].

2.35 **"Intellectual Property"** means any know-how not in the public domain, Invention (whether or not patented), design, trademark (whether or not registered), or Copyright Material (whether or not registered), goodwill, trade or business name, processes, process methodology and all other identical or similar intellectual property as may exist anywhere in the world and any applications for registration of such intellectual property. For the purposes of this definition, "Copyright Material" means any Material in which copyright subsists;

2.36 **"Losses"** means all losses, liabilities, costs, expenses, fines, penalties, actions, damage, damages, judgments and claims, and all related costs and expenses, legal

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fees on the scale as between attorney and own client, tracing and collection charges, costs of investigation, fines, interest and penalties

- 2.37 **"Maintenance Services"** means the performance of scheduled and/or preventative maintenance services required for the purpose of ensuring the continued functionality of the Equipment in accordance with the relevant Service Levels and specifications set forth in [insert addendum no].
- 2.38 **"Materials"** means the Deliverables, the Supplier Materials and the Third Party Materials;
- 2.39 **"Measurement Interval"** means the period specified in an [insert addendum no] over which the Service Provider's performance of the Service Levels will be measured in order to calculate the Service Credit to which Transnet Freight Rail is entitled in respect of that period. The Measurement Interval shall be a calendar month.
- 2.40 **"OEM"** means original equipment manufacturer;
- 2.41 **"PAI Act"** means the Promotion of Access to Information Act 2 of 2000.
- 2.42 **"Permitted Recipients"** means the representatives of the Receiving Party who are directly concerned with the performance of Services and any other Person (including Supplier Affiliates and their representatives) to whom the Receiving Party discloses Confidential Information with the prior written consent of the Disclosing Party.
- 2.43 **"Permitted Use"** means any use of property (including the Intellectual Property), information (including the Confidential Information) or other material for the purposes contemplated and intended by the Agreement.
- 2.44 **"Personal Information"** shall bear the meaning given to the term in the POPI Act.
- 2.45 **"POPI Act"** means the Protection of Personal Information Act 4 of 2014;
- 2.46 **"Procured Equipment"** means the list of equipment to be procured by the Supplier in terms of this Agreement as listed in [insert addendum no].
- 2.47 **"Processing"**, bears the meaning given to the term in chapter 26 of the POPI Act;

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- 2.48 **"Proposal"** means a written proposal in respect of any new Deliverable or Service which introduces a new service tower, significantly changes the nature or an existing Service Tower or Project.
- 2.49 **"Quotation"** means a written quotation in respect of any new Deliverable or Service which modifies or expands existing services by introducing an installation, move, addition, change or deletion (IMACD) thereto.
- 2.50 **"Relevant Specifications"** means in relation to any Equipment and /or End-User Computing Devices, any criteria or standard which applies thereto, whether contained in any Attachment, any Documentation or Deliverables or any business requirements, functional requirements, architecture requirements, design specifications or technical specifications pertaining thereto which have either been agreed between the Parties or which are published by the proprietor, manufacturer or distributor of such Equipment and /or End-User Computing Device.
- 2.51 **"Root Cause Analysis"** means a Problem analysis process undertaken to identify and quantify the underlying cause(s) of a Problem and document the necessary corrective actions to be taken to prevent recurring Problem, or as otherwise defined in [insert addendum no] from time to time. Priority Level One Incidents will result in a Root Cause Analysis Report to be generated.
- 2.52 **"Services"** has the meaning described in [insert addendum no] attached hereto, and includes the procurement on behalf of Transnet Freight Rail, of the Procured Equipment, whether by way of lease of such Procured Equipment or by way of purchase of the Procured Equipment and as they may evolve during the continued duration of this Agreement and includes Disengagement Services as they may be supplemented, enhanced, modified or replaced in accordance with the terms of this Agreement;
- 2.53 **"Service Credit"** means a penalty amount as provided for in clause 12 of the Agreement and which will be credited to Transnet Freight Rail for any failures of the Supplier to meet a defined Service Level in any Measurement Interval;
- 2.54 **"Service Level"** means a quantitative or qualitative level of service specified in [insert addendum no] of this Agreement as to which the Service Provider's performance of the Services must conform and is a standard for performance of the Services, which sets the Supplier and Transnet Freight Rail expectations, describes

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the products or Services to be delivered, and specifies the metrics by which the effectiveness of service activities, functions and processes will measured, examined, changed and controlled;

- 2.55 **"Service Level Failure"** means anytime that the actual level of performance by the Supplier of a particular Service Level metric as calculated by that particular metric's service level calculation is worse than the Service Level;
- 2.56 **"Supplier Relationship Manager"** means the designated Supplier employee who shall be the Service Provider's primary point of contact for all matters relating to the Agreement (move to relevant Attachment);
- 2.57 **"Signature Date"** means the date of signature of this Agreement, which if signed on different dates, shall be the last of such dates;
- 2.58 **"Taxes"** means all present and future taxes, charges, imposts, duties, levies, deductions, withholdings or fees of any kind whatsoever, or any amount payable on account of or as security for any of the forgoing, by whomsoever and whenever imposed, levied, collected, withheld or assessed, together with any penalties, additions, fines, surcharges or interest relating thereto;
- 2.59 **"Term"** means the duration of the Agreement as described in clause 6 of the Agreement. For the avoidance of doubt, Term shall commence on the Effective Date and shall include the Disengagement Period and any additional period as may be required to transition the Services (TBD);
- 2.60 **"Transnet Freight Rail Authorised Person"** means Transnet Freight Rail's information systems compliance manager or other designated contact person at Transnet Freight Rail and who may or may not be Transnet Freight Rail Relationship Manager;
- 2.61 **"Transnet Freight Rail Relationship Manager"** means the designated Transnet Freight Rail employee who shall be Transnet Freight Rail's primary point of contact for all matters relating to the Agreement;
- 2.62 **"Transnet Freight Rail Sites"** means sites where the Services are to be provided, as provided for in [insert addendum no] hereto;

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- 2.63 **"Transnet Freight Rail Fixed Asset Register"** means the fixed asset register kept, maintained and updated by Transnet Freight Rail from time to time, to ensure that all assets are easily and readily recognizable and located in order to maintain its Procurement Services infrastructure up to date, relevant and complies with Transnet Freight Rail technology and/or asset management and standards and/or Applicable Law;
- 2.64 **"VAT"** means value added tax in terms of the Value Added Tax Act, 89 of 1991 ('the Vat Act');
- 2.65 **"Work Around"** means a temporary solution that the Supplier or Transnet Freight Rail can implement in the event of an incident as an alternate method of providing full Service or process functionality that allows the affected system(s) and/or process(es) to deliver to Transnet Freight Rail an acceptable level of business operations functionality until a permanent incident resolution can be implemented. Any such Work Around must be acceptable to and approved by Transnet Freight Rail;
- 2.66 **"Work Order(s)"** means a detailed scope of work for a Service required by Transnet Freight Rail, including timeframes, Deliverable, Fees and costs for the supply of the Service to Transnet Freight Rail, which may be appended to this Agreement from time to time; and
- 2.67 **"ZAR"** means the South African Rand, the lawful currency of the Republic of South Africa.

### **3 INTERPRETATION**

- 3.1 If a definition imposes substantive rights and obligations on a Party, such rights and obligations shall be given effect to and shall be enforceable, notwithstanding that they are contained in a definition.
- 3.2 Where any term is defined within the context of any particular clause in this Agreement, the term so defined, unless it is specifically stated in the clause in question that the term so defined has a limited application to the relevant clause, shall bear the meaning ascribed to it for all purposes in terms of this Agreement, notwithstanding that the term has not been defined in this clause.

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- 3.3 References to any amount shall mean the amount exclusive of VAT, unless the amount expressly includes VAT.
- 3.4 Where any number of days is prescribed, those days shall be reckoned exclusively of the first and inclusively of the last day unless that day falls on a day which is not a Business Day, in which event the last day shall be the next succeeding Business Day.
- 3.5 The expiry or termination of this Agreement shall not affect such of the provisions of this Agreement which are expressly provided to operate after any such expiry or termination, or which of necessity must continue to have effect after such expiry or termination, notwithstanding that the relevant clause doesn't provide for this.
- 3.6 As the terms of this Agreement have been negotiated by the Parties and drafted for the benefit of the Parties, the rule of construction that the agreement shall be interpreted against the Party responsible for its drafting or preparation, shall not apply.
- 3.7 In this Agreement, the eiusdem generis rule shall not apply and whenever the term "including" is used followed by specific examples, such examples shall not be construed so as to limit the meaning of that term.

#### **4 INTRODUCTION AND APPOINTMENT**

##### **4.1 Appointment**

- 4.1.1 On (.....) Transnet Freight Rail issued a request for proposal (RFP no: HOAC\_HO\_37603) for the supply and delivery of end user computing hardware to Transnet Freight Rail ("RFP"). The Supplier submitted its response on (.....) ("Supplier Bid Response"). The RFP and the Supplier Bid Response are attached hereto as [insert addendum no], respectively.
- 4.1.2 In consideration of the representations; warranties and undertakings given by the Service Provider, and accepted by Transnet Freight Rail, the Parties wish to enter into this Agreement to specify the terms and conditions under which the Supplier will provide the Services to Transnet Freight Rail.
- 4.1.3 This Agreement provides a framework for, and the general terms applicable to the Services that the Supplier will provide to Transnet Freight Rail under this Agreement.



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#### 4.2 As and When Service Requests:

4.2.1 The Supplier is appointed to provide the Services to Transnet Freight Rail from time to time and as when Services are required and subject to complying with, inter alia, timelines, the requisite skills and capacity, and other relevant criteria as required for the Services.

4.2.2 Nothing contained herein shall in any way be construed to be or constitute a guarantee in favour of the Supplier that the Supplier will receive any work or contract for Services for the full duration of the Term under this Agreement.

#### 4.3 Non-Exclusivity:

4.3.1 Transnet Freight Rail reserves the right, to obtain the Services from other Service Providers, subject to the terms of the Agreement. Transnet Freight Rail can exercise such option at any time during the course of this Agreement, provided it notifies the Supplier of its intention to do so.

4.3.2 Nothing contained herein shall in any way be construed to be or constitute a guarantee in favour of the Supplier that the Supplier will receive any work or contract for services in the future, whether under this Agreement or otherwise.

#### 4.4 Purchase Orders

4.4.1 Transnet Freight Rail shall provide to the Supplier purchase orders or order forms requesting any Services to be provided in accordance with clause 8 of this Agreement.

### **5 PARENT COMPANY GUARANTEE OR FINANCIAL GUARANTEE**

5.1 To the extent that the Supplier is not its ultimate parent entity, it shall procure that its ultimate parent company provide a guarantee of its performance of this Agreement ("Parent Company Guarantee") in the form acceptable to Transnet Freight Rail. Notwithstanding the Parent Company Guarantee, the Supplier shall at all times remain liable to Transnet Freight Rail for the performance of the Services in accordance with the terms of this Agreement.

5.2 Should the Supplier not have a parent company such that it is its own ultimate parent company, the Supplier shall be required to provide Transnet Freight Rail with a Financial Guarantee to present to Transnet Freight Rail on or before the Effective

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Date, for approval by Transnet Freight Rail, securing performance by the Supplier of its obligations in this Agreement ("Financial Guarantee"). The Financial Guarantee, shall be held by a reputable financial institution acceptable to Transnet Freight Rail with a long term national credit rating, such as Moody's Investors Service Limited ("Moody's"); Standard & Poor's Rating Services ("Standard and Poor's"); or Fitch Ratings Limited ("Fitch") or any successor to their respective ratings business or any other ratings agency approved by Transnet Freight Rail, of at least A- in the case of Fitch and Standard and Poor, and A3 in the case of and Moody's ("Minimum Credit Rating"). The Financial Guarantee shall be made in favour of Transnet Freight Rail for the Service Provider's obligations in terms of this Agreement, subject to the following:

- 5.3 This Financial Guarantee shall represent 5 % (five percent) of the full value of the Fees and charges payable under the Agreement in accordance with form and standard acceptable to Transnet Freight Rail, for the duration of the Term; and shall remain in full force and effect for such duration (including any renewal hereof);
- 5.4 The Supplier shall not be absolved of any of its obligations and liabilities under this Agreement by virtue of it having obtained a Parent Company or a Financial Guarantee and shall at all times for the term of this Agreement (and in the case of those obligations which survive the termination, beyond such termination date) retain primary liability to Transnet Freight Rail for the performance of the Services and all of its obligations under this Agreement in accordance with the terms of this Agreement.
- 5.5 Transnet Freight Rail shall be entitled to encash either the Parent Company Guarantee or the Financial Guarantee if:
  - 5.5.1 An event occurs in respect of which this Agreement permits Transnet Freight Rail to recover a penalty or Service Credit from the Supplier and the Supplier fails to pay such penalty or Service Credit when it is due in terms of this Agreement or otherwise upon demand by Transnet Freight Rail; or
  - 5.5.2 the Supplier materially breaches this Agreement and such breach is reasonably considered by Transnet Freight Rail to be irremediable; or

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5.5.3 The Supplier materially breaches this Agreement, such breach is reasonably capable of being remedied and the Supplier fails to remedy such breach when called upon by Transnet Freight Rail to do so.

## **6 TERM**

6.1 Notwithstanding the Signature Date hereof, this Agreement will commence on the [.....] and will subsist on an as and when required basis for a period of five (five) years expiring on [.....] ("the Initial Term") unless the Agreement:

6.1.1 is terminated by either Party in accordance with the provisions of clause 36; or

## **7 AFFILIATES**

7.1 It is recorded that Transnet Freight Rail shall be entitled to procure Services from any Supplier Affiliate(s) for itself or any of Transnet's Affiliates under the terms of this Agreement and the Supplier agrees that it or its Affiliates may be required to provide the Services to Transnet Freight Rail's Affiliates in accordance with the Agreement.

7.2 In the event that an operating division or part thereof (department), divests itself from Transnet Freight Rail or that an Affiliate of Transnet Freight Rail divests itself from Transnet Freight Rail, the Service Provider, unless agreed to by the Parties, shall continue to provide any Services under this Agreement to the divested operating division or part thereof, or Affiliate.

7.3 The Supplier hereby acknowledges that any Affiliate of Transnet shall be entitled to benefit from the terms and conditions set forth in this Agreement. As such (i) any licence rights granted to Transnet Freight Rail and (ii) any right of use of any Deliverable, shall be deemed to be granted to Transnet's Affiliates unless specifically recorded otherwise in this Agreement.

7.4 The Supplier shall be required to advise Transnet Freight Rail in writing of any request for Services which it receives directly from any Transnet Affiliate.

7.5 The Supplier hereby acknowledges that to the extent that this Agreement or any Attachment executed under this Agreement regulates the Services to Transnet Freight Rail by the Supplier and which provides for pricing based upon pricing discounts or rebates or upon preferential pricing arising from the aggregation of supply, procurement or licence volumes by Transnet Freight Rail, then, and to that extent,

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Transnet Freight Rail shall be entitled to include within its supply, procurement or licensing volumes, any volumes derived from such Affiliates of Transnet as provided in [Annexure C].

## **8 SERVICES**

- 8.1 The Supplier shall provide purchasing of End User Computing Devices as set forth in [Annexure A] to this Agreement, together with all modifications to such Services, as are applicable from time to time, for the Term.
- 8.2 Supplier shall provide the Services to Transnet Freight Rail and its Affiliates in accordance with its respective Service Levels in exchange for the Fees, which are set out in the price workbook in [Annexure D].
- 8.3 Without limiting the foregoing, the Supplier shall provide hardware, software (operating and management) and other items required to provide the Services and otherwise to perform its obligations hereunder, including its obligations under clause 8.1, all of which shall be deemed included in the Fees.
- 8.4 The Supplier shall be responsible for the provision of all resources, including all hardware, software and Employees required to provide the Services in accordance with the Service Levels, at whatever volumes are from time to time required by Transnet Freight Rail and/or its Affiliates.
- 8.5 The Supplier is fully responsible for the performance of its obligations under this Agreement with respect to the Services provided by the Supplier to Transnet Freight Rail and its Affiliates.
- 8.6 The Supplier shall be entitled to undertake and execute any necessary cost, process and technology optimisations within its own operations in relation to the supply, save that such optimisations shall not lead to an adverse impact with regard to the Fees or Service Levels or any consequent contravention of any Applicable Law relating to the Services provided to Transnet Freight Rail.
- 8.7 The Supplier shall supply the goods, lawfully, diligently, and in accordance with Applicable Law, and will not participate in corrupt practices, in contravention of the Prevention and Combating of Corrupt Activities Act 12 of 2004 (the "PCCA Act") and will be required to maintain accurate business records that reflect actual transactions

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and payments. The Supplier is expected to report any behaviour or actions that violate the spirit of this clause 8.

8.8 The manner in which the goods are supplied shall be such that they are easily scalable to support any growth of, or contraction in, Transnet Freight Rail's and/or its Business Units and Departments for the duration of the Agreement.

8.9 All Services shall be provided in compliance with Transnet Freight Rail Integrity Pact, a copy of which shall be provided to the Service Provider, upon request.

## **9 GOOD FAITH AND BEST PRACTICE**

9.1 This Agreement will foster a working relationship between the Parties and establish an agreement that is customer-focused and which provides Services that fully support the business requirements of Transnet Freight Rail.

9.2 The Supplier undertakes to act with due skill, care and diligence at all times when implementing this Agreement. Moreover, it shall ensure that it will discharge its duties and obligations in respect of this Agreement professionally and on a standard commensurate with Best Practice.

9.3 Except to the extent expressly stated to the contrary, time will be of the essence and the Supplier will perform its obligations under this Agreement in accordance with the timeframes set out in [Annexure A], save that the Supplier will not be liable under this clause if it is unable to meet such obligations within the time required as a direct result of any act or omission by Transnet Freight Rail and it has used its best endeavours to advise Transnet Freight Rail of such act or omission. In the event of such delay, any time deadlines detailed in the relevant schedule shall be extended by a period equal to the period of that delay.

9.4 The Supplier will promptly notify Transnet Freight Rail upon becoming aware of any problem (including any Problem), incident or circumstances (including Transnet Freight Rail's failure to perform, or to perform on a timely basis, that may reasonably be expected to jeopardise the performance or timely performance of any part of the Services.

9.5 The Supplier will not take or authorise any action that results in a reduction of the scope of or degradation in the quality and timeliness of the performance of the Services during the term of the Agreement.

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## 10 SERVICE LEVELS

10.1 The Supplier undertakes to act with due skill, care and diligence at all times when supplying the goods. Moreover, it shall ensure that it will discharge its duties and obligations in respect of this Agreement professionally and on a standard set out in the service and performance measurements levels set out in [insert addendum no].

10.2 In order to achieve and provide the required Service Level and quality of Service, the Supplier undertakes to:

10.2.1 supply Transnet Freight Rail with all relevant information needed for the implementation of the; and

10.2.2 adhere to the Service Levels contained in this Agreement and supply the goods subject to the following conditions; namely that the Supplier:

10.2.2.1 obtains the most favourable price, rates and discounts available;

10.2.2.2 shall be entitled to apply no mark-up to the costs of the Equipment;

10.2.2.3 subject to Applicable Law, shall be responsible for ordering, receiving, warehousing, configuring, installing, and testing, such Equipment;

10.2.2.4 ensures that the Procured Equipment is compatible with Transnet Freight Rail's network infrastructure, including fibre infrastructure;

10.2.2.5 ensures that all elements, where applicable, function properly;

10.2.2.6 ensures that the Equipment is tagged; and

10.2.2.7 procures such Equipment in accordance with Transnet Freight Rail's procurement policies.

10.3 Should the Supplier not be able to procure a EUCD as listed in [Annexure A], the Supplier may, upon receipt of Transnet Freight Rail's written approval, procure a replacement of similar functionality and value to the Equipment / Device and immediately reimburse Transnet Freight Rail for the difference in cost, if applicable, between the Equipment / Device as contained in [insert addendum no] and the substituted product.

10.4 All the Procured Equipment listed in [insert addendum no] and/or purchased in pursuit of this Agreement, shall be procured in Transnet Freight Rail's name and Transnet Freight Rail shall have all right, title and interest to them.

## 11 SERVICE CREDITS

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- 11.1 The Supplier recognises that its failure to meet Service Levels may have a material adverse impact on the business and operations of Transnet Freight Rail and that such failure may be deemed an Event of Default. Accordingly, in the event that the Supplier fails to meet a Service Level, then in addition to all other remedies available to Transnet Freight Rail in law or under this Agreement, Transnet Freight Rail may recover the applicable Service Credit from the Supplier as specified [insert addendum no].
- 11.2 In the event that Transnet Freight Rail is entitled to a Service Credit and elects not to enforce the Service Credit, the Service Credit(s) shall accrue to Transnet Freight Rail. If more than one Service Credit has accrued to Transnet Freight Rail in one Measurement Interval, the sum of the corresponding Service Credits shall be credited to Transnet Freight Rail in accordance with clause 11.1.
- 11.3 Each month no later than 15 (fifteen) Business Days after the end of the preceding month, Transnet Freight Rail and the Supplier shall meet to finalise that preceding month's invoice. At such meetings, the Supplier shall provide Transnet Freight Rail with a report detailing the Service Level Failures and the Service Credits to which Transnet Freight Rail is entitled.
- 11.4 The Supplier shall itemise all Service Credits incurred in a Measurement Interval in its monthly invoice relating to the month applicable to the Measurement Interval, and such Service Credits shall be credited as the total amount of Service Credits related to that given month and be set off against the following months invoice.
- 11.5 If the Agreement is terminated prior to the end of a particular month, the Supplier shall prepare the report referred to in clause 11.3 on the written request of Transnet Freight Rail and the assessment referred to therein shall be undertaken for the portion of the month during which the Agreement was in effect. Notwithstanding the foregoing, upon termination or expiration of the Term, the Supplier shall pay to Transnet Freight Rail the amount of any Service Credits that are due and outstanding at that time.

## **12 FAILURE TO COMPLY WITH SERVICE LEVELS**

- 12.1 The Service Provider's performance of the Service Level shall be measured in terms of the service level agreements set out in [insert addendum no].

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- 12.2 If the Supplier fails to comply with its measurement and reporting obligations with respect to a Service Level as provided in [insert addendum no], it will be deemed to have failed such Service Level.
- 12.3 The Parties shall meet at least monthly, or more frequently as may be agreed, to review the Service Provider's actual performance against the Service Levels and shall collectively recommend remedial actions to resolve any performance Deficiencies.
- 12.4 Notwithstanding the recommended remedial action as stipulated above; the Supplier shall, at its sole cost and expense, implement appropriate measures to remedy the performance Deficiency.

### **13 BBEE AND SOCIO-ECONOMIC OBLIGATIONS**

#### **13.1 B-BBEE Scorecard**

- 13.1.1 Transnet Freight Rail fully endorses and supports the Broad-Based Black Economic Empowerment Programme and is strongly of the opinion that all South African business enterprises have an equal obligation to redress the imbalances of the past. It is also a fundamental requirement of the RFP that the Supplier also contributes to the Supplier Development Programme, as applied by Transnet Freight Rail.
- 13.1.2 In response to this requirement, the Supplier shall submit to Transnet Freight Rail's Contract Manager or such other designated person details of its B-BBEE status in terms of the latest Codes of Good Practice issued in terms of the B-BBEE Act and proof thereof at the beginning of March each year during the currency of this Agreement.
- 13.1.3 The Supplier undertakes to notify and provide full details to Transnet Freight Rail in the event there is:
- 13.1.3.1 a change in the Service Provider's B-BBEE status which is less than what it was at the time of its appointment including the impact thereof; and
  - 13.1.3.2 a corporate or internal restructure or change in control of the Supplier which has or likely to impact negatively on the Service Provider's B-BBEE status.
- 13.1.4 Notwithstanding any other reporting requirement in terms hereof, the Supplier undertakes to provide any B-BBEE data (underlying data relating to the Supplier



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which has been relied upon or utilised by a verification agency or auditor for the purposes of issuing a verification certificate in respect of the Supplier B-BBEE status) which Transnet Freight Rail may request on written notice within 30 (thirty) calendar days of such request. A failure to provide such data shall constitute a Supplier Default and may be dealt with in accordance with the provisions of clause 36.

13.1.5 In the event there is a change in the Service Provider's B-BBEE status, then the provisions of clause 15.2 shall apply.

## **14 PENALTIES**

14.1 Respondents are to note that Transnet Freight Rail will determine the size of the entity (i.e. EME, QSE and Large) and the applicable Non-compliance Penalties annually based on the Service Provider's turnover in the year the penalty applies.

14.2 Should there be a change in the status of the Supplier between the year the B-BBEE Retention Amount is deducted and the year the penalty is imposed, Transnet Freight Rail will be entitled to recover any shortfall between the B-BBEE Retention Amount and Non-compliance Penalty imposed, withhold payment due to the Supplier in lieu of payment of the remaining shortfall or deduct (set off) the amount not paid by the Supplier from the account of the Supplier in the ensuing month.

## **15 FEES AND EXPENSES**

15.1 In consideration of the provision of the Services, Transnet Freight Rail will pay to the Supplier the Fees detailed in [Annexure D Pricing Schedule].

15.2 Unless otherwise agreed in this Agreement, Transnet Freight Rail will reimburse to the Supplier all reasonable and proper expenses incurred directly and solely in connection with the supply of the goods , provided that all such expenses:

15.2.1 are agreed by Transnet Freight Rail in advance;

15.2.2 are incurred in accordance with Transnet Freight Rail's standard travel and expenses policies;

15.2.3 are passed on to Transnet Freight Rail at cost with no administration fee; and

15.2.4 will only be reimbursed if supported by relevant receipts.

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- 15.3 All Tax Invoices relating to Fees, out of pocket expenses and, if applicable, travel and accommodation costs, will provide the detail for each of the Personnel carrying out the Services and incurring the expenses, and the Tax Invoice will, where appropriate, include VAT as a separate item.

## **16 INVOICING AND PAYMENT**

- 16.1 Transnet Freight Rail shall pay the Supplier the amounts stipulated in the relevant schedule or Work Order, subject to the terms and conditions of this Agreement.
- 16.2 Transnet Freight Rail shall pay such undisputed amounts to the Supplier, upon receipt of a valid and undisputed Tax Invoice together with the supporting documentation as specified in the Work Order appended hereto, once the valid and undisputed Tax Invoices, or such portion of the Tax Invoices which are valid and undisputed become due and payable to the Supplier for the supply of the goods, in terms of this Agreement.
- 16.3 All Fees and other sums payable under this Agreement are exclusive of VAT, which will be payable at the applicable rate in ZAR.
- 16.4 Unless otherwise provided for in the Work Order(s) appended to this Agreement, Tax Invoices shall be submitted together with a month-end statement. Payment against such month-end statement shall be made by Transnet Freight Rail within 30 [thirty] calendar days after date of receipt by Transnet Freight Rail of the statement together with all valid and undisputed Tax Invoices and supporting documentation.

## **17 FEE ADJUSTMENTS**

- 17.1 The Supplier shall keep full and accurate records of all costs with the provision of the Services to Transnet Freight Rail, in a format to be approved in writing by Transnet Freight Rail. The Supplier shall produce such records to Transnet Freight Rail for inspection at all reasonable times on request and such records may, at Transnet Freight Rail's option, be audited by Transnet Freight Rail or its designated representatives.

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- 17.2 Should Transnet Freight Rail and the Supplier fail to reach an agreement on Fees for the successive period, either Party shall be entitled to submit this matter to dispute resolution in accordance with clause 48 of this Agreement.
- 17.3 If during the period of this Agreement Transnet Freight Rail can purchase similar goods of a like quality from another Supplier at a lower fee than the Service Provider, Transnet Freight Rail may notify the Supplier accordingly and the Supplier shall have an opportunity to adjust the Fee of the goods purchased hereunder accordingly within 30 [thirty] calendar days of such notice. If the Supplier fails to do so or cannot legally do so, Transnet Freight Rail 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 Freight Rail and the Supplier hereunder shall be reduced accordingly; (ii) terminate this Agreement without any penalty, liability or further obligation; or (iii) continue purchases under this Agreement.
- 17.4 If during the period of this Agreement the Supplier sells any goods which are the same as, equivalent to, or substantially similar to the goods herein to a third party at a lower fee than the fee charged to Transnet Freight Rail, then the Supplier shall adjust its fees for the goods supplied/sold to Transnet Freight Rail in terms of this Agreement, within 30 [thirty] calendar days, so that the Fee is the same or lower than the fees charged to such third party. If the Supplier fails to do so or cannot legally do so, Transnet Freight Rail 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 Freight Rail and the Supplier 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 Freight Rail so requests, the Supplier shall certify in writing to Transnet Freight Rail that it is in compliance with this clause and shall provide all information that Transnet Freight Rail reasonably requests in order to verify such compliance.
- 17.5 Should Transnet Freight Rail and the Supplier fail to reach an agreement on Fees for the successive period, either Party shall be entitled to submit this matter to dispute resolution in accordance with clause 48 of this Agreement.

## **18 RELATIONSHIP MANAGEMENT AND MEETINGS**

18.1 The Parties Shall form a Contract Steering Committee in terms of [insert addendum no] for the purposes of having on-going and regular review of the service, Supplier's performance and relationship management by both Parties.

18.2 More specifically, the Parties undertake to hold regular meetings, where applicable, at such times and venues as shall be agreed upon between the Parties in order to discuss:

18.2.1 compliance with the supply of the goods;

18.2.2 compliance with the Service Levels;

18.2.3 quality of the goods with respect to the requirements;

18.2.4 Problems experienced by either of the Parties and possible solutions;

18.2.5 any modifications to the agreed to goods that are required; and

18.2.6 any other relevant matters.

18.3 The meeting shall be attended by a minimum of one (1) nominated person representing each of the Parties.

18.4 Notwithstanding the measurement mechanisms provided in [insert addendum no], it is agreed that where applicable, there shall be two (2) mechanisms for monitoring performance in terms of this Agreement, namely:

18.4.1 monthly general compliance meetings - minutes to be produced within fourteen (14) days; and

18.4.2 fortnightly meetings for performance sign-off.

## **19 TECHNOLOGY MANAGEMENT**

19.1 General

19.1.1 The Supplier shall obtain Transnet Freight Rail's prior written consent before acquiring, maintaining, upgrading or replacing any Transnet Freight Rail asset that is used by the Supplier to satisfy its obligations hereunder if such acquisition, maintenance, upgrade or replacement could result in any material change in the

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Fees or Service Levels that are then being provided to Transnet Freight Rail. The Supplier shall be obliged to provide Transnet Freight Rail with regular written reports at a frequency of at least once a year, or as such change may be required, on all such new equipment acquisitions or upgrades or replacements thereof that has an impact on the Services.

## 19.2 Technology Upgrades and Enhancements

19.2.1 The Supplier will keep all Services under this Agreement current with Best Practice and leading technology standards as relevant and applicable to the Services.

19.2.2 All hardware used to provide the Services will be kept at levels supported by the respective OEM, and Equipment will be upgraded or replaced as required to meet the Service Levels, OEM end-of-life policies and timelines and OEM-recommended requirements.

19.3 The Supplier shall schedule all such upgrades and replacements in advance and in such a way as to prevent any interruption or disruption of, or diminution in, the nature or level of any portion of the Services.

19.4 In addition, the Supplier will apply continuous and regular innovation to the Services in accordance with Best Practice and leading technology standards, including providing for the refresh of its technology with respect to the Services to ensure that they are:

19.4.1 current and proven;

## 19.5 Technology Refresh

19.5.1 The Supplier shall be required to keep Transnet Freight Rail advised of its technology refresh strategy and road map and shall be required to ensure that the Supplier internal systems and infrastructure and the Service provision at all times remains compatible with Transnet Freight Rail's architectural technology standards and strategies.

19.5.2 The Supplier shall also have an on-going responsibility to provide Transnet Freight Rail with information at least twice a year (or more frequently as may be requested by Transnet Freight Rail) regarding any newly improved or enhanced commercially available information technologies that reasonably could be expected to have a

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positive impact on the Services including, without limitation, in the areas of increased efficiency, increased quality and/or reduced costs ("Enhanced Technology").

19.5.3 Upon identifying any Enhanced Technology that the Parties believe would materially improve performance or reduce the cost of the Services, the Parties will meet and discuss in good faith the terms upon which such Enhanced Technology may be implemented into the Services, including detailed Service Levels specific to each such enhancement.

## **20 MAINTENANCE**

20.1 As part of the Services and for the Term of this Agreement, the Supplier shall, where applicable, provide on-site and off-site maintenance and support services in accordance with the Maintenance Schedule to be agreed to between the parties to ensure that the hardware used for the Services are in good operating condition, fair wear and tear excepted.

20.2 The maintenance and support services, including repairs and preventive maintenance must be undertaken in accordance with the applicable OEM's specifications and in accordance with the agreed Maintenance Schedule in referred to in 20.1.

## **21 PRE-DELIVERY TESTING BY THE SUPPLIER**

21.1 Prior to presenting each Deliverable to Transnet Freight Rail for Acceptance, the Supplier shall perform all pre-delivery functionality testing required in accordance with Transnet Freight Rail's reasonable requirements and in accordance with the Annexures to this Master Services Agreement.

21.2 The Supplier's testing shall be sufficiently rigorous to identify any faults or Deficiencies that are reasonably discoverable and the Supplier shall be required to promptly remedy any faults or Deficiencies identified during such testing and retest the Deliverable in accordance with this clause 21 to verify that the fault or Deficiency has been successfully remedied and that there are no other Deficiencies.

## **22 REVIEW AND ACCEPTANCE**

22.1 Transnet Freight Rail shall have the right to review and accept or reject all Deliverables, components of such Deliverables and any systems (generally

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comprised of the Deliverables) to be provided by the Supplier to Transnet Freight Rail under this Agreement, pursuant to the methodology set forth in this clause 22.

22.2 Following the Supplier's notification to Transnet Freight Rail that it has completed any component or Deliverable in terms of this Agreement, Transnet Freight Rail shall begin testing the component or Deliverable to determine whether such component or Deliverable complies with and conforms to the applicable technical and functional specifications and/or standards, which have been developed by the Supplier and approved by Transnet Freight Rail (collectively, the "Acceptance Criteria").

22.3 If the component or Deliverable is identified as being part of a larger, integrated system being developed by the Supplier, then any Acceptance of such component or Deliverables shall constitute conditional acceptance ("Conditional Acceptance") and such component or Deliverable shall be subject to final Acceptance in accordance with clause 22.7 below.

22.4 If Transnet Freight Rail determines that a component or Deliverable does not conform to the applicable Acceptance Criteria, Transnet Freight Rail shall provide the Supplier with a report describing the defect, nonconformity and/or non-compliance with the Acceptance Criteria (the "Exception Report").

22.5 Within 5 (five) days following receipt of an Exception Report (or such longer time period as may be agreed with Transnet Freight Rail), the Supplier shall:

22.5.1 perform a Root Cause Analysis to identify the cause of the non-conformity;

22.5.2 provide Transnet Freight Rail with a written report detailing the cause of, and procedure for correcting, such nonconformity;

22.5.3 provide Transnet Freight Rail with satisfactory evidence that such nonconformity will not recur; and

22.5.4 remedy the nonconformity; provided, however, that if the nonconformity is incapable of remedy within such 5 (five) day period then, within a period of 5 (five) days thereafter, the Supplier shall present to Transnet Freight Rail a mutually agreeable plan to remedy such nonconformity within a reasonable period of time.

22.6 Upon the Supplier's notice to Transnet Freight Rail that it has remedied any such nonconformity, Transnet Freight Rail shall re-test the defective component or

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Deliverable and shall use reasonable efforts to complete such testing within a reasonable period of time having regard to the nature of the defect and/or the complexity of the component or Deliverable, at the end of which the process described in clause 22.2 above shall be repeated.

22.7 Upon achievement of a Conditional Acceptance for all identified components or Deliverables, Transnet Freight Rail shall begin testing the system that is comprised of such component(s) or Deliverable(s) using the applicable test procedures and standards (including relevant Acceptance procedures and test cases, as are approved by Transnet Freight Rail) to determine whether such system performs as an integrated whole in accordance with the Acceptance Criteria. After Transnet Freight Rail has completed such testing or upon expiration of the agreed-upon testing period (the "Acceptance Testing Period"), Transnet Freight Rail shall notify the Supplier in writing within 5 (five) Business Days or a longer period as mutually agreed either that:

22.7.1 the component or Deliverable meets the Acceptance Criteria and that Acceptance of such component or Deliverable has occurred; or

22.7.2 that the Acceptance Criteria have not been met and provide an Exception Report in respect of any failures or defects.

22.8 Notwithstanding the above, failure to issue a notice in terms of 22.7.1 and above, such identified component or Deliverable, shall be deemed accepted by Transnet Freight Rail.

22.9 If Transnet Freight Rail determines that the Acceptance Criteria have not been so met, the process described in clause 22.2 above shall be initiated, with all references to "component" or "Deliverable" being references to the "system", and all references to the "Acceptance Testing Period" being references to the "Final Acceptance Testing Period".

22.10 After the Deliverable, component and/or system has been subjected to further Acceptance Testing, as set out in clauses 22.6 through 22.9 as the case may be, if Transnet Freight Rail does not accept the Deliverable, component or system it shall give the Supplier written notice of its rejection (including a written description of the nonconformity or defects in order to enable the Supplier to remedy same) and a final period of 14 (fourteen) days in which to correct the defect or nonconformity.



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22.11 If the Supplier is still unable to correct the defect within this period, then Transnet Freight Rail may in its sole discretion elect to:

22.11.1 direct the Supplier to continue its efforts to make the Deliverable, component or system comply with the Acceptance Criteria, in which case, the Supplier shall continue such efforts; or

22.11.2 accept the Deliverable, component or system with its defects, in which event, the charges with respect to such Deliverable shall be equitably reduced to reflect the presence of such defects.

22.12 It is specifically agreed that in the event that any agreed project plan or time schedule is delayed and/or extended due to a Deliverable not meeting the Acceptance Criteria at any time, the costs of such delay and/or extension shall, unless otherwise agreed, be borne by the Service Provider. The Supplier shall further not be entitled to charge Transnet Freight Rail for any work done or time spent in ensuring that a Deliverable meets the Acceptance Criteria, save to the extent that it can demonstrably prove that the delay was caused wholly by Transnet Freight Rail.

## **23 THIRD PARTY SERVICE COOPERATION AND SERVICE COMPATIBILITY**

23.1 As part of the agreement, the Supplier shall work in coordination with, and cooperate with, any and all other Third Party Service Providers providing ICT and any other related services to Transnet Freight Rail so that all Transnet Freight Rail required ICT services are provided seamlessly across all Service Providers (including the Service Provider).

23.2 This coordination and cooperation referred to in this clause shall include:

23.2.1 exchanging information with Transnet Freight Rail and such other Third Party Service Providers in connection with the Services and services, but shall exclude any:

23.2.1.1 financial information;

23.2.1.2 pricing information;

23.2.1.3 Intellectual Property;

23.2.1.4 information in respect of trading terms applicable between Transnet Freight Rail and the Supplier and Transnet Freight Rail and the Third Party Service Providers generally; and

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- 23.2.1.5 other information, which if exchanged, could be used by the Supplier and Third Party Service Providers to fix the prices or to jointly agree to trading terms in respect of their services, or to act anti-competitively in any way.
- 23.2.2 participating in meetings with such other Third Party Service Providers and Transnet Freight Rail required to manage interfaces between and the interaction of the Services and the services being provided by such other Third Party Service Providers to Transnet Freight Rail; and
- 23.2.3 working jointly and in good faith with such other Third Party Service Providers required to allocate responsibilities where the services provided by other Third Party Service Providers overlap and with the Supplier and the other Third Party Service Providers, to prevent:
  - 23.2.3.1 any failure by the Supplier and the Third Party Service Providers to provide Transnet Freight Rail with end to end services, and/or (ii) any events, disputes or Problems.
- 23.3 The Supplier will ensure that all Procured equipment, enhancements, upgrades, and modifications shall be successfully integrated and interfaced, and shall be compatible with the services, equipment, networks, software, enhancements, upgrades, modifications and other resources that are being provided to or recommended to by Third Party Service Providers (collectively, the "Third Party Resources").
- 23.4 Further, the Supplier shall use its best endeavours to ensure that none of the Services or other items provided to Transnet Freight Rail by the Supplier shall be adversely affected by, or shall adversely affect, those of any such Third Party Service Providers, whether as to functionality, speed, service levels, interconnectivity, reliability, availability, performance, response times or similar measures.
- 23.5 To the extent that any interfaces need to be developed or modified in order for the Resources to integrate successfully, and be compatible with, the Third Party Resources, the Supplier shall develop or modify such interfaces as part of the Services, pursuant to the process set forth in in the clause 33.
- 23.6 Where any Problem with respect to the Services is caused by Resources or by the Service Provider, the Supplier shall be responsible for correcting at its cost, such problem, except to the extent that the Supplier can demonstrate, to Transnet Freight

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Rail's satisfaction, by means of a Root Cause Analysis, that the cause was not due to Resources or Third Party Resources.

23.7 The Supplier shall immediately notify Transnet Freight Rail if an act or omission of a Third Party may cause a problem (including a Problem) or delay in providing the Services and shall work with Transnet Freight Rail to prevent or circumvent such problem or delay.

## **24 ASSET MANAGEMENT AND CONFIGURATION MANAGEMENT DATABASE (CMDB)**

24.1 Transnet Freight Rail requires the Supplier to develop a Configuration Management Database ("CMDB") to include all the EUCD and to maintain such CMDB for the duration of the Agreement. Such CMDB must be aligned with certain mutually identified fields in Transnet Freight Rail fixed asset register.

24.2 It is recorded that the cost for developing the CMDB is included in the Fees and the Supplier will within 30 (thirty) days of the Effective Date provide to Transnet Freight Rail proof of development, in a form acceptable to Transnet Freight Rail, including such terms and conditions for developing and maintaining the CMDB.

24.3 The Supplier shall provide access to such inventory to Transnet Freight Rail upon request by Transnet Freight Rail. This access shall be provided through a portal.

## **25 ASSET SANITISATION SERVICES**

25.1 As part of the Services, for dismantlement, decommissioning and Disengagement, the Supplier, working together Transnet Freight Rail IT Data Service Provider, shall be required to sanitise Supplier Equipment containing Transnet Freight Rail Data and Transnet Freight Rail Equipment, in accordance with Transnet Disposal of Electronic Media Standard policy, as managed by the Supplier in the provision of the Services, and ensure that all Transnet Freight Rail Data is irretrievably removed. The Supplier shall perform its obligations in a manner that does not adversely impact the environment and shall take such steps as may be reasonably possible to reduce its consumption of electricity and natural resources while at the same time reducing its production of waste materials.

25.2 In providing the asset sanitisation services referred to above, the Supplier shall, where applicable, be required to adhere to:

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25.2.1 environmental laws;

25.2.2 privacy and Data protection laws and policies, including the POPI Act; and

25.2.3 Best Practices.

## **26 TRANSNET FREIGHT RAIL DATA**

26.1 Transnet Freight Rail shall permit the Supplier to have access to Transnet Freight Rail Data solely to the extent that the Supplier requires access to such data to provide the Services in accordance with the terms of this Agreement.

26.2 The Supplier may only access and process Transnet Freight Rail Data in connection herewith or as directed by Transnet Freight Rail in writing and may not otherwise modify Transnet Freight Rail Data, merge it with other data, commercially exploit it or engage in any other practice or activity that may in any manner adversely affect the integrity, security or confidentiality of Transnet Freight Rail Data, other than as specifically permitted herein or as directed by Transnet Freight Rail in writing.

26.3 The Supplier understands and agrees that Transnet Freight Rail owns all right, title and interest in and to Transnet Freight Rail Data and in and to any modification, compilation or Derivative Works therefrom (collectively, "Data and Modified Data"), and also owns all Intellectual Property, and other proprietary rights in and to the Data and Modified Data.

26.4 The Parties specifically record that all Transnet Freight Rail Data to which the Supplier may be exposed, shall constitute Confidential Information and as such, the Supplier shall comply with all the provisions of clause 44 with regard to Transnet Freight Rail Data.

26.5 The Supplier hereby warrants in favour of Transnet Freight Rail that it shall at all times strictly comply with all Applicable Law relating to data protection and with all the provisions and requirements of Transnet Freight Rail's Data protection policies and procedures (including encryption standards) in force, from time to time, and any further requirements of which Transnet Freight Rail may, from time to time, advise the Supplier in writing, or which may be required by Applicable Law.

26.6 The Supplier hereby warrants and undertakes that it shall not, at any time copy, compile, collect, collate, process, mine, store, transfer, alter, delete, interfere with or

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in any other manner use Transnet Freight Rail Data for any purpose other than with the express prior written consent of Transnet Freight Rail, and to the extent necessary to provide the Services to Transnet Freight Rail.

26.7 The Supplier warrants and undertakes that, as part of the Services, it shall take, implement and maintain all such technical and organisational security procedures and measures necessary or appropriate to preserve the security and confidentiality of Transnet Freight Rail Data processed by it and protect such Transnet Freight Rail Data against unauthorised or unlawful disclosure, access or processing, accidental loss, destruction or damage, including any technical and organisational security procedures and measures as may be required or directed by Transnet Freight Rail from time to time. The Supplier agrees, at Transnet Freight Rail's request, to provide relevant assistance to Transnet Freight Rail to devise appropriate technical and organisation measures.

26.8 The Supplier further warrants that it shall ensure that all its systems and operations which it uses to provide the Services, including all systems on which Transnet Freight Rail Data is copied, compiled, collected, collated, processed, mined, stored, transmitted, altered or deleted or otherwise used as part of providing the Services, at all times, comply with Applicable Law and Best Practice for the protection, control and use of such data.

## **27 CYBERSECURITY LIABILITY RISK**

27.1 It is hereby recorded that cyber-attacks consists of any attack on a computer system or network carried out maliciously by electronic means (usually using another computer system) with the intention of gaining unauthorized access, stealing, monitoring, changing or destroying data.

27.2 Transnet Freight Rail owns and pursuant to this Agreement the Supplier will have access to Transnet Freight Rail owned networks and systems, which systems often contain some of the most valuable information and if subjected to cyberattacks may expose Transnet Freight Rail to diverse and uncertain regulatory, criminal, civil liabilities, labour litigation, reputational damage and financial loss.

27.3 Pursuant to clause 27.1 and 27.2, the Supplier hereby warrants that all equipment to be purchased and/or leased to Transnet Freight Rail have been fitted with robust IT

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mechanisms to prevent cyber loss, data extortion and ward off any cyber-attack against Transnet Freight Rail owned networks and systems.

27.4 The Supplier shall, within 30 days of signing of this Agreement and before delivery of the End User Computing Devices to Transnet Freight Rail, hire a third party auditing firm to perform an audit on internal and external procedures and systems used by the Supplier to ensure that the End User Computing Devices comply with clause 27.3.

27.5 The Supplier will upon Transnet Freight Rail's request, provide Transnet Freight Rail with a copy of the audit results set forth in clause 27.4.

27.6 In the event of any of the events listed in clause 27.3 occurring, the Supplier shall immediately notify Transnet Freight Rail of a cyber incident and do all that is possibly practical to obtain evidence and implement mitigation strategies to avoid further attacks and losses.

27.7 Within 30 days from the date of signature of this Agreement, the Supplier shall provide Transnet Freight Rail with proof of insurance from a reputable and recognised insurance to the effect that the Supplier has taken out an insurance policy to cover Transnet Freight Rail for the following:

27.7.1 Data loss, and indemnifying Transnet Freight Rail against Loss arising from a Data Breach in or about the course of Transnet Freight Rail business pursuant to this Agreement;

27.7.2 Data liability, and indemnifying Transnet Freight Rail against Loss arising from any Claim made against Transnet Freight Rail for the duration of this Agreement in respect of a Data Breach pursuant to this Agreement;

27.7.3 Cyber loss, and indemnifying Transnet Freight Rail against loss arising from cyber-attack on all equipment and computers purchased and rented from the Supplier in terms of this Agreement; or

27.7.4 Data extortion in or about the course of Transnet Freight Rail's business for the duration of the Agreement, and indemnifying Transnet Freight Rail in relation thereto.

27.7.5 Cyber liability and indemnifying Transnet Freight Rail against Loss arising from any Claim made against Transnet Freight Rail during the course of this Agreement in

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respect of the Service Provider's negligent transmission of a Computer Virus that has emanated from or passed through to Transnet Freight Rail Computers;

27.7.6 Cyber Attack, or an Incident in or about the conduct of Transnet Freight Rail's business during the course of this Agreement; and

27.7.7 Network interruption and indemnifying Transnet Freight Rail against Loss incurred during the course of this Agreement arising from Transnet Freight Rail's Computers being subject to a Cyber Attack.

27.8 Should the Supplier at any stage fail to comply with clause 27.7 above, Transnet Freight Rail shall have the right to obtain an insurance policy and insure its risk against events listed in clauses 27.4 to 27.7 and offset any amount payable as insurance premium from the amount and/or fees payable to the Supplier in terms of this Agreement.

## **28 PROTECTION OF PERSONAL INFORMATION**

28.1 In this clause, the following expressions shall have the meanings set out hereunder:

28.1.1 "Cloud computing" shall mean the practice of using remote servers on the internet or internet-enabled devices to process data;

28.1.2 "Personal Information" shall mean any information relating to Transnet Freight Rail, its holding company and subsidiaries, associated and affiliated companies, directors, officers, employees, agents, contractors and customers, including (without limitation) information of the nature contemplated in the definition of "personal information" in POPI and information processed by the Supplier pursuant to or as a result of this Agreement;

28.1.3 "POPI" shall mean the Protection of Personal Information Act, 2013, including any regulations and amendments thereto from time to time;

28.1.4 "Process" shall mean any operation or activity or any set of operations, whether or not by automatic means, concerning Personal Information, including:

28.1.4.1 the collection, receipt, recording, organisation, collation, storage, updating or modification, retrieval, alteration, consolidation or use;

28.1.4.2 dissemination by means of transmission, distribution or making available in any other form; or

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28.1.4.3 merging, linking, as well as restriction, degradation, erasure or destruction of information.

28.1.5 The Supplier shall strictly comply with all provisions of POPI relating to the Processing of Personal Information. Failure by the Supplier to comply with POPI or any of the provisions of this clause shall be deemed to constitute a material breach of this Agreement and shall entitle Transnet Freight Rail, in its sole discretion, to immediately terminate this Agreement.

28.1.6 The Supplier shall Process Personal Information only for the purposes relating directly to this Agreement and the rendering of the services in terms hereof. Unless provided for in terms of the provisions of this Agreement or otherwise as may be agreed to by Transnet Freight Rail in writing, the Supplier shall not modify, merge with other data, commercially exploit or engage in any other practice or activity that may in any manner adversely affect the integrity, security or confidentiality of the Personal Information.

28.1.7 All Personal Information shared by Transnet Freight Rail with the Supplier during the subsistence of this Agreement shall constitute confidential information and as such, the Supplier shall comply with all the confidentiality and/or non-disclosure provisions contained in this Agreement, and as such the Supplier shall not disclose any Personal Information to any third party without Transnet Freight Rail's prior written consent.

28.1.8 The Supplier shall implement and maintain adequate technical and organisational security and safety measures to protect the integrity of Personal Information Processed by it under this Agreement and to avoid any damage or unauthorised access to or loss of any such Personal Information.

28.1.9 The Supplier shall immediately notify Transnet Freight Rail if Personal Information has been lost or damaged, or accessed or acquired by an unauthorised person, and the Supplier shall comply with any instructions and/or directives which Transnet Freight Rail may issue in the event of any such circumstances.

28.1.10 Transnet Freight Rail shall be entitled to verify compliance of the technical and organisational security and safety measures implemented by the Service Provider, or appoint auditors to do so, upon reasonable prior notice to the Service Provider. Transnet Freight Rail shall respect the operational sequences of the business of the



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Supplier and the Supplier shall assist Transnet Freight Rail in the execution of the inspections in the best possible way.

28.1.11 The Supplier shall provide Transnet Freight Rail upon request with any information required to meet Transnet Freight Rail's obligations in law relating to the processing of Personal Information and make the necessary documentation available within a reasonable time.

28.1.12 The Supplier shall ensure that its personnel and /or any other authorised person or entity which processes Personal Information on its behalf receives adequate and appropriate training in the care and handling of Personal Information in terms of POPI and any other applicable data privacy legislation.

28.1.13 The Supplier shall maintain adequate records of all processing of Personal Information, including the training of the Service Provider's personnel with regard to the Protection of Personal Information and any applicable data privacy legislation.

28.1.14 The Supplier shall not transfer any of the Personal Information across the borders of the Republic of South Africa or use any Cloud computing solutions without Transnet Freight Rail's prior written approval.

28.1.15 In the event that the Supplier sub-contracts any of its obligations in terms of this Agreement, it shall do so only by way of a written agreement with the sub-contractor, which agreement, imposes the same obligations relating to the protection of Personal Information on the sub-contractor as are imposed on the Supplier under this Agreement. Where the sub-contractor fails to fulfil its data protection obligations under such written agreement, the Supplier shall remain fully liable to Transnet Freight Rail for the performance of the sub-contractor's obligations under such agreement.

28.1.16 The Supplier confirms that it has met all requirements for registration, if any, in terms of the laws applicable to this Agreement.

28.1.17 Upon this Agreement coming to an end for whatever reason, the Supplier shall return to Transnet Freight Rail or destroy, if instructed by Transnet Freight Rail to do, all such Personal Information in its possession, or in the possession of its agents, sub-contractors or any third party who may have had access and /or possession of the Personal Information, in accordance with such procedure which Transnet Freight Rail may prescribe from time to time.

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28.1.18 The Supplier shall indemnify and hold Transnet Freight Rail harmless against any claim, loss, damage, cost and expense (including legal fees) relating to or arising from the Supplier breaching any of the provisions of this clause.

28.1.19 In so far as Transnet Freight Rail processes any Personal Information of the Service Provider, Transnet Freight Rail shall conduct such processing within the ambit of the prevailing data privacy legislation and shall adhere to such provisions to the fullest extent.

## **29 DOCUMENTATION**

29.1 The Supplier shall be responsible for developing and/or maintaining up-to-date Documentation. The Supplier shall provide the Documentation to Transnet Freight Rail electronically (and in a manner such that it can be accessed via either Transnet Freight Rail's intranet or the Internet).

29.2 The Documentation shall describe, inter alia:

29.2.1 the manner in which the Supplier will provide the Services hereunder, including the Equipment (hardware) to be used (including operations manuals, user guides, specifications and End-User support documentation) that provide further details of such activities and detailed problem and Change Management Procedures; and

29.2.2 the activities the Supplier will undertake in order to provide the Services including, where appropriate, direction, supervision, monitoring, staffing, quality assurance, reporting, planning and oversight activities, as well as the specific measures taken to comply with all Applicable Laws and regulations including, without limitation, those relating to the privacy and security of Transnet Freight Rail Data and any other laws and regulations applicable to Transnet Freight Rail Data.

29.3 The format of the Documentation must be agreed to between the Parties.

29.4 The Service Provider's responsibilities with respect to Documentation shall include, on an on-going basis, auditing Documentation for completeness and accuracy to ensure that the Documentation is available, organised, readable, and updated. The resulting audit findings will be reported monthly to Transnet Freight Rail in writing. Where it is determined that Documentation is inaccurate, the Supplier shall promptly correct such Documentation.

### **30 CHANGE MANAGEMENT /CONTROL**

- 30.1 During the period of this Agreement, Transnet Freight Rail or the Supplier can make written suggestions for amendments to the Services contained in [insert addendum no] and Schedules to this Agreement.
- 30.2 All changes to Services, as defined and configuration items associated with such Services shall follow the Change Management procedure as set out in [insert addendum no].
- 30.3 In such an event the Requested party will advise the Requestor within 14 (fourteen) days or such other period as mutually agreed within the said 14 (fourteen) days whether the amendment is possible and what effect it will have on this Agreement. Requests for changes must be sufficiently detailed to enable the other Party to assess, ascertain and evaluate the impact of the requested change on the charges, timetable or any other aspect of the Agreement and the Parties agree to work together to consider, and if appropriate, seek to agree on any changes.
- 30.4 Unless otherwise agreed, until a change is agreed in writing all Parties will continue to act in accordance with the latest signed version of the Agreement, as the case may be.
- 30.5 Once agreement has been reached regarding the required amendments, and subject to clause 30 (Change Management), the Parties shall amend the Agreement. No change will be affected before agreement has been reached in writing and signed by both Parties.

### **31 SUPPLIER EMPLOYEES**

- 31.1 The Service Provider's Employees shall be regarded at all times as employees or agents of the Supplier and no relationship of employer and employee shall arise between Transnet Freight Rail and any Supplier Employees under any circumstances regardless of the degree of supervision that may be exercised over the Employees by Transnet Freight Rail.

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31.2 For purposes of this clause, Service Provider's Employees includes employees of Supplier Affiliates who are or may from time to time be involved in the provision of any component of the Services.

31.3 The Supplier shall ensure that the its Employees:

31.3.1 have the necessary knowledge in respect of Transnet Freight Rail's and its Affiliates' business, technical and operational requirements and needs in terms of the Agreement;

31.3.2 will be entitled to work in South Africa or any other country in which the Services are to be performed as provided under Transnet Freight Rail Sites in [insert addendum no];

31.3.3 comply with all reasonable requirements made known to the Supplier by Transnet Freight Rail concerning conduct at any Transnet Freight Rail Sites upon which the Services are to be performed, including but not limited to security regulations, policy standards and codes of practice and health and safety requirements;

31.3.4 at all times act in a lawful and proper manner in accordance with these requirements and Applicable Law;

31.4 Transnet Freight Rail reserves the right to refuse to admit or to remove from any premises occupied by or on behalf of it, any Supplier Employees whose admission or presence would, in the reasonable opinion of Transnet Freight Rail, be undesirable or who represents a threat to confidentiality or security or whose presence would be in breach of any rules and regulations governing Transnet Freight Rail's Employees, provided that Transnet Freight Rail notifies the Supplier of the reasons of such refusal. The exclusion of any such individual from such premises shall not relieve the Supplier from the performance of its obligations under this Agreement.

31.5 The Supplier agrees to use all reasonable endeavours to ensure the continuity of its Employees assigned to perform the Services. If any re-assignment by the Supplier of those Employees is necessary, or if Transnet Freight Rail advises that any such Employees assigned are in any respect unsatisfactory, including where any such Employees are, then the Supplier will promptly supply a replacement of equivalent calibre and experience.

## **32 AUDIT RIGHTS**

- 32.1 This Agreement is subject to the provisions of the Public Finance Management Act 1 of 1999 ("the PFMA").
- 32.2 Transnet Freight Rail, acting through its duly authorised representatives (including without limitation, its external auditors) shall be given reasonable access to inspect, during business hours relevant books, records, and supporting documentation, where applicable, related specifically to the rendering of the Procurement Services and to make copies of such books, records, and supporting documentation for audit purposes.
- 32.3 The Supplier shall maintain a complete audit trail of all financial and non-financial transactions pertaining to this Agreement and which may be required by Transnet Freight Rail for purposes of clause 32.2 above.
- 32.4 To the extent that any audit reveals a non-compliance on the part of the Supplier and/or a material inadequacy or deficiency in the Service Provider's performance, in anticipation of the findings of a follow up audit, the Supplier shall prepare and deliver to Transnet Freight Rail a detailed plan that is reasonably acceptable to Transnet Freight Rail for promptly correcting such failures and exceptions ("Corrective Plan").
- 32.5 The Corrective Plan and its timelines must align to Transnet Freight Rail's Audit and Control Deficiency Correction Methodology.
- 32.6 If any such audit reveals that the Supplier has overcharged Transnet Freight Rail by any amount during the period to which the audit relates (as determined prior to the commencement of the audit), then the Supplier shall promptly set off overcharges to Transnet Freight Rail in the following month's invoice and in addition, shall be liable to pay Transnet Freight Rail an amount equal to 15% (fifteen percent) of the total overcharged amount.
- 32.7 Except as indicated below, Transnet Freight Rail shall bear the costs of the audit of any initial audit and upon reasonable notice to the Service Provider. The cost of all follow up audits to verify that audit findings have been rectified shall be borne by the Service Provider. The Supplier may request to appoint an auditor of its choice as long as such appointment does not unduly delay the commencement of the follow up audit. The Supplier shall also bear all costs and expenses associated with correcting all deficiencies and exceptions identified in the Corrective Plan.

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32.8 The audits shall be conducted expeditiously and efficiently and may not unreasonably interfere with the Service Provider's ability to perform the Services in accordance with the Service Levels.

32.9 The auditors shall be obliged to comply with access protocols and control procedures of the Service Provider, which access shall not be unreasonably withheld, but must be maintained by the Supplier and made available to Transnet Freight Rail for a period of 5 (five) years after the expiry or termination of this Agreement or such other period as is required by Applicable Law in relation to those records, documents or other information.

### **33 VERIFICATION OF SERVICE PROVIDER'S RECORDS**

33.1 Transnet Freight Rail may at its discretion audit the Service Provider's compliance with this Agreement (including verification of the Service Provider's premises and systems) provided that any such verification is carried out with reasonable prior notice and in a reasonable way so as to cause as little disruption as is reasonably possible to the delivery of the Software and the Service Provider's other business. Such verifications will only be done if Transnet Freight Rail has reason to believe that the Supplier is not carrying out its duties with reasonable care and skill or that it does not have the required staff and equipment in order to provide the services that it is contracted to provide in terms of this agreement.

33.2 The Supplier shall provide all assistance reasonably requested by Transnet Freight Rail in relation to any verification, including access to the Service Provider's Personnel, records and premises, provided that Transnet Freight Rail or its agents will only be given access to the records that they request in writing with sufficient prior notice.

33.3 Transnet Freight Rail may engage Third Party advisers to undertake any such verification.

33.4 Transnet Freight Rail may allow any Regulator and any persons appointed by such Regulator to participate in any such verification and to receive the results of that verification.

### **34 INTELLECTUAL PROPERTY RIGHTS**

34.1 Transnet Freight Rail Intellectual Property

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34.1.1 Transnet Freight Rail retains all right, title and interest in and to its Intellectual Property and the Supplier shall only be permitted to use Transnet Freight Rail's Intellectual Property, without the written consent of Transnet Freight Rail only for the sole purpose of providing the Services and rendering the Deliverables to Transnet Freight Rail and its Affiliates. Except as otherwise requested or approved by the Transnet Freight Rail, which approval shall be in the Transnet Freight Rail's sole discretion, the Supplier shall cease all use of Transnet Freight Rail Intellectual Property as of the earliest of: (i) termination or expiration date of this Agreement, or (ii) the date of rendering of the last of the Deliverables.

34.1.2 If so required by the Transnet Freight Rail, the Supplier shall certify in writing to Transnet Freight Rail that it has either returned all Transnet Freight Rail Intellectual Property to Transnet Freight Rail or destroyed or deleted all other Transnet Freight Rail Intellectual Property in its possession or under its control.

34.2 Intellectual Property developed during the Services:

34.2.1 Transnet Freight Rail shall have all Intellectual Property Rights in all Developed Material and Paper Deliverables, developed or generated for Transnet Freight Rail as part of the Services or Deliverables provided under this Agreement. Notwithstanding the provisions of clause 34.1, the Supplier hereby irrevocably assigns, transfers and conveys to Transnet Freight Rail without further consideration all of its Intellectual Property Rights in such Paper Deliverables and Developed Material, including where such materials have not yet been created, all future copyright therein (with immediate effect from the date that such copyright comes into existence).

34.2.2 The Supplier agrees to execute all documents and take all other actions as may reasonably be necessary, or as Transnet Freight Rail may reasonably request in writing, to perfect Transnet Freight Rail's ownership of the Intellectual Property Rights in such Paper Deliverables, and/or Developed Material, and further, hereby irrevocably appoints Transnet Freight Rail as its agent with full power of attorney *in rem suam* to sign all such deeds and documents and to take all such actions as may be necessary or desirable for Transnet Freight Rail to perfect its proprietary rights in such Intellectual Property should the Supplier fail to comply with any such written request within 5 (five) days after date thereof.

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34.2.3 Unless otherwise agreed in a Transaction Document, where Paper Deliverables, Developed Software or Developed Web Material incorporates Supplier Intellectual Property, systems, and processes that the Supplier did not develop in the course of providing Services under the Agreement, the Supplier hereby grants Transnet Freight Rail and its Affiliates an irrevocable, perpetual, world-wide, fully paid-up, royalty-free, non-exclusive license for Transnet Freight Rail and its Affiliates and their Staff and agents to perform any lawful act, including the right to use, copy, maintain, modify, enhance and create derivative works in connection with such Supplier Intellectual Property.

34.2.4 The Intellectual Property Rights in and to Data, literary works or other works of authorship generated in the course of performing Services and creating Paper Deliverables under the Agreement, such as manuals, training materials, reports, and other Documentation, shall be owned by the Transnet Freight Rail. For the sake of clarity, it is recorded that Transnet Freight Rail shall have sole and exclusive ownership of the Intellectual Property Rights in all reports generated by the Supplier under the Agreement and all of the Transnet Freight Rail's Data.

#### 34.3 Supplier Intellectual Property:

34.3.1 The Supplier retains all right, title and interest in and to the Service Provider's pre-existing Intellectual Property that is used in connection with the Services to the extent listed in [insert addendum no].

34.3.2 Except as may be expressly provided to the contrary in this Agreement, as of any termination or expiration of this Agreement, the Supplier shall grant to Transnet Freight Rail the post -termination rights against payment therefor by Transnet Freight Rail at a market related price.

#### 34.4 Third Party Intellectual Property:

34.4.1 The Supplier shall not introduce into the Transnet Freight Rail's environment any third party Intellectual Property or use any third party Intellectual Property to provide the Services without first obtaining the Transnet Freight Rail's written consent thereto. In the event of such consent, The Supplier shall be responsible for obtaining a license on behalf of Transnet Freight Rail and in Transnet Freight Rail's name, to use such Third Party Intellectual Property.

#### 34.5 Use of third party Intellectual Property licensed to the Transnet Freight Rail:



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34.5.1 The Supplier shall not, without the Transnet Freight Rail's express prior written consent, use any third party Intellectual Property licensed to Transnet Freight Rail, whether to provide the Services or for any other purpose whatsoever.

34.5.2 The Supplier acknowledges that such unauthorised use of third party Intellectual Property licensed to Transnet Freight Rail may constitute a breach of the provisions of the license agreement/s in terms of which such third party Intellectual Property is licensed to the Transnet Freight Rail. Should consent be granted to the Supplier to use third party Intellectual Property licensed to Transnet Freight Rail, the Supplier undertakes that it shall only use such Intellectual Property strictly in accordance with the provisions of the relevant consent and the terms of the license rights held by Transnet Freight Rail.

## **35 REPRESENTATIONS AND WARRANTIES**

35.1 The Supplier warrants to Transnet Freight Rail that:

35.1.1 it has full capacity and authority to enter into and to perform this Agreement and that this Agreement is executed by a duly authorised representatives of the Supplier;

35.1.2 it will discharge its obligations under this Agreement and any annexure, appendix or schedule hereto with all due skill, care and diligence;

35.1.3 it will be solely responsible for the payment of remuneration and associated benefits, if any, of its Personnel and for withholding and remitting income tax for its Personnel in conformance with any applicable laws and regulations;

35.1.4 it will procure licences for Transnet Freight Rail in respect of all Third Party Material detailed in the Work Order(s), and will procure the right for Transnet Freight Rail to take such copies [in whole or in part] of such Third Party Materials as it may reasonably require for the purposes of back-up for archiving and disaster recovery; and

35.1.5 the use or possession by Transnet Freight Rail of any Materials will not subject Transnet Freight Rail to any claim for infringement of any Intellectual Property Rights of any third party.

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- 35.2 The Supplier further warrants that it will perform its obligations under this Agreement in accordance with the Service Levels as defined in the relevant schedule. Transnet Freight Rail may at its discretion audit compliance with the Service Levels, provided that any such audit is carried out with reasonable prior notice and in a reasonable way so as not to have an adverse effect on the performance of the Services. Without prejudice to any rights or entitlements applicable to Transnet Freight Rail under this Agreement, in the event that the Supplier fails to meet the Service Levels, Transnet Freight Rail may claim appropriate service credits or invoke a retention of Fees as detailed in the relevant schedule and/or Work Order.
- 35.3 The Supplier warrants that for a period of 90 [ninety] calendar days from Acceptance of the Deliverables they will, if properly used, conform in all material respects with the requirements set out in the relevant schedule. The Supplier will at its expense remedy any such non-conformance as soon as possible but in any event within 30 [thirty] calendar days of notification by Transnet Freight Rail. In the event that the Supplier fails or is unable to remedy such non-conformance within such time-scale, Transnet Freight Rail will be entitled to employ a third party to do so in place of the Supplier and any excess charges or costs incurred by Transnet Freight Rail as a result shall be paid by the Service Provider.
- 35.4 The Supplier will remedy any defect within 30 [thirty] calendar days of being notified of that defect by Transnet Freight Rail in writing.
- 35.5 The Supplier will not be liable to remedy any problem arising from or caused by any modification made by Transnet Freight Rail to the Deliverables, or any part thereof, without the prior approval of the Service Provider.
- 35.6 The Supplier shall advise Transnet Freight Rail of the effects of any steps proposed by Transnet Freight Rail pursuant to clause 35.5 above, including but not limited to any cost implications or any disruption or delay in the performance of the Services. The Parties agree that any changes to the Services, including the charges for the Services or any timetables for delivery of the Services, will be agreed in accordance with the change management procedures, as set out in clause 30.

## **36 BREACH AND TERMINATION**

### **36.1 Early Termination**

#### **36.1.1 Termination for Convenience of Services and Agreement**

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36.1.1.1 Following the expiry of a period of 8 (Eight) months after the commencement date, Transnet Freight Rail shall have the right to terminate for its convenience (i) all of the Service , orders and other Services; or (ii) this Agreement, in each case by delivering to the Supplier a Termination Notice at least 30 (thirty) days' notice of termination, whereafter this Agreement shall be terminated and be of no further force or effect, subject to any conditions that Transnet Freight Rail may impose.

36.1.1.2 Notwithstanding the notice period set forth in clause 36.1.1.1 and where circumstances permit, Transnet Freight Rail shall have the right to extend, on 60 (sixty) days written notice period for an additional period of up to 6 (six) months as Transnet Freight Rail may deem necessary ensure the successful and complete hand over of the Services.

36.1.1.3 Save as provided for in clause 36.1.1.2 or elsewhere in this Agreement, if Transnet Freight Rail terminates the this Agreement in its entirety as provided in clause 36.1.1, upon completion of Supplier's Disengagement obligations with respect to the terminated Services, Transnet Freight Rail shall pay to Supplier the Termination Fee.

#### 36.1.2 Termination for Convenience of Services and Agreement

36.1.2.1 Subject to the provision of clause 36.1.2.2, Transnet Freight Rail may terminate this Agreement, in whole or in part, for convenience and without cause at any time by giving the Supplier at least 60 (sixty) days prior written notice designating the Termination Date.

36.1.2.2 For the avoidance of doubt, Transnet Freight Rail shall not be entitled to terminate any Services performed by Supplier as part of the Transition Services and Transformation Services for convenience as specifically detailed in the Transition Plan.

36.1.2.3 Other than being liable for payment to Supplier for work completed and Services delivered pursuant to this Agreement prior to its termination and as set forth in clause 36.1. and 36.1.2 Transnet Freight Rail shall have no liability to the Supplier with respect to such termination.

36.1.2.4 In the event that this Agreement or Services is terminated for convenience in accordance with clause 36.1.2.1, Transnet Freight Rail

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will reimburse Supplier for:

- 36.1.2.4.1 any capital expenditure incurred by Supplier subject to: (i) Supplier being able to demonstrate to the Transnet Freight Rail's satisfaction that, despite its best efforts, it is unable to recoup such expenditure; and (ii) ownership of the assets (in respect of which capital was expended) being transferred to Transnet Freight Rail;
- 36.1.2.4.2 actual penalties levied against the Supplier by a Third Party supplier as a result of Service Provider's early termination of a long term supply agreement entered into between the Supplier and such Third Party supplier, subject to Transnet Freight Rail having provided its prior written approval to Supplier of the long term supply agreement at the commencement of the Project or the Other Services, as the case may be; and
- 36.1.2.4.3 pre-paid support and maintenance fees paid by Supplier to a Third Party licensor where the Service Provider, despite its best efforts, is unable to recoup such expenditure from the Third Party licensor.

### 36.1.3 Reduction in Fees

- 36.1.3.1 In the case of a termination of the Agreement in part, the charges payable under this Agreement shall be reduced to reflect the partial termination of the Agreement.

### 36.2 Change in Control of Service Provider

- 36.2.1 In the event of a sale, merger, acquisition or other Change in Control of Supplier that will adversely and materially affect the provision of Services to the Transnet Freight Rail, then at any time within 60 (sixty) days after the Change in Control, Transnet Freight Rail may terminate the Agreement by giving Supplier at least 30 (thirty) days prior notice and designating a Termination Date.
- 36.2.2 If Transnet Freight Rail terminates the Agreement pursuant to this clause, Supplier shall be obliged to perform its Disengagement obligations hereunder until such obligations are fulfilled.

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36.2.3 Any termination pursuant to this clause 36.2 shall not constitute a termination for convenience and Transnet Freight Rail shall in no event be required to pay a Termination Fee to Supplier with respect to any such termination and except for those terms that survive any expiration or termination of this Agreement, Transnet Freight Rail shall have no further liability or obligation to Supplier under this Agreement, including that Transnet Freight Rail shall not be liable to pay for its receipt of Disengagement Services.

### 36.3 Non Compliance with Applicable Laws

36.3.1 Transnet Freight Rail may terminate this Agreement, in whole or in part, by giving a Termination Notice to Service Provider, specifying the Termination Date in the event that it is advised that the Applicable Laws, as they may be changed, enacted or repealed, prevent the Supplier from performing its obligations under this Agreement.

36.3.2 Any termination pursuant to this clause 36.3 shall not constitute a termination for convenience and Transnet Freight Rail shall in no event be required to pay a Termination Fee to Supplier with respect to any such termination and except for those terms that survive any expiration or termination of this Agreement, Transnet Freight Rail shall have no further liability or obligation to Supplier under this Agreement. Transnet Freight Rail shall however be liable to pay for its receipt of Disengagement Services.

### 36.4 Termination for Breach

#### 36.4.1 Material Breach

36.4.1.1 If Supplier commits a material breach and fails to remedy such material breach within 14 (fourteen) days of notice thereof from Transnet Freight Rail, Transnet Freight Rail shall be entitled, in addition to any other rights and remedies that it may have in terms of the Agreement or otherwise, to terminate this Agreement and/or any or all Schedules and Appendices upon written notice to Service Provider, without prejudice to any claims which Transnet Freight Rail may have for damages against the Service Provider.

#### 36.4.2 Non Material Breaches

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36.4.2.1 If Supplier commits a breach of any term of this Agreement which constitutes a non-material breach and fails to remedy such breach within 21 (twenty-one) days of notice thereof from Transnet Freight Rail, Transnet Freight Rail shall be entitled (in addition to any other rights and remedies that it may have in terms of the Agreement or otherwise and without prejudice to any claims which Transnet Freight Rail may have for damages against the Service Provider) to terminate this Agreement and/or any or all Schedules and Appendices upon written notice to Supplier in circumstances where:

36.4.2.1.1 during the first 6 (six) months following the Effective Date, Supplier has failed to remedy more than 12 (twelve) non-material breaches within the 21 (twenty one) day notice period in a Three Month Period;

36.4.2.1.2 after a period of 6 (six) months following the Effective Date, Supplier has failed to remedy more than 6 (six) non-material breaches within the 21 (twenty-one) day notice period in a Three Month Period.

36.4.2.1.3 For the purposes of this clause, the term "Three Month Period" means each consecutive 3 (three) month period calculated as from the Effective Date onwards and where the remedy period extends beyond the Three Month Period in which the breach in question occurred, that breach shall be reckoned in the following Three Month Period.

36.4.2.2 Transnet Freight Rail shall be required to act in terms of clause 36.4.2 within a reasonable period of time of Transnet Freight Rail becoming aware of the breach occurring, provided that it shall forfeit its right to place Supplier on terms in accordance with the provisions of clause 36.4.2.1 after a period of 18 (eighteen) months has expired following Transnet Freight Rail becoming aware of the breach in question.

36.4.2.3 Further, Supplier is afforded an opportunity to notify Transnet Freight Rail of any intended remedial action that it wishes to take in order to remedy a non-material breach and to discuss same with the Transnet Freight Rail. Should the Parties have agreed in writing on the appropriate rectification action that Supplier shall take to remedy any non-material breach, which agreement shall not be unreasonably withheld, the timeous completion of such rectification in compliance

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with the agreed rectification action shall constitute a remedy of the non-material breach in question, and consequently such breach shall not be taken into account in calculating the number of non-material breaches which the Supplier has failed to remedy for the purposes of clause 36.4.2.1.

36.4.2.4 The provisions of this clause 39.4.2 will not apply in circumstances where a non-material breach amounts to a material breach (even in circumstances where the Supplier has been placed on terms in accordance with the provisions of this clause 36.4.2), in which case Transnet Freight Rail shall be entitled to exercise its rights in terms of clause 36.4.1 above.

36.4.2.5 Transnet Freight Rail accepts that this clause does not provide Transnet Freight Rail with an opportunity to place the Supplier on terms for a non-material breach for its failure to perform any Services at performance levels or Service Levels other than as contracted for under this Agreement.

36.4.2.6 Should Transnet Freight Rail fail to make any undisputed payment within 60 (sixty) days after the due date specified in this Agreement for such payment, and provided that:

36.4.2.6.1 Transnet Freight Rail fails to remedy such failure within 30 (thirty) days after Transnet Freight Rail has received written notice of such failure from the Service Provider; and

36.4.2.6.2 the undisputed payment is equivalent to an amount greater than the Fees invoiced by Supplier in the 3 (three) month period preceding the date on which Transnet Freight Rail is placed on notice in terms of clause 36.4.2.6.1;

36.4.2.6.3 Supplier shall be entitled to terminate the Agreement or the relevant Schedule or Appendix, provided that it is specifically recorded that the withholding of disputed charges in terms of clause 39.3 shall not constitute a breach of the Agreement by the Transnet Freight Rail. Notwithstanding the termination of this Agreement or the applicable Schedule or Appendix by the Supplier in terms of this clause, Supplier shall remain obligated to perform its Disengagement obligations set forth in clause 48 until they are fulfilled. Transnet Freight Rail shall be

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liable to pay the Termination Fee for any termination pursuant to this clause. In the event that the Supplier agrees to render Disengagement Services following Termination, Transnet Freight Rail shall be liable to pay for its receipt of Disengagement Services in terms of the provisions of this Agreement.

36.4.2.7 It is agreed that should this Agreement be terminated as a result of the termination of the Share Purchase Agreement, for any reason whatsoever, Transnet Freight Rail shall not be liable to Supplier for any losses or claims arising from the termination of this Agreement, including for the payment of any Termination Fee.

### 36.5 Events of Default

36.5.1 The occurrence of any 1 (one) or more of the Events of Default set forth in clause 36.5.2 shall constitute a material breach of this Agreement that shall afford Transnet Freight Rail the right to terminate this Agreement (or any applicable Schedule or Appendix thereto or part thereof), at its option and upon written notice to Service Provider,

36.5.1.1 which termination will be without prejudice to any claims which Transnet Freight Rail may have inter alia for damages against Service Provider, to institute an action for specific performance and/or any additional remedies that may be set forth in this Agreement or in any Schedule, Attachment or Appendix or as it may be entitled to in law; and

36.5.1.2 which right to terminate this Agreement (or any applicable Schedule or Appendix thereto or part thereof), Transnet Freight Rail may exercise within a period of no later than 180 (one hundred and eighty) days from the occurrence of the Event of Default.

36.5.2 The Events of Default are:

36.5.2.1 Supplier becomes liable for the total annualised At-Risk Amount attributable to the Services or any Service Tower in a consecutive 12 (twelve) month period or less; or Supplier reaches half of the annualised At-Risk Amount attributable to any Service Tower in a consecutive 6 (six) month period or less.

36.5.2.2 a Disaster Event occurs which is not recovered in accordance with the



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timelines agreed to and/or as set out in the relevant Schedules, Appendices and/or Attachments. For the avoidance of doubt, in the event that a Disaster Event occurs as a result of a Force Majeure Event, the provisions of clause 46 and not this clause 36.5.2.2 shall apply to such Disaster Event;

36.5.2.3 the occurrence of 3 (three) or more Priority One Problems affecting the same system, which occurs during 3 (three) or more consecutive Measurement Intervals;

36.5.2.4 Service Provider's failure to maintain insurance coverage as specified in clause 48, provided that such failure is not remedied by Supplier within 30 (thirty) days following receipt of written notice of such failure from Transnet Freight Rail;

36.5.2.5 Supplier carries out a compromise, scheme of arrangement or composition by the Supplier with any or all of its creditors;

36.5.2.6 the liquidation of the Supplier or placement of the Supplier in judicial management, whether provisionally or finally;

36.5.2.7 a default or cessation, or a reasonable prospect of default or cessation (as the case may be), of the Service Provider's normal line of business relating to the Services;

36.5.2.8 the commission of any act or any omission which is an act of insolvency by an individual in terms of the Insolvency Act, 1936, or the existence of circumstances which would allow for the winding up of the Supplier in terms of section 81 of the Companies Act, 2008;

36.5.2.9 the disposal by the Supplier of a material portion of its undertaking or assets; or

36.5.2.10 Supplier fails, to remediate any internal control deficiencies and/or exceptions identified in any SAS 70 Type II Reports and/or Transnet Freight Rail's (or its Independent Auditor's) inquiries conducted pursuant to clause 36 within the timelines agreed in the Corrective Plan, or fails to comply with the security assessment pursuant to this Agreement.

### 36.5.3 Rights and Remedies of Transnet Freight Rail Upon Default of Service Provider

36.5.3.1 Upon the occurrence of an Event of Default with respect to which Transnet Freight Rail exercises a termination remedy as described in

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clause 36.5.1, Transnet Freight Rail shall effectuate such termination by delivering to Supplier a Termination Notice specifying the Termination Date; and provided, however, that Supplier shall remain obligated to perform its Disengagement obligations hereunder until they are fulfilled.

36.5.3.2 Any termination pursuant to this clause 36.5 shall not constitute a termination for convenience, and Transnet Freight Rail shall in no event be required to pay a Termination Fee to Supplier with respect to any such termination.

### 36.6 Rights and Remedies of Supplier upon Default of Transnet Freight Rail

36.6.1 The failure by Transnet Freight Rail to perform any obligation under this Agreement, other than Transnet Freight Rail's obligation to pay undisputed amounts owed to Supplier under the Agreement as set forth in clause 39.4.2.6, shall not be deemed to be grounds for termination by Supplier of the Agreement or of any Schedule or Appendix, provided that the Supplier shall remain entitled to exercise any other rights which it may have with respect to claims for damages, specific performance and/or any additional remedies that may be set forth in this Agreement or in any Schedule or Appendix.

## 37 FORCE MAJEURE

37.1 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, lockout, government action, laws or regulations, terrorism or civil disturbance, defaults 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. Transnet Freight Rail may however rely on strikes, industrial dispute and riots as a ground of force majeure.

37.2 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.

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37.3 If a Party fails to agree to such modifications proposed by the other Party within 90 (ninety) calendar days of the act of force majeure first occurring, either Party may thereafter terminate this Agreement with immediate notice.

## **38 DISENGAGEMENT SERVICES**

### **38.1 General Obligations**

38.1.1 Upon termination or expiration of this Agreement, the Supplier shall have completed the Disengagement Services for the Services in full cooperation with Transnet Freight Rail, its Affiliates and/or third parties including as the case may be, any replacement Service Provider(s) that may be designated by Transnet Freight Rail (the "Replacement Service Provider") and

38.1.2 generally, accomplish a complete handover of the Services from Supplier to any Replacement Service Provider(s) designated by Transnet Freight Rail without causing any unnecessary interruption of, or causing any unnecessary adverse impact on the Services.

38.1.3 Clauses hereunder sets forth the framework for a Disengagement Plan, which outlines the high level obligations and tasks required to accomplish an orderly transition to Transnet Freight Rail, its Affiliates and/or the Replacement Service Provider.

38.1.4 The Service Provider's obligation to provide the Services shall not cease until the Disengagement Services have been completed in accordance with this clause 38, to the satisfaction of Transnet Freight Rail.

### **38.1.5 Disengagement Period**

38.1.5.1 Commencement of the Disengagement Services shall be on the date stipulated by Transnet Freight Rail in the Termination Notice and for a period to be mutually agreed by the Parties and in accordance with this clause 38.

38.1.5.2 The Supplier agrees that the Disengagement Services shall continue for a period of time, which may be for a period of up to 12 (twelve) months, or such longer period as is required by Transnet Freight Rail, (with the applicable date on which the Service Provider's obligation to perform the Services expires being referred to as the "Expiration Date").

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38.1.5.3 If requested by Transnet Freight Rail and agreed by the Supplier to perform Disengagement obligations on an expedited basis if Transnet Freight Rail terminates this Agreement pursuant to clauses 17 and 40, the Supplier shall comply with such a requested subject to clause 38.1.6 hereunder.

#### 38.1.6 Specific Obligations

38.1.6.1 The Supplier shall as soon as reasonably possible following its issuance or receipt of a Termination Notice, but in no event longer than 10 (ten) Business Days thereafter; provide to Transnet Freight Rail a complete and accurate list of all items that will be subject to return to Transnet Freight Rail as provided under this Agreement.

38.1.6.2 Further to the provisions of clause 15 the Supplier agrees that its agreements with Affiliates shall not include any terms that would prohibit or otherwise restrict such Affiliates, from entering into agreements with Transnet Freight Rail, its Affiliates and/or the Replacement Supplier (whether directly or through an assignment) after Disengagement as provided herein and as it relates to Services.

#### 38.1.7 Full cooperation, information and knowledge transfer

38.1.7.1 During Disengagement, the Parties shall cooperate fully with one another to facilitate a smooth transition of the terminated Services from the Supplier to Transnet Freight Rail, its Affiliates and/or the Replacement Service Provider.

38.1.7.2 The Supplier shall provide full cooperation which shall include provision of full, complete, detailed, and sufficient information (including all information then being utilised by Supplier with respect to programs, tools, utilities and other resources used to provide the Services) and knowledge transfer with respect to all such information in order to enable Transnet Freight Rail's, its Affiliate's and/or the Replacement Service Provider's Employees (or that of Third Parties) to fully assume, become self-reliant with respect to, and continue without interruption, the provision of the Services.

38.1.7.3 The Supplier shall cooperate with Transnet Freight Rail and all of Transnet Freight Rail's other Service Providers, to provide a smooth

transition during Disengagement, with no unnecessary interruption of the Services and no unnecessary adverse impact on the provision of the Services or Transnet Freight Rail's activities.

#### 38.1.8 Third Party authorisations

38.1.8.1 Without limiting the obligations of the Supplier under this Agreement and subject to the terms of any Third Party contracts, if requested by Transnet Freight Rail as part of the Disengagement, the Supplier shall assist Transnet Freight Rail in procuring, any Third Party authorisations necessary to grant Transnet Freight Rail the use and benefit of any Third Party contracts between the Supplier and Third Party contractors used to provide the Services, pending their assignment to Transnet Freight Rail pursuant to clause 38.1.11.

#### 38.1.9 Licenses to Software

38.1.9.1 Without limiting Transnet Freight Rail's rights in and to the lease agreements previously granted to Transnet Freight Rail pursuant to clause 9, which lease agreements Transnet Freight Rail shall have the right to retain following the Expiration Date if and as requested by Transnet Freight Rail as part of the Disengagement, the Supplier shall re-assign to Transnet Freight Rail, its Affiliates and/or the Replacement Supplier any lease agreements assigned to the Supplier pursuant to clause 38.1.11 and subject to the OEM licensing regime.

#### 38.1.10 Transfer of Dedicated Assets

38.1.10.1 Although Transnet Freight Rail acknowledges that Supplier does not control Third-Party equipment vendors (if any), if requested by Transnet Freight Rail, the Supplier shall assist Transnet Freight Rail, its Affiliates, and/or the Replacement Supplier in securing maintenance (including all enhancements and upgrades) and support with respect to any such assets for so long as Transnet Freight Rail requires at competitive rates.

#### 38.1.11 Assignment of contracts

38.1.11.1 If and as requested by Transnet Freight Rail; and subject to the terms of any Third Party contracts; as part of the Disengagement, the Supplier shall endeavour to assist Transnet Freight Rail, its Affiliates and/or

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Transnet Freight Rail's Replacement Supplier in obtaining an assignment from among those leases, maintenance, support, warranties for the Equipment and other contracts used by the Service Provider, Transnet Freight Rail or any other Person in connection with the Services, such contracts as Transnet Freight Rail might select from the list provided by the Supplier pursuant to clause 15 of this Agreement.

38.1.11.2 The Service Provider's obligation under this clause 38.1.11.2 shall include the Service Provider's performance of all obligations under such leases, maintenance, support and other contracts to be performed by it with respect to periods prior to the date of assignment, and the Supplier shall reimburse Transnet Freight Rail for any Losses resulting from any claim that the Supplier did not perform any such obligations.

#### 38.1.12 Delivery of documentation and data

38.1.12.1 The Supplier shall deliver to Transnet Freight Rail authorised Person, all Transnet Freight Rail Data and Documents, as well as all procedures, standards, installation guides, user manuals, training material and operating schedules related to the Service Provider's provision of the Services.

#### 38.1.13 Payment for Disengagement Services

38.1.13.1 Upon the expiry of this Agreement or if this Agreement, or any portion thereof, is terminated for material breach on the part of the Supplier or on the occurrence of an Event of Default by the Supplier or is terminated in accordance with the provisions of clause 36, then the Parties shall agree on the Disengagement Fees for the applicable Disengagement Services, using the baseline to be determined by Transnet Freight Rail for the amount payable.

### 39 STEP IN RIGHTS

39.1 In addition to any other rights and remedies that it may have in terms of the Agreement or otherwise, including the right to terminate this Agreement, Transnet Freight Rail in its sole discretion elect to (i) call for an urgent senior level meeting with Service Provider; and/or (ii) launch an audit investigation into Service Provider's

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operations in accordance with the audit provisions detailed in clause 35 above immediately upon Transnet Freight Rail's identification or the Service Provider's notification of the occurrence of any event which Transnet Freight Rail considers, in its sole discretion, to be an event which may affect the continuity of the Services.

- 39.2 For purposes of this clause 39, where Transnet Freight Rail exercises its right to invoke the Parent Company guarantee in accordance with the provisions of clause 6 above and the Parent Company fails to fulfil the terms of the Parent Company guarantee, Transnet Freight Rail may (at its option), either itself or by the procurement of an alternate Third Party Service Provider, temporarily take over the provision of the Services until such time as Transnet Freight Rail is able to make permanent alternate arrangements for the provision of the Services, which right shall apply for a period of no more than 180 (one hundred and eighty) days from the date that Transnet Freight Rail temporarily takes over the provision of the Services.
- 39.3 Supplier shall, upon the request of Transnet Freight Rail, fully cooperate with and assist Transnet Freight Rail in the performance of the Services during any such temporary take-over of the Services by Transnet Freight Rail.
- 39.4 For the avoidance of doubt, during a temporary take-over of the Services pursuant to the provisions of this clause 39, Transnet Freight Rail and/or an alternate Third Party Supplier shall not be entitled to access any equipment, materials, software or data which belong to Service Provider's other clients and in the case of any infrastructure that may be shared with other Supplier clients, Transnet Freight Rail may only access and use such infrastructure with the consent of the other clients with whom it is sharing such infrastructure.
- 39.5 To the extent that Transnet Freight Rail exercises its rights to assume the rendering of the Services or part thereof itself, or procures that a Third Party Supplier renders some or all of the Services pursuant to the provisions of clause 39.2 above, Transnet Freight Rail shall be obliged to also assume, for that period, any direct costs and expenses solely attributed to any such temporary rendering of part or all of the Services, incurred by Transnet Freight Rail in accordance with this clause, including the salary costs for Supplier Employees that Transnet Freight Rail may require to assist it in so rendering the Services or part thereof, and any relevant software license or hardware maintenance fees.

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39.6 Transnet Freight Rail shall not under any circumstances by virtue of such assumption, be obliged or deemed or required to also take over or assume responsibility for the conduct of the Service Provider's business operations or the employment of any Supplier Employees, in terms of this clause.

#### **40 ASSET TAKE BACK AT TERMINATION OR EXPIRATION OF THE AGREEMENT**

40.1 As at the termination of this Agreement by Transnet Freight Rail or at expiration of the Agreement, Transnet Freight Rail may exercise its rights, at its election, in respect of the purchase of any Supplier Equipment in accordance with the provisions of clause 40.2 below.

40.2 On termination (save in the case where the Agreement is terminated as a result of a breach on the part of the Supplier and in the case where a Termination Fee is payable in terms of this Agreement) or expiration of the Agreement and in respect of the Supplier Equipment's which Transnet Freight Rail does not elect to purchase in accordance with this clause and which the Service Provider, acting in good faith and reasonably, is unable to redeploy within its environment, and for which the Supplier is able to provide sufficient proof that such Supplier Equipment has an outstanding net book value as reflected in the Service Provider's books and records (i.e. each with a depreciation period of at least 1 (one) year but longer in respect of certain Supplier Equipment) (the "Outstanding Net Book Value"), Transnet Freight Rail shall be required to make payment to Supplier of an amount equal to 15 % (fifteen percent) of the Outstanding Net Book Value to the Supplier within 30 (thirty) days of the date of the termination or expiration of the Agreement.

40.3 The Supplier is required to furnish Transnet Freight Rail with full written details of the current and projected net book value on all Supplier Equipment, at the end of the Contract Year.

#### **41 DISCLOSURE AND USE OF CONFIDENTIAL INFORMATION**

41.1 From time to time during the duration of this Agreement, Confidential Information may be given by one Party to this Agreement ("the Disclosing Party") to the other Party ("the Recipient").

41.2 The Receiving Party will treat and keep all Confidential Information as secret and confidential and will not, without the Disclosing Party's written consent, directly or



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indirectly communicate or disclose (whether in writing or orally or in any other manner) Confidential Information to any other person other than in accordance with the terms of this Agreement.

41.3 The Receiving Party will only use the Confidential Information for the sole purpose of complying with its obligations under this Agreement.

41.4 Notwithstanding clause 41.2 (Confidential Information) the Receiving Party may disclose Confidential Information:

41.4.1 to those of its Agents who strictly need to know the Confidential Information for the sole purpose set out in clause 41.3 (Confidential Information) provided that the Receiving Party shall ensure that such Agents are made aware prior to the disclosure of any part of the Confidential Information that the same is confidential and that they owe a duty of confidence to the Disclosing Party on the same terms as contained in this Agreement. The Receiving Party shall at all times remain liable for any actions of such Agents that would constitute a breach of this Agreement; or

41.4.2 to the extent required by law or the rules of any applicable regulatory authority, subject to clause 41.5 (Confidential Information) below.

41.5 If the Receiving Party is required to disclose any Confidential Information in accordance with clause 41.4.2 (Confidential Information) above, it shall promptly notify the Disclosing Party so that the Disclosing Party may have an opportunity to prevent the disclosure through appropriate legal means and the Receiving Party shall co-operate with the Disclosing Party regarding the form, nature, content and purpose of such disclosure or any action which the Disclosing Party may reasonably take to challenge the validity of such requirement.

41.6 The contents and the existence and the scope of this Agreement are Confidential Information.

41.7 If any Confidential Information is copied, disclosed or used otherwise than as permitted under this Agreement then, upon becoming aware of the same, without prejudice to any rights or remedies of the Disclosing Party, the Receiving Party shall as soon as practicable notify the Disclosing Party of such event and, if requested by the Disclosing Party, take such steps (including the institution of legal proceedings)

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as shall be necessary to remedy (if capable of remedy) the default and/or to prevent further unauthorised copying, disclosure or use.

41.8 Notwithstanding whether the Receiving Party uses the Confidential Information in accordance with this Agreement or not (including modifying or amending the Confidential Information), all Confidential Information shall remain the property of the Disclosing Party and its disclosure shall not confer on the Receiving Party any rights of the Disclosing Party (or its Agents), including Intellectual Property rights, over the Confidential Information whatsoever beyond those contained in this Agreement.

41.9 Use by the Receiving Party of any Confidential Information in accordance with the terms of this Agreement will not infringe the Intellectual Property of any other person and no notification of any actual or potential claim alleging such infringement has been received by the Disclosing Party.

41.10 The Receiving Party agrees to ensure proper and secure storage of all Confidential Information and any copies thereof to at least the same standard as the Receiving Party keeps its own Confidential Information. The Receiving Party shall not make any copies or reproduce in any form any Confidential Information except for the purpose of disclosure as permitted in accordance with this Agreement.

41.11 The Receiving Party shall keep a written record, to be supplied to the Disclosing Party upon request, of the Confidential Information received and any copies made thereof and, so far as is reasonably practicable, of the location of such Confidential Information and any copies thereof.

41.12 Without prejudice to any other rights or remedies of the Disclosing Party, the Receiving Party acknowledges and agrees that damages would not be an adequate remedy for any breach by it of the provisions of this clause 41 (Confidential Information) and that the Disclosing Party shall be entitled to seek the remedies of injunction, specific performance and other equitable relief for any threatened or actual breach of any such provision by the Receiving Party or its Agents, and no proof of special damages shall be necessary for the enforcement of the rights under this clause 44 (Confidential Information).

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## **42 LIMITATION OF LIABILITY**

- 42.1 Subject to clause 42.3 (Limitation of Liability) the total respective liability of Transnet Freight Rail and the Supplier in respect of a claim arising in terms of this Agreement (whether arising from negligence, breach of contract or otherwise howsoever) (in this clause, "Default") will be limited to 100% (one hundred percent) of the total Fees paid to the Supplier in terms of the Equipment provided in question, in the Contract Year immediately preceding that in which the event giving rise to the liability arises (or where such event arises in the first Contract Year of this Agreement, the actual total Fees paid together with the projected Fees for the remainder of the first Contract Year).
- 42.2 Subject to clause 42.3, in no event shall either party be liable to the other party for indirect or consequential loss or damage, loss of profits, business, revenue, goodwill or anticipated savings suffered by the other party during the term of this Agreement.
- 42.3 Neither party excludes or limits liability to the other party for death, personal injury caused by its proven gross negligence or that of its employees, for fraud or theft by it or its employees and for a breach of any of the provisions under clause 45 (Intellectual Property Rights Indemnity), clause 42 (Confidential Information) and clause 44 (Regulatory Indemnity).
- 42.4 The Parties expressly agree that if any limitation or provision contained or expressly referred to in this clause 42 (Limitation of Liability) is held to be invalid under any applicable statute or rule of law it will to that extent be deemed omitted but if any Party becomes liable for loss or damage which would otherwise have been excluded that liability will be subject to the other limitations and provisions set out in this clause 42 (Limitation of Liability).
- 42.5 Nothing in this clause 42 (Limitation of Liability) will be taken as in any way reducing or affecting a general duty to mitigate loss suffered by a Party.

## **43 REGULATORY INDEMNITY**

- 43.1 The Supplier will be solely liable for all losses, damages, costs, expenses and liabilities (including legal fees) incurred by or awarded against Transnet Freight Rail or their respective directors, officers, agents, employees, members, subsidiaries and successors in interest (together the "Indemnified Persons") in connection with any proceedings, claim or action against an Indemnified Person resulting from a breach by the Supplier of any Regulatory Requirements, where applicable.

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43.2 The Supplier will hold harmless each of the Indemnified Persons and indemnify each Indemnified Person on written demand in respect of all losses, damage, costs, expenses and liabilities (including legal fees) incurred by or awarded against an Indemnified Person in connection with any proceedings, claim or action against an Indemnified Person resulting from a breach by the Supplier of any Regulatory Requirements.

#### **44 INTELLECTUAL PROPERTY RIGHTS INDEMNITY**

44.1 The Supplier shall at all times whether during or after termination or expiry of this Agreement, indemnify and keep indemnified Transnet Freight Rail against all losses, claims, damages, liabilities, additional licence fees and expenses (including all reasonable legal fees) incurred by or awarded against Transnet Freight Rail or which are agreed by Transnet Freight Rail to be paid by way of settlement or compromise arising out of or in relation to any infringement or alleged infringement of any Intellectual Property Rights of any Third Party which is suffered by Transnet Freight Rail as a result of Transnet Freight Rail's receipt of the Services or use or possession of the Supplier Tools, Deliverables, or any part thereof, ("IPR Claim") provided that Transnet Freight Rail shall:

44.1.1 allow the Supplier to conduct all negotiations and proceedings and give the Supplier all reasonable assistance in relation to the IPR Claim, each at the Service Provider's cost; and

44.1.2 make no admission relating to the IPR Claim.

44.2 Transnet Freight Rail shall notify the Supplier in writing as soon as is reasonably practicable of any IPR Claim of which Transnet Freight Rail has notice.

44.3 The Supplier shall conduct the litigation diligently using competent counsel and in such a way as not to bring the reputation or name of Transnet Freight Rail into disrepute.

44.4 The Supplier shall not be entitled to settle or compromise any IPR Claim made against Transnet Freight Rail without Transnet Freight Rail's prior written consent (not to be unreasonably withheld).

44.5 If at any time an IPR Claim is made, the Supplier may, at its own expense and sole option, either:

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44.5.1 procure for Transnet Freight Rail the right to continue using the relevant services, Supplier Tools or Deliverables; or

44.5.2 replace or modify the Services, Supplier Tools or Deliverables with non-infringing substitutes, provided that any substitute shall not materially prejudice Transnet Freight Rail's use of the Services, Supplier Tools or Deliverables and that such substitution will be carried out so as to avoid or reduce insofar as possible any interruption to Transnet Freight Rail's business operations.

44.6 If the Supplier has availed itself of its rights to modify the Deliverables or to supply substitute item(s) under clause 47.2 or to procure a licence in accordance with clause 47.1 and such exercise of the said rights has not avoided the relevant IPR Claim, then Transnet Freight Rail may:

44.6.1 at its option return the Deliverables to the Supplier and, without prejudice to the indemnity in clause 44.1 the Supplier shall refund in full all Fees paid by Transnet Freight Rail under this Agreement in relation to such Deliverables; or

44.6.2 at its option terminate this Agreement by giving the Supplier 30 (thirty) days written notice.

## **45 INSURANCE**

45.1 The Supplier shall, for the continued duration of this agreement, have and maintain sufficient insurance to cover its obligations and liabilities under this agreement. The Supplier shall provide Transnet Freight Rail with a certificate of existence of such insurance.

45.2 The terms of any insurance or the amount of cover shall not relieve the supplier of any liabilities under this agreement.

45.3 If the Supplier or its personnel are involved in any occurrence which to their knowledge may give rise to a claim under any insurance policy effected by Transnet Freight Rail, the Supplier shall without delay:

45.3.1 notify Transnet Freight Rail of the circumstances giving rise to such occurrence, the nature of the occurrence and the estimate of any loss or damage which may be suffered as a result of such occurrence; and

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45.3.2 provide Transnet Freight Rail and its insurance brokers with any assistance reasonably required in order to ensure that Transnet Freight Rail is able to successfully prosecute such insurance claim.

## **46 SUPPLIER INDEMNITIES**

46.1 The Supplier shall indemnify, defend and hold harmless Transnet Freight Rail from and against, all Losses sustained or incurred by Transnet Freight Rail, based upon or relating to any claim, action or proceeding brought by any Third Party against Transnet Freight Rail for infringement of any Intellectual Property or other proprietary right, including misappropriation of trade secrets, arising out of or relating to the Services, any Deliverable and/or technology provided used by Supplier to provide the Services (an "Infringement Claim").

### **46.2 Third-Party Claims**

46.2.1 The Supplier shall indemnify, defend and hold harmless Transnet Freight Rail from and against, and shall pay any and all Losses sustained or incurred by Transnet Freight Rail, based upon or relating to any claim brought by any Third Party (as well as any Supplier Employee) against Transnet Freight Rail for:

46.2.1.1 breach by Supplier of any agreement with any Third Party; or

46.2.1.2 breach of an agreement between Supplier and its supplier; or

46.2.1.3 any unlawful activity or any negligent, wilful or fraudulent conduct by Supplier or Supplier Employees, and claims attributable to errors or omissions; and

46.2.1.4 the Supplier shall immediately notify Transnet Freight Rail if an act or omission of a Third Party may cause a problem (including a Problem or Incident) or delay in providing the Services and shall work with Transnet Freight Rail to prevent or circumvent such problem or delay.

## **47 GIFTS AND FAVOURS**

47.1 Transnet Freight Rail shall be entitled to terminate the Agreement forthwith if it is found that (i) gifts and favours (for example business transactions, terms, and/or conditions that are not freely available to the public, entertainment, gifts or otherwise) were given by the Supplier or any Employee, agent or representative of the Supplier (or its suppliers) to any officer or Employee of Transnet Freight Rail or its Affiliates (or family of such an officer or Employee of Transnet Freight Rail or its

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Affiliates) with a view toward securing the Agreement or securing favourable treatment or terms by or from Transnet Freight Rail or the Supplier contravened Transnet Freight Rail's Integrity Pact, which the Supplier is obliged to strictly comply with.

47.2 The Supplier warrants to Transnet Freight Rail that to the best of its knowledge and belief, neither the Supplier nor any of its Affiliates, nor any Employee of either:

47.2.1 Shall have or shall acquire any direct or indirect contractual, financial, business or other interest or advantage that would conflict in any manner or degree with the Service Provider's performance of its obligations, duties and responsibilities to Transnet Freight Rail under the Agreement or otherwise create an appearance of impropriety with respect to this Agreement and the Supplier shall promptly inform Transnet Freight Rail of any such interest or advantage that may be incompatible with the interests of Transnet Freight Rail or creates an appearance of impropriety;

47.2.2 has used or shall use the authority provided or to be provided under the Agreement to improperly obtain financial gain, advantage or benefit for the Service Provider, any of its Affiliates, any of their Employees, or any member of the immediate family of any such Employee;

47.2.3 has used or shall use any Transnet Freight Rail Confidential Information acquired in connection with the Agreement to obtain financial gain, advantage or benefit for the Service Provider, any of its Affiliates, any of their Employees or any member of the immediate family of any such Employee;

47.2.4 has accepted or shall accept anything of value or an inducement that would provide a financial gain, advantage or benefit, based on an understanding that the actions of the Service Provider, any such Affiliates or any such Employees on behalf of Transnet Freight Rail would be influenced thereby; and neither the Supplier nor any of its Affiliates shall attempt to influence any Transnet Freight Rail Employee by the direct or indirect offer of anything of value or an inducement; and

47.2.5 has paid or agreed to pay any Person any fee, commission, percentage, brokerage fee, gift or any other consideration, that is contingent upon or resulting from the award or execution of this Agreement, save for such remuneration as is paid to bona fide Employees working solely for the Supplier or such Affiliates.

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47.3 The Supplier warrants to Transnet Freight Rail that to the best of its knowledge and belief, the prices presented in the Service Provider's proposal were arrived at independently, without consultation, communication or agreement with any other Supplier for the purpose of restricting competition; the prices quoted in the Service Provider's proposal were not knowingly disclosed by the Supplier to any other Supplier and no attempt was made by the Supplier to induce any other Person to submit or not to submit a proposal for the purpose of restricting competition.

## **48 DISPUTE / PROBLEM RESOLUTION**

### **48.1 Internal Dispute Resolution Procedure**

#### **48.1.1 Informal Resolution**

48.1.1.1 If any dispute or Problem arises between the Parties, Transnet Freight Rail Relationship Manager and the Supplier Relationship Manager shall meet and attempt to resolve the Problem. Written minutes of such meetings shall be kept by Supplier and delivered to Transnet Freight Rail within 5 (five) days after the meeting.

48.1.1.2 If the Parties are unable to resolve the Problem within 10 (ten) days after the initial request for the meeting, then the Parties shall seek to resolve the Problem through Executive Resolution.

#### **48.1.2 Executive Resolution**

48.1.2.1 For Problems that are not resolved as described in the clauses before, negotiations shall be conducted by the Chief Information Officer or higher-level officer of Transnet Freight Rail and a similar level Officer of the Service Provider.

48.1.2.2 If such representatives are unable to resolve the Problem within 5 (five) Business Days after the Parties have commenced negotiations, or 15 (fifteen) days have passed since the initial request for negotiations at this level, then the Parties shall be entitled to discontinue negotiations and to seek to resolve the Problem through arbitration as hereinafter provided.

### **48.2 Arbitration**

48.2.1 If the Parties are unable to resolve any dispute, other than a dispute described in clause 48.2.8, in the manner contemplated by clause 48.1.2, then subject to clause



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48.2.2, such dispute shall on written demand by either Party to the dispute be submitted to arbitration at AFSA in Sandton and in accordance with the rules thereof by an arbitrator or arbitrators agreed on by the Parties or should the Parties fail to agree on an arbitrator within 10 (ten) days after arbitration has been demanded, the arbitrator shall be nominated by AFSA. The arbitration shall be held in the English language.

48.2.2 The Parties shall request that the arbitrator(s) commence the arbitration within 21 (twenty-one) days and proceed as if time is of the essence in the arbitration proceeding.

48.2.3 The Parties shall request that the arbitrator render his or her decision within 14 (fourteen) days following the conclusion of the hearing.

48.2.4 Recognising the express desire of the Parties for an expeditious means of dispute resolution, the arbitrator shall limit or allow the Parties to expand the scope of discovery as may be reasonable under the circumstances.

48.2.5 The Parties undertake not to withhold their consent to join another party to the Arbitration.

48.2.6 The Parties irrevocably agree that the submission to arbitration is subject to the Parties' rights of appeal. Any Party may appeal the decision of the arbitrator within a period of 20 (twenty) days after the arbitrator's ruling has been handed down by giving written notice to that effect to the other Party to the arbitration. The appeal shall be dealt with in accordance with the rules of AFSA by a panel of 3 (three) arbitrators appointed by AFSA.

48.2.7 The decision of the arbitrator shall be binding on the Parties to the arbitration after the expiry of the period of 20 (twenty) days from the date of the arbitrator's ruling if no appeal has been lodged by any Party or upon the issue of determination by the appeal panel, as the case may be. A decision, which becomes final and binding in terms of this clause 48.2.7 may be made an order of court at the instance of any Party to the arbitration.

48.2.8 Disputes between the Parties regarding Service Provider's obligations to provide Disengagement Services as contemplated in this Agreement shall not be subject to the provisions of clause 48.2.1 and Transnet Freight Rail may proceed directly to court in these circumstances.

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48.2.9 Each Party agrees to continue performing its obligations under the Agreement while any dispute is being resolved except to the extent the issue in dispute precludes performance (dispute over payment shall not be deemed to preclude performance).

48.2.10 The Parties shall use commercially reasonable efforts to resolve disputes arising under the Agreement as rapidly as possible.

48.2.11 This clause shall not preclude (i) either Party from seeking urgent relief; or (ii) Transnet Freight Rail from seeking any relief in relation to any dispute which may be raised by the Supplier which has the effect of frustrating, delaying or preventing Transnet Freight Rail's expedient exercise or enforcement of its rights in terms of the Parent Company guarantee, from either the High Court of South Africa or any other competent organs of state created for the specific purpose of regulating the business or industry activities in which the Parties are engaged.

48.2.12 Any dispute resolution or arbitration process under this clause shall be conducted in camera and the Parties shall treat as confidential and not disclose to any Third Party the existence of the dispute, details of the dispute, the conduct of the informal or formal dispute resolution proceedings or the outcome of the dispute resolution proceedings, without the written consent of the other Party provided that the Parties shall be entitled to disclose such information to such persons as are necessary to enable them to conduct their case.

48.2.13 Except for the duration of a valid Force Majeure Event, and in accordance with clause 40 herein, the Parties agree to continue performing their obligations under this Agreement while the Problem is being resolved as provided in this clause 60 until the Problem is resolved or until this Agreement is terminated.

## **49 GENERAL**

### **49.1 Third Party Beneficiaries**

49.1.1 This Agreement is an agreement between the applicable Parties and, except for Transnet Freight Rail Indemnitees and the Supplier Indemnitees, confers no rights upon any of such Parties' Employees, agents, or contractors, or upon any other Person.

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## 49.2 Use of Transnet Freight Rail Name

49.2.1 Except as necessary to deliver the Services in accordance with this Agreement, the Supplier shall have no right to use, and shall not use, the name of Transnet Freight Rail and/or any of its officials or Employees, or logos or trademarks in any manner, including in any press releases and sales material, without the prior written consent of Transnet Freight Rail, which consent may be withheld in Transnet Freight Rail's sole discretion.

## 49.3 Assignment

49.4 Subject to all other provisions herein contained, this Agreement shall be binding on the Parties and their successors-in-title and permitted assigns.

## 49.5 Notices

49.5.1 The Parties select as their respective *domicilia citandi et executandi* the following physical addresses, and for the purposes of giving or sending any notice provided for or required under this Agreement, the said physical addresses as well as the following e-mail numbers

<b>PARTIES</b>	<b>Addresses and email numbers</b>
Transnet Freight Rail	Transnet Freight Rail Head Office  Inyanda 2  Girton Road  Parktown  JOHANNESBURG  Marked for the attention of: General Counsel, Transnet Freight Rail
Service Provider	[insert]

provided that a Party may change its *domicilium* or its address for the purposes of notices to any other physical address or e-mail number by written notice to the other

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Party to that effect. Such change of address will be effective 5 (five) Business Days after receipt of the notice of the change.

49.6 All notices to be given in terms of this Agreement will be given in writing, in English, and will

49.6.1 be delivered by hand or sent, by e-mail;

49.6.2 if delivered by hand during business hours, be presumed to have been received on the date of delivery. Any notice delivered after business hours or on a day which is not a Business Day will be presumed to have been received on the following Business Day; and

49.6.3 if sent by e-mail during business hours, be presumed to have been received on the date of successful transmission of the e-mail, upon receipt of confirmation of a delivery and read report. Any e-mail sent after business hours or on a day which is not a Business Day will be presumed to have been received on the following Business Day, upon receipt of confirmation of a delivery and read report.

49.6.4 Notwithstanding the above, any notice given in writing in English, and actually received by the Party to whom the notice is addressed, will be deemed to have been properly given and received, notwithstanding that such notice has not been given in accordance with this clause.

49.6.5 The Parties record that whilst they may correspond via email during the currency of this Agreement for operational reasons, no formal notice required in terms of this Agreement, nor any amendment of or variation to this Agreement may be given or concluded via email.

49.7 Relationship between the Parties

49.7.1 The Parties warrant and acknowledge that the relationship between them is not in the nature of a partnership and that neither Party is in any manner entitled to make or enter into binding agreements of any nature on behalf of the other Party.

49.8 Authorised Signatories

49.8.1 The Parties agree that this Agreement and any Attachment, Appendix or Addendum concluded in terms hereof shall not be valid unless signed by an authorised signatory of Transnet Freight Rail and the Service Provider. Transnet Freight Rail's company

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secretary or the office of the Chief Information Officer shall upon request furnish the Supplier with such documentation as may reasonably be required by the Supplier to establish the authority of the proposed authorised Transnet Freight Rail signatories.

#### 49.9 Severability

49.9.1 Should any of the terms and conditions of the Agreement be held to be invalid, unlawful or unenforceable, such terms and conditions shall be severable from the remaining terms and conditions which shall continue to be valid and enforceable. If any term or condition held to be invalid is capable of amendment to render it valid, the Parties agree to negotiate an amendment to remove the invalidity.

#### 49.10 Amendments and Waiver

49.10.1 No addition to or variation, deletion, or agreed cancellation of all or any clauses or provisions of this Agreement will be of any force or effect unless in writing and signed by the Parties.

49.10.2 No waiver of any of the terms and conditions of this Agreement will be binding or effectual for any purpose unless in writing and signed by the Party giving the same. Any such waiver will be effective only in the specific instance and for the purpose given. Failure or delay on the part of either Party in exercising any right, power or privilege hereunder will not constitute or be deemed to be a waiver thereof, nor will any single or partial exercise of any right, power or privilege preclude any other or further exercise thereof or the exercise of any other right, power or privilege.

#### 49.11 Counterparts

49.11.1 This Agreement may be executed in counterparts, each of which shall be deemed an original, and all of which together shall constitute one and the same Agreement as at the date of signature of the Party last signing one of the counterparts.

#### 49.12 Governing Law and Venue

49.12.1 The Agreement will be governed by and construed in accordance with the law of the Republic of South Africa and all disputes, actions and other matters relating thereto will be determined in accordance with such law. The Parties exclude the

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application of the United Nations Convention on Contracts for the International Sale of Goods from the Agreement.

#### 49.13 Survival

49.13.1 Any provision of the Agreement, which contemplates performance or observance subsequent to any termination, or expiration of the Agreement shall survive any termination or expiration of the Agreement and continue in full force and effect.

#### 49.14 Expenses

49.14.1 Each Party shall bear all expenses paid or incurred by it in connection with the planning, drafting, negotiation and execution of this Agreement.

#### 49.15 Benefits of Agreement

49.15.1 All rights and benefits granted hereunder to Transnet Freight Rail may be exercised and enjoyed by any Affiliate of Transnet Freight Rail, provided that Transnet Freight Rail shall be and remain responsible for the compliance of the terms and conditions of this Agreement with respect to such Affiliate and will be Affiliate's agent for all purposes of this Agreement and any claims or actions arising from such Affiliate shall be pursued solely by Transnet Freight Rail.

#### 49.16 Entire Agreement

49.16.1 This Agreement and all its Attachments and Appendices must be read and interpreted together with the Agreement as a single document that constitutes the whole of the agreement between the Parties relating to the subject matter herein. Save to the extent otherwise provided herein, no undertaking, representation, term or condition relating to the subject matter of this Agreement not incorporated in this Agreement, shall be binding on any of the Parties.

49.16.2 This Agreement, together with all its Attachments, and Appendices, sets forth the entire, final and exclusive agreement between the Parties and supersedes all prior and contemporaneous agreements, understandings, negotiations and discussions, whether oral or written, between the Parties related to the subject matter herein.

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Signed by the Parties at the places and dates below - :

SIGNED at \_\_\_\_\_ on \_\_\_\_\_ 2019

For and on behalf of

TRANSNET FREIGHT RAIL

Signature \_\_\_\_\_

Name of Signatory \_\_\_\_\_

Designation of Signatory \_\_\_\_\_

SIGNED at \_\_\_\_\_ on \_\_\_\_\_ 2019

For and on behalf of the

SERVICE PROVIDER

Signature \_\_\_\_\_

Name of Signatory \_\_\_\_\_

Designation of Signatory \_\_\_\_\_

Witness 1 \_\_\_\_\_

Witness 2 \_\_\_\_\_