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**AIR TRAFFIC AND NAVIGATION SERVICES SOC LTD**

**REPUBLIC OF SOUTH AFRICA**



**REQUEST FOR BID/TENDER: ATNS/TPQ/RPF19/2024/25/ VDF REPLACEMENT**

**VDF REPLACEMENT PROJECT**

**APPOINTMENT OF A SERVICE PROVIDER FOR REPLACEMENT OF VHF DIRECTION  
FINDER (VDF) EQUIPMENT AT RICHARDS BAY (FARB), VIRGINIA (FAVG), PILANESBERG  
(FAPN) AIRPORTS AND ATA (ATNS AVIATION TRAINING ACADEMY).**

**VOLUME 1B**

**CONDITIONS AND FORM OF CONTRACT (SERVICE LEVEL AGREEMENT)**

**October 2024**

The information contained within this document is confidential to ATNS in all respects and it is hereby acknowledged that the information as provided shall only be used for the preparation of a response to this document. The information furnished will not be used for any other purpose than stated and that the information will not directly or indirectly, by agent, employee or representative, be disclosed either in whole or in part, to any other third party without the express written consent by the Company or it's representative.

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# CHAPTER 1

## DEFINITIONS AND INTERPRETATIONS

### CHAPTER 1: DEFINITIONS AND INTERPRETATION

#### 1 DEFINITIONS AND INTERPRETATION

##### 1.1 Definitions

The words and expressions defined below shall, when used in these Tender Documents have the meanings hereby assigned to them unless such meanings are inconsistent with the context or an alternative meaning is stated:

- 1.1.1 “**Acceptance Certificate**” means either an Interim, Substantial Completion or Final Acceptance Certificate issued to the Contractor by the Engineer stating that Supplies and Services presented by the Contractor for testing or inspection have been accepted by the Engineer as satisfying the requirements of the Contract and have passed, where required, the Factory Acceptance Test (FAT) the Site Acceptance Test (SAT) Final Acceptance, or other inspections, tests or re-tests as required by the Engineer; and in accordance with the Management Plan;
- 1.1.2 “**acceptance of a Tender**” means the award of a contract to a Tenderer in response to their Tender or price quotation;
- 1.1.3 “**Acceptance or Accepted**” means the issuance of an Acceptance Certificate by the Engineer to the Contractor signifying that Acceptance Testing and Inspection of Supplies and Services have been successful;
- 1.1.4 “**Acceptance Testing and Inspection**” means the act of testing or inspecting the Supplies and Services provided by the Contractor under the Contract, using agreed test procedures in accordance with the Management Plan, or other tests and inspections required by the Engineer;
- 1.1.5 “**ACSA**” means Airports Company South Africa SOC Ltd;
- 1.1.6 “**Acquisition Phase**” means the period from Effective Date to the end of PBU;
- 1.1.7 “**Agreement**” or “**Contract**” means this Service Level Agreement, and all annexures specified herein and all / any annexures to be incorporated herein and as may be amended from time to time;
- 1.1.8 “**AIMU**” means Aeronautical Information Management Unit;
- 1.1.9 “**Air Traffic Controller**” or “**ATC**” means that person who is designated by the Company as being responsible for the safe movement of aircraft and vehicles on the Manoeuvring Area;
- 1.1.10 “**Airport**” means the area of land including buildings intended to be used partly or wholly for the arrival, departure and movement of aircraft, air passengers and air freight;
- 1.1.11 “**Airport Manager**” or “**APM**” means that person who is designated by the Airports Company as being responsible for the operation and security of the aerodrome and for the safe movement of aircraft and vehicles on the Apron;
- 1.1.12 “**Airport Security Area**” means the defined portion of the Airport subject to special safety and security regulations as specified in the contract. The Works may be situated within this security area;
- 1.1.13 “**Airside**” means the area of the Airport in which flying operations and movement of aircraft take place. This area is an Airport Security Area;
- 1.1.14 “**Apron**” means an all-weather surface for parking aircraft at the Airport;
- 1.1.15 “**ATA**” means ATNS Aviation Training Academy;
- 1.1.16 “**ATSU**” means Air Traffic Services Unit;
- 1.1.17 “**B-BBEE Act**” means Broad-Based Black Economic Empowerment Act No, 53 of 2003, as amended from time to time;

- 1.1.18 “**B-BBEE**” means broad-based black economic empowerment as contemplated in the BBBEE Act and any regulations promulgated thereunder as amended from time to time;
- 1.1.19 “**B-BBEE Requirements**” means the broad-based black economic empowerment requirements in respect of Black People under the BEE Scorecard which are applicable to the Parties and which are binding from time to time on the Parties, and those which are not binding on the Parties but which are of substantial general application and non-compliance therewith would have a material adverse impact on the Parties, including the requirements contained in the BBBEE Act and the codes of good practice on BBBEE, as amended from time to time;
- 1.1.20 “**BEE Scorecard**” means the generic scorecard which is used as a basis for the measurement of an entity’s BEE status, or such other scorecard or mechanism as may be prescribed in terms of the codes of good practice on BBBEE, as amended from time to time as a basis for the measurement of the Parties’ BEE status;
- 1.1.21 “**BEE Status**” means the BBBEE rating, standing, classification and/or measurement (or its equivalent) as contemplated under the codes of good practice on BBBEE, as the case may be, attributable to any entity;
- 1.1.22 “**Beneficial Use**” means the use by the Company of the accepted system during the period of time between successful completion of the Site Acceptance Tests and Final Acceptance of the system by the Company; or at the direction of the Company
- 1.1.23 “**Black People**” means as stated in the Schedule 1 of the BEE Codes, African, Coloured or Indian persons who are natural persons and who: (i) are citizens of the Republic of South Africa by birth or descent; or (ii) are citizens of the Republic of South Africa by naturalisation before the commencement date of the Constitution of the Republic of South Africa, Act 200 of 1993 (“**Interim Constitution**”); or (iii) became citizens of the Republic of South Africa after the commencement date of the Interim Constitution, but who, but for the Apartheid policy that had been in place prior to that date, would have been entitled to acquire citizenship by naturalisation prior to that date; or shall have such other meaning as may be ascribed to under the BBBEE Act, the Codes and/or the Charter from time to time, and “**Black Person**” shall be construed accordingly;
- 1.1.24 “**Board**” means the Board of Directors of the Company;
- 1.1.25 “**Closing Time**” means the date and hour specified in the Tender Documents for the receipt of Tenders;
- 1.1.26 “**Codes**” means the Codes of Good Practice on the Broad Based Black Economic Empowerment published by the Minister of Trade and Industry in terms of section 9(1) of the BBBEE Act;
- 1.1.27 “**Commissioning**” means the bringing into operational service a system or part of a system;
- 1.1.28 “**Company**” or “**ATNS**” means Air Traffic and Navigation Services SOC Ltd, with registration number 1993/004150/30;
- 1.1.29 “**Company’s representative**” in the first instance means the Managing Director of ATNS, but further includes any person appointed by the Company to act as the Company’s Representative such as the Engineer. The Company shall notify the Contractor of all appointments in writing;
- 1.1.30 “**Contract Price**” means the total price for the Supplies and Services as set out in the Contract Price Schedule to the Contract;
- 1.1.31 “**Contractor**” or “**Service Provider**” means any natural or legal person whose Tender has been accepted by the Company;
- 1.1.32 “**Delivery Date for Delivery**” means the dates set out in the Delivery Schedule contained in the Project Management Plan, by which the Contractor is to deliver the Supplies and Services to or at the Delivery Sites;
- 1.1.33 “**Date for Installation**” means the dates set out in the Delivery Schedule by which the Contractor is to install the Supplies and Services at the Installation Site(s);
- 1.1.34 “**day**” means calendar day;
- 1.1.35 “**Delivery**” means in general, delivery in compliance with the conditions of contract or Order, or in particular the act of packaging and transporting any part of the Supplies and Services to the Delivery Sites in accordance with the Delivery Schedule;
- 1.1.36 “**Delivery Ex Stock**” means immediate Delivery directly from stock actually on hand;
- 1.1.37 “**Delivery into consignee’s store or to his site**” means Delivery and unloading in the specified store or depot or on the specified site in compliance with the conditions of the contract or Order, the Contractor bearing all risks and charges involved until the supplies are so delivered and a valid receipt is obtained;
- 1.1.38 “**Delivery Schedule**” means the component of the Project Management Plan to the Contract which indicates the Supplies and Services, their respective quantities, Date for Delivery, Date for Installation and Delivery Site;
- 1.1.39 “**Delivery Site**” means the places specified in the Delivery Schedule for the purpose of Delivery or Installation of the Supplies and Services, or any other places nominated by the Engineer and notified in writing to the Contractor;
- 1.1.40 “**Documentation**” means the documentation to be supplied by the Contractor in accordance with the Specifications as defined in the Contract Data Requirements List and delivered in accordance with the Delivery timetable;
- 1.1.41 “**D&R**” means disaster and recovery;
- 1.1.42 “**Effective Date**” means the Signature Date;

- 1.1.43 “**Engineer**” means the person appointed by the Company for the purpose of representing the Company for the purpose of the Contract and includes any other person appointed by the Engineer to act as the Engineer’s representative. The Company shall notify the Contractor of all appointments in writing;
- 1.1.44 “**Exchange Rate Fluctuation**” means all possible changes in the values of currencies quoted in the Tender relative to each other, arising as a result of market forces, formal devaluation or revaluation of those currencies or from any cause howsoever arising;
- 1.1.45 “**Factory Acceptance Testing**” or “**FAT**” means the act of performing the tests required to be carried out on the VDF System in accordance with the Factory Acceptance Test Procedures prepared by the Contractor as a Contract requirement and in accordance with the Management Plan;
- 1.1.46 “**Factory Acceptance Test Procedures**” or “**FATP**” means the tests required to be performed on the VDF System in accordance with the overall test and evaluation plan prepared by the Contractor as a Contract requirement and in accordance with the systems Engineering Management Plan;
- 1.1.47 “**Factory Inspection**” means the Physical Inspection to be carried out at the Contractors’ premises of the Supplies and Services in accordance with the overall test and evaluation plan;
- 1.1.48 “**FAOR**” means O.R Tambo International Airport;
- 1.1.49 “**FAGC**” means Grand Central Airport;
- 1.1.50 “**FAPN**” means Pilanesberg Airport;
- 1.1.51 “**FARB**” means Richards Bay Airport;
- 1.1.52 “**FAVG**” means Virginia Airport;
- 1.1.53 “**FRC**” means Fault Reporting Centre;
- 1.1.54 “**Final Acceptance**” means the acceptance of the Supplies and Services by the Company after the satisfactory validation of the Integrated Logistic Support System at the end of the Period of Beneficial Use and coincident with the end of the Guarantee Period;
- 1.1.55 “**Fixed Price**” means the price which cannot be changed and is not subject to adjustment;
- 1.1.56 “**Final Acceptance Testing**” means the act of validation of the Integrated Logistic Support System to be carried out by the Contractor in accordance with the Contract as documented in the Integrated Logistic Support Plan;
- 1.1.57 “**Foreign Currency Debt**” means any amount which the Contractor is obliged to remit abroad in fulfilment of its contractual obligations to the Company;
- 1.1.58 “**Formal Contract**” means a written contract, all the terms of which are embodied in a single or composite document signed by all the parties thereto and duly witnessed;
- 1.1.59 “**Guarantee Period**” means, in respect of each part of the Supplies and Services, a period of a minimum of twelve (12) months commencing on the date of Acceptance of such part;
- 1.1.60 “**Historically Disadvantaged Individuals**” means all South African citizens:
- who had no franchise in national elections prior to the introduction of the 1983 and 1993 constitutions;
  - women; or
  - disabled persons;
- 1.1.61 “**ICAO**” means International Civil Aviation Organization;
- 1.1.62 “**Imported Content**” means that portion of the Tender price represented by the costs of components, parts or materials which have been or are still to be imported (whether by the Tenderer or its suppliers or subcontractors) and which costs are inclusive of the costs incurred outside South Africa, plus freight and other direct importation costs such as landing costs, dock dues, import duty, sales duty, or other similar tax or duty at the South African place of entry as well as transportation and handling charges to the factory in the Republic where the supplies which have been Tendered for are Manufacture d;
- 1.1.63 “**Indices**” means indices published by the Central Statistical Services, SEIFSA (Steel and Engineering Industries Federation of Southern Africa) and other bodies approved by the Company reflecting price adjustments or changes in cost;
- 1.1.64 “**Installation**” means the physical Installation of the Supplies and Services at the designated Delivery or Installation Site;
- 1.1.65 “**Installation site**” means the locations designated in the Delivery Schedule, contained in the Project Management Plan of the Contract;
- 1.1.66 “**Intellectual Property Rights**” means any patent, design, trademark, copyright, trade secret, confidential information, circuit layout, computer software and all other rights result from intellectual activity in the industrial or scientific field both in South Africa and throughout the world;
- 1.1.67 “**Landside**” means the area of the Airport to which the public has unrestricted access;
- 1.1.68 “**Latent Defect**” means any omission from, fault within, deficiency in or any other aspect of the Supplies and Services which, during the Life of the Supplies and Services, preclude the Supplies and Services from meeting the requirements of the Specifications;

- 1.1.69 “**legislation**” means acts, ordinances, regulations, by-laws, proclamations and subordinate legislation under by or pursuant to any government statute;
- 1.1.70 “**Life of the Supplies and Services**” means, in respect of each part of the Supplies and Services, the period of fifteen (15) years commencing on the date of Acceptance of such part;
- 1.1.71 “**local content**” means that portion of the Tender price which is not included in the Imported Content provided that local Manufacture does take place;
- 1.1.72 “**Maintenance and Support Phase**” means the period from the end of PBU until the end of the maintenance and support period of the Project;
- 1.1.73 “**Manoeuvring Area**” means that area on an aerodrome, excluding Aprons, to be used for the take-off, landing and taxiing of aircraft;
- 1.1.74 “**Manufacture**” means the Production of products in a factory using labour, materials, components and machinery and includes fabrication, assembly or processing;
- 1.1.75 “**Milestone Payment**” is the actual payment of a proportion of the Contract Price. Milestone Payments are based on measurable achievements when the Supplies and Services are delivered to, or installed at, the Delivery site by the Contractor. Milestone Payments shall be effected following Acceptance of the Supplies and Services, 30 days after presentation of a correctly produced and presented invoice to the Engineer;
- 1.1.76 “**Milestone Payment Schedule**” is the payment schedule at Chapter 6 that indicates the points in the Delivery Schedule at which the Engineer is required to pay instalments to the Contractor against the Contract Price upon achievement of the Milestone;
- 1.1.77 “**month**” means calendar month;
- 1.1.78 “**Notice of Rejection**” means a fully detailed written notice issued by the Engineer to the Contractor stating that the Supplies and Services are not in accordance with the requirements of the Contract;
- 1.1.79 “**NTP**” means Network Time Protocol;
- 1.1.80 “**Obstruction Free Area**” means an area as defined by ICAO, Annex 14;
- 1.1.81 “**Order**” means an official written order issued for the supply of goods or the rendering of a service;
- 1.1.82 “**Parties**” means the ATNS and the Service Provider. “**Party**” means each of them;
- 1.1.83 “**Period of Beneficial Use**” or “**PBU**” means a period starting from the Site Acceptance of the first site until **12 months** after the Site Acceptance of the last site, in which the Service Provider shall be responsible for the maintenance and support of the Supplies and Services until the validation of the support system is achieved;
- 1.1.84 “**Period of Contract**” means the period of **three (3) years** (Two (2) years for acquisition phase and One (1) year PBU) from the Effective Date to the end of PBU, in respect of the Acquisition Phase and **fifteen (15) years** thereafter, in respect of the Maintenance and Support Phase;
- 1.1.85 “**Performance Guarantee**” means a guarantee issued by an insurance company or bank on behalf of the Service Provider to ATNS, wherein the Service Provider guarantees the full and due performance of the Contract according to the plans and Specifications;
- 1.1.86 “**Personal Information**” means data that can be used to identify a person and includes biometrics;
- 1.1.87 “**Physical Inspection**” means the visual inspection of the Supplies and Services by the Engineer to ensure the Supplies and Services meet the requirements of the Specifications;
- 1.1.88 “**Price**” means the amount in the currency stated in the Agreement and which may be fixed or not fixed;
- 1.1.89 “**Price not fixed**” means the price which is subject to adjustment or, if clearly indicated in the Agreement, a budgetary price;
- 1.1.90 “**price quotation**” means a written offer on any documentation which is not necessarily subject to the general conditions and procedures contained in this Agreement and which is invited and dealt with in any manner;
- 1.1.91 “**Production**” means the production of products, whether in a factory or not, and includes manufacturing and other activities such as mining and agriculture;
- 1.1.92 “**Project**” means the supply, delivery, installation and commissioning of VDF Systems at FARB, FAVG and FAPN airports in compliance with the ICAO requirements. The Project may be extended to FAGC upon ATNS’ discretion;
- 1.1.93 “**Provisional Sum**” a sum allocated by the Company for the optional supply and incorporation into the contract of an identified item. It is up to the Tenderer to confirm whether this sum is adequate and agreed in the Tender response;
- 1.1.94 “**Rand**” or “**R**” mean the lawful currency of the Republic of South Africa;
- 1.1.95 “**Remedial Work**” means the correction of any defect in the Supplies and Services, including the provision or replacement of any Spare Parts during the Guarantee Period in order to satisfy the requirements of the Specifications;
- 1.1.96 “**Runway**” means it is a defined surfaced rectangular area at an Airport prepared for the landing and take-off of aircraft;



- 1.1.97 “**Runway Overrun**” means a graded area beyond the Runway Threshold to accommodate aircraft in the case of an overrun on landing and to accommodate certain landing aids used during aircraft landing approaches;
- 1.1.98 “**Runway Strip**” means it is that area adjacent to the Runway extending 75m on either side from the centre line of the Runway;
- 1.1.99 “**SAN**” means storage area network;
- 1.1.100 “**schedule**” or “**appendix**” means a Schedule/Appendix to the Agreement forming part of the Agreement and derived from the Contractor’s Tender and subsequent clarifications;
- 1.1.101 “**Signature Date**” means the date on which this Agreement is signed by the last Party to do so, whether in counterpart or not;
- 1.1.102 “**Site Acceptance Test**” or “**SAT**” means the act of performing the technical and operational tests required to be carried out on the VDF System at the Delivered or Installed Site(s) to determine acceptability for full operational use;
- 1.1.103 “Site Acceptance Test Procedures” or “SATP” means the tests required to be performed on the Project as indicated Master Test and Evaluation Plan contained in the Systems Engineering Management Plan of the Contract;
- 1.1.104 “Site Inspection” means the Physical Inspection of Supplies and Services to be provided under the Contract at the designated Delivery or Installation Sites;
- 1.1.105 “**South Africa**” means the Republic of South Africa;
- 1.1.106 “**Spare Parts**” means the component parts listed within the Integrated Logistic Support Plan;
- 1.1.107 “**Specifications**” or “**System Specification**” or “**Requirements Specification**” means the specifications set out in Volumes 2 to 4 inclusive of the Tender Documents;
- 1.1.108 “**Spot Rate**” means the telegraphic transfer selling rate at which commercial banks will provide foreign currency to a customer against payment of the Rand;
- 1.1.109 “**SSS Building**” means the Simulator Support Suite building;
- 1.1.110 “**statement of compliance**” or “**compliance matrix**” means the document submitted by the Contractor in respect of its response to the REQUEST FOR PROPOSAL, and included at Schedule H;
- 1.1.111 “**sub-contractor**” means a person who supplies goods, products or services to the Contractor either directly or through another sub-contractor for use by the Contractor for the purposes of the Contract;
- 1.1.112 “**Substantial Completion**” means successful completion and Acceptance of the supply, Installation and test of all the major VDF System deliverables to the satisfaction of the Engineer. It includes Site Acceptance but does not encompass Final Acceptance of the system or the completion of the Guarantee Period;
- 1.1.113 “**Supplier**” means the person or company awarded a contract in terms of the Tender and is synonymous with the Contractor;
- 1.1.114 “**Supplies and Services**” means all or part, as the Contract requires, of the equipment, Documentation, Training Services, Spare Parts, maintenance aids and all other items identified in the Contract;
- 1.1.115 “**System**” means the following but not limited to:
- 1.1.115.1 Antenna System;
- 1.1.115.2 VHF Receiver;
- 1.1.115.3 Evaluation or Control Unit;
- 1.1.115.4 Operational Workstation or Display Unit;
- 1.1.115.5 Technical Workstation.
- 1.1.116 “**Taking-Over Certificate**” means a certificate issued by the Engineer on behalf of the Company confirming Final Acceptance of the Works;
- 1.1.117 “**Taxiway**” means the defined surfaced path at an Airport, selected or prepared for the taxiing of aircraft;
- 1.1.118 “**Tender**” means a written offer on the official Tender Documents forming part of an invitation to Tender which invitation has been dealt with in accordance with the requirements of the conditions of tendering contained in this Agreement unless otherwise determined by the Company;
- 1.1.119 “**Tender Documents**” means the documents prepared by the Company for the purpose of obtaining Tenders or quotes for the supply of Goods and/or Services, and the response documents submitted by the Service Provider;
- 1.1.120 “**Tenderer**” means any qualified or legal person submitting a Tender or a price quotation;
- 1.1.121 “**Threshold**” means the beginning of that portion of the Runway used for the landing or take-off of aircraft;
- 1.1.122 “**Training**” or “**Training Services**” means the technical and operational training services to be provided by the Contractor in accordance with the Agreement and identified as Part of the Integrated Logistic Support Plan;
- 1.1.123 “**VAT**” means, value-added tax levied in terms of the VAT Act;
- 1.1.124 “**VAT Act**” means the Value-Added Tax Act No.89 of 1991, as amended or replaced from time to time;

- 1.1.125 “VDF” means VHF Direction Finder equipment;
- 1.1.126 “VHF” means Very High Frequency;
- 1.1.127 “VPN” means Virtual Private Network;
- 1.1.128 “working day” means any day other than Saturday, Sunday or a day that is a statutory or public holiday in South Africa;
- 1.1.129 “Works” means design, development manufacture, fabrication, supply, transport, Delivery to site, installation, testing and completion, preparation and Delivery of all equipment, drawings and manuals, provision of Spare Parts, consumables, test equipment and tools and management of all such matters, in accordance with the Tender Documents for the **Project**.
- 1.1.130 “written” or “in writing” means hand-written in ink or any form of printed writing and duly signed;
- 1.2 Interpretation
- 1.2.1 In this Agreement:
- 1.2.1.1 headings are for convenience only and do not affect the interpretation of the Contract;
- 1.2.1.2 words importing the singular include the plural and *vice versa*;
- 1.2.1.3 words importing a gender include any gender;
- 1.2.1.4 expressions importing persons include any company, partnership, joint venture, association, corporation or other body corporate;
- 1.2.1.5 reference to parts, clauses, parties, annexes, exhibits and schedules are references to parts and clauses of, and parties, annexes, exhibits and schedules to, the Contract; and
- 1.2.1.6 where the day on or by which any thing is to be done is not a working day, it shall be done on or by the preceding working day.
- 1.2.2 The headings used herein shall not be deemed to be part of the terms and conditions and procedures and shall not be taken into consideration in the explanation or interpretation of the terms and conditions and procedures.
- 1.2.3 In order to establish an order of precedence and to assist in resolving any potential conflict between the requirements of this Agreement and any of its associated annexure, this Agreement is to be regarded as having a superseding requirement.
- 1.2.4 Some words and phrases used throughout the specification have strict definitions that may convey a different understanding to that which is in everyday use. To assist in the correct interpretation of the requirements contained in this functional specification, the following definitions are provided:
- 1.2.4.1 **Shall** or **Must** means an item is mandatory. For example:
- 1.2.4.1.1 *Aircraft track data shall be presented to the controller in correct geographical relationship to ground and airspace features.*
- 1.2.4.2 **Should** or **Should Not** means an item is strongly recommended. For example:
- 1.2.4.2.1 *The number of console input devices should be minimised.*
- 1.2.4.2.2 *A failure of the simulator display system should not prevent the conduct of other training activities.*
- 1.2.4.3 **May** means an item is optional. For example:
- 1.2.4.3.1 *Controller input may be via a touch input device.*
- 1.2.4.4 **Will** means futurity, not necessarily a requirement. For example:
- 1.2.4.4.1 *Airspace procedures will need to accommodate proposed changes to the ICAO airspace model.*
- 1.2.4.5 **Can** implies capability, not necessarily a requirement. For example:
- 1.2.4.5.1 *System data can appear in graphical and textual format.*
- 1.2.5 Use of singular words shall also infer the plural of those words, and *vice versa*. **For example**, the following phrases shall be interpreted to mean either a single tower controller, or all tower controllers, shall provide ATC services:
- 1.2.5.1.1 *The tower controller shall provide ATC services.*
- 1.2.5.1.2 *Tower controllers shall provide ATC services.*
- 1.2.6 Within the Technical Requirements of Volume 2, mandatory requirements will also be clearly identified by the letter “**M**” against each paragraph. However, It will be the responsibility of Tenderers to determine the correct status of each requirement from the specification language used. If there is any doubt, the status shall be determined in accordance with the definitions listed above.
- 1.2.7 Where any conditions are referred to as special conditions, and they are in conflict with any other conditions, the special conditions shall apply.
- 1.2.8 Any provision in this Agreement which is or may become illegal, invalid or unenforceable in any jurisdiction affected by this Agreement shall, as to such jurisdiction, be ineffective to the extent of such prohibition or unenforceability and shall be treated as having not been written (i.e. *pro non scripto*) and severed from the balance of this Agreement, without invalidating the remaining provisions of this Agreement or affecting the validity or enforceability of such provision in any other jurisdiction.

- 1.2.9 The expiration or termination of this Agreement shall not affect such of the provisions of this Agreement which are expressly provided to operate after any such expiration or termination, or which of necessity must continue to have effect after such expiration or termination, notwithstanding that the relevant provisions themselves do not provide for this.
- 1.2.10 Each of the provisions of this Agreement has been negotiated by the Parties and drafted for the benefit of the Parties, and accordingly the rule of construction that the contract shall be interpreted against or to the disadvantage of the party responsible for the drafting or preparation of the agreement (i.e. the *contra proferentem rule*), shall not apply.
- 1.2.11 Unless the Company decides to the contrary, the Agreement shall be governed by and interpreted in accordance with the laws of South Africa.

# CHAPTER 2

# TERMS AND CONDITIONS

## CHAPTER 2: TERMS AND CONDITIONS

### 2 PREAMBLE

The Terms and Conditions as provided in this document constitute standard reference information as has been used previously by the Company with a diversity of other contracts.

Some of the conditions referenced herein, may not be wholly applicable to this particular Contract. Nevertheless, Contractors are required to satisfy themselves as to the relevance of all the terms and conditions and where necessary, seek clarification from the Company concerning any proposed qualifying conditions or alternatives, prior to contract signature.

Several clauses within this document are referenced in other parts of the REQUEST FOR PROPOSAL (RFP) and as a contract reference.

## 2.1 PART A

### 2.1.1 Tender Documents

2.1.1.1 The Tender Documents shall form the basis of this Agreement. Any fraud, misrepresentation or nondisclosure committed by the Contractor/Service Provider in the Tender Documents shall entitle ATNS to cancel the Agreement and claim damages.

### 2.1.2 Accident

2.1.2.1 The Company shall not be liable for or in respect of any damages or compensation payable by law in respect of or in consequence of any accident or injury to any workman or other person in the employ of the Contractor or any subcontractor, save an accident or injury resulting from any act or default of the Company, his agents or servants (excluding the Contractor as an agent or servant of the Company), and the Contractor shall indemnify the Company and keep him indemnified against all such damages and compensation (save as aforesaid) and against all claims, demands, lawsuits, costs, including attorney and client costs, charges and expenses whatsoever in respect thereof or pertaining thereto.

### 2.1.3 Amendment of Agreement

2.1.3.1 No agreement to amend or vary the Contract or Order or the conditions, stipulations or provisions thereof shall be valid and of any force and effect unless such agreement to amend or vary is entered into in writing and signed by the Parties. Any waiver of the requirement that the agreement to amend or vary shall be in writing, shall also be in writing.

### 2.1.4 Acceptance Testing and Inspection Requirements

#### 2.1.4.1 Acceptance Testing and Inspection

2.1.4.1.1 This section is supplemental to and shall be read in conjunction with clause 2.6.

2.1.4.1.2 Except for progress meetings and reports, all Supplies and Services provided under the Contract shall be subject to Acceptance Testing and Inspection by the Engineer and the costs for such Acceptance Testing and Inspection are deemed to be included in the Contract Price.

2.1.4.1.3 The Supplies and Services shall be subject to Factory Acceptance Tests ("FAT"), Site Acceptance Tests ("SAT"), Physical Inspection, Substantial Completion and Final Acceptance. All Tests and Inspections shall be performed on the Navigational Aids equipment as a system or parts of a system and Physical Inspection shall be performed on Training, Documentation, Spare Parts, and the logistic support system definition and establishment. The Acceptance Tests shall be conducted in accordance with Factory Acceptance Test Procedures (FATP), Site Acceptance Test Procedures (SATP) and Final Acceptance Procedures developed under an overall Test and Evaluation Master Plan identified as part of the Systems Engineering Management Plan.

2.1.4.1.4 The Final Acceptance will be undertaken towards the end of PBU.

2.1.4.1.5 The Contractor shall allow the Engineer at least fourteen (14) days written notice of the date that the Supplies and Services are offered for Acceptance Testing and Inspection. If the Engineer is unable to be present for the notified date, the Engineer and Contractor shall agree a mutually suitable date as close as practicable to the notified date.

2.1.4.1.6 Prior to notifying the Engineer that the Supplies and Services are offered for Acceptance Testing or Physical Inspection, the Contractor shall perform a rehearsal Acceptance. The records from the rehearsal Acceptance shall be provided to the Engineer with the notification of the proposed conduct of the FAT or SAT.

2.1.4.1.7 The Contractor shall carry out the FAT and associated Physical Inspection of the Supplies and Services at the Contractors facility.

2.1.4.1.8 The Contractor shall carry out the FAT and associated Physical Inspection in the presence of the Engineer.

2.1.4.1.9 The Engineer may issue an Interim Acceptance Certificate which notes that there are minor omissions or minor defects in the Supplies and Services which do not affect their normal use and operation. The Contractor shall rectify those omissions or defects within 5 days or other such period as agreed with the Engineer.

2.1.4.1.10 The Contractor shall not deliver the Supplies and Services to the Installation Sites until an Interim Acceptance Certificate in respect of FAT is issued by the Engineer.

2.1.4.1.11 Prior to notifying the Engineer that the Supplies and Services are offered for SAT and system Commissioning requirements, the Contractor shall perform a rehearsal SAT. The records from the rehearsal SAT shall be provided to the Engineer with the notification of the proposed conduct of the SAT.

2.1.4.1.12 The Contractor shall carry out the SAT and associated Physical Inspection of the Supplies and Services at the Installation Site.

2.1.4.1.13 The Contractor shall carry out the SAT and associated Physical Inspection in the presence of the Engineer.

#### 2.1.4.2 Factory Acceptance Testing (FAT)

2.1.4.2.1 The Contractor shall carry out FAT of the Supplies and Services in accordance with the Systems Engineering and Management Plan of the Contract. The Contractor shall also carry out such other tests as the Engineer may require in order to satisfy himself/herself that the Supplies and Services comply with the Specifications.

2.1.4.2.2 The Contractor shall submit his FATP 30 days prior to the commencement of the FAT for approval by the Company. No FAT will take place without the approval of the FATP by the Engineer.

- 2.1.4.2.3 The FAT and any other tests of the Supplies and Services shall not in any way relieve the Contractor from its obligations under the Contract or its liability for any breach of the Contract or any other liability of the Contractor in relation to the Supplies and Services.
- 2.1.4.2.4 When the Engineer considers that the Contractor has carried out the FAT in accordance with the FATP, and the Supplies and Services successfully pass FAT and any other such tests required by the Engineer to ensure the Supplies meet the requirements of the Specifications, the Engineer shall issue an Acceptance Certificate to the Contractor, on the provision that such certificate shall not be unreasonably withheld.
- 2.1.4.2.5 When the Engineer considers that the Contractor has not carried out the FAT in accordance with the FATP or the Supplies and Services have not successfully passed FAT and any other such tests required by the Engineer to ensure the Supplies and Services meet the requirements of the Specifications, then the Engineer shall issue a Notice of Rejection to the Contractor.
- 2.1.4.2.6 On receipt of a Notice of Rejection, the Contractor shall, at its own cost and within 5 days or other such period as agreed with the Engineer, ensure that the Supplies and Services are rectified. The Contractor shall then carry out any re-testing required by the Engineer until the Engineer is satisfied that the Supplies and Services successfully pass such tests and meet the requirements of the Specifications.
- 2.1.4.2.7 The Engineer may issue an Interim Acceptance Certificate which notes that there are minor omissions or minor defects in the Supplies and Services which do not affect their normal use and operation. The Contractor shall rectify those omissions or defects within 5 days or other such period as agreed with the Engineer, further to reasonable requests from the Contractor.
- 2.1.4.2.8 The issue of an Interim Acceptance Certificate shall not in any way release the Contractor from its obligations under the Contract to supply the Supplies and Services in accordance with the Contract. Neither the Company nor the Engineer assumes any duty of care to the Contractor nor shall the Company nor the Engineer be liable to the Contractor if an Interim Acceptance Certificate is issued and the Supplies and Services are subsequently found not to satisfy the requirements of the Specifications and contain Latent Defects. Clause 2.5.1 of this Agreement shall remain and the acceptance of warranty does not invalidate the rights of the Company under common law.
- 2.1.4.2.9 The issue of an Interim Acceptance Certificate in respect of FAT shall empower the Contractor to perform Delivery of the Supplies and Services to the Delivery Sites. When the Contractor has completed Delivery, it may submit a properly completed invoice to the Engineer for the amount identified for the appropriate Milestone Payment in the Milestone Payment Schedule. When the Engineer is satisfied that the Supplies and Services have been delivered in accordance with the Contract and the Supplies and Services are complete and in proper physical condition, he shall effect the Milestone Payment in accordance with the Contract.
- 2.1.4.2.10 The Contractor shall not deliver the Supplies and Services to the Delivery Sites until an Interim Acceptance Certificate is issued by the Engineer.
- 2.1.4.3 SITE Acceptance Testing (SAT)
- 2.1.4.3.1 The Contractor shall carry out SAT of the Supplies and Services in accordance with the Systems Engineering Management Plan. The Contractor shall also carry out such other tests as the Engineer may require in order to satisfy himself that the Supplies and Services comply with the Specifications.
- 2.1.4.3.2 The Contractor shall submit his SATP 30 days prior to the commencement of the SAT for approval by the Company. No SAT will take place without the approval of the SATP by the Engineer.
- 2.1.4.3.3 The SAT and any other tests of the Supplies and Services shall not in any way relieve the Contractor from its obligations under the Contract or its liability for any breach of the Contract or any other liability of the Contractor in relation to the Supplies and Services.
- 2.1.4.3.4 When the Engineer considers that the Contractor has carried out the SAT in accordance with the SATP, and the Supplies and Services successfully pass SAT, and any other such tests required by the Engineer to ensure the Supplies meet the requirements of the Specifications, and an Acceptance Certificate has previously been issued for Physical inspection of the Supplies and Services applicable to the site, the Engineer shall issue an Acceptance Certificate to the Contractor, on the provision that such certificate shall not be unreasonably withheld.
- 2.1.4.3.5 When the Engineer considers that the Contractor has not carried out the SAT in accordance with the SATP or the Supplies and Services have not successfully passed SAT and any other such tests required by the Engineer to ensure the Supplies and Services meet the requirements of the Specifications, then the Engineer shall issue a Notice of Rejection to the Contractor.
- 2.1.4.3.6 On receipt of a Notice of Rejection, the Contractor shall, at its own cost and within 5 days or other such period as agreed with the Engineer, ensure that the Supplies and Services are rectified. The Contractor shall then carry out any re-testing required by the Engineer until the Engineer is satisfied that the Supplies and Services successfully pass such tests and meet the requirements of the Specifications.
- 2.1.4.3.7 The Engineer may issue an Interim Acceptance Certificate which notes that there are minor omissions or minor defects in the Supplies and Services which do not affect their normal use and operation. The Contractor shall rectify those omissions or defects within 5 days or other such period as agreed with the Engineer.
- 2.1.4.3.8 The issue of an Interim Acceptance Certificate shall not in any way release the Contractor from its obligations under the Contract to supply the Supplies and Services in accordance with the Contract. Neither the Company nor the Engineer assumes any duty of care to the Contractor nor shall the Company nor the Engineer be liable to the Contractor if an Acceptance Certificate is issued and the Supplies and Services are subsequently found not to satisfy the requirements of the Specifications and contain Latent Defects. (See clause 2.1.4.2.8).
- 2.1.4.3.9 The issue of a Certificate of Substantial Completion in respect of SAT shall represent that the site is not only fully ready for operational service, but that all the essential contract deliverables have been met and shall empower the Contractor to complete all action in respect of this phase of the Contract and, with the agreement of the Company to

simultaneously commence the Warranty Period and the PBU. When the Contractor has received a Certificate of Substantial Completion, subsequent to successful SAT, he may then submit a properly completed invoice to the Engineer for the amount identified for the appropriate Milestone Payment in the Milestone Payment Schedule. Whereupon the Engineer shall effect the Milestone Payment for the SAT in accordance with the Contract.

#### 2.1.4.4 Physical Inspection

2.1.4.4.1 For those Supplies and Services which do not require FAT or SAT, viz., Training, Documentation, Spare parts, maintenance equipment, progress meetings and reports, Acceptance Testing and Inspection shall entail a Physical Inspection of the Supplies and Services. Following successful completion of Physical Inspection of the Supplies and Services to ensure they meet the requirements of the Specifications, the Engineer shall issue an Acceptance Certificate.

2.1.4.4.2 The Physical Inspection of the Supplies and Services shall not in any way relieve the Contractor from its obligations under the Contract or its liability for any breach of the Contract or any other liability of the Contractor in relation to the Supplies and Services.

2.1.4.4.3 When the Engineer considers that the Physical Inspection is unsatisfactory and the Supplies and Services do not meet the requirements of the Specifications, then the Engineer shall issue a Notice of Rejection to the Contractor.

2.1.4.4.4 On receipt of a Notice of Rejection, the Contractor shall, at its own cost and within 5 days or other such period as agreed with the Engineer, ensure that the Supplies and Services are rectified. The Contractor shall then carry out any re-inspection required by the Engineer until the Engineer is satisfied that the Supplies and Services successfully pass such re-inspection and meet the requirements of the Specifications.

2.1.4.4.5 The issue of an Acceptance Certificate in respect of Physical Inspections shall not in any way release the Contractor from its obligations under the Contract to supply the Supplies and Services in accordance with the Contract. Neither the Company nor the Engineer assumes any duty of care to the Contractor nor shall the Company nor the Engineer be liable to the Contractor if an Acceptance Certificate is issued and the Supplies and Services are subsequently found not to satisfy the requirements of the Specifications and contain Latent Defects.

2.1.4.4.6 The issue of an Acceptance Certificate in respect of Physical Inspection associated with Factory Inspections shall empower the Contractor to perform Delivery of the Supplies and Services to the Delivery Sites. When the Contractor has completed Delivery he may submit a properly completed invoice to the Engineer for the amount identified for the appropriate Milestone Payment in the Milestone Payment Schedule. When the Engineer is satisfied that the Supplies and Services have been delivered in accordance with the Contract and the Supplies and Services are complete and in proper physical condition, he shall effect the Milestone Payment in accordance with the Contract.

2.1.4.4.7 The issue of an Acceptance Certificate in respect of Physical Inspection associated with Site Inspections shall empower the Contractor to complete all action associated with the SAT and he shall effect the Milestone Payment for this component of the Physical Inspection in accordance with the Contract.

#### 2.1.4.5 Final Acceptance

2.1.4.5.1 Final Acceptance shall occur when the Contractor has satisfied all of the obligations under the Contract and shall represent the conclusion of PBU and simultaneously the expiration of the warranty period.

2.1.4.5.2 Final Acceptance shall be subject to:

2.1.4.5.2.1 Completion of FAT and SAT and satisfactory correction of outstanding issues relating to the Certificate of Substantial Completion.

2.1.4.5.2.2 Satisfactory implementation of the Support System in accordance with the Integrated Logistic Support Plan.

2.1.4.5.2.3 Validation of the Support System during PBU in accordance with the requirements of the Specification.

2.1.4.5.3 Upon satisfaction of the requirements for Final Acceptance, the Engineer shall issue a Final

Acceptance Certificate, he shall effect the final payment in accordance with the Contract, and he shall notify the release of the Security, as applicable, provided by the Contractor in accordance with the contract requirement.

## 2.2 PART B

### 2.2.1 Consignment

2.2.1.1 Supplies shall be consigned in the name of the Contractor or his representative, otherwise consignments may be rejected. The representative shall have been nominated by the Contractor in writing and approved by the Company also in writing, prior to the dispatch of the consignment.

### 2.2.2 Customs Clearance

2.2.2.1 The Contractor shall arrange for the clearance of all imported goods through customs.

2.2.2.2 A provision shall be made for the storage of equipment, Documentation and spares during the customs clearing procedure.

### 2.2.3 Company Property in Possession of a Contractor

2.2.3.1 Company property supplied to a Contractor for the execution of a contract remains the property of the Company and shall at any time be available for inspection by the Company or its representatives. Any such property in the possession of the Contractor on completion of the contract shall, at the Contractor's expense, be returned to the Company forthwith.

2.2.3.2 The Contractor shall be responsible at all times for any loss of or damage to Company property in his possession and if required he shall furnish such security for the payment of any such loss or damage as the Company may require.

### 2.2.4 Cession of Contracts

2.2.4.1 The Contractor shall not abandon, transfer, assign or sublet a contract or part thereof without the prior written consent of the Company. The contractor cannot sub-contract more than 25% of the project to any other enterprise that does not have an equal or higher B-BBEE status level of contributor than the person concerned, unless the contract is subcontracted to an EME that has the capability and ability to execute the subcontract.

### 2.2.5 Confidentiality

2.2.5.1 The Contractor shall not, without the written approval of the Company make public or disclose to any person other than the Company any information about the Contract. In giving its written approval, the Company may impose such conditions as it thinks fit.

2.2.5.2 The Contractor shall ensure that its employees, agents and Sub-Contractors do not make public or disclose information referred to in this Clause.

2.2.5.3 The Company may, at any time require the Contractor to give, and arrange for the Contractor's employees, agents or Sub-Contractors engaged in the performance of the Contract to give, written undertakings and the Contractor shall arrange for all the undertaking to be given promptly.

2.2.5.4 Subject to the Contract expressly allowing the Company to disclose certain information, the Company shall;

2.2.5.4.1 treat as confidential all information obtained from the Contractor which is clearly marked confidential; and

2.2.5.4.2 except as required by law, not disclose to any person other than employees, consultants or advisers of the Company without the consent of the Contractor (which consent shall not be unreasonably or unlawfully withheld) any information referred to in this Clause.

2.2.5.5 The obligation on the Contractor under this Clause and the obligation on the Company under this Clause, shall not be taken to have been breached where the information referred to in those clauses:

2.2.5.5.1 is or becomes public knowledge other than by breach of this Clause;

2.2.5.5.2 is in the possession of the receiving party without restriction in relation to disclosure before the date of receipt from the disclosing party; or

2.2.5.5.3 has been independently developed or acquired by the receiving party;

2.2.5.5.4 is required to be disclosed as required by law or under the Rules and Regulations on the South African Stock Exchange or any other relevant commercial authority.

2.2.5.6 The Contractor shall on demand, or on completion of the Contract, return to the Company any documents supplied by the Company to the Contractor.

2.2.5.7 This Clause 2.2.5 shall survive the termination or expiry of the Contract.

2.2.5.8 The Contractor agrees to liaise with the Company and to provide any information required by the Company for the assessment of South African industry involvement in the supply of the Supplies and Services.

## 2.3 PART C

### 2.3.1 Disputes

2.3.1.1 All disputes between the Parties in connection with or arising out of the existence, validity, construction, performance and termination of this Contract (or any terms thereof), which the Parties are unable to resolve between themselves within sixty (60) days from the notification of the dispute by the claimant to the Party, shall be finally settled by arbitration in accordance with the Rules of Arbitration of the International Chamber of Commerce by three (3) arbitrators appointed in accordance with said Rules. The arbitration shall be held in Johannesburg (South Africa); arbitration and arbitration shall be in the English language.



### **2.3.1.2 Negotiation**

2.3.1.2.1 Should any dispute, disagreement or claim arise between the Parties (“**the dispute**”) concerning this Agreement, the Parties shall try to resolve the dispute by negotiation. This entails that one Party invites the other Party in writing to meet and attempt to resolve the dispute within five (5) days from the date of the written invitation.

2.3.1.2.2 The Parties undertake to extensively consult with each other in the event of a dispute and to use their best endeavours to resolve such dispute amongst themselves in good faith and without recourse to litigation.

### **2.3.1.3 Mediation**

2.3.1.3.1 In the event of any dispute arising between the Parties, either Party may declare a dispute by notice to the other Party.

2.3.1.3.2 Prior to submission of dispute to arbitration in accordance with clause 2.2.1.5 below, the matter may first be referred for mediation before the mediator appointed by agreement between the Parties to the dispute and failing an agreement within ten (10) business days of the demand for mediation, then any Party to the dispute shall be entitled to forthwith call upon the President of the Legal Practice Council to nominate the mediator.

2.3.1.3.3 The mediator shall have absolute discretion in the manner in which the mediation proceedings shall be conducted.

2.3.1.3.4 The mediator shall deliver a copy of his or her reasoned opinion to each Party within twenty-one (21) days of his or her appointment.

2.3.1.3.5 The opinion so expressed by the mediator shall be final and binding on the Parties, unless either Party within twenty-one (21) days of the delivery of the opinion, notifies the other Party of its unwillingness to accept the said opinion, in which event the dispute may be referred to arbitration or to any competent court with jurisdiction.

2.3.1.3.6 The costs of mediation shall be determined by the mediator and shall be borne equally by the Parties and shall be due and payable to the mediator on presentation to them of his or her written account.

### **2.3.1.4 Arbitration**

2.3.1.4.1 In the event of the Parties, or any of them, failing to accept the ruling of the mediator, the matter in dispute may be referred to arbitration, by written agreement between the Parties. The arbitrator shall at the written request of either Party be appointed by the secretary of the Arbitration Foundation of Southern Africa (“**AFSA**”). The arbitration shall be conducted in accordance with the AFSA Commercial Rules, which arbitration shall be administered by AFSA.

2.3.1.4.2 Should AFSA, as an institution, not be operating at that time or not be accepting requests for arbitration for any reason, then the arbitration shall be conducted in accordance with the AFSA rules for commercial arbitration (as last applied by AFSA) before an arbitrator appointed by agreement between the Parties to the dispute or failing agreement within ten (10) business days of the demand for arbitration, then any Party to the dispute shall be entitled to forthwith call upon the chairperson of the Johannesburg Bar Council to nominate the arbitrator, provided that the person so nominated shall be an advocate of not less than ten (10) years standing as such. The person so nominated shall be the duly appointed arbitrator in respect of the dispute. In the event of the Parties to the dispute failing to agree on any matter relating to the administration of the arbitration, such matter shall be referred to and decided by the arbitrator whose decision shall be final and binding on the Parties to the dispute.

2.3.1.4.3 Any Party to the arbitration may appeal the decision of the arbitrator or arbitrators in terms of the AFSA rules for commercial arbitration.

2.3.1.4.4 Nothing herein contained shall be deemed to prevent or prohibit a Party to the arbitration from applying to the appropriate court for urgent relief.

2.3.1.4.5 Any arbitration in terms of this clause 2.3.1.4 (including any appeal proceedings) shall be conducted in camera and the Parties shall treat as confidential details of the dispute submitted to arbitration, the conduct of the arbitration proceedings and the outcome of the arbitration.

2.3.1.4.6 This clause 2.3.1 will continue to be binding on the Parties notwithstanding any termination or cancellation of the Agreement.

2.3.1.4.7 The Parties agree that the written demand by a Party to the dispute in terms of clause 2.3.1.4.1 that the dispute or difference be submitted to arbitration is to be deemed to be a legal process for the purpose of interrupting extinctive prescription in terms of the Prescription Act, 1969.

2.3.1.4.8 The costs of arbitration shall be determined by the arbitrator or AFSA and shall be borne equally by the Parties and shall be due and payable to the arbitrator or AFSA on presentation to them of his or her written account.

2.3.1.4.9 Should any Party fail to pay its share of any administration fee or cost when requested by the AFSA Secretariat, that Party shall automatically be excluded to participate in the arbitration process so long as that Party is in default of payment. Where one Party is excluded by reason of default, the Secretariat will revise the fees payable by the remaining Party to cover all costs and expenses, subject to the right of the paying Party to recover, if so ordered by the arbitrator, from the non-paying Party.

### **2.3.2 Delivery**

2.3.2.1 This section shall be read in conjunction with and is supplemental to clauses 2.2.1, 2.4.1, 2.11.17, 2.15.3 and 2.13.2.1.

2.3.2.2 The Contractor shall deliver or install the Supplies and Services in accordance with Schedule F Schedule contained in the Contract.

2.3.2.3 The Contractor shall provide the Engineer at least five (5) days written notice of the time at which the Contractor intends to deliver the Supplies and Services.

2.3.2.4 On Delivery the Engineer shall inspect the Supplies and Services to ensure the Supplies and Services are complete and/or no damage has occurred during transportation. In the event the Supplies and Services are incomplete and/or damage has occurred, the Engineer shall immediately notify the Contractor detailing the Supplies and Services omitted and/or damaged and describe omissions and/or the damage. The Engineer and Contractor shall investigate the incident and the Contractor shall correct any omissions and/or, if damage was sustained through poor packaging or mishandling, the Contractor shall rectify the damage within a period agreed between the Engineer and Contractor. Payment of any Milestone Payment shall not be effected until the Engineer is satisfied that the Supplies and Services have been delivered in accordance with the Contract and the Supplies and Services are complete and in proper physical condition.

## 2.4 PART D

### 2.4.1 Export License

2.4.1.1 When Orders are placed for supplies in respect of which an export licence is required -

2.4.1.2 the Contractor shall not incur any direct or indirect costs in connection with the supply or dispatch of such supplies before he has obtained such licence; or

2.4.1.3 if the Government of the country from which the supplies are to be exported refuses, or fails to grant, such licence within three months from the placing of the Order, the Order shall be considered to be cancelled and no liability will be accepted for any loss or expenses irrespective of the nature thereof, including loss or expenditure suffered or incurred by the Contractor or any other person in respect of the Production, supply, transport or Delivery of such supplies.

### 2.4.2 Entire Contract

2.4.2.1 The Contract represents the entire Contract between the Parties and supersedes all prior representations, warranties, promises, statements, negotiations and letters.

### 2.4.3 Extension of Time

2.4.3.1 This section shall be read in conjunction with and is supplemental to clause 2.9.2.

2.4.3.2 Where the Contractor is unable to deliver the Supplies and Services in accordance with the Delivery Schedule contained in the Project Management Plan, which the Contractor considers justifies an extension of time under clause 2.9.1.5, the Contractor shall;

2.4.3.2.1 give written notice to the Engineer of the cause of delay not later than fifteen (15) days after the cause of the delay first arose; and

2.4.3.2.2 immediately after the circumstances causing the delay have ceased, give written notice to the Engineer of;

2.4.3.2.3 the period of delay and the likely affect on the Delivery Schedule; and

2.4.3.2.4 the extension of time which the Contractor requests.

2.4.3.3 The Engineer shall consider the Contractor's request for an extension of time and shall, as soon as practicable after receiving the Contractor's notice under this Clause, notify the Contractor of his decision and amend the Delivery Schedule accordingly.

2.4.3.4 If the Contractor fails to give notice in accordance with this Clause, then the Contractor shall not be entitled to an extension of time.

2.4.3.5 The Engineer may, by written notice to the Contractor, amend the Delivery Schedule by extending Delivery time for Supplies and Services.

### 2.4.4 Liquidated and Ascertained Damages

2.4.4.1 The Contractor warrants that the amount of liquidated damages stated in clause 2.9.1.4.2 has been considered by it and represents a genuine pre-estimate of the damage to be suffered by the Company in the event of late Delivery or Installation of the Supplies and Services.

2.4.4.2 The Engineer may deduct the amount of liquidated damages calculated pursuant to this Clause from any payments due to the Contractor.

## 2.5 PART E

### 2.5.1 Warrantee

2.5.1.1 The Service Provider warrants that:

2.5.1.1.1 It has not engaged in corrupt practices or collusive practices or Fraudulent Practices in competing for or in executing the Agreement and/or the Works and Supplies and Services;

2.5.1.1.2 No litigation, arbitration or administrative or business rescue proceedings are pending or threatened against the Service Provider which would have an adverse effect upon its financial condition or business, nor its ability to perform its obligations under this Contract;

2.5.1.1.3 It has the relevant power and authority to sign and perform in terms of the Contract;

2.5.1.1.4 Its BEE status which has been furnished to ATNS is true and correct, and it has complied with the B-BBEE Requirements;

2.5.1.1.5 It has not committed (transformation) fronting and will not commit (transformation) fronting for purposes of the transformation laws of South Africa, which include but not limited to the B-BBEE Act;

2.5.1.1.6 It complies with all of its obligations in terms of all tax laws and regulations applicable to it, including but not limited to all of its obligations pertaining to the payment of income tax, capital gains tax, employees tax (PAYE and SITE), VAT, skills development levies, unemployment insurance levies, workmen's compensation levies, regional services council levies and all other taxes and levies payable both now or in the future and whether it is liable in South Africa or other jurisdictions; and undertakes to continue to take all reasonable and necessary steps to ensure that this remains so; and

- 2.5.1.1.7 the warranties provided herein in this clause is *in lieu* of all other warranties, express or implied, and that it is *in lieu* of and supersedes any other liability arising out of the suppliers and services.
- 2.5.1.2 The Service Provider warrants and undertakes that it shall, at all times during the duration of this Agreement:
- 2.5.1.2.1 maintain the tender submission BEE status for the duration of the Contract;
- 2.5.1.2.2 possess and have knowledge and sufficient expertise, to enable it to provide and/or procure the provision of the Works in terms of this Agreement;
- 2.5.1.2.3 use and adopt reasonable and professional techniques and standards generally accepted in the relevant field for the provision of the works with due care, skill and diligence;
- 2.5.1.2.4 comply with all applicable laws, regulations, rules and procedures; and
- 2.5.1.2.5 at all times when providing the Works within the premises of ATNS or Airports Company South Africa SOC Ltd (“**ACSA**”), abide by safety regulations laid down by ATNS or ACSA, *inter alia*, for the prevention and combating of accidents, vandalism, damage to property, arson, fire damage and any other similar events.
- 2.5.1.3 The complete Installation shall be guaranteed by the Contractor against faulty components, materials, equipment installation, workmanship and design, fair wear and tear excepted, for a period of one year, commencing either from the date of issue of the Completion Certificate of the completed Installation or one month after the commencement of PBU, whichever is the later. The warrantee period may be extended to the extent and on the conditions set forth in clause 2.5.1.10.
- 2.5.1.4 Within the frame of the warrantee, the Contractor will ensure that the serviceability of the system will be as stipulated in Volume 4 of the Specification for a period of twelve (12) months.
- 2.5.1.5 Without prejudice to any other rights the Company may have, the Contractor shall, accordingly, for the period of validity of this warrantee, replace equipment, which has failed due to faulty Installation work, at no cost to the Company. The supplies and the parts so replaced or the services so rendered, shall be guaranteed for a similar period.
- 2.5.1.6 Where persistent failures of a component or circuit occur, in addition to other rights the Company may have, the Contractor shall redesign the circuit or component and supply such redesigned circuit or component with the necessary drawings and modification list free of charge to the Company. The conditions of this warrantee shall apply to the redesigned component or circuit, with effect from the date of Installation of the replacement.
- 2.5.1.7 Unless the contract stipulates otherwise, the Contractor shall warrantee for a period of twelve months that no faulty material or workmanship was used in the Manufacture of supplies or in the execution of services and that the finish is not defective. Should the warrantee not be complied with, the Company may, without prejudice to any other rights it may have, demand that the supplies be replaced and the services repaired without cost to the Company.
- 2.5.1.8 The liability of the Contractor under the warrantee shall *inter alia* also cover the free Delivery to the Company of supplies required in replacement of defective supplies, and where parts are to be replaced the liability shall include their free installation. The supplies and the parts so replaced or the services so rendered shall be guaranteed for a similar period.
- 2.5.1.9 The Contractor warrants that any software (whether application software, operating systems or any third party software) and any hardware equipment delivered by him in terms of the contract shall not be subject to any misinterpretations of date related calculations of any sorts. The software and hardware delivered shall continue functioning as per the specification regardless of the date. Any such related problem or related problems shall be repaired or corrected by the Contractor free of charge to the Company for as long as the software and hardware is used by the Company. This clause shall be honoured by any future shareholders or owners of the Contractor and shall survive this contract.
- 2.5.1.10 The requirements of clause 2.5.1 shall apply with the following exceptions:
- 2.5.1.10.1 In case, at the end of the one year term for the warrantee period, the requirement of clause 2.5.1.4 has not been fulfilled, the PBU will be extended, but only with respect to such part(s) of the System which has(ve) caused the non-reaching of the required rate of serviceability of the System. The extension of PBU with respect to each of such parts shall be 12 months from the respective repair or replacement thereof, unless a new failure occurs within the latter six month period – in which case PBU shall be again so extended. The extension of PBU in accordance with the foregoing shall be valid, with respect to a given part of the System, until the end of a continuous period of 6 months during which the part(s) in question has(ve) shown no failure.
- 2.5.1.10.2 The Contractor warrants the Supplies and Services provided under the Contract are as follows;
- 2.5.1.10.2.1 that all the time property in the Supplies and Services passes to the Company, they shall be free from any property claim;
- 2.5.1.10.2.2 that the Supplies and Services shall, at the time of Delivery or Installation, comply with any Legislation that the Contractor is required to observe.

## 2.6 PART F

### 2.6.1 Insurance

#### 2.6.1.1 Service Provider to Effect Insurances

2.6.1.1.1 Without limiting the Service Provider's obligations under clause 2.6.1.1.3 to 2.6.1.1.5, the Service Provider shall arrange and maintain the following insurances with a reputable insurance and duly registered company in accordance with the applicable laws of South Africa, for the purposes of the Contract:

2.6.1.1.1.1 public liability insurance that covers the cost of claims (such as compensation for: personal injuries, loss of or damage to property) made by members of the public for any incidents that may occur in connection with the implementation of this contract;

2.6.1.1.1.2 insurance, for the full value of the Supplies and Services from time to time, against loss or damage, including loss or damage in transit;

2.6.1.1.1.3 workers' compensation insurance against liability for death of or injury to persons employed by the Contractor including liability pursuant to the Legislation and for an unlimited amount at common law. This insurance shall be extended to indemnify the Company for the Company's liability under the Legislation to persons employed by the Contractor. The Contractor shall ensure that every Sub Contractor is similarly insured.

2.6.1.1.2 The insurance's referred to in this Clause shall be effected before the execution of the Contract and maintained during the Period of the Contract as follows:

2.6.1.1.2.1 insurance for the full value of the Supplies and Services maintained until Delivery of the last Supplies and Services to the Company at the conclusion of the Warrantee Period;

2.6.1.1.2.2 the public liability policy of insurance maintained until the Contractor has completed all of its obligations under the Contract; and

2.6.1.1.2.3 workers' compensation insurance until all of the obligations of the Contractor under the Contract have been completed.

2.6.1.1.3 The Contractor shall take out insurance policies, which are adequate to cover all its obligations under the Agreement and shall keep them in force for the duration of the Agreement.

2.6.1.1.4 Should the Contractor fail to effect and keep in force any of the insurances that it must effect under the Agreement, then (and in any such case) the Company may effect and keep in force such insurance and pay such premium as may be necessary for that purpose and from time to time deduct the amount thus paid by the Company (as aforesaid) from any moneys due to or that may become due to the Contractor, or recover it from the Contractor as a debt payable to it.

2.6.1.1.5 The Contractor shall furnish evidence to the Company and make any necessary financial arrangements to underwrite or provide suitable insurance for the Equipment and the System against fire, theft, damage, accident, disaster etc. This is required in order to indemnify the Company against loss and to protect the Company's investment and ownership of the equipment until such time as the system is finally accepted. Pursuant to clause 2.6.1.1 a suitable draft proposal, which would form the basis of a formal policy to be incorporated within a future contract, is required to be included for evaluation within this Tender. The proposal and policy shall also include the PBU period.

#### 2.6.1.2 Insurance Effected by the Service Provider

2.6.1.2.1 Notwithstanding anything elsewhere contained in this Contract and without limiting the obligations, liabilities or responsibilities of the Contractor in any way whatsoever (including but

not limited to any requirement for the provision by the Contractor of any other insurances) the Company shall effect and maintain as appropriate in the joint names of the Company, the Contractor and where relevant Sub-Contractors the following insurances which are subject to the terms, limits, exceptions and conditions of the Policy.

2.6.1.2.2 **CONTRACT WORKS Insurance** - which will provide cover against accidental physical loss of or damage to the Works, Temporary Works and material intended for incorporation in the Works.

2.6.1.2.3 **PUBLIC LIABILITY Insurance** - which will provide indemnity against legal liability in the event of accidental death of or injury to third party persons and/or loss of or damage to third party property arising directly from the execution of the contract and occurring during the period of insurance with a limit of indemnity (to be determined at the time of contract signature) in respect of all claims arising from any one occurrence or series of occurrences consequent on or attributable to one source or original cause.

2.6.1.2.4 The Service Provider shall pay the Premium and stamp duty in connection with the insurance effected by the Service Provider.

2.6.1.2.5 The Service shall not include any Premium charges for this insurance except to the extent which he may deem necessary in his own interest to effect supplementary insurance to the insurance effected by ATNS. ATNS reserves the right to call for full information regarding insurance costs included by the Service Provider.

2.6.1.2.6 Any further clarification of the scope of cover provided by the Policies arranged by ATNS should be obtained from ATNS or their Insurance Brokers:

- 2.6.1.2.7 In the event of any occurrence which is likely to or could give rise to a claim under the insurances arranged by ATNS the Service Provider shall:
- 2.6.1.2.8 In addition to any statutory requirements or other requirements contained in the Contract immediately notify ATNS' Insurance Brokers or the Insurers via the Engineer, by telephone, telex or telefax giving the circumstances, nature and an estimate of the loss or damage or liability.
- 2.6.1.2.9 Complete a Claims Advice Form available from the Insurance Brokers to whom the form must be returned without delay.
- 2.6.1.2.10 Negotiate the settlement of claims with the Insurers through ATNS' Insurance Brokers and shall when required to do so obtain ATNS' approval of such settlement.
- 2.6.1.2.11 ATNS and Insurers shall have the right to make all and any enquiries on the site of the Works or elsewhere as to the cause and results of any occurrence and the Service Provider shall cooperate in the carrying out of such enquiries.
- 2.6.1.2.12 The Service Provider will be liable for the amount of the deductible (First Amount Payable) in respect of any claim made by or against the Service Provider or Sub-Contractors under the insurances effected by ATNS.
- 2.6.1.2.13 The Deductibles (First Amount Payable) for which the Service Provider is responsible and which is applicable in respect of each and every occurrence or series of occurrences attributable to one source or original cause giving rise to loss or damage or liability indemnifiable are as per the latest Insurance Program available from ATNS.
- 2.6.1.2.14 The Service Provider will be liable for the amount of the deductible (First Amount Payable) in respect of any claim settled under the policies maintained by the Service Provider.
- 2.6.2 Incorrect Information
- 2.6.2.1 Where a contract has been awarded on the strength of information furnished by the Contractor which, after the conclusion of the relevant agreement, is proved to have been incorrect, the Company may, without prejudice to any other legal remedy it may have -
- 2.6.2.1.1 recover from the Contractor all costs, losses or damages incurred or sustained by the Company as a result of the award of the contract: and/or
- 2.6.2.1.2 cancel the contract and claim any damages which the Company may suffer as a result of having to make less favourable arrangements; and/or
- 2.6.2.1.3 impose on the Contractor, a penalty not exceeding five per cent of the value of the contract.
- 2.6.3 Incapacity, Death, Sequestration, Liquidation or Business Rescue
- 2.6.3.1 In the event of the death of a Contractor or the provisional or final sequestration/liquidation of the Contractor's estate or of the Contractor's cession or transfer of a contract without the approval of ATNS or of the surrender of its estate or of its statutory or common law reaching a compromise with its creditors or the placing of its affairs under business rescue, ATNS may, without prejudice to any other rights it may have, exercise any of the following options:
- 2.6.3.1.1 Cancel the Contract and accept any of the Tenders that were submitted originally with that of the Service Provider or any offer subsequently received to complete the Contract. In such a case, the estate of the Service Provider or the liquidator as the case may be, shall not be relieved from liability for any claim which has arisen or may arise against the Service Provider in respect of Supplies not Delivered or work not carried out by the Service Provider under the Contract, and ATNS shall have the right to hold and retain all or any of the securities and retention moneys held by it at the date of the aforesaid occurrence until such claim has been satisfied; or
- 2.6.3.1.2 allow the executor, trustee, liquidator or business rescue practitioner, as the case may be, for and on behalf of and at the cost and expense of the estate of the Service Provider to carry on with and complete the Contract; or
- 2.6.3.1.3 for and on behalf of and at the cost and expense of the estate of the Service Provider, itself carry on with and complete the Contract and in that event the ATNS may take over and utilise, without payment, the Service Provider's tools, plant and materials in whole or in part until the completion of the Contract.
- 2.6.3.2 Should ATNS elect to act in terms of clause 2.6.3.1.3, it shall give notice of its requirements to the executor, trustee, liquidator or business rescue practitioner of the Contractor's estate and should the said executor, trustee, liquidator or business rescue practitioner fail within 14 days of the dispatch of such notice to make provision to the satisfaction of ATNS for the fulfilment of such requirements, or should no executor, trustee, liquidator or business rescue practitioner be appointed within fourteen (14) days of the occurrence mentioned in clause 2.6.3.1, ATNS may apply any remedy open to it in terms of the Agreement as if a breach thereof had taken place.
- 2.6.3.3 Should ATNS act in terms of clause 2.6.3.1.3 the Contractor must leave the premises immediately and may not occupy such premises on account of retention or any other right.
- 2.6.4 Indemnity
- 2.6.4.1 The Contractor shall indemnify the ATNS and keep him indemnified against all losses and claims for injuries or damage to any person or property whatsoever which may arise from or in consequence of the execution, completion and maintenance of the contract including all acts or omissions of the Contractor, his employees or agents and against all claims, demands, lawsuits, damages, costs, including attorney and client costs, charges and expenses whatsoever in respect thereof or pertaining thereto. Provided always that nothing

contained herein shall be deemed to render the Contractor liable for, or to indemnify ATNS against, any compensation or damages for or with respect to injuries or damage to persons or property resulting from any act or neglect done or committed during the duration of the Agreement by ATNS, its agents, servants or other contractors (not being employed by the Contractor), or for or in respect of any claims, demands, lawsuits, damages, costs, charges and expenses in respect thereof or pertaining thereto.

## 2.6.5 Intellectual Property Rights

2.6.5.1 The Contractor is responsible for all expenses and other liabilities in regard to royalties, patent rights, trade marks or other protected rights in respect of goods supplied by him to the Company and he indemnifies the Company against any claims of whatever nature which may arise in connection with such rights.

2.6.5.2 The Contractor shall at any time furnish, on request, adequate security to the satisfaction of the Company for the payment of all costs including attorney and client costs in cases where proceedings are instituted against the Company and/or its officers or employees in respect of alleged breach of patent rights, trade marks or any other protected rights.

2.6.5.3 In consideration of the Company paying the Contractor the Contract Price the Contractor shall grant the Company on the issue of the Taking-Over Certificate an irrevocable and rent free licence to use all Intellectual Property Rights held by the Contractor in the Supplies and Services for the intended operational purposes only.

2.6.5.4 The Contractor shall indemnify and keep indemnified the Company against any claim or liability for loss, damages, costs (including the costs of any settlement), compensation, or expenses arising out of any infringement of any Intellectual Property Rights pertaining to the Supplies and Services.

2.6.5.5 The Company shall notify the Contractor in writing as soon as practicable of any claim made or threatened arising from any infringement referred to in this Clause and shall provide all reasonable information and assistance to the Contractor to enable it to defend or settle any such claim.

2.6.5.6 If a judgement or award is made against the Company as a result of an infringement of any Intellectual Property Rights, or if a settlement, which has been approved by the Contractor, is agreed with the plaintiff (in a situation where the Contractor is providing an indemnity under this Clause), the Contractor shall;

2.6.5.6.1 not less than five (5) working days before the date on which the Company is to pay the amount referred to in the judgement, award or settlement; or

2.6.5.6.2 if no date for payment is fixed by that judgement, award or settlement, within seven (7) days of receipt of a notice in writing from the Company that it intends to pay the amount referred to in that judgement, award or settlement;

2.6.5.6.3 pay to the Company by bank cheque a sum equivalent to the sum that the Company is required to pay.

2.6.5.7 The Contractor's consent to the settlement referred to in this Clause shall not be unreasonably withheld.

2.6.5.8 The Contractor shall pay to the Company all other sums required to be paid under the indemnity provided under this Clause within seven (7) days of receipt of a written notice from the Company requiring payment of those sums.

2.6.5.9 In the event of the failure of the Contractor to comply with this Clause, the Company, without prejudice to any other right or remedy which the Company may have, shall have the right to suspend any payment due under the Contract until such claim, demand, suit, action or proceeding has been resolved.

2.6.5.10 In the event of any claim, demand, suit, action or proceeding being made, brought or threatened in respect of an infringement of any Intellectual Property Rights, the Contractor shall at its own expense and with the written consent of the Company, use its best endeavours to;

2.6.5.10.1 procure for the Company, on reasonable commercial terms, the right to continue to use, the whole, or the relevant part, of the Supplies and Services; or

2.6.5.10.2 replace or modify the Supplies and Services in a manner acceptable to the Company such that the quality, performance or usefulness of the Supplies and Services are not degraded and so that the infringement ceases.

2.6.5.11 The Company may obtain the consent of the owner of the Intellectual Property Right to continue using the infringing item of the Supplies and Services and the indemnity in this Clause shall cover any costs incurred by the Company and the costs incurred by the Company including any payment made to the owner.

2.6.5.12 The Contractor warrants to the Company that one hundred percent (100%) of the Software (such percentage being calculated by reference to the operable lines of code included in the source code for the Software) and of the Design Documents and the Documentation will consist of the original work of the Contractor, ownership of which will vest in the Company upon creation, unless the Company is informed and has agreed otherwise in accordance with the provisions of clause 2.6.5.13.

2.6.5.13 Subject to clause 2.6.5.15, if the Contractor wishes to include within the Software or the Design Documents or the Documentation or otherwise to use in connection with the Execution of the Works any computer program, data, document or other material the Intellectual Property Rights of which are not owned by the Contractor (or any adaptation of such computer program, data, document or other material) it shall require the permission of the Company to do so. Although the grant of any such consent shall be in the absolute discretion of the Company, the Company will give reasonable consideration to any such request for permission and provided always that the Contractor has:

2.6.5.13.1 provided the Company with the proposed terms for the appropriate assignment or licence; and

2.6.5.13.2 outlined the function for which the programs and associated material will be used;

- 2.6.5.13.3 shall respond within ten (10) business days of any such request. Where the Company grants consent to the inclusion or use of any such any computer program and/or associated material all costs associated with the assignment of the Intellectual Property Rights therein to the Company or the grant or continuation of any necessary licence to the Company (including royalties payable under the terms of the licence) shall be borne by the Contractor.
- 2.6.5.14 Without in any way fettering the discretion of the Company to grant or withhold consent pursuant to clause 2.6.5.13.3, the Company hereby notifies the Contractor that, if the Contractor is unable to obtain an assignment of the relevant Intellectual Property Rights to the Company and proposes instead to grant, or to procure the grant of, a licence to the Company, the Company's consent to accepting the grant of such a licence will be subject, as a minimum, to the following conditions:
- 2.6.5.14.1 the licence shall be for the widest possible use consistent with the protection of the owner's property in the Intellectual Property Rights and (without limitation) shall allow the use, adaptation, alteration, enhancement and updating of the relevant computer program and/or associated materials for the purposes of the Project and any future alteration or extension thereto; 2.6.5.14.2 the licence shall be for a period of one hundred (100) years from the Effective Date; and
- 2.6.5.14.3 the terms of clauses 2.6.5.18 and 2.6.5.19 shall apply.
- 2.6.5.15 The provisions of clauses 2.6.5.13 and 2.6.5.14 shall not apply to, and the Contractor shall not require prior permission to use, any computer programs and associated materials which fulfil all the following conditions:
- 2.6.5.15.1 they are not, and are not intended to be, included within the Software, the Design Documents or the Documentation;
- 2.6.5.15.2 they are used by the Contractor or any Sub-Contractor only to perform functions of a general nature which are not specific to the Works;
- 2.6.5.15.3 the owner of the Intellectual Property Rights in the computer programs and associated materials does not by reason of such ownership or any other contractual or moral right acquire or retain any Intellectual Property Rights in, or any right to control or influence the use of, the product of such computer programs and associated materials; and
- 2.6.5.15.4 they could readily and inexpensively be replaced by commercial "off-the-shelf" software which performs equivalent functions and, where applicable, which is capable of reading and utilising their products without loss of data or (where formatting is significant) formatting.
- 2.6.5.16 Examples of computer programs which may fall within this category are "off-the-shelf" word-processing packages or spreadsheets which are used in the course of producing Documentation and which create files in industry-standard formats. For the avoidance of doubt, the fact that a computer program satisfies the above conditions does not affect the manner in which the remainder of the Contract applies to any material (of any nature) produced by such program:
- 2.6.5.16.1 save as otherwise provided in clause 2.6.5.13 and 2.6.5.15, all Intellectual Property Rights in;
- 2.6.5.16.2 the Software (including the source code relating thereto), the Design Documents and the Documentation, and all drafts and interim versions thereof; and
- 2.6.5.16.3 all other materials created by or coming into existence through the Works of the Contractor (or any of its employees, agents or Contractors) whether in connection with the provision of the Works or otherwise in the course of performing the Contractor's obligations under the Contract, shall vest in the Company on creation and the Contractor shall thereafter use the same only as licensee of the Company and only for the proper performance of the Contractor's obligations under the Contract.
- 2.6.5.17 Use of Software Programs, Tools and Data following "Taking-Over"
- 2.6.5.17.1 Where any code included in the Software is generated by the Contractor (or its employees, agents or Contractors, including Sub-Contractors) through the use of computer programs and associated materials owned by the Contractor or any third party, the Contractor shall grant to, or procure for, the Company (and its agents and Contractors) the right, for a period of one hundred (100) years from the time of Final Acceptance, to use such computer programs and associated materials for the purpose of generating amendments or additions to, or replacements of, the said code, for the purpose of maintaining, adapting, enhancing and updating the Software. Such rights shall be granted:
- 2.6.5.17.1.1 in the case of computer programs and associated materials owned by the Contractor or any Sub-Contractor of the Contractor on the then standard terms of the Contractor or such Sub-Contractor or such other commercial terms as may be negotiated between the parties (but in any case, for a licence fee of R 1 (One South African Rand) in respect of the entire licence period);
- 2.6.5.17.1.2 in the case of computer programs and associated materials owned by any other third party, on terms which are no less favourable than the third party's standard terms (but so that the Contractor shall be responsible for bearing any fee and royalties necessary for the grant and continuation of the licence within the Contract Price).
- 2.6.5.17.2 Save to the extent that the necessary rights have vested in, or been granted to, the Company pursuant to clauses 2.6.5.17, 2.6.5.18 and 2.6.5.19 at the time in question, the Contractor shall permit, and shall procure, in relation to any elements of the Equipment designed or to be designed and/or to be supplied by the Contractor, or any Sub-Contractor or Supplier, that it shall, and all Sub-Contractors and Suppliers shall, permit the Company, without any payment whatsoever, whether royalties or otherwise, to use following Final Acceptance of the Works and without limitation in time and notwithstanding any termination of the Contractor's employment, or entry and expulsion by the Company, or termination, completion or abandonment of the Contract and/or any Sub-Contract



and/or the Works or any part thereof, all data (including, but without limiting the generality of the foregoing, computer software and data and documents relating to the programming of electronic equipment) contained in or produced pursuant to or in connection with the Contract and/or the Works;

2.6.5.17.2.1 for the operation, maintenance, updating, alteration, extension, dismantling, reassembling, adjustment and upkeep of the Equipment including without limitation for the Manufacture whether by the Company or others of any parts equivalent, identical or similar to any items of Equipment or any other materials forming part of the Works as Spare Parts or replacement parts or extra parts provided that the same are for use in or in connection with the Project or any extension or alteration thereof; and

2.6.5.17.2.2 in relation to or in connection with any Works or proposed Works other than those in clause 2.6.5.17.2.1 above with which the Project will or may be physically or functionally linked, including without limitation for the Manufacture of parts equivalent, similar or identical to elements of the Equipment.

2.6.5.17.3 Further, the Contractor shall permit (and shall procure, in relation to any elements of the Plant designed or to be designed and/or to be supplied by them, that all Sub-Contractors and Suppliers permit) the Company to use any part or item forming part of the Works as a sample for the purpose of Manufacture envisaged in clause 2.6.5.17.2.1 and 2.6.5.17.2.2 of this clause.

#### 2.6.5.18 Provision of Software Source Code

2.6.5.18.1 Upon issue of the Taking-Over Certificate for the Whole of the Works, the Contractor shall provide two (2) copies of the source code for the Software in magnetic form accompanied by a print out on paper of an index that allows access to each program or sub-program. For the avoidance of doubt the Software shall include computer programs and associated materials included within the Software which are owned by, or are an adaptation of a computer program or associated material which is owned by, the Contractor or any Sub-Contractor of the Contractor.

2.6.5.18.2 This referenced Software Source Code, programs and associated material will be delivered to the Company upon the applicable date of issue of a Taking-Over Certificate for the Works as a Whole (the "**Relevant Date**"); or, if the Contractor is unwilling so to agree.

2.6.5.18.3 The source code of such computer programs and associated materials (and the adaptations thereof) be placed in escrow on the Relevant Date with a commercial escrow agent proposed by the Contractor and approved by the Company, the terms of the escrow to be such as the Company shall reasonably prescribe.

2.6.5.18.4 Where any code included in the Software referred to in clause 2.6.5.18.1 is generated by the Contractor (or its employees, agents or Contractors) through the use of computer programs owned by third parties, the material input to such computer programs in order to generate such code (whether in magnetic, paper or other form) shall be treated as source code for the purposes of clause 2.6.5.18.1.

2.6.5.18.5 Where pursuant to any consent given under clause 2.6.5.13 or under the terms of clause 2.6.5.17 the Contractor is required to procure for the Company a licence to use computer programs and associated materials (or adaptations thereof) owned by a third-party, the Contractor shall use all reasonable endeavours to procure:

2.6.5.18.5.1 agreement from the third party that the source code of such computer programs and associated materials (and the adaptations thereof) will be delivered to the Company upon the applicable date of issue of a Taking-Over Certificate for the Works as a Whole (in this clause 2.6.5.18.5, the "**Relevant Date**"); or, if the third party is unwilling so to agree;

2.6.5.18.5.2 that the source code of such computer programs and associated materials (and the adaptations thereof) be placed in escrow on the Relevant Date with a commercial escrow agent proposed by the Contractor and approved by the Company, the terms of the escrow to be such as the Company shall reasonably prescribe;

2.6.5.18.5.3 in either case, without additional cost to the Company.

2.6.5.18.6 The Company shall be entitled to take the willingness of the third party to agree to such Delivery or escrow into account in determining whether to grant consent under clause 2.6.5.13 to the use of such third-party computer programs or associated materials. Nevertheless, without prejudice to the generality of the Company's discretion, the Company acknowledges that any third-party who is prepared to agree to such Delivery or escrow as is referred to in clause 2.6.5.18.5, is likely to do so upon terms:

2.6.5.18.6.1 which require that the use of the source code is limited to use for the purposes of maintaining, amending, adapting or extending the Software;

2.6.5.18.6.2 that the Company undertakes reasonable restrictions upon the disclosure of the source code; and

2.6.5.18.6.3 that the third-party will not be liable for faults arising from unauthorised amendments to the computer programs in question and the Company hereby indicates its willingness to agree such terms if it believes that it is in the best interests of the Project that it should do so.

#### 2.6.5.19 Extent of Software Licences

2.6.5.19.1 Where pursuant to clauses 2.6.5.3, 2.6.5.17 and 2.6.5.18, the Company is granted any licence to use computer programs or associated materials or methodologies, such licence shall (notwithstanding any other provision of the Contract to the contrary) be granted on such terms as shall:

2.6.5.19.1.1 permit the licensee to assign the rights included in the licence as a whole to any person

(including, but not limited to, any operator of the Project);

2.6.5.19.1.2 permit the licensee to grant sub-licences of the whole or any part of the rights included in the licence; and

2.6.5.19.1.3 permit the licensee to allow the use of such rights by any person providing software consultancy, facilities management or similar services to the licensee.

## 2.6.6 Inspection, Tests and Analyses

2.6.6.1 If it is a contract condition that supplies to be produced or services to be rendered should at any stage during Production or execution or on completion at the suppliers Works be subject to inspection, then the Company and the Contractor shall each be responsible for their own costs in terms of such an inspection. The premises of the Contractor shall be open, at all reasonable hours, for inspection by a representative of the Company or of an organisation acting on behalf of the Company.

2.6.6.2 Inspections, tests and analyses may be carried out prior to dispatch in regard to such contract supplies as may be deemed necessary by the Company and the Contractor shall provide, if required, all the required facilities for the inspections, tests and analyses of the supplies free of charge and shall, if required, provide all the materials, samples, labour and available apparatus which may be required for the purpose of such inspections, tests and analyses free of charge unless otherwise specified.

2.6.6.3 If there are no inspection requirements in the Tender Documents and no mention thereof is made in the letters of acceptance, but during the contract period it is decided that inspections shall be carried out, the Company shall itself make the necessary arrangements, including payment arrangements, with the testing authority concerned.

2.6.6.4 If the inspections, tests and analyses referred to in clause 2.6.6.3 show the supplies to be in accordance with the contract requirements, the cost of the inspections, tests and analyses shall be defrayed by the Company; otherwise the cost shall be defrayed by the Contractor and the Company shall have the right, without prejudice to any other legal remedy it may have, to deduct such costs from payments due to the Contractor under the contract or under any other contract.

2.6.6.5 Where the Supplies or services referred to in clause 2.6.6.3 do not comply with the contract requirements, but such supplies or services are nevertheless accepted at whatever price, the cost in connection with the inspections, tests or analyses thereof shall be defrayed by the Contractor.

2.6.6.6 Supplies and Services that are referred to in clauses 2.6.6.1, 2.6.6.2 and 2.6.6.4 that do not comply with the contract requirements, may be rejected at the absolute discretion of the Company.

2.6.6.7 Any contract supplies may on or after Delivery be inspected, tested or analysed and may be rejected if found not to comply with the requirements of the contract and such rejected supplies shall be held at the cost and risk of the Contractor who shall, when called upon, remove them immediately at his own cost and forthwith substitute them with supplies which do comply with the requirements of the contract. Failing such removal the rejected supplies shall be returned at the Contractor's cost and risk. Should the Contractor fail to provide the substitute supplies forthwith, the Company may, without giving the Contractor further opportunity to substitute the rejected supplies, purchase such supplies as may be necessary at the expense of the Contractor.

2.6.6.8 Transport costs and any other expenses with regard to the rejected supplies referred to in clauses 2.6.6.1 and 2.6.6.3 shall be refunded by the Contractor.

2.6.6.9 Where imported supplies are to be inspected before shipment, the Contractor shall notify his suppliers abroad of the conditions applicable to inspections.

2.6.6.10 The provisions of clauses 2.6.6.1 to 2.6.6.9 shall not prejudice the right of the Company to cancel the contract on account of a breach of the conditions thereof, or to act in terms of paragraphs 2.9.1.1 to 2.9.1.4

## 2.7 PART G

### 2.7.1 Legal Compliance

2.7.1.1 The Contractor shall give all notices and pay all fees required to be given or paid by any act of parliament or any regulation or by-law of any provincial, local or other statutory authority in relation to the execution of the Works or of any Temporary Works and by the rules and regulations of all public bodies and companies whose property or rights are or may be affected in any way by the Works or any Temporary Works. The Contractor shall conform in all respects with the provisions of any general or local act of parliament, provincial ordinances and the regulations or by-laws of any local or other statutory authority which may be applicable to the works or to any Temporary Works with such rules and regulations of public bodies and companies as aforesaid and shall keep the Company indemnified against all penalties and liabilities of every kind for breach or any such act, ordinance, regulation or by-law.

2.7.1.2 The Contractor shall in carrying out its obligations under the Contract comply with all relevant Legislation.

### 2.7.2 Liability of Contractor

2.7.2.1 In the event of the contract being cancelled by the Company in the exercise of its rights in terms of these conditions, the Contractor shall be liable to pay to the Company any losses sustained and/or additional costs or expenditure incurred as a result of such cancellation and the Company shall have the right to recover such losses, damages or additional costs by means of set-off from moneys due or which may become due in terms of the contract or any other contract, or from a guarantee provided for the due fulfilment of the contract and, until such time as the amount of such losses, damages or additional costs has been

determined, to retain such moneys or guarantee or any deposit as security for any loss which the Company may suffer or have suffered.

2.7.2.2 The Contractor may be held responsible for any consequential damages and loss sustained which may be caused by any defect, latent or otherwise, in the supply or service rendered or if the supply or service as a result of such defect, latent or otherwise, does not conform to any condition or requirement of the contract.

2.7.2.3 The Contractor's total liability arising howsoever under or in connection with the Contract shall be limited to the Contract Price.

## **2.8 PART H**

2.8.1 Logistic Support (LS)

2.8.1.1 LS Programme Requirements

2.8.1.1.1 The Contractor shall establish and conduct a formal LS programme in accordance with the requirements of the Specification and as outlined in the Logistic Support Plan. The objective is to define the required Logistic Support System and Resources, establish this Support System, and validate this.

2.8.1.1.2 Final Acceptance will only take place when the Company is satisfied that the Support System has been validated in accordance with the Contract.

2.8.1.1.3 The support system shall be defined in accordance with the Contract, prior to Site Acceptance.

2.8.1.2 Period of Beneficial Use

2.8.1.2.1 PBU shall be twelve months from Site Acceptance as may be extended to the extent and on the conditions set forth in clause 2.5.1 from Site Acceptance to Final Acceptance and shall be a period of at least twelve months, terminating when the validation of the support system is achieved. PBU may be extended to the extent and on the condition set forth in clause 2.5.1.

2.8.1.2.2 The Contractor shall be responsible for the maintenance and support of the Supplies and Services during PBU in accordance with the Logistic Support System and Resources defined and established in accordance with the Contract, prior to Site Acceptance.

2.8.1.2.3 The Contractor shall provide supervisory assistance capable of undertaking all relevant aspects associated with the maintenance and support of the Navigational Aids system. The Contractor may use, without charge, the Company's staff to assist in the performance of maintenance and support during PBU. The use of the Company's staff does not remove any of the obligations of the Contractor under the Contract.

2.8.1.2.4 With the exception of the company staff costs, all costs for the maintenance and support during PBU are included in the Contract Price.

2.8.1.2.5 At the termination of PBU, the Company may enter into appropriate depot level support Contracts.

## **2.9 PART M**

2.9.1 Failure to Comply with Conditions and Delayed Execution

2.9.1.1 Should the Contractor fail to comply with any of the conditions of the contract, the Company shall be entitled, without prejudice to any of its other rights, to cancel the contract.

2.9.1.2 Upon any delay beyond the contract period in the case of a supplies contract, the Company shall, without prejudice to its other rights and without cancelling the contract, be entitled forthwith to purchase supplies of a similar quality and up to the same quantity in substitution of the goods not supplied in conformity with the contract and to return any supplies delivered later at the Contractor's expense and risk, or forthwith to cancel the contract and buy such supplies as may be required to complete the contract and without prejudice to its other rights, be entitled to claim damages from the Contractor.

2.9.1.3 Upon any delay beyond the contract period in the case of a service contract, the Company shall, without prejudice to any other right and without cancelling the contract, be entitled forthwith to arrange for the execution of the service not rendered or not rendered in conformity with the contract or to cancel the contract and without prejudice to its other rights, be entitled to claim damages from the Contractor.

2.9.1.4 In the event of the Company availing itself of the remedies provided for in clauses 2.9.1.1 to 2.9.1.3:

2.9.1.4.1 the Contractor shall bear any adverse difference in price of the said supplies or services and these amounts plus any other damages which may be suffered by the Company shall be paid by the Contractor to the Company immediately on demand or the Company may deduct such amounts from moneys (if any) otherwise payable to the Contractor in respect of any supplies or services rendered or to be rendered under the contract or under any other contract or any other amount due to it; or

2.9.1.4.2 if the Contractor fails to supply the goods or render the service within the period stipulated in the contract, the Company shall have the right, in its sole discretion either to deduct as a penalty from the value of the contract sum an amount of one-fourteenth per cent thereof per day for the period of delay or to claim any damages or loss suffered in lieu of such penalty. Provided that where Beneficial Use of the completed portion is enjoyed, the penalty shall be applied to the value of the outstanding portion only.

2.9.1.5 No penalty or damages shall be claimed in respect of any period of delay which the Contractor can prove to the satisfaction of the Company to be directly due to a state of war, sanctions, strikes, lockouts, damage to machinery as a result of accidents, fires, floods or tempests or acts of God, which could not be reasonably foreseen or reasonably overcome by the Contractor, or to any act or omission on the part of persons acting in any capacity on behalf of the Company.

2.9.1.6 If the Delivery of the supplies or the rendering of the service is likely to be delayed or is in fact being delayed on account of any of the reasons mentioned in clause 2.9.1.5, full particulars of the circumstances shall be reported forthwith in writing to the Company, and at the same time the Contractor shall indicate the extension of the Delivery period which is desired.

## 2.9.2 Delivery and Penalties

2.9.2.1 Penalties will be imposed from the end of the contractual Delivery period at the rate indicated in clause 2.9.1.4.2.

## 2.9.3 Notices

2.9.3.1 After Contract award, any notice required or authorised to be given or served upon a party pursuant to the Contract shall be written and may be given by facsimile, registered post or hand delivered to that party at its address appearing in the Contract, or otherwise advised by each party in writing from time to time. Facsimile notices shall be confirmed in writing by registered post or hand delivered.

2.9.3.2 After Contract award, any notice given to the Company shall be addressed to the Engineer.

## 2.10 PART N

### 2.10.1 Options

2.10.1.1 The Company may decide, at its discretion, to purchase additional quantities of any of the Supplies or related Supplies and Services covered by the Contract. The Contractor shall offer the Supplies or related Supplies and Services to the Company under identical conditions of the Contract and at prices reflecting the scale of Order. This Option shall extend for a period of up to 60 Months from the effective date of the Contract. This Clause does not commit the Company to acquire any further quantities of the Supplies or related Supplies and Services.

### 2.10.2 Operational Airports

2.10.2.1 Where work has to be executed on or in the vicinity of an operational Airport, such work shall be subject to various special conditions and regulations as listed below in Order to guarantee and safeguard the operation of the Airport at all times.

2.10.2.2 The APM and the relevant ATC are ultimately responsible for the safe and efficient operation of the Airport.

### 2.10.3 Airport Management and Air Traffic Control

2.10.3.1 The APM will in his official capacity have authority to give the Contractor verbal or written Orders on matters concerning the operation, security or safety of the Airport and the Contractor shall carry out these instructions as if issued by the Engineer.

2.10.3.2 The ATC is responsible for the safe movement of all aircraft traffic, both in the air and whilst on the ground. The ATC shall at all times have absolute authority regarding the movement of any construction personnel, vehicles or equipment, where such movement takes place within the Obstruction Free Areas of existing facilities, or on the Manoeuvring Area, and his instructions shall be implicitly obeyed. The ATC's decision regarding the acceptability and programming of the Contractor's activities within the above-mentioned areas shall be taken into account and may result in night work where considered necessary.

2.10.3.3 All liaison with the APM or ATC shall be arranged through the Engineer

2.10.3.4 If required, the Contractor shall establish an acceptable radio communication system on the Airport. Such a system must be approved by the Company by the Engineer to ensure that no interference with normal ATC communication occurs.

### 2.10.4 Radio Communication on the Airport

2.10.4.1 Radio communication between the ATC and the Contractor may, however, be effected by means of radios supplied to the Contractor free of charge. The number of units shall be determined by the ATC, depending on the need for direct contact with the Contractor. The Contractor's personnel will attend a basic course in radio procedures before sets will be supplied to the personnel. The Contractor shall be responsible for any maintenance costs, damage or loss of these sets. Maintenance and repair shall only be carried out by company personnel and the Contractor shall not be entitled to any compensation for possible inconveniences, delays or disruptions because of the non-availability of radios during such repair or maintenance periods.

### 2.10.5 Airport Security

2.10.5.1 The Contractor shall ensure that the security of the Airport is maintained whenever it may be affected by his operations under the contract. He shall be responsible for the observance of all security regulations and related requirements, both by his employees, sub-contractor and their employees, as well as by his suppliers.

2.10.5.2 Entry into the security area, whether for personnel, vehicles or self-propelled construction equipment shall be subject to the issue of access permits by the Airports Company of South Africa or his authorised delegate. All personnel or vehicle permits shall be displayed at all times while such person or vehicle is

within the security area. Permits may be issued to grant access to a designated area only and it shall be the Contractor's responsibility to exercise the necessary control on site in Order to prevent trespassing by personnel or vehicles in this regard. The Contractor shall pay all costs involved in the issue of such permits. Before such permits are issued, employees of the contractor may be required to attend an induction course as prescribed by ACSA.

2.10.5.3 No photographs shall be taken on the Airport and the possession of cameras on the site is expressly forbidden. The possession of any firearms, explosives or other weapons on the site is also expressly forbidden. Smoking or fires are prohibited in certain areas on the Airport, and fires required for any purpose may only be lit after written approval has been obtained from the Airport authorities who will also supervise such fires.

2.10.5.4 Sketches, drawings, diagrams, information, etc, regarding the Works may not be made, recorded or reproduced other than that specifically required by and for the purpose of the contract, and no sketches, drawings, diagrams, information, etc, may be published in magazines, journals or elsewhere unless authorised in writing by the Company.

2.10.5.5 The Tender Documents could contain information related to the defence of the Republic of South Africa and should be treated as secret. Amongst others, the provisions of section 118 of the Defence Act, Act 44 of 1957, as amended, as well as the provisions of the Protection of Information Act, Act No 84 of 1982, as amended, are applicable.

2.10.5.6 The failure of the Contractor to comply with these or other security regulations and requirements, shall be sufficient reason to cancel the Contractor's access permits and/or terminate all construction activities until such shortcomings or breaches of security have been rectified, and the Contractor shall have no right to claim for any resulting delays, standing time or losses whatsoever.

2.10.5.7 The Contractor shall control all movement of his personnel, vehicles and equipment according to the stipulations laid down by the ATC or specified in the documents or indicated on the drawings. In order to achieve proper control over all movements on site, certain areas, routes or corridors shall be clearly demarcated by the erection of temporary construction fences, or security fences, as indicated on the drawings or instructed by the Engineer. Such fences shall be erected prior to the commencement of any construction activities in any particular area, and will have to be moved to new positions as the requirements change during construction of the Works.

#### 2.10.6 Movement on the Airport

2.10.6.1 Movements and operations within the above-mentioned demarcated zones, shall not normally be subject to any restrictions from the relevant ATC. Any access, haul or construction routes shall, however, be fixed after consultation with the ATNS project engineer.

2.10.6.2 The crossing of any operational facility on the Airport will require special control as Ordered by the ATC or the APM and will be limited to pre-determined points as indicated on the drawings or instructed by the Engineer. The required controls may include any of the following:

2.10.6.2.1 Unrestricted crossing by the Contractor linked with a system of pre-warnings that the facility will be required for Airport use within a certain period after notification.

2.10.6.2.2 Flagmen at crossing points, allowing movements across the facility whenever aircraft traffic permits.

2.10.6.2.3 Radio controlled crossing points, where movement across the facility may only take place after receiving clearance from the ATC.

#### 2.10.7 Additional Requirements Regarding Construction Activities

2.10.7.1 All construction vehicles and self-propelled equipment to be utilised within the Airport Security Area shall be fitted with a boldly displayed black identification number (minimum dimension 600mm, line thickness 75mm) on a white background on both sides of the vehicle or equipment. A record of all identification numbers and related vehicles shall be available at all times for perusal by the APM or the Engineer.

#### 2.10.8 Identification Numbers

2.10.8.1 The surfaces of existing facilities at crossing points shall be absolutely clean whenever they are used by aircraft. This will require the full-time presence of a cleaning team at such crossings, at any time when they are being used, to remove all debris, stones or other material from the surfaces. The Contractor shall be responsible for any damage to aircraft or other equipment as a result of failure to comply with this requirements.

#### 2.10.9 Crossing Points

2.10.9.1 The Contractor shall provide, erect, maintain, move and finally remove temporary barriers, fences and markings all as prescribed by the APM or the Engineer, or as shown on the drawings. The work shall include the placing of temporary barriers where Runways or Taxiways have been closed as well as lights at these points to facilitate night-time interpretation of the situation. It may, also include the painting of markings and the final removal thereof.

#### 2.10.10 Barricades, Lights and Markings

2.10.10.1 The Contractor shall control dust in all working areas (especially on the Apron, etc.) and on haul roads to the satisfaction of the Airport authorities. No pollution from machines, Workshops or other sources will be tolerated.

2.10.11 Dust and Pollution

2.10.11.1 The Contractor shall keep the entire site of the Works, including his own camp site, in a neat and clean condition to the satisfaction of the Airport authorities.

2.10.12 Orders

2.10.12.1 Supplies shall be delivered and services rendered only upon receipt of a written letter of acceptance or order from the Company and accounts shall be rendered as indicated on the official Order or in the letter of acceptance or contract, as the case may be.

## 2.11 PART O

2.11.1.1 Price means the amount in the currency stated in the Tender and which may be fixed or not fixed.

2.11.1.2 Fixed Price means the price that cannot be changed and is not subject to adjustment.

2.11.1.3 Price not fixed means the price that is subject to adjustment as indicated in clause 2.11.10, or, if clearly indicated in the contract, a budgetary price.

2.11.2 Equipment

2.11.2.1 The price contracted for equipment includes full compensation for the design of the system in accordance with the technical specification and for the Manufacture of the various components of the system.

2.11.3 Services

2.11.3.1 The price contracted for services includes full compensation for maintenance to the system, buildings, electrical work, etc. on a regular basis, for a predetermined period, for transport of all equipment from the place of Manufacture , the port or Airport to which it was imported, to the site, for comprehensive insurance cover, during the whole contract period, as specified in clause 2.6.1.1.1, for all customs duties, import surcharges and finance charges associated with the import of the various components, for unpacking equipment at the site and installing it and for all civil and electrical Works for which the specified Provisional Sum is included in the price schedule.

2.11.3.2 The building(s) or building alterations (as applicable) and structures shall be constructed, and all electrical Installation work undertaken, by the Contractor or a selected sub-contractor.

2.11.4 Customs Duties and Surcharges

2.11.4.1 Where applicable the estimated cost of all customs duties and import surcharges shall be quoted in the Price Schedule. The Contractor has indicated the Tariff Heading under which the equipment will be cleared through customs in the price schedule.

2.11.5 The Provision of Spares

2.11.5.1 The price contracted for the provision of spares shall include full compensation for the Delivery of the spares considered by the Tenderer advisable to be held in store. The spares shall be according to the list submitted with the Tender.

2.11.6 Documentation

2.11.6.1 The price contracted for Documentation, includes full compensation for the supply of all Documentation, excluding the material needed for Training of operating and maintenance staff.

2.11.7 Training of Operating and Maintenance Staff

2.11.7.1 The prices contracted for the Training of operating and maintenance staff shall include full compensation for all costs incurred to train the number of operating and maintenance staff for the duration as submitted with the Tender and for providing the necessary operating and maintenance manuals.

2.11.8 Test Equipment

2.11.8.1 The price contracted for test equipment includes full compensation for all test equipment, special tools, etc., that will be necessary, for the technical staff of the Company, to fully maintain the complete system for its full operational lifetime.

2.11.9 Acceptance Test

2.11.9.1 The price contracted for acceptance tests includes full compensation for all acceptance tests required in terms of the contract.

2.11.10 Adjustment of Prices allowed in the event of prices which are not fixed:

2.11.10.1 The basic sum or tariff in the currency stated in the contract shall be subject to amendment only in accordance with adjustments that appear in specified Indices, subject to the following being contained in the contract:

2.11.10.1.1 the respective percentages of the total Contract Price which are subject to adjustment in accordance with changes in the specified Indices;

2.11.10.1.2 the title of the official bulletin or other document in which the specified Indices are published;

2.11.10.1.3 the method of calculating such sum;

- 2.11.10.1.4 the dates or periods pertaining to the contractual term to be used for determining the final Indices, provided that such dates or periods may not be later than the contractual Delivery date, whichever is the earlier.
- 2.11.10.2 Where a contract makes provision for escalation, such escalation shall be calculated per deliverable item as follows:
- 2.11.10.2.1 in the case of a fixed Delivery date, by taking the index or rate which in terms of the contract is applicable on such fixed Delivery date or on the actual Delivery date, whichever is the earlier; or,
- 2.11.10.2.2 in the case of a Delivery date which is not fixed (whether or not the Delivery of such item is at the same time subject to a further fixed Delivery date), by taking the index or rate which in terms of the contract is applicable on such not fixed Delivery date, or on the actual Delivery date, whichever is the earlier.
- 2.11.10.3 Should the Delivery date of any item be changed in any way, the index or rate according to which escalation is calculated in terms of the contract shall be amended only if expressly provided for in a written amendment of contract.
- 2.11.10.4 Claims against the Company shall, unless otherwise authorised by the Company, be proved to the satisfaction of the Company as soon as possible but in any case not later than the following:
- 2.11.10.4.1 In the case of period contracts, 90 days after the change in cost or the date of advice of acceptance of the Tender, whichever date is the later, in which case the prices may be backdated to the date of change in cost. If a claim is received after 90 days, the prices will be backdated only to the date on which the claim was proved to the satisfaction of the Company.
- 2.11.10.4.2 In the case of non-period contracts, 90 days from the date on which the firm contractual Delivery period expired if the contractual Delivery period was adhered to. If he does not claim within 90 days, the Contractor shall forfeit his claim to a price adjustment unless otherwise decided by the Company.
- 2.11.10.5 In cases where a price adjustment is in favour of the Company such favourable difference shall on demand be paid forthwith by the Contractor to the Company or the Company may deduct such amounts from moneys (if any) which may otherwise be due to the Contractor in regard to supplies or services which he delivered or rendered or is to deliver or render in terms of the contract or any other contract or any amount which may be due to him.
- 2.11.10.6 If Delivery takes place within the contracted Delivery period, the Contract Price ruling at date of Delivery shall apply. Deliveries shall not be withheld for the purpose of benefiting from price increases.
- 2.11.11 Statutory cost adjustments
- 2.11.11.1 The basic sum or any specified portion thereof, in the currency stated in the contract shall be subject only to statutory cost adjustments determined by the Government of the Republic or any other competent authority by way of promulgation in the Government Gazette or any other official document, provided the following is contained in the contract:
- 2.11.11.1.1 the nature of the statutory costs;
- 2.11.11.1.2 the sum which is subject to statutory cost adjustments;
- 2.11.11.1.3 the method of calculating such sum;
- 2.11.11.1.4 the dates or periods pertaining to the contractual terms to be used for determining the final date on which statutory cost adjustments shall apply: provided that such dates or periods shall not be later than the contractual or actual Delivery date, whichever is the earlier.
- 2.11.12 Price Lists
- 2.11.12.1 Price lists, which are part of this contract, shall not be amended without the approval of the Company.
- 2.11.13 Total Contract Price
- 2.11.13.1 Subject to any Contract Variations as defined and processed in accordance with the Contract, the total Contract Price for the provision of the Supplies and Services under the Contract shall be as stated in the Form of Contract. Schedule B of the Contract defines the Price Schedule and Milestone Payment Schedule for the provision of the Supplies and Services for the Project as defined in the Contract.
- 2.11.14 Method of Payment
- 2.11.14.1 The Company reserves the right to enter into an agreement with any third party Finance Institution regarding the payment of amounts that may be due from time to time in terms of the contract. If the Company at its sole discretion elects to enter into such an agreement, all invoice(s) must be made out in the name of the third party financial institution. Prior to the submission of the invoice(s), it(they) must be submitted to the engineer for certification and approval. The Company will pass the invoice to the third party financial institution for payment. Letters of Credit and bank guarantees will be issued/accepted by the third party financial institution and must be mutually agreed to by the Contractor and the third party financial institution. In any event the payment schedule shall be based upon milestone breakdown below:

Milestones	Payment Structure
FAT	20%
Delivery of entire System	30%
SAT	30%
Retention / performance guarantee	10%
Warranty / PBU	10%
<b>TOTAL</b>	<b>100%</b>

2.11.14.2 The Contractor shall indicate which performance-based security they elect between retention and performance guarantee.

2.11.14.3 The Contractor is required to **propose** a justifiable detailed Delivery Milestone Payment Schedule on Supply and Delivery and Installation and SAT.

2.11.14.3.1 Variation Orders

2.11.14.3.1.1 Paid on completion at a rate of cost plus not more than 5%. The base costs shall be disclosed to the company prior to the Variation Order being approved.

2.11.14.3.2 Performance-Based Security

2.11.14.3.2.1 Payment for the site and building Works, in respect of Supply and Delivery and Installation and SAT, will be treated as follows:

2.11.14.3.2.2 Progress payments less 10% retention / performance guarantee of the value of the work completed or equipment installed. No claims in respect of loose equipment or materials or equipment stored off site will be entertained.

2.11.14.3.2.3 The engineer shall certify all claims.

2.11.14.3.2.4 Upon satisfactory completion and inspection of the buildings, site Works, electrical installation, road construction and other infrastructure (SAT), the retention on this portion of the contract will be reduced to 5%.

2.11.14.3.2.5 The balance of the retention / performance guarantee (5%) money will be released on expiry of the Guarantee Period (PBU) of the entire contract.

2.11.15 Rates of Exchange

**2.11.15.1 Rate of Exchange Variation**

**2.11.15.2 Contract:**

2.11.15.2.1 ATNS shall not be liable for the Rate of Exchange Variation under the Contract for the Acquisition Phase. The Contract Price shall be a fixed in **Rands**.

2.11.15.3 Option and CVO:

2.11.15.3.1 Any options or Contract Variation Orders shall be hedged upon the receipt of an Order by the Contractor, and any variation between the quoted rate and hedged rate shall be for the account or credit of the Contractor.

2.11.15.4 Maintenance and Support Phase

2.11.15.4.1 At the commencement of each of support, the Contractor shall hedge the foreign content for that year, and any variation between the quoted rate of the Price Schedule and the hedged rate shall be for the account or credit of ATNS.

2.11.15.4.2 Rules that apply when exchange cover on a fixed term basis is a condition of the contract:

2.11.15.4.2.1 The Contractor shall, within 14 fourteen days of receipt of the contract (or if an export permit is required within 14 [fourteen] days after receipt of such permit) or such extended period as agreed upon at the time, arrange exchange cover for the total exchange amount which cover may not exceed the contractual term and shall be transferred abroad on a fixed term basis. Once the currency futures have been issued, the Company's finance division must be provided with a copy of such currency futures.



- 2.11.15.4.2.2 Should the currency futures not be taken out within the prescribed period, then, subject to the provisions of clause 2.11.15.4.3, one of the following two rates, whichever is to the best advantage of the company, shall be used for calculation purposes:
- 2.11.15.4.2.2.1 the Spot Rate applicable on the last day of the prescribed period;
- 2.11.15.4.2.2.2 the actual rate applicable to the currency futures.
- 2.11.15.4.3 Should the Contractor fail to take out exchange cover, the Spot Rate applicable on the last day of the prescribed period, or the actual transfer rate, whichever is to the best advantage of company, shall be used for calculating the exchange rate adjustments. Should the Contractor fail to submit the required documentary proof to substantiate the transfer rate, the conditions contained in clause 2.11.15.5 shall apply.
- 2.11.15.4.4 In addition to compliance with the preceding conditions, the Contractor shall submit a copy of his foreign supplier's invoice together with his claim for exchange rate adjustment, with clear reference to the currency futures
- 2.11.15.4.5 Where exchange cover is not required in the contract or in terms of these conditions, the "end date" will be determined by the company according to the following rules:
- 2.11.15.4.5.1 Where payment to a foreign supplier is effected before the Contractor is paid by the Company, the rate of exchange applicable to such payment shall be taken for the purposes of the adjustment, provided that the foreign supplier is paid within the contractual Delivery period. Should payment occur after the contractual Delivery period the provisions of clause 2.11.15.4.6.2 shall apply.
- 2.11.15.4.6 Where payment to a foreign supplier (the "**first-mentioned payment**") is effected after the Contractor has been paid by the company and
- 2.11.15.4.6.1 Delivery takes place before the contractual Delivery date, the rate of exchange applicable on the date of the first-mentioned payment or on the thirtieth day after the date appearing on the company's official remittance advice, whichever is the earlier, shall be used for the purposes of the adjustment; or
- 2.11.15.4.6.2 Delivery takes place after the contractual Delivery date, the rate of exchange applicable on the date of the first-mentioned payment, or which ruled on the contractual Delivery date or on the actual Delivery date, whichever is to the best advantage of the company, shall be taken for the purposes of the adjustment.
- 2.11.15.4.7 The Contractor shall, after having paid the amount abroad, submit the relevant invoice from his foreign supplier, accompanied by supporting documentary proof from his bankers as to when the foreign exchange was paid and the rate of exchange at which payment was effected, in contract to enable the company to verify the particulars.
- 2.11.15.5 Preliminary Exchange rate adjustments
- 2.11.15.5.1 Any exchange rate adjustments made by ATNS shall be furnished to the Contractor in writing.
- 2.11.15.5.2 In the event of the invoice for the goods or work which is subject to exchange rate adjustments in terms of the Agreement not being accompanied by the prescribed proof, ATNS reserves the right, to make a preliminary exchange rate adjustment based on one of the following rates which is best for ATNS:
- 2.11.15.5.2.1 The rate stated in the contract;
- 2.11.15.5.2.2 The rate which ruled on the date of ATNS' payment to the Contractor.
- 2.11.15.5.3 Any Contractor who, has detailed in a Tender document any Foreign Currency Debt (or debts) and the Spot Rate applied in translating that debt (or debts) to South African Rand, shall also, in issuing any invoice to the company upon being awarded the contract Tendered for, detail any Foreign Currency Debt included in that invoice for payment and the prevailing Spot Rate applicable to that debt upon the date that the invoice is issued.
- 2.11.15.5.4 If the contract is completed to the satisfaction of the Company within the contract period;
- 2.11.15.5.4.1 any increase in the Rand value of the Contractor's Foreign Currency Debt in consequence of Exchange Rate Fluctuation shall be for the Company account, provided that the Company does not elect to exercise its rights set out in 2.11.15.2.1 **Error! Reference source not found.**; and
- 2.11.15.5.4.2 any decrease in the Rand value of the Foreign Currency Debt in consequence of Exchange Rate Fluctuation shall be for the Contractor's account on the terms and conditions set out in this clause 2.11.15.
- 2.11.15.5.5 Where payment of the contract amount is to be effected by the Company to the Contractor in South African Rand and the Contractor is required remit a Foreign Currency Debt, the Company shall pay the Contractor the contract amount, as adjusted in the Contractor's invoice to account for an Exchange Rate Fluctuation (affecting any Foreign Currency Debt) which may have occurred between the date of submission of his Tender and the date upon which he issues any invoice pursuant to winning the Tender, provided that the invoice date is within 10 (ten) days of the date of Delivery shipment of the goods giving rise to the Foreign Currency Debt.
- 2.11.15.5.6 Where payment of the contract amount has been made by the Company to the Contractor in South African Rand and the Rand value of any Foreign Currency Debt increases or decreases as a result of Exchange Rate Fluctuations between the date upon which the Contractor issued an invoice to the Company and the date upon which he remitted abroad the amount due in terms of the Foreign Currency Debt, then

- 2.11.15.5.6.1 to the extent that the Rand value of the Foreign Currency Debt due by the Contractor has increased as a result of Exchange Rate Fluctuation, the Company shall pay the Contractor the amount of such increase, provided that the Exchange Rate Fluctuation is in excess of 1,0% (one comma nought per centum) and the remittance is made within 10 (ten) days of the date of the cheque issued or bank transfer by the Company in payment of the contract amount;
- 2.11.15.5.6.2 to the extent that the Rand value of the Foreign Currency Debt due by the Contractor has decreased as a result of Exchange Rate Fluctuations, the Contractor shall pay to the Company the amount of such decrease, provided only that the Exchange Rate Fluctuation is in excess of 1,0% (one comma nought per centum).
- 2.11.15.5.7 Where the Contractor is required to remit part or all of the contract amount abroad in the form of Foreign Currency Debts prior to his issuing an invoice to the Company, and he has indicated in his Tender that such payments will be required to be remitted abroad prior to his leaving an invoice to the Company, then the date of such remittance shall be regarded as the date in respect of which the adjustments in terms of clauses 2.11.15.5.5 and 2.11.15.5.6 are to be made, provided that hit can substantiate the payments so made.
- 2.11.15.5.8 Claims arising as a result of Exchange Rate Fluctuations, shall be substantiated by the following documentary evidence -
- 2.11.15.5.8.1 in the case of clause 2.11.15.5.5, a copy of the relevant invoice from the foreign suppliers;
- 2.11.15.5.8.2 in the case of clause 2.11.15.5.6, a copy of the relevant invoice from the foreign supplier for reconciliation with the bank remittance voucher and a copy of the bank remittance voucher;
- 2.11.15.5.8.3 in the case of both clause 2.11.15.5.5 and 2.11.15.5.6, proof from any registered commercial bank of any change in the Spot Rate; and
- 2.11.15.5.8.4 in the case of amounts that are not proper to a specific Order being included in the remittance abroad, documentary proof or an audited certificate that substantiates the inclusion of the amounts.
- 2.11.15.5.9 If the Contractor has not stated any Foreign Currency Debt the Company is under no obligation to reimburse the Contractor any money's due as a result of the variation in exchange between any currencies whether stated or not in the price schedules.
- 2.11.15.5.10 If the contract is not completed to the Company's satisfaction within the contract period, then no adjustments will be affected in terms of this clause to account for changes in the Rand value of any Foreign Currency Debts due by the Contractor in consequence of the Contract.
- 2.11.15.6 The Company shall make payment to the Contractor in accordance with the Contract Terms and the Milestone Payment Schedule, provided the relevant Supplies and Services have been Accepted and delivered to, or installed at the Delivery Site, and a properly completed invoice has been presented to the Engineer.
- 2.11.15.7 Payment shall be effected 30 days following receipt by the Engineer of a properly completed invoice indicating the Contract number, purchase Order number, milestone title and Milestone Payment amount. Unless otherwise provided in the Contract, payment is deemed to be effected by the drawing of an endorsed cheque at the Company's or its nominees' offices in Johannesburg. The Engineer reserves the right to reject any improperly submitted invoice for resubmission by the Contractor and not effect payment. Payment shall be effected on receipt of a subsequent properly completed invoice.
- 2.11.16 Programme
- 2.11.16.1 A detailed Installation programme shall be submitted by the Contractor, at least 90 days before the proposed Installation commencement date, to the Company for approval and such approval shall be obtained before Installation commences.
- 2.11.17 Packing, Packing Materials, Containers
- 2.11.17.1 Unless otherwise specifically provided for in a contract, the Contractor is responsible for packing supplies at his own cost and in such a manner as to ensure that there is no loss or damage in transit.
- 2.11.17.2 Unless otherwise agreed no charge shall be allowed for packing material or containers and such material or containers shall not be returned to the Contractor.
- 2.11.17.3 Where provision is expressly made in a contract for the return of packing material or containers, such packing material or containers shall be returned at the Contractor's expense. Returnable packing material or containers shall be invoiced at the prices given in the contract and full credit shall be allowed therefor on receipt of the Company's claim supported by a copy of the freight transit Order irrespective of whether they are returnable to the Contractor or to a third party.
- 2.11.17.4 The Contractor is responsible for ensuring that supplies to be shipped or railed are properly packed having regard to the requirements of the Order and of the South African Conference Lines or other shipping lines serving South African ports or an inland transport service as the case may be, relating to the use of certain types of containers and wrappers. Unless otherwise expressly agreed, such containers and wrappers will be accepted only on the understanding that the Contractor indemnifies the Company and its employees against any loss, breakage or damage occasioned by their use. Should bills of lading be classed to the effect that the ship is not responsible for such loss, breakage or damage, the Contractor shall accept responsibility therefore.
- 2.11.17.5 Any special packing requirements such as palletising, containerisation, etc., shall be provided if necessary or if so required in the Tender Documents.

- 2.11.18 Participation in Installation
- 2.11.18.1 The Company reserves the right, to attach officers of the Company to the Contractor's Installation team during the Installation and Commissioning of the equipment, for the purpose of obtaining practical experience on the equipment.
- 2.11.19 Procurement Outside of the Contract
- 2.11.19.1 The right is reserved to procure outside of the contract small quantities or to have minor essential services executed if an emergency arises, the Contractor's point of supply is not situated at or near the place where the supplies are required, or if the Contractor's services are not readily available.
- 2.11.19.2 No provision in a contract shall be deemed to prohibit the obtaining by the Company of supplies or services from another entity.
- 2.11.20 Precedence
- 2.11.20.1 The order of precedence shall be the Instrument of Agreement, the Conditions of Contract and the Schedules in alphabetical order as included within the Form of Contract as provided in this document.
- 2.11.21 Performance
- 2.11.21.1 The Contractor shall supply, install, test, set to work, commission and maintain the Supplies and Services indicated in the Management Plan, and Logistic Support Plan identified as Schedule P of the Contract, in accordance with the requirements of the Contract.
- 2.11.22 Conduct of the Contract
- 2.11.22.1 The project management and system engineering shall be carried out under the Contract in accordance with the requirements of the Specification, identified as Schedule E to the Contract.
- 2.11.22.2 The Contractor shall, in carrying out the Contract, comply with all reasonable directions of the Engineer.
- 2.11.22.3 The Contractor shall, when using the Company's premises or facilities, comply with all reasonable directions and procedures of the Company.
- 2.11.22.4 The language used in all business conducted under the Contract and any Documentation provided or instigated by the Contract shall be English.
- 2.11.22.5 Wherever the Engineer is required to make a consideration, determination or issue a document, he shall do so expeditiously.

## 2.12 PART P

- 2.12.1 Protection of Personal Information
- 2.12.1.1 Each of the Parties shall ensure that its employees, representatives and officers, comply with the provisions of the Protection of Personal Information Act, 2013 ("POPIA") and all other applicable data protection laws and, without limitation to the foregoing, shall ensure the security and confidentiality of all Personal Information processed by that Party is in accordance with POPIA and all other applicable data protection laws.
- 2.12.1.2 The Service Provider must only process personal information of the Company and third parties on behalf of the Company, with the Company's knowledge or authorisation, treat such information which comes to their knowledge as confidential and must not disclose it unless required by law or in the course of the proper performance of the Service Provider's duties. The Service Provider must comply with the responsible party's obligations in clause section 19 of POPIA.
- 2.12.1.3 Where the Service Provider, its agents, subcontractors, officers, directors, shareholders, representatives, or employees has/have access to any Personal Information held by the Company for any reason in connection with this Agreement or is/are supplied with or otherwise provided with Personal Information by the Company or on behalf of the Company for any purpose, or are supplied with or otherwise provided with Personal Information relating to the Services, the Service Provider shall:
- 2.12.1.3.1 process such Personal Information only for purposes of performing its/their obligations under this Agreement and shall not otherwise modify, amend or alter the contents of such Personal Information or disclose or permit the disclosure of such Personal Information to any third party, unless specifically authorised to do so by the Company or as required by law or any regulatory authority, and shall take all such steps as may be necessary to protect and safeguard such Personal Information;
- 2.12.1.3.2 without prejudice to the generality of the foregoing, ensure that appropriate, reasonable technical and organisational measures shall be taken by it/them to prevent –
- 2.12.1.3.2.1 the unauthorised or unlawful processing of such Personal Information; and
- 2.12.1.3.2.2 the accidental loss or destruction of, or damage to, such Personal Information; and
- 2.12.1.3.2.3 promptly notify the Company when it becomes aware of any unauthorised, unlawful or dishonest conduct or activities, or any breach of the terms of this Agreement relating to Personal Information.
- 2.12.1.4 The Service Provider shall be liable for all claims, demands, actions, costs, expenses (including but not limited to reasonable legal costs and disbursements), fines, losses and damages arising from or incurred by reason of any wrongful processing of any Personal Information by the Service Provider (including its agents,

subcontractors, officers, representatives or employees) for any breach of its obligations or warranties in terms of clause 2.5.1.

2.12.1.5 Both Parties will comply with their obligations under POPIA in relation to personal information for which they are the responsible party.

2.12.1.6 The Service Provider must notify the Company immediately where there are reasonable grounds to believe that personal information has been accessed or acquired by any unauthorised person (Data Breach) and must assist the Company, at its own cost: a) with any investigation or notice to the Regulator or data subjects that the Company may make in relation to a Data Breach; and b) in responding to any directions by the Regulator to publicise the Data Breach, including assisting the Company to make public announcements if required.

2.12.1.7 The Service Provider indemnifies the Company against any civil or criminal action or administrative fine or other penalty or loss as a result of the Service Provider's breach of this clause.

2.12.2 Quantities other than those Specified

2.12.2.1 If a Tender is based on quantities and the Tender is accepted for a quantity other than that called for or offered, the Tenderer is given the option of refusing acceptance if the quantity required is less than that for which he has Tendered. However, if the Tender is accepted for a larger quantity, only the excess may be refused. Written notification of rejection of the changed quantities must be received from the Tenderer within 14 days of the date on which he was advised of the change, failing which he will be deemed to have accepted.

2.12.3 Quality

2.12.3.1 Goods supplied and services rendered shall be in accordance with, and the Contractor guarantees that they are equal in all respects to, the samples, patterns, drawings and Specifications stipulated in the contract or Order and unless otherwise specified, supplies shall be new and unused. Where specific grades and special brands are specified, such grades and brands only shall be supplied unless the Company agrees otherwise.

2.12.3.2 Where a contract calls for a supply or service according to a standard specification of the South African Bureau of Standards, the Contractor is required to take cognisance of the provisions of sections 15(6), (7) and (8) of the Standards Act, 1982 (Act No. 30 of 1982)

## 2.13 PART Q

2.13.1 Care of the Works

2.13.1.1 From the commencement to the completion of the contract the Contractor shall take full responsibility for the care thereof and of all temporary works, materials and equipment and in the event of any damage, loss or injury to any part thereof or to any temporary works or materials, from any cause whatsoever (save the excepted risks as defined hereafter in subparagraph 2.13.1.2), he shall at his own expense repair and make good the same so that upon completion, the project shall be in good order and condition and in conformity in every respect with the provisions of the contract. In the event of any such damage, loss or injury resulting from any of the excepted risks, the Contractor shall, if and to the extent required by the engineer, repair and make good the same as aforesaid, at the cost of the Company.

2.13.1.2 The excepted risks are -

2.13.1.2.1 war, invasion, act of foreign enemies, hostilities (whether war be declared or not) or civil war;

2.13.1.2.2 insurrection, terrorism, rebellion or revolution;

2.13.1.2.3 mutiny, military rising, military or usurped power, martial law or state of siege, or any other event or cause which determines the proclamation or maintenance of martial law or state of siege;

2.13.1.2.4 riot (in so far as it is uninsurable);

2.13.1.2.5 risks arising from political riot and malicious damage, unless these risks are insurable with the South African Special Risk Insurance Association at the time of Tendering and it is stipulated in the contract that the Contractor is to effect insurance against these risks;

2.13.1.2.6 any occurrence for which a fund has been established in terms of the War Damage Insurance and Compensation Act;

2.13.1.2.7 ionising, radiation or contamination by radio-activity from any nuclear fuel or from nuclear waste from the combustion of nuclear fuels;

2.13.1.2.8 pressure waves caused by aircraft or other aerial devices travelling at sonic and supersonic speeds;

2.13.1.2.9 a cause due to the negligence or omission on the part of the Company;

2.13.1.2.9.1 (all of which are collectively referred to as "**the excepted risks**").

2.13.2 Risk

2.13.2.1 The risk of loss or damage to all the Supplies and Services shall remain with the Contractor until the issue of the Substantial Completion Certificate. Subsequently, liability for Spares, Test Equipment and Services shall remain with the Contractor until Final Acceptance. Property in the Supplies and Services shall pass to the Company on payment of the relevant Milestone Payment.

- 2.13.2.2 Delivery of the supplies and services, in accordance with sub-clause 2.3.2 shall be made according to DDP Incoterms (2010) at the applicable Delivery Site set out therefor in the Delivery Schedule.
- 2.13.3 Business Continuity and Disaster Recovery Plans
- 2.13.3.1 The Contractor shall maintain a business continuity plan for each deliverable, describing measures the Contractor will implement to recover from a Disaster.
- 2.13.3.2 The Contractor shall include in each business continuity plan a plan for the recovery of critical technology systems, and procedures for restoring business operations at the primary location or at a designated recovery site for those critical technology systems, if necessary.
- 2.13.3.3 The Parties shall cooperate to establish a plan for alternative communications in the event of a Disaster.
- 2.13.4 Relaxation
- 2.13.4.1 Waiver of any right arising from a breach of the Contract or any right arising from a default under the Contract shall be in writing and signed by the party granting the waiver.
- 2.13.4.2 A failure or delay in exercise, or partial exercise, of a right arising from a breach of the Contract does not result in a waiver of that right.
- 2.13.4.3 A party is not entitled to rely on a delay in the exercise or non-exercise of a right arising from a breach of the Contract or on a default under the Contract as constituting a waiver of that right.
- 2.13.4.4 A party may not rely on any conduct of another party as a defence to the exercise of a right by that other party.
- 2.13.4.5 This clause may not itself be waived except in writing.

## **2.14 PART R**

- 2.14.1 Services Available
- 2.14.1.1 The necessary electricity and ablution facilities will not be provided by the Company for use by the Contractor during construction Installation and Commissioning activities.
- 2.14.1.2 It shall be the responsibility of the Contractor, to connect to the available electricity and water supplies. The Contractor will also be responsible for providing ablution facilities on site.
- 2.14.2 Site
- 2.14.2.1 The site, for erection of the structure, will normally also serve as a Contractor's site where he must erect offices, stores, etc. to enable him to fulfil his duties, regarding all civil and other works required to complete the project. Any site and storage accommodation required by the Contractor and his subcontractor, for their own use, shall be included in the contract.
- 2.14.2.2 The Contractor shall keep this site(s) clean and tidy at all times and shall restore it to its original condition, at his own expense, to the engineer's satisfaction. No pollution or littering of any kind will be tolerated.
- 2.14.2.3 The Contractor shall be responsible for the dewatering of the excavations, when necessary, and shall protect the Works against damage due to storm, rain, snow, river water floods, storm water, subsoil water and seepage. The Contractor shall reinstate, at his own cost, or pay compensation for all damage occurring to the Works by water or otherwise, during the validity of this contract.
- 2.14.2.4 The Contractor shall supply and erect a notice board and maintain same in a prominent position. The notice board shall state, in one official language, the description of the work as well as the full name and address of the Company, Contractor and any major sub-Contractor or design consultant engaged by the Contractor for the purposes of execution of the Contract. The Contractor shall remove the board, on completion of the work and make good, all ground disturbed, to the entire satisfaction of the Company or its representative.
- 2.14.3 Clearance of Site on Completion
- 2.14.3.1 On completion of the installation, the Contractor shall clear away and remove from the site all surplus materials, rubbish and temporary works of every kind and leave the area around the site clean and in a workmanlike and safe condition to the satisfaction of the Engineer. Contractors are required to take special notice of permissions and conditions contained in Environmental Impact Assessment Permissions granted.
- 2.14.4 Substitution for Local Products
- 2.14.4.1 In the event of a contract being concluded for the supply of products produced in the Republic, a Contractor desiring to substitute imported products therefore may do so only if he obtains the prior approval of the Company.
- 2.14.5 Superintendence by the Contractor
- 2.14.5.1 The Contractor shall give or provide all necessary superintendence during the execution of the contract. The Contractor or a competent and authorised agent or representative approved of in writing by the engineer (which approval may at any time be withdrawn) shall be on the site during the execution of the contract and shall give his whole time to the supervision thereof and be constantly available for the duration of the contract. Such authorised agent or representative shall receive on behalf of the Contractor directions and instructions from the engineer.

## 2.14.6 Sub-Contractors

2.14.6.1 The Company and the Contractor shall compile a list of firms of sub-contractor acceptable to both and who will be invited to submit tenders. Before the closing date of such tenders the Contractor shall furnish the Company with a sealed list in which is indicated the price increase required by the Contractor regarding the handling and appointment of every Tenderer as selected sub-contractor. The list is then opened with the tenders and on the basis thereof the Company shall indicate which tender he wishes to accept. Unless such tender contains provisions or qualifications to which the Contractor takes reasonable objection, the Contractor shall accept that tenderer and appoint him as selected subcontractor.

2.14.6.2 The Contractor shall not be compelled to take into his employ a selected sub-contractor to whom he takes reasonable objection or who declines to enter into a subcontract with the Contractor containing provisions that:

2.14.6.2.1 in respect of the work that is the subject of the subcontract the selected sub-contractor undertakes to the Contractor the like obligations and liabilities as are imposed upon the Contractor towards the Company in terms of the contract, and holds the Contractor harmless from and indemnifies him against the same and in respect of all claims, demand, lawsuits, damages, costs, charges and expenses whatsoever arising out of or in connection therewith, or arising out of or in connection with any failure to perform such obligations or to fulfil such liabilities, and

2.14.6.2.2 the selected sub-contractor holds the Contractor harmless from and indemnifies him against:

2.14.6.2.2.1 shortcomings in the subcontracted Works if and where the Works were designed by the selected sub-contractor;

2.14.6.2.2.2 defects in the goods if and where the goods were Manufacture d and/or supplied by the selected sub-contractor;

2.14.6.2.2.3 any negligence by the selected sub-contractor, his agents, employees, workmen and servants;

2.14.6.2.2.4 any misuse by the selected sub-contractor of any constructional plant, temporary Works or materials provided by the Contractor for the purposes of the contract; and

2.14.6.2.2.5 any claims as aforesaid.

2.14.6.3 Before the Engineer issues any certificate that includes any payment in respect of work done by any selected sub-contractor, he shall be entitled to call upon the Contractor to furnish reasonable proof that all payments (less retention moneys) included in previous certificates in respect of the work done by such selected sub-contractor have been made or discharged by the Contractor, in default of which, unless the Contractor -

2.14.6.3.1 informs the Engineer in writing that he has reasonable cause for withholding or refusing such payment; and

2.14.6.3.2 submit to the Engineer reasonable proof that he has so informed such selected sub-contractor in writing.

2.14.6.4 The Company shall be entitled to pay direct to such selected sub-contractor on the Engineer's certificate all payments (less retention moneys) the Contractor has failed to make to such sub-contractor and to deduct, by way of settlement, the amount so paid by the Company from any moneys owing to or that may become owing to the Contractor.

2.14.6.5 Where the Company appoints the Contractor as a Prime Contractor with a Company nominated main Sub-Contractor the Contractor shall accept overall responsibility for Delivery of all of the Supplies and Services and for integrating the sub-contracted Supplies and Services into the Contractors deliverables against the Contract. The Contractor shall be responsible for establishing a sub-contract agreement with the nominated Sub-Contractor for this purpose.

## 2.14.7 Statements of Supplies and Services

2.14.7.1 The Contractor shall, when requested to do so, furnish particulars of supplies delivered or services executed. If he fails to do so, the Company may, without prejudice to any other rights which it may have, institute inquiries at the expense of the Contractor to obtain the required particulars.

## 2.14.8 Security

2.14.8.1 Where security is required particulars thereof are indicated in the Tender Documents. Unless otherwise stated, security covering the following amounts is required from Contractors:

2.14.8.1.1 where Company property is to be handed to Contractors, the value of Company property which may be in the possession of the Contractor at any time;

2.14.8.1.2 performance guarantee/retention of ten percent (10%) of the Supply and Deliver and Installation and SAT; and

2.14.8.1.3 where the Company so decides in its absolute discretion prior to the contracting, 10 per cent of the value of the contract.

2.14.8.2 Where approval has been granted for advance or progress payments to a Contractor, the security to be provided by the Contractor is determined by the Company.

2.14.8.3 The security required consists of -

2.14.8.3.1 a guarantee issued by a banking institution registered in terms of the Banks Act, 1990, Act No. 94 of 1990, or an insurer registered in terms of the Long-term Insurance Act, 1998 (Act No. 52 of 1998) or the Short-term Insurance Act, 1998 (Act No. 53 of 1998), to do insurance business, or Business Partners, or cash, negotiable government stock, negotiable approved municipal stock, a security bond or in the case of service contracts, two or more acceptable sureties; or

- 2.14.8.3.2 such other form of security as the Company approves.
- 2.14.8.4 In accordance with the requirements of clause 2.14.8.1, the Contractor shall at the execution of the Contract, and at the discretion of the Company provide to the Engineer in consideration of the Company an unconditional bank guarantee to the value of ten percent (10%) of the Contract Price.
- 2.14.8.5 The Engineer is entitled, without any further reference to the Contractor, to use the Security under the circumstances permitted by the Contract.
- 2.14.8.6 The Contractor warrants to the Company that it shall not institute any proceedings or take any steps to injunct the Company or in any way seek to restrain the Company from exercising its rights to the Security.
- 2.14.8.7 The Security shall be reduced by 50% of the residual value of the Security on Acceptance of the last of any part of the Supplies and Services. The Engineer shall provide the Contractor with a written notice addressed to the designated financial institution stating that the Security may be reduced by 50% of the residual value.
- 2.14.8.8 Subject to the Guarantor's maximum liability referred to above, the Guarantor must undertake to pay ATNS the Guaranteed Sum or the full outstanding balance upon receipt of a first written demand notice from the ATNS to the Guarantor at the Guarantor's physical address calling up this Guarantee for Construction stating that:
- 2.14.8.8.1 The Agreement has been terminated due to the Service Provider's default and that the Security for Construction is called up in terms of 2.14.8. The demand notice shall enclose a copy of the notice of termination; or
- 2.14.8.8.2 A provisional liquidation court order has been granted against the Service Provider and that the Guarantee for Construction is called up in terms of 2.14.8. The demand notice shall enclose a copy of the court order.
- 2.14.8.8.3 Payment by the Guarantor as referred above shall be made within seven (7) calendar days upon receipt of the first written demand notice to the Guarantor.
- 2.14.8.8.4 This Guarantee for performance shall neither be negotiable nor transferable and shall expire in terms of this Agreement or on payment in full of the Guaranteed Sum or on the Security expiry date, whichever is the earlier, where after no claims will be considered by the Guarantor. The original Guarantee for Construction form shall be returned to the Guarantor after it has expired.
- 2.14.8.8.5 This Guarantee for performance, with the required demand notices referred above, shall be regarded as a liquid document for the purpose of obtaining a court order.
- 2.14.8.8.6 Where this Guarantee for performance is issued in the Republic of South Africa, the Guarantor must consent to the jurisdiction of a Court in the area where the project is located.
- 2.14.8.9 The residual Security shall be totally released on the issuance of the Certificate of Final Acceptance for the Supplies and Services. The Engineer shall provide the Contractor with a written notice addressed to the designated financial institution stating that the Security may be fully released.
- 2.14.9 Safety
- 2.14.9.1 In terms of the provisions of Section 37 (2) of the Occupational Health and Safety Act 1993 (Act 85 of 1993, hereinafter referred to as "the Act) that the following arrangements and procedures shall apply between the Company and the Contractor to ensure compliance by the Contractor with the provisions of the Act, namely:-
- 2.14.9.2 The appropriate officials and employees of the Contractor and their nominated sub-Contractors shall fully acquaint themselves with all relevant provisions of the Act and the regulations promulgated in terms of the Act,
- 2.14.9.3 The Contractor shall fully comply with all relevant duties, obligations and prohibitions imposed in terms of the Act and Regulations.
- 2.14.9.4 The Contractor shall accept sole liability for such due compliance with the relevant duties, obligations and prohibitions imposed by the Act and Regulations and shall expressly absolve the Company from itself being obliged to comply with any of the aforesaid duties, obligations and prohibitions,
- 2.14.9.5 Any duly authorised officials of the Company shall be entitled, although not obliged, to take such steps as may be necessary to ensure that the Contractor has complied with his undertakings as set out in this paragraph 2.14.9, which steps may include, but will not be limited to, the right to inspect any appropriate site or premises occupied by the Contractor, or to inspect any appropriate records held by the Contractor,
- 2.14.9.6 The Contractor shall report forthwith to the Company any investigation, complaint or criminal charge which may arise as a consequence of the provisions of the Act and Regulations, pursuant to work performed in terms of this Contract, and shall, on written demand, provide full details in writing of such investigation, complaint or criminal charge.

## **2.15 PART S**

### **2.15.1 Taxes, Levies and Duties**

- 2.15.1.1 A Contractor for projects in the Republic who is not based in South Africa, or who is based in the Republic but makes purchases for the contract outside the Republic, is responsible for paying all relevant duties, levies and taxes which may be due on the importation of the purchases into the Republic and he indemnifies the Company against any liability for the payment of such duties, levies and taxes. If so required by the Company, a Contractor must indicate the gross value of the relevant purchases and also furnish the necessary proof that all such duties, levies and taxes have been paid.

## 2.15.2 Anti-Dumping Duties

2.15.2.1 When, after the contract date, provisional payments are required or anti-dumping or countervailing duties are imposed or the amount of a provisional payment or anti-dumping or countervailing right is increased in respect of any dumped or subsidised import the Company is not liable for any amount so required or imposed or for the amount of any such increase. When after the said date, such a provisional payment is no longer required or any such anti-dumping or countervailing right is abolished, or where the amount of such provisional payment in any such right is reduced, the provision of clause 2.15.2.1.1 shall apply *mutatis mutandis*.

2.15.2.1.1 In cases where a price adjustment is in favour of the Company such favourable difference shall on demand be paid forthwith by the Contractor to the Company of the Company may deduct such amounts from moneys (if any) which may otherwise be due to the Contractor in regard to supplies or services which he delivered or rendered or is to deliver or render in terms of the contract or any other contract or any other amount which is due to him.

2.15.2.1.2 All duties and taxes payable in the country of Manufacture of the Supplies and Services, and due under the laws of that country of Manufacture shall have been paid and borne by the Contractor.

2.15.2.1.3 In addition to the requirements of clause 2.15.1.1 the Contractor shall be liable for all South African taxes, duties, levies and charges arising out of the performance of the Contract except as expressly provided for in this Clause.

2.15.2.1.4 Goods which are purchased by the Contractor in connection with the Contractor's performance of the Contract may be eligible for tax exemption. The Contractor shall obtain and be wholly responsible for obtaining such exemptions. The Company shall provide any documentation necessary to substantiate the Contractor's claim for exemption.

2.15.2.1.5 In the event that there is any reduction in any duties, taxes and charges (except income tax liability or taxes described in this Clause) incurred by the Contractor solely by reason of changes in Legislation after the date of the Contract which result in a direct decrease in the cost to the Contractor of supplying the Supplies and Services the Contractor shall pass on to the Company in the form of a reduction in the Contract Price the amount of any such reduction. The Company may deduct from any monies payable to the Contractor the amount of any such reduction.

2.15.2.1.6 The Contractor shall apply to the South African Customs Service or any other relevant authority responsible for the issue of permits, licences or approvals for permission to enter all imported goods in connection with the performance of the Contract under a tariff concession order or by law (or such other order, consent or authority as may from time to time be appropriate under the Legislation) and in doing so shall make every reasonable endeavour to obtain entry into South Africa at the most advantageous tariff rate. Any application to the South African Customs Service and/or any other relevant authority shall be lodged prior to entry into South Africa of the imported goods to which it relates. The Company shall comply with any reasonable request by the Contractor to provide the Contractor with a letter from the Company sponsoring the application to be lodged with the application. A copy of each such application and of all papers and letters written in support or in furtherance thereof shall be made available by the Contractor to the Company.

2.15.2.1.7 In pursuing its objectives for the most advantageous tariff rate, the Contractor shall ensure that all declarations made to the South African Customs Service or any other relevant authority are correct and, in respect of any duty assessable, customs values and tariff classifications are made strictly in accordance with the Legislation. The Company shall not be liable to reimburse the Contractor for any additional costs or duties incurred by the Contractor from its failure to observe this Clause.

2.15.2.1.8 Notwithstanding the provisions in this Clause, the Company shall not be liable to reimburse the Contractor for any fines or penalties imposed by or under the Legislation from time to time in force, for falsely declaring the description of goods or their value or otherwise for any offence under the Legislation.

2.15.2.1.9 Any savings in duty identified following any review by the Company of the duty rates shall be passed on to the Company by way of a reduction in the Contract Price to the extent of the savings as identified.

## 2.15.3 Transport

2.15.3.1 Where use is made of a national transport service for the consignment of supplies and the Contractor consigns them by mobile containers, the surcharge for transportation in such containers as well as the extra cost for Delivery to the consignee from the destination station and any other incidental charges raised by the transport service are for the Contractor's account. Where, however, in exceptional cases, the contract provides for the raising of separate charges for containers, packing or materials for packing and the supplies are, with the prior approval of the Company, consigned unpacked in mobile containers, the surcharge for transportation in such mobile containers, plus the extra cost for Delivery to the consignee at the destination station and any other incidental charges raised by the transport service, are for the account of the Company.

2.15.3.2 Where the contract provides for dispatch by rail from two or more railway stations or sidings the Company reserves the right to choose the station or siding from which the supplies are to be despatched, unless otherwise stated in the contract.

2.15.3.3 The supplier shall make all arrangements with regard to the Delivery and transport of the equipment to the site. Delivery shall be on a DDP Incoterms (2010) basis and the cost thereof shall be quoted in the space provided in the Price Schedule.

## 2.15.4 Termination

### 2.15.4.1 Contractor's Default



- 2.15.4.1.1 Without prejudice to any of its rights under clause 2.9.1, the Company may give to the Contractor a written notice stating that it intends to terminate the Contract if any one of the following events has occurred, namely;
- 2.15.4.1.1.1 the Contractor or its Sub-Contractor suspends work without written approval of the Engineer;
- 2.15.4.1.1.2 the Contractor or its Sub-Contractor fails to proceed with due diligence and expedition;
- 2.15.4.1.1.3 the Contractor or its Sub-Contractor fails to proceed in a competent manner;
- 2.15.4.1.1.4 the Contractor or its Sub-Contractor fails to use the materials or standards of workmanship required by the Contract;
- 2.15.4.1.1.5 the Contractor or its Sub-Contractor breaches or ignores the requirements of Legislation;
- 2.15.4.1.1.6 the Contractor becomes bankrupt or insolvent, or makes an assignment of its property or estate for the benefit of creditors, or makes any arrangement or composition with its creditors, or proposes going into liquidation, or knows of or undertakes any other action which may lead to cessation of the Company operations;
- 2.15.4.1.1.7 the Contractor assigns its rights otherwise than in accordance with the Contract; or
- 2.15.4.1.1.8 the Contractor or its sub-Contractor commits any other breach of the provisions of the Contract which is a substantial breach.
- 2.15.4.1.2 The notice shall specify the default.
- 2.15.4.2 Termination by the Company for Contractor's Breach
- 2.15.4.2.1 If the Contractor fails to remedy a substantial breach of which it has been given notice under this Clause within thirty (30) days of receipt of such notice the Company may without prejudice to its other rights under the Contract, terminate the Contract without liability to the Contractor for compensation.
- 2.15.5 Default
- 2.15.5.1 If a Party ("**Defaulting Party**") commits any breach of this Agreement and fails to remedy such breach within 14 (Fourteen) business days ("**Notice Period**") of written notice requiring the breach to be remedied, then the Party giving the notice ("**Aggrieved Party**") will be entitled, at its option –
- 2.15.5.1.1 to claim immediate specific performance of any of the Defaulting Party's obligations under this Agreement, with or without claiming damages, whether or not such obligation has fallen due for performance and to require the Defaulting Party to provide security to the satisfaction of the Aggrieved Party for the Defaulting Party's obligations; or
- 2.15.5.1.2 in case the defaulting party is the service provider, to suspend further payments to the service provider; or
- 2.15.5.1.3 in case the defaulting party is the service provider, to appoint any other person or persons to complete the execution of the project, in which event the service provider shall be held liable for the additional costs incurred as a result of the appointment of such other person; or
- 2.15.5.1.4 to cancel this Agreement, with or without claiming damages, in which case written notice of the cancellation shall be given to the Defaulting Party, and the cancellation shall take effect on the giving of the notice. Neither Party shall be entitled to cancel this Agreement unless the breach is a material breach. A breach will be deemed to be a material breach if –
- 2.15.5.1.4.1 it is capable of being remedied, but is not so remedied within the Notice Period; or
- 2.15.5.1.4.2 it is incapable of being remedied or is not remedied within the Notice Period, and payment in money will compensate for such breach but such payment is not made within the Notice Period.
- 2.15.5.2 In the event that either member of the consortium commits an act of insolvency or is placed under a provisional or final winding-up or business rescue, or judicial management Order or if either member of the consortium makes an assignment for the benefit of creditors, or fails to satisfy or take steps to have set aside any judgment taken against it within 14 (Fourteen) business days after such judgment has come to its notice, then the other Party will be entitled to terminate the Agreement on written notice.
- 2.15.5.3 Study Gap and EMS Technologies Canada Ltd are jointly and severally liable for the performance of the contract.
- 2.15.5.4 The Parties agree that any costs awarded will be recoverable on an attorney-and-own-client scale unless the Court / Arbitrator specifically determines that such scale shall not apply, in which event the costs will be recoverable in accordance with the High Court tariff, determined on an attorney-and-client scale.
- 2.15.5.5 The Aggrieved Party's remedies in terms of this clause 10 are without prejudice to any other remedies to which the Aggrieved Party may be entitled in law.

**2.16 PART T**

**2.16.1 Miscellaneous Matters**

**2.16.1.1 Whole Agreement**

2.16.1.1.1 This Agreement constitutes the whole of the agreement between the Parties relating to the matters dealt with herein and, save to the extent otherwise provided herein, no undertaking, representation, term or condition relating to the subject matter of this Agreement not incorporated in this Agreement shall be binding on either of the Parties.

2.16.1.1.2 This Agreement supersedes and replaces any and all agreements between the Parties (and other persons, as may be applicable) and undertakings given to or on behalf of the Parties (and other persons, as may be applicable) in relation to the subject matter hereof.

**2.16.1.2 Variations to be in Writing**

No addition to or variation, deletion, or agreed cancellation of all or any clauses or provisions of this Agreement will be of any force or effect unless in writing and signed by the Parties. The amendment of the Agreement shall be recorded as an addendum to this Agreement.

**2.16.1.3 No Indulgences**

No latitude, extension of time or other indulgence which may be given or allowed by either Party to the other in respect of the performance of any obligation hereunder, and no delay or forbearance in the enforcement of any right of either Party arising from this Agreement and no single or partial exercise of any right by either Party under this Agreement, shall in any circumstances be construed to be an implied consent or election by that Party or operate as a waiver or a novation of or otherwise affect any of its rights in terms of or arising from this Agreement or estop or preclude it from enforcing at any time and without notice, strict and punctual compliance with each and every provision or term hereof. Failure or delay on the part of either Party in exercising any right, power or privilege under this Agreement will not constitute or be deemed to be a waiver thereof, nor will any single or partial exercise of any right, power or privilege preclude any other or further exercise thereof or the exercise of any other right, power or privilege.

**2.16.1.4 No Waiver or Suspension of Rights**

No waiver, suspension or postponement by either Party of any right arising out of or in connection with this Agreement shall be of any force or effect unless in writing and signed by that Party. Any such waiver, suspension or postponement will be effective only in the specific instance and for the purpose given.

**2.16.1.5 Provisions Severable**

All provisions and the various clauses of this Agreement are, notwithstanding the manner in which they have been grouped together or linked grammatically, severable from each other. Any provision or clause of this Agreement which is or becomes unenforceable in any jurisdiction, whether due to voidness, invalidity, illegality, unlawfulness or for any other reason whatever, shall, in such jurisdiction only and only to the extent that it is so unenforceable, be treated as *pro non scripto* and the remaining provisions and clauses of this Agreement shall remain of full force and effect. The Parties declare that it is their intention that this Agreement would be executed without such unenforceable provision if they were aware of such unenforceability at the time of execution hereof.

**2.16.1.6 Continuing Effectiveness of Certain Provisions**

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.

**2.16.1.7 Assignment**

Neither party shall cede or assign any of its rights and obligations in terms of this Agreement to any third party without prior written consent of the other party, which consent shall not be unfeasible withheld.

## 2.17 PART U

### 2.17.1 Variations

- 2.17.1.1 The terms, conditions and prices of the Contract shall be varied only by variations approved by the CEO of ATNS or his/her delegated official. Either the Service Provider or the ATNS may submit variations to the Contract. Any additional work or expenses incurred by the Service Provider in performing activities outside the scope of the Contract and not approved through a Contract Variation shall be at the Service Providers cost and no liability shall rest with the ATNS.
- 2.17.1.2 Request for Contract Variations by the Service Provider shall be submitted to the Engineer for consideration prior to the work being undertaken. The CEO of ATNS shall, provided the submission is properly documented and fall within the prescribed variation threshold; approve or reject the Variation and notify the Service Provider accordingly.
- 2.17.1.3 Any variation above the prescribed threshold shall be submitted to ATNS and ATNS shall submit it to the relevant Treasury for approval. Unless the variation is an emergency work and duly approved by the CEO of ATNS, no variation work shall be undertaken prior to written approval.
- 2.17.1.4 In the event of an emergency variation, the CEO of ATNS shall process (approve or reject) the variation Order request within a reasonable time, from the time of receipt of the variation Order request.
- 2.17.1.5 On approval of a Contract Variation, the Engineer shall issue a Contract Change Notice amending the Contract as appropriate.
- 2.17.1.6 All variation for scope or price must be approved in writing.

## 2.18 PART V

### 2.18 Anti-bribery and anti-corruption

- 2.18.1 The Parties represent that neither Party or its subsidiary, nor any of their respective directors, officers, agents, or employees acting on behalf of either Party or any subsidiary, has taken any action that will or would be in breach of any applicable laws for the prevention of fraud, bribery, corruption, racketeering, money laundering or terrorism, including but not limited to the Constitution of South Africa (1996), the Competition Act No. 89 of 1998, the Prevention and Combatting of Corrupt Activities Act No. 12 of 2004, the Protected Disclosures Act No. 26 of 2000, the Public Finance Management Act No.1 of 1999 and Regulations, the Companies Act No. 71 of 2008 and Regulations and, including international anti-corruption treaties and regional conventions that set out obligations to fight corruption, such as the United Nations Convention Against Corruption, the African Union Convention Against Corruption, the SADC Protocol against Corruption and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("**Anti-Bribery Laws**").
- 2.18.1.1 Each Party represents that performance under this Agreement will be made in compliance with the Anti-Bribery Laws.
- 2.18.1.2 Each Party warrants that it and its Affiliates have not made, offered, solicited or accepted an advantage or authorised and will not make, offer, or authorise with respect to the matters which are the subject of this Agreement, any payment, gift, promise or other advantage, whether directly or through any other person or entity, to or for the use or benefit of any officer or employee of the other Party or any public official (i.e., any person holding a legislative, administrative or judicial office, including any person employed by or acting on behalf of a public agency, a public enterprise or a public international organisation) or any political party or political party official or candidate for office, where such payment, gift, promise or advantage would violate the applicable Anti-Bribery Laws.
- 2.18.1.3 Neither Party shall make any unofficial payment to an employee of the other Party to speed up an administrative process where the outcome is already pre-determined (facilitation payment) in the performance of its obligations in terms of this Agreement.
- 2.18.1.4 Each Party agrees to maintain adequate internal controls and to keep accurate and complete records that support the payments due and all transactions under this Agreement.
- 2.18.1.5 Each Party represents that, to the best of its knowledge and belief, and save as disclosed to the other Party, neither it nor any of its affiliates/shareholders or personnel have been investigated (or is being investigated or is subject to a pending or threatened litigation or investigation) or is involved in an investigation or litigation (as a witness or suspect) in relation to any breach of the Anti-Bribery Laws by any law enforcement, regulatory or other governmental agency or any customer or supplier; or has admitted to; or been found by a court in any jurisdiction to have engaged in, any breach of the Anti-Bribery Laws, or been debarred from bidding for any contract or business; or are public officials or persons who might otherwise reasonably be considered likely to assert a corrupt or illegal influence on behalf of the company. Each Party agrees that if, at any time, it becomes aware that any of the representations set out in this clause are no longer correct, it will notify the other Party of this immediately in writing.
- 2.18.1.6 Each Party ("**Indemnifying Party**") shall be liable for and shall indemnify, defend and hold the other ("**Indemnified Party**") harmless to the maximum extent provided in law from and against any claims, losses, costs, fees, payment of interest, fines or other liabilities incurred in connection with or arising from the investigation of, or defence against, any litigation or other judicial, administrative, or other legal proceedings brought against the Indemnified Party by a regulator or governmental enforcement agency as a result of acts or omissions by the Indemnifying Party or its Affiliates, subcontractors or agents in violation of, or alleged to be in violation of, the Anti-Bribery Laws.
- 2.18.1.7 Should the service provider or any of its affiliate be found guilty for violation of any of the applicable Anti-Bribery Laws, such shall be deemed material breach.
- 2.18.1.8 Any breach of, or failure to comply with, any of the provisions of this clause shall be deemed material and shall entitle the non-breaching Party to terminate the Agreement forthwith.
- 2.18.1.9 The indemnity contained in this clause shall survive the termination of the Agreement.

- 2.18.1.10 Unless otherwise provided for in this Agreement, no Party shall have the right to represent or make decisions on behalf of the other Party.
- 2.18.1.11 Unless otherwise provided for in the Agreement, no Party shall have the right to interact with government officials with respect to the matters which are the subject of this Agreement without the written consent of the other Party.
- 2.18.1.12 Each Party may request that the other Party provide a certification to the effect that neither it nor any of its Affiliates, directors, officers, agents or other representatives acting on its behalf in connection with the performance under the Agreement have engaged in any transaction or activity in violation of these Anti-Bribery Laws. Upon request a Party shall deliver such certification within 10 business days.
- 2.18.1.13 Each Party agrees to perform its obligations under this Agreement in accordance with the applicable anti-bribery and anti-corruption laws of the territory in which such Party conducts business with the other Party as set forth herein. Each Party shall be entitled to exercise its termination right, under and in accordance with the terms of this Agreement, to terminate this Agreement immediately on written notice to the other Party, if the other Party fails to perform its material obligations.
- 2.18.1.14 Each Party agrees that, in connection with this Agreement and the Works, they will each, (and will procure that their respective officers, employees, agents and any other persons who perform services for them or on their behalf in connection with this Agreement will:
- 2.18.1.14.1 not commit any act or omission which causes or could cause the other Party to breach, or commit an offence under, any laws relating to anti-bribery and/or anti-corruption;
- 2.18.1.14.2 keep accurate and up to date records showing all payments made and received and all other advantages given and received in connection with this Agreement and the steps taken to comply with this clause 2.18, and permit the other Party to inspect those records as reasonably required;
- 2.18.1.14.3 promptly report to the other Party any request or demand for any undue financial or other advantage of any kind received in connection with the performance of this Agreement;
- 2.18.1.15 Each Party shall be solely responsible for the observance and performance of the relevant requirements by each of its affiliates or subcontractor and shall be directly liable to the other Party for any breach by its Affiliates or subcontractor. Notwithstanding the foregoing, each Affiliate and subcontractor shall be required to comply with the relevant requirements to the extent applicable to their respective performance of activities under this Agreement, including the place of such performance, and/or if required by the relevant requirements.

# CHAPTER 3

# FORM OF CONTRACT

## CHAPTER 3 : FORM OF CONTRACT

### FORM OF CONTRACT SUPPLY AND SERVICES CONTRACT

**THE CONTRACT** is made on the xx<sup>th</sup> day of xxxxxx YYYY between the following parties:

1. The AIR TRAFFIC AND NAVIGATION SERVICES COMPANY LIMITED (hereinafter known as “The Company”) of Private Bag X15, Kempton Park, 1620, South Africa

and

2. XXXXXXXXXXXXXXXX (hereinafter known as the “Contractor”) of XXXXXXXXXXXXXXXX, XXXXXXXXXXXXXXXX

#### RECITALS

- A. The Company hereby engages the Contractor to supply the Company with the Supplies and Services identified in the Contract.
- B. The Contractor is experienced in the Manufacture , supply, installation, testing and Commissioning of equipment and services similar to the Supplies and agrees to provide the necessary resources, personnel, skills and expertise required to comply with all of its obligations under the Contract.
- C. The Company has selected the Contractors proposal Reference xxxxxx following the Company’s RFP Reference A35/06/10 and following subsequent clarifications and negotiations the Contractor has agreed to provide the Supplies and Services to the Company on the terms set out in this Contract.

**THE PARTIES AGREE**, in consideration of the mutual promises contained in the Contract, to perform all their obligations as set out in the Contract. In accordance with the Conditions of Contract, the Contract comprises:

1.1.1 This signed Form of Contract 1.1.2 The Contract Particulars 1.1.3 The Conditions of Contract 1.1.4 The Schedules from A to and including H (in descending Order of priority)

In the case of any conflict or inconsistency between any of the documents forming part of the Contract they shall be interpreted in the Order of precedence listed above.

EXECUTED by the parties as an Contract

SIGNED by

\_\_\_\_\_

Delegate

\_\_\_\_\_

Witness

\_\_\_\_\_

Full Name (please print)

\_\_\_\_\_

Full Name (please print)

for and on behalf of the AIR TRAFFIC AND NAVIGATION SERVICES COMPANY LIMITED

SIGNED by

\_\_\_\_\_

Delegate

\_\_\_\_\_

Witness

\_\_\_\_\_

Full Name (please print)

\_\_\_\_\_

Full Name (please print)

for and on behalf of XXXXXXXXXXXXXXX

## CONTRACT PARTICULARS

Total Contract Price	ZAR XXXXX
Maintenance Contract Price	ZAR XXXXX
Company's Representative	<b>Chief Executive Officer ATNS Company Limited, Private Bag X15, Kempton Park, 1620 South Africa</b>
Contractor's Representative	<b>Managing Director XXXXXXXXXXXXXX, XXXXXXXXXXXXXX XXXXXXXXXXXXXX XXXXXXXXXXXXXX</b>
Maintenance Period:	<b>15 years from the Date of Final Acceptance as certified in the Taking-Over Certificate for the Whole of the Works.</b>
Name of Company providing parent Company guarantee(s)	<b>To be submitted</b>
Time for issuance of notice to commence after issuance of Letter of Acceptance	<b>30 Days</b>
Date for Substantial Completion:	<b>(Insert Date)</b>
Liquidated Damages for delay to the Works	<b>ZAR 10,000.00 per day, or in accordance with clause 2.9.1.4.2 of the Conditions of Contract - whichever is greater.</b>
Warranty Period	<b>1 Year  To commence on the Date of Substantial Completion as certified in the Acceptance Certificate and to expire at a time of not less than 1 year from the Date of Substantial Completion.</b>
Percentage of Retention	<b>10%</b>
Address for service of notices on Company's Representative	<b>Chief Executive Officer ATNS Company Limited, Private Bag X15, Kempton Park, 1620 South Africa</b>
Address for service of notices on Contractor's Representative	<b>Managing Director XXXXXXXXXXXXXX XXXXXXXXXXXXXX XXXXXXXXXXXXXX XXXXXXXXXXXXXX</b>

## **SCHEDULES**

The list of Schedules attached to this “Form of Contract” provides reference to the actual schedules that will become an integral part of the Contract agreement. The schedules will be assembled for the Contract from information provided by the Contractor with his Tender or as amended by agreement with the Engineer in accordance with the Conditions of Contract. In some cases the schedules listed may provide overlapping information in which case the list will be rationalised prior to Contract execution.

### **SCHEDULES (WITH PRECEDENCE – FROM A TO H)**

Schedule A	Price Schedule
Schedule B	List of Supply
Schedule C	Models of Performance Guarantees
Schedule D	Part 1 Contract Milestone Schedule Part 2 Milestone Payment Schedule
Schedule E	Statement of Compliance
Schedule F	Sample of Acceptance Certificates
Schedule G	Contractors Proposal