

## MASTER AGREEMENT

entered into by and between

**TRANSNET SOC LTD**

and

.....

**FOR THE PROVISION OF SPECIALISED MATERIAL HANDLING EQUIPMENT (MHE) FLEET  
MANAGEMENT SERVICES FOR A PERIOD OF THREE (3) YEARS TO TRANSNET FREIGHT  
RAIL.**

**Agreement No**                      **HOAC HO 39480.**

**Commencement Date**           **.....**

**Expiry Date**                      **.....**

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Agreement between Transnet and .....

For the provision of specialised material handling equipment (MHE) fleet management services for a period of three (3) years to Transnet Freight Rail

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#### SCHEDULE 1 – WORK ORDER

## 1 INTRODUCTION

This Agreement is entered into by and between:

**Transnet SOC Ltd** [Registration Number 1990/000900/30] whose registered address is **138 Eloff Street, Braamfontein, Johannesburg, 2001**, Republic of South Africa [**Transnet**]

and

..... [Registration Number .....] whose registered address is ..... [**the Service Provider**].

### NOW THEREFORE, IT IS AGREED:

- 1.1 Transnet hereby appoints the Service Provider to provide, and Transnet undertakes to accept the of provision of Services provided for herein, as formally agreed between the Parties and in accordance with the Schedule of Requirements / Work Orders issued as a schedule to this Agreement; and
- 1.2 the Service Provider hereby undertakes to provide the Services provided for herein, as formally agreed between the Parties and in accordance with the Schedule of Requirements issued as a schedule to this Agreement.

## 2 DEFINITIONS

Where the following words or phrases are used in this Agreement, such words or phrases shall have the meaning assigned thereto in this clause, except where the context clearly requires otherwise:

- 2.1 **AFSA** means the Arbitration Foundation of South Africa;
- 2.2 **Agreement** means this Agreement and its associated schedules and/or annexures and/or appendices, and/or schedules, including the Work Orders, the technical specifications for the Services and such special conditions as shall apply to this Agreement, together with the General Tender Conditions and any additional provisions in the associated bid documents tendered by the Service Provider [as agreed, in writing, between the Parties], which collectively and exclusively govern the provision of Services and provision of ancillary Services by the Service Provider to Transnet;
- 2.3 **Assignment** refers to the transfer of rights and obligations in a contract from an assigner to an assignee.
- 2.4 **Background Intellectual Property** means all Intellectual Property introduced and required by either Party to give effect to their obligations under this Agreement owned in whole or in part by or licensed to either Party or their affiliates prior to the Commencement Date or developed after the Commencement Date otherwise pursuant to this Agreement;
- 2.5 **Business Day(s)** means Mondays to Fridays between 07:30 and 16:00, excluding public holidays as proclaimed in South Africa;
- 2.6 **Cession** refers to the transfer of only the rights a service provider has in terms of a contract from it to a third party.

- 2.7 **Commencement Date** means [REDACTED], notwithstanding the signature date of this Agreement;
- 2.8 **Confidential Information** means any information or other data, whether in written, oral, graphic or in any other form such as in documents, papers, memoranda, correspondence, notebooks, reports, drawings, diagrams, discs, articles, samples, test results, prototypes, designs, plans, formulae, patents, or inventor's certificates, which a Party discloses or provides to the other Party [intentionally or unintentionally, or as a result of one Party permitting the representative of the other Party to visit any of its premises], or which otherwise becomes known to a Party, and which is not in the public domain and includes, without limiting the generality of the term:
- a) information relating to methods of operation, data and plans of the disclosing Party;
  - b) the contents of this Agreement;
  - c) private and personal details of employees or clients of the disclosing Party or any other person where an onus rests on the disclosing Party to maintain the confidentiality of such information;
  - d) any information disclosed by either Party and which is clearly marked as being confidential or secret;
  - e) information relating to the strategic objectives and planning of the disclosing Party relating to its existing and planned future business activities;
  - f) information relating to the past, present and future research and development of the disclosing Party;
  - g) information relating to the business activities, business relationships, products, services, customers, clients and Subcontractors of the disclosing Party where an onus rests on the disclosing Party to maintain the confidentiality of such information;
  - h) information contained in the software and associated material and documentation belonging to the disclosing Party;
  - i) technical and scientific information, Know-How and trade secrets of a disclosing Party including inventions, applications and processes;
  - j) Copyright works;
  - k) commercial, financial and marketing information;
  - l) data concerning architecture, demonstrations, tools and techniques, processes, machinery and equipment of the disclosing Party;
  - m) plans, designs, concepts, drawings, functional and technical requirements and specifications of the disclosing Party;
  - n) information concerning faults or defects in Goods, equipment, hardware or software or the incidence of such faults or defects; and
  - o) information concerning the charges, fees and/or costs of the disclosing Party or its authorised Subcontractors, or their methods, practices or service performance levels actually achieved;
- 2.9 **Copyright** means the right in expressions, procedures, methods of operations or mathematical concepts, computer program codes, compilations of data or other material, literary works,

musical works, artistic works, sound recordings, broadcasts, program carrying signals, published editions, photographic works, or cinematographic works of the copyright owner to do or to authorise the doing of certain acts specified in respect of the different categories of works;

- 2.10 **Data** means all data, databases, documents, information, graphics, text or other material in an electronic or tangible medium which the Parties to this Agreement generate, collect, process, store or transmit in relation to their business;
- 2.11 **Designs** mean registered Designs and/or Design applications and will include the monopoly right granted for the protection of an independently created industrial design including designs dictated essentially by technical or functional considerations as well as topographies of integrated circuits and integrated circuits;
- 2.12 **Expiry Date** means [REDACTED];
- 2.13 **Foreground Intellectual Property** means all Intellectual Property developed by either Party pursuant to this Agreement;
- 2.14 **ICC Incoterms** means the the latest version of commercial trade terms as published by the International Chamber of Commerce, Paris [ICC], which are otherwise referred to as purchase terms and which define precisely the responsibilities, costs and risks of the buyer [**Transnet**] and the seller [**the Supplier**]. Incoterms are only applicable to contracts involving the import or export of Goods from one country to another and for the purpose of this Agreement, if applicable, shall mean the designated Incoterm as stipulated in Schedule 1 hereto. Further details of the Incoterm [purchase terms] for this Agreement, if applicable, can be viewed at the International Business Training website - <http://www.i-b-t.net/incoterms.html>;
- 2.15 **Intellectual Property** means Patents, Designs, Know-How, Copyright and Trade Marks and all rights having equivalent or similar effect which may exist anywhere in the world and includes all future additions and improvements to the Intellectual Property;
- 2.16 **Know-How** means all Confidential Information of whatever nature relating to the Intellectual Property and its exploitation as well as all other Confidential Information generally relating to Transnet's field of technology, including technical information, processing or manufacturing techniques, Designs, specifications, formulae, systems, processes, information concerning materials and marketing and business information in general;
- 2.17 **Parties** mean the Parties to this Agreement together with their subsidiaries, divisions, business units, successors-in-title and assigns;
- 2.18 **Party** means either one of these Parties;
- 2.19 **Patents** mean registered Patents and Patent applications, once the latter have proceeded to grant, and includes a right granted for any inventions, products or processes in all fields of technology;
- 2.20 **Permitted Purpose** means any activity or process to be undertaken or supervised by a Staff member of one Party during the term of this Agreement, for which purpose authorised disclosure of the other Party's Confidential Information or Intellectual Property is a prerequisite in order to enable such activity or process to be accomplished;

- 2.21 **Price(s)** means the agreed Price(s) for the Services to be purchased from the Service Provider by Transnet, as detailed in the Schedule of Requirements, issued in accordance with this Agreement, as amended by mutual agreement between the Parties and in accordance with the terms and conditions in this Agreement from time to time;
- 2.22 **Purchase Order(s)** means official orders issued by an operating division of Transnet to the Service Provider for the supply of Goods or Services;
- 2.23 **Service(s)** means, the provision of specialised material handling equipment (mhe) fleet management services, the Service(s) provided to Transnet by the Service Provider, pursuant to the Work Order(s) in terms of this Agreement;
- 2.24 **Service Level Agreement** or **SLA** means the processes, deliverables, key performance indicators and performance standards relating to the Services to be provided by the Service Provider;
- 2.25 **Service Provider Materials** means all works of authorship, products and materials [including, but not limited to, data, diagrams, charts, reports, specifications, studies, inventions, software, software development tools, methodologies, ideas, methods, processes, concepts and techniques] owned by, or licensed to, the Service Provider prior to the Commencement Date or independently developed by the Service Provider outside the scope of this Agreement at no expense to Transnet, and used by the Service Provider in the performance of the Services;
- 2.26 **Staff** means any partner, employee, agent, consultant, independent associate or contractor, Subcontractor and the staff of such Subcontractor, or other authorised representative of either Party;
- 2.27 **Schedule of Requirements** means Schedule 1 hereto;
- 2.28 **Subcontract** means any contract or agreement or proposed contract or agreement between the Service Provider and any third party whereby that third party agrees to provide to the Supplier the Goods or related Services or any part thereof or material used in the manufacture of the Goods or any part thereof;
- 2.29 **Subcontractor** means the third party with whom the Service Provider enters into a Subcontract;
- 2.30 **Tax Invoice** means the document as required by Section 20 of the VAT Act, as may be amended from time to time;
- 2.31 **Trade Marks** mean registered Trade Marks and Trade Mark applications and include any sign or logo, or combination of signs and/or logos capable of distinguishing the goods or services of one undertaking from those of another undertaking;
- 2.32 **VAT** means Value-Added Tax chargeable in terms of the VAT Act, 89 of 1991, as may be amended from time to time; and
- 2.33 **VAT Act** means the Value Added Tax Act, No 89 of 1991, as may be amended from time to time.
- 2.34 **Work Order(s)** means a detailed scope of work for a Service required by Transnet, including **timeframes**, Deliverable, Fees and costs for the supply of the Service to Transnet, which may be appended to this Agreement from time to time.

### **3 INTERPRETATION**

- 3.1 Clause headings in this Agreement are included for ease of reference only and do not form part of this Agreement for the purposes of interpretation or for any other purpose. No provision shall be construed against or interpreted to the disadvantage of either Party hereto by reason of such Party having or being deemed to have structured or drafted such provision.
- 3.2 Any term, word or phrase used in this Agreement, other than those defined under the clause heading "*Definitions*" shall be given its plain English meaning, and those terms, words, acronyms, and phrases used in this Agreement will be interpreted in accordance with the generally accepted meanings accorded thereto.
- 3.3 A reference to the singular incorporates a reference to the plural and *vice versa*.
- 3.4 A reference to natural persons incorporates a reference to legal persons and *vice versa*.
- 3.5 A reference to a particular gender incorporates a reference to the other gender.

### **4 NATURE AND SCOPE**

- 4.1 This Agreement is an agreement under the terms and conditions of which the Service Provider will arrange for the provision to Transnet of the Services which meet the requirements and specifications of Transnet, the delivery of which is controlled by means of Purchase Orders to be issued by Transnet and executed by the Service Provider in accordance with this Agreement.
- 4.2 Such Purchase Orders and deliveries to Transnet shall be agreed between the Parties from time to time, subject to the terms of the Schedule of Requirements/Work Order.
- 4.3 Each properly executed Purchase Order forms an inseparable part of this Agreement as if it were fully incorporated into the body of this Agreement.
- 4.4 During the period of this Agreement, both Parties can make written suggestions for amendments to the Schedule of Requirements/Work Orders in accordance with procedures set out in clause 36 [*Amendment and Change Control*]. A Party will advise the other Party within 14 [fourteen] Business Days, or such other period as mutually agreed, whether the amendment is acceptable.
- 4.5 Insofar as any term, provision or condition in the Schedule of Requirements/Work Order conflicts with a like term, provision or condition in this Agreement and/or a Purchase Order, the term or provision or condition in this Master Agreement shall prevail, unless such term or provision or condition in this Master Agreement has been specifically revoked or amended by mutual written agreement between the Parties.
- 4.6 Time will be of the essence and the Service Provider will perform its obligations under this Agreement in accordance with the timeframe(s) [if any] set out in the relevant schedule, save that the Service Provider will not be liable under this clause if it is unable to meet such obligation within the time required as a direct result of any act or omission by Transnet and it has used its best endeavours to advise Transnet 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.



## **5 AUTHORITY OF PARTIES**

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

## **6 DURATION/TERM AND CANCELLATION**

- 6.1 Notwithstanding the date of signature hereof, the Commencement Date if this Agreement is ..... and the duration shall be for three [3] year period, expiring on ....., unless:
- a) this Agreement 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
  - b) this Agreement is extended at Transnet's option for a further period to be agreed by the Parties.
- 6.2 Notwithstanding clause 23 [*Breach and Termination*], either Party may cancel this Agreement without cause by giving 30 [thirty] calendar days prior written notice thereof to the other Party, provided that in such instance, this Agreement will nevertheless be applicable in respect of all Purchase Orders which have been placed prior to the date of such cancellation.
- 6.3 Transnet hereby appoints the Service Provider as an independent contractor to render the Services.
- 6.4 Transnet hereby appoints the Service Provider as an independent contractor to render the Services from the Commencement Date and for the duration of the Contract Period.
- 6.5 Transnet shall, for the duration of the Contract Period and, save as may be provided to the contrary in this Agreement, exclusively source its Fleet requirements originating in the Allocated Regions from the Service Provider. To the extent that the Service Provider is unable to fulfil Transnet's requirements within a reasonable time in the circumstances in that Allocated Region, Transnet shall be entitled to approach the open market on a Three Quote Basis.
- a) not be obliged to lease any minimum number of Vehicles from the Service Provider in terms of this Agreement, and the total number of Vehicles leased by Transnet at any time in terms of this Agreement shall be determined by Transnet in its sole and absolute discretion; nor
  - b) be construed to guarantee the Service Provider that Transnet will request any Services or place any orders for a specific number of Vehicles on the Service Provider during the Contract Period.

- 6.6 No relationship of employment, agency, partnership or joint venture shall be created or deemed to be created by this Agreement. Accordingly, neither Party shall be entitled to bind the other Party in any way including by the pledging of the security or the credit of the other Party.
- 6.7 The term of an Individual Contract shall be specified in that Individual Contract. In this regard:
- a) an Individual Contract shall specify the Lease Period; and
  - b) to the extent that the End Date is stipulated to take place after the Expiry Date, the Individual Contract shall be deemed to terminate on the Expiry Date notwithstanding the provisions of the Individual Contract and clause 62, it being agreed that such Individual Contract will be dealt with in accordance with the provisions of clause **Error! Reference source not found..**
- 6.8 An Individual Contract may terminate for whatever reason independently of the termination of this Agreement, and the existence of this Agreement shall not be affected by the termination of an Individual Contract, unless the reason for the termination of the Individual Contract results in a failure to achieve a Strategic KPI; in which event the termination of such Individual Contract may contribute to the termination of this Agreement.
- 6.9 The existence of an Individual Contract is dependent on the existence of this Agreement. Accordingly, to the extent that this Agreement terminates for whatever reason, all of the Individual Contracts concluded pursuant hereto shall terminate *ipso facto*.
- 6.10 The Contract Period shall comprise three distinct phases:
- a) the period from the Commencement Date until ..... (“**Initial Phase**”);
  - b) the period commencing on the day immediately succeeding the expiry of the Initial Phase and, subject to the provisions of clause c), for the remainder of the Contract Period (“**Operational Phase**”); and
  - c) the period which shall commence:
    - (i) in the case of this Agreement terminating as a result of expiry on the Expiry Date, no more than 120 (one hundred and twenty) days prior to the Expiry Date;
    - (ii) in the case of this Agreement terminating in circumstances contemplated in clause **Error! Reference source not found.**, on the date of the giving of the notice contemplated in clauses **Error! Reference source not found.** and **Error! Reference source not found.**, as the case may be; or
    - (iii) where, due to circumstances contemplated in clause **Error! Reference source not found.** this Agreement is deemed to have terminated (“**Deemed Termination Date**”), the Contract Period shall be notionally extended for a period of 120 (one hundred and twenty) days following the Deemed Termination Date, subject to the provisions of clause **Error! Reference source not found.** (“**Transition Phase**”).
- 6.11 from the Commencement Date and for the duration of the Contract Period.

Transnet shall, for the duration of the Contract Period and, save as may be provided to the contrary in this Agreement, exclusively source its Fleet requirements originating in the Allocated Regions from the

Service Provider. To the extent that the Service Provider is unable to fulfil Transnet's requirements within a reasonable time in the circumstances in that Allocated Region, Transnet shall be entitled to approach the open market on a Three

- a) not be obliged to lease any minimum number of Vehicles from the Service Provider in terms of this Agreement, and the total number of Vehicles leased by Transnet at any time in terms of this Agreement shall be determined by Transnet in its sole and absolute discretion; nor
  - b) be construed to guarantee the Service Provider that Transnet will request any Services or place any orders for a specific number of Vehicles on the Service Provider during the Contract Period.
- 6.12 No relationship of employment, agency, partnership or joint venture shall be created or deemed to be created by this Agreement. Accordingly, neither Party shall be entitled to bind the other Party in any way including by the pledging of the security or the credit of the other Party.
- 6.13 The term of an Individual Contract shall be specified in that Individual Contract. In this regard:
- 6.14 An Individual Contract may terminate for whatever reason independently of the termination of this Agreement, and the existence of this Agreement shall not be affected by the termination of an Individual Contract, unless the reason for the termination of the Individual Contract results in a failure to achieve a Strategic KPI; in which event the termination of such Individual Contract may contribute to the termination of this Agreement.
- 6.15 The existence of an Individual Contract is dependent on the existence of this Agreement. Accordingly, to the extent that this Agreement terminates for whatever reason, all of the Individual Contracts concluded pursuant hereto shall terminate *ipso facto*.

## **7 RISK MANAGEMENT**

- 7.1 Where Transnet determines appropriate, within 2 weeks from the date of contract signature, the Parties are to meet to prepare and maintain a contract Risk Register. The Risk Register shall include a description of the risks and a description of the actions which are to be taken to avoid or reduce these risks which both Parties shall jointly determine.
- 7.2 Contract progress meetings shall be held monthly, or unless otherwise agreed between the Parties in writing. The purposes of these progress meetings shall be to capture the number of late deliverables against agreed milestones, actual costs against payment plans, performance issues or concerns, contract requirements not achieved, the status of previous corrective actions and risk management. Minutes of meetings shall be maintained and signed off between the Parties throughout the contract period

## **8 TRANSNET'S OBLIGATIONS**

- 8.1 Transnet undertakes to promptly comply with any reasonable request by the Service Provider for information, including information concerning Transnet's operations and activities, that relates to the Services as may be necessary for the Service Provider to provide the Services, but for no other purpose. However, Transnet's compliance with any request for information is

subject to any internal security rules and requirements and subject to the observance by the Service Provider of its confidentiality obligations under this Agreement.

8.2 The Service Provider shall give Transnet reasonable notice of any information it requires.

8.3 Transnet agrees to provide the Service Provider or its Personnel such access to and use of its facilities as is necessary to allow the Service Provider to perform its obligations under this Agreement.

## **9 GENERAL OBLIGATIONS OF THE SERVICE PROVIDER**

9.1 The Service Provider shall:

- a) respond promptly to all complaints and enquiries from Transnet;
- b) inform Transnet immediately of any dispute or complaint arising in relation to the storage or delivery of the Goods;
- c) conduct its business in a professional manner which will reflect positively upon the Service Provider and the Service Provider's services;
- d) keep full records clearly indicating all transactions concluded by the Service Provider relating to the delivery of the Services and keep such records for at least 5 [five] years from the date of each such transaction;
- e) obtain, and at all times maintain in full force and effect, any and all licences, permits and the like required under applicable laws for the provision of the Services and ancillary Services and the conduct of the business and activities of the Service Provider;
- f) observe and ensure compliance with all requirements and obligations as set out in the labour and related legislation of South Africa, including the Occupational Health and Safety Act, 85 of 1993, as may be amended from time to time;
- g) observe and ensure compliance with all requirements and objectives of the Transnet Supplier Integrity Pact as agreed to in response to the RFP. 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;
- h) comply with all applicable environmental legislation and regulations, demonstrate sound environmental performance and have an environmental management policy which ensures that its products, including the Services or ancillary Services are procured, produced, packaged, delivered and are capable of being used and ultimately disposed of in a way that is environmentally appropriate; and
- i) ensure the validity of all renewable certifications, including but not limited to its B-BBEE Verification Certificate, throughout the entire term of this Agreement. Should the Service Provider fail to present Transnet with such renewals as they become due, Transnet shall be entitled, in addition to any other rights and remedies that it may have in terms of the Agreement, to terminate this Agreement forthwith without any liability and without prejudice to any claims which Transnet may have for damages against the Service Provider.

9.2 The Service Provider acknowledges and agrees that it shall at all times:

- a) render the supply of the Services and ancillary Services (if applicable) and perform all its duties with honesty and integrity;
- b) communicate openly and honestly with Transnet regarding the supply and performance of the Services and demonstrate a commitment to effecting the supply and performing ancillary Services timeously, efficiently and at least to the required standards;
- c) endeavour to provide the highest possible standards of service and workmanship, with a reasonable degree of care and diligence;
- d) use its best endeavours and make every diligent effort to meet agreed deadlines;
- e) treat its own Staff, as well as all Transnet's Staff, with fairness and courtesy and respect for their human rights;
- f) practice and promote its own internal policies aimed at prohibiting and preventing unfair discrimination;
- g) treat all enquiries from Transnet in connection with the supply of the Services and/or ancillary Services with courtesy and respond to all enquiries promptly and efficiently. Where the Service Provider is unable to comply with the provisions of this clause, the Service Provider will advise Transnet of the delay and the reasons therefor and will keep Transnet informed of progress made regarding the enquiry;
- h) when requested by Transnet, provide clear and accurate information regarding the Service Provider's own policies and procedures, excluding Know-How and other Confidential Information, except where a non-disclosure undertaking has been entered into between the Parties;
- i) not allow a conflict of interest to develop between its own interests [or the interests of any of its other customers] and the interests of Transnet;
- j) not accept or offer, nor allow, induce or promote the acceptance or offering of any gratuity, enticement, incentive or gift that could reasonably be regarded as bribery or an attempt to otherwise exert undue influence over the recipient;
- k) not mislead Transnet or its officers, employees and stakeholders, whether by act or omission;
- l) not otherwise act in an unethical manner or do anything which could reasonably be expected to damage or tarnish Transnet's reputation or business image;
- m) immediately report to Transnet any unethical, fraudulent or otherwise unlawful conduct of which it becomes aware in connection with Transnet or the supply of Services or ancillary Services to Transnet;
- n) ensure that at all times, during the currency of this Agreement, it complies with all obligations and commitments in terms of the provisions of the Income Tax Act, No 58 of 1962, the VAT Act or any other tax legislation relating to their liability for Income Tax, VAT, Pay as You Earn or any other tax. The Service Provider shall further ensure Tax Clearance Compliance, for the duration of this Agreement;

- o) not victimise, harass or discriminate against any employee of either Party to this Agreement or any applicant for employment with either Party to this Agreement due to their gender, race, disability, age, religious belief, sexual orientation or part-time status. This provision applies, but is not limited to employment, upgrading, work environment, demotion, transfer, recruitment, recruitment advertising, termination of employment, rates of pay or other forms of compensation and selection for training.
  - p) shall ensure that its employees, agents and Subcontractors will not breach any applicable discrimination legislation and any amendments and re-enactments thereof.
- 9.3 In compliance with the National Railway Safety Regulator Act, 16 of 2002, as may be amended from time to time, the Service provider shall ensure that the Services and ancillary Services, to be supplied to Transnet under the terms and conditions of this Agreement, comply fully with the Specifications as set forth in Schedule 1 hereto, and shall thereby adhere [as applicable] to railway safety requirements and/or regulations. Permission for the engagement of a Subcontractor by the Service provider, as applicable, shall be subject to a review of the capability of the proposed Subcontractor to comply with the specified railway safety requirements and/or regulations. The Service provider and/or its Subcontractor shall grant Transnet access, during the term of this Agreement, to review any safety-related activities, including the coordination of such activities across all parts of its organisation.

## **10 SERVICE PROVIDER'S PERSONNEL**

- 10.1 The Service Provider's Personnel shall be regarded at all times as employees, agents or Subcontractors of the Service Provider and no relationship of employer and employee shall arise between Transnet and any Service Provider Personnel under any circumstances regardless of the degree of supervision that may be exercised over the Personnel by Transnet.
- 10.2 The Service Provider warrants that all its Personnel will be entitled to work in South Africa or any other country in which the Services are to be performed.
- 10.3 The Service Provider will ensure that its Personnel comply with all reasonable requirements made known to the Service Provider by Transnet concerning conduct at any Transnet premises or any other premises 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]. The Service Provider will ensure that such Personnel at all times act in a lawful and proper manner in accordance with these requirements.
- 10.4 Transnet reserves the right to refuse to admit or to remove from any premises occupied by or on behalf of it, any Service Provider Personnel whose admission or presence would, in the reasonable opinion of Transnet, 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's Personnel, provided that Transnet notifies the Service Provider of any such refusal [with reasons why]. The reasonable exclusion of any such individual from such premises shall not relieve the Service Provider from the performance of its obligations under this Agreement.
- 10.5 The Service Provider agrees to use all reasonable endeavours to ensure the continuity of its Personnel assigned to perform the Services. If any re-assignment by the Service Provider of those Personnel is necessary, or if Transnet advises that any such Personnel assigned are in

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any respect unsatisfactory, including where any such Personnel are, or are expected to be or have been absent for any period, then the Service Provider will promptly supply a replacement of equivalent calibre and experience, and any such replacement shall be approved by Transnet prior to commencing provision of the Services, such approval not to be unreasonably withheld or delayed.

## **11 SUBCONTRACTING**

- 11.1 The Service Provider may only enter into a subcontracting arrangement or replace a subcontractor with the approval of Transnet.
- 11.2 If the Service Provider subcontracts a portion of the contract to another person without declaring it to Transnet reserves the right to penalise the Service Provider up to 10% of the value of the contract.
- 11.3 Where the Service Provider seeks to replace a subcontractor Transnet shall be entitled to obtain representations or input from the initial subcontractor who was part of the tender process whose credentials were used in the Service Provider's tender submission. Transnet shall consider input from all parties concerned, in order to take a decision on the proposed replacement of the subcontractor. The subcontracting arrangement or contract remains between the Service Provider (main contractor) and the subcontractor.
- 11.4 Should Transnet approve the Service Provider's subcontracting arrangement, the Service Provider and not the Sub-contractor will at all times be held liable for performance in terms of its contractual obligations.
- 11.5 The Service Provider may not subcontract in such a manner that the the overall value of the contract is reduced to below the stipulated minimum threshold.
- 11.6 The 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 Service Provider, unless the contract is subcontracted to an Exempted Micro Enterprise (EME) that has the capability and ability to execute the Subcontract.

## **12 PAYMENT TO SUB-CONTRACTORS**

- 12.1 Transnet reserves the right, in its sole discretion, to make payment directly to the sub-contractor of the 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 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 Service Provider, against the required standards.
- 12.2 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 Service Provider to demand that Transnet pay its sub-contractor directly. The decision to pay any sub-contractor directly, remains that of Transnet alone.

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- 12.3 The Service Provider remains liable for its contractual obligations under the Agreement, including all services rendered by the sub-contractor.
- 12.4 This clause does not establish any contractual relationship between Transnet and any sub-contractor of the Service Provider, whatsoever.

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

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

- a) Transnet 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.
- b) In response to this requirement, the Service Provider shall submit to Transnet'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.
- c) The Service Provider undertakes to notify and provide full details to Transnet in the event there is:
  - (i) 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
  - (ii) a corporate or internal restructure or change in control of the Service Provider which has or likely to impact negatively on the Service Provider's B-BBEE status.
- d) Notwithstanding any other reporting requirement in terms hereof, the Service Provider undertakes to provide any B-BBEE data (underlying data relating to the Service Provider 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 Service Provider B-BBEE status) which Transnet may request on written notice within 30 (thirty) calendar days of such request. A failure to provide such data shall constitute a Service Provider Default and may be dealt with in accordance with the provisions of clause 23.
- e) In the event there is a change in the Service Provider's B-BBEE status, then the provisions of clause 23 shall apply.

#### **13.2 Green Economy/Carbon Footprint**

- a) The Service Provider has in its bid provided Transnet with an understanding of the Service Provider's position with regard to issues such as waste disposal, recycling and energy conservation.

### **14 PENALTIES**

#### **14.1 Penalties for Non-compliance to Service Level Agreement**

Where the Service Provider fails to deliver the Services within the agreed and accepted milestone timelines and provided that the cause of the delay was not due to a fault of Transnet, penalties shall be imposed at [REDACTED].

- 14.2 The Service Provider recognises that its failure to meet Required Service Levels and other obligations in terms of this Agreement will have a material adverse impact on the business and operations of Transnet.



- 14.3 Accordingly, during the Operational Phase, at the option of Transnet and in substitution of all other remedies available to Transnet in cases of breach under this Agreement, Transnet is entitled to impose and levy the Penalties specified in the Operational SLA and/or the Strategic SLA, as the case may be ("**Penalties**") on the Service Provider and may recover the applicable Penalties from the Service Provider, subject to the provisions of clause **Error! Reference source not found.**
- 14.4 In no event shall all the Penalties which Transnet is entitled to impose on the Service Provider in terms of this Agreement exceed in aggregate the Contract Value.
- 14.5 Transnet shall on a monthly basis (or as otherwise specified in this Agreement) submit a Tax Invoice to the Service Provider for the aggregate Penalties to be levied by Transnet on the Service Provider. The Tax Invoice shall be accompanied by a schedule itemising the Penalties and the reasons for the raising of such Penalties.
- 14.6 The Service Provider shall make payment of all Tax Invoices rendered by Transnet within 30 (thirty) days of the date of the Tax Invoice ("**Due Date**") into Transnet's Bank Account via electronic funds transfer.
- 14.7 To the extent that the Service Provider fails to make payment by the Due Date or at all, Transnet shall be entitled to levy interest on the overdue amount determined at the Prime Rate from the Due Date until date of payment in full.
- 14.8 Within 10 (ten) Business Days of the Due Date, if the Service Provider objects to any item specified in the Tax Invoice or it shall make payment of the balance of the Tax Invoice that it does not dispute and shall notify the Transnet Group Representative of such objection in writing.
- 14.9 Within 10 (ten) Business Days of the date of receipt of the written objection of the Service Provider, the Transnet Representative shall convene a meeting with *inter alia* the Service Provider Representative in order to resolve such objection.
- 14.10 To the extent that the Service Provider's objection is warranted, Transnet shall amend the Tax Invoice and such amended Tax Invoice shall become due and payable by the later of the Due Date or 10 (ten) Business Days from the date of the amended Tax Invoice.
- 14.11 If Transnet disputes the Service Provider's objection, the matter shall be referred to an independent chartered accountant nominated by the Chief Executive Officer for the time being of SAICA. In making his determination, the independent chartered accountant shall act as an expert and not as an arbitrator.
- 14.12 The Service Provider recognises that its failure to meet Required Service Levels and other obligations in terms of this Agreement will have a material adverse impact on the business and operations of Transnet.
- 14.13 Accordingly, during the Operational Phase, at the option of Transnet and in substitution of all other remedies available to Transnet in cases of breach under this Agreement, Transnet is entitled to impose and levy the Penalties specified in the Operational SLA and/or the Strategic SLA, as the case may be ("**Penalties**") on the Service Provider and may recover the applicable Penalties from the Service Provider,

- 14.14 In no event shall all the Penalties which Transnet is entitled to impose on the Service Provider in terms of this Agreement exceed in aggregate the Contract Value.
- 14.15 Transnet shall on a monthly basis (or as otherwise specified in this Agreement) submit a Tax Invoice to the Service Provider for the aggregate Penalties to be levied by Transnet on the Service Provider. The Tax Invoice shall be accompanied by a schedule itemising the Penalties and the reasons for the raising of such Penalties.
- 14.16 The Service Provider shall make payment of all Tax Invoices rendered by Transnet within 30 (thirty) days of the date of the Tax Invoice ("**Due Date**") into Transnet's Bank Account via electronic funds transfer.
- 14.17 To the extent that the Service Provider fails to make payment by the Due Date or at all, Transnet shall be entitled to levy interest on the overdue amount determined at the Prime Rate from the Due Date until date of payment in full.
- 14.18 Within 10 (ten) Business Days of the Due Date, if the Service Provider objects to any item specified in the Tax Invoice or the schedule referred to in clause 14.15, it shall make payment of the balance of the Tax Invoice that it does not dispute and shall notify the Transnet Group Representative of such objection in writing.
- 14.19 Within 10 (ten) Business Days of the date of receipt of the written objection of the Service Provider, the Transnet Group Representative shall convene a meeting with *inter alia* the Service Provider Representative in order to resolve such objection.
- 14.20 To the extent that the Service Provider's objection is warranted, Transnet shall amend the Tax Invoice and such amended Tax Invoice shall become due and payable by the later of the Due Date or 10 (ten) Business Days from the date of the amended Tax Invoice.
- 14.21 If Transnet disputes the Service Provider's objection, the matter shall be referred to an independent chartered accountant nominated by the Chief Executive Officer for the time being of SAICA. In making his determination, the independent chartered accountant shall act as an expert and not as an arbitrator.

**14.22 Non-compliance penalties for subcontracting**

- a) Breach of subcontracting obligations provides Transnet cause to terminate the contract in certain cases where there is a material Non-compliance.
- b) If the Service Provider fails to achieve its subcontracting commitments as per their bid submission ("a **Non-Compliance**"), the Service Provider shall pay a Non-Compliance penalty ("Non-compliance Penalty") to Transnet in respect of such Non-compliance.
- c) Such penalty shall be calculated based on the difference in value between the committed and delivered subcontracting value (i.e. 100% of the undelivered subcontracting value) plus an additional 10% (ten per cent) of such difference.

**Non-compliance Penalty Certificate:**

- d) If any Non-compliance Penalty arises, the Supplier Development Manager shall issue a Non-compliance Penalty Certificate 90 business days before the expiry of the contract indicating the Non-compliance Penalties which have accrued during that period.

- e) A Non-compliance Penalty Certificate shall be prima facie proof of the matters to which it relates. If the Service Provider disputes any of the amounts set out in a Non-compliance Penalty Certificate:
- the dispute shall be resolved in accordance with the provisions of the Agreement; and
  - if pursuant to that referral, it is determined that the Service Provider owes any amount to Transnet pursuant to the Non-compliance Penalty Certificate, then the Service Provider shall pay such amount to Transnet within 10 (ten) Business Days of the determination made pursuant to such determination and an accompanying valid Tax Invoice.

**Payment of Non-compliance Penalties:**

- f) Subject to Clause (e) above, the Service Provider shall pay the Non-compliance Penalty indicated in the Non-compliance Penalty Certificate within 10 (ten) Business Days of Transnet issuing a valid Tax Invoice to the Service Provider for the amount set out in that certificate. If Transnet does not issue a valid Tax Invoice to the Service Provider for Non-compliance Penalties accrued during any relevant period, those Non-compliance Penalties shall be carried forward to the next period.
- g) The Service Provider shall pay the amount due within 10 (ten) days after receipt of a valid Tax Invoice from Transnet, failing which Transnet shall, without prejudice to any other rights of Transnet under this Agreement, be entitled to call for payment which may be in any form Transnet deems reasonable and/or appropriate.
- h) Should the Service Provider fail to pay any Non Compliance Penalties within the time indicated above (as applicable), Transnet shall be entitled to deduct (set off) the amount not paid by the Service Provider from the account of the Service Provider in the ensuing month.
- i) The Non Compliance Penalties set forth in this Clause are stated exclusive of VAT. Any VAT payable on Non Compliance Penalties will be for the account of the Service Provider.

**15 FEES AND EXPENSES RELATING TO SERVICES**

- 15.1 In consideration of the provision of the Services, Transnet will pay to the Service Provider the Fees detailed in the relevant schedule or Work Order.
- 15.2 Transnet will not be invoiced for materials used in the provision of the Services save for those materials [if any] set out in the Work Order and accepted by Transnet or in any relevant Work Order [which will be invoiced to Transnet at cost].
- 15.3 Unless otherwise agreed in a schedule or Work Order, Transnet will reimburse to the Service Provider all reasonable and proper expenses incurred directly and solely in connection with the provision of the Services, provided that all such expenses:
- a) are agreed by Transnet in advance;
  - b) are incurred in accordance with Transnet's standard travel and expenses policies;
  - c) are passed on to Transnet at cost with no administration fee; and

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d) will only be reimbursed if supported by relevant receipts.

- 15.4 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 INVOICES AND PAYMENT

- 16.1 Transnet shall pay the Service Provider the amounts stipulated in each Purchase Order/Work Order, subject to the terms and conditions of this Agreement.
- 16.2 Transnet shall pay such amounts to the Service Provider upon receipt of a valid and undisputed Tax Invoice together with the supporting documentation, as specified in the Schedule of Requirements appended hereto, once the valid and undisputed Tax Invoices or such portions of the Tax Invoices which are valid and undisputed become due and payable to the Service Provider for the delivery of the Services ordered, in terms of clause 16.5 below.
- 16.3 Transnet may, pending an investigation, withhold any payments to the Service Provider, in the case where irregular expenditure has been identified in the particular contract and that there is reasonable suspicion that the Service Provider is involved or was aware that the contract transgressed any legislation.
- 16.4 All Prices set out in this Agreement and the Schedule of Requirements hereto are to be indicated inclusive and exclusive of VAT, which will be payable at the applicable rate in ZAR.
- 16.5 Unless otherwise provided for in the Schedule of Requirements 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 within 30 [thirty] calendar days after date of receipt by Transnet of the Service Provider's statement together with the relevant valid and undisputed Tax Invoice(s) and supporting documentation.
- 16.6 Where the payment of any Tax Invoice, or any part of a Tax Invoice which is not in dispute, is not made in accordance with this clause, the Service Provider shall be entitled to charge interest on the outstanding amount, at The Standard Bank of South Africa's prime rate of interest in force, for the period from the due date of payment until the outstanding amount is paid.
- 16.7 The Service Provider shall remain the owner of all plant, material, machinery, equipment and the like [collectively, **the Supplier's Goods**] provided to Transnet until Transnet has paid in full for the Services provided, it being specifically agreed that Transnet shall acquire no rights [including liens] of whatsoever nature in such Service providers services/goods until date of final payment by Transnet. Subject to the foregoing, all risk and benefit to the Service provider's Goods shall pass from the Service providers to Transnet on delivery of the Service providers Good's by the Service providers to Transnet.

## 17 PRICE ADJUSTMENTS

- 17.1 Prices for Services supplied in terms of this Agreement shall be subject to review as indicated in the Schedule of Requirements/Works Order annexed hereto.

- 17.2 No less than 2 [two] months prior to any proposed Price adjustment, the Parties shall commence negotiations for Prices for the next period or as otherwise indicated in Schedule 1 hereto. The Parties shall have regard for market-related pricing of equivalent goods, continuous improvement initiatives, costs [including labour, raw materials and transport/delivery], order size and frequency and changes to the specification of the Services .
- 17.3 Pursuant to clause 17.2 above, the Service Provider shall keep full and accurate records of all costs associated with the supply of the Services to Transnet, in a form to be approved in writing by Transnet. The Service Provider shall produce such records to Transnet for inspection at all reasonable times on request and such records may, at Transnet's option, be audited by Transnet or its designated representatives.
- 17.4 Should Transnet and the Service Provider fail to reach an agreement on Price for the successive period, either Party shall be entitled to submit this matter to dispute resolution in accordance with clause 33 of the Master Agreement [Dispute Resolution].
- 17.5 If during the period of this Agreement Transnet can purchase similar Services of a like quality from another supplier at a total delivered cost to a Transnet facility that is lower than the total delivered cost of the Services purchased hereunder from the Service Provider, Transnet may notify the Service Provider of such total delivered cost and the Service Provider shall have an opportunity to adjust the Price of the Services purchased hereunder, on such a basis as to result in the same total delivered cost to Transnet, within 30 [thirty] calendar days of such notice. If the Service Provider fails to do so or cannot legally do so, Transnet may (i) purchase the Services from such other supplier in which case the obligations, including, but not limited to, any purchase and sale requirements and/or commitments, if any, of Transnet and the Service Provider hereunder shall be reduced accordingly; (ii) terminate this Agreement without any penalty, liability or further obligation; or (iii) continue purchases under this Agreement.
- 17.6 If during the period of this Agreement the Service Provider sells any materials which are the same as, equivalent to, or substantially similar to the Services herein, at a total delivered cost to a third party lower than the total delivered cost to a Transnet facility, then the Service Provider has an opportunity to adjust its Price for the Services purchased hereunder within 30 [thirty] calendar days so that the Price is the same or lower than the total delivered cost of such third party. If the Service Provider fails to do so or cannot legally do so, Transnet may (i) purchase the Services from any other such supplier, in which case the obligations, including, but not limited to, any purchase and sale requirements and/or commitments, if any, of Transnet and the Service Provider hereunder shall be reduced accordingly; or (ii) terminate this Agreement without any penalty, liability or further obligation. Within 30 [thirty] calendar days of the Commencement Date of this Agreement or at any time Transnet so requests, the Service Provider shall certify in writing to Transnet that it is in compliance with this clause and shall provide all information that Transnet reasonably requests in order to verify such compliance.

## **18 WARRANTIES APPLICABLE TO SERVICES**

18.1 The Service Provider warrants to Transnet that:

- a) 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 Service Provider;
- b) it will discharge its obligations under this Agreement and any annexure, appendix or schedule hereto with all due skill, care and diligence;
- c) 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;
- d) it will procure licences for Transnet in respect of all Third Party Material detailed in the Work Order(s), and will procure the right for Transnet 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
- e) the use or possession by Transnet of any Materials will not subject Transnet to any claim for infringement of any Intellectual Property Rights of any third party.

18.2 The Service Provider warrants that it will perform its obligations under this Agreement in accordance with the Service Levels as defined in the relevant schedule. Transnet 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 clause 18.3 below, in the event that the Service Provider fails to meet the Service Levels, Transnet may claim appropriate service credits or invoke a retention of Fees as detailed in the relevant schedule and/or Work Order.

18.3 The Service Provider 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 Service Provider 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. In the event that the Service Provider fails or is unable to remedy such non-conformance within such time-scale, Transnet will be entitled to employ a third party to do so in place of the Service Provider and any excess charges or costs incurred by Transnet as a result shall be paid by the Service Provider.

18.4 The Service Provider will remedy any defect within 30 [thirty] calendar days of being notified of that defect by Transnet in writing.

18.5 The Service Provider will not be liable to remedy any problem arising from or caused by any modification made by Transnet to the Deliverables, or any part thereof, without the prior approval of the Service Provider.

18.6 The Service Provider shall advise Transnet of the effects of any steps proposed by Transnet pursuant to clause 18.6 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 control procedure, as set out in clause 36 *[Amendment and Change Control]*.

18.7 The Service Provider warrants that:

- a) it has, using the most up-to-date software available, tested for [and deleted] all commonly known viruses in the Materials and for all viruses known by the Service Provider at the date of the relevant Work Order; and
- b) at the time of delivery to Transnet, the Materials do not contain any trojan horse, worm, logic bomb, time bomb, back door, trap door, keys or other harmful components.

The Service Provider agrees that, in the event that a virus is found, it will at its own expense use its best endeavours to assist Transnet in reducing the effect of the virus and, particularly in the event that a virus causes loss of operational efficiency or loss of data, to assist Transnet to the same extent to mitigate such losses and to restore Transnet to its original operating efficiency.

18.8 The Service Provider undertakes to comply with South Africa's general privacy protection in terms of Section 14 of the Bill of Rights in connection with this Agreement and shall procure that its Personnel shall observe the provisions of Section 14 [as applicable] or any amendments and re-enactments thereof and any regulations made pursuant thereto.

18.9 The Service Provider warrants that it has taken all reasonable precautions to ensure that, in the event of a disaster, the impact of such disaster on the ability of the Service Provider to comply with its obligations under this Agreement will be reduced to the greatest extent possible, and that the Service Provider shall ensure that it has appropriate, tested and documented recovery arrangements in place.

18.10 In compliance with the National Railway Safety Regulator Act, 16 of 2002, the Service Provider shall ensure that the Services, to be supplied to Transnet under the terms and conditions of this Agreement, comply fully with the specifications as set forth in Schedule 1 hereto, and shall thereby adhere [as applicable] to railway safety requirements and/or regulations. Permission for the engagement of a Subcontractor by the Service Provider [as applicable] shall be subject to a review of the capability of the proposed Subcontractor to comply with the specified railway safety requirements and/or regulations. The Service Provider and/or its Subcontractor shall grant Transnet access, during the term of this Agreement, to review any safety-related activities, including the coordination of such activities across all parts of its organisation.

## 19 THIRD PARTY INDEMNITY

The Service Provider hereby indemnifies and shall hold Transnet harmless against any direct damages suffered by or claims arising against Transnet in respect of clause 18.2 above.

## 20 TOTAL OR PARTIAL TO PERFORM

20.1 The Service Provider shall thereupon, as soon as possible after such date, deliver to Transnet the Services [if any] already completed, and payment for the part performance shall be made on a pro rata basis, provided the uncompleted part is not an integral or essential part of the completed Services. Where an integral or essential part of the work has not been completed, the amount to be paid to the Service Provider will be calculated on the basis of Transnet's enrichment. The Service Provider shall, wherever practicable, supply Transnet with the necessary drawings and/or specifications to enable it to complete the work.



- 20.2 Whenever, in any case not covered by clause 20.1 above, the Supplier fails or neglects to execute the work or to deliver any portion of the Services as required by the terms of this Agreement or Purchase Order, Transnet may cancel this Agreement or Purchase Order in so far as it relates to the unexecuted work or the undelivered or rejected portion of the Services, and in such event, the supply of the remaining portion shall remain subject in all respects to these conditions.

## **21 NON CONFORMANCE OF SERVICES PROCURED**

- 21.1 In the case of Services manufactured for and procured by Transnet from the Service Provider in terms of this Agreement, being found not to conform to the Transnet standards, specifications and requirements, Transnet at any time may be entitled to raise a Non Conformance Report (NCR) against a Service Provider whose Services do not conform to Transnet standards, specifications and requirements directing the Service Provider to investigate and remedy the non-conformance within the stipulated time frame as may be determined by Transnet at its discretion.
- 21.2 Failure by the Service Provider to fully comply with NCR within the period stated in sub-clause 21.1 above, shall entitle Transnet to further conditions to which the Service Provider must discharge in order to close the NCR or to terminate the order without giving the Service Provider written notice of termination in terms of this Agreement.

## **22 RIGHTS ON CANCELLATION**

- 22.1 If this Agreement or Purchase Order is cancelled in whole or in part in terms of clause 20 [*Total or Partial Failure to Perform*], Transnet may execute or complete this Agreement with any other entity and do so on such terms as it may deem proper, or may procure other comparable Services in substitution for those neglected to be manufactured or supplied or rejected as aforesaid, and may recover from the Service Provider the difference between the cost of such Services and the Price [if the latter was lower] as well as any costs and expenses [including any additional transport costs] which Transnet may have had to incur in consequence of the Service Provider's default.
- 22.2 Any amount which may be recoverable from the Service Provider in terms of clause 22.1 above, without prejudice to any other legal remedies available to Transnet, may be deducted in whole or in part from any monies in the hands of Transnet and due for payment to the Service Provider.

## **23 BREACH AND TERMINATION**

- 23.1 Termination in accordance with clause 6 [Term and Cancellation] shall not prejudice or affect any right of action or remedy which shall have accrued or shall thereafter accrue to either Party and all provisions which are to survive this Agreement or impliedly do so shall remain in force and in effect.
- 23.2 On termination of this Agreement or a Work Order, the Service Provider will immediately deliver up, and procure that its Personnel will immediately deliver up to Transnet, all Deliverables and property belonging to Transnet [or, in the event of termination of a Work



Order, such as is relevant to that Work Order] which may be in the possession of, or under the control of the Service Provider, and certify to Transnet in writing that this has been done.

- 23.3 To the extent that any of the Deliverables and property referred to in clause 23.2 above are in electronic form and contained on non-detachable storage devices, the Service Provider will provide Transnet with unencrypted copies of the same on magnetic media and will irretrievably destroy and delete copies so held.
- 23.4 In the event that this Agreement is terminated by the Service Provider under clause 6 [Term and Cancellation], or in the event that a Work Order is terminated by Transnet under clause 23 [Breach and Consequences of Termination], Transnet will pay to the Service Provider all outstanding Fees [apportioned on a pro rata basis] relating to the work undertaken by the Service Provider up until the date of such termination. Transnet will also pay the costs of any materials ordered by the Service Provider in relation to the such work for which the Service Provider has paid or is legally obliged to pay, in which case, on delivery of such goods or materials, the Service Provider will promptly deliver such goods and materials to Transnet or as it may direct.
- 23.5 If either Party [**the Defaulting Party**] commits a material breach of this Agreement and fails to remedy such breach within 30 [thirty] calendar days of written notice thereof, the other Party [hereinafter **the Aggrieved Party**], shall be entitled, in addition to any other rights and remedies that it may have in terms of this Agreement, to terminate this Agreement forthwith without any liability and without prejudice to any claims which the Aggrieved Party may have for damages against the Defaulting Party.
- 23.6 Either Party may terminate this Agreement forthwith by notice in writing to the other Party when the other Party is unable to pay its debts as they fall due or commits any act or omission which would be an act of insolvency in terms of the Insolvency Act, 24 of 1936 [as amended from time to time], or if any action, application or proceeding is made with regard to it for:
- a) a voluntary arrangement or composition or reconstruction of its debts;
  - b) its winding-up or dissolution;
  - c) the appointment of a liquidator, trustee, receiver, administrative receiver or similar officer;
  - d) any similar action, application or proceeding in any jurisdiction to which it is subject.
- 23.7 Transnet may terminate this Agreement at any time within 2 [two] months of becoming aware of a change of control of the Service Provider by notice in writing to the Service Provider. For the purposes of this clause, **control** means the right to direct the affairs of a company whether by ownership of shares, membership of the board of directors, agreement or otherwise.
- 23.8 Notwithstanding this clause 23, Transnet may cancel this Agreement without cause by giving 30 [thirty] calendar days prior written notice thereof to the Service Provider, or
- 23.9 The provisions of clauses 2 [Definitions], 18 [Warranties], 28[Rights on Cancellation], 27[Confidentiality], 29 [Limitation of Liability], 30 [Intellectual Property Rights], 33 [Dispute Resolution] and 37.1 [Governing Law] shall survive termination or expiry of this Agreement.

- 23.10 In the event that either Party ("Defaulting Party") breaches any of the provisions of this Agreement, the other Party ("Aggrieved Party") shall be entitled to require the Defaulting Party, on 30 (thirty) Business Days' prior written notice, to remedy that breach.
- 23.11 If the Defaulting Party fails to remedy the breach within the period stipulated and if:
- 23.12 the breach is not a material breach, the Aggrieved Party shall enforce specific performance of this Agreement and, if the Aggrieved Party is Transnet, shall be entitled to levy penalties or to claim damages; provided that in claiming damages, if the Aggrieved Party is Transnet, it shall deduct the amount of any Penalties levied against the Service Provider in respect of that particular breach from the amount of such damages claim; or
- the breach is a material breach going to the root of this Agreement, the Aggrieved Party shall, in its sole and absolute discretion, either:
- enforce specific performance of this Agreement; or
- cancel this Agreement;
- in either event without prejudice to the Aggrieved Party's entitlement to either levy penalties or to claim damages; provided that in claiming damages, if the Aggrieved Party is Transnet, it shall deduct the amount of any Penalties levied against the Service Provider in respect of that particular breach from the amount of such damages claim
- 23.13 To the extent that any Region is in breach of any of the obligations of Transnet specified in this Agreement, the Service Provider shall provide the Region concerned with a breach notice and shall similarly provide a copy of the breach notice to the Transnet Representative.
- 23.14 Should the Service Provider commit a breach this Agreement and should such breach involve fraud and/or any Prohibited Act, Transnet shall, in addition to the remedies available to it:
- report and submit the Service Provider's credit information to a credit bureau in terms of section 70 of the National Credit Act 34 of 2005;
  - include the Service Provider's details on its list of blacklisted suppliers;
  - notify the Government's Department of Treasury to blacklist the Service Provider; and
  - notify the South African Police Service, if applicable.

## **24 CESSIONS AND ASSIGNMENTS AS PER NT INSTRUCTION NOTE 08 OF 2022/2023**

- 24.1 The Service Provider is not allowed to cede its rights for payment in terms of this Agreement without prior written approval from Transnet. Cession shall only be applicable as follows:
- Cession must only be applicable to the transfer of right to payment for Services rendered by a Service Provider to an FSP or State Institutions;
  - The written request for cession must be by the Service Provider and not a third party; and
  - The written request by the Service Provider must be accompanied by the cession agreement.
- 24.2 The Service Provider is prohibited from transferring its rights and obligations to perform under this contract. Assignments are against the principles of section 217 of the Constitution mainly, fairness, transparency and competitiveness.

## **25 FORCE MAJEURE**

- 25.1 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 may however rely on strikes, industrial dispute and riots as a ground of force majeure.
- 25.2 Each Party will take all reasonable steps by whatever lawful means that are available to resume full performance as soon as practicable and will seek agreement to modification of the relevant provisions of this Agreement in order to accommodate the new circumstances caused by the act of *force majeure*. If a Party fails to agree with 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.

## **26 PROTECTION OF PERSONAL INFORMATION**

- a) The following terms shall bear the same meaning as contemplated in Section 1 of the Protection of Personal Information Act 4 of 2013 ("POPIA"):
- consent; person; personal information; processing; record; Regulator as well as any terms derived from these terms of the POPIA
- b) Transnet will process all information by the Respondent in terms of the requirements contemplated in Section 4(1) of the POPIA:
- Accountability; Processing limitation; Purpose specification; Further processing limitation; Information quality; Openness; Security safeguards and Data subject participation.
- c) Transnet agrees that in submitting any information or documentation requested in the RFP and in this Agreement, the Service Provider consents to the processing of their personal information for the purpose of, but not limited to, risk assessment, contract award, contract management, auditing, legal opinions/litigation, investigations (if applicable), document storage for the legislatively required period, destruction, de-identification and publishing of personal information by Transnet and/or its authorised appointed third parties.
- d) The Parties agree that they may obtain and have access to personal information for the fulfilment of the rights and obligations contained herein. In performing the obligations as set out in this Agreement, the Parties shall at all times ensure that:
- i. they process personal information only for the express purpose for which it was obtained;
  - ii. once processed for the purposes for which it was obtained, all personal information will be destroyed to an extent that it cannot be reconstructed to its original form, subject to any legal retention requirements;
  - iii. Personal information is provided only to authorised personnel who strictly require the personal information to carry out the Parties' respective obligations under this Agreement;

- iv. they do not disclose personal information of the other Party, other than in terms of this Agreement;
  - v. they have all reasonable technical and organisational measures in place to protect all personal information from unauthorised access and/or use;
  - vi. they have appropriate technical and organisational measures in place to safeguard the security, integrity and authenticity of all information in their possession or under their control in terms of this Agreement;
  - vii. they identify all reasonably foreseeable internal and external risks to personal information in their possession or under their control; establish and maintain appropriate safeguards against the risks identified; regularly verify that the safeguards are effectively implemented; and ensure that the safeguards are continually updated in response to new risks or deficiencies in previously implemented safeguards;
  - viii. such personal information is protected against unauthorised or unlawful processing, accidental loss, destruction or damage, alteration, disclosure or access.
- 26.1 The Parties agree that if personal information will be processed for additional purposes beyond the original purpose for which it was obtained, explicit consent must be obtained beforehand from those persons whose information will be subject to such processing.
- 26.2 Should it be necessary for either Party to disclose or otherwise make available the personal information to any third party (including sub-contractors and employees) that is not already consented to, it may do so only with the prior written consent of the other Party. The Party requiring such consent shall require of all such third parties, appropriate written undertakings to be provided, containing similar terms to that set forth in this clause, and dealing with that third party's obligations in respect of its processing of the personal information. Following approval by the other Party, the Party requiring consent agrees that the provisions of this clause shall *mutatis mutandis* apply to all authorised third parties who process personal information.
- 26.3 The Parties shall ensure that any persons authorized to process information on their behalf (including employees and third parties) will safeguard the security, integrity and authenticity of all information. Where necessary to meet this requirement, the Parties shall keep all personal information and any analyses, profiles, or documents derived therefrom logically separated from all other information and documentation held by it.
- 26.4 The Parties shall carry out regular assessments to identify all reasonably foreseeable internal and external risks to the personal information in its possession or under its control. The Parties shall implement and maintain appropriate safeguards against the risks which it identifies and shall also regularly verify that the safeguards which it has in place have been effectively implemented.
- 26.5 The Parties agree that they will promptly return, destroy or de-identify any personal information in their possession or control which belongs to the other Party once it no longer serves the purpose for which it was collected in relation to this Agreement, subject to any legal retention requirements. This may be at the request of the other Party and includes

circumstances where a person has requested the Parties to delete all instances of their personal information. The information will be destroyed or de-identified in such a manner that it cannot be reconstructed to its original form, linking it to any particular individual or organisation.

**26.6 Personal Information security breach:**

- a) Each Party shall notify the other party in writing as soon as possible after it becomes aware of or suspects any loss, unauthorised access or unlawful use of any personal information and shall, at its own cost, take all necessary remedial steps to mitigate the extent of the loss or compromise of personal information and to restore the integrity of the affected personal information as quickly as is possible. The Parties shall also be required to provide each other with details of the persons affected by the compromise and the nature and extent of the compromise, including details of the identity of the unauthorised person who may have accessed or acquired the personal information.
- b) The Parties shall provide on-going updates on the progress in resolving the compromise at reasonable intervals until such time as the compromise is resolved.
- c) Where required, the Parties must notify the South African Police Service; and/or the State Security Agency and the Information Regulator and the affected persons of the security breach. Any such notification shall always include sufficient information to allow the persons to take protective measures against the potential consequences of the compromise.
- d) The Parties undertake to co-operate in any investigations relating to security which is carried out by or on behalf of the other including providing any information or material in its possession or control and implementing new security measures.

**27 CONFIDENTIALITY**

**27.1 The Parties hereby undertake the following with regard to Confidential Information:**

- a) not to divulge or disclose to any person whomsoever in any form or manner whatsoever, either directly or indirectly, any Confidential Information of the other without the prior written consent of such other Party, other than when called upon to do so in accordance with a statute, or by a court having jurisdiction, or by any other duly authorised and empowered authority or official, in which event the Party concerned shall do what is reasonably possible to inform the other of such a demand and each shall assist the other in seeking appropriate relief or the instituting of a defensive action to protect the Confidential Information concerned;
- b) not to use, exploit, permit the use of, directly or indirectly, or in any other manner whatsoever apply the Confidential Information disclosed to it as a result of this Agreement, for any purpose whatsoever other than for the purpose for which it is disclosed or otherwise than in strict compliance with the provisions in this Agreement;
- c) not to make any notes, sketches, drawings, photographs or copies of any kind of any part of the disclosed Confidential Information without the prior written consent of such

other Party, except when reasonably necessary for the purpose of this Agreement, in which case such copies shall be regarded as Confidential Information;

- d) not to de-compile, disassemble or reverse engineer any composition, compilation, concept application, item, component de-compilation, including software or hardware disclosed and shall not analyse any sample provided by Transnet, or otherwise determine the composition or structure or cause to permit these tasks to be carried out except in the performance of its obligations pursuant to this Agreement;
- e) not to exercise less care to safeguard Transnet Confidential Information than the Party exercises in safeguarding its own competitive, sensitive or Confidential Information;
- f) Confidential Information disclosed by either Party to the other or by either Party to any other party used by such party in the performance of this Agreement, shall be dealt with as "restricted" or shall be dealt with according to any other appropriate level of confidentiality relevant to the nature of the information concerned, agreed between the Parties concerned and stipulated in writing for such information in such cases;
- g) the Parties shall not make or permit to be made by any other person subject to their control, any public statements or issue press releases or disclose Confidential Information with regard to any matter related to this Agreement, unless written authorisation to do so has first been obtained from the Party first disclosing such information;
- h) each Party shall be entitled to disclose such aspects of Confidential Information as may be relevant to one or more technically qualified employees or consultants of the Party who are required in the course of their duties to receive the Confidential Information for the Permitted Purpose provided that the employee or consultant concerned has a legitimate interest therein, and then only to the extent necessary for the Permitted Purpose, and is informed by the Party of the confidential nature of the Confidential Information and the obligations of the confidentiality to which such disclosure is subject and the Party shall ensure such employees or consultants honour such obligations;
- i) each Party shall notify the other Party of the name of each person or entity to whom any Confidential Information has been disclosed as soon as practicable after such disclosure;
- j) each Party shall ensure that any person or entity to which it discloses Confidential Information shall observe and perform all of the covenants the Party has accepted in this Agreement as if such person or entity has signed this Agreement. The Party disclosing the Confidential Information shall be responsible for any breach of the provisions of this Agreement by such person or entity; and
- k) each Party may by written notice to the other Party specify which of the Party's employees, officers or agents are required to sign a non-disclosure undertaking.

27.2 The duties and obligations with regard to Confidential Information in this clause 27 shall not apply where:

For the provision of specialised material handling equipment (MHE) fleet management services for a period of three (3) years to Transnet Freight Rail

- a) a Party can demonstrate that such information is already in the public domain or becomes available to the public through no breach of this Agreement by that Party, or its Staff; or
  - b) was rightfully in a Party's possession prior to receipt from the other Party, as proven by the first-mentioned Party's written records, without an infringement of an obligation or duty of confidentiality; or
  - c) can be proved to have been rightfully received by a Party from a third party without a breach of a duty or obligation of confidentiality; or
  - d) is independently developed by a Party as proven by its written records.
- 27.3 This clause 27 shall survive termination for any reason of this Agreement and shall remain in force and effect from the Commencement Date of this Agreement and 5 [five] years after the termination of this Agreement. Upon termination of this Agreement, all documentation furnished to the Service Provider by Transnet pursuant to this Agreement shall be returned to Transnet including, without limitation, all corporate identity equipment including dyes, blocks, labels, advertising matter, printing matter and the like.
- 27.4 Each Party ("Receiving Party") must treat and hold as confidential the Confidential Information, which it receives from the other Party ("Disclosing Party") or which becomes known to it concerning pursuant to this Agreement.
- 27.5 The Receiving Party agrees that in order to protect the proprietary interests of the Disclosing Party in its Confidential Information:
- a) it will only make the Confidential Information available to those of its Personnel who are actively involved in the execution of this Agreement and who have signed appropriate non-disclosure agreements;
  - b) it will initiate internal security procedures reasonably acceptable to the Disclosing Party to prevent unauthorised disclosure and will take all practical steps to impress upon those Personnel who need to be given access to Confidential Information, of the confidential nature thereof;
  - c) 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 the Disclosing Party and shall be promptly handed over to the Disclosing Party when no longer required for the purposes of this Agreement. In no event shall any proprietary rights in respect of the Confidential Information be transferred in any manner to the Receiving Party by virtue of its access to such Confidential Information. In addition, the disclosure of Confidential Information by the Disclosing Party to the Receiving Party shall not create a right to the Confidential Information of the Disclosing Party in terms of the provisions of any Applicable Laws.
- 27.6 Save for any documents that should be retained in terms of Applicable Law, within 30 (thirty) days of the Termination Date, the Receiving Party will deliver to the Disclosing Party, or at the Disclosing Party's option, destroy or expunge any electronic copies of documents forming part of the Confidential Information in its possession or under its direct or indirect control and shall



confirm under oath that all documents have been returned, destroyed or expunged as the case may be.

27.7 The foregoing obligations shall not apply to any Confidential Information which:

- a) is lawfully in the public domain at the time of disclosure;
- b) subsequently and lawfully becomes part of the public domain by publication or otherwise;
- c) 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
- d) is disclosed pursuant to a requirement or request by operation of Applicable Law or court order; provided that to the extent legally permissible, the Receiving Party shall notify the Disclosing Party in writing as soon as is reasonably practicable in order to allow the Receiving Party to take appropriate legal action to prevent or limit the disclosure of the Confidential Information. To the extent that the disclosure of such Confidential Information is not readily available to the public other than by proving a right to such Confidential Information and initiating a request for such Confidential Information in terms of any Applicable Laws,

27.8 Nothing in this clause **Error! Reference source not found.** shall preclude the Parties from disclosing the Confidential Information to their professional advisors in the *bona fide* course of seeking business and professional advice.

27.9 Notwithstanding the provisions of clause 27, the Receiving Party hereby indemnifies the Disclosing Party against any loss or damage, which the Disclosing Party may suffer as a result of a breach of this clause by the Receiving Party or its Personnel.

27.10 The provisions of this clause 27 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 10 (ten) years after the Termination Date.

## 28 INSURANCES

28.1 Without limiting the liability of the Service Provider under this Agreement, the Service Provider shall take out insurance in respect of all risks for which it is prudent for the Service Provider to insure against, including any liability it may have as a result of its activities under this Agreement for theft, destruction, death or injury to any person and damage to property. The level of insurance will be kept under review by Transnet, 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 Service Provider.

28.2 The Service Provider shall arrange insurance with reputable insurers and will produce to Transnet evidence of the existence of the policies on an annual basis within 30 [thirty] calendar days after date of policy renewals.

28.3 Subject to clause 28.4 below, if the Service Provider fails to effect adequate insurance under this clause 28, it shall notify Transnet in writing as soon as it becomes aware of the reduction or inadequate cover and Transnet may arrange or purchase such insurance on behalf of the



Service Provider. The Service Provider shall promptly reimburse Transnet for any premiums paid provided such insurance protects the Service Provider's liability. Transnet assumes no responsibility for such insurance being adequate to protect all of the Service Provider's liability.

- 28.4 In the event that the Service Provider receives written notice from its insurers advising of the termination of its insurance cover referred to in clause 28.1 above or if the insurance ceases to be available upon commercially reasonable terms, the Service Provider shall immediately notify Transnet in writing of such termination and/or unavailability, whereafter either the Service Provider or Transnet may terminate this Agreement on giving the other Party not less than 30 [thirty] calendar days prior written notice to that effect.

## **29 LIMITATION OF LIABILITY**

- 29.1 The Service Provider's liability under this clause 29 shall be in addition to any warranty or condition of any kind, express or implied by law or otherwise, relating to the Services or ancillary Services, including the quality of the Services or ancillary Services or any materials delivered pursuant to this Agreement.
- 29.2 Neither Party excludes or limits liability to the other Party for:
- a) death or personal injury caused by its negligence, [including its employees', agents' or Subcontractors' negligence]; or
  - b) fraud or theft.
- 29.3 The Service Provider shall indemnify and keep Transnet indemnified from and against liability for damage to any Transnet property [whether tangible or intangible] or any other loss, costs or damage suffered by Transnet to the extent that it results from any act of or omission by the Service Provider or its Personnel in connection with this Agreement. The Service Provider's liability arising out of this clause 29.3 shall be limited to direct damages.
- 29.4 Subject always to clauses 29.4 and 29.2 above, the liability of either the Service Provider or Transnet under or in connection with this Agreement, whether for negligence, misrepresentation, breach of contract or otherwise, for direct loss or damage arising out of each Default or series of related Defaults shall not exceed 100% [one hundred per cent] of the Fees paid under the schedule or Work Order to which the Default(s) relates.
- 29.5 Subject to clauses 29.1 to 29.4 above, in no event shall either Party be liable to the other for indirect or consequential loss or damage or including indirect or consequential loss of profits, business, revenue, goodwill or anticipated savings of an indirect nature or loss or damage incurred by the other Party as a result of third party claims.
- 29.6 If for any reason the exclusion of liability in clause 29.5 above is void or unenforceable, either Party's total liability for all loss or damage under this Agreement shall be as provided in clause 29.3 above.
- 29.7 Nothing in this clause 29 shall be taken as limiting the liability of the Parties in respect of clauses 27 [Confidentiality] and 30 [Intellectual Property Rights].

## **30 INTELLECTUAL PROPERTY RIGHTS**

- 30.1 **Title to Confidential Information**

For the provision of specialised material handling equipment (MHE) fleet management services for a period of three (3) years to Transnet Freight Rail

- a) Transnet will retain all right, title and interest in and to its Confidential Information and Background Intellectual Property and the Service Provider acknowledges that it has no claim of any nature in and to the Confidential Information and Background Intellectual Property that is proprietary to Transnet. For the avoidance of doubt all the Service Provider's Background Intellectual Property shall remain vested in the Service Provider.
- b) Transnet shall grant to the Service Provider an irrevocable, royalty free, non-exclusive licence to use Transnet's Background Intellectual Property only for the Permitted Purpose. This licence shall not permit the Service Provider to sub-license to other parties.
- c) The Service Provider shall grant to Transnet an irrevocable, royalty free, non-exclusive licence to use the Service Provider's Background Intellectual Property for the Permitted Purpose. This licence shall not permit Transnet to sub-license to other parties.
- d) The Service Provider shall grant Transnet access to the Service Provider's Background Intellectual Property on terms which shall be *bona fide* negotiated between the Parties for the purpose of commercially exploiting the Foreground Intellectual Property, to the extent that such access is required.
- e) The above shall not pertain to any software licenses procured by the Service Provider from third parties and used in the supply of the Services .

## 30.2

### **Title to Intellectual Property**

- a) All right, title and interest in and to Foreground Intellectual Property prepared, conceived or developed by the Service Provider, its researchers, agents and employees shall vest in Transnet and the Service Provider acknowledges that it has no claim of any nature in and to the Foreground Intellectual Property. The Service Provider shall not at any time during or after the termination or cancellation of this Agreement dispute the validity or enforceability of such Foreground Intellectual Property, or cause to be done any act or anything contesting or in any way impairing or tending to impair any part of that right, title and interest to any of the Foreground Intellectual Property and shall not counsel or assist any person to do so.
- b) Transnet shall be entitled to seek protection in respect of the Foreground Intellectual Property anywhere in the world as it shall decide in its own absolute discretion and the Service Provider shall reasonably assist Transnet in attaining and maintaining protection of the Foreground Intellectual Property.
- c) Where the Foreground Intellectual Property was created by the Service Provider or its researchers, agents and employees and where Transnet elects not to exercise its option to seek protection or decides to discontinue the financial support of the prosecution or maintenance of any such protection, Transnet shall notify the Service Provider who shall have the right of first refusal to file or continue prosecution or maintain any such applications and to maintain any protection issuing on the Foreground Intellectual Property.
- d) No consideration shall be paid by Transnet to the Service Provider for the assignment of any Foreground Intellectual Property from the Service Provider to Transnet, over and

above the sums payable in terms of this Agreement. The Service Provider undertakes to sign all documents and do all things as may be necessary to effect, record and perfect the assignment of the Foreground Intellectual Property to Transnet.

- e) Subject to anything contrary contained in this Agreement and/or the prior written consent of Transnet [which consent shall not be unreasonably withheld], the Service Provider shall under no circumstances be entitled as of right, or to claim the right, to use Transnet's Background Intellectual Property and/or Foreground Intellectual Property.

### 30.3 **Title to Improvements**

Any improvements, developments, adaptations and/or modifications to the Foreground Intellectual Property, and any and all new inventions or discoveries, based on or resulting from the use of Transnet's Background Intellectual Property and/or Confidential Information shall be exclusively owned by Transnet. The Service Provider shall disclose promptly to Transnet all such improvements, developments, adaptations and/or modifications, inventions or discoveries. The Service Provider hereby undertakes to sign all documents and do all things as may be necessary to effect, record and perfect the assignment of such improvements, developments, adaptations and/or modifications, inventions or discoveries to Transnet and the Service Provider shall reasonably assist Transnet in attaining, maintaining or documenting ownership and/or protection of the improved Foreground Intellectual Property.

### 30.4 **Unauthorised Use of Confidential Information**

The Service Provider shall not authorise any party to act on or use in any way any Confidential Information belonging to Transnet whether or not such party is aware of such Confidential Information, and shall promptly notify Transnet of the information if it becomes aware of any party so acting, and shall provide Transnet the information with such assistance as Transnet reasonably requires, at Transnet's cost and expense, to prevent such third party from so acting.

### 30.5 **Unauthorised Use of Intellectual Property**

- a) The Service Provider agrees to notify Transnet in writing of any conflicting uses of, and applications of registrations of Patents, Designs and Trade Marks or any act of infringement, unfair competition or passing off involving the Intellectual Property of Transnet of which the Service Provider acquires knowledge and Transnet shall have the right, as its own option, to proceed against any party infringing its Intellectual Property.
- b) It shall be within the sole and absolute discretion of Transnet to determine what steps shall be taken against the infringer and the Service Provider shall co-operate fully with Transnet, at Transnet's cost, in whatever measure including legal action to bring any infringement of illegal use to an end.
- c) The Service Provider shall cooperate to provide Transnet promptly with all relevant ascertainable facts.
- d) If proceedings are commenced by Transnet alone, Transnet shall be responsible for all expenses but shall be entitled to all damages or other awards arising out of such proceedings. If proceedings are commenced by both Parties, both Parties will be

responsible for the expenses and both Parties shall be entitled to damages or other awards arising out of proceedings.

### 31 NON-WAIVER

- 31.1 Failure or neglect by either Party, at any time, to enforce any of the provisions of this Agreement, shall not in any manner be construed to be a waiver of any of that Party's rights in that regard and in terms of this Agreement.
- 31.2 Such failure or neglect shall not in any manner affect the continued, unaltered validity of this Agreement, or prejudice the right of that Party to institute subsequent action.

### 32 PARTIAL INVALIDITY

If any provision of this Agreement shall be held to be invalid, illegal or unenforceable, or shall be required to be modified, the validity, legality and enforceability of the remaining provisions shall not be affected thereby.

### 33 DISPUTE RESOLUTION

- 33.1 Should any dispute of whatsoever nature arise between the Parties concerning this Agreement, the Parties shall try to resolve the dispute by negotiation within 10 [ten] Business Days of such dispute arising.
- 33.2 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.
- 33.3 Such dispute shall be finally resolved in accordance with the rules of AFSA by an arbitrator or arbitrators appointed by AFSA.
- 33.4 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 33.
- 33.5 This clause 33 is severable from the rest of this Agreement and shall remain in effect even if this Agreement is terminated for any reason.
- 33.6 This clause 33 shall not preclude either Party from seeking urgent relief in a court of appropriate jurisdiction, where grounds for urgency exist.
- 33.7 If a dispute arises between the Parties with regards to this Agreement or its interpretation and such dispute has first been referred to the Operational Steercom and thereafter to the Strategic Steercom (alternatively has been referred directly to the Strategic Steercom as specifically contemplated in any clause in this Agreement) and has not been resolved as contemplated by the provisions of clause **Error! Reference source not found.**, either Party may convene a meeting (to be held either in person or via teleconference or video conference) between the Transnet Group Chief Supply Chain Officer and the Chief Executive Officer of the Service Provider on 30 (thirty) Business Days' prior written notice in order to resolve such dispute.
- 33.8 If the dispute is not resolved through *bona fide* discussion within 14 (fourteen) days of the date of the meeting contemplated, either Party shall be entitled to refer such matter to arbitration by giving the other Party a written notice of arbitration ("**Arbitration Notice**").

For the provision of specialised material handling equipment (MHE) fleet management services for a period of three (3) years to Transnet Freight Rail

- 33.9 The Arbitration Notice shall constitute legal process for the purpose of interrupting extinctive prescription as contemplated in the Prescription Act (Act No. 68 of 1969)
- 33.10 The arbitration shall be held in Sandton, Gauteng, South Africa.
- 33.11 The arbitration shall be held in accordance with the Arbitration Act (No. 42 of 1965) utilising the AFSA expedited commercial rules for arbitration ("**AFSA Rules**").
- 33.12 Only the Parties and their legal representatives (or persons agreed to) shall attend the arbitration proceedings and the arbitration proceedings shall be confidential save insofar as a disclosure is necessary in order to obtain an order for interim relief.
- 33.13 The Parties shall use reasonable commercial endeavours to expedite the arbitration proceedings; it being the intention of the Parties to dispose of the dispute within 60 (sixty) days of the date of the Arbitration Notice.
- 33.14 The arbitrator shall be an independent party agreed to by the Parties. In the absence of agreement, the arbitrator shall be nominated by the chairperson for the time being of AFSA
- 33.15 The award of the arbitrator shall be binding on the Parties save that the Parties shall be entitled to appeal or review the decision of the arbitrator in accordance with the AFSA Rules.
- 33.16 The arbitrator shall, as part of his award, make an order an award as to costs within his discretion.
- 33.17 Nothing in this clause **Error! Reference source not found.** shall prevent any Party from seeking urgent interim relief from a court of competent jurisdiction pending the decision of the arbitrator.
- 33.18 By signing this Agreement, the Parties irrevocably and unconditionally agree to the arbitration proceedings contemplated in this clause 33.

#### **34 ADDRESSES FOR NOTICES**

- 34.1 The Parties to this Agreement select the physical addresses and fax numbers, as detailed hereafter, as their respective addresses for giving or sending any notice provided for or required in terms of this Agreement, provided that either Party shall be entitled to substitute such other address or fax number, as may be, by written notice to the other:

a) **Transnet**

- (i) For legal notices:

.....  
.....  
.....

Fax No. ....

Attention: Group Legal Department

- (ii) For commercial notices:

.....  
.....  
.....

Fax No. ....

Attention: ....

For the provision of specialised material handling equipment (MHE) fleet management services for a period of three (3) years to Transnet Freight Rail

b) **The Service Provider**

(i) For legal notices:

.....

.....

.....

Fax No. ....

Attention: .....

(ii) For commercial notices:

.....

.....

.....

Fax No. ....

Attention: .....

34.2 Any notice shall be addressed to a Party at its physical address, or delivered by hand, or sent by fax or email.

34.3 Any notice shall be deemed to have been given:

- a) if hand delivered, on the day of delivery;
- b) if faxed, on the date and time of sending of such fax, as evidenced by a fax confirmation printout, provided that such notice shall be confirmed by prepaid registered post on the date of dispatch of such fax, or, should no postal facilities be available on that date, on the next Business Day; or
- c) if sent by email, on the date and time received, provided that such notice shall be confirmed by prepaid registered post on the date of dispatch of such email, or, should no postal facilities be available on that date, on the next Business Day.

**35 WHOLE AND ONLY AGREEMENT**

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

35.2 The Parties hereby confirm that this Agreement replaces all other agreements which exist or may have existed in any form whatsoever between them, with regard to the subject matter dealt with in this Agreement, any annexures appended hereto and the Work Order.

**36 AMENDMENT AND CHANGE CONTROL**

36.1 Any amendment or change of any nature made to this Agreement and the Schedule of Requirements thereof shall only be valid if it is in writing, signed by both Parties and added to this Agreement as an addendum hereto. In this regard a Change Notice must first be defined and issued by the requesting Party. A Change Notice Response must then be issued by responding Party. A formal approval of the Change Request will then trigger the issue of the addendum to this Agreement.

36.2 In the event the Parties cannot agree upon changes, the Parties shall in good faith seek to agree any proposed changes using the dispute resolution procedures in clause 33 [*Dispute Resolution*].

### **37 GENERAL**

#### **37.1 Governing Law**

This Agreement is exclusively governed by and construed in accordance with the laws of the Republic of South Africa and is subject to the jurisdiction of the courts of the Republic of South Africa.

#### **37.2 Change of Law**

In this Agreement, unless the context otherwise requires, references to a statutory provision include references to that statutory provision as from time to time amended, extended or re-enacted and any regulations made under it, provided that in the event that the amendment, extension or re-enactment of any statutory provision or introduction of any new statutory provision has a material impact on the obligations of either Party, the Parties will negotiate in good faith to agree such amendments to this Agreement as may be appropriate in the circumstances. If, within a reasonable period of time, the Service Provider and Transnet cannot reach agreement on the nature of the changes required or on modification of Prices, delivery schedules, warranties, or other terms and conditions, either Party may seek to have the matter determined in accordance with clause 33[*Dispute Resolution*] above.

#### **37.3 Counterparts**

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

### **38 DATABASE OF RESTRICTED SUPPLIER**

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.

### **39 FLEET OPTIMISATION**

39.1 The Service Provider shall ensure, that in rendering the Services, its primary focus is to achieve the most optimal and efficient Fleet necessary for the attainment of Transnet's business objectives taking into account prevailing market conditions from time to time.

39.2 In optimising the Fleet, the Service Provider shall take the following factors into consideration:

39.3 ensuring that Vehicles supplied by the Service Provider to Transnet satisfy the requirements specified in the purchase order so that downtime is reduced;

39.4 achieving appropriate Availability of the Fleet whilst simultaneously reducing costs for both Parties;

- conducting Fleet audits to verify:
- the size of the Fleet; and

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- the rate at which the Fleet is actually clocking utilisation as compared to the Monthly Contracted Utilisation or usage;
  - ensuring interchangeability of Vehicles and Accessories insofar as is reasonably practicable;
  - optimising the mix between long-term and *ad hoc* Vehicle requirements;
    - achieving the Uptime Target on the Fleet through the provision of STR Vehicles;
    - minimizing downtime on maintenance and accident repairs;
    - arranging Scheduled Maintenance other than during Business Hours; and
    - completing regular needs analyses to identify the “nice-to-have” versus the “need-to-have”.

39.5 The composition and utilisation of the Fleet by Transnet shall be monitored and reported on monthly by the Service Provider.

39.6 During the Initial Phase, the Service Provider may consider taking over the STR Vehicles contracted by Transnet with the incumbent supplier and to this end, a transition plan shall be formulated to transition the existing demand for Vehicles from the incumbent supplier to the Service Provider over the period specified in that transition plan.

#### **40 MANAGED MAINTENANCE**

40.1 The Service Provider shall provide Managed Maintenance to Transnet in respect of the Owned Fleet, at the discretion of the Operating Division, on the following basis:

- 40.1.1 the management and scheduling of Scheduled Maintenance and Unscheduled Maintenance in respect of the Owned Fleet;
- 40.1.2 the provision of assistance in cases of breakdowns, accidents and incidents;
- 40.1.3 the optimisation of the Owned Fleet across the Operating Divisions so that Owned Fleet is utilised prior to the procurement of FML Vehicles and STR Vehicles to the extent that this is reasonably operationally viable;
- 40.1.4 the reporting in respect of the Owned Fleet to the extent that data has been provided by Transnet to the Service Provider including:
  - 40.1.4.1 the projected time within which the Owned Fleet will attain the Maximum Vehicle Kilometres taking into account the rate of current utilisation of the Vehicle;
  - 40.1.4.2 the possible extension of the Maximum Vehicle Kilometres where such extension is operationally viable and will not place the operations of Transnet or the safety of its Personnel at any known risk as a result of such extension; and
  - 40.1.4.3 the utilisation of the Owned Fleet;
  - 40.1.4.4 the details of all Vehicles which formed part of the Owned Fleet and which were disposed of by the Service Provider on behalf of Transnet
  - 40.1.4.5 such other reports that Transnet may reasonably require as agreed at the Operational Steercom or the Strategic Steercom, as the case may be.



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40.2 The Service Provider shall provide Transnet with assistance in the management of the Owned Fleet, including *inter alia*, the implementation of best practice controls for the effective management of the Owned Fleet.

40.3 Transnet shall make payment of a fee for Managed Maintenance for all Vehicles whether or not specified ("**Managed Maintenance Fee**") as at the Commencement Date and for a period of 12 (twelve) consecutive months thereafter. 120 (one hundred and twenty) days prior to the Anniversary Date, the Service Provider shall furnish Transnet with proposals regarding the adjustment of the Managed Maintenance Fee taking into account the following components and adjustment mechanisms at the following intervals:

Fee	When adjusted	Adjustment mechanism
Managed Maintenance Fee	Anniversary Date	CPI Variance
Licensing	Government regulated	Actual charges  The Service Provider shall not be entitled to any margin on the actual charges
Tracking device	Anniversary Date	CPI Variance

40.4 Should Transnet not provide feedback on the approval or rejection of an adjustment to the Managed Maintenance Fee as proposed by the Service Provider no later than 90 (ninety) days prior to the Anniversary Date, the Managed Maintenance Fee shall be adjusted automatically by the CPI Variance, compounded annually.

40.5 The Service Provider shall optimise and manage the costs of Scheduled Maintenance and Unscheduled Maintenance incurred in relation to the Owned Fleet and shall settle the costs relating to such Scheduled Maintenance and Unscheduled Maintenance directly with the supplier concerned including parts and labour. For the avoidance of doubt, the costs of Scheduled Maintenance and Unscheduled Maintenance shall be obtained on a Three Quote Basis (to the extent that this is practically possible) which shall be submitted to Transnet for approval. Transnet shall approve a quote in writing and the Service Provider shall action such approved quote.

40.6 The Service Provider shall, on a monthly basis, present Transnet with Tax Invoices in respect of each individual Vehicle forming part of the Owned Fleet. In this regard:

40.6.1 the Tax Invoices shall be addressed to the Cost Centre Owner responsible for that Owned Vehicle. To the extent that the Vehicle is allocated to a different Cost Centre Owner from time to time, Transnet shall notify the Service Provider in writing of such change within 30 (thirty) Business Days of the date of the change of such Cost Centre Owner; and

40.6.2 the Tax Invoice shall reflect the costs incurred by the Service Provider for and on behalf of Transnet on a "pass through" basis i.e. at cost without the addition of any margin thereon.

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The Service Provider warrants that it is not entitled to any rebate in respect of any of the third party supplier invoices and to the extent that it is entitled to such rebate, that the Tax Invoice shall reflect the amount of the supplier invoice and thereafter reflect the amount of the rebate granted to the Service Provider by such supplier. To the extent that the Service Provider is entitled to a rebate and has failed to pass such rebate onto Transnet and Transnet subsequently is made aware of this, the Service Provider shall be in material breach and Transnet shall be entitled to avail itself of the remedies provided in this contract.

40.7 The Service Provider shall submit a monthly Tax Invoice to the Contract Manager of the Operating Division concerned in relation to the Managed Maintenance Fee in respect of each Vehicle forming part of the Owned Fleet operated by that Operating Division.

#### **41 DISPOSAL OF OWNED VEHICLES**

41.1 Transnet, in its sole and absolute discretion, may require the Service Provider to dispose of Vehicles forming part of the Owned Fleet ("**Owned Vehicle**").

41.2 The Service Provider shall be entitled to a fee calculated at 5% (five percent) of the disposal value of the Owned Vehicle ("**Disposal Fee**") upon issuing a valid and undisputed Tax Invoice to Transnet for such Disposal Fee. other than the Disposal Fee, Transnet shall incur no additional cost in relation to the disposal of the Owned Vehicle.

41.3 Owned Vehicles that are to be disposed of shall be stored at Transnet's premises. To the extent that this is not reasonably practicable, the Owned Vehicle shall be stored by the Service Provider at its premises and in this regard, this shall be subject to the approval by Transnet of the storage costs and towing costs (if applicable) which shall be quoted by the Service Provider prior to such storage (and towing, if applicable).

41.4 The proceeds of the disposal of an Owned Vehicle shall be paid by the Service Provider to Transnet within 30 (thirty) days from the date of disposal of such Owned Vehicle upon presentation by Transnet of a Tax Invoice issued to the purchaser of the Owned Vehicle.

#### **42 FML VEHICLES**

42.1 Where a Vehicle is anticipated to be used for a period that is equal to or less than 12 (twelve) months, an Individual Contract shall not be concluded in respect of a FML Vehicle. Instead a STR Vehicle will be deployed. If Transnet requires a Vehicle for longer than 12 (twelve) consecutive months, Transnet shall conclude an Individual Contract with the Service Provider for the provision of a FML Vehicle, subject to the approval of the relevant Transnet Contract Manager.

42.2 The price of all FML Vehicles supplied by the Service Provider to Transnet shall be net of the maximum discounts negotiated between the Service Provider and the OEM in terms of the Government and Vehicle Outsourcing Price List ("**RT57**"). Accordingly, all such discounts shall be passed directly onto Transnet without the retention of any portion thereof by the Service Provider.

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42.3 The Residual Value of any FML Vehicle shall be determined with reference to the actual resale values of such FML Vehicles in the used vehicle market and the index published by the Auto Dealers Guide from time to time.

42.4 All Vehicle usage will be monitored on Transnet's usage management system as to the monthly use for the duration of the Individual Contract ("**Lease Period**") in respect of that Vehicle ("**Actual Monthly Utilisation**"). Monthly utilisation of the Vehicle is included in the Lease Payment and shall be determined by dividing the Contracted Utilisation by the total number of months comprising the Lease Period. This shall constitute the "**Monthly Contracted Utilisation**". The Monthly Contracted Utilisation as specified in **Error! Reference source not found.** may be varied by the relevant Cost Centre Owner based on operational requirements and shall be set out in the Contract Schedule pertaining to that Vehicle.

42.4 The usage management system shall be one of the following:

42.4.1 a manual odometer reading, which shall be valid, credible and on time ;

42.4.2 satellite tracking-based readings using the global positioning system; or

42.4.3 automated readings through the use of fuel cards.

42.5 If a usage management system:

42.5.1 is not implemented by Transnet in respect of all or any of the FML Vehicles;

42.5.2 fails for any reason to function either properly or at all; or

42.6 Where a manual usage management system has been introduced, then the number of kilometres travelled or hours used during any 1 (one) month by any FML Vehicle determined with reference to the monthly odometer reading shall be deemed to be the difference between the odometer reading of that FML Vehicle as at the 16<sup>th</sup> (sixteenth) day of the preceding month compared with the 16<sup>th</sup> (sixteenth) day of the immediately succeeding month. Data in respect of such manual usage management system shall be communicated by Transnet to the Service Provider.

42.7 The Service Provider is required to dispose of the FML vehicles once Transnet has settled the outstanding amount owing.

### 43 LEASE PAYMENTS

43.1 The Lease Payment payable by Transnet to the Service Provider shall be specified in each Individual Contract and shall comprise the following elements:

43.1.1 the fixed capital cost of the FML Vehicle which shall be determined at the Base Vehicle Price (discounted to the prices for that Vehicle specified in RT 57), amortised over the duration of the Lease Period; and

43.1.2 interest;

43.1.3 maintenance costs;

43.1.4 Administration Fee; and

43.1.5 tracking device costs.

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43.2 The elements of the Lease Payment shall be adjusted by the changes to the following indices at the following intervals:

Fee	When adjusted	Adjustment mechanism
Interest rate	As and when the Prime Rate is adjusted	Agreed Prime Rate linked percent
Administration Fee	Anniversary of the Start Date,	CPI Variance
Maintenance Fund	Anniversary of the Start Date,	CPI Variance
Tracking device	Anniversary of the Start Date,	CPI Variance

43.3 The Lease Payment (including the Base Vehicle Price and the cost of Standard Mandatory Fitments and Accessories) ("**Capital Costs**") shall be negotiated as part of the ordering process contemplated in clause 50 in respect of each Vehicle.

43.4 No later than 90 (ninety) days prior to the anniversary of the Start Date, the Service Provider shall provide the Transnet Contract Manager with a proposal in respect of the escalation of the variable elements of the Lease Payment. The Parties shall use their reasonable endeavours to agree the escalation of the variable elements of the Lease Payment as soon as is reasonably practicable in the circumstances. To the extent that Transnet fails to provide feedback on the approval or rejection of a proposed adjustment to the variable elements of the Lease Payment within 90 (ninety) days of receipt of such proposal from the Service Provider, the variable elements of the Lease Payment shall escalate by the CPI Variance, compounded annually.

The Service Provider shall determine the Lease Payment for a FML Vehicle on the same basis and taking into account the same cost principles regardless of when the Individual Contract is concluded in respect of the FML Vehicle during the Contract Period.

#### 44. MAINTENANCE AND DEPRECIATION ELEMENTS OF THE LEASE PAYMENT

44.1 In calculating the Lease Payments, the Service Provider has:

44.1.1 estimated the quantum of the Maintenance Fund taking into account the Monthly Contracted Utilisation which is specified in the Contract Schedule;

44.1.2 determined the residual value of the FML Vehicle with reference to:

44.1.2.1 the Monthly Contracted Utilisation;

44.1.2.2 the duration of the Lease Period;

44.1.2.3 the potential value of the FML Vehicle given the anticipated utilisation of the FML Vehicle at the end of the Lease Period (excluding the Capital Costs of the Vehicle amortised over the Lease Period) ("**Residual Value**"); and

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- 44.1.3. determined the depreciation costs associated with the Vehicle based on the Capital Costs amortised over the duration of the Lease Period taking into account the Threshold.
- 44.2. In determining the monthly maintenance and depreciation costs of the Vehicle determined on a CPK basis ("**CPK Rate**"):
  - 44.2.1 the maintenance component is determined by dividing the Maintenance Fund by the Threshold in order to determine the maintenance CPK ("**Maintenance CPK**");
  - 44.2.2. the depreciation component is determined by dividing the Base Vehicle Price (including any finance charges) less the Residual Value of the Vehicle by the Threshold in order to arrive at a fixed depreciation CPK ("**Depreciation CPK**"); and
  - 44.2.3. the Maintenance CPK is then added to the Depreciation CPK.
- 44.3. The CPK Rate is charged on a monthly basis by the Service Provider based on the calculation of the Monthly Contracted Utilisation multiplied by the CPK Rate.
- 44.4. The Maintenance CPK and the Depreciation CPK shall be stipulated in each Contract Schedule. Only the Maintenance CPK shall be adjusted in accordance with the provisions of clause 43.2 which shall apply *mutatis mutandis*.
- 44.5. If the Actual Monthly Utilisation exceeds the Monthly Contracted Utilisation, the Service Provider shall, subject to the Tolerance, be entitled to recover accelerated maintenance and depreciation costs determined by multiplying the difference between the Actual Monthly Utilisation and the Contracted Monthly Utilisation by the CPK Rate ("**Excess CPK**") subject to the provision of clause 44.4.
- 44.6. Similarly, where Transnet has under-utilised a Vehicle, the Service Provider shall credit Transnet an amount equal to the monthly maintenance CPK for every kilometre less than the difference Monthly Contracted Utilisation and multiplying the product of that calculation by the Maintenance CPK ("**Deficient CPK**"),
- 44.7. Subject to the specific agreement being reached between the Service Provider and each corridor, the Service Provider shall include the Excess CPK as a debit or the Deficient CPK as a credit on the Tax Invoice rendered by it to Transnet in respect of that FML Vehicle on a quarterly basis. Transnet shall make payment of such Excess CPK as part of the payment of the Tax Invoice raised by the Service Provider for that FML Vehicle.
- 44.8. Transnet and the Service Provider shall embark on a quarterly review of the actual utilisation of the FML Vehicles as compared to their Monthly Contracted Utilisation, provided that in conducting such quarterly review:
  - 44.8.1 the Parties shall take into account the Tolerance; and
  - 44.8.2 should the Actual Monthly Utilisation of the STR Vehicle exceed the Tolerance on average over the quarter under review, the Parties shall engage as to the restructuring of the Individual Contract in terms of the provisions of clause 48

## 45 PROVISION OF STR VEHICLES

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45.1 It is recorded prior to the Commencement Date, the Service Provider has concluded an agreement with Transnet for the supply of vehicles on a STR basis ("**Interim Contract**").

45.2 In the event that Transnet:

45.2.1 has a need for Vehicles on a temporary basis in order to supplement the Fleet during the Initial Phase pending delivery of FML Vehicles ordered from the Service Provider; or

45.1.1 requires Vehicles to be provided by the Service Provider to Transnet on an *ad hoc* basis;

the Service Provider shall provide Transnet with STR Vehicles on a temporary basis that are reasonably fit for purpose, provided that such STR Vehicles shall be leased for no more than 12 (twelve) months ("**Maximum Rental Period**").

45.2 The lead times for the delivery of STR Vehicles that have been ordered by Transnet from the Service Provider shall be determined on a per quotation basis given the availability of specialised vehicles.

45.3 In the event that Transnet leases a STR Vehicle from the Service Provider for more than the Maximum Rental Period, the Service Provider shall convert the STR Vehicle into a FML Vehicle.

45.4 In no event shall the Service Provider supply a STR Vehicle which is older than 24 (twenty- four) months or where the odometer reading, at the date of first delivery of the Vehicle to Transnet exceeds 160,000 (one hundred and sixty thousand) kilometres or 5000 hours in terms of equipment.

45.5 In the event that the Actual Monthly Utilisation of a FML Vehicle is less than the Monthly Contracted Utilisation and the planned usage of the FML Vehicle is less than the Maximum Rental Period:

45.6.1 the Service Provider shall notify the relevant Transnet Contract Manager in writing;

45.5.1 the Transnet Contract Manager shall advise the Service Provider in writing that it wishes to terminate the Individual Contract in respect of that FML Vehicle;

45.5.2 within 7 (seven) days of the date of the notice referred to in clause 45.5.1, the Service Provider Contract Manager shall furnish the relevant Transnet Contract Manager with a schedule reflecting the commercial impact of terminating the Individual Contract in respect of the FML Vehicle and concluding a new Individual Contract in respect of a STR Vehicle,

45.5.3 if the Transnet Contract Manager accepts the updated schedule, the Individual Contract in respect of the FML Vehicle shall be terminated and shall be replaced with an Individual Contract concluded in respect of a STR Vehicle;

45.5.4 if the Transnet Contract Manager does not accept the updated schedule on reasonable grounds, he shall notify the Service Provider Contract Manager in writing of the grounds for his objection;

45.5.5 if the objection can be resolved by the Service Provider within 7 (seven) days of the date of the written objection,

45.5.6 to the extent that the Transnet Contract Manager persists in his objections to the proposed amendments to the Individual Contract, the matter shall be referred to an independent leasing expert nominated by the chair person for the time being of AFSA (or its successor)

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or his nominee who shall make a determination acting as an expert and not as an arbitrator.

- 45.6 Only a Fleet Manager or his nominee may place an order for STR Vehicles in accordance with the provisions of clause 50, which shall only be placed via the Call Centre or by email to the email address nominated by the Service Provider for the placement of orders.
- 45.7 In the event the Service Provider is unable to meet the request from Transnet for the provision of a STR Vehicle within the Required Service Levels, Transnet may rent a similar vehicle from a third party ("**Rental Vehicle**") for the period required and Transnet shall be entitled to recover and deduct any costs incurred by it in relation to the rental of the Rental Vehicle from the third party supplier for the period until the Service Provider is able to supply Transnet with the STR Vehicle ordered by Transnet.
- 45.8 The Service Provider shall provide Transnet with a monthly report specifying:
- 45.8.1 details of the STR Vehicles that are leased by Transnet from the Service Provider;
  - 45.8.2 the number of months that the STR Vehicles have been leased by Transnet from the Service Provider as well the balance of the Maximum Rental Period remaining;
  - 45.8.3 details of those STR Vehicles in respect of which either:
    - 45.8.3.1 there are less than 4 (four) months remaining until the date of expiry of the Maximum Rental Period;
    - or
    - 45.8.3.2 the STR Vehicles have exceeded the Threshold.
- 45.9 In the event that Transnet wishes to utilise a STR Vehicle for longer than 12 (twelve) months, that Vehicle shall be converted into a FML Vehicle.

## **46 STR RATES**

- 46.1 In respect of the Vehicle types, the STR Rate for such Vehicles shall be limited to 1.55 (one point fifty-five) times the FML Rate for the same Vehicle during the Initial Phase ("**FML Percentage**"); provided that to the extent that Transnet requests Accessories and/or Modifications to the STR Vehicle which unreasonably limits the ability of the Service Provider to either lease that STR Vehicle to a third party or to dispose of that STR Vehicle after the expiry of the Lease Period, the FML Percentage shall be agreed to by the Parties in writing prior to the conclusion of the Individual Contract related to such STR Vehicle.
- 46.2 In respect of Vehicle types the FML Percentage shall not exceed the highest FML Percentage specified in provided that the FML Percentage shall be agreed to by the Parties in writing.
- 46.3 For the avoidance of doubt, the STR Rates shall include the costs of all Standard Mandatory Fitments as well as all costs associated with the delivery and collection of the STR Vehicles at the Start Date or End Date.
- 46.4 STR Rates to be charged by the Service Provider for STR Vehicles shall be all-inclusive monthly charges but shall exclude costs related to fuel, toll fees, top-up fluids, fines, charges occasioned by Operator Default and charges associated with the provision of drivers. Toll fees and fines shall be

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billed to Transnet as separate line items on the Tax Invoice related to the specific STR Vehicle at cost without the addition of any margin and shall be substantiated by proof of the incurral of such costs.

- 46.5 The STR Rate shall include the following components and shall be adjusted by the following indices at the following intervals:

Fee	When adjusted	How adjusted
Monthly rental determined at 1.3 (one point three) times to 1.4 (one point four ) times the Lease Payment	N/A	N/A
E-tolls	When actual e-toll costs increase	Actual increases in e-tolls as published from time to time

- 46.6 STR Vehicles cannot be leased for longer than 12 (twelve) months and accordingly, there shall be no escalation of any element of the STR Rate during the Lease Period, provided that if the Lease Period is extended with the prior written approval of the Transnet Representative for whatever reason, the monthly maintenance fees and the monthly Administration Fee

#### 47 MAINTENANCE AND DEPRECIATION CHARGES: STR VEHICLES

- 47.1 In calculating the STR Rates, the Service Provider has taken into account the factors specified in clause 44.2 which shall apply *mutatis mutandis*.
- 47.2 The CPK Rate for STR Vehicle is determined solely with reference to the Maintenance CPK.
- 47.3 The Maintenance CPK shall be stipulated in each Individual Contract. Only the Maintenance CPK shall be adjusted in accordance with the provisions of clause 43.2 which shall apply *mutatis mutandis*.
- 47.4 If the Actual Monthly Utilisation of the Vehicle exceeds the Monthly Contracted Utilisation, subject to the Tolerance, the Service Provider shall be entitled to levy an Excess CPK charge.
- 47.5 Similarly, where Actual Monthly Utilisation is less than the Monthly Contracted Utilisation, the Service Provider shall credit Transnet an amount equal to the Deficient CPK, subject to the provisions of clause 47.4.
- 47.6 Subject to the specific agreement being reached between the Service Provider and each Operating Division, the Service Provider shall include the Deficient CPK as a credit or the Excess CPK as a debit on the Tax Invoice rendered by it to Transnet in respect of that STR Vehicle on a quarterly basis and Transnet shall make payment of the Excess CPK as a line item on the Tax Invoice related to that STR Vehicle.
- 47.7 Transnet and the Service Provider shall embark on a quarterly review of the average Actual Monthly Utilisation of STR Vehicles as compared to their Monthly Contracted Utilisation, provided that in conducting such quarterly review:



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47.7.1 the Parties shall take into account the Tolerance; and

47.7.2 should the Actual Monthly Utilisation of the STR Vehicle exceed the Tolerance on average over the quarter under review, the Parties shall engage as to the restructuring of the Individual Contract in terms of the provisions of clause 48.

#### 48 RESTRUCTURING OF LEASE PAYMENTS AND STR RATES

48.1 In the event that a Vehicle exceeds the Monthly Contracted Utilisation for 2 (two) consecutive quarters notwithstanding the Tolerance ("**Restructure Trigger Event**"), the Lease Payment or the STR Rate, as the case may be, shall be adjusted as follows:

48.1.1 the Maintenance Fund shall be restructured in accordance with the following formula:

$$a = \frac{b}{(c - d)}$$

where:

a	is the restructured Maintenance CPK
b	is the amount of the Maintenance Fund
c	is the Monthly Contracted Utilisation
d	is the new Monthly Contracted Utilisation

48.1.1 the Depreciation CPK shall be restructured in accordance with the following formula:

$$a = \left(\frac{b}{c}\right) * (d - e)$$

where:

a	is the Depreciation CPK
b	is the Capital Costs less Residual Value
c	is the Threshold
d	is the Monthly Contracted Utilisation
e	is the new Monthly Contracted Utilisation

48.2 The Lease Payment or STR Rate, as the case may be, per the Individual Contract shall be adjusted by the formulae in clause 48.1 provided that to the extent that the difference between the Lease Payments or the STR Rates paid by Transnet to the Service Provider prior to such restructure ("**Original Rates**") and the restructured Lease Payments or STR Rates after such restructure aggregated across the entire Fleet ("**Restructure Difference**") exceed 10% (ten percent) of the Original Rate (viewed across the entire Agreement and aggregated in respect of each Operating Division), full details of such restructuring and the impact of such restructuring shall be reported on to the Operational Steercom and the Strategic Steercom by the Service Provider.

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- 48.3 In order to ensure the reasonableness of the restructured Lease Payment or the restructured STR Rate, as the case may be, Transnet shall ensure that the Lease Payment or STR Rate prior to such restructuring together with the CPK Rate or Maintenance CPK, as the case may be, payable in respect of the Threshold shall be equivalent to the restructured Lease Payment or STR Rate; the intention of the Parties being that the restructuring of the Lease Payment or STR Rate is intended to accelerate the recovery of maintenance and depreciation costs and to provide certainty to both Parties in terms of the Lease Payments or STR Rates, as the case may be, and to try as far as possible to keep the Lease Payment or the STR Rate fixed rather than consistently operating on a variable basis. In no event is the intention of the restructuring to enable the Service Provider to profit from the additional utilisation, but rather to compensate the Service Provider from a maintenance and depreciation perspective.
- 48.4 If the Parties are unable to agree on the restructured Lease Payment or the restructured STR Rate, as the case may be, in accordance with the provisions of clause 48.3, the Individual Contract will be restructured in accordance with a determination of an independent leasing expert appointed by the chair person of AFSA (or its successor organisation), which independent leasing expert shall act as an expert and not as an arbitrator.
- 48.5 During the review contemplated in clause 48.4 if it is determined that Transnet has under-utilised the Monthly Contracted Utilisation for a period of 2 (two) consecutive quarters, the restructured Lease Payment or the restructured STR Rate, as the case may be, shall be restructured only in relation to the Maintenance Fund which shall be calculated in accordance with the formula set out in clause 48.1.1.

#### 49 OUT OF CONTRACT CHARGE

- 49.1 If the Threshold of a Vehicle has been exceeded prior to the expiry of the Lease Period, the Lease Payment or the STR Rate, as the case may be, shall be adjusted by the formulae set out in clause 49.3 ("**Out of Contract Charge**") only in respect of those kilometres/hours which exceed the Threshold.
- 49.2 Alternatively, in the event that Transnet wishes to increase the Threshold of that Vehicle in excess of the Threshold stipulated in the Contract Schedule pertaining to such Vehicle, provided that the safety and operational requirements of Transnet are not compromised, the Lease Payments or STR Rates, as the case may be, will be amended in accordance with the provisions of clause 49.3
- 49.3 The Out of Contract Charge shall be determined on a CPK basis:

- 49.3.1 the increased depreciation costs shall be determined in accordance with the following formula:

$$a = \frac{(b - c)}{d}$$

where:

a	is the out of contract Depreciation CPK
b	is the original Residual Value of the Vehicle as specified in the Contract Schedule relating to the Vehicle
c	is the revised Residual Value of the Vehicle
d	is the difference between the new Threshold and the old

	Threshold as specified in the Contract Schedule
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49.3.2 the increased depreciation costs of the Service Provider shall be determined by recalculating the Residual Value of the Vehicle provided that the Residual Value shall not be determined over more than an additional 12 (twelve) month period;

49.3.3 the increased maintenance costs shall be determined in accordance with the following formula:

$$a = \frac{b}{c}$$

where:

a	is the out of contract Maintenance CPK
b	is the new Maintenance Fund for the new Threshold
c	is the difference between the new Threshold and the old Threshold as specified in the Contract Schedule

49.4 the new Maintenance Fund shall be determined with reference to the maintenance schedule specified by the OEM and the likelihood of Major Component Failure and shall take into account the CPK Rate determined in accordance with the formula in clauses 0 and 47, as the case may be.

## 50 ORDERS

50.1 The Fleet Manager shall request a quote from the Service Provider in a request for quote and shall specify:

50.1.1 the proposed Lease Period;

50.1.2 the functional requirements for the Vehicle together with details of the Accessories required;

50.1.3 the operating conditions under which the Vehicle is likely to be used; and

50.1.4 where the Vehicle will be located and the Cost Centre Owner to which the Vehicle will initially be allocated;

provided that the Fleet Manager shall not be entitled to increase the Threshold to exceed the Maximum Vehicle Kilometres in respect of the type of Vehicle ordered by the Fleet Manager, unless this has been approved by the Fleet Management Meeting. To the extent that the Threshold is to exceed the Maximum Vehicle Kilometres by 10% (ten percent) or more, this is to be escalated to the Operational Steercom.

50.2 For the avoidance of doubt, a Vehicle shall be allocated to an Allocated Region based on the geographic location in which the request for quote for that Vehicle originated.

50.3 The Vehicle types shall be as specified. However, the Parties recognise that during the Contract Period, the makes and models shall change given market factors and technology changes. To the extent that the Service Provider supplies Transnet with a Vehicle other than the makes and models specified, such Vehicle shall, as a minimum, not prejudice Transnet in any way from a safety or operational point of view. In addition, the Vehicle types in may be extended from time to time.

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50.4 The Service Provider shall provide the Fleet Manager with 3 (three) quotes for suitable Vehicles and their prices within 1 (one) Business Day of the request for the quote. The Vehicles shall be fit for purpose and shall include the costs of all Standard Mandatory Fitments.

50.5 During the Initial Phase, Transnet shall place orders on the Service Provider either in terms of an individual order per Vehicle or alternatively on the basis of a bulk order in terms whereof multiple Vehicles are included in a single order. For the avoidance of doubt, despite the fact that a Vehicle is ordered as part of a bulk order, an Individual Contract shall be concluded in respect of each Vehicle forming part of such bulk order.

50.6 In the case of Vehicles requiring non-standard bodies, the Service Provider shall prepare a quotation within five (5) Business Days of the date of the placing of the order and shall include 3 (three) alternative quotations for such non-standard bodies from either the Service Provider or a third party specialist equipment supplier, as the case may be; the provisions of clause 50.4 applying *mutatis mutandis*.

50.7 Upon receipt of the quotations, Transnet shall be entitled, in its sole discretion, either to:

50.7.1 accept a quotation, in which event:

50.7.1.1 Transnet shall furnish the Service Provider with a purchase order. In cases where the Transnet does not issue a purchase order, the order shall be deemed to have been placed by the Transnet on the Service Provider once the Contract Schedule has been signed by the relevant Fleet Manager;

50.7.1.2 the Service Provider shall furnish the Fleet Manager with a further reference number signifying receipt of the acceptance of a quotation;

50.7.1.3 within 3 (three) Business Days of the date of receipt of a reference number as contemplated in clause 50.7.1.2, the Service Provider shall furnish Transnet with a Contract Schedule for signature by the relevant Transnet Contract Manager;

50.7.1.4 within 5 (five) Business Days of the date of receipt of the Contract Schedule from the Service Provider, the Fleet Manager shall sign the Contract Schedule; or

50.7.2 reject the quotation on the basis of price, in which event:

50.7.2.1 Transnet shall specify the reason in writing for the rejection of the quotations and shall substantiate the reasons for such rejection;

50.7.2.2 within 1 (one) Business Day of the date of rejection of the quotations by Transnet on the basis of price, the Service Provider Contract Manager shall contact the relevant Fleet Manager in order to conduct further negotiations, if at all possible, in respect of the quotations to the extent that the Service Provider is able to reduce the price of the required Vehicle and/or Accessories, the Service Provider shall furnish Transnet with such amended quotations within 2 (two) Business Days of the date of agreement being reached;

50.7.2.3 in circumstances contemplated in clause 50.7.2, Transnet shall be entitled to review the pricing of the Service Provider on average over 10 (ten) or more quotes during the quarter under review and provide the Service Provider with feedback on whether, in respect of the quarter under review, the pricing of the Service Provider exceeds the pricing in the market; and

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50.7.2.4 to the extent that the Service Provider is unable to reduce the price of the Vehicle and/or the required Accessories, Transnet shall be entitled to obtain a Vehicle and the required Accessories from the third party on a Three Quote Basis.

50.8 Within 7 (seven) days of the date that Transnet places an order on the Service Provider for a Vehicle, Transnet shall be entitled to:

50.8.1 cancel an order;

50.8.2 reschedule the Delivery Date of a Vehicle; or

50.8.3 subject to the provisions of clause 50.9, change the place of delivery to another Designated Area within an Allocated Region;

without incurring any additional cost.

50.9 If the change in the Allocated Region has an impact on the maintenance costs of a Vehicle such that the maintenance costs must increase due to the impact of environmental and/or operational conditions, the Service Provider shall notify the relevant Fleet Manager in writing of such increase and shall specify the reasons for such increase. If accepted by the Fleet Manager, the order shall remain in force. However, should the reasons provided by the Service Provider to the Fleet Manager be rejected by the Fleet Manager as valid reasons for the increase, the order shall lapse and the Service Provider shall re-quote Transnet and accordingly the provisions of clauses 50.1 until and including clause 50.8 shall apply to such order.

50.10 The Service Provider shall acknowledge receipt of the order or any amendments to an order as contemplated in clause 50.6 in writing within 3 (three) Business Hours of the order being placed by Transnet and shall furnish Transnet with a reference number for such order.

50.11 If Transnet has amended an order as contemplated in clause 50.6, the provisions of clause 50.4 shall apply mutatis mutandis to such amended order.

50.12 All pricing shall be valid for a period of 90 (ninety) days calculated from the date the quotation was accepted by Transnet in terms of clause 50.7.1.1 ("**Acceptance Date**").

50.13 If during the period between the Acceptance Date and the Delivery Date, the price of the Vehicle fluctuates for whatever reason (including on account of exchange rate fluctuations) and such fluctuation constitutes:

50.13.1 a decrease in the price of the Vehicle, the Service Provider shall be obliged to supply the Vehicle to Transnet at the reduced price and the Contract Schedule shall be amended accordingly.

50.13.2 an increase in the price of the Vehicle, the Service Provider shall furnish Transnet with written evidence of such increase and shall pass on all increases which occurred beyond the reasonable control of the Service Provider to Transnet, provided that to the extent that such circumstances were reasonably foreseeable by the Service Provider and the Service Provider should have reasonably been able to mitigate the impact of such increase, Transnet shall not be liable for such additional costs. If such circumstances were not reasonably foreseeable by the Service Provider, the Service Provider shall notify Transnet of such circumstances in writing for consideration by Transnet. In the event of a dispute

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arising between the Parties as to the reasonable action that should have been taken by the Service Provider to reduce the impact of such price increase or as to whether the circumstances contributing to such price increase were within the reasonable control of the Service Provider, the matter shall be referred to the chairperson of AFSA who shall appoint an independent motor industry expert who shall make a determination on the matter acting as an expert and not as an arbitrator.

50.14 The provisions of clause 50.6 shall apply *mutatis mutandis* to the inability of the Service Provider to supply Transnet with a Vehicle that is fit for purpose within a reasonable time of Transnet requesting a quotation from the Service Provider.

50.15 The Contract Schedule shall specify the delivery lead time either in terms of a specific Delivery Date or, alternatively, in terms of a number of months until such delivery shall take place. Should the delivery lead time be a number of months specified in the Contract Schedule, the delivery shall be late if the Vehicle is not delivered by the last day of the month in which the delivery lead time ends ("**Deemed Delivery Date**"). For illustrative purposes only, if an order for a Vehicle is placed in September and delivery is specified to take place in 3 (three) months, then if the Vehicle is not delivered by 31 December, the delivery of the Vehicle will be late. If the delivery of a Vehicle is late, Transnet shall be entitled to levy Penalties.

## **51 ACCESSORIES, STANDARD MANDATORY FITMENTS AND MODIFICATIONS**

51.1 All Vehicles shall be fitted with the standard mandatory fitments as described in and as amended from time to time ("**Standard Mandatory Fitments**").

51.2 Subject to agreement between the relevant Operating Division and the Service Provider, a STR Vehicle may not be fitted with driver identification tags or speed limiters where it is envisaged by the Parties that that Vehicle is to be leased by Transnet for a period of less than 30 (thirty) days.

51.3 Transnet undertakes to minimise Modifications and/or the fitment of Accessories to STR Vehicles in recognition of the fact that such fitment of Modifications and Accessories restricts the ability of the Service Provider to rent the Vehicles to other clients.

51.4 During the Initial Phase, each Operating Division shall develop a list of standard Accessories ("**Accessory List**") which they generally require to be fitted to Vehicles. Each Operating Division shall negotiate with the Service Provider for the optimal pricing of the Accessories listed in the Accessory List. The Accessory List may change from time to time by agreement between the Parties at the Operational Steercom.

51.5 During the Operational Phase, the Fleet Managers and the Contract Managers shall share the pricing of the Accessories which they have procured on their Accessory List with the Fleet Managers and Contract Managers of the other Operating Divisions at the Fleet Management Meetings and Operational Steercom meetings; the aim being the consolidation of the Accessory Lists (to the extent reasonably practical) across all Operating Divisions and standardisation of pricing for such Accessories across all Operating Divisions.

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- 51.6 The price of the Standard Mandatory Fitments shall be standard in respect of all Operating Divisions. The price of Standard Mandatory Fitments fitted to a Vehicle shall be itemised in the Contract Schedule and shall form part of the Capital Cost of the Vehicle which depreciation charges shall be included in the Rate.
- 51.7 If at any time during the Contract Period, the Service Provider is required to effect any changes to the Standard Mandatory Fitments or Modifications to any Vehicle, whether to add, withdraw, suspend or enhance, so as to comply with any Applicable Laws, it shall inform the Transnet Representative of such requirements and provide the Transnet Representative with a written commercial motivation itemising the impact of such change in Applicable Laws on the Fleet which shall include an implementation plan across the entire Fleet ("**Implementation Plan**").
- 51.8 The Transnet Representative shall refer such matter to the Regions/Corridors for their approval within 30 (thirty) Business Days of the date of receipt of the Implementation Plan from the Service Provider.
- 51.9 Within 15 (fifteen) Business Days of the expiry of the period referred to in clause 51.8, the Transnet Representative shall in writing advise the Service Provider of the appropriate course of action to be adopted in order to ensure compliance with the Applicable Laws. Insofar as this course of action contemplates the fitment, refitment or removal of Standard Mandatory Fitments, Accessories or Modifications, the Service Provider shall obtain 3 (three) quotes for the costs associated with such fitment, refitment or removal of Standard Mandatory Fitments, Accessories or Modifications within 10 (ten) Business Days of the date of the notice from the Transnet Representative.
- 51.10 The Transnet Representative shall then select 1 (one) of the quotations for implementation and the Service Provider shall implement such fitment, refitment or removal of the Standard Mandatory Fitments, Accessories or Modifications, as the case may be, in accordance with the Implementation Plan (subject to any amendments that the Transnet Representative may reasonably require).
- 51.11 Failure on the part of the Service Provider to implement the decision of the Transnet Representative in accordance with the Implementation Plan shall constitute a material breach by the Service Provider.
- 51.12 The Service Provider shall charge Transnet for the cost of the fitment, refitment or removal of the Standard Mandatory Fitments, Modifications or Accessories, as the case may be, at the cost of the unit plus the associated labour cost and finance charges (if any); provided that in no event shall the Service Provider be entitled to levy any margin on such costs.
- 51.13 If Transnet requires the fitment of any Accessories to any Vehicle, it shall either request such fitment as part of the order for a new Vehicle (as contemplated in clause 50) alternatively such fitment may take place in respect of an existing Vehicle on an *ad hoc* basis. In the latter event, the process specified in clause 50 shall apply to the fitment of such Accessories.
- 51.14 If an Accessory is fitted or a Modification is made to the Vehicle other than by the Service Provider or any third party nominated by the Service Provider, Transnet shall be liable for the costs of removing such Accessory or Modification and for restoring the Vehicle to the same or a similar condition in which it was in prior to the fitment of the Accessory or Modification, Fair Wear and Tear excepted. If Transnet has failed to do so prior to the End Date and returns the Vehicle to the Service Provider with such Accessory or Modification fitted, the Service Provider, at its election, shall either:

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51.14.1 remove the Accessory or Modification and restore the condition of the Vehicle to the condition it was in prior to the fitment of such Accessory or Modification (Fair Wear and Tear excepted) and shall be entitled to recoup the reasonable associated costs from Transnet; or

51.14.2 shall be able to retain the Accessory or Modification which shall be deemed to have acceded to the Vehicle.

## **52 SPEED LIMITERS**

52.1 Speed limiters shall form part of the Standard Mandatory Fitments and shall be specified in the quotations submitted by the Service Provider to Transnet for all Vehicles.

52.2 An Regions/Corridors must specifically and expressly in writing elect not to fit a speed limiter, failing which a speed limiter shall be fitted as a Standard Mandatory Fitment.

52.3 Depending on the requirements of the relevant Operating Division, speed limiters may either physically restrict the Vehicle from exceeding the speed limit or shall be in the form of a warning signal to the driver indicating that the speed limit is being exceeded; it being agreed that the default installation shall be a warning signal unless otherwise specifically required.

52.4 To the extent that an Operating Division requires the installation of a speed limiter, that Operating Division shall indemnify the Service Provider from claims arising from any losses or damages sustained by any third party (including the employees of Transnet) as a direct result of the installation of the speed limiter whether arising in contract, delict on a strict liability basis or otherwise and including all legal costs and other expenses (determined on an attorney and own client scale) reasonably incurred by the Service Provider in defending any action instituted by any third party (including a Transnet employee) against it, provided that in no event shall Transnet indemnify the Service Provider in the case that the indemnified event occurs as a result of fault on the part of the Service Provider or unit malfunction.

## **53 OWNERSHIP AND RISK**

53.1 Transnet is the owner of the Owned Fleet and until such time as Vehicles forming part of the Owned Fleet are disposed of by Transnet in accordance with the provisions of clause 0, shall remain the property of Transnet.

53.2 Pursuant to the conclusion of Individual Contracts in respect of FML Vehicles in terms of the Road Traffic Act No. 93 of 1996:

53.2.1 the Service Provider shall be the title holder of the FML Vehicle; and

53.2.2 Transnet shall be the owner of the FML Vehicle.

53.3 Transnet shall be obliged to notify all third parties who may exercise any lien over the Vehicles that the Vehicles remain the property of the Service Provider notwithstanding the fact that they are within the custody and control of Transnet.

53.4 Transnet shall bear all risk in and to the FML Vehicles and STR Vehicles from the time at which they are delivered to Transnet (as contemplated in clause 54) until such time as they are returned to the



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Service Provider by Transnet at the end of the Lease Period (to the extent that Transnet is able to do this).

53.5 It is anticipated that risk in and to the Vehicles shall transfer from Transnet to the Service Provider on a fluid basis every time that the Vehicle is no longer in the physical custody and control of Transnet or any of its employees including:

53.5.1 Scheduled Maintenance and Unscheduled Maintenance;

53.5.2 during such time as the Service Provider is rendering Breakdown Services to Transnet; and

53.5.3 to the extent that Transnet has been deprived of custody and control of the Vehicles due to accidental damage of the Vehicle subject to the provisions of clause 0.

53.6 Each time that risk in and to the Vehicle is transferred from Transnet to the Service Provider, a Vehicle inspection form ("**Vehicle Inspection Form**") shall be completed reflecting any damage to the Vehicle that is immediately apparent by visual inspection. It shall be compulsory for both Transnet and the Service Provider to complete a Vehicle inspection form. Should Transnet fail to do so, the Service Provider shall not be obliged to accept risk in and to the Vehicle and accordingly shall be released from any obligation to conduct, for example, Scheduled Maintenance or Unscheduled Maintenance in that instance in respect of that Vehicle.

53.7 A copy of all the Vehicle Inspection Forms shall be retained physically and electronically by the Service Provider and Transnet shall be entitled to access the Vehicle Inspection Forms electronically via the Service Provider's e-portal together with all other relevant documentation relating to that Vehicle.

53.8 Transnet shall ensure that the Vehicle is comprehensively insured with a reputable insurer for the replacement value of that Vehicle. To this end, on an annual basis for the duration of the Contract Period within 30 (thirty) days of the Anniversary Date, the Service Provider shall furnish Transnet with a schedule setting out the details of the Vehicles, their Individual Contract number and their revised replacement value. Transnet shall submit this schedule to its insurers. The Service Provider warrants that this information will be accurate in all respects and indemnifies and holds Transnet harmless from any losses or damages that Transnet may sustain as a result of incorrect or inaccurate information including, in the case that Transnet's insurers elect to apply average to any claim submitted by Transnet, for the damage to or loss of a Vehicle.

53.9 Transnet shall, on an annual basis no more than 30 (thirty) days following the Signature Date or the Anniversary Date, furnish the Service Provider with confirmation of insurance cover in respect of the FML Vehicles and the STR Vehicles forming part of the Fleet.

## **54 DELIVERY**

54.1 The Service Provider shall deliver a Vehicle to Transnet on the Delivery Date or the Deemed Delivery Date at the Designated Area and shall furnish Transnet with a Vehicle Acceptance Form.

54.2 Where the delivery of the Vehicle is effected by the OEM on behalf of the Service Provider, the Service Provider shall ensure that one of its duly authorised representatives is present at the time of delivery of the Vehicle to Transnet in order to ensure that the processes set out in this clause 54 are adhered to.

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- 54.3 All costs associated with the delivery of the Vehicle (including licensing and registration) are deemed to be included in the Base Vehicle Price.
- 54.4 It is envisaged that during the Initial Phase, Transnet's demand for Vehicles will be ramped-up to meet its ultimate Fleet requirements. Accordingly:
- 54.4.1 the Service Provider shall provide Transnet with STR Vehicles for the duration of the period between the date of Transnet placing an order on the Service Provider as contemplated in clause 50.1; and the Delivery Date or Deemed Delivery Date of a FML Vehicle, provided that Transnet shall in writing, at the time of the furnishing of a purchase order by Transnet to the Service Provider, request the Service Provider to furnish it with an STR Vehicle during this period;
- 54.4.2 to the extent that the Service Provider fails to achieve the Delivery Date or Deemed Delivery Date, as the case may be, the Service Provider shall provide the STR Vehicle not at the STR Rate but at the same cost as the Lease Payment from the Delivery Date or Deemed Delivery Date, as the case may be, of the ordered FML Vehicle until the date of actual delivery of the FML Vehicle by the Service Provider to Transnet.
- 54.5 Subject to clause 54.6, during the Operational Phase, if the Service Provider is prevented from delivering a Vehicle to Transnet on the Delivery Date or the Deemed Delivery Date, as the case may be, at the Designated Area irrespective of whether this is as a result of a *Force Majeure* Event or not, the Service Provider shall provide Transnet with a suitable STR Vehicle until such time as the Service Provider is able to deliver the ordered FML Vehicle to Transnet at the cost of the Service Provider (if due to the fault of the Service Provider) or at the rate of a FML Vehicle (if due to a *Force Majeure* Event). This shall in no way prejudice the right of Transnet to claim Penalties from the Service Provider for the delayed delivery, provided that the delayed delivery has not been occasioned by a *Force Majeure* Event.
- 54.6 Should the Service Provider be unable to deliver a Vehicle to Transnet as a result of the occurrence of a *Force Majeure* Event which affects Transnet's operations and prevents it from taking delivery of the Vehicle, Transnet shall in writing notify the Service Provider of an alternative Designated Area at which the Vehicle is to be delivered to Transnet. In the absence of such notification, the Service Provider's failure to deliver the Vehicle on the Delivery Date or the Deemed Delivery date, as the case may be, shall be excused.
- 54.7 All Vehicles shall be delivered in a clean and presentable condition both in respect of the interior and exterior of the Vehicle.
- 54.8 Prior to taking delivery of a Vehicle, Transnet shall conduct an inspection of the Vehicle at the Designated Area. The inspection shall in no way be deemed to be exhaustive and shall only be in respect of apparent defects or damage to the body and interior of the Vehicle.
- 54.9 To the extent that the Vehicle delivered by the Service Provider to Transnet does not meet the specifications of Transnet as specified in the Contract Schedule, the Service Provider shall bear all costs associated with the return of the Vehicle to the Service Provider's premises as well as additional costs of the provision of a STR Vehicle pending the delivery of a suitable replacement FML Vehicle that does meet Transnet's specifications. This is without prejudice to Transnet's ability to claim Penalties.

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54.10 Transnet shall complete a Vehicle Inspection Form. By signing the Vehicle Inspection Form, Transnet acknowledges receipt of the Vehicle:

54.10.1 in good condition;

54.10.2 free of any apparent defects; and

54.10.3 in compliance with its order.

54.11 Notwithstanding the provisions of clauses 54.5 and 54.9, in the event that Transnet notifies the Service Provider, within 72 (seventy-two) hours of the date of actual delivery of the Vehicle ("**Actual Delivery Date**"), that the Vehicle is Defective where the defect is not as a result of Operator Default or Fair Wear and Tear, and therefore is not in compliance with the order, Transnet shall be entitled to impose and levy Penalties, provided that this clause 54.11 shall not apply in the case of a latent defect.

54.12 Save in the case of Operator Default, in addition to the liability for Penalties, the Service Provider shall deliver a replacement Vehicle within 72 (seventy-two) hours of the collection of the defective Vehicle by the Service Provider from Transnet, except in the case of Vehicles requiring custom-built Vehicles (in which event, the replacement Vehicle shall be delivered within the timeframe agreed between the Service Provider and the relevant Fleet Manager).

54.13 In the 6 (six) month period following the Actual Delivery Date, should the Vehicle on average fail to achieve the Uptime Target due to Unscheduled Maintenance, Transnet shall be entitled to return the Vehicle to the Service Provider who shall then supply Transnet with a new replacement Vehicle at no additional cost to Transnet. Notwithstanding the substitution of the original Vehicle with a new Vehicle, the Individual Contract shall remain unchanged save that the details of the Vehicle including its VIN number and registration number, as reflected on the original Contract Schedule, shall change.

## 55 VEHICLE COMPLIANCE AND LICENSING

55.1 The Service Provider shall, at its cost:

55.1.1 obtain a certificate of fitness in respect of a Vehicle or roadworthiness in the case of any other Vehicle, roadworthiness;

55.1.2 be responsible for the first registration of the Vehicle;

55.1.3 ensure that the Vehicle remains licensed with the relevant authorities for the duration of the Lease Period;

55.1.4 ensure that the Vehicle and all Standard Mandatory Fitments, Modifications and Accessories comply with all Applicable Laws;

55.1.5 keep each Vehicle registered and licensed in accordance with all Applicable Laws; and

55.1.6 administer this process on an on-going basis.

55.2 To enable the Service Provider to comply with its obligations in terms of clause 55.1, Transnet shall use its reasonable commercial endeavours to:

55.2.1 notify the Service Provider if the licence disc becomes dislodged; and

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- 55.2.2 ensure that the Vehicle is made available to the Service Provider at an agreed time in accordance with any request made by the Service Provider for access to the Vehicle, on at least 30 (thirty) Business Days' prior written notice.
- 55.3 The cost of licensing and registration is incorporated into the Lease Payment and the STR Rate, as the case may be, as per the provisions of clause 46. Actual costs and annual increases in licensing and registration costs are net of any margin thereon
- 55.4 Transnet shall ensure that all Vehicles at all times:
  - 55.4.1 are in a roadworthy condition;
  - 55.4.2 display a certificate of fitness or roadworthiness, where required;
  - 55.4.3 display a number plate with the correct specifications;
  - 55.4.4 are registered and licensed with the relevant local authorities; and
  - 55.4.5 affixed with an up to date licence disc.
- 55.5 Transnet shall ensure that processes and procedures are implemented so that drivers of Vehicles are advised to notify the Fleet Manager concerned immediately of any of the requirements in clause 55.4 not being met.
- 55.6 The Fleet Manager shall notify the Service Provider Contract Manager in writing of any issues brought to his attention in terms of the provisions of clause 55.5 and the Service Provider shall ensure that such issues are resolved within the time periods specified in the Operational SLA.
- 55.7 Nothing in this clause 55 shall derogate from the Service Provider's obligation to inspect a Vehicle during Scheduled Maintenance and Unscheduled Maintenance.

## **56 DRIVER LICENCE VERIFICATION, OPERATOR DEFAULT AND FRAUD**

- 56.1 The Service Provider shall ensure that:
  - 56.1.1 at the time that Transnet takes delivery of a Vehicle, only appropriately qualified and licensed drivers are permitted to take delivery of and drive that Vehicle; and
  - 56.1.2 Operator Default is monitored and controlled.
- 56.2 The Service Provider shall ensure that all Vehicles (excluding trailers and cranes) provided to Transnet are fitted with a suitable tracking device (which shall include the ability to provide information on driver identification, theft and hijack recoveries, speeding exceptions, location identification via global positioning systems and accident reconstruction) if such tracking device constitutes a Standard Mandatory Fitment for that Vehicle type.
- 56.3 At the time of delivery of a Vehicle to Transnet, the Service Provider shall ensure that all employees wishing to drive the Vehicle are in possession of a valid driver's licence and are licensed to drive that particular Vehicle. After the delivery of the Vehicle, Transnet will be responsible for ensuring that only authorised and appropriately licensed drivers drive the Vehicles.
- 56.4 The relevant Fleet Manager shall supply the Service Provider with a list of authorised drivers on a quarterly basis during the Contract Period, together with a copy of each employee's driver's licence.

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Should the driver not be on the system, a copy of the driver's license will have to be supplied at the time of request. The Service Provider reserves the right to deny service if such documentation is not produced.

56.5 Transnet shall make use of the Service Provider's technical and fleet advisors to assist in the management and control of Operator Default. Where Operator Default is suspected, Transnet's internal disciplinary policies and procedures will be implemented to address the issues identified. Accordingly, the Service Provider shall ensure that when allegations of Operator Default are made, such allegations are substantiated by evidence proving Operator Default.

56.6 The Service Provider shall provide Transnet with the reports as required.

## **57 TRAFFIC OFFENCES AND FINES**

57.1 Without limiting the obligation of the Service Provider to take reasonable proactive measures in order to check for fines in respect of the Fleet, within 7 (seven) days of the date of receipt of any fine from any regulatory authority relating to the driving of a Vehicle (including a parking fine or a speeding fine), the Service Provider shall send a copy of the fine to the relevant Fleet Manager. If the Service Provider fails to send through the fine within the aforementioned 7 (seven) day period, the Service Provider shall be liable for the face value of that fine without any recourse to Transnet.

57.2 Transnet shall distribute the fine to the driver of the Vehicle at the time of the occurrence of the incident giving rise to the fine and shall require the driver to settle the fine within 21 (twenty-one) days of the date of receipt of the fine from the Service Provider. The employee concerned shall be required to provide proof of payment of such fine which Transnet shall remit to the Service Provider for its record purposes within 7 (seven) days of the date of receipt of such proof of payment from the said employee.

57.3 Should Transnet not remit proof of payment of a fine to the Service Provider within the period stipulated in clause 57.2, the Service Provider shall:

57.3.1 first verify with the relevant Fleet Manager as to whether the fine has been paid or not; and

57.3.2 in the event that:

57.3.2.1 the fine has been paid, request the Fleet Manager to obtain proof of payment from the employee concerned for remittance to the Service Provider which it shall retain for its record purposes;

57.3.2.2 the fine has not been paid, make payment of the face value of the fine and notify the Fleet Manager of the payment of the fine in writing. On a monthly basis, the Service Provider shall render a Tax Invoice to Transnet for all fines paid by it for and on behalf of Transnet. The Tax Invoice shall:

57.3.2.2.1 only reflect the costs of such fines and the Service Provider shall not be entitled to levy any margin on such costs; and

57.3.2.2.2 be accompanied by a schedule indicating:

57.3.2.2.2.1 the details of the Vehicle concerned;

57.3.2.2.2.2 the details of the driver;

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- 57.3.2.2.2.3 the date of the incident giving rise to the fine;
- 57.3.2.2.2.4 the reference number of the fine;
- 57.3.2.2.2.5 the face value of the fine; and
- 57.3.2.2.2.6 the date of payment of the fine by the Service Provider.

## **58 SCHEDULED MAINTENANCE**

58.1 The Service Provider shall ensure that the Fleet is maintained in a cost-effective manner and is safe and reliable. Without limiting the generality of the foregoing, the Service Provider shall ensure that the Fleet is not maintained in contravention of any Applicable Laws.

58.2 The Service Provider shall ensure that for the duration of the Contract Period, it has a national presence for Scheduled Maintenance for all Vehicles forming part of the Fleet irrespective in which Allocated Region a Vehicle was ordered in terms of this Agreement.

58.3 Transnet shall ensure that all Scheduled Maintenance is managed and approved by the Service Provider in respect of the Fleet in the Allocated Regions.

58.4 It is the responsibility of Transnet to:

- 58.4.1 ensure the Vehicles within its possession and under its control are at all times roadworthy, clean and in good condition; and

- 58.4.2 notwithstanding the provisions of clauses 58.8, 58.10 and 58.10 to book a Vehicle for Scheduled Maintenance at the OEM prescribed intervals.

58.5 Subject to the provisions of clause 53.6, the Service Provider shall provide Scheduled Maintenance of the Fleet so as to ensure it is maintained in a satisfactory and safe operating condition as per OEM specifications and that no OEM warranties or maintenance plans (if applicable) are invalidated for any reason.

58.6 The cost of all Scheduled Maintenance is included in the Rates.

58.7 A Scheduled Maintenance plan/programme for each Vehicle shall be stipulated in a schedule provided and continuously updated by the Service Provider; provided that, as a minimum, the Service Provider shall ensure that the Fleet is maintained in accordance with OEM requirements.

58.8 Any maintenance, servicing, repair or other faults not included in the Scheduled Maintenance plan/program shall constitute Unscheduled Maintenance and be dealt with in accordance with the provisions of clause 60.

58.9 The Service Provider shall provide the Regions/Corridors with a monthly report detailing all Scheduled Maintenance activities due in respect of the forthcoming month, together with details of instances where Scheduled Maintenance is overdue.

58.10 The Service Provider shall provide the Fleet Managers, on no less than 30 (thirty) Business Days' prior written notice, of the details of the Scheduled Maintenance, Vehicles due for Scheduled Maintenance and the closest service facilities in respect thereof. The Fleet Manager shall, subject to the provisions of clause 53.6, ensure that the Vehicle is made available for Scheduled Maintenance at the service facility

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designated by the Service Provider which is within the Allocated Region and located in close proximity to the Transnet depot at which the Vehicle is based.

58.11 Notwithstanding the provisions of clauses and 58.10, the Service Provider shall ensure that a further notification is provided to the relevant Fleet Manager at least 2 (two) weeks before anticipated date for Scheduled Maintenance of a Vehicle.

58.12 In the event that Scheduled Maintenance is not performed in respect of a Vehicle at the interval prescribed by the OEM, the relevant Fleet Manager will be informed by the Service Provider thereof in writing and, subject to the provisions of clause 53.6, will arrange for delivery of the Vehicle to the service facility or Designated Area within 7 (seven) days of the date of such notice, at the Service Provider's direction. The Service Provider shall maintain full and accurate documentary evidence of such notifications.

58.13 Should the Vehicle referred to in clause 58.12 still not be presented to a service facility or Designated Area within the said 7 (seven) day period and, to the extent that this invalidates the OEM warranty or maintenance plan in respect of the Vehicle (if applicable), all costs associated with the repair or maintenance of any elements that would ordinarily be covered by the warranty or the maintenance plan, as the case may be, shall be recoverable by the Service Provider from the relevant Transnet Cost Centre Owner that pays the Rate in respect of that Vehicle.

58.14 Subject to the provisions of clause 53.6, the Service Provider shall be responsible for all damage and/or destruction to the Vehicle (save for that occasioned by Operator Default) as well as all liability that related to the driving of the Vehicle (whether for test drive or other purposes) by the Service Provider or anyone for whose conduct it is vicariously liable at law while the Vehicle is in the possession or under the control of the Service Provider and shall indemnify Transnet accordingly.

58.15 Without detracting from the generality of the provisions of clause 58.17, all Scheduled Maintenance shall be completed in accordance with OEM specifications and within the time frame specified in the Operational SLA. To the extent that such timeframes are exceeded, the Service Provider shall furnish Transnet with the same or a similar substitute STR Vehicle which is fit for the purposes of Transnet (taking into account the specifications of the FML Vehicle which is in the Service Provider's workshop for Scheduled Maintenance) provided that, without prejudice to Transnet's rights in terms of clause 58.16, the Service Provider shall be liable for the cost of such replacement STR Vehicle until the FML Vehicle is returned by the Service Provider to Transnet at the Designated Area.

58.16 Any Scheduled Maintenance which exceeds the time frames specified in the Operational SLA shall attract Penalties to be levied by Transnet against the Service Provider.

58.17 The Service Provider hereby warrants that, as a minimum:

58.17.1 all workmanship undertaken during the Scheduled Maintenance of a Vehicle shall be guaranteed for a period of 12 (twelve) months;

58.17.2 all OEM new parts supplied during the repair and/or servicing of a Vehicle (including safety critical parts) shall be guaranteed for a period of 12 (twelve) months; and

58.17.3 all approved new parts shall be guaranteed for a period of 6 (six) months;

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after the date of such Scheduled Maintenance as evidenced by the Vehicle's service log, unless indicated otherwise in writing by the Service Provider.

58.18 Details of all completed Scheduled Maintenance shall be recorded by the Service Provider in the Vehicle's service log.

58.19 Upon completion of the Scheduled Maintenance of the Vehicle, it shall be tested in accordance with the routine tests specified by the OEM and must withstand those tests before being returned to Transnet.

58.20 Transnet shall collect all Vehicles delivered for Scheduled Maintenance from the service facility at which the Vehicle was initially delivered by Transnet. Risk in and to the Vehicle shall transfer from the Service Provider to Transnet upon Transnet conducting an inspection of the Vehicle and recording such inspection on a Vehicle Inspection Form.

58.21 In order to optimise the Scheduled Maintenance of the Fleet, the Service Provider undertakes that it shall investigate the feasibility of:

58.21.1 providing on-site and after hours Scheduled Maintenance; and/or

58.21.2 implementing a system of mobile workshops to provide Scheduled Maintenance in respect of the Fleet.

## **59 TYRES**

59.1 The Lease Payment shall include the supply of 3 (three) sets of tyres (excluding the set of tyres fitted to the Vehicle as at the Actual Delivery Date) for that FML Vehicle.

59.2 The costs of all punctures and tyre damage (including side wall cuts, run flats and penetration) resulting in the replacement of tyres in excess of the three (3) sets with regard to FML Vehicles and all tyre costs (including repairs and replacements) with regard to the Owned Fleet shall be borne by Transnet.

59.3 The tyres referred to in clause 0 shall be in accordance with the specifications and/or recommendations of the OEM of the Vehicle.

59.4 During Scheduled Maintenance, the Vehicle's tyres shall be checked and rotated if necessary and any problems detected will be rectified or tyres replaced at the same time. For the avoidance of doubt, the checking, rotating and replacement of tyres shall include the costs of all services ancillary to such checking, rotating and replacement of tyres.

59.5 Should a problem arise with tyres during intervals between Scheduled Maintenance, the driver of the Vehicle or the relevant Fleet Manager will contact the Service Provider who will direct that driver or Fleet Manager, as the case may be, to the Service Provider's closest tyre supplier where the tyres will be examined. The tyre supplier who will make a recommendation, if required.

59.6 Should the Service Provider's tyre supplier recommend replacement of one or more of the Vehicle's tyres, those tyres may only be replaced by the tyre supplier on official authorisation from the Service Provider.



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59.7 The day-to-day management of the tyres is the Transnet driver's responsibility. If the Transnet driver is not satisfied with the status of the tyres, he shall alert the Fleet Manager who shall notify the Service Provider by logging a call with the Call Centre.

59.8 When a tyre reaches the minimum legal limit for wear and tear, it is to be replaced by the Service Provider. It shall be the responsibility of the Fleet Manager to notify the Service Provider of tyre wear and tear as soon as is reasonably practicable in the circumstances.

## **60 UNSCHEDULED MAINTENANCE**

60.1 The Service Provider shall ensure that for the duration of the Contract Period, it has a national presence for Unscheduled Maintenance for all Vehicles forming part of the Fleet irrespective of which Allocated Region a Vehicle was ordered from in terms of this Agreement.

60.2 No Unscheduled Maintenance of the Fleet within the Allocated Regions shall be managed and effected without the prior approval of the Service Provider.

60.3 The Service Provider shall make an electronic fault logging system available. All Vehicle faults will be logged by the relevant Fleet Manager on the electronic fault logging system. Transnet shall be liable for all Vehicle faults occasioned by Operator Default. To the extent that Operator Default results in damage to the Vehicle, the Service Provider shall repair the relevant component prior to replacing the component. Progress to resolve faults shall be tracked on the fault logging system. To the extent that Transnet's operations do not have access to such electronic fault logging system, Transnet shall be entitled to log a fault with the Call Centre.

60.4 Where the need for Unscheduled Maintenance arises, the following procedure shall apply:

60.4.1 the Fleet Manager or the driver shall report Vehicle faults and/or breakdowns to the Service Provider via the electronic fault logging system or via the Call Centre;

60.4.2 within the period specified in the Operational SLA for the logging of the fault and/or breakdown and subject to the provisions of clause 63, the Service Provider shall have the Vehicle moved to its nearest service facility;

60.4.3 within 24 (twenty-four) hours of the movement of the Vehicle to the nearest service facility, the Service Provider shall make a STR Vehicle available to Transnet at the Designated Area provided that this has been requested by the relevant Fleet Manager. If the Unscheduled Maintenance was occasioned by:

60.4.3.1 faulty workmanship or the failure of a part or component fitted during Scheduled Maintenance, the costs of the STR Vehicle shall be borne by the Service Provider without any recourse against Transnet until the Vehicle is returned from Unscheduled Maintenance by the Service Provider to Transnet at the Designated Area; or

60.4.3.2 accidental damage or damage occasioned due to Operator Default, then, subject to the provisions of clause 50, Transnet shall place an order on the Service Provider for the provision of a STR Vehicle at Transnet's expense.

60.4.4 if the Unscheduled Maintenance was occasioned by circumstances contemplated in clause 60.4.3.2, the Service Provider shall furnish the Fleet Manager with a quotation setting out

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the proposed repair work and repair programme including the proposed costs for labour, parts and components to the Fleet Manager together with the requirements set out in clause 60.6.

60.5 Any repairs to the Vehicle that are necessary due to Operator Default (including tyres) by Transnet employees are to be reported to the Service Provider by the relevant Fleet Manager as soon as is reasonably practicable following the relevant Fleet Manager becoming aware of such Operator Default.

60.6 The Service Provider will provide the Fleet Manager with the complete relevant reports, including a technical report by an independent third party submitted within 2 (two) Business Days of request of repair, photographs and quotation for the necessary repairs, which may only proceed after the relevant Transnet Contract Manager has inspected the damage. In the event of damage to the Vehicle occasioned by Operator Default, the Service Provider shall repair components first before replacing them. The reasonable costs of the technical report shall be borne by Transnet to the extent that such damage occurred as a result of Operator Default.

60.7 The Service Provider shall, where relevant and reasonably practically possible, provide Transnet with 3 (three) quotations which Transnet may in its discretion accept or decline.

60.8 On the written approval of the relevant Transnet Contract Manager, repairs may proceed.

60.9 All Unscheduled Maintenance shall be completed within the time frames specified in the Operational SLA and to the extent that such Unscheduled Maintenance is not completed timeously, Transnet shall be entitled to levy Penalties.

60.10 All costs relating to the Unscheduled Maintenance of a Vehicle must be included on a separate Tax Invoice for Transnet's account. On completion of the repairs, the associated Tax Invoice must be stamped "**Operator Default**" and processed for payment in accordance with standard operating procedures.

## **61 CAR WASH**

61.1 The Service Provider shall ensure that the interior and exterior of Vehicles are washed:

61.1.1 on delivery; and

61.1.2 each time a Vehicle undergoes Scheduled Maintenance and Unscheduled Maintenance.

## **62 TERMINATION OF THE INDIVIDUAL CONTRACT**

62.1 No later than 90 (ninety) Business Days prior to the termination of an Individual Contract (save in circumstances contemplated in clauses 63, 64 or 65), the Service Provider shall notify the Fleet Manager in writing that the Vehicle to which such Individual Contract relates is due for return to the Service Provider specifying the due date for such return.

62.2 Within 24 (twenty-four) hours of the End Date, Transnet shall return the Vehicle to the Designated Area.

62.3 At the Designated Area, the Service Provider Contract Manager and the relevant Fleet Manager shall both a Vehicle Inspection Form. Photographs shall be taken of all aspects of the Vehicle in order to

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record any patent damage to the Vehicle. These photographs are to be retained by the Service Provider for a period of 3 (three) years following the date of actual return of the Vehicle ("**Return Date**"). Both Parties shall retain a copy of the signed Vehicle Inspection Form and the Vehicle inspection form. To the extent that the Service Provider is not able to provide the evidence specified in this clause 62.3, the Service Provider irrevocably waives any claim it may have against Transnet in this regard.

62.4 With effect from the Return Date, Transnet shall not be obliged to continue making payment of any Lease Payments or STR Rates in respect of that Vehicle, as the case may be, to the Service Provider.

62.5 The Vehicle shall be returned in an undamaged state and in good working order and condition, Fair Wear and Tear excepted, together with all licences, permits, roadworthy certificates, other relevant documentation, and keys (including the spare keys).

62.6 Transnet shall not be liable to pay any costs associated with the use of the Vehicle beyond the Return Date save for any Make Good Costs, subject to clause 62.7.

62.7 The Service Provider shall advise Transnet of any Make Good Costs in sufficient detail to enable Transnet to accurately determine what these Make Good Costs are and shall provide 3 (three) quotes within 3 (three) Business Days of the Return Date which shall specify the turnaround time for the repairs to the Vehicle. No repairs shall be effected to the Vehicle by the Service Provider without the prior written approval of the relevant Cost Centre Owner.

62.8 If Transnet disputes its liability to make payment of any Make Good Costs, it shall notify the Service Provider in writing within 5 (five) Business Days thereof specifying in sufficient detail the grounds for its disputing such liability.

62.9 If the Parties are unable to agree as to Transnet's liability for Make Good Costs within 5 (five) Business Days, an independent motor industry expert nominated by the director of NADA who shall act as an expert and not as an arbitrator and who shall make a determination as to Transnet's liability for Make Good Costs.

62.10 Should the Fleet Manager agree to be held liable for such Make Good Costs in terms of clause 62.7 or should the circumstances contemplated in clause 62.9 arise, Transnet shall furnish the Service Provider with a purchase order for such Make Good Costs. Should Transnet fail to provide the Service Provider with a purchase order for such Make Good Costs within 10 (ten) Business Days from the Return Date, the Service Provider shall proceed to repair the Vehicle on the basis of the lowest reasonable quote provided to Transnet and shall issue a Tax Invoice to the relevant Operating Division for such Make Good Costs either agreed or determined by the Service Provider in terms of the provisions of clause 62.9 and Transnet shall issue a purchase order for the value of such Tax Invoice. Transnet shall make payment of such Tax Invoice within 10 (ten) Business Days of the date of such Tax Invoice.

## **63 ACCIDENTS / INCIDENTS**

63.1 If a Vehicle is damaged as a result of any conduct on the part of Transnet's Personnel including any accident or collision:

63.1.1 the relevant Fleet Manager or the driver of the Vehicle concerned shall notify the Service Provider of such accident or collision as soon as reasonably possible after the incident, by telephoning the Call Centre and shall obtain a reference number; and

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- 63.1.2 the Service Provider shall manage and provide all necessary assistance to Transnet and/or its Personnel in respect of such incident, including the dispatch of roadside assistance, tow-in services and medical and emergency services; provided that to the extent that tow-in services are provided, the tow-in services are rendered by a tow-in service provider that is approved by the Service Provider.
- 63.2 The Service Provider shall be responsible for managing the accident response from the provision of roadside assistance to the provision of a replacement vehicle of the same type, category and cost as the Vehicle involved within the time period stipulated in the Operational SLA.
- 63.3 Within 48 (forty-eight) hours of the incident, the Fleet Manager shall lodge a claim with its insurers and, if the Vehicle has not been towed to a workshop designated by the Service Provider, shall present the damaged Vehicle to the Service Provider's designated workshop for inspection. The Service Provider shall appoint an accredited assessor to conduct an independent assessment of the damage to the Vehicle.
- 63.4 Within 5 (five) Business Days of the date of receipt of the Vehicle for inspection, the Service Provider shall prepare and submit 3 (three) quotations for the necessary repairs to the Fleet Manager for submission to its insurers in order to obtain authorisation from its insurers to proceed with the repairs based on a quotation selected by the assessor appointed by Transnet's insurers, or otherwise, as the case may be.
- 63.5 Within 30 (thirty) days of the date of the accident, the Service Provider shall provide the Fleet Manager with the complete relevant accident reports, including photographs, including photographs, provided that within 5 (five) Business Days of the accident, the Service Provider shall provide Transnet with reports regarding the accident that can be easily generated based on data that is readily available including photographs, vehicle telemetry reports and narratives specifying initial findings.

#### **64 WRITE-OFF**

- 64.1 If a Vehicle is destroyed, damaged beyond repair or written-off, the Fleet Manager shall notify the Service Provider thereof; the provisions of clauses 63.1 to 63.3 applying *mutatis mutandis*.
- 64.2 Within 6 (six) weeks of the date of the aforesaid notification, the Service Provider shall prepare and submit a quotation for the Settlement Amount of the Vehicle. The relevant Operating Division shall make payment of the Settlement Amount
- 64.3 Transnet shall decide whether to issue a further purchase order for a new FML Vehicle or a STR Vehicle to replace the written-off Vehicle and, in this regard, shall follow the process contemplated in clause 50.

#### **65 THEFTS OR HIJACKS**

- 65.1 The Service Provider shall, in conjunction with Transnet, take all necessary precautions to minimise thefts and hijacks.
- 65.2 Should a Vehicle be stolen or hijacked, Transnet shall notify the Service Provider thereof in terms of the provisions of clauses 0 and 63.2 which shall apply *mutatis mutandis*.

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65.3 In the event the Vehicle is stolen or hijacked and cannot be recovered within 6 (six) weeks of the date of the theft or hijacking, as the case may be, the Individual Contract shall terminate on the date of expiry of the aforementioned 6 (six) week period and the Service Provider shall furnish Transnet with a Settlement Amount within 2 (two) Business Days of such date.

65.4 Should Transnet require a replacement Vehicle, it shall order a Vehicle in terms of the provisions of clause 50.

## **66 INSURANCE CLAIMS PROCESS**

To the extent that a Vehicle is involved in an accident or incident (including theft and hijacking), the notification of the insurance claim shall be as stipulated in Transnet's insurance claim process.

## **67 COMPUTATION OF THE SETTLEMENT AMOUNT**

67.1 The Settlement Amount, in the case of total loss, write-off, theft or destruction of a Vehicle, shall be calculated as follows:

67.1.1 in respect of write-off, the Settlement Amount of a Vehicle which is damaged beyond repair or "written off" by the insurers, will be calculated at the higher of the Net Book Value and the Market Value of the Vehicle less the Salvage Value of the Vehicle; or

67.1.2 in respect of theft or loss of a Vehicle, the Settlement Amount of a Vehicle will be calculated at the higher of the Net Book Value and the Market Value of the Vehicle.

67.2 The Settlement Amount is to be calculated as at the earlier of the date of occurrence of the loss, theft or destruction of a Vehicle or the date of receipt of an assessor's report by Transnet providing confirmation of irreparable damages to the Vehicle, provided that in the case of the loss of the Vehicle by means of theft or hijacking, the date of loss shall be deemed to be the date specified in clause 65.3.

## **68 BREAKDOWN SERVICES AND ROADSIDE ASSISTANCE**

68.1 The Service Provider undertakes to provide and manage a 24 (twenty-four) hour breakdown and roadside assistance service, 7 (seven) days a week throughout the Contract Period in respect of all Vehicles ("**Breakdown Services**").

68.2 The Service Provider shall ensure that it provides national Breakdown Services notwithstanding the fact that the Vehicle was procured by an Operating Division in a particular Allocated Region.

68.3 The Service Provider shall in the event of a Breakdown Service call, attend on the scene of the breakdown within:

68.3.1 2 (two) hours of receipt of the notification, where the breakdown occurs within a 20 (twenty) kilometre radius of the Service Provider's workshop (urban);

68.3.2 3 (three) hours of receipt of the notification, where the breakdown occurs outside a 20 (twenty) kilometre radius of the Service Provider's workshop (rural); and

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68.3.3 an additional 30 (thirty) minutes per 50 (fifty) kilometres from the Service Provider nearest technical repair centre.

68.4 In the event of a breakdown, the Service Provider shall use its reasonable endeavours to provide assistance to Transnet Personnel and to transport them to the nearest Transnet premises or the nearest safe place (including their homes).

## **69 FUEL MANAGEMENT AND TOLL FEES**

69.1 Notwithstanding the Services that the Service Provider shall provide in terms of this Agreement, and unless otherwise agreed, Transnet Fuel Solutions shall be responsible for:

69.1.1 fuel usage and management with regard to the Vehicles; and

69.1.2 subject to the provisions of clauses 69.2 and 69.3, registration of e-Tags and payment of associated toll fees;

provided that the Service Provider shall be responsible for all administration pertaining to e-Tags in respect of the Owned Fleet.

69.2 All STR Vehicles must come fitted with e-Tags and the Service Provider shall invoice Transnet for actual toll fees incurred by it in respect of a particular STR Vehicle without being entitled to levy any margin thereon.

69.3 In respect of FML Vehicles, Transnet Fuel Solutions shall acquire an e-Tag. Pending receipt of an e-Tag for a particular FML Vehicle, the Service Provider shall make payment of all e-tolls billed to it and shall invoice Transnet for such e-toll costs at cost without levying any margin thereon incurred in respect of that FML Vehicle from the time of delivery of the FML Vehicle on the Delivery Date until the date that Transnet notifies the Service Provider in writing that it has fitted an e-Tag to the FML Vehicle.

## **70 TECHNICAL ADVICE AND CONTINUOUS IMPROVEMENT**

71.1 The Service Provider shall:

71.1.1 provide Transnet with technical and fleet advice to optimise the utilisation and exploitation of the Fleet;

71.1.2 at all times endeavour to identify means including the optimisation of the Fleet and of saving costs in a manner which does not impact Transnet's operations;

71.1.3 at all times during the Contract Period, provide all technical advice, information and assistance to Transnet necessary to render the Services in the most efficient and optimal manner to Transnet. The Service Provider shall ensure that the Service Provider's dedicated fleet managers are available to service Transnet's Fleet requirements at all times;

71.1.4 procure that suitably trained and qualified technical consultants are made available to support, assist and consult to Transnet and its Personnel on any technical aspect in respect of the Fleet at all times during the Contract Period. In addition, the Service

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Provider's fleet managers shall obtain an in-depth knowledge of Transnet's Fleet operations and requirements, as well as ensuring that regular feedback sessions are held;

71.1.5 be responsible for the training of Transnet's Personnel with respect to:

- 71.1.5.1 the Services and the Required Service Levels;
- 71.1.5.2 the selection of Vehicles;
- 71.1.5.3 budgeting for Vehicles;
- 71.1.5.4 managing the utilisation of Vehicles;
- 71.1.5.5 inspecting Vehicles;
- 71.1.5.6 managing Individual Contract obligations; and
- 71.1.5.7 interpreting and reviewing the Service Provider's Tax Invoices and month-end statements.

## **71 TECHNICAL TRAINING AND SKILLS TRANSFER**

71.1. The Service Provider shall be responsible for the familiarisation training of drivers and other relevant officials with respect the following:

- 71.1.1 the Services and the Required Service Levels;
- 71.1.2 caring for the Vehicles; and
- 71.1.3 the obligations arising from the Individual Contracts specifically highlighting the responsibilities of drivers.

71.2 The Service Provider shall provide training:

- 71.2.1 in accordance with a training plan agreed to between the Parties at Operational Steercom meetings;
- 71.2.2 in addition to training in accordance with the training plan referred to in clause, the Service Provider shall in addition provide *ad hoc* training to Transnet Personnel as determined by the Operational Steercom from time to time or as specifically requested by a Fleet Manager;
- 71.2.3 in groups of not more than 50 (fifty) delegates; and
- 71.2.4 in the English and any other local languages agreed to by Transnet.

71.3 All training shall be supported by user-friendly training manuals and operating handbooks.

71.4 Training shall be provided at a designated location to be agreed between the Parties and, failing agreement, at each of the Operating Divisions of Transnet or at the head office of Transnet.

71.5 The cost of all training, including the costs of the trainer, the venue, the training material and the refreshment costs shall be for the account of the Service Provider.

- 71.6 The costs of travel to and from the venues and, if applicable, accommodation and subsistence allowances for trainees shall be for the account of Transnet.
- 71.7 Training shall be provided initially during the two-week period immediately succeeding the Signature Date or such later date as the Parties may agree and then annually on the Anniversary Date, to any Transnet employees who deal with the Service Provider directly and as soon as possible following any major changes to the Services, the Required Service Levels or the method of accessing the Services.

## 72 COMPLIANCE

- 72.1 To the best of the knowledge and belief of the Service Provider:
  - 72.1.1 the transaction contemplated in this Agreement does not contravene any provision of the Competition Act nor require any consents or approvals from the competition authorities as contemplated in the Competition Act; and
  - 72.1.2 it has disclosed all correspondence, if any, between itself and the competition authorities in respect of the transaction contemplated in this Agreement.
- 72.2 To the extent that either of the Parties engage with the Competition Commission in relation to this Agreement, they shall jointly engage with the Competition Commission.
- 72.3 The Service Provider warrants that:
  - 72.3.1 it shall comply with and enforce all Applicable Laws in the rendering of the Services to Transnet, and that its Personnel, contractors or agents shall be required at all times to work in accordance with all such Applicable Laws including:
    - 72.3.1.1 Occupational Health and Safety Act No. 85 of 1993;
    - 72.3.1.2 National Key Point Act No. 102 of 1980; and
    - 72.3.1.3 Control of Access to Public Premises and Vehicles Act No. 53 of 1985;
  - 72.3.2 it has full knowledge of all relevant statutory, collective and other stipulations applicable to the relationship with its Personnel, contractors and its relationship with Transnet. This includes, but is not limited to, the Labour Relations Act 66 of 1995 ("**Labour Relations Act**"), the Basic Conditions of Employment Act 75 of 1997, the Employment Equity Act 55 of 1998 and any other applicable employment legislation; and
  - 72.3.3 it is not and will not in future be in contravention of any of the provisions of any Applicable Laws.
- 72.4 In the event of a contravention of any Applicable Law, the Service Provider shall as soon as is reasonably practicable in the circumstances take all steps to remedy such contravention.
- 72.5 If Transnet advises the Service Provider of any contravention of any Applicable Law in writing, the Service Provider shall, within 10 (ten) days after receipt of such notice, take all steps necessary to remedy such contravention and shall keep Transnet informed in writing of the steps taken and the implementation and the result thereof.



72.6 The compliance with all Applicable Laws is a material obligation of this Agreement and any breach of this clause 72 shall constitute a material breach of this Agreement on the part of the Service Provider.

72.7 Transnet shall for the duration of the Contract Period comply with all Applicable Laws including the Public Finance Management Act No. 1 of 1999 and the Preferential Procurement Policy Framework Act No. 5 of 2000 together with all schedules and regulations thereto, as amended, in relation to this Agreement and any security relating to this Agreement.

## **73 LIABILITY**

73.1 The Service Provider's liability under this clause 16 shall be in addition to any warranty or condition of any kind, express or implied by law or otherwise, relating to the Goods or ancillary Services, including the quality of the Goods or ancillary Services or any materials delivered pursuant to this Agreement.

73.2 Neither Party excludes or limits liability to the other Party for:

73.2.1 death or personal injury caused by its negligence, [including its employees', agents' or Subcontractors' negligence]; or

73.2.2 fraud or theft.

73.3 The Service Provider shall indemnify and keep Transnet indemnified from and against liability for damage to any Transnet property [whether tangible or intangible] or any other loss, costs or damage suffered by Transnet to the extent that it results from any act of or omission by the Service Provider or its Personnel in connection with this Agreement. The Service Provider's liability arising out of this clause 73.3 shall be limited to direct damages.

73.4 Subject always to clauses 73.1 and 73.2 above, the liability of either the Service Provider or Transnet under or in connection with this Agreement, whether for negligence, misrepresentation, breach of contract or otherwise, for direct loss or damage arising out of each Default or series of related Defaults shall not exceed 100% [one hundred per cent] of the Fees paid under the schedule or Work Order to which the Default(s) relates.

73.5 Subject to clauses 73.1 to 73.4 above, in no event shall either Party be liable to the other for indirect or consequential loss or damage or including indirect or consequential loss of profits, business, revenue, goodwill or anticipated savings of an indirect nature or loss or damage incurred by the other Party as a result of third party claims.

73.6 If for any reason the exclusion of liability in clause 73.5 above is void or unenforceable, either Party's total liability for all loss or damage under this Agreement shall be as provided in clause 73.3 above.

73.7 Nothing in this clause 73 shall be taken as limiting the liability of the Parties in respect of clauses 19 [Confidentiality] and 14 [Intellectual Property Rights].

## **74 SECTION 197 INDEMNITY**

- 74.1 Nothing in this Agreement shall be deemed to constitute the outsourcing of a function within Transnet from Transnet to the Service Provider which in any way could be construed as a standalone business. Instead, the nature of this Agreement relates to the provision of Vehicles and the rendering of Services to Transnet by the Service Provider. Accordingly, upon the termination of this Agreement for whatever reason, no transfer of the employment of the employees employed by the Service Provider and dedicated to this Agreement shall take place from the Service Provider to Transnet.
- 74.2 To the extent that a court determines that the provisions of Section 197 of the Labour Relations Act applies to this Agreement notwithstanding the provisions of clause 74.1, the Parties hereby indemnify each other against all loss, liability, costs, damage and expense of every nature whatever (including, but not limited to, actual reasonable legal costs incurred on the scale as between attorney and own client, disbursements and other charges) incurred by either Party directly or indirectly as a result of and/or attributable to:
- 74.2.1 any employee claiming that his employment contract should transfer from one Party to the other, or
- 74.2.2 the actual transfer of the employment contract of any employee from one Party to the other, whether by order of court or operation of law or for any other reason.

## **75 CONTRACT MANAGEMENT**

- 75.1 As soon as reasonably practicable after the Signature Date, each of the Operating Divisions and the Service Provider shall appoint a Contract Manager to be responsible for the overall delivery of Services by the Service Provider to Transnet.
- 75.2 Each Party's Contract Manager shall be authorised to manage the operational elements of this Agreement on behalf of the Operating Division and the Transnet Group and the Service Provider respectively and the Parties shall procure that their Contract Managers have the necessary skill, expertise and experience to carry out such responsibility.
- 75.3 Unless otherwise specifically provided in this Agreement or agreed to in writing by a Party, such Party's Contract Manager will be entitled to make operational decisions concerning the provision of the Services but shall not be authorised to bind or commit that Party to any amendments to this Agreement.
- 75.4 The Transnet Group Representative and the Service Provider Representative shall manage this Agreement on an overall strategic basis and in line with Transnet's prevailing contract management policies and procedures.
- 75.5 Either Party may replace its Contract Manager on written notice to the other Party. Similarly, Transnet shall be entitled to change the identity of the Transnet Group Representative and the Service Provider shall be entitled to change the identity of the Service Provider Representative.
- 75.6 All communications concerning the performance of this Agreement shall, unless otherwise agreed to between the Parties, take place between the Parties' Contract Managers save

Agreement between Transnet and .....

For the provision of specialised material handling equipment (MHE) fleet management services for a period of three (3) years to Transnet Freight Rail

insofar as specific reference is made in this Agreement to the Fleet Managers or the Transnet Representative and the Service Provider Representative, as the case may be.

**Thus signed by the Parties and witnessed on the following dates and at the following places:**

For and on behalf of <b>TRANSNET SOC LTD</b> duly authorised hereto	For and on behalf of <div style="background-color: red; height: 1.2em; width: 100%;"></div> duly authorised hereto
Name:	Name:
Position:	Position:
Signature:	Signature:
Date:	Date:
Place:	Place:

<b>AS WITNESS:</b> Name:	<b>AS WITNESS:</b> Name:
Signature:	Signature:

<b>AS WITNESS:</b> Name:	<b>AS WITNESS:</b> Name:
Signature:	Signature: