



**STANDARD TERMS AND CONDITIONS**  
**FOR**  
**PRODUCT**

Version 17/11/2010

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1. **INTRODUCTION**

These Standard Terms and Conditions (hereinafter “STCs”) will apply to and shall form part of the Memorandum of Agreement (hereinafter “MOA”) to be entered into between TELKOM and the Supplier, in the event that the Supplier is appointed by TELKOM to supply the Product as defined herein. Amendments, if any, to the STCs will be stipulated in the MOA.

2. **DEFINITIONS**

Unless the context indicates otherwise, the words and expressions set out below shall bear the following meanings and cognate expressions shall bear corresponding meanings:

**“Acceptance Period”** the period of 30 (thirty)days (or such other period as may have been agreed to in writing) after Delivery during which TELKOM may consider whether the Product complies with the specifications and/or is free of any defect;

**“Advance Shipment Notice”** means the written notice to be delivered by the Supplier to TELKOM advising the relevant TELKOM department of a Delivery in accordance with the provisions of clause 7.3 hereof;

**“Affiliates”** means with respect to any person, any other person that, directly or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, such person, and the term “control” (including the terms “controlled by” and “under common control with”) means the possession, directly or indirectly, of the power to direct or cause the direction of the management of the business and

policies of such person, whether through ownership of voting securities, by contract or otherwise;

**“Agreement”**

means the various documents constituting the Agreement which shall include, but not be limited to the Tender, the Proposal, the STCs, the MOA, the LOA, the Order and such additional documents as may be required to give effect to the intentions of the parties;

**“Authorised User”**

means subsidiaries, affiliates, employees, agents, consultant, Outsourcing Companies, contractors and sub-contractors who need to use the Software and Document in the furtherance of TELKOM’s business and who are authorized and enable by TELKOM to access and utilize the Software and Documentation;

**“Calendar Month”**

being a period from the first to the last day of a month (e.g. 1 January to 31 January);

**“Certificate of Acceptance”**

the certificate delivered by TELKOM to the Supplier confirming its acceptance of the Product after the Delivery;

**“Competitors”**

any natural person, legal entity, trust, partnership or joint venture supplying telecommunication and information technology services to members of the public

**“Contact person”**

the relevant person(s) appointed by TELKOM from time to time, to oversee the execution of the Agreement and whose name(s) appears on the Order

**“Contractors”**

Means any person that renders and/or executes services for Telkom and that is certified by Telkom in writing to

benefit;

**“CPI”** means Consumer Price Index as determined by Statistics South Africa from time to time;

**“CPU”** means a central processing unit being any computer or computer systems that is used in TELKOM business to store, process, or retrieve data or perform other functions using operating systems and applications software;

**“Delivery Date”** means the date stipulated on the Order or on any of the Agreement documents as the date for the Delivery of the Product;

**“Delivery”** means delivery in compliance with the conditions of the Agreement and includes, without limitation the physical act of delivery (including where applicable the completion of the installation, and/or the commissioning) of the Product up to the acknowledgement by TELKOM in writing of the delivery at the delivery location on or before the Delivery Date;

**“Documentation”** means the user’s manuals and any other materials in any form or medium customarily provided by the Supplier to the users of the Product which will provide to TELKOM sufficient information to operate, diagnose, and maintain the Product properly, safely and efficiently;

**“Foreign Supplier”** a supplier who has its registered address outside South Africa;

**“Incoterms 2000”** the rules developed by the International Chamber of Commerce for purposes of the interpretation of trade

terms;

**“Intellectual Property”**

all intellectual property, whether or not registerable, including but not limited to copyright, patents, domain names, knowledge (of markets, products, client profiles, preferences), licences, goodwill. proprietary material, trademarks, design, know-how, trade secrets, new proprietary and secret concepts, methods, techniques, processes, adaptations, ideas, technical specifications and testing methods;

**“Invoice”**

the original tax invoice prepared by the Supplier reflecting the purchase price (or the adjusted purchase price (if any) owing by TELKOM to the Supplier and which conforms to the provisions of the VAT Act;

**“LOA”**

the letter of acceptance in terms of which a supplier is advised by TELKOM of its conditional appointment to supply Product subject to the conclusion of MOA;

**“Local Supplier”**

a supplier who has its registered address in South Africa;

**“MOA”**

means the written agreement to be entered into between TELKOM and the Supplier, which shall *inter alia* contain special terms and conditions (if any) to which these STCs are subject;

**“Order”**

an official printed order form on the corporate stationery of TELKOM reflecting the TELKOM Logo and a unique order number duly executed as set out in clause 6.2;

**“Parties”**

the Supplier and TELKOM and “party” shall as the context requires, be either of them;

<b>“Product”</b>	means the items and or material as more fully described in the Tender;
<b>“Project”</b>	means the totality of all Documentation, products and services to provided by Supplier under this Agreement;
<b>“Proposal”</b>	means the written response of a Proposer to TELKOM’s Tender;
<b>“Proposer”</b>	means any natural person, legal entity, partnership, trust or joint venture submitting a Proposal;
<b>“Purchase Price”</b>	means the price for the Product as stated in the MOA and confirmed in the Order;
<b>“Recommended Environment”</b>	means the complete physical, configuration and environmental conditions and specifications (including, without limitations, DASD storage requirements, CPU memory requirements, CPU processor typed requirements, CPU feature requirements and limitations, network requirements, Internet and remote access capabilities, CPU configuration and connection, and all peripheral devices configuration and connection) recommended by the Supplier for the full and proper operation of the Software;
<b>“Reconciliation Certificate”</b>	the document prepared by the Supplier reflecting all the amounts owing in respect of invoices delivered to TELKOM in respect of a particular Calendar Month;
<b>“Software”</b>	means the Object Code and Source Code of all software, including any Module or System, to be licensed by the Supplier to TELKOM as described in this Agreement, and includes any all Configuration,

Customisation, Updates, Upgrades and Documentation which TELKOM obtains or is granted any rights under this Agreement;

**“South Africa”** the Republic of South Africa;

**“Special Terms and Conditions”** and the special terms and conditions as agreed upon by the Parties and recorded in the MOA.;

**“Specifications”** the information provided by or on behalf of the Supplier that fully describes the capabilities and functionality of the Product as set forth, in any material provided by the Supplier, including the documentation;

**“STCs”** means this document entitled “Standard Terms and Conditions for Product (including Software and Information Technology related products)” as contained herein, which document forms part of the Tender and consequently the Agreement irrespective of whether a copy thereof is attached to the Agreement or not.

**“Supplier”** means a Party appointed by TELKOM in terms of the LOA to supply the Product to TELKOM;

**“Subsidiaries”** means as ascribed to such term in the Companies Act No. 61 1973;

**“Telkom Modifications”** means any modifications, corrections, or enhancements made by TELKOM to the Software;

**“Telkom”** TELKOM South Africa Limited, a company duly incorporated under the laws of South Africa, registration number 1991/005476/06, with its registered address at 152 Proes Street, Pretoria, 0002, South Africa;

<b>“Tender”</b>	means the formal written invitation issued by TELKOM requesting the submission of Bids or Proposals to TELKOM for the supply of the Product, which could be any one or more of the following: <ul style="list-style-type: none"> <li>• Request for Bid;</li> <li>• Request for Proposal;</li> <li>• Request for Information; or</li> </ul> Request for Quotation.
<b>“The POD”</b>	the document evidencing proof of Delivery of the Product to the Delivery Location and signed by a duly authorised TELKOM employee;
<b>“Update”</b>	means a software program or code which contains errors/fault fixes to operational and/or display aspects of the software program it is updating;
<b>“Upgrade”</b>	means a software program or code which modifies or improves existing, or modifies or provides additional, functionality in or to the software program it is upgrading;
<b>“VAT Act”</b>	the Value Added Tax Act number 89 of 1991 as amended.
<b>“VAT”</b>	value added tax at the rates as specified from time to time in accordance with the VAT Act;
<b>“Warranty Period”</b>	means a period of 12 months from Final Acceptance;

**“Working Day”** a day other than a Saturday or a Sunday or a day which from time to time is a proclaimed public holiday in South Africa;

**“Working Day”** means Monday through Friday between the hours 07:30 to 16:30, excluding Saturdays, Sundays or a day which from time to time is proclaimed a public holiday in South Africa;

**Notice of Non-acceptance** the written notice to be delivered by TELKOM to the Supplier in the event that the Product is defective and/or does not comply with the Specifications;

**Program Set”** means the group of programs and products, including the Licensed Software plus any additional programs and products licensed or provided to TELKOM under this Agreement for use by TELKOM;

### 3. **INTERPRETATION**

The headings to the clauses, schedules and annexures of the Agreement are for reference purposes only and shall in no way govern or affect the interpretation of nor modify nor amplify the terms of the Agreement nor any clause, schedule or annexure thereof.

3.1 Any reference in the Agreement to:

3.1.1 a **“clause”** shall, subject to any contrary indication, be construed as a reference to a clause hereof;

3.1.2 a **“holding company”** shall be construed in accordance with the Companies Act, No 61 of 1973 (as amended);

3.1.3 **“law”** shall be construed as any law (including common or customary law), or statute, constitution, decree, judgment, treaty, regulation, directive, bye-law, order

or any other legislative measure of any government, local government, statutory or regulatory body or court;

- 3.1.4 a **“Schedule”** or **“Annexure”** shall, subject to any contrary indication, be construed as a reference to a schedule or annexure hereof;
- 3.1.5 a **“subsidiary”** shall be construed in accordance with the Companies Act, No. 61 of 1973 (as amended);
- 3.1.6 **“tax”** shall be construed so as to include any tax, levy, impost or other charge of a similar nature (including, without limitation, any penalty or interest payable in connection with any failure to pay or delay in paying any of the same) specifically in relation to the Product only;
- 3.1.7 a **“person”** shall be construed as a reference to any person (natural or juristic) and shall include, company, corporation, government, state or agency of a state or any association or partnership (whether or not having separate legal personality) of two or more of the foregoing.
- 3.2 Unless inconsistent with the context or save where the contrary is expressly indicated:
- 3.2.1 if any provision in a definition is a substantive provision conferring rights or imposing obligations on any party, notwithstanding that it appears only in this definition clause, effect shall be given to it as if it were a substantive provision of the Agreement;
- 3.2.2 when any number of days is prescribed in the 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 subsequent business day;
- 3.2.3 in the event that the day for payment of any amount due in terms of the Agreement should fall on a day which is not a business day, the relevant day for payment shall be the subsequent business day;

- 3.2.4 in the event that the day for performance of any obligation to be performed in terms of the Agreement should fall on a day which is not a business day, the relevant day for performance shall be the subsequent business day;
- 3.2.5 any reference in the Agreement to an enactment is to that enactment as at the signature date and as amended or re-enacted from time to time;
- 3.2.6 any reference in the Agreement to the Agreement or any other agreement or document shall be construed as a reference to the Agreement or, as the case may be, such other Agreement or document as same may have been, or may from time to time be, amended, varied, novated or supplemented;
- 3.2.7 no provision of the Agreement constitutes a stipulation for the benefit of any person who is not a party to the Agreement;
- 3.2.8 references to day/s, month/s or year/s shall be construed as calendar day/s, month/s or year/s;
- 3.2.9 a reference to a party includes that party's successors-in-title and permitted assigns.
- 3.3 Unless inconsistent with the context, an expression which denotes:
- 3.3.1 any one gender includes the other genders;
- 3.3.2 a natural person includes an artificial person and *vice versa*;
- 3.3.3 the singular includes the plural and *vice versa*.
- 3.4 The schedules or annexures to the Agreement form an integral part thereof and words and expressions defined in the Agreement shall bear, unless the context otherwise requires, the same meaning in such schedules or annexures. To the extent that there is any conflict between the schedules or annexures to the Agreement and the provisions of the Agreement, the provisions of the Agreement shall prevail.

- 3.5 Where any term is defined within the context of any particular clause in the Agreement, the term so defined, unless it is clear from the clause in question that the term so defined has limited application to the relevant clause, shall bear the same meaning as ascribed to it for all purposes in terms of the Agreement, notwithstanding that that term has not been defined in this interpretation clause.
- 3.6 The rule of construction that, in the event of ambiguity, the contract shall be interpreted against the party responsible for the drafting thereof, shall not apply in the interpretation of the Agreement.
- 3.7 The expiration or termination of the Agreement shall not affect such of the provisions of the 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.
- 3.8 This Agreement shall be binding on and enforceable by the estates, heirs, executors, administrators, trustees, permitted assigns or liquidators of the parties as fully and effectually as if they had signed the Agreement in the first instance and reference to any party shall be deemed to include such party's estate, heirs, executors, administrators, trustees, permitted assigns or liquidators, as the case may be.
- 3.9 The use of any expression in the Agreement covering a process available under South African law such as winding-up (without limitation *eiusdem generis*) shall, if any of the parties to the Agreement is subject to the law of any other jurisdiction, be construed as including any equivalent or analogous proceedings under the law of such other jurisdiction.
- 3.10 Where figures are referred to in numerals and in words, if there is any conflict between the two, the words shall prevail.

#### 4. **PRECEDENCE**

- 4.1 In the event of a conflict between the various documents constituting the Agreement the order of precedence for the interpretation thereof shall be:

4.1.1 Order;

- 4.1.2 MOA;
- 4.1.3 LOA;
- 4.1.4 Proposal;
- 4.1.5 Incoterms;
- 4.1.6 STC's and
- 4.1.7 Tender.

4.2 No claim by the Supplier for additional payment on any grounds will be allowed, including, without limitation, misunderstanding or misinterpretation in respect of the Tender, nor will the Supplier be released from any risk or obligations imposed on/or undertaken by the Supplier on any such grounds or on the ground that it could not have foreseen any matter which might affect, or have affected its performance in terms of the Agreement.

## 5. **LICENCE**

### 5.1 **Grant of Licence**

5.1.1 On the terms and conditions set forth in this Agreement, Supplier hereby grants to TELKOM a fully paid-up, irrevocable, non-exclusive, worldwide, perpetual licence to use the Program Set and Documentation on or in connection with any CPU utilized by TELKOM to fulfil its own data processing needs.

5.1.2 The provisions of this clause will survive termination or expiration of this Agreement.

### 5.2 **Licence Fee**

In consideration of the licence granted to TELKOM hereunder for the Program Set, TELKOM shall pay to Supplier a licence fee as provided in the MOA.

### 5.3 **Source Code**

TELKOM rights to utilize the Product shall include the right to utilize the Source Code of the Product should an event as envisaged in Clause 21.12 occur.

#### **5.4 Authorized Users**

TELKOM shall not permit the Program Set and Documentation to be used by any person other than an Authorized User.

#### **5.5 Number of Users**

Unless otherwise specified to the contrary, there shall be no limit on the number of CPU's, number of users, number of locations or size of CPU on which TELKOM can operate the Program Set and Documentation. TELKOM shall have the right to receive free of charge additional copies of the Program Set and Documentation as required by TELKOM for use on additional or alternate CPU's for TELKOM business operations.

#### **5.6 Platform Compatibility**

Supplier shall Deliver to TELKOM one copy of the Program Set and Documentation for each Platform. At the request of TELKOM, Supplier shall Deliver to TELKOM a copy of the Program Set in CD-ROM or other media format, from which TELKOM may make copies for its use consistent with the limitations of this Agreement.

### **6. ORDER**

6.1 The Delivery of the Order to the Supplier shall be in TELKOM's sole and exclusive discretion.

6.2 The Order shall:

6.2.1 where appropriate, stipulate:

6.2.1.1 the Product required;

6.2.1.2 the quantity required;

6.2.1.3 the Purchase Price;

6.2.1.4 the Delivery Date(s);

6.2.1.5 the Delivery Location;

6.2.1.6 contact details for the Delivery of the Advance Shipment Notice;

6.2.1.7 the Order number;

6.2.1.8 name and contact details of Contact Person;

6.2.1.9 address for Delivery of the Invoice and statement;

6.2.1.10 name and address for the Delivery and Advance Shipment Notice;

6.2.1.11 details of the Incoterms, and

6.2.2 be signed by a TELKOM employee duly authorised thereto.

6.3 It is specifically recorded that TELKOM shall, by written notice at any time during the term of this Agreement (“the amendment notice”) to the Supplier, be entitled to amend the terms of the Order by:

6.3.1 varying quantities;

6.3.2 altering the Specifications of the Product;

6.3.3 altering the Delivery Date; and/or

6.3.4 altering the Delivery Location

(“the amendment”) subject to the provisions of clause 6.7.

6.4 The Supplier shall within 1 (one) Working Day of receipt of the Order and the amendment notice, as the case may be, acknowledge receipt of such document, by delivery of a written notice to the Contact Person, which notice shall:

6.4.1 confirm receipt of the Order or the amendment notice, as the case may be;

6.4.2 detail any discrepancy between the provisions of the Agreement and the Order or the amendment notice, as the case may be; and

- 6.4.3 stipulate any adjustment to the Purchase Price (if any) arising from the discrepancy.
- 6.5 In the event that the Supplier fails to comply with the provisions of clause 6.4 above and proceeds with the execution of the Order, the Supplier shall be liable for any additional costs so incurred.
- 6.6 The Supplier shall be obliged (as far as reasonably possible) to give effect to the amendment notice subject to the provisions of clause 6.7.
- 6.7 To the extent that the amendment results in an adjustment to the Purchase Price (“the adjusted Purchase Price”) the Supplier shall not give effect to the amendment notice, until it has received written confirmation in the form of a letter on TELKOM’s official stationery from TELKOM signed by the Group Executive: Procurement Services or his duly authorised representative (“the confirmation notice”) of its approval of such adjusted Purchase Price. Such confirmation notice will constitute a valid variation to the Order.
- 6.8 To the extent that the Supplier’s obligations, (including the guarantees required in terms of the Agreement (if any), are affected by the amendment notice, such obligations will be deemed to be subject to the provisions of the Agreement *mutatis mutandis* upon the delivery of the confirmation notice to the Supplier.
- 6.9 It is specifically recorded that:
- 6.9.1 TELKOM shall only be bound by the quantities specified in the Order and shall not be obliged to purchase a minimum quantity of the Product from the Supplier nor shall it be bound to purchase such quantity(ies) as specified in the Tender; and
- 6.9.2 TELKOM shall, subject to the Order, be entitled to source the Product from any Supplier of its choice.

## **7. DELIVERY**

- 7.1 It is specifically recorded that for purposes of the Agreement, time is of the essence. Failure to Deliver timeously shall constitute a material breach of the terms of the Agreement entitling TELKOM to the relief detailed in clause 24; and

7.2 The Supplier shall deliver the Product:

7.2.1 in strict compliance to the Specifications and the terms of the Order;

7.2.2 on the Delivery Date; and

7.2.3 at the Delivery location.

7.3 7 (seven) business days prior to the Delivery of the Product, the Supplier shall deliver the Advance Shipment Notice to the person named in the Order at the Delivery Location advising of the expected time and date of the Delivery.

7.4 In the event that the Supplier fails to Deliver the Advance Shipment Notice and such failure results in a delay of the Delivery, TELKOM shall not be liable for any additional costs to the Supplier arising from such delay.

7.5 Within 30 (thirty) days (or such other period as may have been agreed to in writing) of the Delivery Date, TELKOM shall deliver to the Supplier:

7.5.1 the Certificate of Acceptance; or

7.5.2 the Notice of Non-acceptance.

7.6 In the Notice of Non-acceptance TELKOM shall detail:

7.6.1 the grounds of its rejection of the defective Product; and

7.6.2 the remedial action it requires the Supplier to take in respect of the defective product.

It is specifically recorded that TELKOM shall be under no obligation to accept Product which is delivered late or which does not comply with the Specifications.

7.7 Without limiting the provisions of clause 24, it is specifically recorded that TELKOM's remedies as envisaged in clause 7.6.2 shall include any one or more of the following, but not be limited to:

- 7.7.1 the cancellation of the Agreement;
  - 7.7.2 the request from TELKOM directed to the Supplier for the repair of the defective Product;
  - 7.7.3 the request from TELKOM directed to the Supplier for the removal of the defective Product and replacement thereof with a product complying with the Specifications; or
  - 7.7.4 the removal of the defective Product by TELKOM (in the event that the Supplier fails to comply with the request envisaged in clause 7.7.2 and the recovery of any cost incurred by TELKOM from the Supplier for the removal and the acquisition of the Product from a third party.
- 7.8 Upon receipt of a Notice of Non-acceptance the Supplier shall be obliged to:
- 7.8.1 give effect to TELKOM's instructions as contained in the notice of Non-Acceptance; and
  - 7.8.2 pay such additional cost as envisaged in clause 7.7.4 (if any) incurred by TELKOM in respect of the acquisition of the Product from one or more third parties.

## **8. PROJECT METHODOLOGY**

### **8.1 Project Delivery**

The Parties agree that all Product and services to be delivered in terms of this Agreement shall be delivered in accordance with a project plan to be discussed and agreed upon by the parties.

### **8.2 Variation Orders**

8.2.1 It is recorded that the Parties have expressly agreed that any purported alteration or amendment of the Specification other than by way of a Specification Specific Variation Order shall be of no force or effect whatsoever between the Parties.

8.2.2 Should either Party wish to make any amendment or alteration to this Agreement, that Party shall prepare a Variation Order which shall specify the following:

- a) the Party's name and contact details;
- b) the date of the Variation Order;
- c) a description of the proposed amendment or alteration;
- d) the reason for making the proposed amendment or alteration;
- e) when the Party requires the Variation Order to be implemented, if agreed, being:
  - i) immediately;
  - ii) at a date specified, which is prior to Project completion;
  - iii) subsequent to Project completion.

8.2.3 The Supplier shall allocate a unique number to each Variation Order and shall promptly undertake an exercise to determine the impact (including any knock-on effect) of the proposed amendment or alteration on:

- a) the detailed delivery schedule of the Project;
- b) the Milestones;
- c) the Project Plan;
- d) pricing;
- e) the Specification, and a corresponding Specification Specific Variation Order if required;
- f) the Requirements Definition;
- g) the Specification;
- h) the Platform compatibility;
- i) the Recommended Environment.

8.2.4 The Supplier shall incorporate the outcome of the impact assessment into the Variation Order and present it to TELKOM for consideration.

8.2.5 No Variation Order shall be of any force or effect until it is signed by duly authorised representatives of each of the Parties: provided that, the Supplier shall not be entitled to unreasonably withhold its agreement to any Variation Order requested by TELKOM.

## 9. ACCEPTANCE TESTING

- 9.1 As soon as practicable after signature of this Agreement, the Parties will agree on the Acceptance Testing Procedure and the Acceptance Tests, subject always to the provisions of this Clause 9.
- 9.2 The object of Acceptance Testing is to ensure that the Product and services meet the terms of this Agreement, including the Specifications. Final Acceptance will take place after successful completion of all Acceptance Tests.
- 9.3 Supplier agrees to provide Maintenance Services during Acceptance Testing at no expense to TELKOM. Subsequent to Acceptance Testing, the Supplier agrees to provide Maintenance Services in terms of Clause 11.
- 9.4 In the event that the Product fails Acceptance Testing, then TELKOM may, on each such occasion and in its sole discretion, elect 1 (one) of the following options, which election shall be effective upon written notification to the Supplier by TELKOM:
- 9.4.1 At TELKOM's sole discretion, TELKOM may allow the Supplier a further opportunity to undertake the Acceptance Testing on a date as specified by TELKOM.
- 9.4.2 TELKOM may terminate this Agreement and request the removal of the Product in which event TELKOM may pursue any remedy hereunder or available at law or in equity, or seek to enforce any damages, including any penalties that may be specifically set forth in this Agreement.
- 9.4.3 Supplier shall install at Supplier's sole cost and expense, within such time period as may be mutually agreed in writing by TELKOM and Supplier, a direct replacement of the Product, failing to meet the applicable phase of Acceptance Testing. Such replacements shall be subject to the terms of this Agreement, including, without limitation, Acceptance Testing as provided in this Clause 9. Supplier shall use due care in the removal and replacement of such Product.
- 9.5 In no event shall use of the Product by TELKOM for business, profit, revenue, or any other purpose during any phase of the Acceptance Testing, constitute acceptance of the Product by TELKOM.

## **10. DOCUMENTATION AND TRAINING**

### **10.1 Documentation**

Supplier shall provide Documentation to TELKOM sufficient to allow TELKOM to utilize fully the Product in accordance with the Specifications. Documentation will include (but is not limited to) overview descriptions of all major functions and detailed step-by-step operating procedures for each screen and activity. The Documentation to be provided by Supplier is in addition to any on-line HELP, which is part of the Product user interface. Supplier shall deliver to TELKOM upon execution of this Agreement, copies of the Documentation as well as a copy of the Documentation in CD-ROM or other media format as requested by TELKOM. Supplier shall revise such Documentation as necessary from time to time, to reflect any subsequent Customisation, Update or Upgrade made by Supplier to the Product. TELKOM may copy and incorporate the Documentation in works prepared for TELKOM's business endeavors so long as TELKOM includes all copyright, trademark, and other notices of Supplier in the same form as they appear on or in the Documentation. Supplier warrants and represents that the Documentation and all modifications or amendments thereto and any other documentation that Supplier is required to provide pursuant to this Agreement shall be sufficient in detail and content to allow an appropriately skilled programmer to understand fully, modify, enhance, and correct errors in the Product without reference to any other materials or information. Supplier further hereby warrants and represents that the Documentation and all modifications or amendments thereto and any other documentation which Supplier is required to provide pursuant to this Agreement shall be in accordance with the documentation standards in the present Documentation. If any user manual or portion thereof is the proprietary material or intellectual property of another party, Supplier shall convey to TELKOM the right (to the extent possible under law) to make copies and to use the material as TELKOM deems necessary.

### **10.2 User Group, Bulletin Boards, and Internet Sites**

Supplier shall notify TELKOM of any user group, bulletin board, or internet site relating to the Product or services provided by Supplier under this Agreement, and to the extent necessary, provide access for TELKOM thereto.

### **10.3 Training**

Supplier shall be responsible for providing TELKOM and its employees with such training in the operation and maintenance of the Product as TELKOM may reasonably request from time to time prior to execution of this Agreement and for a period of 180 (one hundred and eighty) days thereafter. Such training shall be provided at TELKOM's principal place of business or other site selected by TELKOM, through instructors satisfactory to TELKOM in the reasonable exercise of its discretion. Training will be performed "hands-on" using the actual system and the user manual. The courses will train TELKOM-designated employees or agents, who can then train the Product operators, such that TELKOM will have an ongoing in-house Product training capability. Without limitation of the foregoing right, Supplier and TELKOM shall prepare and agree upon a proposed training schedule for submissions to TELKOM not later than one week after the execution of the Agreement. TELKOM shall be entitled to have any number of its employees attend any training session held pursuant to this Clause 10.3. All training shall be conducted at Supplier's sole expense including, but not limited to, training materials, traveling, meals and lodging for instructors. Supplier's employees shall follow all of TELKOM's work rules, confidentiality rules, and drug policies, including the non-disclosure obligations set out herein.

## **11. MAINTENANCE**

### **11.1 Maintenance (Overview)**

Supplier undertakes to make Maintenance Services, including SME's, available to TELKOM at TELKOM's request, from time to time. TELKOM shall not be obliged to contract for Maintenance Services, nor shall Maintenance Services be structured in a way that links them to usage or license rights of any Software. The provision of Maintenance Services by Supplier is an option, to be acquired, terminated or reinstated at the sole option of TELKOM, from time to time. Cancellation of Maintenance Services at any time by TELKOM will not in any way affect this Agreement and the grant of license herein. At TELKOM's option, Maintenance Services shall commence upon expiration of the Warranty Period and shall continue for the period and at a fee specified in the MOA.

### **11.2 End-of-Life Termination of Support**

The Supplier shall notify TELKOM no less than 3 (three) years in advance, of the date on which the Supplier or original licensor of the Product intends terminating support, generally, of the Product due to it reaching end-of-life. Simultaneously with such notice, Supplier shall

propose alternate arrangements for the Maintenance Services subsequent to such date for consideration by TELKOM.

### **11.13 Spares**

- 11.3.1 The Supplier shall make available to the TELKOM on request and with reasonable despatch and at reasonable price, all spares and replacement parts as TELKOM shall require for the Product. The Supplier shall keep and maintain a supply of compatible spare or replaced parts for seven (7) years from the Acceptance Date.
- 11.3.2 In the event that the Supplier or its sub-contractors intend to discontinue manufacture of spare or replacement parts, the Supplier shall notify TELKOM, who may order for its requirements, so that TELKOM may make or have made, the spare or replacement part itself.
- 11.3.3 During the seven year period referred to above, TELKOM shall have the right to require the Supplier to deliver to it, free of charge, the specifications and other information referred to above, to enable TELKOM to make or have made, the spare or replacement parts. Should the Supplier fail to comply with clause 11.3.1, or else becomes insolvent, etc. TELKOM may only retain the specifications and other information for as long as necessary to exercise its rights under this sub-clause 11.3.3, and shall return them to the Supplier when the latter requests them.
- 11.3.4 In terms of this sub-clause, the exercise of TELKOM's rights in terms hereof shall be free of any royalty or charge. TELKOM is given the express right to make copies of the specifications and other information, for the purpose of making, or having made, spares or replacement parts.
- 11.3.5 The Supplier agrees to bind its sub-Contractors to comply with the provisions of this clause 11.3. TELKOM may procure directly, spares or replacement part from such sub-Contractors if Supplier fails to provide them and charge the Supplier any additional costs in incurs by so doing.

## 12. PURCHASE PRICE

- 12.1 The Supplier shall, for the duration of the Agreement, be bound to the Purchase Price, charges and fees, save as provided for in clause 6.7 above. In the event that the Parties agree to a price variation, such price variation shall not apply retrospectively.
- 12.2 Save as provided for in clause 6.7 TELKOM shall not be liable for any additional costs irrespective of the cause of such additional costs.

## 13. PAYMENT TERMS

- 13.1 Telkom does not allow Advance Payments to Suppliers.
- 13.2 The Supplier shall, only after the Delivery of the Product, deliver:
- 13.2.1 the invoice and the POD in respect of the Product delivered;
  - 13.2.2 or procure the Delivery of the invoice of any Foreign Supplier (which supplies to the Supplier any/or some of the Product)(if any); and
  - 13.2.3 the statement, reflecting the invoices delivered to TELKOM in the previous Calendar Month, on or before the 5<sup>th</sup> (fifth) day of the following Calendar Month, in accordance with the provisions of clause 13.2.
- 13.3 The Local Supplier shall deliver the invoice and the statement (and the invoice of the Foreign Supplier (if any)) to the address stipulated on the Order and the Foreign Supplier shall deliver the invoice or statement to:
- TELKOM SA Limited  
Accounts Payable  
Private Bag X145  
Pretoria, 0001
- 13.4 TELKOM shall only be liable to make payment to:

- 13.4.1 the Supplier upon receipt of all the documents contemplated in 13.1;
- 13.4.2 the Foreign Supplier upon receipt of the invoice; and the Certificate of Acceptance .

It is specifically recorded that no liability to pay shall arise until such time as correct and complete documentation as envisaged in this clause 13.1 have been received by TELKOM.

13.5 TELKOM shall pay:

13.5.1 The Supplier on the last business day of the Calendar Month following the month of the invoice and if the statement was delivered to TELKOM, provided that the statement was delivered to TELKOM as envisaged in clause 13.1, failing which payment will only be made to the Supplier on the last day of the Calendar Month in which the statement is delivered to TELKOM in accordance with the provisions of clause 13.1;

13.5.2 The Foreign Supplier 45 (forty five) days after receipt by TELKOM of the invoice to the closest payment run. Payment runs are limited to 2 (two) payment runs per month, which is mid month and month end.

13.6 TELKOM shall make all payments electronically to the Supplier's bank account. The Supplier shall furnish the particulars set out below to TELKOM not less than 30 (thirty) days before payment is due:

Name of account holder:

Account number:

Name of bank:

Branch code:

Address:

Routing number/sort code/ABA number:

13.7 If the Supplier, is registered as a VAT vendor in terms of the VAT Act, it shall ensure that the invoice complies with the provisions of the VAT Act, failing which TELKOM shall not make

any payment in respect thereof until such time as it receives an invoice from the Supplier which complies with the fore mentioned provisions.

13.8 TELKOM shall be entitled to:

13.8.1 deduct settlement discounts (if any) agreed upon by the parties from any amount owing to the Supplier;

13.8.2 set off any amounts owing by the Supplier to TELKOM against any amount TELKOM owes to the Supplier; or

13.8.3 withhold payment in the eventuality contemplated in clause 34.

13.9 All payments in respect of or in connection with the Product will be made without withholding or deductions for, or on account of, any present or future taxes, duties, assessments or governmental charges of whatever nature imposed or levied by, or on behalf of the taxation authorities of the Supplier's country of origin or any such other authority in or of the Supplier's country of origin having power to tax, unless such withholding or deduction is required by law in which event TELKOM shall pay such additional amounts as may be necessary in order that the net amount received by the Supplier after such withholding or deduction shall be equal to the consideration to which it would otherwise have been entitled in respect of or in connection with the product in the absence of the withholding or deduction except that no such additional amounts shall be payable:

13.9.1 arising from the failure of the Supplier to comply with any statutory requirement or by making a declaration of non-residence or other similar claim for exemption to the relevant tax authority; or

13.9.2 if such withholding or deduction arises through the exercise by the taxation authorities of special powers in respect of tax defaulters.

13.9.3 At all material times, during the course of this Agreement, the Supplier shall comply with all tax laws of the Republic of South Africa. TELKOM shall at any time be entitled to request proof of such compliance from the Supplier and the

Supplier shall be obliged to produce such proof, failing which TELKOM shall be entitled to terminate this Agreement forthwith.

#### 14. **WARRANTIES**

14.1 In respect of the Product:-

14.1.1 the Supplier warrants that the Product supplied to TELKOM in terms of this Agreement is new, unused, of the most recent or current models, and that it incorporates all recent improvement in design and materials unless otherwise provided for in this Agreement.

14.1.2 the Supplier warrants that for a period of 12 (twelve) calendar months, which period shall commence on the day after the expiry of the Acceptance period or such longer period as may be specified in the MOA (“the warranty period”), the Product or any part thereof shall comply with the Specifications and be free of latent or patent defects (“the warranty”).

14.1.3 in the event that the Product is defective during the warranty period, the Supplier shall at its own costs, repair or replace the Product within 3 (three) business days (or such reasonable period as TELKOM may agree to in writing), failing which TELKOM shall be entitled to repair or replace or procure the repair or replacement of the Product at the cost of the Supplier. It is specifically recorded that the risk of loss or damage in respect of the Product shall vest in the Supplier during the period that the Product is removed from the Delivery Location.

14.2 The warranty period referred to in clause 14.1.2 shall, for purposes of the repaired or replaced Product referred to in clause 14.1.3, commence on the day succeeding the date of the repair or replacement of the Product.

14.3 In respect of Software the Supplier represents and warrants as follows:-

##### 14.3.1 **Media Defects**

that the media on which the Software is provided shall be free of defects in material and workmanship.

14.3.2 **Function and Features**

that the Software shall possess all material functions and features, as described in the Documentation as amended from time to time.

14.3.3 **Performance**

that the Software shall operate in accordance with the Specifications.

14.3.4 **Compatibility**

that every item of Software shall be compatible with every other item of Software, the Operating System, CPU's, Platform and the Recommended Environment.

14.4 The warranties provided for in clause 14.3 above, shall apply to all Updates and Upgrades released or made available to by Supplier to TELKOM from time to time.

14.5 In addition to the warranties set out under 14.1 and 14.3 Supplier further represents and warrants as follows:-

14.5.1 **Governmental Consent**

Supplier warrants that it has sought and obtained all necessary consents, approvals and certificates required from any governmental authority with respect to the entering into or the performance of this Agreement and that no other consent, approval, certificate or withholding of objection is required from any governmental authority.

14.5.2 **No Actions, Suits, or Proceedings**

Supplier warrants that there are no actions, suits, or proceedings, pending or threatened against it or any of its third party suppliers or subcontractors, that will have a material adverse effect on Supplier's ability to fulfil its obligations under this Agreement. Supplier further warrants that it will notify TELKOM immediately if Supplier becomes aware of any action, suit, or proceeding, pending or threatened, that will have a material adverse effect on Supplier's ability to fulfil the obligations under this Agreement.

14.5.3 **Free and Clear Title**

Supplier warrants that it has and will continue to have free and clear title (including all proprietary rights) to any Product delivered to TELKOM and the right to license, transfer, or assign any and all Product that is licensed, transferred, assigned or otherwise provided to TELKOM by Supplier pursuant to this Agreement. Supplier shall not create or permit the creation of any lien, encumbrance, or security interest in any Product licensed to TELKOM.

14.5.4 **Infringement**

The Supplier warrants that TELKOM use of any Product, Documentation or other product provided in connection with this Agreement will not infringe any patent, trademark, copyright, or other proprietary right of any third party. Supplier further warrants that any information disclosed to TELKOM will not contain any trade secrets of any third party, unless disclosure is permitted by such third party.

14.5.5 **Future Support**

Supplier warrants that it will offer and provide Maintenance Services for the Product for the period referred to in this Clause 14.

14.5.6 **Legal Compliance**

The Supplier warrants that it complies with all laws applicable to the Product, relating to security, safety, occupational health and environment and promotion of competition.

14.6 Notwithstanding anything to the contrary, the Supplier accepts and agrees that breach of any of the warranties as set out in this clause 14, shall constitute a material breach, going to the root of this Agreement and that TELKOM shall without prejudice to other rights it may have in law or in terms hereof, terminate this Agreement, in which event the Supplier agrees to and undertakes to refund to TELKOM all licence fees, maintenance and support services fees paid by TELKOM to the Supplier pursuant to this Agreement.

14.7 It is specifically recorded that the provisions of this clause 0 will survive the termination of the Agreement for any reason whatsoever including, but not be limited to, termination by effluxion of time.

**15. QUALITY ASSURANCE**

15.1 The Supplier shall, as required in terms of the Tender, employ a comprehensive integrated quality assurance system based on the ISO 9001:2001 Standard of Quality Management System or an equivalent recognised standard approved by TELKOM. A document, entitled “TTSD-052882: High Level Overview of the Supplier Quality Department’s Activities and Interfaces” detailing TELKOM’s requirements in respect of such system is available from TELKOM’s Procurement Department: Methods and Procedures on written request.

15.2 The Supplier shall ensure that it is familiar with these requirements and shall procure that the Product complies therewith.

**16. PACKAGING**

16.1 Unless otherwise specifically provided for in the Agreement, the Supplier shall be liable for the proper and secure packaging of the Product and the cost related thereto.

16.2 Save as otherwise provided herein, the packaging and related material shall become the property of TELKOM upon the Delivery of the Product to TELKOM.

16.3 In the event that the Supplier requires the return of the packaging and the related material, such requirement shall specifically be recorded in the MOA.

16.4 It is specifically recorded that:

16.4.1 the Supplier shall be liable for the recovery thereof as well as the cost related to such recovery; and

16.4.2 the risk in and to the packaging and related material shall remain vested in the Supplier.

**17. INSPECTION**

17.1 TELKOM’s duly appointed agent and/or employees shall, after Delivery of the Order to the Supplier, be entitled at any time during normal business hours, to inspect test and / or analyse

the Product at the premises of the Supplier or such premises as may be nominated by the Supplier.

- 17.2 TELKOM shall be entitled to execute such inspections, tests and/or analysis as may be appropriate in respect of the Product prior to the Delivery thereof to the Delivery Location.
- 17.3 The Supplier shall supply such facilities, including but not limited to, materials, samples, labour and equipment, as may be required for such inspections, test and/or analysis free of charge to TELKOM's agents and/or employees.
- 17.4 The execution of the inspections, tests and/or analysis by TELKOM shall in no way relieve the Supplier of its liability to ensure that the Product complies with the Specifications and are free of any Defects. The Supplier shall remain liable to perform such inspections, tests and/or analysis as may be necessary.

## **18. BLACK ECONOMIC EMPOWERMENT**

- 18.1 The Supplier shall at all material times during the course of this Agreement keep and maintain its Black Economic Empowerment ("BEE") status at the same (if not better) level as set out in its Proposal i.e. and without limitation, its shareholding, employment equity etc. shall not fall below the status indicated in its aforesaid Proposal.
- 18.2 In the case where the appointment of the Supplier is subject to the Supplier committing to a BEE Commitment Plan ("BEE Plan"), then within 30 days of signature of this Agreement, the Supplier shall negotiate and conclude with TELKOM a BEE Commitment Plan. In the event that the parties fail to reach agreement on a BEE Plan contemplated hereinabove within the said 30 day period, this Agreement may be terminated by TELKOM at its sole discretion by written notice and TELKOM shall have no obligation or liability to the Supplier save for Orders that TELKOM may have placed with the Supplier. The commitment plan shall form part of the main contract. Telkom shall further perform quarterly assessment on the Supplier against all transformation pillars agreed upon. The two last quarterly assessments will be used to measure performance against the entire B-BBEE contract.

Non-compliance shall mean performance which is 10% below the agreed performance on each of the Transformation pillars.

- 18.3 The Supplier shall, within 90 days (quarter) from date of signature of the MOA or signature of the Commitment Plan contemplated in 18.2 above, and every quarter thereafter, furnish TELKOM with a report from its Auditors or its designated personnel certifying that the Supplier complies with the provisions of clause 18.1 or 18.2 above as the case may be.
- 18.4 Should the Supplier fail to provide TELKOM with the Audit report, it shall be deemed that the Supplier has failed to comply with the provisions of clauses 18.1 or 18.2 as the case may be, in which case TELKOM shall be entitled to invoke the provisions of clause 18.7.
- 18.5 The Supplier agrees that notwithstanding the audit contemplated in clause 18.3 above, TELKOM shall at any time be entitled to appoint external auditors of its choice to audit the Supplier's compliance with the provisions of clause 18.1 and 18.2, in which case, the Supplier shall be obliged to cooperate with such auditor's investigation, including but not limited to furnishing such auditors with all such information and access to such personnel as the auditors may in their sole and absolute discretion deem necessary.
- 18.6 The Supplier agrees and accepts that the report of the auditors contemplated in clause 18.5 shall be final, binding, shall take precedence over its auditor's report and may be used by TELKOM for purposes of clause 18.7.
- 18.7 In the event that the Supplier breaches any provision of this clause, TELKOM shall be entitled to:-
- 18.7.1 cancel or withdraw any Order placed with the Supplier, provided such Order was not placed more than 7 days from date of cancellation or withdrawal and provided that no Delivery has taken place pursuant to such Order; and/or
  - 18.7.2 suspend the placing of further Orders with the Supplier until the breach has been rectified to the satisfaction of TELKOM and/or
  - 18.7.3 impose penalties against the Supplier per each pillar agreed upon in the commitment plan where there is no compliance as agreed. Each pillar except for

Equity Ownership pillar shall be penalised at a rate of 3% of the total value of invoices paid or payable or due as at the time of breach and all subsequent invoices until the breach is rectified to the satisfaction of TELKOM. Equity Ownership shall be penalised at 10% of the total value of invoices paid or payable or due at the time of breach and all subsequent invoices until the breach is rectified to the satisfaction of Telkom. All the pillars penalties shall have total percentage of 25% of the value of invoices due and/or

- 18.7.4 terminate this Agreement forthwith.
- 18.8 The Supplier agrees and accepts that should the auditor's report contemplated in clause 18.4 indicate any partial or non-compliance by the Supplier to the provisions of clause 18.1 and/or 18.2, the Supplier shall be liable for all costs and expenses relating to the preparation of such report.
- 18.9 Notwithstanding anything to the contrary, it is specifically recorded and agreed by the Parties that TELKOM shall be entitled to recover any penalties imposed against the Supplier in terms of this clause from any amounts owed by TELKOM to Supplier in terms of any other agreement the Supplier may have with TELKOM and notwithstanding any provisions to the contrary contained in such agreement.
- 18.10 It is specifically agreed and recorded that notwithstanding the foregoing, the Supplier is obliged to comply with all and any other law enacted by Parliament, pertaining to Black Economic Empowerment, including but not limited to the Broad Based Black Economic Empowerment Act No 53 of 2003 (as amended from time to time), and the Codes of Good Practice.
- 18.11 In the event that the Supplier contravenes the provisions of clause 18.10 above, TELKOM shall be entitled to invoke the provisions of clause 18.7 above.

## **19. NON-EXCLUSIVITY**

The Agreement is not exclusive. Notwithstanding the delivery of the LOA and the conclusion of a MOA, TELKOM reserves the right to purchase the Product from any other supplier.

## **20. INDEMNITY**

The Supplier agrees to indemnify, hold harmless and defend TELKOM and its officers, employees, agents and representatives from and against the following damages, losses and liabilities (hereinafter collectively referred to as “Liability”):-

- 20.1 Any Liability with regard to claims by governmental authorities or others for non-compliance by the Supplier with any Act of Parliament, law, ordinance, regulation or by-law made by a lawful authority provided that such compliance therewith was required for the execution of the Agreement.
- 20.2 Any Liability arising out of intentional or negligent acts or omissions to act, of the Supplier.
- 20.3 Any Liability arising from claims with regard to the death of, or injury to, the Supplier or the death of, or injury to, third parties due to the Supplier’s negligence (excluding TELKOM employees in respect of whom TELKOM holds the Supplier harmless).
- 20.4 Any Liability arising from any loss of, or damage to, property (including TELKOM property and/or equipment of the Supplier).

## **21. INTELLECTUAL PROPERTY RIGHTS**

- 21.1 To the extent that any Intellectual Property rights attached to the Product, the Supplier hereby grants TELKOM a royalty free, irrevocable, non-exclusive, perpetual licence to use the intellectual property and all updates/upgrades relating thereto notwithstanding the termination of the Agreement for any reason whatsoever, including the termination thereof by the effluxion of time.
- 21.2 The Supplier warrants that it either owns all the rights, title and interest in and to the Intellectual Property rights or it is duly authorised to sub-licence the Intellectual Property rights or it is duly authorise to sub-licence the Intellectual Property rights to TELKOM. The Supplier further warrants that, to the best of its knowledge, no Intellectual Property rights of third parties are infringed herein by the use thereof as contemplated in the Agreement.
- 21.3 The Supplier shall be liable for all costs, liabilities and obligations relating to the Intellectual Property rights in respect of the Product.

- 21.4 The Intellectual Property rights which may be developed by the Supplier in compliance with its obligations in terms of the Agreement shall be the property of TELKOM and shall only be used by the Supplier for TELKOM purposes. Insofar as may be necessary in law, the Supplier hereby assigns to TELKOM all such Intellectual Property rights. The Supplier undertakes to sign all documents and do all such things as may be necessary to record and perfect the transfer of such Intellectual Property rights into the name of TELKOM.
- 21.5 It is specifically recorded that all documents, including information, data, plans, investigation schedules, working papers, diagnostic models, methodology, reports or the like developed or used by the Supplier for the performance of its obligations in terms of the Agreement and delivered to TELKOM pursuant to the Agreement shall be the property of TELKOM.
- 21.6 TELKOM has the right to modify and/or develop the Intellectual Property rights without the consent of the Supplier.
- 21.7 Any modification, invention, improvement or discovery, whether or not registrable (“the enhancement”) made by TELKOM or its employees or agents which relates directly or indirectly to the Intellectual Property rights shall be the property of TELKOM and the Supplier hereby assigns any such Intellectual Property rights to TELKOM, even if such enhancement were made with the collaboration of the Supplier. Immediately upon demand by TELKOM, the Supplier shall sign all necessary documents required to perfect the assignment.
- 21.8 In the event that TELKOM is prevented from using the Product due to an actual or claimed infringement of the Intellectual Property rights of any third party, then, at TELKOM’s option, the Supplier shall promptly either:
- 21.8.1 procure for TELKOM at the Supplier’s expense, the right to continue to use the Product;
  - 21.8.2 replace or modify the Product at the Supplier’s expenses so that the Product no longer infringes the Intellectual Property rights.
- 21.9 In the event that the Supplier fails or is unable to comply with TELKOM’s election as envisaged in clause 21.8 TELKOM shall be entitled to terminate the Agreement forthwith and

claim the Purchase Price and damages from the Supplier, without prejudice to any of the rights TELKOM may have.

21.10 As soon as TELKOM becomes aware of any claim, action, proceeding or suit, alleging infringement or violation of the Intellectual Property rights, it shall forthwith give written notice thereof to the Supplier. The Supplier shall be entitled to assume and control the defence of such claim, action, proceeding or suit, including any appeal in respect thereof, and to settle same, in which event TELKOM shall assist the Supplier as far as reasonably possible, subject thereto that the Supplier reimburse TELKOM for all expenses so incurred.

21.11 The Supplier hereby indemnifies and holds TELKOM harmless from and against all costs, expenses, liabilities (including legal costs), loss, damage and expense which TELKOM may be required to pay in:

21.11.1 defending a claim in respect of the actual or alleged infringement of the Intellectual Property rights;

21.11.2 due to the death or injury of a person arising from the actual or alleged infringement of the Intellectual Property; and

21.11.3 loss or damage to property pertaining to the actual or alleged infringement of the Intellectual Property.

21.12 The Supplier shall grant to TELKOM the right to access at no cost to TELKOM, all such Source Code, Object Code and Documentation, relating to such Product, should any one or more of the following events occur:

21.12.1 If the Supplier be liquidated or placed under judicial management (provisionally or finally) or enter into an agreement/arrangement with his creditors or commit and act of insolvency.

- 21.12.2 If the Supplier transfers or attempts in any way or manner, and whether directly or indirectly, to divest itself of any or all of the intellectual property rights of any Product.
- 21.12.3 If the Supplier is in material default of its obligations to provide any Maintenance Services.
- 21.12.4 If the Supplier is in material breach of any terms of this Agreement and fails to remedy such breach within the period prescribed by this Agreement after having received a written notice from TELKOM calling on it to do so.
- 21.12.5 If the Supplier ceases to trade or changes the main purpose of its business.
- 21.12.6 Irrespective of the events in Clause 21.12 materialising or not, the Supplier shall grant TELKOM access, at no cost to TELKOM, to the Object Code, Source Code, Documentation, all Configuration files, script files and templates, including but not limited interface Configuration files and event handling Configuration templates for purposes of:

21.12.6.1 Maintenance Services;

21.12.6.2 Updates or Upgrades;

21.12.6.3 Customisation or Configuration,

and the like, by TELKOM, or a third party acting on behalf of TELKOM, if in TELKOM sole discretion TELKOM determines that said Maintenance Services, Updates, Upgrades, Customisation or Configuration are to be done by TELKOM or a third party acting on

behalf of TELKOM. TELKOM will ensure that if such information is made available to third parties, the necessary confidentiality agreements are entered into with the third parties.

21.13 Notwithstanding anything to the contrary, the Supplier acknowledges that TELKOM has a contract with Molapo Technologies, in terms of which Molapo has been appointed by TELKOM, without limitation, to repair all out of Warranty Equipment for and on behalf of TELKOM. The Supplier agrees to fully support and cooperate with TELKOM to give effect to TELKOM's obligations in terms thereof. Failure by the Supplier in this regard will constitute a material breach of this Agreement.

21.14 Both Parties' obligations in terms of this Clause will survive the completion of termination of the Agreement.

## **22. INSURANCE**

22.1 The Supplier shall obtain and maintain for the duration of the Agreement insurance cover with a reputable insurance company to insure against all reasonably foreseeable insurance risk relating to the performance of its obligations in terms of the Agreement for amounts which accord with sound and prudent commercial practices and, in addition thereto, without limiting the generality thereof:

22.1.1 product liability;

22.1.2 public liability;

22.1.3 any liability to pay damages or compensation to its employees;

22.1.4 damage or loss to the Product, equipment, whether owned, hired or operated by the Supplier to be used by TELKOM at the Delivery Location; and

22.1.5 injuries as is required under the Compensation for Injuries and Diseases Act No. 130 of 1993 as amended;

22.1.6 damage or loss to motor vehicles brought onto the Delivery Location or any other site under the control of TELKOM.

22. The Supplier shall upon the written request of TELKOM, submit proof of, to the satisfaction of TELKOM, that it has obtained and maintained insurance as set out in this clause 0 above and shall deliver proof of the payment of the premiums in respect of such insurance cover to TELKOM.

### 23. **CONFIDENTIALITY**

23.1 For the purposes of the Agreement confidential information means any and all information including but not limited to technical, financial, product and commercial information - disclosed in writing or otherwise by the furnishing party to the receiving party, whether disclosed in view of the purpose before or after the date of the Agreement and shall be deemed to include all documents and other material (including samples, models and computer software) containing or embodying or based on the confidential information (or part thereof) together with all notes, summaries and other material derived therefrom and all copies or reproductions of the foregoing. Such confidential information shall not include information:

23.1.1 which is generally available to the public, or which will become generally available to the public other than by breach by the receiving party of its obligations hereunder;

23.1.2 which was or is already known to the receiving party before it had been or will be disclosed by the furnishing party, provided that such information may not reasonably be considered by the receiving party as confidential;

23.1.3 which the receiving party has received or will receive on a non-confidential basis from any party (including any third party) which is not in breach of an obligation of confidentiality towards the furnishing party or any party (including any third party), provided that such information may not reasonably be considered by the receiving party as confidential;

- 23.1.4 which is independently developed by or on behalf of the receiving party.
- 23.2 Either party shall:
- 23.2.1 hold the other party's confidential information in the strictest confidence;
  - 23.2.2 not make use thereof other than for the performance of its obligations under the Agreement; and
  - 23.2.3 only release such confidential information on a "need to know" basis subject thereto that the persons to whom such confidential information is released shall undertake to be bound by the confidentiality obligations contained herein.
- 23.3 Neither party shall be entitled to use the name of the other nor of any party to the Agreement in publicity releases or advertising or for other promotional purposes without procuring the prior written approval of the party concerned.
- 23.4 The parties' obligation in terms of this clause will survive the termination of the Agreement including the termination thereof by the effluxion of time.
- 23.5 In the case of a release, announcement or document which is required to be given, made or published by law or under the rules of the JSE Securities Exchange of South Africa and the New York Stock Exchange or any other relevant stock exchange, the party liable so to give, make or publish the same shall give to the other party as much advance warning thereof as is reasonable in the circumstances together with drafts or a copy thereof as soon as it is at liberty to do so.

## **24. BREACH AND TERMINATION**

- 24.1.1 If a party to the Agreement:

- 24.1.2 fails to pay any amount due by it in terms of the Agreement, by the due date, and fails to remedy such breach within 45 (forty five) days of written notice to do so; or
  - 24.1.3 Fails to meet any due date or maximum period specified in this Agreement; or
  - 24.1.4 Commits a material breach of this Agreement; or
  - 24.1.5 Commits an act of insolvency within the ambit of Section 8 of the Insolvency Act, No 24 of 1936, is deemed unable to pay its debts within the ambit of Section 345 of the Companies Act, alternatively Section 69 of the Close Corporations Act, as the case may be, finds itself in circumstances capable of being wound up in terms of Section 344 of the Companies Act, alternatively Section 68 of the Close Corporations Act, as the case may be, is deregistered or applies for deregistration in terms of Section 73 of the Companies Act, alternatively Section 26 of the Close Corporations Act, as the case may be, or is subject to application by a person other than a party for the provisional winding up or judicial management of such party, or a special resolution is passed for the winding up of such party;  
  
such party shall be in default.
- 24.2 If a party is in default, the aggrieved party shall be entitled, in addition to all other remedies to which it may be entitled in law or in terms of the Agreement, to terminate the Agreement.
- 24.3 Notwithstanding the provisions of clause 24.1 and/or 24.2, TELKOM may, without prejudice to any other rights herein, at any time and by giving written notice, forthwith terminate the Agreement if:
- 24.3.1 TELKOM has any reason to believe that the Supplier or anyone employed by it or acting on its behalf, whether with or without the Supplier's knowledge, engages in a fraudulent practice in connection with the Agreement;
  - 24.3.2 there is a substantial change of the ownership in or in the control of the Supplier (save in the event of the restructuring of the group of companies of which the

Supplier forms part), without TELKOM's prior written permission to such change;

- 24.3.3 the Supplier fails to satisfy a judgement against the Supplier within 21 (twenty one) days after the Supplier becomes aware of the judgement, except if the Supplier provides evidence on an ongoing basis to the reasonable satisfaction of TELKOM that steps have been initiated within the 21 (twenty one) days to appeal or rescind the judgement and to procure suspension of execution of the judgement and that such steps are being expeditiously pursued. The period of 21 (twenty one) days shall run from the date succeeding the date on which judgement becomes final, or the date on which the attempts to procure the suspension of the execution fail; or
  - 24.3.4 the Supplier acts against the expressed policies and instructions of TELKOM as expressed in terms of the Agreement.
- 24.4 The termination of the Agreement, will not prejudice the rights of TELKOM to claim damages or to obtain any other relief in respect of any antecedent breach of the terms and conditions of the Agreement prior to such termination.
- 24.5 Notwithstanding any other provision contained in the Agreement, in the event that the Supplier fails to deliver on the Delivery Date (or such later date as the Parties may have agreed to in writing) or fails to deliver the Product in compliance with the Specifications, then TELKOM shall, at its election, be entitled, but not obliged to:
- 24.5.1 terminate the relevant Order and or this Agreement forthwith; and
  - 24.5.2 acquire the Product from any third party and recover such additional expenditure (if any) in relation to the cost of the Product incurred by TELKOM and damages (if any) from the Supplier; or
  - 24.5.3 deduct from any amount owing to the Supplier by TELKOM in terms of this Agreement or any other agreement TELKOM may have with the Supplier , as a penalty, an amount equal to 5% (five percent) of the Purchase Price (or the adjusted Purchase Price) for every week or part thereof during which Delivery

remains outstanding or incomplete or during which the Product fails to comply with the Specifications provided that such penalty amount shall not be in excess of the Purchase Price or the adjusted Purchase Price; or

24.5.4 claim damages or loss suffered in lieu of such penalty.

24.6 In no event shall TELKOM be liable for any indirect, special, incidental, exemplary, punitive or consequential damages, including without limitation lost revenues, loss profits and/or lost data, under and or in connection with the Agreement. In no event will TELKOM's liability under the Agreement, regardless of the basis for the claims (including material breach, misrepresentation, delay, penalties or liquidated damages if any, or other delictual or contractual claim) for direct damages, exceed the total of payments received by the Supplier from TELKOM.

## **25. DISPUTE RESOLUTION**

25.1 All disputes between the parties shall, when all efforts to resolve such dispute by negotiation have failed, be referred to the High Court of South Africa (North Gauteng High Court), save if the parties agree to refer the dispute to arbitration as envisaged in clause 26.

25.2 The party declaring the dispute shall be obliged, prior to referring the matter to the High Court or to arbitration, deliver written notice to the other party giving full details in respect of the alleged disputes to enable the other party to fully appreciate the nature and extent of the alleged dispute.

## **26. ARBITRATION**

26.1 In the event that the parties agree to refer a dispute to arbitration, such arbitration shall be held subject to the provisions of this clause:

26.1.1 at Pretoria;

26.1.2 informally;

- 26.1.3 otherwise in accordance with the provisions of the Arbitration Act No. 42 of 1965, as amended;
- 26.2 The arbitrator shall be if the question in issue is:
- 26.2.1 primarily an accounting matter, an independent accountant agreed upon between the parties;
- 26.2.2 primarily a legal matter, a practising Senior Counsel with no less than 10 (ten) years standing agreed upon between the parties;
- 26.2.3 any other matter, an independent person agreed upon between the parties.
- 26.3 If the parties cannot agree upon a particular arbitrator in terms of 26.2 above within 7 (seven) business days after the arbitration has been demanded, the nomination in terms of 26.2.1, 26.2.2, 26.2.3, as the case may be, shall be made by the President of the Transvaal Law Society (or its successor) within 7 (seven) days after the parties have so failed to agree.
- 26.4 The parties irrevocably agree that the decision in these arbitration proceedings:
- 26.4.1 shall be binding on them,
- 26.4.2 shall be carried into effect,
- 26.4.3 either party shall have right for review;
- 26.4.4 may be made an order of any Court of competent jurisdiction; and
- 26.4.5 shall not exclude parties' right for urgent relief.
- 26.4.6 either party shall have the right of appeal.

## **27. NOTICES AND DOMICILIUM**

- 27.1 For the purpose of the Agreement the Parties' respective addresses will be:

27.1.1 as regards TELKOM:  
TELKOM SA LIMITED  
THE GROUP EXECUTIVE  
PROCUREMENT SERVICES  
TELKOM TOWER NORTH  
152 PROES STREET  
PRETORIA 0002  
REPUBLIC OF SOUTH AFRICA

or

TELKOM SA LIMITED  
THE GROUP EXECUTIVE  
PROCUREMENT SERVICES  
PO BOX 447  
PRETORIA 0001  
REPUBLIC OF SOUTH AFRICA  
FAX: +27 12 323 3570

27.1.2 as regards the Supplier, as indicated in its Proposal.

27.2 Any notice given, or other documents sent (excluding invoices) in terms of the Agreement, will be in writing and will:

27.2.1 if delivered by hand be deemed to have been duly delivered by the addressee on the first Working Day after the date of delivery;

27.2.2 if posted by prepaid registered post be deemed to have been received by the addressee on the 10<sup>th</sup> (tenth) Working Day following the date of such posting;

27.2.3 in the case of all documents, excluding notices, if posted by ordinary prepaid post, be deemed to have been received by the addressee on the 10<sup>th</sup> (tenth) Working Day following the date of such posting;

27.2.4 in the case of a facsimile, be deemed to have been received on the date appearing on the facsimile transmission report.

27.3 Notwithstanding anything to the contrary contained in the Agreement, a written notice or communication actually received by one of the Parties from the other will be adequate written notice of communication to such Party.

27.4 Either Party may by notice to the other Party change the physical and/or postal address chosen as its domicilium citandi et executandi to another physical and/or postal address where postal delivery occurs in the Republic of South Africa, or its telefax number, provided that the change shall become effective on the 10<sup>th</sup> (tenth) Working Day from the deemed receipt of the notice by the other Party.

## 28. **JURISDICTION**

28.1 The parties irrevocably agree that the High Court of South Africa (Transvaal Provincial Division (“TPD”)) shall have jurisdiction to hear and determine any suit, action or proceeding and to settle any dispute which may arise out of or in connection with the Agreement and for such purpose irrevocably submit to the jurisdiction of the High Court of South Africa (TPD).

28.2 Each of the parties irrevocably waives any objection which it might now or hereafter have to the courts referred to in clause 28.1 being nominated as a forum to hear and determine any suit, action or proceedings and to settle any disputes, which may arise out of or in connection with the Agreement and agrees not to claim that any such court is not a convenient or appropriate forum. The parties agree that the process by which any suit, action or proceeding is begun may be served on it by being delivered in connection with any suit, action or proceeding at its registered office for the time being.

28.3 The Supplier shall, if its registered address is not in South Africa, as soon as any suit, action or proceeding is brought against it, appoint an address in South Africa for purposes of service and failing such appointment within 15 (fifteen) days after such suit, action or proceeding is instituted, TELKOM shall be entitled to appoint such address by notice to the Supplier. Nothing contained herein shall affect the right to serve process in any other manner permitted by law.

28.4 The submission to the jurisdiction of the courts referred to in clause 28.1 shall not be construed so as to limit the rights of either party to take proceedings against the other party in

any other court of competent jurisdiction for the purpose of obtaining urgent or interdictory relief.

**29. APPLICABLE LAW**

The Agreement shall be governed exclusively in all respects by and shall be interpreted in accordance with the laws of South Africa.

**30. FORCE MAJEURE**

30.1 If circumstances which were not foreseeable with reasonable foresight or avoidable with reasonable care ("circumstances"), arise or be reasonably anticipated and delayed or have potential to delay the performance, whether in whole or in part impossible, the Party whose performance is affected, or whose performance may be affected ("Affected Party"), will forthwith, in good faith and by the most expeditious means, notify the other Party in writing of:

- 30.1.1 the cause, nature and extent of the circumstances;
- 30.1.2 the expected duration of the circumstances;
- 30.1.3 the extent to which the performance will be affected.

30.2 If the circumstances change after the Affected Party has notified the other Party in accordance with Clauses stated above, the Affected Party will, forthwith, in good faith and by the most expeditious means, inform the other Party of such changes and keep the other Party updated on such changes.

30.3 Subject to the Clauses stated above, the circumstances will not terminate the Agreement between the Parties, or absolve the Affected Party from performance.

30.3.1 If the circumstances make the agreed performance impossible, the Affected Party will, having regard to all relevant factors, as soon as possible and in good faith, put proposals for alternatives to the other Party. Such proposals will be in sufficient detail to enable the other Party to technically and informatively assess the alternatives and to decide whether any alternative is acceptable.

- 30.3.2 If there be no alternative acceptable to the other Party, it may elect to terminate the Agreement with immediate effect and without prejudice to any other rights it may have.
- 30.4 If the circumstances delay the agreed performance -
- 30.4.1 the Affected Party will, forthwith and in good faith, take all reasonable steps to mitigate delay and recover lost time, and
- 30.4.2 the Affected Party will, having regard to all relevant factors and in good faith, notify the other Party as soon as possible of the steps to be taken to mitigate the delay and recover lost time and keep the other Party updated on changes and progress thereof;
- 30.4.3 the other Party may, if the extent to which the delay may be mitigated and time lost be recovered are unacceptable to it, elect to terminate the Agreement.
- 30.4.4 neither of the Parties will have any claim, arising from the circumstances, on the other.
- 30.5 Without limiting the generality and intention of the Clauses above in any way, the circumstances may include, without being limited thereto:
- 30.5.1 War, riots, civil or military insurrection and like political happenings.
- 30.5.2 Natural disasters such as earthquakes, fire, storms and floods.
- 30.5.3 Governmental acts and omissions.
- 30.5.4 Terrorism and sabotage.

## **31. CESSION AND ASSIGNMENT**

The Supplier shall not:

- 31.1 transfer any rights and/or obligations arising out of the Agreement; or
- 31.2 make or allow any change to the shareholding or management control of Supplier as it is at the time of signature of this Agreement, without the prior written permission of TELKOM.

## **32. SAFETY AND SECURITY**

- 32.1 The Supplier shall comply and procure that its sub-contractors, employees or agents comply with TELKOM's security and safety procedures.
- 32.2 The Supplier confirms that it complies and for the duration of the Agreement shall comply with the provisions of the Occupational Health and Safety Act No. 85 of 1993 (as amended) ("the OHS Act"). It is specifically recorded that the Agreement constitutes a written arrangement as contemplated in section 37(2) of the OHS Act.
- 32.3 TELKOM shall be entitled to request the Supplier by written notice (stipulating a period for compliance with such request) to remove any of its employees, agents, consultants or sub-contractors from the delivery location or to cease interfacing with TELKOM at TELKOM's instance.
- 32.4 The Supplier shall be obliged to remove such person within the time limit stipulated by TELKOM in its written notice as envisaged in clause 32.3.
- 32.5 The Supplier indemnifies and holds TELKOM harmless from and against any claim (including legal costs) that may arise from such request.

## **33. CANVASSING, GIFTS, INDUCEMENTS AND REWARDS**

- 33.1 The Supplier shall not under any circumstances offer, promise or make any gift, payment, loan, reward, inducement, benefit or other advantage to any of TELKOM employees.
- 33.2 A breach of clause 33.1 shall be deemed to be a material breach of the Agreement in which event TELKOM shall be entitled to terminate the Agreement forthwith without prejudice to any rights it may have at law.

## **34. FRAUD**

- 34.1 If, upon *prima facie* evidence TELKOM determines that the Supplier:
- 34.1.1 acted dishonestly and/or in bad faith;

34.1.2 made any intentional or negligent misrepresentation to TELKOM in respect of the negotiations preceding the Agreement or in respect of the Agreement or in respect of the execution of the Agreement or any previous agreement and/or the negotiations and/or the execution thereof;

(“the alleged impropriety”), then TELKOM shall be entitled, by written notice to the Supplier, forthwith to terminate the Agreement.

34.2 Upon such termination as envisaged in this clause 34, TELKOM shall be entitled to, in addition to all other remedies available to it, to withhold payment or any amount in respect of the Agreement for a period of 90 (ninety) days from the date of such termination.

34.3 During such 90 (ninety) day period TELKOM shall conduct such investigation as it may deem necessary in respect of the alleged impropriety and the damage (if any) suffered.

34.4 No payment made by TELKOM to the Supplier pursuant to the forementioned period shall preclude TELKOM from the recovery of any amount paid to the Supplier after the expiry of such period and such damages as it may have suffered.

### **35. OWNERSHIP AND RISK**

Save as otherwise provided for herein, the risk and ownership in and title to the Product shall pass to TELKOM upon Delivery thereof, subject thereto that ownership shall be deemed not to have passed in the event that the Product is defective and in which event TELKOM shall retain the right to reject the Product within the approval period.

### **36. LIENS AND CLAIMS BY THIRD PARTIES**

36.1 Upon the delivery of the Product, the Supplier waives all liens and rights of possession relating to the Product.

36.2 In the event that a third party makes a claim against TELKOM for the Product or in respect of the Product, the Supplier shall upon receipt of a written notification thereof from TELKOM:

- 36.2.1 take all such steps (including the defence thereof) as may be necessary to ensure undisturbed possession of the Product by TELKOM; and
  - 36.2.2 inform TELKOM in writing of the steps taken.
- 36.3 In the event that the Supplier fails to take such steps as may be required to defend such action, TELKOM shall be entitled, in its absolute discretion, to defend such claim in which event the Suppliers shall:
- 36.3.1 assist TELKOM to defend such claim; and
  - 36.3.2 be liable for such costs as may be incurred by TELKOM in the defence of such claim.
- 36.4 TELKOM shall be entitled to recover the cost that it may incur respect of the defence of such claim from the Supplier and, shall be entitled to deduct such cost from any amount owing by TELKOM to the Supplier.

**37. TELKOM EQUIPMENT IN POSSESSION OF SUPPLIER**

- 37.1 The ownership of equipment delivered by TELKOM or made available by TELKOM to the Supplier (“the TELKOM equipment”) at the delivery location shall remain vested in TELKOM.
- 37.2 The Supplier shall, upon the written request of TELKOM, deliver the TELKOM equipment to TELKOM in the condition it received same, fair wear and tear excepted.
- 37.3 The Supplier shall be liable for all loss or damage to the TELKOM equipment in its possession or under its control.
- 37.4 Prior to making the TELKOM equipment available to the Supplier, TELKOM shall be entitled to require the Supplier to furnish security for the full value of the TELKOM equipment in the event of any loss or damage to the aforesaid equipment.

**38. USE OF SOFTWARE, SERVICE AND PURCHASE OF PRODUCTS**

The supplier agrees that Telkom's current and future, local and international Subsidiaries, Affiliates, and Contractors shall be entitled to obtain, procure, acquire and use the software, service and/or products from the Supplier in terms of this Agreement or in accordance with a separate agreement which will include substantially the same terms and conditions as this Agreement inclusive of the same prices, delivery periods, warranties, indemnities etc the Supplier supplies software, services and/or products to Telkom.

**39. SEVERABILITY**

If any clause or term of the Agreement should be invalid, unenforceable or illegal, then the remaining terms and provisions of the Agreement shall be deemed to be severable therefrom and shall continue in full force and effect unless such invalidity, unenforceability or illegality goes to the root of the Agreement.

**40. WAIVER**

40.1 The waiver (whether expressed or implied) by either party of any breach of the terms or conditions of the Agreement by the other party shall not prejudice any remedy of the waiving party in respect of any continuing or other breach of the terms and conditions hereof.

40.2 No failure, delay, relaxation or indulgence on the part of either party in exercising any power or right conferred on such party in terms of the Agreement shall operate as a waiver of such power or right nor shall any single or partial exercise of any such power or right preclude any other or further exercises thereof or the exercise of any other power or right under the Agreement.

40.3 The expiry or termination of the Agreement shall not prejudice the rights of either party in respect of any antecedent breach or non-performance by the other party of any of the terms or conditions hereof.

**41. MODIFICATION**

No amendment, variation or consensual cancellation of this Agreement or any provision or term hereof or of any other document issued or executed pursuant to or in terms of this Agreement and no settlement of any disputes arising under this Agreement and no extension of time, waiver or relaxation or suspension of or Agreement not to enforce or to suspend or postpone the enforcement of any of the provisions or terms of this Agreement or of any other document issued pursuant to or in terms of this Agreement shall be binding unless made in accordance with the terms of this Agreement and recorded in a written document signed by the duly authorized representative of the Parties.

**42. ENTIRE AGREEMENT**

This agreement and the Annexures thereto constitute the sole and entire record of the Agreement between the Parties with regard to the subject matter thereof and supercedes, overrides and replaces all prior agreements, quotations, negotiations, terms, conditions, offers, discussions, promises, representations, understandings of the parties with respect thereto, whether written or oral.

END