



ISENZO

Customer Relationship Terms general terms for the provision of ICT Goods and Services

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1 Introduction

The Terms are the general terms of the relationship between Vendor and Customer. The Terms cover any transactions where Vendor provides ICT Goods or Services to Customer. The commercial terms of any transaction will be contained in an Order that will incorporate these Terms. The Order will prevail if there is a conflict of meaning. Nothing in the Terms obligates any party to enter into any Orders.

2 Definitions and interpretation

Definitions. In the Agreement:

AFSA means the Arbitration Foundation of Southern Africa (or its successor or body nominated in Writing by it in its stead);

Agreement means the agreement between Vendor and Customer, consisting of the Terms and any Orders the parties enter into;

Business Day means any day other than a Saturday, a Sunday or a holiday (including a public or bank holiday) in the jurisdiction where the entity of the Vendor that entered into the relevant Order is organised;

Business Hours means Vendor's normal business hours on Business Days;

Consumables means any consumable items Vendor uses to fulfil its obligations under the Agreement including tapes, discs (both optical and magnetic), diskettes, cartridges, ribbons, cards, paper and other storage media;

Contract Year means, in respect of an Order, each successive 12 calendar month period during the term of the Order, calculated from the Effective Date;

Customer means the customer that enters into an Order and, if specified in the Order, those related to it;

Customer Data means Customer's data (including information about an identifiable person) that:

- Customer (or any third party on Customer's behalf) provides to Vendor; or
- Vendor generates, processes, or supplies to Customer in providing the Goods or Services;

but excludes any derived data that Vendor creates for its own internal purposes or which is proprietary or confidential to Vendor or Vendor's Third Party Contractors;

Customer Material means any materials or media (in electronic or physical form) Customer (or any third party on Customer's behalf) provides or makes available to Vendor for purposes of the Agreement and includes Customer Data;

Customer Policies means any of Customer's policies, practices, codes of conduct and procedures, including any applicable broad based black economic empowerment, security, information technology, health, safety and environmental policies (as amended from time to time) that may be of general application;

Deliverable means any deliverable or work product that Vendor delivers relating to the Services, including code, material, a web application, a website, or custom software;

Delivery Date means the estimated date of completion of each Deliverable referred to in the corresponding Order;

Effective Date means in respect of each Order, the effective date stipulated in each Order, in the absence of which it will be the date the Order is accepted by Vendor;

EULA means an end user license agreement;

Existing Material means any code, forms, algorithms or materials developed by or for either party independently and outside of the Agreement and provided during the course of the Agreement;

Fees means the fees, charges, or purchase consideration that Customer will pay to Vendor in respect of Goods or Services Vendor provides under Orders;

Goods means any goods Vendor provides to Customer, under Orders;

ICT means information, communication or technology;

Order means a goods or services order agreed to and signed by both the parties describing the specific Goods or Services that Vendor will provide to Customer;

Personnel means any director, employee, agent, consultant, contractor or other representative;

Services means any services Vendor provides to Customer, under Orders;

Service Levels means the levels according to which Vendor will provide each Service as agreed by the parties in Writing and signed;

Sign means the handwritten signature, an advanced electronic signature, or an electronic signature that the parties agree to use, of the duly authorised representative of a party;

Signature Date means the date of signature by the party signing last;

Site means the physical site referred to in an Order, to which Vendor will deliver Goods or provide Services under the Order;

Specification means the specification (which may be in the form of a proposal, wire frame, project initiation document, functional specification, or technical specification) of the Deliverable, which may be (i) in or attached to an Order, or (ii) in Writing, dated and signed by the parties;

Tax means any:

- tax (including value added tax, income taxes, pay-as-you-earn tax or other taxes levied in any jurisdiction);
- duty (including stamp duty);
- tariff, rate, levy; or
- any other governmental charge or expense payable;

Terms means the terms, consisting of:

- these customer relationship terms; and
- any other relevant specific terms, policies, disclaimers, rules and notices that the parties agree on (including any that may be applicable to any specific Goods or Services);

Third Party Contracts means any contracts in force at the Effective Date between Customer and Third Parties Contractors, referred to in the Order;

Third Party Contractor means, in respect of any goods and services, any contractor, supplier, vendor or licensor of the goods or services, which is not a party to the Agreement;

Time and Materials means Vendor's time and materials Fees applicable from time to time;

Vendor means the vendor that enters into an Order and, if specified in the Order, those related to it;

Vendor Technology means any technology that Vendor has created, acquired or otherwise has rights in and may, in connection with the performance of Vendor's obligations under the Agreement, employ, provide, modify, create or otherwise acquire rights in and includes any: concepts or ideas; methods or methodologies; procedures or processes; know-how or techniques; function, process, system, data, or object models; templates; the generalised features of the structure, sequence and organisation of software, user interfaces and screen designs; general purpose consulting and software tools, utilities, routines or frameworks; logic, coherence and methods of operation of systems; and patches or enhancements to open source libraries;

Writing means the reproduction information or data in physical form and includes handwritten documents, hard copy printouts and fax transmissions, but excludes information or data in the form of email.

- 2.1 **Definitions in the Order.** Words defined (or assigned a meaning) in the Order will have that meaning in the Customer Relationship Terms, unless the context clearly indicates otherwise.
- 2.2 **Interpretation.** A word defined in the Agreement will start with a capital letter. All headings are inserted for reference purposes only and must not affect the interpretation of the Agreement. Whenever "including" or "include", or "excluding" or "exclude", together with specific examples or items follow a term, they will not limit its ambit. Terms other than those defined within the Agreement will be given their plain English meaning. References to any enactment will be deemed to include references to the enactment as re-enacted, amended, or extended. A reference to a person includes a natural and juristic person and a reference to a party includes the party's successors or permitted assigns. Unless otherwise stated in the Agreement, when any number of days is prescribed in the Agreement the first day will be excluded and the last day included. The rule of construction that an agreement must be interpreted against the party responsible for its drafting or preparation does not apply. GMT +2 will be used to calculate any times.
- 2.3 **Conflict.** If there is a conflict of meaning between these customer relationship terms and any Order, the Order will prevail in respect of Customer's use of the relevant Goods or Services.

3 Duration

The Terms commence on acceptance and continue until terminated.

4 Orders

- 4.1 **Request for Goods or Services.** If Customer at any time requires additional goods or services related to the Goods or Services, Customer will submit a request for proposal (**RFP**) to Vendor detailing:
- the nature of and scope of the services; or
 - the specification and quantity of goods;
- required together with any other requirements or information that is relevant to the provision of additional Goods or Services and stipulating a reasonable timeframe within which Vendor may submit a proposal to Customer.
- 4.2 **Submission of proposal.** Vendor may submit a proposal to Customer. It may be in the form of an Order.
- 4.3 **Acceptance of proposal.** If the proposal is acceptable to Customer, the parties will execute an Order.
- 4.4 **Rejection of proposal.** If Customer rejects the proposal, but still wishes to acquire the items requested, Customer will not procure the additional Goods or Services from any third party without offering Vendor the opportunity to provide them at the rate and on terms quoted by another service provider.
- 4.5 **Invitation to do business.** The marketing of the Goods or Services by Vendor is merely an invitation to do business or for Customer to make an offer to procure Goods or Services. The parties only conclude a valid and binding Order when Vendor accepts the offer made by Customer. Unless otherwise agreed in Writing or Vendor accepts an offer earlier, Vendor only accepts an offer relating to Goods, when Vendor ships the Goods. If Vendor only ships part of the Goods relating to an offer, Vendor only accepts that portion of the offer. Unless proven to the contrary, Vendor only accepts an offer relating to Services, when Vendor begins providing the Services. Vendor may accept or reject any offer. If Vendor does not accept any offer, then Vendor will refund any monies already paid by Customer.
- 4.6 **Third party terms.** If a third party supplies or delivers any Goods or Services directly to Customer, third party terms or conditions may apply. Customers are solely responsible to ensure they understand and agree to those terms.
- 4.7 **Time and place.** The parties conclude any agreement between them at the time when a duly authorised representative of Vendor accepts the relevant offer and at the place where Vendor has its head office. Vendor does not need to communicate the acceptance of the offer to Customer.
- 4.8 **Orders.** The Terms in effect at the time Customer makes an offer will govern the Order. Each Order will create a separate agreement. Despite that, Vendor may consider the breach of any one Order to constitute a breach of any Order.
- 4.9 **Stock availability.** Vendor may not always have the Goods on which Customers make offers in stock. Customers may cancel the offer or make another offer on the part of the Goods that are in stock.

5 Goods

- 5.1 **Sale.** Vendor sells to Customer who purchases the Goods on the terms of the Agreement.
- 5.2 **Countries.** Customer may only make offers for Goods for delivery to the countries specified by Vendor. If Customer's shipping or billing address is not amongst those specified, Customer must not make an offer. Vendor is only able to sell into the countries specified, and Vendor is only able to ship to those countries.
- 5.3 **Shipping and packing.** Vendor will display all available shipping options and charges before Customers completes Customer's purchase. Unless otherwise agreed in Writing, Vendor will select the specific mode of shipment of the Goods and the cost of shipment will be for Customer's account. Vendor will pack the Goods in accordance with Vendor's packaging specifications for the Goods and the Fees will include the cost of packaging.
- 5.4 **Time until dispatch.** Once Vendor receives an offer, Vendor will endeavour to dispatch the Goods as soon as reasonably practicable (which may be longer than 30 calendar days) to the address specified in the offer Vendor will try to adhere to the estimated delivery dates but accepts no liability for failing to do so. Customer may not withdraw any offer due to a delay in delivery.
- 5.5 **Risk and ownership.** All risk of loss or damage to the Goods will pass to Customer upon physical delivery of the Goods to Customer's delivery address. Ownership in the Goods will only pass to Customer upon full payment of the Fees.
- 5.6 **Warranty.** The Goods will be subject to any warranty indicated in the description of the Goods appearing on the accompanying documentation, packaging, or EULA. Please review those documents carefully. Customer will have the same rights against Vendor as Vendor has against the supplier regards defects in the Goods, the intention being that Vendor's liability to Customer will be co-extensive with the right of recourse Vendor has against the supplier. Vendor will provide a copy of any warranty on request. To the extent legally possible, Vendor assigns to Customer the benefit of any supplier warranties that a supplier may give to Vendor regards the Goods. Customer may not waive any of Vendor's common law rights as against the supplier.
- 5.7 **Sales representatives.** No sales representatives of Vendor has the authority to bind Vendor and no representation, warranty or any other

statements made or given by any sales representative of Vendor will be binding on Vendor, unless given in Writing and Signed by a duly authorised representative of Vendor.

- 5.8 **Software.** Please note that intellectual property laws protect all software. Software is licensed, not sold, to Customer. Unless agreed otherwise, the license for any software is contained in the EULA. Customer will be required to agree to the EULA prior to use of the software. The applicable EULA, which takes precedence, governs the use of the software. If Customer does not agree to the EULA, Customer must return the software in accordance with the return policy of Vendor for a refund of the Fees. If Customer uses the software (or takes any other action that is described in the packaging or software as constituting Customer's consent to the EULA), then Customer agrees to the EULA and may not be eligible for a refund or return of the software, unless otherwise allowed in the documentation accompanying the software or applicable law.
- 5.9 **Resale and exports.** If a Customer wishes to resell or export any Goods, Customer must obtain all required consents or licences under all applicable laws and regulations, including the Export Administration Regulations of the United States of America that may affect or regulate such resale or export.

6 Services

Vendor will provide the Services to Customer at the Service Levels.

7 Change control

- 7.1 **Changes to Goods or Services.** During the currency of an Order, events may occur which require a change to the nature and scope of Goods or Services. The parties will not implement a change unless they comply with this clause.
- 7.2 **Change request.** A party may propose a change to the nature and scope of Goods or Services by sending a scope change document to the other party detailing the desired changes.
- 7.3 **Scope change document.** If a scope change document is made by:
- Customer, Customer will specify the reasons for that change and describe the change in sufficient detail to enable Vendor to formulate a response. Vendor will investigate the likely impact of any proposed changes on the provision of Goods or Services and will provide Customer with a scope change proposal, including amended pricing and timeframes;
 - Vendor, Vendor will detail in a scope change proposal the reasons for and impact of the change, the services required to implement the change and the effect that the changes, if implemented, will have on the relevant Order.
- 7.4 **Sign-off.** The parties will discuss and agree the proposed changes and make the necessary amendments to Vendor's scope change proposal. Customer will then consider the scope change proposal and may approve or reject it in Writing within three Business Days. If Customer:
- accepts a scope change proposal, a duly authorised representatives of the parties will sign off the scope change proposal and it will be incorporated into the relevant Order; or
 - rejects a scope change proposal, Vendor will continue to provide the Goods or Services on the existing terms.
- 7.5 **No change effective until sign-off.** No party may proceed with any change to an Order until the change and all matters relating to the change have been agreed in Writing between the parties. Pending sign-off, the parties will continue to perform their obligations without taking account of the proposed changes. No party must agree to any change, but a party will not unreasonably delay or withhold their agreement to a proposed change.
- 7.6 **Exception.** Amendments to the content of the Agreement that do not directly impact the nature and scope of the Goods or Services will not be subject to this change control procedure, but the parties will execute it in Writing.

8 Personnel

- 8.1 **Access.** With effect from the Signature Date, Customer will allow Vendor and its Personnel access (at all reasonable times) to the Sites for the purposes of fulfilling its obligations under Orders.
- 8.2 **Compliance with Customer Policies.** Vendor will take all reasonable steps to comply, and ensure that its Personnel comply, with Customer Policies. Customer must notify Vendor of all Customer Policies prior to the Effective Date and give Vendor and the relevant Personnel reasonable written notice of any change in existing Customer Policies or the implementation of new Customer Policies.
- 8.3 **Allocation of resources.** Vendor may allocate and re-allocate all Vendor Personnel who provide Services under the Agreement.

9 Customer obligations

To enable Vendor to provide the Goods or Services, Customer agrees to provide ongoing assistance, liaison, input, support and full co-operation and will, to the extent Vendor requires and at Customer's cost:

- 9.1 **provision of office and working space;** provide Vendor and its Personnel with access to adequate working space, office furniture and parking;
- 9.2 **provision of Consumables;** provide the Consumables Vendor reasonably requires to fulfil its obligations under Orders, unless Vendor agrees to provide any Consumable under an Order;
- 9.3 **decisions and approvals;** render any decisions and approvals required as soon as is reasonably possible;
- 9.4 **suitable infrastructure;** provide a suitable infrastructure for the components, software or Deliverables that Vendor must implement, including main servers, network operating systems, third party software, databases, tools and related facilities, in accordance with any specification requirements;
- 9.5 **access;** provide Vendor with reasonable access to Customer Material and Customer's computer systems;
- 9.6 **notifications;** notify Vendor as soon as reasonably possible of any issues, concerns or disputes;
- 9.7 **Customer Material;** be responsible for the accuracy and completeness of all Customer Material;
- 9.8 **supply of infrastructure;** provide electricity services, telephone services and other connectivity (including access to computer networks and the Internet) at each Site;
- 9.9 **dependent functions** make available sufficiently qualified and authorised Customer Personnel, with appropriate access rights and permissions;
- 9.10 **compliance with Vendor policies;** comply with all reasonable policies, procedures and instructions of Vendor; and
- 9.11 **no malicious software;** take commercially reasonable measures to ensure that Customer (or its Personnel or any third party) does not introduce any malicious software into any system.

10 Customer Material and Customer Data

- 10.1 **Ownership.** Ownership in all Customer Material whether under its control or not, will continue to vest in Customer and Vendor will not obtain any proprietary rights in Customer Material. Customer grants to Vendor (and Vendor's contractors as necessary) a perpetual,

non-exclusive, royalty free licence to use, reproduce and modify any Customer Material for the purposes of providing the Goods or Services or as directed by Customer.

10.2 **Privacy and protection of personal information.**

- Vendor and Customer are each responsible for complying with their respective obligations under applicable laws governing Customer Data.
- Customer remains the responsible party for determining the purpose and means of Vendor's processing of Customer Data, including that processing will not place Vendor in breach of any laws.
- Vendor and Customer both acknowledge that it is not investigating the steps the other is taking to comply with any applicable privacy and protection of personal information laws.

10.3 **Trans-border Customer Data flows.**

- Customer consents to Vendor transferring Customer Data across a country border to enable Vendor to comply with its obligations under the Agreement.
- Customer is solely responsible for determining that any transfer of Customer Data across a country border complies with the applicable laws.

10.4 **Indemnity. Customer agrees to indemnify, defend, and hold harmless Vendor (and those related to it and its Personnel, co-branders or other partners) from and against any claim, demand, loss, damage, cost, or liability (including legal costs) arising out of or relating to Customer failing to comply with its obligations under this clause. If permissible under applicable law, legal costs will be on an attorney and own client basis.**

10.5 **Access.** On a party's reasonable written request, the other party will provide the requesting party with the information that it has regarding Customer Data and its processing that is necessary to enable the requesting party to comply with its obligations under this clause and the applicable laws. The requesting party will reimburse the other party for its reasonable charges for its assistance.

10.6 **Preservation of integrity of Customer Data.** Both parties will take reasonable precautions (having regard to the nature of their obligations under the Agreement), to preserve the integrity of Customer Data and prevent any unauthorised access, corruption or loss of Customer Data.

10.7 **Return of data.** On termination of any Order, each party will return to the other party in the form in which it was received all of the other party's data or information provided to the party for the purpose of the performance of the relevant Order.

11 Customer third party contractors

11.1 **Applicable terms.** Where Vendor is required under Orders to manage or co-ordinate with Customer-appointed Third Party Contractors in relation to Third Party Contracts, the following terms will apply:

- Customer will notify Vendor in Writing of the applicable terms of the Third Party Contracts as they relate to Vendor's obligations;
- Vendor will not be required to ensure or be responsible for ensuring Customer's or the Third Party Contractors' compliance with the Third Party Contracts;
- Customer will obtain and maintain all necessary licences, consents, or authorities under the Third Party Contracts (including any consents or licences required to enable Vendor to fulfil its obligations under the Agreement) and will be liable for all fees and other charges payable to any Third Party Contractors in relation to the Third Party Contracts.

11.2 **No liability. Vendor will not be liable for any act or omission of a Third Party Contractor.**

12 Vendor warranties

12.1 **Service warranties.** Vendor warrants that in relation to the Services:

- Vendor and its Personnel will possess and have the right to use knowledge and expertise sufficient to enable Vendor to provide the Services and all maintenance and other manuals, specifications, diagnostic aids and testing devices and specialised tools and equipment necessary to enable Vendor to provide the Services.
- Vendor will employ a sufficient number of suitably trained Personnel to provide the Services and to achieve the Service Levels;
- Vendor will provide the Services in accordance with all applicable laws, enactments, and regulations.

12.2 **General Warranties.** Vendor warrants further that:

- Vendor has the legal right and full power and authority to execute and deliver, and to exercise Vendor's rights and perform Vendor's obligations under the Agreement;
- Vendor and its Personnel will not knowingly introduce any malicious software into the Customer Material or Customer's system.

13 Disclaimer of warranties

13.1 **Disclaimer.** Use of the Goods or Services is at the sole responsibility and risk of each Customer. Vendor provides the Goods or Services on an "as is" and "as available" basis. Except for the warranties given in the Agreement and to the extent allowed by law, Vendor expressly disclaims all representations, warranties, or conditions of any kind, whether express or implied, including:

- any implied warranties or conditions of satisfactory quality, no latent defects, merchantability, fitness for a particular purpose, accuracy, system integration, quiet enjoyment, title, and non-infringement; or
- any warranties regards third party software; or
- that the Goods or Services will meet the requirements of Customer or be uninterrupted, legally effective or complete, timely, secure, error-free or free from infection by malicious software. Each Customer should keep up-to-date security software on any systems used to access the Goods or Services.

13.2 **Exclusion of liability. Despite any warranty given by Vendor, Vendor will not be liable regards any defect arising from:**

- fair wear and tear, wilful damage, negligence, abnormal working conditions, failure to follow its instructions (whether oral or in Writing), misuse, or alteration or repair of the Goods without Vendor's express prior approval;
- attachments, features or devices used on the Goods that are not supplied or approved in Writing by Vendor;
- the use of any version other than the current version of the correct operating system software.

14 Customer warranties

Customer warrants that:

14.1 **it has not been induced to enter into the Agreement by any prior representations, warranties or guarantees (whether oral or in Writing), except as expressly contained in the Agreement;**

- 14.2 **by entering into an Order Customer is not acting in breach of any agreement to which Customer is a party;**
- 14.3 **if Customer requires Vendor Personnel to use software owned or operated by Customer, all necessary user licences have been obtained in advance;**
- 14.4 **the use of Customer Material by Vendor does not and will not infringe the intellectual property rights of any other person; and Customer agrees to indemnify, defend, and hold harmless Vendor (and those related to it and its Personnel, co-branders or other partners) from and against any claim for damages by any third party as a result of the breach of these warranties, including all legal costs. If permissible under applicable law, legal costs will be on an attorney and own client basis.**

15 Fees and payment

- 15.1 **Due Dates.** Customer will be liable for and pay the Fees promptly on the Due Date, without any deduction, set off or demand and free of exchange in the currency specified in the Order.
- 15.2 **Manner of payment.** Customer must make payment in the manner specified.
- 15.3 **Late payments.** Any additional surcharges and penalties specified will apply to any payment received after the Due Date to cover collection fees and additional administration costs. Customer must pay the surcharges and penalties to Vendor on-demand. Vendor may withhold or remove any Goods or halt the provision of any Services until Customer has paid all amounts that are due.
- 15.4 **Interest on overdue amounts.** To the extent permitted by applicable law, any amount not paid by Customer on the date of the statement of outstanding invoices will bear interest for the benefit of Vendor, from the Due Date until the date Customer pays it. The rate of interest will be either the published prime overdraft rate from time to time of Vendor's bankers or 15%, whichever is higher. A letter signed by a general, branch or other bank manager setting out their rate will be proof of the rate. Interest will be payable on a claim for damages from when the damages were suffered.
- 15.5 **Appropriation.** Vendor may appropriate any payment received from Customer towards the satisfaction of any indebtedness of Customer to Vendor under the Agreement.
- 15.6 **Withhold payment.** Customer may not withhold payment of any amount due to Vendor for any reason.
- 15.7 **Certificate.** A certificate, signed by an accountant appointed by Vendor, of the amount due by Customer and the date on which it is payable will be conclusive irrefutable proof of the correctness of the certificate's contents.
- 15.8 **Tax.** All Fees exclude any Tax, which will be payable where applicable by Customer in addition to the Fees.
- 15.9 **Costs to implement.** Unless otherwise stated, the parties will bear their own costs to implement (or perform their obligations under) the Agreement.
- 15.10 **Payment profile.** Customer and any signatory consent and agree that Vendor may provide any registered credit bureau with information about the payment of amounts.
- 15.11 **Expenses.** Customer will reimburse Vendor for all reasonable expenses that Vendor or Vendor's Personnel incur in fulfilling Vendor's obligations under the Agreement. Expenses include travelling, subsistence, goods, and services purchased on Customer's behalf, communications, stationery, and report or presentation material. Vendor will bill for all travelling and subsistence expenses in accordance with Vendor's standard policies from time to time.
- 15.12 **Reimburse costs.** If Vendor suspends the Services or removes any Goods supplied by Vendor, Customer will pay to Vendor the costs incurred by Vendor (including redeployment, travel and associated expenses) in remobilising Vendor's employees affected by the Agreement and recommencing the Services or re-installing the removed Goods.

16 Delays

- 16.1 **Definition.** Where:
- Customer does not provide access to a person, place or thing timeously; changes a decision that Customer has previously communicated to Vendor; does not reply to a communication from Vendor within the required (or reasonable) period required; unreasonably withholds an acceptance or consent; commits a breach of the Agreement that is not otherwise categorised as a Delay; or
 - Vendor's performance is affected by an event of force majeure; or
 - the failure of a third party supplier or service provider;

it will constitute a **Delay**.

- 16.2 **Notification.** A party will notify the others of an event that has occurred or is anticipated and that:
- the notifying party believes is or may be a Delay;
 - occurred no more than 14 calendar days previously.
- 16.3 **Extension of time for performance.** Vendor's performance will be extended on a reasonable basis in proportion to the prejudice caused by the Delay, provided that the extension is at least the number of days of the Delay.
- 16.4 **Proposals for Delay.**
- If a Delay arises, Customer may instruct Vendor to submit proposals for different ways of dealing with the Delay. Vendor will submit proposals to Customer, which may set out a variety of methods for dealing with the Delay that Vendor considers practical. Proposals for addressing Delays will include proposed changes to the scope of work, prices and any delay to the date of performance assessed by Vendor.
- Vendor will submit proposals within 14 calendar days of being requested to do so by Customer and Customer will reply to Vendor within three Business Days of the submission:
- accepting the proposal, or
 - requiring a revised proposal, in which event, Customer will provide Vendor with reasons for doing so. Vendor will submit the revised proposal within 21 calendar days of being required to do so; or
 - notifying Vendor that the proposal will not be accepted and that a revised proposal is not required. In such event, a dispute will be deemed to exist between the parties.

16.5 Assessing Delays.

The changes to the prices must be assessed with regard to the effect of the Delay on:

- the fee for the work already done, and
- the forecast fee for the work not yet done.

A delay in performance is assessed as the length of time that, due to a Delay, planned performance is later than originally indicated.

Vendor will include in Vendor's proposal for a change to the scope proposed rates for its Personnel.

- 16.6 **Implementation.** Vendor will implement each accepted proposal in accordance with the proposal's terms.
- 16.7 **Milestones.** If an amount would have been payable to Vendor had it not been for a Delay, Customer will pay Vendor the amount, despite the fact that any milestone has been adjusted.
- 17 Intellectual property**
- 17.1 **Deliverables.** Except as provided to the contrary in the Agreement, all right, title, and ownership to or of any Deliverables are the sole property of or will vest in Vendor or a third party licensor. All moral rights are reserved. Upon payment in full, Vendor grants Customer a non-exclusive, perpetual, fully paid up license to use, reproduce and modify (if applicable) any Deliverables in the form delivered to Customer. The perpetual license applies only to Deliverables that Vendor leaves with Customer at the conclusion of the Agreement and is only for Customer's internal business operations. Customer will not resell or distribute the Deliverables to any third party. The parties may expressly agree to the contrary in any Order.
- 17.2 **Retention of Rights.** Vendor has created, acquired or otherwise obtained rights in the Vendor Technology and despite anything contained in the Agreement, Vendor will own all right, title, and interest to the Vendor Technology.
- 17.3 **Use of Vendor Technology.** If Vendor utilises any Vendor Technology in connection with Vendor's performance under an Order, the Vendor Technology will remain the property of Vendor and Customer will not acquire any right or interest.
- 17.4 **Trademarks.** Vendor's logo and sub-logos, marks, and trade names are the trademarks of Vendor and no person may use them without permission. Any other trademark or trade name that may appear on the marketing material of Vendor is the property of its respective owner.
- 17.5 **Restrictions.** Except as expressly permitted under the Agreement, the Goods or Services may not be:
- modified, distributed, or used to make derivative works;
 - rented, leased, loaned, sold or assigned;
 - decompiled, reverse engineered, or copied; or
 - reproduced, transferred, or distributed.
- 17.6 **Prosecution.** All violations of proprietary rights or the Agreement will be prosecuted to the fullest extent permissible under applicable law.
- 18 Confidential information**
- 18.1 **Responsibility to keep information confidential.** Each party must keep confidential any information it receives from the other party or under this Agreement.
- 18.2 **The receiving party's responsibilities.** The party that receives confidential information agrees to protect the interests of the party it is from, and will:
- only use it to comply with its responsibilities under this Agreement.
 - only give the information to any of its employees or agents that need it, and only give as much of it as they need.
 - use reasonable security procedures to make sure employees or agents keep the information confidential.
 - get promises of confidentiality from those employees or agents who need access to the information.
 - not reveal the information to anyone else.
 - not use it for any purpose other than this Agreement.
- 18.3 **End of this Agreement.** At the end of an Agreement, the parties will give back to the other all originals and copies of confidential information of the other that they have. If the other agrees, they may destroy the confidential information they have.
- 18.4 **Exceptions.** These responsibilities will not apply to any information that:
- is lawfully in the public domain (available to the general public) when a party received it;
 - lawfully becomes part of the public domain afterwards;
 - is given to the receiving party afterwards by a different person who is allowed to reveal the confidential information; or
 - is given to comply with a court order or other legal duty.
- 18.5 **Indemnity.** Each party indemnifies the other against any loss or damage that the other may suffer because of a breach of this clause by a party or its employees or agents.
- 18.6 **Survival.** This clause about confidential information is separate from the rest of this Agreement and remains valid for five years after the end of this Agreement.
- 19 Non-solicitation**
- No party will, during the currency of any Order or for a period of 12 calendar months following termination, directly or indirectly solicit, offer employment to, employ, or contract in any manner with any Personnel of the other party who were involved in the implementation or execution of the Order.
- 20 Intellectual property infringement**
- 20.1 **Defence.** Vendor will defend Customer against any claims made by an unaffiliated third party that any Goods or Services infringes its patent, design, copyright, or trade mark and will pay the amount of any resulting adverse final judgment (or settlement to which Vendor consents). Vendor will reimburse Customer with all costs reasonably incurred by Customer in connection with assisting Vendor with the defence of the action. Customer will promptly notify Vendor of the claim in Writing and Vendor will have sole control over its defence or settlement.
- 20.2 **Consequences of successful claim by third parties.** If any third party succeeds in its claim for the infringement of any intellectual property rights, Vendor may within 30 calendar days of the infringing item having been found to so infringe:
- obtain for Customer the right to continue using the infringing item or the parts that constitute the infringement; or
 - replace the infringing item or the parts that constitute the infringement with another product that does not infringe and that in all respects operates substantially in accordance with its specifications; or
 - alter the infringing item in a way as to render it non-infringing while still in all respects operating substantially in accordance with its specifications; or
 - withdraw the infringing item and refund to Customer all Fees paid by Customer to Vendor under the relevant Order specifically with regard to the infringing item in the preceding 6 calendar month period.
- 20.3 **Exclusion.** Vendor will not be liable for any claim that arises out of goods or services Customer selects and acquires from third parties.
- 20.4 **Survival.** This clause will survive termination of the Agreement.
- 21 Project managers**
- 21.1 **Appointment.** On the Effective Date, each party will appoint a suitably qualified and responsible person to act as their project manager.

21.2 **Function.** The project managers' responsibilities include to manage and coordinate the Goods or Services and to discuss and manage any changes.

21.3 **Replacement.** A party may, on seven calendar days' written notice to the other, appoint an alternative project manager who is suitably qualified and responsible.

22 Limitation of liability

22.1 **Direct damages limited.** To the extent permitted by applicable law, regardless of the form (whether in contract, delict or any other legal theory) in which any legal action may be brought, each party's maximum liability for direct damages for anything giving rise to any legal action will be an amount equal to the total fees already paid (or due and payable) by you to us in respect of this Agreement for the period 12 months preceding the claim. The aggregate amounts for all claims will not be greater than the maximum amount.

22.2 **Indirect damages excluded.** To the extent permitted by applicable law, in no event will a party be liable for any indirect, incidental, special or consequential damages or losses (whether foreseeable or unforeseeable) of any kind whatsoever and howsoever caused (including loss of profits, loss of goodwill, damages relating to lost or damaged data or software, loss of use, damages relating to downtime or costs of substitute products) arising from this Agreement.

22.3 **Exclusions.** The limitation contained in this clause will not apply to (i) any breach by a party of the other party's proprietary or confidential information or intellectual property or damages arising from a party's gross negligence.

22.4 **Vendor not liable for Customer default.** Vendor will not be liable for any loss or damage suffered by Customer arising out of or in connection with any breach of the Agreement by Customer or any act, misrepresentation, error or omission made by or on behalf of Customer or Customer's Personnel.

22.5 **Other goods or services.** Vendor is not liable for any other goods, or service provided by any third party.

22.6 **Liability.** Without limiting liability, neither party will be liable to the other for any loss that it may suffer as a result of theft, fraud, or other criminal act by a party or its personnel.

23 Breach and termination

23.1 **Breach.** If a party:

- does not fix any breach of this Agreement (failure to comply with it) within seven days of receiving written notice from the other party to do so;
- breaches this Agreement materially twice or more in any six month period;
- is insolvent (bankrupt), or has some legal disability, for example, if they are placed under administration;
- takes steps to deregister itself (close down) or is deregistered;
- makes any settlement or arrangement with its creditors;
- fails to pay a court order against it (does not satisfy a writ of execution) for more than one million rand, within 21 days;

then the other party may, without prejudice to any of its rights:

- claim specific performance of this Agreement (make the party comply with this Agreement); or
- immediately cancel this Agreement in Writing; and
- claim damages from the other party, including any claim for any fees already due.

23.2 **Discontinue the goods, or services.** The Agreement will automatically terminate if Vendor discontinues the Goods or Services.

24 Effect of termination

24.1 **Amounts due to us become due and payable.** On termination, cancellation, or expiry this Agreement, all amounts due to Vendor for Services rendered before termination will become due and payable even if Vendor has not yet invoiced them. Customer may not withhold the amounts for any reason, unless the arbitrator directs otherwise.

24.2 **Duties on termination.** On termination, cancellation, or expiry of this Agreement:

- Vendor will stop providing the services; and
- each party will deliver to the other party, or at the other party's option destroy (and procure the delivery or destruction by third party contractors of) all originals and copies of confidential information and proprietary materials in its or their possession or under its or their control.

24.3 **Survival.** The termination, cancellation, or expiry of this Agreement will not affect the enforceability of the terms that are intended to operate after expiry or termination.

25 Resolving disputes

25.1 **Notifying each other.** There will be a dispute about or from this Agreement if a party writes to the other about it and asks for it to be resolved under this clause. The parties must refer any dispute to be resolved by:

- Negotiation (direct talks to try and agree how to end the dispute); failing which
- Mediation (talks in which a neutral third party tries to help the parties agree how to end the dispute); failing which
- Arbitration (a hearing after which a neutral third party makes a binding decision about the dispute).

25.2 **Negotiation.** Each party must make sure that their chosen representatives meet within 10 business days of notification, to negotiate and try to end the dispute by written agreement within 15 more business days.

25.3 **Mediation.** If negotiation fails, the parties must refer the dispute to mediation under AFSA's rules.

25.4 **Arbitration.** If mediation fails, the parties must refer the dispute within 15 business days to arbitration (including any appeal against the arbitrator's decision) The parties will agree and appoint one arbitrator. The arbitration will be held in English. The arbitration will be in Cape Town under AFSA's latest rules for expedited arbitrations.

25.5 **Agree otherwise in an Order.** The parties may agree otherwise in an Order.

25.6 **Periods.** The parties may agree in Writing to change the periods for negotiation or mediation.

25.7 **Urgent interim relief.** This clause will not stop a party from applying to court for urgent interim relief (temporary help) while the dispute resolution process is being finalised. An example might be an interdict (type of court order).

25.8 **Severability.** This clause is separate and divisible from the rest of this Agreement and remains effective even if this Agreement ends or is invalid.

26 Notices and domicile

26.1 **Notices.** The parties will send all notices, authorisations, disclosures, acknowledgements, or requests by hand delivery, prepaid registered post, fax, or email to an address or number given in the relevant Order.

26.2 **Service (delivery) address for legal documents.** Each party chooses its street addresses and numbers as its domicilium citandi et

executandi (its address for the service of any document used in legal action) for this Agreement.

- 26.3 **Change of addresses or numbers.** Each party may change the addresses or numbers in the relevant Order to any other addresses or numbers by Writing to the other party 14 days before the change.
- 26.4 **Deemed delivery.** Notice will be considered to be delivered on the date shown on any hand-delivered, prepaid registered post, courier, fax or email confirmation of delivery.

26.5 **Notice actually received.** If a party actually receives any notice or other communication, this will be good enough.

27 Force Majeure

- 27.1 **Parties not liable.** No party will be responsible for any breach of this Agreement caused by circumstances beyond its control, including flood, fire, earthquake, war, tempest, hurricane, industrial action, government restrictions, or acts of God.
- 27.2 **Party affected to notify other party.** If there is an event of force majeure, the party affected will tell the other immediately, and they will meet within seven days to negotiate other ways to carry out any affected responsibilities under this Agreement. The parties will continue to comply with the responsibilities that are not affected by the circumstances.
- 27.3 **Right to cancel.** If a party cannot fulfil a material (significant) part of its responsibilities under this Agreement for more than 60 days because of force majeure, the other party may cancel this Agreement by written notice.

28 Assignment and subcontracting

- 28.1 **No Assignment.** No party may delegate its duties under this Agreement or assign its rights under this Agreement, in whole or in part. Vendor may assign this Agreement to any successor or purchaser of its business or some of its assets.
- 28.2 **Exception.** Despite this clause, Vendor may cede and assign all rights and obligations under this Agreement to a related person without Customers' prior written consent, provided that Vendor notifies Customer within a reasonable time of the event occurring.
- 28.3 **Vendor third party contractors.** Vendor may sub-contract or delegate its obligations under this Agreement to third party contractors. Vendor will remain liable for performance of the third party contractors. No one may require Vendor to disclose the terms (including payment terms) of any sub-contract entered into with respect to Vendors obligations under this Agreement.

29 Relationship

- 29.1 **No temporary employment service.** Nothing in this Agreement will be construed as constituting a temporary employment service.
- 29.2 **No partnership.** Nothing in this Agreement will be construed as creating a partnership between the parties and no party will have any authority to incur any liability on behalf of the other or to pledge the credit of the other party.
- 29.3 **No employment relationship.** Each party enters into the Agreement as an independent contractor. The Agreement does not create any other relationship, including employment for any purpose, partnership, agency, trust or joint venture relationship. The relationship between Customer and Vendor (and its Personnel) will not be deemed to be one of employer/employee.

30 Non-exclusivity

Vendor may provide any goods or services to any other person or entity. Vendor may exploit its intellectual property (including providing services or creating programming or materials for other customers or itself, providing services that are competitive with any Deliverables, irrespective of their similarity to the Deliverables), subject to its confidentiality obligations.

31 General

- 31.1 **Entire Agreement.** The Agreement is the entire agreement between the parties on the subject.
- 31.2 **Changes.** No change to this Agreement is effective unless in Writing and Signed with a handwritten signature by authorised signatories of both parties.
- 31.3 **Waiver (giving up rights).** Any favour Vendor may allow Customer will not affect or substitute any of Vendor's rights against Customer.
- 31.4 **Severability.** If any term is void (invalid), unenforceable, or illegal, the term may be severed (removed) from and will not affect the rest of this Agreement if it does not change its purpose.
- 31.5 **Governing law.** South African law governs this Agreement.
- 31.6 **Jurisdiction.** Customer consents to the jurisdiction of the Magistrate's Court in respect of any action or proceedings that Vendor may bring against Customer in connection with this Agreement, even if the action or proceedings would otherwise be beyond its jurisdiction without prejudice to Vendors right to institute any action in any other court having jurisdiction.
- 31.7 **Costs.** Each party is responsible for its own costs of drafting and negotiating this Agreement.
- 31.8 **Publicity.** A party will not make or issue any formal statement to the press in connection with the Agreement, without the prior written consent of the other parties.
- 31.9 **Right to reference.** Customer consents to Vendor using its name and a general description of the Goods or Services in any marketing or sales material.