



**MASTER AGREEMENT**

entered into by and between

**TRANSNET SOC LTD**

[Registration No. 1990/000900/30]

trading through its Operating Division TRANSNET NATIONAL PORTS AUTHORITY  
(hereinafter referred to as TNPA)

and

.....

**FOR THE PROVISION OF PROFESSIONAL SERVICES:  
GEOTECHNICAL INVESTIGATION AT FERRY LANDING IN THE PORT OF EAST  
LONDON**

<b>Agreement Number</b>	<b>PAC 267</b>
<b>Commencement Date</b>	<b>01 MARCH 2019</b>
<b>Expiry Date</b>	<b>18 MARCH 2019</b>

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**THIS PROFESSIONAL SERVICES AGREEMENT is made between**

..... [Registration Number .....] whose registered office is at  
..... **[the Service Provider]** for itself and on behalf of its Affiliates;

**and**

**Transnet SOC Ltd** [Registration Number 1990/000900/30] trading through its Operating Division  
TRANSNET NATIONAL PORTS AUTHORITY whose registered office is at 30 Wellington Street, Parktown,  
Johannesburg 2193 **[TNPA]**

**INTRODUCTION**

This Agreement is intended to be a master set of terms and conditions to cover all works to be carried out by the Service Provider, as Transnet may request from time to time, such services to be carried out on the terms of this Agreement and any relevant Work Order or Schedule hereto.

**NOW THEREFORE IT IS AGREED:**

**1 DEFINITIONS AND INTERPRETATION**

1.1 In this Agreement the following definitions will apply:

- a) **Acceptance** means acceptance by Transnet of any Deliverables [or a group of Deliverables], the Services or any part of the Services in accordance with clause 6 *[Delivery and Acceptance]*;
- b) **Affiliate** means any person or entity controlled by or under common control with such Party. For the purposes of this definition, control of an entity means the power, direct or indirect, to direct or cause the direction of the management and policies of such entity whether by contract or otherwise and, in any event and without limitation of the foregoing, any entity owning more than 50% [fifty per cent] of the voting securities of a second entity shall be deemed to control that second entity;
- c) **Agreement** means this document together with all its Schedules attached hereto, as may be amended, added or substituted, by agreement between the Parties in writing from time to time;
- d) **Agreement Change** means any material change to this Agreement and/or any Work Order to be made in accordance with clause 19 *[Change Control]*;
- e) **Default** means any breach of the obligations of either Party [including but not limited to fundamental breach or breach of a fundamental term] or any default, act, omission, negligence or statement of either Party, its employees, agents or subcontractors in connection with or in relation to the subject of this Agreement and in respect of which such Party is liable to the other;

- f) **Deliverables** means any and all works of authorship, products and materials developed, written, prepared, assembled, integrated, modified or provided by the Service Provider in relation to the Services;
- g) **Force Majeure** means the occurrence after this Agreement comes into effect of:
  - (i) an event, the occurrence of which could not have been reasonably foreseen at the time this Agreement came into effect; and
  - (ii) includes, but is not limited to, war, whether declared or not, revolution, riot, strikes or other protestor action which strikes or protestor action are part of or directly related to any more widespread or general strike or other industrial action, insurrection, civil commotion, invasion, armed conflict, hostile act of foreign enemy, act of terrorism, sabotage, radiation or chemical contamination, ionising radiation, Act of God, fire, government act, legislative constraints, plague or other serious epidemic; and
  - (iii) causes either Party to be unable to comply with all or a material part of its obligations or to exercise all or a material part of its rights under this Agreement;
- h) **Intellectual Property Rights** includes any patents or patent applications, trade and services marks whether registered or unregistered, registered design, design rights, copyright, rights in databases, domain names, trade or business names and any other similar protected rights in any country [together with the right to apply for any of the above, if applicable];
- i) **Materials** means the Deliverables, the Service Provider Materials and the Third Party Materials;
- j) **Parties** means the Parties to this Agreement together with their subsidiaries, divisions, business units, successors-in-title and assigns;
- k) **Party** means either one of these Parties;
- l) **Personnel** means the employees, agents and approved subcontractors of the Service Provider who are assigned to perform the Services;
- m) **Service(s)** means the provision of a **Geotechnical Investigation at Ferry Landing in the Port of East London**, the Service(s) provided to Transnet by the Service Provider, pursuant to the Work Order(s) in terms of this Agreement;
- n) **Service Levels** means Service Levels as defined in Schedule 1;
- o) **Service Provider Materials** means all works of authorship, products and materials [including, but not limited to, data, diagrams, charts, reports, specifications, studies, inventions, software, software development tools, methodologies, ideas, methods, processes, concepts and techniques] owned by, or licensed to, the Service Provider prior to the commencement date or independently developed by the Service Provider outside the scope of this Agreement at no expense to Transnet, and used by the Service Provider in the performance of the Services;
- p) **Service Provider Systems** means all of the information technology systems which the Service Provider uses to run its business;

- q) **Tax Invoice** means the document as required by Section 20 of the Value-Added Tax Act, 89 of 1991, as may be amended from time to time;
- r) **Third Party Materials** means software, software development tools, methodologies, ideas, methods, processes, concepts and techniques owned by, or licensed to a third party and used by the Service Provider in the performance of the Services;
- s) **Transnet & Transnet Group** mean Transnet together with its Affiliates, operating divisions, business units, successors-in-title and its assigns;
- t) **Transnet Premises** means any location owned, leased or licensed by Transnet at which Transnet may require the Services to be provided from time to time;
- u) **VAT** means Value-Added Tax chargeable in terms of the Value-Added Tax Act, 89 of 1991, as may be amended from time to time; and
- v) **Work Order** means a Work Order substantially in the form set out in Schedule 1 hereto.

1.2 In this Agreement, unless the context otherwise requires:

- a) Reference to the singular includes the plural and *vice versa*, and reference to a gender includes the other gender.
- b) References to a statutory provision include references to that statutory provision as from time to time amended, extended or re-enacted and any regulations made under it provided that in the event that the amendment, extension or re-enactment of any statutory provision or introduction of any new statutory provision has a material impact on the obligations of either Party, the Parties will negotiate in good faith to agree such amendments to this Agreement as may be appropriate in the circumstances [refer clause 22.2, *Law*].
- c) The headings in this Agreement are for ease of reference only and shall not affect its interpretation.

## 2 ENGAGEMENT

- 2.1 Transnet agrees to engage the Service Provider to provide, and the Service Provider agrees to provide, the Services on the terms and conditions of this Agreement.
- 2.2 All Services to be provided by the Service Provider pursuant to this Agreement will be agreed to in writing by the Parties and set out in a Work Order.
- 2.3 Except as may be agreed by both Parties in writing by way of a Work Order, every engagement will be subject to this Agreement. Any terms and conditions other than those in this Agreement or in any Work Order are expressly excluded. If there is any inconsistency between the terms of this Agreement and those of a Work Order, the terms of this Agreement will prevail.
- 2.4 On receipt by Transnet of a Work Order executed by both Parties, the Service Provider will be deemed to have accepted such Work Order on the terms and conditions of this Agreement.
- 2.5 The Service Provider is not authorised to undertake any work for Transnet which is not the subject of a Work Order properly authorised and signed on behalf of Transnet.
- 2.6 Time will be of the essence and the Service Provider will perform its obligations under this Agreement in accordance with the time schedule(s) [if any] set out in the relevant Work Order, save that the Service Provider will not be liable under this clause if it is unable to meet such

obligation within the time required as a direct result of a *Force Majeure* or any act or omission by Transnet and it has used its best endeavours to advise Transnet of such act or omission. In the event of such delay, any time deadlines detailed in the relevant Work Order shall be extended by a period equal to the period of that delay, subject to clause 18 below.

### **3 SERVICE PROVIDER'S WARRANTIES**

- 3.1 The Service Provider warrants to Transnet that:
- a) it has full capacity and authority to enter into and to perform this Agreement and that this Agreement is executed by a duly authorised representative of the Service Provider;
  - b) it will discharge its obligations under this Agreement and any Work Order with all due skill, care and diligence;
  - c) it will be solely responsible for the payment of remuneration of its Personnel and associated benefits, if any, and for withholding and remitting income tax for its Personnel in conformance with any applicable laws and regulations;
  - d) it will license to Transnet or procure licences for Transnet in respect of all Service Provider and/or Third Party Materials detailed in the Work Order(s), and will grant to Transnet or procure the right for Transnet to take such copies [in whole or in part] of such Service Provider and/or Third Party Materials as it may reasonably require for the purposes of back-up for archiving and disaster recovery; and
  - e) the use or possession by Transnet of any Materials will not subject Transnet to any claim for infringement of any Intellectual Property Rights of any third party.
- 3.2 The Service Provider warrants that it will perform its obligations under this Agreement in accordance with the Service Levels. Transnet may at its sole and absolute discretion audit compliance with the Service Levels, provided that any such audit is carried out with reasonable prior notice and in a reasonable way so as not to have an adverse effect on the performance of the Services. Without prejudice to clause 3.3 below, in the event that the Service Provider fails to meet the Service Levels, Transnet may claim appropriate service credits or invoke a retention of fees as detailed in the relevant Work Order.
- 3.3 The Service Provider warrants that for a period of 90 [ninety] days from Acceptance of the Deliverables these will, if properly used, conform in all material respects with the requirements set out in the relevant Work Order. The Service Provider will at its expense remedy any such non-conformance as soon as possible but in any event within 30 [thirty] days of notification by Transnet. In the event that the Service Provider fails or is unable to remedy such non-conformance within such time-scale Transnet will be entitled on behalf of the Supplier to contract with a third party to do so in place of the Service Provider and any excess charges or costs incurred by Transnet as a result shall be recovered from the Service Provider by issuance of a Tax Invoice by Transnet, inclusive of VAT.
- 3.4 The Service Provider will remedy any defect within 14 [fourteen] days of being notified of that defect by Transnet in writing.
- 3.5 The Service Provider will not be liable to remedy any problem arising from or caused by any modification made by Transnet to the Deliverables, or any part thereof, without the prior approval of the Service Provider.

3.6 The Service Provider warrants that:

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

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

3.7 The Service Provider shall advise Transnet of the effects of any steps proposed by Transnet pursuant to clause 3.5 above, including but not limited to any cost implications or any disruption or delay in the performance of the Services. The Parties agree that any changes to the Services, including the charges for the Services or any timetables for delivery of the Services, will be agreed in accordance with the change control procedure, as set out in clause 19 [*Change Control*].

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

#### **4 TRANSNET'S OBLIGATIONS**

- 4.1 Transnet undertakes to promptly comply with any reasonable written request by the Service Provider for information, including information concerning Transnet's operations and activities, that relate to the Services as may be necessary for the Service Provider to perform the Services, but for no other purpose. However, Transnet's compliance with any written request for information is subject to any internal security rules and requirements and subject to the observance by the Service Provider of its confidentiality obligations under this Agreement.
- 4.2 The Service Provider shall give Transnet reasonable written notice of any information it requires in accordance with clause 4.1 above.
- 4.3 Subject to clause 11 [*Personnel*], Transnet agrees to provide the Service Provider or its Personnel such access to and use of its facilities as is necessary to allow the Service Provider to perform its obligations under this Agreement.

## **5 PROGRESS AND REVIEW MEETING**

- 5.1 For the purposes of project management of the Services to be provided under a Work Order, both Parties shall appoint representatives to operate as Project Managers, such individuals to be identified in the relevant Work Order.
- 5.2 Any change in either Party's Project Manager shall be notified in writing to the other Party.

## **6 DELIVERY AND ACCEPTANCE**

Acceptance of any Deliverable or any part of the Services will only be regarded as complete, when such Deliverable or such part of the Services has been successfully completed in terms of any relevant acceptance criteria set out in the Work Order, or in the absence of such acceptance criteria, on written agreement with Transnet.

## **7 FEE RATES AND EXPENSES**

- 7.1 In consideration of the provision of the Services, Transnet will pay to the Service Provider the fees detailed in the relevant Work Order.
- 7.2 Transnet will not be invoiced for materials used in the provision of the Services save for those materials [if any] set out in the Work Order and accepted by Transnet or in any relevant Work Order [which will be invoiced to Transnet at cost].
- 7.3 Unless otherwise agreed in a Work Order, Transnet will reimburse to the Service Provider all reasonable and proper expenses incurred directly and solely in connection with the provision of the Services, provided that all such expenses:
  - a) are agreed by Transnet in advance;
  - b) are incurred in accordance with Transnet's standard travel and expenses policies;
  - c) are passed on to Transnet at cost with no administration fee; and
  - d) will only be reimbursed if supported by relevant receipts.
- 7.4 All Tax Invoices relating to fees, out of pocket expenses and, if applicable, travel and accommodation costs, will provide the detail for each of the Personnel carrying out the Services and incurring the expenses, and the Tax Invoice will, where appropriate, include VAT as a separate item.

## **8 INVOICING AND PAYMENT**

- 8.1 The Service Provider shall invoice Transnet for payment of fees and costs in accordance with the provisions of the relevant Work Order. Unless otherwise agreed, upon receipt of a valid and undisputed Tax Invoice, Transnet shall pay the Service Provider within 30 [thirty] days [the **Due Date**] from date of receipt of a month-end statement reflecting payments received and current Tax Invoices due for payment.
- 8.2 All fees and other sums payable under this Agreement are exclusive of VAT, which will be payable at the applicable rate.
- 8.3 Where the payment of any Tax Invoice or any part thereof is not made in accordance with this clause 8, the Service Provider, shall be entitled to charge interest on the outstanding amount at



The Standard Bank of South Africa's prime rate of interest in force for the time from the Due Date until the outstanding amount is paid.

## **9 INTELLECTUAL PROPERTY**

- 9.1 Subject to clauses 9.2 and 9.3, the Deliverables and all Intellectual Property Rights therein shall be and remain the exclusive property of Transnet.
- 9.2 All Intellectual Property Rights in the Service Provider Materials and Third Party Materials vest in the Service Provider or the third party as appropriate. The Service Provider hereby grants or will procure a grant to Transnet of an irrevocable, royalty-free, non-transferable licence to use such Service Provider Materials and/or Third Party Materials for its own business purposes.
- 9.3 Where there are modifications to pre-existing material, which are inseparable from the pre-existing material, the owner of the pre-existing material will own the modifications. However, the Service Provider will use its best endeavours to procure from the owner for Transnet the grant of an irrevocable, royalty free, fully transferable licence to use such modifications as Transnet in its absolute discretion thinks fit.
- 9.4 All rights in the Transnet name and logo remain the absolute property of Transnet.

## **10 INTELLECTUAL PROPERTY RIGHTS INDEMNITY**

- 10.1 The Service Provider shall promptly notify Transnet, in writing, of any infringement or apparent or threatened infringement [or any circumstances which may potentially give rise to an infringement] of or any actions, claims or demands in relation to any Intellectual Property Rights [whether occurring during or after the termination of this Agreement] and shall provide to Transnet all assistance which Transnet may reasonably require in connection herewith including, but not limited to, the prosecution of any rights in relation to such Intellectual Property Rights.
- 10.2 The Service Provider shall at all times, whether during or after termination or expiry of this Agreement, indemnify and keep Transnet indemnified against all losses, claims, damages and expenses [including all reasonable legal fees] in relation to any infringement or alleged infringement of any Intellectual Property Rights suffered by Transnet as a result of Transnet's use or possession of the Materials or any part thereof.
- 10.3 The Service Provider shall be entitled to conduct all negotiations and proceedings in relation to any such claims brought against Transnet, but shall not be entitled to settle or compromise any claim without Transnet's prior written consent [not to be unreasonably withheld or delayed].
- 10.4 If at any time an allegation of infringement of Intellectual Property Rights is made, the Service Provider may, at its own expense and sole option, either:
  - a) procure for Transnet the right to continue using the relevant Materials; or
  - b) replace or modify the Materials with non-infringing substitutes, provided that any substitute shall not materially prejudice Transnet's beneficial use of the Materials or the Services, or cause the Service Provider no longer to comply with the Work Order, and that such substitution will be carried out so as to avoid or reduce insofar as possible any interruption to Transnet's business operations; or

- c) failing sub-clauses a) or b) above, without prejudice to the indemnity in clause 10.2 above, refund in full all fees paid by Transnet under this Agreement in relation to such Materials, and Transnet will return such materials to the Service Provider.

## **11 PERSONNEL**

- 11.1 The Personnel shall be regarded at all times as employees, agents or subcontractors of the Service Provider and no relationship of employer and employee shall arise between Transnet and any Personnel under any circumstances regardless of the degree of supervision that may be exercised over the Personnel by Transnet.
- 11.2 The Service Provider warrants that all Personnel will be entitled to work in South Africa or any other country in which the Services are performed.
- 11.3 The Service Provider will ensure that its Personnel comply with all reasonable requirements made known to the Service Provider by Transnet concerning conduct at any Transnet Premises or any other premises upon which the Services are to be performed [including but not limited to security regulations, policy standards and codes of practice and health and safety requirements]. The Service Provider will ensure that such Personnel at all times act in a lawful and proper manner in accordance with these requirements.
- 11.4 Transnet reserves the right to refuse to admit or to remove from any premises, including Transnet Premises, occupied by or on behalf of it, any Personnel whose admission or presence would, in the reasonable opinion of Transnet, be undesirable or who represents a threat to confidentiality or security or whose presence would be in breach of any rules and regulations governing Transnet's own staff, provided that Transnet notifies the Service Provider of any such refusal [with reasons why]. The reasonable exclusion of any such individual from such premises shall not relieve the Service Provider from the performance of its obligations under this Agreement.
- 11.5 The Service Provider agrees to use all reasonable endeavours to ensure the continuity of the Personnel assigned to perform the Services. If any re-assignment by the Service Provider of those Personnel is necessary, or if Transnet advises that any Personnel assigned are in any respect unsatisfactory, including where any such personnel are, or are expected to be, or have been absent for any period, then the Service Provider will promptly supply a replacement of equivalent calibre and experience, and any such replacement shall be approved by Transnet prior to commencing provision of the Services, such approval not to be unreasonably withheld or delayed.

## **12 LIABILITY**

- 12.1 Neither Party excludes or limits liability to the other Party for:
  - a) death or personal injury due to negligence; or
  - b) fraud;
- 12.2 The Service Provider shall indemnify and keep Transnet indemnified from and against liability for damage to any Transnet property [whether tangible or intangible] or any other loss, costs or damage suffered by Transnet to the extent that it results from any act of or omission by the Service Provider or its Personnel in connection with this Agreement.
- 12.3 Subject always to clauses 12.1 and 12.2, the liability of the Service Provider under or in connection with this Agreement, whether for negligence, misrepresentation, breach of contract or

otherwise, for direct loss or damage arising out of each default or series of related defaults shall not exceed the insurable limits set out in clause **Error! Reference source not found.** below *[Insurance]*.

- 12.4 Subject to clause 12.1 above, and except as provided in clauses 12.2 and 12.3, in no event shall either Party be liable to the other for indirect or consequential loss or damage or including indirect or consequential loss of profits, business, revenue, goodwill or anticipated savings of an indirect nature or loss or damage incurred by the other Party as a result of third party claims.
- 12.5 If for any reason the exclusion of liability in clause 12.4 above is void or unenforceable, either Party's total liability for all loss or damage under this Agreement shall be as provided in clause 12.3.
- 12.6 Nothing in this clause 12 shall be taken as limiting the liability of the Service Provider in respect of clause 10 *[Intellectual Property Rights Indemnity]*, or clause 13.1 *[Confidentiality and Publicity]*.

### 13 INSURANCE

- 13.1 The Service Provider must at all-times during this agreement have Professional Indemnity cover with a minimum limit of R5,000,000.00 per claim.
- 13.2 Without limiting the liability of the Service Provider under this Agreement, the Service Provider shall take out any other additional insurance in respect of all other risks for which it is prudent for the Service Provider to insure against, including any liability it may have as a result of its activities under this Agreement for theft, destruction, death or injury to any person and damage to property.
- 13.3 The Service Provider shall arrange insurance with reputable insurers and will produce to Transnet evidence of the existence of the policies at the inception of this agreement and on an annual basis within 30 [thirty] days after date of Insurance policy renewals.
- 13.4 Should the Service Provider fail to take out and maintain Professional Indemnity insurance required under this clause 13, then Transnet may itself insure against such risks and any sum(s) paid by Transnet in respect of premiums shall be deducted from any fees due to the Service Provider under this Agreement or may be recoverable as a debt from the Service Provider, Transnet may terminate this Agreement by giving the Service Provider not less than 30 [thirty] days prior written notice to that effect.
- 13.5 In the event that the Service Provider becomes aware of the termination of its insurance cover referred to in clause **Error! Reference source not found.** above or if the insurance ceases to be available upon commercially reasonable terms, the Service Provider shall immediately notify Transnet in writing of such termination and/or unavailability, where after Transnet may terminate this Agreement by giving the Service Provider not less than 30 [thirty] days prior written notice to that effect.
- 13.6 Should any claim exceed the amount of limits covered by the Service provider's Liability Insurance Policy(s) the Service Provider shall be liable for the difference between the actual amount claimed and the amount insured. Likewise it is recorded that in the event that the annual limit of cover is exceeded the Service provider shall be fully liable for any claims above those applicable limits.

## **14 CONFIDENTIALITY AND PUBLICITY**

- 14.1 The Parties undertake at all times to keep confidential and not to use or to disclose to any third party without the other Party's prior written consent any trade or business secrets or similar confidential information supplied by the other Party or obtained as a result of this Agreement [or any discussions prior to execution of this Agreement] including all information [in whatever form] relating to the other Party's business, technology and customers. The Parties accept that such information is valuable and secret, and that unauthorised disclosure of such information would be likely to cause the other Party unquantifiable loss and damage. Disclosure of such information to the Party's own employees and subcontractors shall only be on a 'need to know' basis.
- 14.2 Nothing contained in this clause 13.1 shall apply to prevent the Parties from disclosing any information:
- a) in their possession [with full right to disclose] prior to receiving it; or
  - b) which is public knowledge other than by breach of this clause 13.1; or
  - c) which it may independently develop or receive from a third party [with full right to disclose]; or
  - d) which is required to be disclosed by court order or pursuant to regulatory or statutory obligation.
- 14.3 At Transnet's request the Service Provider will ensure that each of its Personnel will prior to commencing work under this Agreement enter into a Confidentiality Agreement in the form set out in Schedule 2.
- 14.4 The Service Provider undertakes [except as may be required by law or in order to instruct professional advisers in connection with this Agreement] not to disclose or permit disclosure of any details of this Agreement or any information concerning or relating thereto to the news media or any third party other than subcontractors, or to disclose that Transnet is a customer of the Service Provider or use Transnet's name and/or brand in any promotion or marketing or announcement of orders, without the prior written consent of Transnet.
- 14.5 The Parties agree not to remove and to ensure that their personnel shall not remove from the other's premises any materials, documents, books, papers, disks, tapes or other records [in whatever medium] or other items or copies thereof being the property of the other Party or in the possession of the other Party and used, prepared or produced pursuant to this Agreement or otherwise unless they or their personnel have been expressly authorised in writing by the other Party.

## **15 PRIVACY AND DATA PROTECTION**

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

## 16 TERM AND TERMINATION

- 16.1 Notwithstanding the date of signature hereof, the commencement date if this Agreement is **01 March 2019** and the duration shall be for a two [2] weeks, expiring on **18 March 2019**, unless:
- a) this Agreement is terminated by either Party in accordance with the provisions incorporated herein or in any schedules or annexures appended hereto, or otherwise in accordance with law or equity; or
  - b) this Agreement is extended at Transnet's option for a further period to be agreed by the Parties.
- 16.2 Either Party may terminate this Agreement without cause by giving the other Party 30 [thirty] days' notice in writing.
- 16.3 Either Party may terminate this Agreement forthwith by notice in writing to the other Party where the other Party has committed a material Default and, where such Default is capable of remedy, has failed to remedy such Default within 30 [thirty] days of receiving notice specifying the Default and requiring its remedy.
- 16.4 Either Party may terminate this Agreement forthwith by notice in writing to the other Party when the other Party is unable to pay its debts as they fall due or commits any act or omission which would be an act of insolvency in terms of the Insolvency Act, 24 of 1936 [as amended from time to time], or if any action, application or proceeding is made with regard to it for:
- a) a voluntary arrangement or composition or reconstruction of its debts;
  - b) its winding-up or dissolution;
  - c) the appointment of a liquidator, trustee, receiver, administrative receiver or similar officer; or
  - d) any similar action, application or proceeding in any jurisdiction to which it is subject.
- 16.5 Transnet may terminate this Agreement at any time within 2 [two] months of becoming aware of a change of control of the Service Provider by notice in writing to the Service Provider. For the purposes of this clause, **control** means the right to direct the affairs of a company whether by ownership of shares, membership of the board of directors, agreement or otherwise.
- 16.6 Transnet may cancel any Work Order at any time on giving the Service Provider thirty [30] days' prior written notice.

## 17 CONSEQUENCES OF TERMINATION

- 17.1 Termination in accordance with clause 16 [*Term and Termination*] above shall not prejudice or affect any right of action or remedy which shall have accrued or shall thereafter accrue to either Party and all provisions which are to survive this Agreement or impliedly do so shall remain in force and in effect.
- 17.2 On termination of this Agreement or a Work Order, the Service Provider will immediately deliver up, and procure that its Personnel will immediately deliver up to Transnet, all Deliverables and property belonging to Transnet [or, in the event of termination of a Work Order, such as is relevant to that Work Order] which may be in the possession of, or under the control of the Service Provider, and certify to Transnet in writing that this has been done.

- 17.3 To the extent that any of the Deliverables and property referred to in clause 17.2 above are in electronic form and contained on non-detachable storage devices, the Service Provider will provide Transnet with unencrypted copies of the same on magnetic media and will irretrievably destroy and delete copies so held on such non-detachable storage devices.
- 17.4 In the event that the Agreement is terminated by the Service Provider under clause 16.3, or in the event that a Work Order is terminated by Transnet under clause 16.6, Transnet will pay to the Service Provider all outstanding fees [apportioned on a daily basis] relating to the work undertaken by the Service Provider up until the date of such termination. Transnet will also pay the costs of any goods and materials ordered by the Service Provider in relation to the such work for which the Service Provider has paid or is legally obliged to pay, in which case, on delivery of such goods or materials, the Service Provider will promptly deliver such goods and materials to Transnet or as it may direct.
- 17.5 The provisions of clauses 1 [*Definitions and Interpretation*], 3 [*Service Provider's Warranties*], 9 [*Intellectual Property*], 10 [*Intellectual Property Rights Indemnity*], 12 [*Liability*], 13.1 [*Confidentiality and Publicity*], 17 [*Consequences of Termination*], 22 [*Law*] and 23 [*General*] shall survive termination or expiry of this Agreement.

## **18 FORCE MAJEURE**

- 18.1 Neither Party shall be liable to the other for any delay in performance or failure to perform its obligations in accordance with this Agreement where such delay or failure is due to circumstances beyond its reasonable control, such circumstances including but not restricted to the Force Majeure [**Force Majeure Event**].
- 18.2 The affected Party shall not be relieved of its obligations hereunder in accordance with clause 18.1 above unless, as soon as reasonably possible after the start of the Force Majeure Event, the affected Party notifies the other Party of the Force Majeure Event, the date on which started, its anticipated duration and the effect of the Force Majeure Event on the affected Party's ability to perform its obligations under this Agreement.
- 18.3 If a Force Majeure Event continues for a period of more than 30 [thirty] days, either Party may terminate this Agreement by giving not less than 7 [seven] days written notice to the other.

## **19 CHANGE CONTROL**

- 19.1 Any requirement for an amendment or change to this Agreement or to a Work Order shall only be valid if it is in writing, signed by both Parties and added to this Agreement as an addendum hereto.
- 19.2 In the event the Parties cannot agree upon changes, the Parties shall in good faith seek to agree any proposed changes using the dispute resolution procedures in clause 23.1 [*General*].

## **20 EQUALITY AND DIVERSITY**

- 20.1 The Service Provider will not victimise, harass or discriminate against any employee of either Party to this Agreement or any applicant for employment with either Party to this Agreement due to their gender, race, disability, age, religious belief, sexual orientation or part time status. This provision applies, but is not limited to, employment, upgrading, work environment, demotion,

transfer, recruitment, recruitment advertising, termination of employment, rates of pay or other forms of compensation and selection for training.

- 20.2 Both Parties to this Agreement undertake that they will not, and shall procure that their employees, agents and subcontractors will not breach any applicable discrimination legislation and any amendments and re-enactments thereof.

## **21 ENVIRONMENT**

The Service Provider undertakes to demonstrate sound environmental performance and to have an environmental management policy. The Service Provider shall, upon request from Transnet, demonstrate that its activities comply with all applicable environmental legislation and regulations and that its products or services are procured, produced, packaged, delivered and are capable of being used and ultimately disposed of, in a way that is environmentally friendly.

## **22 LAW**

22.1 This Agreement shall be governed by and construed in accordance with South African law and each Party agrees to submit to the exclusive jurisdiction of the South African Courts.

22.2 Pursuant to clause 1.2b) [*Interpretation - Change Of Law*], in the event that the amendment, extension or re-enactment of any statutory provision or introduction of any new statutory provision has a material impact on the obligations of either Party and if, within a reasonable period of time, the Service Provider and Transnet cannot reach agreement on the nature of the changes required or on modification of fees, Deliverables, warranties, or other terms and conditions, either Party may seek to have the matter determined in accordance with clause 23.1 [*Dispute Resolution*] below.

## **23 GENERAL**

23.1 If any dispute arises out of this Agreement the dispute shall be referred to the Managing Director of the Service Provider and to the Chief Executive Officer, or his/her delegated authority, of the relevant operating division for Transnet, who will attempt to settle it by negotiation. If the Parties are unable to settle any dispute by negotiation within 21 [twenty-one] days, the Parties may elect to refer the dispute to mediation or an alternative form of dispute resolution, including the right of either Party to refer the unresolved dispute to the Arbitration Foundation of South Africa. However, nothing in this clause shall prevent either Party from seeking urgent relief in a court of appropriate jurisdiction, where grounds for urgency exist.

23.2 Neither Party shall be obliged to follow the procedures set out in clause 23.1 above where that Party intends to apply for interdictory relief against the other, provided that there is no delay in the prosecution of that application.

23.3 Any notice or communications between the Parties to be given under this Agreement must be in writing and shall be delivered in accordance with Schedule 3 to the addresses set out therein.

23.4 No failure, delay, relaxation or forbearance on the part of either Party in exercising any power or right under this Agreement shall operate as a waiver of such power or right or any other power or right, unless expressly stated in writing.

- 23.5 If any provision of this Agreement is held invalid, illegal or unenforceable for any reason by any court of competent jurisdiction, such provision shall be severed and the remainder of the provisions hereof shall continue in full force and effect as if this Agreement had been executed with the invalid, illegal or unenforceable provisions eliminated. In the event that a provision of this Agreement that is fundamental to the accomplishment of the purpose of the Agreement is held invalid, the Service Provider and Transnet shall immediately commence good faith negotiations to remedy such invalidity.
- 23.6 Neither Party may assign the benefit of this Agreement nor any interest hereunder except with the prior written consent of the other save that Transnet may assign this Agreement at any time to any member of the Transnet Group. Further, in the event that Transnet wishes to assign or novate this Agreement to any third party, the Service Provider agrees that it shall not unreasonably withhold or delay its consent to such assignment or novation and that it shall only be entitled to recover from Transnet any reasonable legal costs incurred by it as a direct result of such assignment or novation.
- 23.7 The Service Provider will not subcontract any of its obligations under this Agreement except with the prior written approval of Transnet [not to be unreasonably withheld or delayed].
- 23.8 The Service Provider and Transnet acknowledge and agree that this Agreement shall not constitute, create or give effect to a joint venture, pooling arrangement, principal/agency relationship, partnership or formal business organisation of any kind and neither the Service Provider nor Transnet shall have the right to bind the other without the other's express prior written consent.
- 23.9 Except to the extent of any misrepresentation or breach of warranty which constitutes fraud, this Agreement, together with any Work Orders, constitutes the entire agreement between the Parties relating to the subject matter of this Agreement.



Agreement between Transnet and [REDACTED]  
 For the provision of a Detailed conditional assessment of port view road, including geotechnical investigations, traffic study, rehabilitation method, designs and drawings

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

For and on behalf of <b>TRANSNET SOC LTD</b> duly authorised hereto	For and on behalf of [REDACTED] duly authorised hereto
Name:	Name:
Position:	Position:
Signature:	Signature:
Date:	Date:
Place:	Place:

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

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

**SCHEDULE 1 – Work Order No**  
**For The Provision of Geotechnical Investigation at Ferry Landing In The Port Of**  
**East London**

With reference to the Professional Services Agreement, Reference Number **PAC 267** [the **Agreement**] between Transnet SOC Ltd operating as Transnet National Ports Authority [**TNPA**] and ..... [the **Service Provider**] pursuant to which the Service Provider has agreed to the Services for and on behalf of TNPA subject to such Agreement, the defined terms in the Master Agreement will, unless otherwise indicated, have the same meaning in this Schedule 1.

In consideration of the mutual covenant and agreements contained in the Agreement and in this Schedule 1, it is agreed as follows:

**1 DESCRIPTION OF THE SERVICE**

1.1 The scope of the service is described more fully in the Annexures and Schedules referred to below:

- Clause 11 of section 1 of the RFQ Document – Scope / Specification
- Section 3 of the RFQ Document – Pricing Schedule

**2 DELIVERABLES AND COMPLETION DATE (DELETE IF NOT APPLICABLE)**

The Deliverables, due for completion by ..... and governed by this Schedule 1, include:

- Provide an overview of the geology of the site;
- Present a description of soil material above and below water and the bedrock profiles;
- Assess the engineering properties of the soil and the rock;
- Identify geotechnical considerations that may influence the proposed design;
- Provide geotechnical-related recommendations for design and construction; and
- Provide a study report.

In the event that the Service Provider fails to meet the delivery dates as agreed, the following penalties will be imposed:

Penalties will be capped at 5% of the total contract value

**3 REPRESENTATIVE'S**

<b>TNPA</b>	Sinqobile Nkabinde
Designation	Chief Engineering Technician
Operating Division	Transnet National Ports Authority, Port of East London
Address	Transnet National Ports Authority (TNPA) Room 2, Port Control Building Ganteaume Crescent, Quigney East London 5201

Cell Phone	060 583 4983
Telephone	043 700 2064
Fax	043 700 1060
Email	Sinqobile.Nkabinde@transnet.net

<b>Service Provider</b>	.....
Designation	.....
Address	..... .....
Cell Phone	.....
Telephone	.....
Fax	.....
Email	.....

**4 ACCEPTANCE CRITERIA FOR DELIVERABLES**

4.1 TNPA’s Representative or his/her nominated delegate will sign off the authorisation approval for Deliverables as detailed above as and when the service is required.

**5 FEES AND DISBURSEMENTS**

- 5.1 The Service Provider hereby agrees to perform the service for the term of the agreement as per the Pricing Schedule (Section 3 of the RFQ document)
- 5.2 Expenses / disbursements will be reimbursed, subject to the provisions of clause 7 [*Fee Rates and Expenses*] of the Agreement hereto.
- 5.3 Payment terms are subject to clause 8 [*Invoicing and Payment*] of the Agreement hereto.

**7. BUSINESS CONTINUITY PLAN**

- 7.1 The Service Provider hereby agrees that it will ensure that it has adequate business continuity measures in place to avoid a disruption and mitigate risk to this Agreement in the event of an unforeseen incident.
- 7.2 In the event of an incident taking place which invokes TNPA’s Business Continuity Plan, the Service Provider will implement its measures referred to in clause 7.1 above.
- 7.3 Implementation of the Service Provider’s Business Continuity measures will be more fully described in the SLA and monitored accordingly

## **8. PENALTIES**

- 8.1 TNPA shall be entitled to impose/levy penalties upon the Service Provider in the event that the Service Provider does not comply with the quality standards and requirements stipulated in this Agreement. TNPA shall be entitled to deduct such penalties from the monthly amount due to the Service Provider by TNPA. The Service Provider agrees to the imposition of such penalties and authorises TNPA to apply set-off as is contemplated in this clause 8.1.
- 8.2 Notwithstanding the provision of this penalty clause, TNPA shall not:-
- 8.2.1 be precluded from exercising its right to terminate the Agreement; and/or
  - 8.2.2 be stopped from claiming damages from the Service Provider , should damages be suffered by TNPA or any third party (who claims from TNPA ) as a result of any conduct or failure on the part of the Service Provider or any of its employees arising out of a breach by the Service Provider of this Agreement; and/or
  - 8.2.3 be in anyway prevented from exercising any or all of its rights in terms of the Agreement.
- 8.3 10% penalties shall be levied upon the Service Provider for non-compliance by the Service Provider of its quality standard set out in the service level agreement:
- 8.4 Any penalty imposed in terms of this clause 8 shall be set-off against the invoiced (vatable) amount (as declared in the Service Provider's Tax Invoice) to which the penalty has attached, and the VAT payable by TNPA to the Service Provider shall be calculated on the invoiced amount, less the service-related penalty imposed.

## **9. COMPLIANCE TO LABOUR AND ENVIRONMENTAL LAWS**

- 9.1 The Service Provider shall comply with the following requirements from TNPA with regard to labour and environmental laws:

The Service Provider shall not permit any persons who are or who appear to be under the influence of intoxicating substances to enter or remain at the workplace;

- 9.1.1 No person at the workplace shall, be under the influence of, have in his or her possession or partake or offer any other person intoxicating substances;
- 9.1.2 In the case where a Service Provider's employee is taking medication, the Service Provider shall only allow such person to perform duties at the workplace if the side effects of such medication do not constitute a threat to the health and safety of the person concerned or any other persons at such workplace.

➤ Random testing will be conducted by TNPA.

- Attendance of SHE meeting
- Every operator to have valid induction certification
- Valid Competency certificates for all operators

9.2 Fuel and oil spillages shall be cleared by the Service Provider in accordance with Environmental requirements, within 24 hours.

9.2.1 Should the Service Provider fail to do so, TNPA shall appoint an appropriate organisation to do so, and the cost shall be transferred to the Service Provider.

9.2.3 In the Event that the Service Provider fails to comply with all applicable environmental legislation, the Service Provider shall be liable for and bear all costs of making good any damage or harm caused by it to any person, area within the Terminal, public road, path or street, private or third party property, environment including but not limited to fauna and flora. The Service Provider indemnifies TNPA in respect of any damage or harm caused by the Service Provider

## **10. CONTINUOUS IMPROVEMENT**

10.1 The Service Provider shall immediately advise TNPA of any decision taken to discontinue or in any way change the provision of any services stipulated in this Agreement.

10.2 The Parties will jointly and continually investigate and search for opportunities to improve on specifications, technology, procedures and management of the services supplied in order to reduce TNPA's overall costs.

10.3 The representative(s) of the Service Provider as well as the TNPA Commodity Manager and other identified TNPA Staff shall conduct regular meetings. Such meetings will be scheduled by the TNPA Commodity Manager where, amongst others, the following aspects shall be addressed:

- 10.3.1 problem solving and generating of savings ideas for implementation to reduce the total cost of the provision of this service as well as other services relating thereto;
- 10.3.2 considering and/or developing of savings ideas for implementation and specific reports submitted by either Party on aspects related to the operation, application, and management of the services as provided for in this Agreement;
- 10.3.3 discussion of all current aspects relating to the Agreement between the Parties. To this end the Parties in general undertake to take all steps to enhance the relationship between the Parties;
- 10.3.4 identification of cost saving and efficiency improvement opportunities, maintenance applications and operational practices;
- 10.3.5 development of initiative proposals;
- 10.3.6 obtaining buy-in from all users/stakeholders;
- 10.3.7 implementation of cost savings initiatives / action plans;
- 10.3.8 continuous measuring and benchmarking;
- 10.3.9 quantification of savings (impact and cost);
- 10.3.10 correction of deviations; and
- 10.3.11 discussion of demand tendencies and fluctuations.

- 10.4 The meeting shall be coordinated by TNPA and TNPA shall keep proper minutes of the proceedings.
- 10.5 In the event of any disagreement between the Parties, the matter shall be dealt with in terms of the dispute resolution mechanisms as provided for in the Master Agreement.
- 10.6 The meeting type and frequency will be as follows:
  - 10.6.1 Quarterly meetings (and extended members where needed) with a set agenda to address continuous improvement issues as indicated herein.
  - 10.6.2 Monthly technical / operations meetings at TNPA’s facilities, between the representatives from each Party.
- 10.7 The Parties agree that in the event that specifications/Service/Price needs to be amended due to the outcomes of the above-mentioned program or for any other reason, a formal amendment to the Agreement will be reduced to writing to formalise such changes.

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

<b>SIGNED</b> for and on behalf of:  .....	<b>SIGNED</b> for and on behalf of:  <b>Transnet SOC Ltd operating as Transnet National Ports Authority</b>
Signature .....	Signature .....
Name:	Name:
Position:	Position:
Date:	Date:
Place:	Place:

## SCHEDULE 2 – Confidentiality Agreement

I [*name*] .....  
of [*address*] .....  
.....  
.....  
.....

Undertake to Transnet SOC Ltd [**Transnet**] that:

I shall keep confidential and not disclose to or make available to any third party, except with the express prior written consent of Transnet, any Confidential Information relating to Transnet’s business, assets, customers or staff which is disclosed to me or to which I may have access during the course of providing services to Transnet [**my assignment**]; and

upon termination of my assignment, I shall return to Transnet all documents, books, discs, tapes or other records [in whatever medium] which I may have in my possession, custody or control and which are the property of Transnet, its customers, staff or agents and any copies thereof.

For the purposes of this Confidentiality Agreement, **Confidential Information** shall mean any information in whatever form including, without limitation, any information relating to systems, operations, plans, intentions, market opportunities, know-how, trade secrets and business affairs of the Transnet Group or its customers, whether in writing, conveyed orally or by machine-readable medium.

I understand that this Confidentiality Agreement shall survive the termination of my assignment.

SIGNED at \_\_\_\_\_ on \_\_\_\_\_ 20\_\_

[*Signature*] .....

in the presence of:

Witness name: ..... Witness Signature: .....

### SCHEDULE 3 – Notices

Any notice or communications between the Parties to be given under this Agreement shall be deemed to have been received at the following times:

- 8.4.1.1 by facsimile transmission - immediately the sender receives confirmation of receipt;
- 8.4.1.2 by hand or physical delivery - immediately upon receipt by the recipient.

Any notice or communications between the Parties shall be delivered to the addresses set out below:

#### LEGAL NOTICES

The Service Provider	Transnet
<u>Addressee:</u>	<u>Addressee:</u> Transnet SOC Ltd operating as Transnet National Ports Attention: Justin Uren
<u>Physical Address:</u>	<u>Physical Address:</u> 112 Green Street Port Admin Building Port Elizabeth 6000
<u>Fax Number:</u>	<u>Fax Number:</u> 086 669 1261

#### COMMERCIAL NOTICES

The Service Provider	Transnet
<u>Addressee:</u>	<u>Addressee:</u> Transnet SOC Ltd operating as Transnet National Ports Attention: Nomasomi Mgandela
<u>Physical Address:</u>	<u>Physical Address:</u> 01 Hely Hutchinson RDF Port of East London East London 5201
<u>Fax Number:</u>	<u>Fax Number:</u> 086 601 6286

Either Party may, by a notice given in accordance with this Schedule 3, change its address or facsimile number for the purpose of this Schedule 3.



## **ANNEXURE A – SCOPE OF WORKS**

### **Executive overview**

Transnet National Ports Authority (TNPA) - Port of East London (Port of EL) executive team has identified a need to secure a service contract for conducting a Geotechnical Investigation for the collapsed Ferry Landing. The investigation will determine the suitability of in-situ material for the construction of a rock revetment (riprap) in order to stabilise the embankment and prevent further erosion. Currently, the material composition, soil stability, and bed rock condition are unknown.

### **Specification and description of the services**

The scope of the services is to conduct a detailed geotechnical investigation for the collapsed Ferry Landing transition wall at East Bank within the Port of East London.

The geotechnical investigation requirement includes but not limited to the provision of a level 4 programme.

The scope of works is detailed below:

- Forensic Geotechnical Engineering (3 bore holes at 15m depth); and
- Produce a study report;

### **Location of site**

All the works are located at Ferry Landing, on the East bank, at the Port of East London, shown in the diagram below:

Agreement between Transnet and [REDACTED]  
For the provision of a Detailed conditional assessment of port view road, including geotechnical investigations, traffic study, rehabilitation method, designs and drawings



**Figure 1: Overview of the proposed site**

### **Expected Deliverables**

It is expected that the deliverables provided by the Consultant will be sufficient to satisfy the design development phase requirements as per Transnet Project Lifecycle Process (PLP). The expected deliverables will include but not limited to the following:

- Provide an overview of the geology of the site;
- Present a description of soil material above and below water and the bedrock profiles;
- Assess the engineering properties of the soil and the rock;
- Identify geotechnical considerations that may influence the proposed design;
- Provide geotechnical-related recommendations for design and construction; and
- Provide a study report.

### **General Obligation**

1. The Contractor shall quote their completion time
2. The Contractor shall ensure that safety is maintained on site at all times
3. The Contractor shall comply with all applicable legislation and Transnet safety requirements adopted from time to time and instructed by the Project Manager/Supervisor. Such compliance shall be entirely at his own cost, and shall be deemed to have been allowed for in the rates and prices in the contract.
4. The Contractor shall, in particular, comply with the following Acts and Transnet Specifications:-
  - a) The compensation for Occupational Injuries and Diseases Act, No. 130 of 1993.
  - b) The Occupational Health and Safety Act (Act 85 of 1993).

Agreement between Transnet and .....  
For the provision of a Detailed conditional assessment of port view road, including geotechnical investigations, traffic study, rehabilitation method, designs and drawings

- c) The Management Contractor shall comply with the current Transnet Specification, Safety Arrangements and Procedural Compliance with the Occupational Health and Safety Act, Act 85 of 1993.

## ANNEXURE B – PRICING SCHEDULE

Item No	Description of Goods /Services	Unit of Measure	Quantity	Unit Price (ZAR)	Total Price (ZAR)
<b>1</b>	<b>Forensic Geotechnical Investigation</b>				
1.1	Site Establishment and De-establishment	Sum	1		
1.2	Geotechnical Investigation	Sum	1		
2	<b>Produce Study Report</b> - Issue a comprehensive study report detailing causes of collapse, geotechnical profiles, recommendations, etc.	Sum	1		
3	<b>Progress reporting</b> - Electronic (not excluding telephonic) reporting of progress and status update, to ensure that project is still aligned to schedule.	Sum	1		