

## **STANDARD TERMS AND CONDITIONS OF CONTRACT**

### **TRANSNET SOC LTD**

Registration Number 1990/000900/30

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## **1 SOLE AGREEMENT**

Unless otherwise agreed in writing, these terms [**Terms** and each **Term**] and Transnet's purchase order(s) [**Order** or **Orders**] represent the only conditions upon which Transnet SOC Ltd [**Transnet**] procures Goods/Services [**the Goods/Services**] specified in the Order from the person to whom the Order is addressed [**the Supplier/Service Provider**]. Transnet does not accept any other conditions which the Supplier/Service Provider may specify, unless otherwise agreed to by Transnet in writing. In the event of any inconsistency between these Terms and any Order, these Terms shall take precedence.

## **2 CONFORMITY WITH ORDER**

Goods/Services shall conform strictly with the Order. The Supplier/Service Provider shall not vary the quantities specified and/or the specification, if any, stipulated in the Order, without the prior written consent of Transnet. The Supplier/Service Provider warrants that the Goods/Services shall be fit for their purpose and of satisfactory quality.

## **3 DELIVERY AND TITLE**

- 3.1 The delivery dates and addresses are those in the Order. Time shall be of the essence in respect of the Supplier/Service Provider's obligations under the Order.
- 3.2 The Supplier/Service Provider will not be excused for delay in delivery or performance except due to circumstances outside its control and then only subject to the Supplier/Service Provider having notified Transnet in writing on becoming aware of such circumstances. Transnet may terminate an Order, in whole or in part, without incurring any liability to the Supplier/Service Provider if such a delay becomes, in Transnet's absolute opinion, significant.
- 3.3 Risk of loss or damage to Goods shall pass to Transnet on delivery, and title shall pass to Transnet when payment to the Supplier for the Goods has been effected.
- 3.4 If on delivery, the Goods/services do not conform to the Order, Transnet may reject the Goods/Services and the Supplier/Service Provider shall promptly rectify any defects or in Transnet's opinion, supply appropriate replacement Goods/Services at the

Supplier/Service Provider's expense within the specified delivery times, without any liability due by Transnet. Goods shall be subject to such testing and/or inspection as Transnet may consider necessary.

#### **4 PRICE AND PAYMENT**

- 4.1 Prices specified in an Order cannot be increased. Payment for the Goods/Services shall be made by Transnet against an original undisputed invoice(s) [a Tax Invoice], supporting documentation and month-end statement from the Supplier/Service Provider. Tax Invoices plus supporting documentation shall be posted to the address shown in the Order.
- 4.2 Payment of the Supplier/Service Provider's valid Tax Invoice(s) will be made by Transnet in the South African currency and on the terms stated in the Order, the standard payment terms being 30 [thirty] days from date of receipt by Transnet of a month-end statement, unless otherwise agreed to in writing. Transnet shall arrange for payment of such Tax Invoices and any pre-authorised additional expenses incurred, provided that the authorised expenses are supported by acceptable documentary proof of expenditure incurred [where this is available]. Any amounts due in terms of these Terms shall be paid to the Supplier/Service Provider, taking into account any deduction or set-off and bank charges.

#### **5 LOCAL CONTENT OBLIGATIONS & NON COMPLIANCE PENALTIES**

- 5.1 In terms of Annexure A (SBD 6.2) and Annexure C of the RFq, the Supplier has undertaken to implement the local content and production requirements set by National Treasury for the Rail Rolling Stock designated sector ("local content undertaking"). It is recorded that the local content undertaking was a prequalification criterion of the RFP and it is therefore mandatory for the Supplier to comply with Annexures A and C in order for it to fulfil its local content obligations.
- 5.2 The Supplier is required to note that Transnet, the Department of Trade and Industry [DTI] and/or the body appointed by the DTI as the verification authority for local content may conduct compliance audits with regard to the local content requirements as prescribed in Regulation 9 of the Preferential Procurement Regulations, 2011 issued in terms of the Preferential Procurement Policy Framework Act.
- 5.3 Breach of Local Content obligations also provides Transnet cause to terminate the contract in certain cases where material noncompliance with Local Content requirements are not achieved.
- 5.4 If for any reason the Supplier is unable to achieve the local content undertaking, the Supplier must approach the Department of Trade and Industry ("DTI") to obtain exemption in order to supply the goods at a lower local content threshold. The Supplier is obliged to approach DTI for exemption within 10 (ten) days of determining that it is

unable to achieve the local content threshold. Should the DTI provide exemption, the Supplier shall be entitled to provide the goods at the lower local content threshold set by DTI. Should DTI not provide the necessary exemption, the Supplier shall be obliged to meet the local content undertaking.

5.5 Should the Supplier fail to meet the local content undertaking, the following remedies shall apply without limiting any of Transnet's other rights in law:

- i. Transnet shall afford the Supplier a period of thirty (30) days to remedy its non-compliance.
- ii. Should the Supplier fail to meet its obligations within the further 30 day period, the Supplier shall pay a Non-Compliance penalty ("Non-compliance Penalty") to Transnet in respect of such Non-compliance as set out in clause iv below. The penalties shall be imposed against the non-delivery of committed values where local content undertakings must be met immediately.
- iii. To the extent that the Actual Local Content Spend is lower than the Required Local Content Spend (or the Adjusted Required Local Content Spend, as the case may be), the Supplier shall be liable for Penalties which is the difference in value between the Actual Local Content Spend and the Required Local Content Spend (or the Adjusted Required Local Content Spend, as the case may be) plus an additional percentage of such difference. Such Non-compliance Penalties shall be imposed against the non-delivery of committed values where local content undertakings must be met immediately, in accordance with clause iv below.
- iv. Non-compliance penalties shall apply at the following rate: the difference in value between the Required Local Content Spend and the Actual Local Content Spend, plus 5% of such difference.

## **6 PROPRIETARY RIGHTS LIABILITY**

If any allegations should be made or any claim asserted against Transnet that ownership of, or any act or omission by Transnet in relation to Goods/Services or any written material provided to Transnet relating to any Goods/Services or pursuant to an Order being a violation or infringement of any third party's contractual, industrial, commercial or intellectual property rights including but not limited to any patent, registered design, design right, trade mark, copyright or service mark on any application thereof, the Supplier/Service Provider hereby indemnifies Transnet against and hold it harmless from any and all losses, liabilities, costs, claims, damages and expenses [including any legal fees] arising directly or indirectly from such allegation or claim provided that this indemnity shall not apply where the allegation or claim arises solely as a result of the Supplier/Service Provider following a design or process originated and furnished by Transnet. The Supplier/Service Provider shall either

- a) procure for Transnet the right to continue using the infringing Goods/Services; or
- b) modify or replace the Goods/services so that they become non-infringing,

provided that in both cases the Goods/services shall continue to meet Transnet's requirements and any specifications stipulated in the Order. Should neither option be possible, the Supplier/Service Provider may remove, with Transnet's prior written consent, such Goods/services and will pay to Transnet a sum equivalent to the purchase price. If Transnet

refuses to give such consent, the Supplier/Service Provider shall have no liability in respect of any continued use of the infringing Goods/services after Supplier/Service Provider's prior written request to remove the same.

## **7 PROPRIETARY INFORMATION**

All information which Transnet has divulged or may divulge to the Supplier/Service Provider and any information relating to Transnet's business which may have come into the Supplier/Service Provider's possession whilst carrying out an Order, and the existence of the Order, shall be treated by the Supplier/Service Provider as confidential information and shall not, without Transnet's prior written consent, be disclosed to any third party, or be used or copied for any purposes other than to perform the Order. This clause does not apply to information which is public knowledge or available from other sources other than by breach of this Term. Upon request by Transnet, the Supplier/Service Provider shall return all materials issued pursuant to the Order and, pending this, shall protect Transnet's rights in any such materials. Such confidential information shall at all material times be the property of Transnet.

## **8 PUBLICITY**

The Supplier/Service Provider shall not name Transnet or use its trademarks, service marks [whether registered or not] or Goods in connection with any publicity without Transnet's prior written consent.

## **9 DEVELOPMENT WORK IN THE PRODUCTION OF GOODS**

If the production or provision of any Goods involves research and/or development which are wholly or partly funded by Transnet, then all intellectual property or other rights as a result thereof shall be the property of Transnet on creation.

## **10 AFTER SALES SERVICE**

The Supplier shall provide replacement parts necessary to ensure the uninterrupted operation of the Goods supplied for the duration of the warranty period, from delivery of any particular item of the Goods and if requested by Transnet shall make these parts available to a third party maintainer of Transnet's choice at the same price as if the parts had been supplied to Transnet. The Supplier undertakes to provide a maintenance service for Goods, should Transnet so request, on terms to be agreed. If the Order so indicates, the Supplier will provide a warranty service for the Goods at a level to be agreed with Transnet.

## **11 TERMINATION OF ORDER**

11.1 Notwithstanding the date of signature hereof, the commencement date of this Order is **the date of award**; unless:

- this Order is terminated by either Party in accordance with the provisions incorporated herein or in any schedules or annexures appended hereto, or otherwise in accordance with law or equity; or
  - this Order is extended at Transnet's option for a further period to be agreed by the Parties; or
  - the allocated maximum contract value is depleted before the contract expiry date.
- 11.2 Transnet may cancel this Order in whole or in part at any time upon at least 30 [thirty] days' written notice to the Supplier/Service Provider, or when there is a change in control of the Supplier/Service Provider or the Supplier/Service Provider commits any serious breach or any repeated or continued material breach of its obligations under these Terms and/or Order or shall have been guilty of conduct tending to bring itself into disrepute, on written notice to the Supplier/Service Provider when such work on the Order shall stop.
- 11.3 Transnet shall pay the Supplier/Service Provider a fair and reasonable price for justified work in progress, where such price reflects only those costs not otherwise recoverable by the Supplier/Service Provider, at the time of termination, and the Supplier/Service Provider shall give Transnet full assistance to check the extent of such work in progress. Payment of such price shall be in full and final satisfaction of any claims arising out of such termination and upon such payment the Supplier/Service Provider shall deliver to Transnet all work, including any materials, completed or in progress. The sum payable to the Supplier/Service Provider under this clause will not in any event exceed the total amount that would have been payable to the Supplier/Service Provider had the Order not been terminated.
- 11.4 In the event of termination the Supplier/Service Provider must submit all claims within 2 [two] months of termination after which time claims will only be met in what Transnet considers exceptional circumstances.
- 11.5 If the Goods/services are not provided in accordance with an Order, the Order shall be deemed terminated and the Supplier/Service Provider shall compensate Transnet for any costs incurred in obtaining substitute Goods/services or any damage caused due to the failure or delay in the delivery.
- 11.6 Both parties to this agreement reserve the right to terminate this agreement:
- 12.6.1. If the other commits a material breach of this contracts and fails to remedy such breach within a stipulated time frame or within a reasonable time;
  - 12.6.2. There is non-performance from either of the parties; or
  - 12.6.3. If the other party is unable to perform its obligations under this agreement.

## **12 ACCESS**

The Supplier/Service Provider shall be liable for the acts, omissions and defaults of its personnel or agents who, for the purposes of the Order, shall be treated as if they are the Supplier/Service Provider's employees. The Supplier/Service Provider shall ensure that any such personnel or agents, whilst on Transnet's premises, shall comply with Transnet's health and safety, security and system security rules and procedures as and where required.

## **13 WARRANTY**

The Supplier/Service Provider warrants that it is competent to supply the Goods/services in accordance with these Terms to the reasonable satisfaction of Transnet and that all Goods/services delivered under the Order: (a) conform and comply in all relevant legislation, standards, directives and orders related to *[inter alia]* the Goods/services in force at the time of delivery, and to any specifications referred to in the Order; (b) will not cause any deterioration in the functionality of any Transnet equipment; and (c) do not infringe any third party rights of any kind. The Supplier/Service Provider hereby indemnifies Transnet against all losses, liabilities, costs, claims, damages, expenses and awards of any kinds incurred or made against Transnet in connection with any breach of this warranty.

## **14 INSOLVENCY**

If the Supplier/Service Provider shall have a receiver, manager, administrator, liquidator or like person appointed over all or any part of its assets or if the Supplier/Service Provider compounds with its creditors or passes a resolution for the writing up or administration of the Supplier/Service Provider, Transnet is at liberty to terminate the Order or Orders forthwith, or at its option, to seek performance by any such appointed person.

## **15 SUBCONTRACTING**

- 15.1 The Supplier/Service Provider may only enter into a subcontracting arrangement with the approval of Transnet. If the Supplier subcontracts a portion of the contract to another person without declaring it to Transnet, Transnet must penalise the Supplier up to 10% of the value of the contract.
- 15.2 Should Transnet approve the Supplier's/Service Provider's subcontracting arrangement, the Supplier/Service Provider and not the sub-contractor will at all times be held liable for performance in terms of its contractual obligations.
- 15.3 The Supplier/Service Provider may not subcontract in such a manner that the local production and content of the overall value of the contract is reduced to below the stipulated minimum threshold.
- 15.4 The Supplier/Service Provider may not subcontract more than 25% of the value of the contract to any other enterprise that does not have an equal or higher B-BBEE status level of contributor than the Supplier, unless the contract is subcontracted to an



Exempted Micro Enterprise (EME) that has the capability and ability to execute the subcontract.

## **16 PAYMENT TO SUB-CONTRACTORS**

- 16.1 Transnet reserves the right, in its sole discretion, to make payment directly to the sub-contractor of the Supplier/Service Provider, subject to the following conditions:
- a) Receipt of an undisputed invoice from the sub-contractor; and
  - b) Receipt of written confirmation from the Supplier/Service Provider that the amounts claimed by the sub-contractor are correct and that the services for which the sub-contractor has requested payment were rendered to the satisfaction of the Supplier/Service Provider, against the required standards.
- 16.2 Nothing contained in this clause must be interpreted as bestowing on any sub-contractor a right or legitimate expectation to be paid directly by Transnet. Furthermore, this clause does not bestow any right or legitimate expectation on the Supplier/Service provider to demand that Transnet pay its sub-contractor directly. The decision to pay any sub-contractor directly, remains that of Transnet alone.
- 16.3 The Supplier/Service Provider remains liable for its contractual obligations under the Agreement, including all services rendered by the sub-contractor.
- 16.4 This clause does not establish any contractual relationship between Transnet and any sub-contractor of the Supplier/Service Provider, whatsoever.

## **17 ASSIGNMENT**

The Supplier/Service Provider shall not assign its obligations under an Order without Transnet's prior written consent, which consent shall not be unreasonably withheld or delayed.

## **18 SUPPLIER INTEGRITY PACT**

The Supplier/Service Provider shall observe and ensure compliance with all requirements and objectives of the Transnet Supplier Integrity Pact as agreed to in response to the RFQ. The general purpose of the Supplier Integrity Pact is to agree to avoid all forms of dishonesty, fraud and corruption by following a system that is fair, transparent and free from any undue influence prior to, during and subsequent to the currency of the procurement event leading to this Agreement and this Agreement itself;

## **19 DATABASE OF RESTRICTED SUPPLIERS**

The process of restriction is used to exclude a company/person from conducting future business with Transnet and other organs of state for a specified period. No Bid shall be awarded to a Bidder whose name (or any of its members, directors, partners or trustees) appear on the Register of Tender Defaulters kept by National Treasury, or who have been placed on National Treasury's List of Restricted Suppliers. Transnet reserves the right to withdraw an award, or

cancel a contract concluded with a Bidder should it be established, at any time, that a bidder has been restricted with National Treasury by another government institution.

## **20 NOTICES**

Notices under these Terms shall be delivered by hand to the relevant addresses of the parties in the Order or may be served by facsimile or by email, in which event notice shall be deemed served on acknowledgement of receipt by the recipient.

## **21 LAW**

Orders shall be governed by and interpreted in accordance with South African law and any disputes arising herein shall be subject to South African arbitration under the rules of the Arbitration Foundation of South Africa, which rules are deemed incorporated by reference in this clause. The reference to arbitration shall not prevent Transnet referring the matter to any South African courts, having jurisdiction, to which the Supplier/Service Provider hereby irrevocably submits but without prejudice to Transnet's right to take proceedings against the Supplier/Service Provider in other jurisdictions and/or obtaining interim relief on an urgent basis from a court of competent jurisdiction pending the decision in other courts or from instituting in any court of competent jurisdiction any proceedings for an interdict or any other injunctive relief. If the Supplier/Service Provider does not have a registered office in the South Africa it will at all times maintain an agent for service of process in South Africa and shall give Transnet the name and address of such agent as such may be amended, in writing, from time to time.

## **22 GENERAL**

Completion or termination of an Order shall be without prejudice to any Term herein which by its nature would be deemed to continue after completion or termination, including but not limited to clauses 5, 6, 7, 8 and 10. Headings are included herein for convenience only. If any Term herein be held illegal or unenforceable, the validity or enforceability of the remaining Terms shall not be affected. No failure or delay by Transnet to enforce any rights under these Terms will operate as a waiver thereof by Transnet. All rights and remedies available to either party under these Terms shall be in addition to, not to the exclusion of, rights otherwise available at law.

## **23 COUNTERPARTS**

These Terms and conditions may be signed in any number of counterparts, all of which taken together shall constitute one and the same instrument. Any party may enter into this agreement by signing any such counterpart.