

Agreement for the Provision of Infrastructure as a Service

ANNEXURE B

AGREEMENT FOR INFRASTRUCTURE AS A SERVICE (IaaS)

CONTRACT NUMBER : ***(To be confirmed)***

CONTRACTOR : ***(To be confirmed)***

NATURE OF WORK : ***Provision of Infrastructure as a Service***

LOCALITY : ***PRASA Group, NATIONALLY***

DATE OF ACCEPTANCE : ***(To be confirmed)***
OF TENDER

EFFECTIVE DATE : ***(To be confirmed)***

DATE OF COMPLETION : ***(To be confirmed)***

CONTRACT VALUE : ***(To be confirmed)***

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1. DEFINITIONS

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

- 1.1. “**Agreement**” shall mean this agreement for the Infrastructure as a Service, together with annexures attached hereto;
- 1.2. “**Applicable Law**” shall mean the Constitution and all applicable statutes, regulations, codes of good practice, sector codes, industry charters, ordinances, by-laws, rules (including rules of court) and other secondary legislation, directives, practice notes having force of law in South Africa and the common law arising out of judicial decisions, notifications and with which the Parties are bound to comply;
- 1.3. “**Business Day**” shall mean any day except Saturday, Sunday or proclaimed public holiday in South Africa;
- 1.4. “**BBBEE**” shall mean Broad Based Black Economic Empowerment as defined in Act, Act 53 of 2003;
- 1.5. “**Change in Law**” shall mean the coming into effect after the Signature Date of this Agreement of any Applicable Law, or any amendment or variation to any Applicable Law other than any Applicable Law that on or before Signature Date has been published in a draft bill;
- 1.6. “**Completion Date**” shall mean the date which is TWENTY FOUR (24) months from the Effective Date;
- 1.7. “**Confidential Information**” shall mean all confidential information owned exclusively by either Party relating to its business or operations and including, but without being limited thereto, information relating to technical know-how and data, drawings, methods, processes and procedures, intellectual property and other information, which comes into the possession or under the control of the other Party in any manner whatsoever, in the course of this Agreement;

- 1.8. “**Constitution**” shall mean the Constitution of the Republic of South Africa;
- 1.9. “**CONTRACTOR**” shall mean **(To be confirmed)** a company duly registered in accordance with the Companies Act, Act 71 of 2008 and having the registration number **(To be confirmed)**;
- 1.10. “**Contract Price**” means the contract price specified in Annexure C, inclusive of VAT, payable by PRASA to the CONTRACTOR in accordance with clause 9 of this Agreement;
- 1.11. “**CONTRACTOR’s Default**” means any of the following events or circumstances:
- 1.11.1. any arrangement, composition or compromise with or for the benefit of creditors (including any voluntary arrangement as defined in the Insolvency Act, 1936 or the Companies Act, 2008) being entered into by or in relation to the CONTRACTOR;
 - 1.11.2. a liquidator, business rescue practitioner or the like taking possession of or being appointed over, or any, winding-up, execution or other process being levied or enforced upon the whole or any material part of the assets of the CONTRACTOR;
 - 1.11.3. the CONTRACTOR ceases to carry on business;
 - 1.11.4. the CONTRACTOR commits a breach of any of its material obligations under this Agreement; and /or
 - 1.11.5. the CONTRACTOR abandons the Works for a period of longer than ten (10) Business Days (other than as a consequence of a breach by the CONTRACTOR of its obligations under this Agreement);
- 1.12. “**Effective Date**” notwithstanding the Signature Date, the Effective Date, shall mean **(To be confirmed)** being the date on which the CONTRACTOR commences to render the Services;
- 1.13. “**Force Majeure Event**” shall bear the meaning assigned thereto in clause 15 which directly causes either Party to be unable to comply with all or a material part of its obligations under this Agreement;

- 1.14. **“Good Industry Practice”** shall mean, in relation to the manner in which the Services are performed and rendered, the standards, practices, methods and procedures conforming to Applicable Law, and exercising that degree of skill, care, diligence, prudence and foresight that would reasonably and ordinarily be expected from a skilled and experienced person engaged in a similar type of undertaking under similar circumstances;
- 1.15. **“Parties”** shall mean the CONTRACTOR and PRASA and **“Party”** shall mean either one of them as the context may require;
- 1.16. **“PRASA”** shall mean the Passenger Rail Agency of South Africa, a Public Entity established in terms of the Legal Succession to the South African Transport Services Act, Act 9 of 1989;
- 1.17. **“PRASA’s Default”** shall mean if any of the following events occur:
- 1.17.1. any arrangement, composition or compromise with or for the benefit of creditors (including any voluntary arrangement as defined in the Insolvency Act, 1936 or the Companies Act, 2008) being entered into by or in relation to PRASA;
 - 1.17.2. a liquidator, business rescue practitioner or the like taking possession of or being appointed over, or any, winding-up, execution or other process being levied or enforced upon the whole or any material part of the assets of the PRASA;
 - 1.17.3. PRASA ceases to carry on business;
 - 1.17.4. PRASA fails to make the payment in accordance with the provisions of clause 9; or
 - 1.17.5. PRASA commits a breach of any material term of this Agreement;
- 1.18. **“Professional Indemnity Insurance”** means the professional indemnity insurance of the CONTRACTOR which shall have maximum liability cover of in accordance with the provisions of clause 25;

- 1.19. “**Project Term**” shall mean a period of TWENTY FOUR (24) months commencing on the Effective Date and lapsing on the Completion Date;
- 1.20. “**Public Entity**” shall mean a public entity as defined in the Public Finance Management Act, 1999;
- 1.21. “**Responsible Authority**” shall mean any ministry, minister, organ of state, official, official in the public administration or any other governmental or regulatory department, commission, department, entity, service utility, board of directors, committee, agency, instrumentality or authority (in each case, whether national, provincial or municipal) or any court, each having jurisdiction over the matter in question;
- 1.22. “**Restricted Enterprise**” shall mean an entity restricted from contracting with PRASA or any other Public Entity as a result of being listed either on the register for tender defaulters compiled in terms of the regulations to the Prevention and Combating of Corrupt Activities Act 12, of 2004; or any other relevant applicable Law;
- 1.23. “**Services**” shall mean the Infrastructure as a Service and services related thereto for and on behalf of PRASA as more fully described in clause 8 of this Agreement;
- 1.24. “**Service Schedules**” shall mean the CONTRACTOR’s Service Schedules signed between the parties hereto;
- 1.25. “**Signature Date**” shall mean the date of signature of this Agreement by the last Party signing;
- 1.26. “**South Africa**” shall mean the Republic of South Africa;
- 1.27. “**Sub CONTRACTOR**” shall mean a sub CONTRACTOR appointed by the CONTRACTOR subject to the provisions of this Agreement;
- 1.28. “**Variation**” shall mean any variations or extension of the scope of the Services and such Variation shall be limited to 10% of the value of this Agreement; and
- 1.29. “**VAT**” shall mean value-added tax levied in terms of the Value-Added Tax Act, Act 89 of 1991.

2. INTERPRETATION

This Agreement shall be interpreted according to the following provisions, unless the context requires otherwise:

- 2.1. references to the provisions of any law shall include such provisions as amended, re-enacted or consolidated from time to time in so far as such amendment, re-enactment or consolidation applies or is capable of applying to any transaction entered into under this Agreement;
- 2.2. references to “Month” shall be to a calendar month;
- 2.3. references to “Parties” shall include the Parties’ respective successors-in-title and, if permitted in this Agreement, their respective cessionaries and assignees;
- 2.4. references to a “person” shall include an individual, firm, company, corporation, juristic person, Responsible Authority, and any trust, organization, association or partnership, whether or not having separate legal personality;
- 2.5. references to any “Responsible Authority” or any public or professional organization shall include a reference to any of its successors or any organization or entity, which takes over its functions or responsibilities;
- 2.6. references to “clauses”, “sub-clauses” and “Schedules” are references to the clauses, sub-clauses and Annexures of this Agreement;
- 2.7. the headings of clauses, sub-clauses and Schedules are included for convenience only and shall not affect the interpretation of this Agreement;
- 2.8. the Parties acknowledge that each of them has had the opportunity to take legal advice concerning this Agreement, and agree that no provision or word used in this Agreement shall be interpreted to the disadvantage of either Party because that Party was responsible for or participated in the preparation or drafting of this Agreement or any part of it;

- 2.9. words importing the singular number shall include the plural and *vice versa*, and words importing either gender or the neuter shall include both genders and the neuter;
- 2.10. references to “this Agreement” shall include this Agreement as amended, varied, novated or substituted in writing from time to time;
- 2.11. any reference to any enactment, order, regulation or similar instrument shall be construed as a reference to enactment, regulation or instrument as amended, re-enacted or replaced from time to time;
- 2.12. when any number of days is prescribed in this Agreement, same shall be reckoned exclusively of the first and inclusively of the last day unless the last day falls on a day which is not a Business Day in which case the last day shall be the immediately following Business Day;
- 2.13. references to “written” do not include communications by way of electronic mail;
- 2.14. annexures to this Agreement shall be deemed to be incorporated in and form part of this Agreement; and
- 2.15. the expiration or termination of this Agreement shall not affect such of the provisions of this Agreement as expressly provide that they will operate after any such expiration or termination or which of necessity must continue to have effect after such expiration or termination, notwithstanding that the clauses themselves do not expressly provide for this.

3. INTRODUCTION

- 3.1. PRASA approved the appointment of **(To be confirmed)** for the Infrastructure as a Service for and on behalf of the PRASA’s Group.
- 3.2. PRASA is appointing the CONTRACTOR to perform and render the Services to, for and on behalf of PRASA, based on the Services Schedules Annexure attached hereto and in accordance with the terms and conditions of this Agreement.

4. INCONSISTENCY

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

- 4.1.1. this Agreement and the annexures hereto;
- 4.1.2. the RFP;
- 4.1.3. Project Prerequisites; (To be confirmed)
- 4.1.4. Service Schedules;
- 4.1.5. the appointment letter; and
- 4.1.6. the CONTRACTOR's acceptance.

4.2. In the event that there is any conflict between the terms, conditions and/or provisions of this Agreement and the aforementioned documents, the provisions of this Agreement shall prevail until such time as the Parties have resolved the matter and reached agreement thereon. In the event that the Parties fail to reach agreement on the terms, conditions and/or provisions as aforesaid, either Party shall be entitled to refer the matter to arbitration in terms of this Agreement or approach a court of competent jurisdiction to resolve the conflict.

5. COMMENCEMENT AND DURATION

Notwithstanding the Signature Date, this Agreement shall be deemed to have commenced on the Effective Date and shall terminate at the end of the Completion Date.

6. REPRESENTATION AND WARRANTIES

6.1. CONTRACTOR Warranties

The CONTRACTOR hereby warrants that:

- 6.1.1. it is a limited liability company, duly incorporated and validly existing under the laws of South Africa and has taken all necessary actions to authorise its execution of and to fulfil its obligations under this Agreement;

- 6.1.2. its obligations under this Agreement are legal, valid, binding and enforceable against it, in accordance with the terms of this Agreement;
- 6.1.3. all information disclosed by or on behalf of the CONTRACTOR at any time up to the Signature Date and up to the Completion Date and, in particular, during the bid process preceding the award of this Agreement to the CONTRACTOR, is true, complete and accurate in all material respects and the CONTRACTOR is not aware of any material facts or circumstances not disclosed to PRASA which would, if disclosed, be likely to have an adverse effect on PRASA's decision (acting reasonably) to award this Agreement to the CONTRACTOR ;
- 6.1.4. the execution and performance of this Agreement does not and will not contravene any provision of its constitutive documents as at the Signature Date, or any order or other decision of any Responsible Authority or arbitrator that is binding on the CONTRACTOR as at the Signature Date;
- 6.1.5. no litigation, arbitration, investigation or administrative proceeding is in progress as at the Signature Date or, to the best of the knowledge of the CONTRACTOR as at the Signature Date having made all reasonable enquiries, threatened against it which is likely to have a material adverse effect on the ability of the CONTRACTOR to undertake the Services;
- 6.1.6. the CONTRACTOR is not subject to any obligation, non-compliance with which is likely to have a material adverse effect on its ability to undertake the Services;
- 6.1.7. no proceedings or any other steps have been taken or, to the best of the knowledge of the CONTRACTOR having made all reasonable enquiries, threatened for the winding-up or liquidation (whether voluntary or involuntary, provisional or final), business rescue (whether provisional or final) or deregistration of CONTRACTOR, or for the appointment of a liquidator, business rescue practitioner or similar officer over it or over any of its assets;
- 6.1.8. it will use reasonable care and skill in carrying out its obligations under this Agreement;
- 6.1.9. it is not a Restricted Enterprise;

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

6.1.11. it has all the insurances required in its sector.

6.2. PRASA WARRANTIES

PRASA hereby warrants that:

6.2.1. it has taken all necessary actions to authorise its execution of and to fulfil its obligations under and in terms of this Agreement;

6.2.2. the execution and performance of this Agreement does not and will not contravene any provision of its constitutive documents as at the Signature Date, or any order or other decision of any Responsible Authority or arbitrator that is binding on PRASA as at the Signature Date;

6.2.3. it is not subject to any obligation, non-compliance with which is likely to have a material adverse effect on its ability to perform its obligations in terms of this Agreement; and

6.2.4. its obligations under and in terms of this Agreement are legal, valid, binding and enforceable against it, in accordance with the terms of this Agreement.

7. CO-OPERATION

Each Party shall co-operate with the other in the exercise and performance of their respective rights and obligations in terms of this Agreement.

8. SERVICES

8.1. The CONTRACTOR shall provide the Services in accordance with Good Industry Practice and the terms and conditions of this Agreement.

8.2. The CONTRACTOR shall provide PRASA with the following hosting environments and services:

8.3. **Wintel Operating Systems Environment**

- 8.3.1. Provide hosted infrastructure environment for Wintel (Windows Server, Linux, CentOS, and Debian, Microsoft SQL databases.
 - 8.3.2. Migrate the systems to the new environment in current form
 - 8.3.3. Upgrade the Operating Systems to newer versions
 - 8.3.4. Implement backup environment
 - 8.3.5. Implement security measures (Anti-Virus, Access Control, Patch management)
- 8.4. SAP Operating Systems Environment**
- 8.4.1. Provide hosted infrastructure environment for SAP (Linux, and Oracle databases)
 - 8.4.2. Implement new Linux Operating Systems to run SAP applications currently running on SPARC.
 - 8.4.3. Install and Migrate SAP systems into Linux Operating System.
 - 8.4.4. Migrate Oracle databases to new hosted Oracle database environment.
 - 8.4.5. Implement operating Systems security measures (Access Control, Patch & release management)
 - 8.4.6. Implement databases security (leverage some of the existing licenses)
 - 8.4.7. Implement backup environment
- 8.5. Post implementation and Support**
- 8.5.1. Support - Provide 247/365 days support to ensure system availability
 - 8.5.2. Availability - Provide 999.9 % uptime and availability
 - 8.5.3. Backup - Provide backup reports, failures and successes
 - 8.5.4. Compliance - Provide Anti-virus status, risks and mitigations
 - 8.5.5. Vulnerabilities - Provide Security Vulnerabilities, Risks and mitigations controls
- 8.6. The Parties shall enter into and agree to relevant Service Schedules in terms of which the services will be provided. Copy of the Service Schedules are marked **Annexure “A”**.
- 8.7. PRASA expressly authorises the CONTRACTOR to provide and render the Services to, or and/or on behalf of PRASA as provided for under and in terms of this Agreement.
- 8.8. The Parties record and agree that there may be occasions when Services are



affected by periods of high demand or unusual circumstances (other than a Force Majeure). In such instances, the CONTRACTOR undertakes to provide and render the Services to PRASA as soon as practically possible.

- 8.9. The Parties shall, as and when required by either of them, review the level of the Service provided and rendered by the CONTRACTOR to PRASA and, to the extent required, make any amendments thereto as agreed to between the Parties in writing.

9. MAINTENANCE AND WARRANTY

9.1. The CONTRACTOR gives PRSA the same warranties in respect of the Equipment and replacement parts in respect thereof which are in turn given to the CONTRACTOR by the product manufacturers of the Equipment concerned. The CONTRACTOR will pass through such warranties so that the product manufacturer concerned will be construed to have given the warranties directly to PRASA. The CONTRACTOR shall procure that that this warranty is, throughout the term of this Agreement, in force and honoured by any such product manufacturer.

9.2. Except as expressly stated in this Agreement or by operation of law, CONTRACTOR gives no other warranties

10. PAYMENT

10.1. Payments to the CONTRACTOR for Services performed and rendered shall be paid in accordance with the Price Schedule contained in **Annexure "B"**.

10.2. Payment under this contract shall be made by PRASA to the CONTRACTOR's bank account:

Beneficiary Name :

Bank name :

Branch Code :

Account no :

10.3. PRASA shall not make any payments into any bank account other than the bank account identified above. Any notices to change the information of the bank account above will take effect once it is duly issued and signed by an authorised representative of the CONTRACTOR or any other person so authorised in writing by

10.4. PRASA agrees to pay the CONTRACTOR for the as per the following terms:

10.4.1. Payment will be effected following the submission of a valid invoice, accompanied by a detailed report for the services provided during the payment period;

10.4.2. PRASA delegated official shall confirm the services rendered for the payment and authorise payment only after such confirmation.

10.5. PRASA shall effect payment:

10.5.1. 30 (thirty) days after submission of such invoice/s by the CONTRACTOR to PRASA, provided such invoices are not withdrawn by the CONTRACTOR under/in terms of query processes. For avoidance of doubt, payment shall be effected within 30 (thirty) days after submission of invoices which are not withdrawn by the CONTRACTOR; and

10.5.2. without withholding, deduction, counterclaim and/or sett-off of any nature whatsoever.

9.6. Should any payment not be received by the due date for payment thereof:

9.6.1. the CONTRACTOR shall inform PRASA thereof by way of notice sent by the CONTRACTOR to PRASA. In the event that the outstanding amount is not settled within 21 (twenty one) days of such notice having been sent by the CONTRACTOR, such amount will bear interest at the prime rate of interest charged by the CONTRACTOR's bankers from time to time, from the actual due date therefore up to and including the date of actual payment thereof;

9.6.2. the CONTRACTOR shall be entitled, in addition to and without prejudice to and/or limitation of any of its other rights, to:

9.6.2.1. put on hold further supply of Services under any and/or all open/active and/or pending orders related to the defaulting division within PRASA;

9.6.2.2. to take any other action it may deem necessary, in accordance with this Agreement or otherwise, until such payment is received.

- 9.7. In the event that a relevant payment due by PRASA to the CONTRACTOR is not timeously made by PRASA, PRASA herewith indemnifies and undertakes to hold the CONTRACTOR harmless with regard to any and all direct costs, expenses, claims, damages, losses and/or demands the CONTRACTOR may suffer or incur (or may have suffered and/or incurred) with regard to delivery of any and all Services which cannot and/or does not proceed, and/or which is terminated, as a result of non-receipt or late receipt of the relevant payment.

11. INVOICING

- 11.1. The CONTRACTOR shall issue to PRASA invoices in accordance with the Price and Payment Schedule (Annexure C) and the invoices shall:
- 11.1.1. indicate the VAT number of the CONTRACTOR;
 - 11.1.2. indicate the full details of the CONTRACTOR and bank account;
 - 11.1.3. be a valid tax invoice in accordance with the requirements of the South African Revenue Services; and
 - 11.1.4. indicate the vendor number provided to the CONTRACTOR by PRASA.

12. INSURANCE

The CONTRACTOR confirms that it maintains Professional Indemnity Insurance with a well- established insurance office or a reputable underwriter. The CONTRACTOR undertakes to maintain such insurance for a period of one (1) year after completion of the Services, provided the same remains available in the market at reasonable premium rates.

13. PLACE WHERE SERVICES WILL BE RENDERED

The CONTRACTOR will perform the Services in accordance with this agreement as identified by PRASA and in terms of this agreement. In addition, the CONTRACTOR will perform Services on the telephone and at such other places as necessary to perform the Services in accordance with this Agreement.

14. BREACH

If either Party breaches any material provision or term of this Agreement (other than those provisions which contain their own remedies or limit the remedies in the event of a breach thereof) and fails to remedy such breach within seven (7) days of receipt of written notice from the aggrieved Party requiring it to do so (or if it is not reasonably possible to remedy the breach), provided that the Party in breach furnishes evidence within the period of seven (7) days, reasonably satisfactory to the aggrieved Party, that it has taken whatever steps are available to it to commence remedying the breach), then the aggrieved Party shall be entitled without notice, in addition to any other remedy available to it at law or under this Agreement, including obtaining an interdict, to claim specific performance of any obligation whether or not the due date for performance thereof has arrived, and without prejudice to the aggrieved Party's or Parties' rights to claim damages.

15. TERMINATION

- 15.1. Either Party may cancel this Agreement by providing the other Party with prior written notice of cancellation hereof.
- 15.2. Subject to the provisions of this clause 14, this Agreement may, upon written notice, be terminated with immediate effect by either Party following the occurrence of either the CONTRACTOR's default or PRASA's default which is not remedied as provided for in clause 13 above.
- 15.3. If termination is as a result of a PRASA default, the CONTRACTOR shall be entitled to payment for all the Services undertaken by the CONTRACTOR up to the date of termination.
- 15.4. If termination is as a result of the CONTRACTOR's default, the CONTRACTOR shall pay direct damages which PRASA may have suffered due to the default.
- 15.5. Notwithstanding clause 13 or any other clause in this Agreement, but subject to clause 26.5, if the CONTRACTOR commits any breach as contemplated in clauses 26.4.1 to 26.4.5 it shall entitle PRASA to terminate this Agreement with immediate effect.

16. FORCE MAJEURE

- 16.1. In the event of any event beyond the reasonable control of a Party including, without limitation, acts of God, war, war-like operation, rebellion, riot, civil commotion, lockout,

interference of trade unions, strikes, industrial action, malicious damage, fire, flood, storm, sonic shock waves caused by aircraft or other aerial devices or action taken beyond or outside the reasonable control of the Parties and preventing them or any one of them from the performance of any obligation hereunder ("**Force Majeure Event**"), then the Party affected by such Force Majeure Event shall immediately notify the other Party forthwith as to the nature and extent of the circumstances in question.

- 16.2. Where a Party is (or claims to be) affected by a Force Majeure Event:
- 16.2.1. it shall take all reasonable steps to mitigate the consequences of such an event upon the performance of its obligations under this Agreement, resume performance of its obligations affected by the Force Majeure Event as soon as practicable and use all reasonable endeavours to remedy its failure to perform; and
- 16.2.2. it shall not be relieved from liability under this Agreement to the extent that it is not able to perform, or has not in fact performed, its obligations under this Agreement due to its failure to comply with its obligations.
- 16.3. The Party claiming relief shall serve written notice on the other Party within 5 (five) days of it becoming aware of the relevant Force Majeure Event. Such initial notice shall give sufficient details to identify the particular event claimed to be a Force Majeure Event.
- 16.4. A subsequent written notice shall be served by the Party claiming relief on the other Party within 5 (five) days, or such longer period as may be agreed between the Parties, which shall contain such relevant information relating to the failure to perform (or delay in performing) as is available, including (without limitation) the effect of the Force Majeure Event on the ability of the Party to perform, the action being taken by that Party to mitigate the effect of the Force Majeure Event and an estimate of the period of time required to overcome it (and/or its effects).
- 16.5. The Party claiming relief shall notify the other as soon as the consequences of the Force Majeure Event have ceased and when performance of its affected obligations can be resumed.
- 16.6. If, following the issue of any notice referred to in clause 15.4, the Party claiming relief receives or becomes aware of any further information relating to the Force Majeure Event (and/or any failure to perform), it shall submit such further information to the



other Party as soon as reasonably possible.

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

17. NOTICES, *DOMICILLIUM* AND LEGAL SERVICE

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

17.1.1. to PRASA at:

Address: UMJANTHSI

House

30 Wolmarans

Street

Braamfontein

Johannesburg

Attention: Legal Department

Telephone number: 012 748-7068 / 748-7192

Email: xxxxxxxx@prasa.com

17.1.2. to the CONTRACTOR: **(To be confirmed)**

Address:

Attention:

Telephone number:

Email:

- 16.2. Either Party may, by written notice to the other Party, change any of the addresses at which or the designated person for whose attention those notices or other communications are to be given.
- 16.3. Any notice or other communication given by any Party to the other Party which:
- 16.3.1. is sent by registered post to the addressee at its specified address shall be rebuttably presumed to have been received by the addressee on the 7th (seventh) day after the date of posting; or
 - 16.3.2. is delivered by hand to the addressee during the normal business hours of the addressee at its specified address shall be rebuttably presumed to have been received by the addressee at the time of delivery; or
 - 16.3.3. is transmitted by facsimile or email to the addressee during the normal business hours of the addressee at its specified facsimile number or email address shall be rebuttably presumed to have been received by the addressee on the date of transmission as indicated on the sender's facsimile transmission report or email.
- 16.4. The preceding provisions of clause 16 shall not invalidate any notice or other communication actually given and received otherwise than as described in those provisions.
- 16.5. The Parties choose their respective physical addresses in clause 16.1 as their respective *domicilia citandi et executandi* at which all documents relating to any legal proceedings to which they are a party may be served. If that address is changed to another address which is not a physical address in South Africa, then the original address shall remain the *domicilium citandi et executandi* of the relevant Party until it nominates a new physical address within South Africa in writing to be its new *domicilium citandi et executandi*.

18. CONFIDENTIALITY

- 18.1. For the entire duration of this Agreement the Parties will (and/or may) have access to each other's Confidential Information.
- 18.2. Each Party (the "**Receiving Party**") acknowledges that the other Party's (the

“Disclosing Party”) Confidential Information is of considerable value to such Disclosing Party and accordingly agrees (and undertakes to procure that its representatives shall be bound by the provisions of this clause 17):

- 18.2.1. only to use such Confidential Information as may be required to enable it and its representatives to perform the functions required of it in terms of this Agreement;
- 18.2.2. save as may be expressly authorised in terms of this Agreement or by the Disclosing Party in advance and in writing, not to disclose, publish, employ, exploit or in any other manner whatsoever use the Disclosing Party’s Confidential Information for any purpose other than as provided for in this Agreement, it being recorded that the Disclosing Party’s consent may be withheld in the sole discretion of the Disclosing Party; and
- 18.2.3. that any unauthorised publication or other disclosure of the Disclosing Party’s Confidential Information may cause irreparable loss, harm and damage to the Disclosing Party. Accordingly, the Receiving Party hereby indemnifies and holds the Disclosing Party harmless against any loss, action, expense, claim, harm or damage of whatsoever nature suffered or sustained by the Disclosing Party pursuant to a breach by the Receiving Party and/or its representatives of the provisions of this clause 17.
- 17.3. The Receiving Party shall protect, and shall procure that its representatives protect, the Disclosing Party’s Confidential Information in the same manner and with the same endeavor which a reasonable person of the Receiving Party’s position and line of business would use to protect its own confidential information.
- 17.4. Any written instructions, drawings, notes, memoranda or records relating to the Disclosing Party’s trade secrets which come into the possession of the Receiving Party or its representatives during the period of this Agreement, shall be deemed to be the property of the Disclosing Party and shall be surrendered to the Disclosing Party on demand and in any event on the termination of this Agreement, and neither the Receiving Party nor its representatives will retain any copies thereof or extracts therefrom.
- 17.5. If the Receiving Party or its representatives are uncertain as to whether any information of the Disclosing Party is Confidential Information as herein defined, they

shall treat such information as confidential until the contrary is agreed by the Disclosing Party in writing.

- 17.6. The obligation of the Parties not to disclose or use Confidential Information unless duly authorised in the manner contemplated in this paragraph 17 shall survive the termination of this Agreement.
- 17.7. The Parties will ensure compliance with this paragraph 17 by employees and any agents, CONTRACTORS or subcontractors that they hire.
- 17.8. Upon termination of this Agreement for any reason whatsoever, or whenever required by either Party, the Parties shall return all of the Confidential Information or any other property that they may have in their possession to the other Party.
- 17.9. If either Party breaches any provisions of this clause 17, the other Party may, without limitation to any of its rights, terminate this Agreement immediately upon prior written notice to the other Party.
- 17.10. This clause 17 shall remain in force both for the entire duration of this Agreement and after the termination of this Agreement for whatsoever reason.

19. DISPUTE RESOLUTION

- 19.1. 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.
- 19.2. If the dispute has not been resolved by such negotiation, either of the Parties may refer the dispute to arbitration, which proceedings shall be held in Pretoria in accordance with the Commercial Rules of the Arbitration Foundation of South Africa. The arbitrator shall be an advocate of not less than 10 (ten) years' standing and will be selected by agreement between the Parties within 7 (seven) days of the referral of the dispute to arbitration or, failing such agreement, will be nominated, at the request of either Party, by the Chairperson of the Pretoria Bar Council.
- 19.3. The Parties will endeavour to have the arbitration concluded within sixty (60) days from the date of referral of the dispute to arbitration.
- 19.4. This clause is severable from the rest of this Agreement and shall remain in effect even if this Agreement is terminated for any reason.

- 19.5. This clause shall not preclude either Party from seeking urgent interim relief in a court of competent jurisdiction, where grounds for urgency exist.

20. GOVERNING LAW AND CONSENT TO JURISDICTION

This Agreement is exclusively governed by and construed in accordance with the laws of South Africa and is the Parties irrevocably consent to the non-exclusive jurisdiction of the High Court, Gauteng Division: Pretoria.

21. COSTS AND EXPENSES

- 20.1 Each Party shall be responsible for paying its own costs and expenses incurred in connection with the negotiation, preparation and execution of this Agreement.
- 20.2 In the event of any legal action being instituted in terms of this Agreement, the Parties agree that the arbitrator or competent court adjudicating on such matter, shall make an order as to costs which will be binding on the Parties.

22. VARIATIONS

- 22.1. PRASA has the right to propose Variations to the Services in accordance with this clause 21, provided that no variation will result in a reduction of the Scope of Services currently being rendered by the CONTRACTOR to PRASA and/or the fee payable by PRASA to the CONTRACTOR in accordance with Annexure "C".
- 22.2. All Variations shall only be valid if approved by the Group Chief Executive Officer of PRASA and a director of the CONTRACTOR and reduced to writing.
- 22.3. If PRASA requires a Variation to the Scope of Services it must serve a notice in writing to the CONTRACTOR detailing the requested variation ("**Variation Proposal**").
- 22.4. The Variation Proposal must set out the Variation required in sufficient detail as to enable the CONTRACTOR to determine whether it is able to assist with the Variation Proposal and to calculate the cost of the Variation Proposal.
- 22.5. As soon as practicable and in any event within 5 (five) Business Days after having received the Variation Proposal, the CONTRACTOR shall deliver to PRASA:
- 22.5.1. the CONTRACTORs availability and willingness to assist with the Variation Proposal, it being recorded and agreed that, in the event that the

CONTRACTOR is not available or willing to assist with the Variation Proposal, such unavailability or unwillingness will have no impact on the terms and conditions of this Agreement, specifically the Services rendered by the CONTRACTOR to PRASA in terms hereof;

- 22.5.2. the estimated costs of the Variation Proposal; and
- 22.5.3. the impact of the Variation Proposal on the Project timelines.
- 22.5.4. As soon as practicable and in any event within 5 (five) Business Days after receiving the information from the CONTRACTOR regarding the impact of the Variation Proposal on the Project timelines and the costs, PRASA shall:
- 22.5.5. confirm its intention in writing to proceed with the Variation Proposal and enter into any documents to amend the Agreement as is necessary to give effect to the Variation Proposal; or
- 22.5.6. withdraw the Variation Proposal.

23. SEVERABILITY

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

24. COUNTERPARTS

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

25. ENTIRE AGREEMENT

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

25.2. Each Party acknowledges that:

- 25.2.1. it does not enter into this Agreement on the basis of and does not rely, and has not relied, upon any statement or representation (whether negligent or innocent) or warranty or other provision (in any case whether oral, written, express or implied) made or agreed to by any person (whether a Party to this Agreement or not) except those expressly contained in or referred to in this Agreement, and the only remedy available in respect of any misrepresentation or untrue statement made to it shall be a remedy available under this Agreement; and
- 25.2.2. this clause 24 shall not apply to any statement, representation or warranty made fraudulently, or to any provision of this Agreement which was induced by fraud, for which the remedies available shall be all those available under any Applicable Law governing this Agreement.

26. INDEMNITIES AND LIMITATION OF LIABILITY

- 26.1. Under no circumstances shall either Party be liable for any indirect, consequential or like damages which may arise pursuant to this Agreement, at any time whatsoever, due to any cause whatsoever and/or for any reason whatsoever.
- 26.2. The CONTRACTOR accepts, and shall have, no responsibility, liability and/or accountability for the acts and/or neglects of any Suppliers and/or PRASA and/or PRASA employees.
- 26.3. Any claim, of any nature whatsoever, which PRASA may have at any time whatsoever and against whomsoever, must be lodged by PRASA in writing with the CONTRACTOR within 30 (thirty) days after the CONTRACTOR had made the relevant reservation/booking for and/or on behalf of PRASA.
- 26.4. Any and all claims which PRASA may have against the CONTRACTOR shall lapse and prescribe no later than 3 (three) months after PRASA became aware of such claim, provided PRASA has not formally instituted such claim against the CONTRACTOR within the said 3 (three) month period.
- 26.5. The CONTRACTOR's liability, accountability and/or responsibility for any loss, cost, claim, demand, liability and/or damage suffered by PRASA, if any, is limited to

R10,000.00 (ten thousand Rand) per incident.

27. CESSION OR DELEGATION AND SUBCONTRACTING

- 27.1. Neither Party shall cede or delegate any of its rights or obligations under this Agreement nor enter into any sub-contract of whatever nature for the execution therefore or part thereof without the prior written consent of the other Party.
- 27.2. Should the CONTRACTOR apply to cede or assign the whole portion of the Agreement, the circumstances shall be reported to the PRASA. The PRASA shall be notified immediately of the Seller's intention to cede and/or assign its business. The name(s) of the new company and its directors shall be furnished to the PRASA together with any other information reasonably required by the PRASA.
- 27.3. The CONTRACTOR may sub-contract any of its obligations in terms of this Agreement to a third party, provided that:
- 27.3.1. such sub-contracting shall not absolve the CONTRACTOR from the responsibility of complying with its obligations in terms of this Agreement and the CONTRACTOR hereby indemnifies and holds PRASA harmless against any loss, harm or damage which PRASA may suffer as a result of such sub-contracting;
- 27.3.2. such sub-contracting shall not have the effect of diluting or circumventing the provisions of the CONTRACTOR Bid submission and this Agreement;
- 27.3.3. the CONTRACTOR shall at all times remain the sole point of contact for PRASA in respect of the Services performed and rendered by the CONTRACTOR to PRASA; and
- 27.3.4. no such sub-contracting shall have any effect on the amount payable by PRASA to the CONTRACTOR for the performance and rendering of the Services in terms of this Agreement.
- 26.4. The CONTRACTOR shall, during the term of this agreement, not be allowed to proceed with any of the following matters prior to receiving written consent of PRASA's Chief Procurement Officer and Group Chief Executive Officer:
- 26.4.1. any transfer of any amount of shares of the CONTRACTOR;
- 26.4.2. any change in the composition of the CONTRACTOR;

- 26.4.3. any change in the ownership of the CONTRACTOR;
- 26.4.4. any material change in the constitution, memorandum, articles of association of similar document providing for the creation, formation or incorporation of the CONTRACTOR; or
- 26.4.5. any change on the BBBEE component of the CONTRACTOR
- 26.5. Provided that the CONTRACTOR shall not require any approval and/or consent of the PRASA and/or PRASA's Chief Procurement Officer and Group Chief Executive Officer where any change as contemplated in clauses 26.4.1 to 26.4.5, any transfer of any amount of shares of the CONTRACTOR and/or any change on the BBBEE component of the CONTRACTOR does not have an adverse impact on the BBBEE status of the CONTRACTOR.

28. PUBLIC RELATIONS AND PUBLICITY

- 28.1. The CONTRACTOR acknowledges that certain information pertaining to the performance and rendering of the Services by the CONTRACTOR to PRASA in terms of this Agreement is required to be disclosed in accordance with the statutory reporting obligations of PRASA as it may be required to publish from time to time in response to enquiries from:
 - 28.1.1. Parliament and its members and officers in accordance with the provisions of the Public Finance Management Act, Act 1 of 1999; and
 - 28.1.2. the Auditor-General under the Public Audit Act, Act 25 of 2004; and
 - 28.1.3. persons acting in the public interest in accordance with the provisions of the Promotion of Access to Information Act, Act 2 of 2000.
- 27.2. Subject to clause 27.1 neither Party shall communicate with representatives of the press, television, radio or other communications media on any matter concerning this Agreement without the prior approval of the other Party, such consent not to be unreasonably withheld.

29. INDEPENDENT STATUS AND RELATIONSHIP BETWEEN THE PARTIES

- 29.1. The Parties shall at all times be and remain independent of each other, it being understood that the relationship constituted by and in terms of this Agreement shall always be conducted, operated and maintained on an arm's length basis.
- 29.2. Nothing in this Agreement shall be construed as creating a partnership between the Parties and neither Party shall have any authority to incur any liability on behalf of the other or to pledge the credit of the other Party.
- 29.3. Notwithstanding that stated above, it is noted and agreed that, in rendering and providing the Services for, to and/or on behalf of PRASA, the CONTRACTOR may (and/or will) from time to time serve and act as the facilitator and/or co-ordinator of PRASA. The nature of the Services dictate, determine, entail and/or require this, and the CONTRACTOR herewith specifically accepts and agrees to that recorded in this clause 28.3, which includes that the CONTRACTOR may act as the facilitator and/or co-ordinator of PRASA in the course of rendering and providing the Services for, to and/or on behalf of PRASA.
- 29.4. Despite the fact that the CONTRACTOR may (and/or will) from time to time serve and act as the facilitator and/or co-ordinator of PRASA for purposes of providing and rendering the Services to, for and/or on behalf of PRASA, PRASA will never serve and/or act as the agent and/or representative of the CONTRACTOR and will have no right, title or authority to do so or to hold itself out or to present itself as an agent and/or representative of the CONTRACTOR.
- 29.5. It is specifically agreed between the Parties that this Agreement shall not be construed as constituting/appointing either Party as an employee of the other Party for any purpose or in any manner whatsoever, nor will it constitute or create a franchise, joint venture or partnership relationship/agreement between the Parties.
- 29.6. Neither of the Parties shall under any circumstances whatsoever describe themselves:
- 29.6.1. as an "employee", "franchisee", "partner" or "joint venture partner" for and/or of the other Party; or
- 29.6.2. in any words that would and/or could indicate or imply the existence of an "employer/employee", "franchisor/franchisee", "partnership" and/or "joint venture" relationship between the Parties.

- 28.7. The CONTRACTOR shall comply with all employment legislation regarding its employees.
- 28.8. The CONTRACTOR warrants that it has full knowledge of all relevant statutory, collective and other stipulations applicable to the relationship with its employees and its relationship with PRASA. This includes, but is not limited to, the Labour Relations Act, 1995, the Basic Conditions of Employment Act, 1997, the Employment Equity Act, 1998 and any other applicable employment legislation currently in force or which may come into force during the currency of this Agreement. The CONTRACTOR warrants that it is not and will not in future be in contravention of any of the provisions of any such legislation and in the event of such contravention, the CONTRACTOR shall immediately take all steps to remedy such contravention. If PRASA advises the CONTRACTOR of any contravention of such legislation in writing, the CONTRACTOR shall, within 10 (ten) days after receipt of such notice, take all steps necessary to remedy such contravention and shall keep PRASA informed regarding the steps taken and the implementation and the result thereof.
- 28.9. The CONTRACTOR warrants that it is conversant with section 198(4) of the Labour Relations Act and warrants further that any the services supplied by the CONTRACTOR shall be as an independent CONTRACTOR as defined in the Labour Relations Act and the Occupational Health and Safety Act, 1993 and will render the Services as such. The CONTRACTOR hereby indemnifies and holds PRASA harmless against any claim or action whatsoever in terms of section 198(4) of the Labour Relations Act, instituted against PRASA by an employee of the CONTRACTOR. In the event that the CONTRACTOR or any of its employees rendering a service to PRASA, become involved in arbitration or other proceedings falling under a collective agreement under a bargaining council, then the CONTRACTOR shall immediately inform PRASA thereof and on request supply PRASA with a copy of any award made pursuant to such proceedings or agreement and any documentation that PRASA may request in respect thereof.



SIGNED at

on

2020

For: **PRASA**

Who warrants that s/he is duly authorised

AS WITNESSES:

1. _____

2. _____

SIGNED at

on

2020

For:

who warrants that s/he is duly authorised

AS WITNESSES:

1. _____

2. _____

ANNEXURE A –

SERVICE SCHEDULES- *(To be confirmed)*

ANNEXURE B

**CONTRACT PRICE AND PAYMENT MILESTONE
*(To be confirmed)***