

**PASSENGER RAIL AGENCY OF SOUTH AFRICA**

**SALE AND PURCHASE OF GOODS CONTRACT**

DRAFT CONTRACT

**PURCHASE AND SALE OF GOODS AGREEMENT**

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## PURCHASE AND SALE OF GOODS AGREEMENT

### 1 INTERPRETATION

#### 1.1 Construction

In this Agreement unless the context indicates to the contrary:

- 1.1.1 Clause headings and sub-headings are for convenience only and are not intended to be used in the interpretation thereof;
- 1.1.2 References to the provisions of any law shall, unless expressly stipulated otherwise, be to South African law and will, unless expressly stipulated otherwise, include the provisions of such law as amended, re-enacted or consolidated from time to time;
- 1.1.3 References to “Clauses” and “sub-Clauses” are references to the Clauses and sub-Clauses of this Agreement unless context indicates the contrary;
- 1.1.4 References to “Parties” shall include the Parties’ respective successors-in-title and, to the extent as would be permitted in this Agreement, their respective cessionaries and assignees;
- 1.1.5 References to a “person” shall include an individual, firm, company, corporation, juristic person, and any trust, organization, association or partnership, whether or not having separate legal personality;
- 1.1.6 References to any “Responsible Authority” or any public or professional organization shall include a reference to any of its successors or any organization or entity, which takes over its functions or responsibilities;
- 1.1.7 The Annexures to this Agreement are an integral part thereof and references to this Agreement shall include the Annexures;
- 1.1.8 Cross references to Clauses in a specific Annexure, part or section shall be a cross reference to Clauses in such Annexure, part or section unless specifically stated otherwise;
- 1.1.9 No provision or word used in this Agreement shall be interpreted to the disadvantage of either Party because that Party was

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responsible for or participated in the preparation or drafting of this Agreement or any part of it;

1.1.10 Words importing the singular shall include the plural and vice versa, and words importing either gender or the neuter shall include both genders and the neuter;

1.1.11 References to “this Agreement” shall include this Agreement as amended, varied, novated or substituted in writing from time to time;

1.1.12 References to Purchaser shall mean PRASA and vice versa;

1.1.13 References to any other contract or document shall include (subject to all approvals required to be given pursuant to this Agreement for any amendment or variation to or novation or substitution of such contract or document) a reference to that contract or document as amended, varied, novated or substituted from time to time;

1.1.14 General words preceded or followed by words such as “other” or “including” or “particularly” shall not be given a restrictive meaning because they are preceded or followed by particular examples intended to fall within the meaning of the general words;

1.1.15 When any number of days is prescribed in this Agreement, same shall, unless otherwise specifically stated, be reckoned exclusively of the first and inclusively of the last day;

1.1.16 If any provision in a definition is a substantive provision conferring rights or imposing obligations on any Party, then notwithstanding that it is only in the definition clause, effect shall be given to it as if it were a substantive provision in the body of this Agreement;

1.1.17 Where words have been defined in the body of this Agreement, such words shall, unless otherwise required by the context, have the meanings so assigned to them throughout this Agreement;

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1.1.18 Where any provision contemplates a notice to be given or agreement to be reached between the Parties, such notice or agreement shall, unless expressly provided otherwise, be in writing.

## 2 DEFINITIONS

In this Agreement, the following words and expressions shall have the meaning assigned to them below and cognate expressions shall have a corresponding meaning, unless inconsistent with the context:

- 2.1 **“Acceptance Date”** shall mean the date on which each Goods is accepted in terms of the unit acceptance procedure by the Purchaser in terms of this Agreement as stipulated in Annexure A;
- 2.2 **“Affiliate”** shall mean any person that directly or indirectly through any one or more intermediaries controls, is controlled or is under common control of or with any person;
- 2.3 **“Agreement”** shall mean this agreement together with all the Annexures attached hereto;
- 2.4 **“Applicable Law”** shall mean the Constitution of the Republic of South Africa and all applicable statutes, regulations, codes of good practice, sector codes, industry charters, ordinances, by-laws, rules (including rules of court) and other secondary legislation, directives, practice notes having force of law in South Africa and the common law arising out of judicial decisions, notifications and with which the Parties are bound to comply;
- 2.5 **“Bid”** means the proposal submitted by the Seller in response to the Tender Invite issued by the Purchaser;
- 2.6 **“BBBEE”** shall mean Broad Based Black Economic Empowerment as defined in Act 53 of 2003;
- 2.7 **“Business Day”** shall mean any day except Saturday, Sunday or proclaimed public holiday in South Africa;
- 2.8 **“Change in Law”** shall mean the coming into effect after Signature Date of this Agreement of any Law, or any amendment or variation to any Law

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other than any Law that on or before Signature Date has been published in a draft bill;

- 2.9 **“Confidential Information”** shall mean all confidential information owned by either Party relating to its business or operations and including, but without being limited thereto, information relating to technical know-how and data, drawings, methods, processes and procedures, and other information, which comes into possession or under the control of the other Party in any manner whatsoever, in the course of this Agreement;
- 2.10 **“Consents”** shall mean all consents, permits, clearances, authorizations, approvals, rulings, exemptions, registrations, filings, decisions, licenses, permissions required to be issued by or made with any Responsible Authority for the performance by the Seller of this Agreement, excluding (for the avoidance of doubt) the Purchaser Consents;
- 2.11 **“Completion Date”** shall mean the date of the warranty period in accordance with clause 19.3 of this Agreement;
- 2.12 **“Constitution”** shall mean the Constitution of the Republic of South Africa;
- 2.13 **“Corrupt Act”** shall mean any offense in respect of corruption or corrupt activities contemplated in the Prevention and Combating of Corrupt Activities Act, 2004, committed in relation to this Agreement or any other contract between Seller and the Purchaser;
- 2.14 **“Effective Date”** shall mean the date of fulfillment of the condition precedent in clause 5;
- 2.15 **“Default”**, in respect of the Seller or the Purchaser (as the case may be) shall occur if:

2.15.1 any arrangement, composition or compromise with or for the benefit of creditors (including any voluntary arrangement as defined in the Insolvency Act, 1936 or the Companies Act, 2008) being entered into by or in relation to the Party concerned;

2.15.2 a liquidator, business rescue practitioner or the like taking



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possession of or being appointed over, or any, winding-up, execution or other process being levied or enforced upon the whole or any material part of the assets of the Party concerned;

2.15.3 the Party concerned ceases to carry on business;

2.15.4 the Purchaser commits a breach of any of its material obligations under this Agreement;

2.15.5 the Seller commits a breach of any of its material obligations under this Agreement, provided that in the event of late delivery of a Goods in terms of clause 14, such late delivery shall not constitute a Seller's Default unless the cap for Liquidated Damages in terms of clause 19 has been reached;

2.15.6 in the case of the Seller, the Purchaser lawfully rejects acceptance of more than 10% (ten percent) of the Goods in accordance with the provisions of this Agreement;

2.15.7 In the case of the Seller, the Seller fails to replace the Goods for which acceptance has been lawfully rejected (in accordance with the provisions of this Agreement) or fails to rectify such cause of rejection (as required in terms of this Agreement); and

2.15.8 in the case of the Purchaser, the Purchaser fails to pay the Purchase Amount (or any portion thereof) on due date.

2.16 **"Delivery Date"** shall mean the date stipulated in the Delivery Schedule for the delivery of the Goods;

2.17 **"Delivery Schedule"** shall mean the schedule for the delivery of the Goods annexed hereto as Annexure A;

2.18 **"Final Delivery at Place"** shall mean addresses in \_\_\_\_\_, (South Africa) and detailed in the Delivery Schedule Annexure "A".

2.19 **"Force Majeure"** shall mean any of the events listed in clause 26 which directly causes either Party to be unable to comply with all or a material part of its obligations under this Agreement;

2.20 **"Goods"** means the Goods to be supplied and delivered by the Seller

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and detailed in Goods Schedule which is Annexure “E” of this Agreement;

- 2.21 **“Good Industry Practice”** shall mean applying, in relation to the manner in which the Goods are manufactured, the standards, practices, methods and procedures conforming to Applicable Law, and exercising that degree of skill, care, diligence, prudence and foresight that would reasonably and ordinarily be expected from a skilled and experienced person engaged in a similar type of undertaking under similar circumstances;
- 2.22 **“Make Good Charges”** shall mean the costs that will be incurred by the Seller in rectifying defects on any Goods arising from rejection thereof by the Purchaser;
- 2.23 **“Parties”** shall mean the Seller and the Purchaser and Party shall mean either of them;
- 2.24 **“Payment Schedule”** shall mean the payment schedule annexed hereto as Annexure “B”;
- 2.25 **“Personnel”** shall mean any employee, agent, consultant or sub-contractor of the Parties;
- 2.26 **“Performance Bond(s)”** shall mean the performance bond(s) to be provided by the Seller for the amount equal to 10% (ten percent) of the Purchase Amount of each affected Goods which must comply substantially with Annexure “F” hereto and provided always that the aggregate of all the Performance Bonds will amount to 10% (ten percent) of the Purchase Amount;
- 2.27 **“PRASA”** shall mean Passenger Rail Agency of South Africa, a public entity established in terms of the Legal Succession to the South African Transport Services Act 9 of 1989;
- 2.28 **“Pricing Schedule”** shall mean the pricing schedule of the Goods annexed hereto as Annexure “C”;
- 2.29 **“Goods”** shall mean Goods to be supplied and delivered by the Seller to the Purchaser as detailed in Annexure “F”;
- 2.30 **“Public Entity”** shall mean a public entity as defined in the Public Finance Management Act, of 1999;

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- 2.31 “**Purchase Amount**” shall mean the amount to be paid by the Purchaser to the Seller for the Purchase of the Goods as set out in the Pricing Schedule;
- 2.32 “**Purchaser**” shall mean PRASA;
- 2.33 “**Responsible Authority**” shall mean any ministry, any minister, any organ of state, any official, any official in the public administration or any other governmental or regulatory department, commission, department, entity, service utility, board of directors, committee, agency, instrumentality or authority (in each case, whether national, provincial or municipal) or any court, each having jurisdiction over the matter in question;
- 2.34 “**Restricted Enterprise**” shall mean an entity restricted from contracting with Purchaser or any other Public Entity as a result of being listed either on the register for tender defaulters compiled in terms of the regulations to the Prevention and Combating of Corrupt Activities Act 12, of 2004; or any other relevant Applicable Law;
- 2.35 “**Seller**” shall mean \_\_\_\_\_ a company duly registered in terms of the Companies Act 71 of 2008 with Registration Number \_\_\_\_\_;
- 2.36 “**Signature Date**” shall mean the date of signature of this Agreement by the last party signing;
- 2.37 “**Signature Date**” shall mean the date of signature of this Agreement by the last party signing;
- 2.38 “**South Africa**” shall mean the Republic of South Africa;
- 2.39 “**Specification Schedule**” means Annexure “D” hereto
- 2.40 “**Tender Invite**” means the tender issued by PRASA for supply and delivery of the Goods.

## 3 INCONSISTENCY

- 3.1 The documents forming the Contract are to be taken as mutually explanatory of one another. For the purposes of interpretation, the priority of the documents shall be in accordance with the following sequence:

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3.1.1 This Agreement and Annexures thereto;

3.1.2 the RFP; and

3.1.3 the Sellers's Bid.

3.2 If an ambiguity or discrepancy is found in the documents, the Parties shall endeavour to resolve the matter failing which they can refer the matter to arbitration in terms of this Agreement.

## 4 INTRODUCTION

4.1 On \_\_\_\_\_, PRASA issued a tender for appointment of a Seller for delivery and Supply of the Goods.

4.2 The appointed seller of Goods to PRASA [the Seller], these Standard Terms and Conditions of Contract, the technical specifications for the Goods, a Schedule of Requirements including such special conditions as may be applicable, and any terms in the associated Bid Documents, exclusively govern the supply of Goods and provision of ancillary Services by the Seller to PRASA

4.3 The Purchaser hereby purchases from the Seller the Goods and unless otherwise specified, the Seller shall supply unused Goods either from stock or from a new production.

## 5 CONDITION PRECEDENT

5.1 Save for this clause 5 (Condition Precedent) and clauses 2 (Definitions), 30 (Confidentiality), 28(Informal Dispute Resolution), **Error! Reference source not found.** (Arbitration), 27 (Notices and Legal Service) and 33 (Severability) which shall be of immediate force and effect, this Agreement is subject to a condition precedent that the Seller deliver to the Purchaser the Performance Bond(s) within 30 days of the Signature Date. The above condition precedent shall not be capable of being waived.

5.2 Unless the condition precedent contained in clause 5.1 is fulfilled on or before the 28th day ("long stop date") from the Signature Date or such later date as the Parties may agree to in writing, the provisions of this clause 5 (Condition Precedent) and clauses 2 (Definitions), 30

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(Confidentiality), 28 (Informal Dispute Resolution), **Error! Reference source not found.** (Arbitration), 27 (Notices and Legal Service) and 33 (Severability) shall continue to be of full force and effect, but the remainder of this Agreement shall not become operative or effective and shall have no force or effect whatsoever.

### 6 PERFORMANCE BOND

- 6.1 The Seller shall issue to the Purchaser Performance Bonds on or before the date specified in clause 5 (Condition Precedent);
- 6.2 The Performance Bond(s) shall either be in respect of each item of Goods or a portion thereof in line with the Delivery Schedule;
- 6.3 Upon the expiry of the Warranty Period in respect of each Good, the Seller shall release the Performance Bond(s) for that Good which is no longer within the Warranty Period.

### 7 INSURANCES

- 7.1 Without limiting the liability of the Seller under the Agreement, the Seller shall take out insurance in respect of all risks for which it is prudent for the Seller to insure against including any liability it may have as a result of its activities under the Agreement for theft, destruction, loss of or damage to Goods, death or injury to any person and damage to property. The level of insurance will be kept under review by PRASA, on an annual basis, to ensure its adequacy, provided that any variation to the level of such insurance shall be entirely at the discretion of the Seller.
- 7.2 The Seller shall arrange insurance with reputable insurers and will produce to PRASA evidence of the existence of the policies on an annual basis within 30 [thirty] calendar days after date of policy renewals upon written request by the Purchaser.
- 7.3 Subject to clause 7.4 below, if the Seller fails to affect adequate insurance under this clause 7, it shall notify PRASA

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in writing as soon as it becomes aware of the reduction or inadequate cover and PRASA may arrange or purchase such insurance. The Seller shall promptly reimburse PRASA for any premiums paid provided such insurance protects the Seller's liability. PRASA assumes no responsibility for such insurance being adequate to protect all of the Seller's liability.

- 7.4 In the event that the Seller receives written notice from its insurers advising of the termination of its insurance cover referred to in clause 7.1 above or if the insurance ceases to be available upon commercially reasonable terms, the Seller shall immediately notify PRASA in writing of such termination and/or unavailability, where after either the Seller or PRASA may terminate the Agreement on giving the other Party not less than 30 [thirty] calendar days prior written notice to that effect.

## **8 DURATION**

The term of this Agreement shall commence on Effective Date, that is upon the delivery of the Performance Bond which is the condition precedence as per clause 5 of this agreement and shall continue unless otherwise terminated in terms of any provision of this Agreement, up to Completion Date.

## **9 OBLIGATIONS OF THE PARTIES**

### **9.1 The Seller's Obligations**

#### **9.1.1 The Seller shall:**

9.1.2 supply the Goods contemplated in this Agreement in accordance with the terms and conditions thereof in accordance with Good Industry Practice as at the Signature Date;

9.1.3 Notify the Purchaser of any trends, activities or occurrence in relation to any of the aspects of this Agreement or part thereof, which are known to the Seller and which are reasonably likely to result in the disruption to the Purchaser's business or the availability of the Goods;

9.1.4 Deliver each Goods according to the Specification Schedule

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annexed hereto as Annexure “D”;

9.1.5 Ensure timely delivery of the Goods as outlined in Delivery Schedule “A”;

9.1.6 Provide performance and other guarantees applicable to the Goods as expressly included in this Agreement.

### 9.2 The Purchasers’ Obligations

9.2.1 The Purchaser shall:

9.2.2 Subject to the provisions of clause 15, to make payments to the Seller in accordance with the Payment Schedule annexed hereto as Annexure “B”;

9.2.3 Accept delivery of Goods in accordance with the Delivery Schedule;

9.2.4 Undertake the inspections and tests to determine the acceptability of Goods as defined in the unit acceptance procedure.

## 10 PURCHASE AMOUNT

10.1 The Purchaser shall pay to the Seller the Purchase Amount in accordance with *terms and conditions set in the Pricing Schedule annexed hereto as Annexure “C”* and this Agreement.

## 11 JOINT AND SEVERAL LIABILITY

**11.1 If the Seller constitutes (under applicable Law) *[MAKE A SELECTION EITHER A JOINT VENTURE, CONSORTIUM OR OTHER UNINCORPORATED GROUPING OF TWO OR MORE PERSONS]*..**

11.1.1 these persons shall be deemed to be jointly and severally liable to the Purchaser for the performance of the Contract;

11.1.2 these persons shall notify Purchaser of their leader who shall have authority to bind the Contractor and each of these persons; and

11.1.3 the Seller shall not alter its composition or legal status without the prior consent of the Purchaser.]

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### **12 SUBJECT MATTER OF PURCHASE AND SALE AGREEMENT**

- 12.1 The Seller shall supply and deliver to the Purchaser and the Purchaser shall purchase and accept delivery from the Seller of the Goods of the type and specifications listed in the Specification Schedule annexed hereto as Annexure "D".
- 12.2 The Purchaser shall inspect and certify the Goods at arrival Final Delivery at Place .

### **13 SELLER'S UNDERTAKING**

- 13.1 The Seller undertakes that the production, the Seller's documents, the execution and the completed Goods will be in accordance with:
- a) The Applicable Law as of the Signature Date; (please write the law in full)
  - b) Good Industry Practice as of the Signature Date; and
  - c) The documents forming the Contract, as altered or modified by variations as agreed in writing between the Parties.

### **14 DELIVERY OF THE GOODS**

- 14.1 The Seller shall, deliver the Goods at the Delivery Point within the time period, specified in the Delivery Schedule with respect thereto in a condition which from the technical perspective is suitable based on the agreed requirements, to for immediate use by Purchaser for the Unit Acceptance Procedure and the Purchaser shall be obliged to effect payment thereof within the time period stipulated in 15.5 below.
- 14.2 Upon delivery of the Goods at the Delivery Point (when the goods have been offloaded by the seller), the Purchaser shall promptly and without delay take possession of the Goods in order to avoid any delay in vessel discharging, inspect the Goods (in line with the standards and specifications in the Specification Schedule) to confirm that they comply with the Specification Schedule.
- 14.3 If the Goods meet the specifications and have successfully undergone the unit acceptance procedure, the Purchaser will accept all such Goods



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so delivered.

- 14.4 Upon delivery and acceptance of the Goods, the Seller and Purchaser shall execute an acceptance certificate hereto indicating the Acceptance Date as to such Goods.
- 14.5 The Purchaser retains the right to reject acceptance of Goods that do not conform to the Specification Schedule within the period specified in clause 14.2.
- 14.6 If the Purchaser rejects acceptance of any Goods, it shall notify the Seller of such rejection within the period specified in clauses 14.2 and 14.5 and shall provide the Seller in writing with full and detailed reasons for the rejection.
- 14.7 The Purchaser shall not be entitled to return a Goods for which acceptance has been rejected. Instead, the Seller shall name a third party inspection company, acceptable to the Purchaser, to verify the compliance of the Goods.
- 14.8 In case the third party inspection reveals that some Goods are found not conforming to the Contract terms, the Seller shall replace or rectify such cause of rejection in such Goods in order to achieve conformity with the Specification Schedule of all the Goods that have been rejected.
- 14.9 The Seller will give Purchaser notice of the targeted delivery week of each Goods approximately 30 (thirty) days prior to the scheduled month of delivery.
- 14.10 The Seller will give the Purchaser at least 14 (fourteen) days' notice of the delivery date of the Goods.
- 14.11 The title to the Goods will pass from the Seller to the Purchaser upon delivery and offloading of such Goods to the Delivery Point, after inspection by the Purchaser and confirmation of acceptance and after full payment of the said Goods to the Seller. The risk of loss of the Goods will pass from the Seller to the Purchaser as per the Incoterms used in the Contract.
- 14.12 Upon delivery and offloading of the Goods the Seller will deliver to

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Purchaser a bill of sale conveying good title to such Goods, free of any liens, claims, charges, and encumbrances.

### 15 PURCHASE AMOUNT AND PAYMENT TERMS

- 15.1 The purchase amount for the Goods and the total purchase amount shall be as stated in the Pricing Schedule annexed hereto as Annexure “C”.
- 15.2 The Purchaser shall, during the subsistence of this Agreement make payments to the Seller for the sale and purchase of the Goods in strict accordance with the invoicing and payment procedures specified in the Payment Schedule.
- 15.3 Payments should be made to the Seller’s Bank Account as notified by the Seller to the Purchaser in writing.
- 15.4 The payments shall be inclusive of all items related to the purchasing of Goods. The Seller shall be responsible for the costs and the risk related to:
- a) Make Good Charges;
  - b) licence fees and other regulatory costs applicable to the Seller.
- 15.5 The purchase amount for the Goods stated in the Pricing Schedule annexed hereto as Annexure C, less Advance Payments received by the Seller, is due on acceptance of such Goods by the Purchaser, provided that if acceptance is delayed for reasons not attributable to the Seller payments shall be made after 30 days.
- 15.6 The Purchaser shall make payments in accordance with the Payment Schedule in Rands by electronic transfer to the Seller’s nominated bank account.
- 15.7 All other payments that are required to be made in terms of this Agreement shall be made in South African Rand.

### 16 INVOICING

- 16.1 The Seller shall issue to Purchaser invoices in accordance to Payment Schedule and the invoices shall:

16.1.1 Indicate the VAT number of the Seller;

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- 16.1.2 Indicate the full details of the Seller's and bank account;
- 16.1.3 Be a valid tax invoice in accordance with the requirements of the South African Revenue Services; and
- 16.1.4 Indicate the vendor number provided to the Seller by Purchaser.

## **17 RISK OF LOSS OR DAMAGE**

If Goods are destroyed or damaged for any reason before delivery at the Delivery Point conditions, the Seller will give written notice to the Purchaser specifying the earliest month possible in which the Seller can deliver a replacement Goods. The Purchaser may within 30 (thirty) days from receipt of the said notice elect to have the Seller supply a replacement Goods under terms and conditions as close as possible to the terms of the damaged or destroyed Goods.

## **18 REPRESENTATIONS AND WARRANTIES**

### **The Sellers warranties**

- 18.1 The Seller hereby warrants that:
  - 18.1.1 it is a Consortium formed by two separate companies duly incorporated/ a company duly registered in accordance with the Companies Act of 2008 and validly existing under the laws of South Africa, and has taken all necessary actions to authorize its execution of and to fulfill its obligations under this Agreement;
  - 18.1.2 to the best of its knowledge and belief, its obligations under this Agreement are legal, valid, binding and enforceable against it, in accordance with the terms of this Agreement;
  - 18.1.3 all information disclosed by or on behalf of the Seller at any time up to the Signature Date and thereafter, is true, complete and accurate in all material respects and the Seller is not aware of any material facts or circumstances not disclosed to Purchaser which would, if disclosed, be likely to have an adverse effect on Purchaser's decision (acting reasonably) to enter into this Agreement with the Seller;
  - 18.1.4 the execution and performance of this Agreement does not and will not contravene any provision of its constitutive documents as

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at the Signature Date, or any order or other decision of any Responsible Authority or arbitrator that is binding on the Seller as at the Signature Date;

18.1.5 no litigation, arbitration, investigation or administrative proceeding is in progress as at the Signature Date or, to the best of the knowledge of the Seller as at the Signature Date having made all reasonable enquiries, threatened against it which is likely to have a material adverse effect on the ability of the Seller to provide the Goods;

18.1.6 the Seller is not subject to any obligation, non-compliance with which is likely to have a material adverse effect on its ability to supply the Goods;

18.1.7 no proceedings or any other steps have been taken or, to the best of the knowledge of the Seller having made all reasonable enquiries, threatened for the winding-up or liquidation (whether voluntary or involuntary, provisional or final), judicial management (whether provisional or final) or deregistration of the Seller or any (or all) of its sub-contractors, or for the appointment of a liquidator, judicial manager or similar officer over it or over any of its assets;

18.1.8 it will use reasonable care and skill in carrying out its obligations under this Agreement;

18.1.9 it is not a Restricted Enterprise; and

18.1.10 in being awarded the business under this Agreement, it did not engage, either directly or indirectly, or in any manner participate in the perpetration of a Corrupt Activities Act 12 of 2004.

### 18.2 **Purchaser warranties**

Purchaser hereby warrants that:

18.2.1 it has taken all necessary actions to authorise its execution of and to fulfill its obligations under this Agreement; and

18.2.2 to the best of its knowledge and belief, its obligations under this Agreement are legal, valid, binding and enforceable against it, in

## PURCHASE AND SALE OF GOODS AGREEMENT

accordance with the terms of this Agreement;

18.2.3 no litigation, arbitration, investigation or administrative proceeding (other than any such proceedings relating to the conduct of the Seller) is in progress as at the Signature Date in respect the award of the Seller's appointment under this Agreement, and to the best of the knowledge of the Purchaser as at the Signature Date having made all reasonable enquiries, threatened against it which is likely to have a material adverse effect on the ability of the Purchaser to perform its obligations under this Agreement;

18.2.4 the Purchaser is not subject to any obligation, non-compliance with which is likely to have a material adverse effect on its ability to perform its obligations under this Agreement;

18.2.5 it will use reasonable care and skill in carrying out its obligations under this Agreement.

18.3 Unless otherwise expressly stated, the warranties of the Seller and the Purchaser in terms of clauses 18.1 and 18.2 respectively shall apply as at the Signature Date and for the duration of this Agreement.

## 19 GOODS WARRANTIES

### 19.1 Goods warranty

19.1.1 The Seller grants the Purchaser a warranty that is independent for each of the Goods under the terms and conditions contained in this clause. By virtue of the Warranty, if any of the components, pieces or original parts of the Goods suffered a breakage, malfunction, imperfection or damage under the terms indicated in clause 19.2 below, the purchaser reserves the right to outline if the Seller should undertake repair and/or replace the Defective Goods..

### 19.2 Aspects covered and aspects excluded

19.2.1 The Warranty is to apply and, therefore, the Seller shall have the obligations indicated in clause 19.1, solely if the breakage, malfunction, damage or deterioration of the Defective Component

## **PURCHASE AND SALE OF GOODS AGREEMENT**

were to be due to (i) defects in the materials used, (ii) manufacturing faults, faults that are not the consequence of any technical specifications specified by the Purchaser and (iii) workmanship faults

19.2.2 Excluded from the Warranty, therefore, are the breakages, malfunctioning, damage or deterioration derived from (including, but not limited to):

19.2.3 Normal wear and tear for the Goods. On this point the Purchaser is aware and accepts that the Goods have to be submitted to periodic maintenance, in which parts should be replaced because of their normal wear.

19.2.4 Improper use of the Goods.

19.2.5 Lack of proper maintenance.

19.2.6 Accidents, natural disasters (floods, fires, explosions, etc.); violent or criminal acts.

19.2.7 Failure by the Purchaser to repair other breakages, malfunctioning, wear or damage.

### **19.3 Warranty Periods**

The Goods will be guaranteed for period of carry a guarantee of no less than 12 months from Acceptance Date. All Goods shall have a general warranty of no less than 60 months and a corrosion warranty of no less than 120 months from Acceptance Date.

### **19.4 Claim process for the Warranty and execution of the same by the Seller**

19.4.1 Once a defect becomes known, the Purchaser shall notify the Seller of the defect. This notification is to be made as soon as possible and, in any case, within one (1) week following the date on which the defect became known. The Purchaser will dismount and make available the defective component to the Seller without delay and free of any cost and/or expense for the Seller at a place designated for this purpose at the Purchaser's premises.

## **PURCHASE AND SALE OF GOODS AGREEMENT**

19.4.2 Following receipt of this notification, the Seller is to adopt the measures necessary to be able to comply in a reasonable period replace the defective Goods.

19.4.3 In any case, prior to complying with the obligations set out in clause 19.1, the Seller may examine the Goods and carry out whatever examinations it considers reasonable in order to determine the cause of the breakage, malfunctioning, damage or deterioration, such investigation to be permitted and facilitated by the Purchaser.

19.4.4 The Seller's liability and obligation under any warranty claim which is accepted by the Seller or finally proven by the Purchaser shall be limited to the replacement of the defective Goods at the sole cost and expense of the Seller, and to the exclusion of any other remedy.

## **20 PENALTY FOR DELAYS**

20.1 If the Contractor fails to complete the Services within the time a stipulated in this Contract for completion of Services or a part or portion of Services, the Contractor shall be liable to the Employer for an amount calculated at 0.5% of the Contract Price per delayed Day per order, which shall be paid for every Day which shall elapse between the time for due completion and completion of the relevant Services. However, the total amount due under this sub-clause shall not exceed the maximum of 10% of the Contract Price.

20.2 The imposition of such penalty shall not relieve the Contractor from its obligation to complete Services or from any of its obligations and liabilities under the Contract,

20.3 The Employer may set off or deduct from the fees due to the Contractor any penalty amounts due and owing by the Contractor in terms of clause 20.1.

## **21 SPECIFICATIONS AND STANDARDS**

21.1 The Goods supplied by the Seller will, at the date of delivery,

## PURCHASE AND SALE OF GOODS AGREEMENT

comply with any specification and standard specified Specification Schedule annexed hereto as Annexure “D”.

- 21.2 Failure by the Purchaser to comply with Purchasers Specification Schedule in Annexure “D” shall constitute material breach by the Seller which shall entitle the Purchaser to reject the Goods so delivered and the Seller shall replace at its costs the Goods so rejected without delay.

## 22 CESSION OR DELEGATION AND SUB-CONTRACT

- 22.1 Neither Party shall cede or delegate any right or obligation under this contract nor enter into any sub-contract of whatever nature for the execution therefore or part thereof without the prior written consent of the other.
- 22.2 The Contractor shall only be entitled to cede its rights to receive payment for Services rendered under this Contract in favour of registered Financial Services Providers (FSP) and state institutions established for the express purpose of providing funding to businesses and entities (State Institution) and such cession shall require the prior written consent of the Chief Procurement Officer and Group Chief Executive Officer or delegated official/s of the Employer.
- 22.3 The Seller may only sub-contract any part of its obligations in terms of this Agreement with prior consent from Purchaser, which consent shall not be unreasonably withheld, provided that:-

22.3.1 such sub-contracting shall not absolve the Seller from the responsibility for complying with its obligations in terms of this Agreement and the Seller hereby subject to the terms of this Agreement indemnifies and holds Purchaser harmless against any loss, harm or damage which Purchaser may suffer as a result of such sub-contracting;

22.3.2 such sub-contracting shall not have the effect of diluting or circumventing the provisions of the Seller quotation and this Agreement;



#### **PURCHASE AND SALE OF GOODS AGREEMENT**

- 22.4 The Seller shall at all times remain the sole point of contact for Purchaser in respect of the acquisition of services by Purchaser; and
- 22.5 no such sub-contracting shall have any effect on the Contract Price payable by Purchaser to the Seller in terms of this Agreement.
- 22.6 The Seller shall during the term of this agreement not be allowed to proceed with any of the following matters prior to receiving written consent of Purchaser's Chief Procurement Officer and Group Chief Executive Officer:
- 22.6.1 any transfer of any amount of shares of the Seller;
  - 22.6.2 any change in the composition of the Seller;
  - 22.6.3 any change in the ownership of the Seller;
  - 22.6.4 any material change in the constitution, memorandum, articles of association of similar document providing for the creation, formation or incorporation of the Seller; or
  - 22.6.5 any adverse change on the BBBEE status of the Seller.
- 22.7 Failure of the Consultant to seek approval and/or consent of PRASA and/or PRASA's Chief Procurement Officer and Group Chief Executive Officer or delegated official/of any change as contemplated in clauses 22.6.1 to 22.6.5 shall constitute a material breach which shall result in an immediate termination of the contract.

#### **23 LIMITATION OF LIABILITY**

The Parties total aggregate liability under this contract shall not exceed twice the Purchase Amount of the Goods. Liability for consequential or other indirect losses are hereby excluded, including but not limited to loss of profits, loss of revenue of production, contracts or any other economic losses of any kind. In the unlikely event of the seller supplying Goods which do not conform to the contract specification or specification schedule, the Seller shall replace them to the point of delivery in the contract.

#### **24 DEFAULT**

##### **24.1 Seller's Default**

## PURCHASE AND SALE OF GOODS AGREEMENT

24.1.1 On the occurrence of a Seller's Default, the Purchaser may serve written notice on the Seller of the occurrence (and specifying details) of such Seller's Default, requiring the Seller at the Seller's option either:

24.1.2 to remedy the Seller's Default referred to in such notice of default (if the same is continuing) or to remedy the underlying cause of such Seller's Default, within 20 (twenty) Business Days of such notice of default or such longer period as may be reasonable in the circumstances; or

to put forward within 20 (twenty) Business Days of such notice of default a reasonable programme for remedying the Seller's Default or to remedy the underlying cause of such Default ("Remedial Programme"). The Remedial Programme shall specify in reasonable detail the manner in, and the latest date by which, such Seller Default is proposed to be remedied.

24.1.3 The default notice shall specify the occurrence, and give details, of the Seller's Default and of any event or circumstance which is likely, with the passage of time or otherwise, to constitute or give rise to the Seller's Default, in either case promptly on the Purchaser becoming aware of its occurrence.

24.1.4 Notwithstanding provisions of clause 24 or any other clause in this Agreement, the Purchaser shall be entitled to terminate this Agreement with immediate effect if the Seller commits a breach in terms of clauses 22.6 and 18.

### **24.2 Remedy Provisions and termination**

24.2.1 Where the Seller puts forward a Remedial Programme in accordance with clause 24.1.1, the Purchaser shall have 10 (ten) Business Days from receipt of the same within which to notify the Seller that it does not accept the Remedial Programme, failing which the Purchaser shall be deemed to have accepted the Remedial Programme.

24.2.2 The Purchaser may not unreasonably reject the Remedial

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Programme and shall give full reasons for a rejection, if applicable. Where the Purchaser notifies the Seller that it does not accept the Remedial Programme, the Parties shall endeavor within the following 10 (ten) Business Days to agree any necessary amendments to the Remedial Programme put forward.

24.2.3 The Purchaser may terminate the relevant Purchase Order in respect of such Goods for which no Acceptance Certificate has been issued, on written notice (which notice shall give full details of the breach which has occurred that entitle the Seller to terminate) if:

- a. the Seller has failed to remedy the Seller's Default within the 20 (twenty) Business Day period in terms of sub-clause 24.1.1 of clause 24.1.1 (if applicable);
- b. the Seller has failed to provide a Remedial Programme within the 10 (ten) Business Day period in terms of sub-clause 24.1.1 of clause 24.1.1 (if applicable); or
- c. the Parties have failed to agree on any amendments to the Remedial Programme after the Purchaser has not accepted the Remedial Programme in accordance with the provisions of 24.2.2.

### 24.3 Purchaser's Costs

24.3.1 Subject to clause 16 above the Seller shall reimburse the Purchaser for all reasonable costs incurred by the Purchaser in exercising any of its rights in terms of clauses 24.1 and 24.2. The Purchaser shall take reasonable steps to mitigate such costs.

24.3.2 Unless expressly set otherwise in this Agreement but subject in any case to the clause 16 above the rights of the Purchaser (to terminate or otherwise) under clauses 24.1 and 19.2 are in addition (and without prejudice) to any other right which the Purchaser may have in law including the right to claim specific performance by the Seller and/or to claim the amount of any direct loss or damages suffered by the Purchaser on account of the acts

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or omissions of the Seller (or to take any action other than termination of this Agreement).

### 24.4 **Purchaser's Default**

24.4.1 On the occurrence of a Purchaser's Default, the Seller may serve written notice on the Purchaser of such occurrence (and specifying details) of such Purchaser's Default, requiring the Purchaser to remedy the Purchaser's Default referred to in such notice of default (if the same is continuing) or to remedy the underlying cause of such Purchaser's Default, within 10 (ten) Business Days of such notice of default.

24.4.2 The default notice shall specify the occurrence, and give details, of the Purchaser's Default and of any event or circumstance which is likely, with the passage of time or otherwise, to constitute or give rise to the Purchaser's Default, in either case promptly on the Seller becoming aware of its occurrence.

24.4.3 Should the Purchaser fail to remedy the Purchaser's Default within the aforesaid 60 (sixty) Business Day period, the Seller may terminate this Agreement on written notice. The Seller's termination notice shall give full details of the breach which has occurred that entitles the Seller to terminate this Agreement.

24.4.4 The Seller shall not exercise, or purport to exercise, any right to terminate this Agreement except as expressly set out in this Agreement. The rights of the Seller (to terminate or otherwise) under clause 24.4.3 are in addition (and without prejudice) to any other right which the Seller may have in law including the right to claim specific performance by the Seller and/or to claim damages.

### 24.5 **Suspension for Force Majeure**

24.5.1 Should any of the obligations of either party become objectively impossible of performance, such party shall be exempted from its obligations under this agreement if the circumstance that renders performance impossible was unforeseeable with reasonable foresight at the time of contracting and unavoidable with

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reasonable care at the time of its occurrence by the party concerned and such party displays reasonable care and diligence in attempting to avoid the consequences thereof.

24.5.2 Such exemption shall, however, operate only to the extent that the performance of the obligations of such party is rendered objectively impossible and only for the period during which the relevant circumstance prevails. Notice of such circumstance shall be given to the other party in writing without delay

### **24.6 Termination for Corrupt Acts**

24.6.1 The Seller warrants that in entering into this Agreement it has not committed any Corrupt Act.

24.6.2 In determining for purposes of this Agreement whether a Corrupt Act was committed in relation to this Agreement by any shareholder, any sub-contractor of the Seller (or anyone employed by or acting on behalf of any of them, including the sub contractors' sub-contractors) ("the Suspected Party"), the following principles shall apply:

(i) a Corrupt Act in relation to this Agreement shall be deemed to have been committed in circumstances where the Seller agrees that a Suspected Party has committed such a Corrupt Act; or

(ii) If a Suspected Party is convicted by a competent court of an offence that constitutes a Corrupt Act in relation to this Agreement, then a Corrupt Act in relation to this Agreement shall be deemed to have been committed.

24.6.3 If it is agreed by the Seller or determined by clause 24.6.2(ii) above that the Suspected Party has committed any Corrupt Act in relation to this Agreement, then the Purchaser shall be entitled to act in accordance with clauses 24.6.4 to 24.6.9 below.

24.6.4 If the Corrupt Act is committed by the Seller, any Shareholder, any director of the Seller, any director of any Shareholder, or any

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employee of the Seller or of any Shareholder acting under the authority of or with the knowledge of a director of the Seller or such Shareholder, as the case may be, then in any such case, the Purchaser may terminate this Agreement with immediate effect by giving written notice to the Seller.

24.6.5 If the Corrupt Act is committed by an employee of the Seller or of any Shareholder acting of his or her own accord, then in any such case, the Purchaser may give written notice to the Seller of termination and this Agreement will terminate, unless within 10 (ten) Business Days of the Seller's receipt of such notice the Seller demonstrates to the reasonable satisfaction of the Purchaser that that employee's involvement in the execution of this Agreement is terminated;

24.6.6 If the Corrupt Act is committed by a sub-contractor, director of a sub-contractor or an employee of a sub-contractor acting under the authority or with the knowledge of a director of that sub-contractor, then in any such case, the Purchaser may give written notice to the Seller of termination and this Agreement will terminate, unless within 30 (thirty) Business Days of its receipt of such notice the Seller terminates the relevant Subcontract.

24.6.7 If the Corrupt Act is committed by an employee of a sub-contractor acting of his or her own accord, then the Purchaser may give notice to the Lesser of termination and this Agreement will terminate, unless within 15 (fifteen) Business Days of its receipt of such notice the Seller procures the termination of that employee's involvement in the execution of this Agreement.

24.6.8 Any notice of termination under this clause 24 shall specify:

- (i) the nature of the Corrupt Act;
- (ii) the identity of the party or parties agreed by the Seller to have committed the Corrupt Act;
- (iii) the date on which this Agreement will terminate in accordance with the applicable provisions of this clause

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24.

24.6.9 without prejudice to its other rights or remedies under this clause 24, the Purchaser shall be entitled to recover from the Seller, the greater of:

- (i) the amount or value of the gift, purchase consideration or commission which is the subject of the Corrupt Act; and
- (ii) any direct losses sustained by the Purchaser in consequence of any breach of this clause 24 by the Seller.

24.6.10 The Seller shall notify the Purchaser of the occurrence (and details) of any Corrupt Act in relation to this Agreement promptly on the Seller becoming aware of its occurrence.

## 25 CHANGE OF LAW

25.1 Any change of Applicable Law after the Signature Date shall only impact this Agreement to the extent that:

25.1.1 the law directly changes the value added tax applicable to agreements similar to this Agreement and/or the law is compulsorily applicable to the Seller; and

25.1.2 to the extent that it prohibits the transaction as anticipated in this Agreement.

25.2 In the event of change of Applicable Law as anticipated in clause 25.1.1 the Purchaser shall bear all direct costs and/or expenses resulting therefrom and the Purchase Amount shall escalate accordingly. In addition, the Seller shall be entitled to a reasonable extension of the date/s stipulated in the Delivery Schedule for the delivery of the Goods.

25.3 In the event of any change of Applicable Law and/or Good Industry Practice which is not compulsorily applicable to the Seller, the Seller shall not be obliged to comply with such changes unless the Parties have agreed thereto (together with all applicable terms including costs associated with such compliance) in writing.

## 26 FORCE MAJEURE



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- 26.1 In the event of any acts of God, , war, war-like operation, rebellion, riot, civil commotion, lockout, , go slow by labour or the introduction, sonic shock waves caused by aircraft or other aerial devices, i or order or any circumstances arising or action taken beyond or outside the reasonable control of the Parties hereto preventing them or any one of them from the performance of any obligation hereunder, then the Party affected by such force majeure shall immediately notify the other Party forthwith as to the nature and extent of the circumstances in question.
- 26.2 Where a Party is (or claims to be) affected by an event of Force Majeure:
- 26.2.1 it shall take all reasonable steps to mitigate the consequences of such an event upon the performance of its obligations under this Agreement, resume performance of its obligations affected by the event of Force Majeure as soon as practicable and use all reasonable endeavors to remedy its failure to perform; and
- 26.2.2 it shall not be relieved from liability under this Agreement to the extent that it is not able to perform, or has not in fact performed, its obligations under this Agreement due to its failure to comply with its obligations.
- 26.3 The Party claiming relief shall serve written notice on the other Party within 5 (five) days of it becoming aware of the relevant event of Force Majeure. Such initial notice shall give sufficient details to identify the particular event claimed to be an event of Force Majeure.
- 26.4 A subsequent written notice shall be served by the Party claiming relief on the other Party within 5 (five) days, or such longer period as may be agreed between the Parties, which shall contain such relevant information relating to the failure to perform (or delay in performing) as is available, including (without limitation) the effect of the event of Force Majeure on the ability of the Party to perform, the action being taken by that Party to mitigate the effect of Force Majeure event and an estimate of the period of time required to overcome it (and/or its effects).
- 26.5 The Party claiming relief shall notify the other as soon as the consequences of the event of Force Majeure have ceased and when



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performance of its affected obligations can be resumed.

26.6 If, following the issue of any notice referred to in clause 26.3 the Party claiming relief receives or becomes aware of any further information relating to the event of Force Majeure (and/or any failure to perform), it shall submit such further information to the other Party as soon as reasonably possible.

26.7 In the event of a national pandemic resulting in an unforeseen lockdown or not, neither party shall have the responsibility of notifying the other nor be liable to the other for any damages suffered as a result of the pandemic and lockdown. The parties will be governed by the prevailing law until the end of the pandemic.

26.8 If the Force Majeure event persist, for a period of more than 20 (twenty) days either Party may terminate this Agreement

## 27 NOTICES AND LEGAL SERVICE

All notices and any other communications whatsoever (including, without limitation, any approval, consent, demand, query or request) by either Party in terms of this Agreement or relating to it shall be given in writing and sent by registered post, or delivered by hand, or transmitted by facsimile to the recipient Party at its relevant address set out below:

27.1 if to the Purchaser at:

Address: Umjantshi House  
30 Wolmarans Street  
Braamfontein  
Johannesburg

Attention: Legal Department

Postal address: Private Bag X101  
Braamfontein  
2017

Facsimile number: 011 773 1600

Telephone number: 011 774 6001

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27.2 if to the Seller:

Address:

Attention:

Postal address:

Facsimile number:

Telephone number:

Email:

27.3 Either Party may, by written notice to the other Party, change any of the addresses at which or the designated person for whose attention those notices or other communications are to be given.

27.4 Any notice or other communication given by any Party to the other Party which:

27.4.1 is sent by registered post to the addressee at its specified address shall be reputably presumed to have been received by the addressee on the 7th (seventh) day after the date of posting; or

27.4.2 is delivered by hand to the addressee during the normal business hours of the addressee at its specified address shall be refutably presumed to have been received by the addressee at the time of delivery; or

27.4.3 is transmitted by facsimile to the addressee during the normal business hours of the addressee at its specified facsimile number shall be reputably presumed to have been received by the addressee on the date of transmission as indicated on the sender's facsimile transmission report.

27.5 The previous provisions of this clause 27 shall not invalidate any notice or other communication actually given and received otherwise than as described in those provisions.

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27.6 The Parties choose their respective physical addresses in clause 27.1 and 27.2 as their respective *domicilia citandi et executandi* at which all documents relating to any legal proceedings to which they are a party may be served. If that address is changed to another address which is not a physical address in South Africa, then the original address shall remain the *domicilium citandi et executandi* of the relevant Party until it nominates a new physical address within the Republic of South Africa in writing to be its new *domicilium citandi et executandi*.

## **28 INFORMAL DISPUTE RESOLUTION**

28.1 Should any dispute of whatsoever nature arise between the Parties concerning the Agreement, the Parties shall try to resolve the dispute by negotiation within 10 [ten] Business Days of such dispute arising.

28.2 If the dispute has not been resolved by such negotiation, either of the Parties may refer the dispute to AFSA and notify the other Party accordingly, which proceedings shall be held in Johannesburg.

28.3 Such dispute shall be finally resolved in accordance with the rules of AFSA by an arbitrator or arbitrators appointed by AFSA.

28.4 This clause constitutes an irrevocable consent by the Parties to any proceedings in terms hereof, and neither of the Parties shall be entitled to withdraw from the provisions of this clause or claim at any such proceedings that it is not bound by this clause 30.

28.5 This clause 28 is severable from the rest of the Agreement and shall remain in effect even if the Agreement is terminated for any reason.

28.6 This clause 28 shall not preclude either Party from seeking urgent relief in a court of appropriate jurisdiction, where grounds for urgency exist.

## **29 PUBLIC RELATIONS AND PUBLICITY**

29.1 The Seller acknowledges that certain information pertaining to the Project

## PURCHASE AND SALE OF GOODS AGREEMENT

is required to be disclosed in accordance with the statutory reporting obligations of the Purchaser as it may be required to publish from time to time in response to enquiries from:

29.1.1 Parliament and its members and officers in accordance with the provisions of the Public Finance Management Act, of 1999; and

29.1.2 the Auditor-General under the Public Audit Act, of 2004; and

29.1.3 persons acting in the public interest in accordance with the provisions of the Promotion of Access to Information Act, 2000.

29.2 Subject to clause 30.5 neither Party shall communicate with representatives of the press, television, radio or other communications media on any matter concerning this Agreement without the prior approval of the other Party, such consent not to be unreasonably withheld.

## 30 CONFIDENTIALITY

30.1 Each Party ("**the Receiving Party**") must treat and hold as confidential all information, which they may receive from the other party ("the Disclosing Party") or which becomes known to them concerning the Disclosing Party during the subsistence of this Agreement and any extension thereof.

30.2 The confidential information of the disclosing Party shall, without limitation, include:

30.2.1 all software and associated material and documentation, including information contained therein;

30.2.2 All information relating to :-

- (i) the disclosing Party's past, present and future research and development;
- (ii) the Disclosing Party's business activities, products, services, customers and Purchasers, as well as its technical knowledge and trade secrets;
- (iii) the terms and conditions of this Agreement;

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(iv) Purchaser's data.

30.3 The Receiving Party agrees that in order to protect the proprietary interests of the Disclosing Party in its confidential information:

30.3.1 it will only make the confidential information available to those of its Personnel who are actively involved in the execution of this Agreement;

30.3.2 it will initiate internal security procedures reasonably acceptable to the Disclosing Party to prevent unauthorized disclosure and will take all practical steps to impress upon those Personnel who need to be given access to confidential information, the confidential nature thereof;

30.3.3 subject to the right to make the confidential information available to their Personnel under clause 30.3.1 above, they will not at any time, whether during this Agreement or thereafter, either use any confidential information of the Disclosing Party or directly or indirectly disclose any confidential information of the Disclosing Party to third parties;

30.3.4 all written instructions, drawings, notes, memoranda and records of whatever nature relating to the confidential information of the Disclosing Party which have or will come into the possession of the Receiving Party and its Personnel, will be, and will at all times remain, the sole and absolute property of such Party and shall be promptly handed over to such Party when no longer required for the purposes of this Agreement.

30.3.5 Upon termination or expiry of this Agreement, the Receiving Party will deliver to the Disclosing Party, or at the Disclosing Party's option, destroy all originals and copies of the Disclosing Party's confidential information in its possession.

30.3.6 The foregoing obligations shall not apply to any information which:

- (i) is lawfully in the public domain at the time of disclosure;
- (ii) subsequently and lawfully becomes part of the public

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domain by publication or otherwise;

- (iii) subsequently becomes available to the Receiving Party from a source other than the Disclosing Party, which source is lawfully entitled without any restriction on disclosure to disclose such confidential information; or
- (iv) is disclosed pursuant to a requirement or request by operation of law, regulation or court order.

30.4 Nothing in this Clause shall preclude the Parties from disclosing the confidential information to their professional advisors or financiers in the bona fide course of seeking finance, business and professional advice.

30.5 Each Party hereby indemnifies the other Party against any loss or damage, which one Party may suffer as a result of a breach of this Clause by the other Party or its Personnel.

30.6 The provisions of this Clause 30 are severable from the rest of the provisions of this Agreement and shall survive its termination and continue to be of full force and effect for a period of 2 (two) years after the date of termination. Notwithstanding the aforementioned, the obligation to keep confidential business and trade secrets shall remain in force for an unlimited period of time.

## 31 ENTIRE AGREEMENT

31.1 Except where expressly provided otherwise in this Agreement, this Agreement constitutes the entire agreement between the Parties in connection with its subject matter and supersedes all prior representations, communications, negotiations and understandings concerning the subject matter of this Agreement.

31.2 Each of the Parties acknowledges that:

31.2.1 it does not enter into this Agreement on the basis of and does not rely, and has not relied, upon any statement or representation (whether negligent or innocent) or warranty or other provision (in any case whether oral, written, express or implied) made or agreed to by any person (whether a Party to this Agreement or

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not) except those expressly contained in or referred to in this Agreement, and the only remedy available in respect of any misrepresentation or untrue statement made to it shall be a remedy available under this Agreement; and

31.2.2 this clause 31 shall not apply to any statement, representation or warranty made fraudulently, or to any provision of this Agreement which was induced by fraud, for which the remedies available shall be all those available under any Law governing this Agreement.

### **32 VARIATION, CANCELLATION AND SUSPENSION**

32.1 No agreement varying or cancelling this Agreement, and no suspension of any right under this Agreement shall be effective unless reduced to writing, signed by or on behalf of the Parties and same is duly endorsed on the Agreement.

32.2 The Purchaser has the right to propose Variations to the supply of Goods in accordance with this clause 32.

32.3 All Variations shall only be valid if approved by the Group Chief Executive Officer of Purchaser and reduced in writing.

32.4 If PRASA requires a Variation to the scope of the Contract it must serve a notice in writing to the Seller detailing the requested Variation ("Variation Proposal").

32.5 The Variation Proposal must set out the Variation required in sufficient detail as to enable the Seller to calculate the cost of the Variation Proposal.

32.6 As soon as practicable and in any event within 5 (five) Business Days after having received the Variation Proposal, the Seller shall deliver to Purchaser.

32.6.1 the estimated costs of the Variation Proposal; and

32.6.2 the impact of the Variation Proposal on the Project timelines.

32.7 As soon as practicable and in any event within 5 (five) Business Days after receiving the information from the Seller regarding the impact

#### **PURCHASE AND SALE OF GOODS AGREEMENT**

of the Variation Proposal on the Project timelines and the costs, Purchaser shall:

32.7.1 confirm its intention in writing to proceed with the Variation Proposal and enter into any documents to amend the Contract as is necessary to give effect to the Variation Proposal; or

32.7.2 withdraw the Variation Proposal.

32.8 No variation orders shall exceed 10% (10 percent) of the Contract Price as required by the Employers procurement policies.

### **33 SEVERABILITY**

Whenever possible, each provision of this Agreement shall be interpreted in a manner which makes it effective and valid under any Applicable Law, but if any provision of this Agreement is held to be illegal, invalid or unenforceable under any Applicable Law, that illegality, invalidity or unenforceability shall not affect the other provisions of this Agreement, all of which shall remain in full force.

### **34 INDEPENDENT STATUS**

34.1 Nothing in this Agreement shall be construed as creating a partnership between the Parties and neither Party shall have any authority to incur any liability on behalf of the other or to pledge the credit of the other Party.

34.2 It is recorded that it is the intention of the parties to exclude all legal consequences of a partnership.

### **35 INDEPENDENT ADVICE**

Each of the Parties hereby respectively agrees and acknowledges that:

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

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



#### PURCHASE AND SALE OF GOODS AGREEMENT

### 36 COUNTERPARTS

This Agreement may be executed in any number of identical counterparts, all of which when taken together shall constitute one agreement. Any single counterpart or a set of counterparts taken together which, in either case, are executed by the Parties shall constitute a full original of this Agreement for all purposes.

DRAFT CONTRACT

**PURCHASE AND SALE OF GOODS AGREEMENT**

SIGNED at Johannesburg on \_\_\_\_\_ 2013

**The Seller:**

For: Seller

\_\_\_\_\_  
**PRINT NAME**

Who warrants that he is duly authorised

For:

AS WITNESSES:

1. \_\_\_\_\_
2. \_\_\_\_\_

SIGNED at Johannesburg on \_\_\_\_\_

**The Purchaser: THE PASSENGER RAIL AGENCY OF SOUTH AFRICA,**

For: PRASA

\_\_\_\_\_  
**PRINT NAME**

Who warrants that he is duly authorised

AS WITNESSES:

1. \_\_\_\_\_
2. \_\_\_\_\_

**ANNEXURE A**

**DELIVERY SCHEDULE**

DRAFT CONTRACT

**ANNEXURE B**

**PAYMENT SCHEDULE**

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**PRICING SCHEDULE**

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**SPECIFICATION SCHEDULE**

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## **ANNEXURE E**

### **GOODS SCHEDULE**

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## ANNEXURE F

### PERFORMANCE BOND

DRAFT CONTRACT