



**MASTER AGREEMENT**

entered into by and between

**TRANSNET SOC LIMITED**

Operating as **TRANSNET PORT TERMINALS**

Registration Number 1990/000900/06

(hereinafter referred to as "**Transnet**")

and

.....

Registration Number .....

(hereinafter referred to as the "**Supplier**")

**FOR THE PROVISION OF PROFESSIONAL SERVICES:**

**PROVISION OF MAINTENANCE AND SOFTWARE SUPPORT AND UPGRADES FOR RUBBER TYRE GANTRY (RTG) AND SHIP TO SHORE (STS) SIMULATORS AT TRANSNET SOC LIMITED OPERATING AS TRANSNET PORT TERMINALS (TPT) AT ITS CONTAINER TERMINALS IN CAPE TOWN, NGQURA AND DURBAN FOR A PERIOD OF TWO (2) YEARS**

Commencement Date - .....

Expiry Date - .....

**Agreement Number .....**

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**THIS PROFESSIONAL SERVICES AGREEMENT** dated ..... **2011**

**BETWEEN:**

.....(Registration Number .....) whose registered office is at .....  
.....(the "Supplier") for itself and on behalf of its Affiliates;

**AND**

**Transnet SOC Limited**, operating as **Transnet Port Terminals**, (Registration Number 1990/000900/06), whose registered office is at 49<sup>th</sup> Floor, Carlton Centre, 150 Commissioner Street, Johannesburg 2001 ("Transnet") for itself and on behalf of its Affiliates.

**INTRODUCTION:**

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

**IT IS AGREED:**

**1. Definitions and Interpretation**

1.1 In this Agreement the following definitions will apply:

"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);

"Affiliate" means any person or entity controlling, 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 percent) of the voting securities of a second entity shall be deemed to control that second entity;

"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;
"Agreement Change"	means any material change to this Agreement and/or any Work Order to be made in accordance with clause 19 (CHANGE CONTROL);
"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;
"Deliverables"	means any and all works of authorship, products and materials developed, written, prepared, assembled, integrated, modified or provided by the Supplier in relation to the Services;
"Force Majeure"	means the occurrence after this Agreement comes into effect of: <ul style="list-style-type: none"> <li>(a) an event, the occurrence of which could not have been reasonably foreseen at the time this Agreement came into effect; and</li> <li>(b) 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</li> <li>(c) 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;</li> </ul>
"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);
"Materials"	means the Deliverables, the Supplier Materials and the Third Party Materials;
"Parties"	means the Parties to this Agreement together with their subsidiaries, divisions, business units, successors-in-title and assigns;
"Party"	means either one of these Parties;
"Personnel"	means the employees, agents and approved subcontractors of the Supplier who are assigned to perform the Services;
"Services"	means the Services to be provided by the Supplier under this Agreement, including provision of Deliverables;
"Service Levels"	means Service Levels as defined in Schedule 1;
"Supplier 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 Supplier prior to the commencement date or independently developed by the Supplier outside the scope of this Agreement at no expense to Transnet, and used by the Supplier in the performance of the Services;
"Supplier Systems"	means all of the information technology systems which the Supplier uses to run its business;
"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;
"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 Supplier in the performance of the Services;

"Transnet" & "Transnet Group" mean Transnet together with its Affiliates, subsidiaries, operating divisions, business units, successors-in-title and its assigns;

"Transnet Premises" means any location owned, leased or licensed by Transnet at which Transnet Port Terminals (TPT) may require the Services to be provided from time to time;

"VAT" means Value-Added Tax in terms of the Value-Added Tax Act, 89 of 1991, as may be amended from time to time; and

"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 sub-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 TPT agrees to engage the Supplier to provide, and the Supplier agrees to provide, the Services on the terms and conditions of this Agreement.
- 2.2 All Services to be provided by the Supplier 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 a Work Order will prevail.

- 2.4 On receipt by TPT of a Work Order executed by both Parties or of the Supplier commencing work in respect of an unexecuted Work Order, whichever is the earlier, the Supplier will be deemed to have accepted such Work Order on the terms and conditions of this Agreement.
- 2.5 The Supplier is not authorised to undertake any work for TPT 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 Supplier 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 Supplier 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 TPT 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. Supplier's Warranties**

- 3.1 The Supplier warrants to TPT 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 Supplier;
  - (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 the 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 TPT or procure licences for Transnet Port Terminals in respect of all Supplier and/or Third Party Materials detailed in the Work Order(s), and will grant to TPT or procure the right for TPT.
  - (e) to take such copies (in whole or in part) of such Supplier and/or Third Party Materials as it may reasonably require for the purposes of back-up for archiving and disaster recovery; and
  - (f) the use or possession by TPT of any Materials will not subject Transnet to any claim for infringement of any Intellectual Property Rights of any third party.
- 3.2 The Supplier 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 sub-clause 3.3 below, in the event that the Supplier fails to meet the Service Levels, TPT may claim appropriate service credits or invoke a retention of fees as detailed in the relevant Work Order.

- 3.3 The Supplier warrants that for a period of 90 (ninety) days from Acceptance of the Deliverables these will, if properly used, conform in all materials respects with the requirements set out in the relevant Work Order. The Supplier will at its expense remedy any such non-conformance as soon as possible but in any event within 30 (thirty) days of notification by TPT. In the event that the Supplier fails or is unable to remedy such non-conformance within such time-scale, TPT will be entitled to employ a third party to do so in place of the Supplier and any excess and delay charges or costs incurred by TPT as a result shall be paid by the Supplier.
- 3.4 The Supplier will remedy any defect within 14 (fourteen) days of being notified of that defect by TPT in writing.
- 3.5 The Supplier will not be liable to remedy any problem arising from or caused by any modification made by TPT to the Deliverables, or any part thereof, without the prior approval of the Transnet Port Terminals.
- 3.6 The Supplier 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 Supplier at the date of the relevant Work Order; and
  - (b) at the time of delivery to TPT, the Materials do not contain any trojan horse, worm, logic bomb, time bomb, back door, trap door, keys or other harmful components.

The Supplier agrees that, in the event that a virus is found, it will at its own expense use its best endeavours to assist TPT 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 TPT to the same extent to mitigate such losses and to restore TPT to its original operating efficiency.

- 3.7 The Supplier shall advise TPT of the effects of any steps proposed by TPT 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 Supplier shall ensure that the professional Services, to be



supplied to TPT 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 Supplier, 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 Supplier 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. TPT's Obligations**

- 4.1 TPT undertakes to promptly comply with any reasonable written request by the Supplier for information, including information concerning TPT's operations and activities, that relate to the Services as may be necessary for the Supplier to perform the Services, but for no other purpose. However, TPT compliance with any written request for information is subject to any internal security rules and requirements and subject to the observance by the Supplier of its confidentiality obligations under this Agreement.
- 4.2 The Supplier shall give TPT reasonable written notice of any information it requires in accordance with sub-clause 4.1 above.
- 4.3 Subject to clause 11 (PERSONNEL), TPT agrees to provide the Supplier or its Personnel such access to and use of its facilities as is necessary to allow the Supplier 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 will have successfully completed any relevant acceptance criteria set out in the Work Order, or in the absence of such acceptance criteria, on written agreement with TPT.

#### **7. Fee rates and expenses**

- 7.1 In consideration of the provision of the Services, TPT will pay to the Supplier the fees detailed in the relevant Work Order.

- 7.2 TPT 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 TPT or in any relevant Work Order (which will be invoiced to TPT at cost).
- 7.3 Unless otherwise agreed in a Work Order, TPT will reimburse to the Supplier 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 TPT in advance;
  - (b) are incurred in accordance with TPT standard travel and expenses policies;
  - (c) are passed on to TPT 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 Supplier shall invoice TPT for payment of fees and costs in accordance with the provisions of the relevant Work Order. Unless otherwise agreed, upon receipt of a correct and undisputed Tax Invoice, TPT shall pay the Supplier 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 Supplier, 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 Supplier Materials and Third Party Materials vest in the Supplier or the third party as appropriate. The Supplier hereby grants or will procure a grant to Transnet of an irrevocable, royalty-free, non-transferable licence to use such Supplier 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 Supplier will use its best endeavours to procure from the owner for TPT the grant of an irrevocable, royalty free, fully transferable licence to use such modifications as TPT in its absolute discretion thinks fit.
- 9.4 All rights in the TPT name and logo remain the absolute property of Transnet.

## **10. Intellectual Property Rights Indemnity**

- 10.1 The Supplier shall promptly notify TPT, 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 TPT all assistance which TPT 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 Supplier shall at all times, whether during or after termination or expiry of this Agreement, indemnify and keep TPT 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 TPT as a result of TPT's use or possession of the Materials or any part thereof.
- 10.3 The Supplier shall be entitled to conduct all negotiations and proceedings in relation to any such claims brought against TPT, but shall not be entitled to settle or compromise any claim without TPT'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 Supplier may, at its own expense and sole option, either:
- (a) procure for TPT 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 TPT's beneficial use of the Materials or the Services, or cause the Supplier 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 TPT's business operations; or
  - (c) failing (a) or (b) above, without prejudice to the indemnity in sub-clause 10.2 above, refund in full all fees paid by TPT under this Agreement in relation to such Materials, and TPT will return such materials to the Supplier.

## **11. Personnel**

- 11.1 The Personnel shall be regarded at all times as employees, agents or subcontractors of the Supplier and no relationship of employer and employee shall arise between TPT and any Personnel under any circumstances regardless of the degree of supervision that may be exercised over the Personnel by TPT.
- 11.2 The Supplier 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 Supplier will ensure that its Personnel comply with all reasonable requirements made known to the Supplier by TPT concerning conduct at any TPT 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 Supplier will ensure that such Personnel at all times act in a lawful and proper manner in accordance with these requirements.
- 11.4 TPT reserves the right to refuse to admit or to remove from any premises, including TPT Premises, occupied by or on behalf of it, any Personnel whose admission or presence would, in the reasonable opinion of TPT, 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 Supplier of any such refusal (with reasons why). The reasonable exclusion of any such individual from such premises shall not relieve the Supplier from the performance of its obligations under this Agreement.
- 11.5 The Supplier agrees to use all reasonable endeavours to ensure the continuity of the Personnel assigned to perform the Services. If any re-assignment by the Supplier of those Personnel is necessary, or if TPT 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 Supplier will promptly supply a replacement of equivalent calibre and experience, and any such replacement shall be approved by TPT 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 Supplier shall indemnify and keep TPT indemnified from and against liability for damage to any TPT property (whether tangible or intangible) or any other loss, costs or

damage suffered by TPT to the extent that it results from any act of or omission by the Supplier or its Personnel in connection with this Agreement.

- 12.3 Subject always to sub-clauses 12.1 and 12.2, the liability of the Supplier 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 sub-clause 13.1 below.
- 12.4 Subject to sub-clause 12.1 above, and except as provided in sub-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 sub-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 sub-clause 12.3.
- 12.6 Nothing in this clause 12 shall be taken as limiting the liability of the Supplier in respect of clause 10 (INTELLECTUAL PROPERTY RIGHTS INDEMNITY), or clause 14 (CONFIDENTIALITY AND PUBLICITY).

### **13. Insurance**

- 13.1 The Supplier agrees that during the term of this Agreement and for a period of 1 (one) year following its termination, it will maintain in force an insurance policy or policies with a reputable insurer which grants the following cover:
  - (a) professional indemnity insurance cover up to a limit (for any single event or series of related events in a single calendar year) of no less than ZAR 3, 000, 000. 00 (three million rand) South African Rand); and
  - (b) public and products liability insurance cover up to a limit (for any single event or series of related events in a single calendar year) of no less than ZAR 3, 000, 000. 00 (Three million South African Rand).

The Supplier shall, at TPT's request, produce copies of such insurance policies.

- 13.2 If the Supplier fails to take out and maintain insurance required under this clause 13, then TPT may itself insure against such risks and any sum(s) paid by TPT in respect of premiums for such insurance shall be deducted from any fees due to the Supplier under this Agreement or may be recoverable as a debt from the Supplier.

## **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 14 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 14; 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 TPT's request the Supplier 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 Supplier 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 TPT is a customer of the Supplier or use TPT's name and/or brand in any promotion or marketing or announcement of orders, without the prior written consent of TPT.
- 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 Supplier undertakes to comply with South Africa’s general privacy protection in terms of the Bill of Rights (Section 14) 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 This Agreement shall commence on the ..... (“Commencement Date”) and shall continue subject to termination in accordance with the provisions of this Agreement or otherwise in accordance with law or equity.
- 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 thirty (30) 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 TPT may terminate this Agreement at any time within 2 (two) months of becoming aware of a change of control of the Supplier by notice in writing to the Supplier. 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 TPT may cancel any Work Order at any time on giving the Supplier (30) thirty 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 Supplier will immediately deliver up, and procure that its Personnel will immediately deliver up to TPT, all Deliverables and property belonging to TPT (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 Supplier, and certify to TPT in writing that this has been done.
- 17.3 To the extent that any of the Deliverables and property referred to in sub-clause 17.2 above are in electronic form and contained on non-detachable storage devices, the Supplier will provide Transnet with unencrypted copies of the same on magnetic media and will irretrievably destroy and delete copies so held.
- 17.4 In the event that the Agreement is terminated by the Supplier under sub-clause 16.3, or in the event that a Work Order is terminated by Transnet under sub-clause 16.6, Transnet will pay to the Supplier all outstanding fees (apportioned on a daily basis) relating to the work undertaken by the Supplier up until the date of such termination. Transnet will also pay the costs of any goods and materials ordered by the Supplier in relation to the such work for which the Supplier has paid or is legally obliged to pay, in which case, on delivery of such goods or materials, the Supplier 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 (SUPPLIER'S WARRANTIES), 9 (INTELLECTUAL PROPERTY), 10 (INTELLECTUAL PROPERTY RIGHTS INDEMNITY), 12 (LIABILITY), 14 (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 sub-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 sub-clause 23.1 (GENERAL).

## **20. Equality and Diversity**

- 20.1 The Supplier 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 Supplier undertakes to demonstrate sound environmental performance and to have an environmental management policy. The Supplier shall upon request from Transnet demonstrate 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 sub-clause 1.2(b) (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 Supplier 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 sub-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 Supplier 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 sub-clause 23.1 above where that Party intends to apply for injunctive 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.
- 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 Supplier and Transnet shall immediately commence good faith negotiations to remedy such invalidity.
- 23.6 Neither Party may assign the benefit of this Agreement or 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 Supplier 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 Supplier 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 Supplier 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 Supplier 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.

**IN WITNESS** of which this Agreement has been duly executed by the Parties.

For and on behalf of <b>TRANSNET LIMITED t/a Transnet Port Terminals</b> duly authorised thereto	For and on behalf of [REDACTED] duly authorised thereto
Name:	Name:
Position:	Position:
Signature:	Signature:
Date:	Date:
Place:	Place:

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

**SCHEDULE 1 – Work Order No W/O.....**

With reference to the Professional Services Agreement, Reference Number ..... dated ..... 200... (the "Master Agreement") between **Transnet SOC Limited o/a** ("TPT") and ..... (the "Supplier") pursuant to which you have agreed to perform certain services for and on behalf of Transnet subject to such Master Agreement, the defined terms in the Master Agreement will, unless otherwise indicated, have the same meaning in this Work Order.

In consideration of the mutual covenant and agreements contained in the Master Agreement and in this Work Order, it is agreed as follows:

**1. Description of the Services**

The scope of Professional Services ("Deliverables") to be performed by the Supplier are appended hereto:

- Annexure 1 – the Supplier’s written proposal to Transnet, dated ....., for ..... (Supplier reference – .....)
- Annexure 2 – Project Plan and timeframes
- Annexure 3 – Project Deliverables
- Annexure 4 – Project Fees

**2. Deliverables and Completion Date**

The Deliverables, due for completion by ..... and governed by this Work Order, include:

- .....
- .....
- .....

3. **Project Managers & Personnel to provide the Services**

<b>Transnet Port Terminals Project Manager</b>	
Designation	
Operating Division	
Address	
Cell Phone	
Telephone	
Fax	
Email	

<b>Supplier's Project Manager</b>	
Designation	
Operating Division	
Address	
Cell Phone	
Telephone	
Fax	
Email	
<b>Supplier's Personnel</b>	<b>Designation &amp; Contact Details</b>

4. **Acceptance Criteria for Deliverables**

Transnet Port Terminals' Project Manager or his/her nominated delegate will sign off the authorisation approval for the Deliverables as detailed at Annexure 3 – Project Deliverables.

**5. Progress Reports and Review Meetings**

Project management and review meetings will be held with a minimum frequency of ..... at ....., or as otherwise directed by Transnet’s Project Manager.

**6. Fees & Disbursements**

- 6.1 In consideration of the performance of the Services by the Supplier pursuant to this Work Order, Transnet Port Terminals will pay to it the fees quoted in the Supplier’s written proposal to Transnet (dated ..... ) for the provision of ..... , appended hereto at Annexure 1 and detailed per sub-element at Annexure 4 – Project Fees
- 6.2 Expenses / disbursements will be reimbursed, subject to the provisions of clause 7 (FEE RATES AND EXPENSES) of the Master Agreement hereto.
- 6.3 Payment terms are subject to clause 8 (INVOICING AND PAYMENT) of the Master Agreement hereto.

**IN WITNESS** of which this Work Order has been duly executed by the Parties.

<b>SIGNED</b> for and on behalf of:  .....	<b>SIGNED</b> for and on behalf of:  <b>Transnet SOC Limited t/a Transnet Port Terminals</b>
Signature .....	Signature .....
Name	Name
Position	Position
Date	Date
Place:	Place:

**SCHEDULE 2 – Confidentiality Agreement**

I (*name*) .....  
of (*address*) .....  
.....  
.....  
.....

Undertake to TPT that:

1. I shall keep confidential and not disclose to or make available to any third party, except with the express prior written consent of TPT, 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
2. 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 \_\_\_\_\_ 2011

(*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:

- (i) by facsimile transmission - immediately the sender receives confirmation of receipt;
- (ii) 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:

<p><b>The Supplier</b></p> <p>.....</p>	<p><b>Transnet SOC Limited o/a Transnet Port Terminals</b></p> <p>.....</p>
<p><u>Addressee:</u></p> <p>.....</p> <p>Attention: .....</p>	<p><u>Addressee:</u></p> <p>Transnet Port Terminals</p> <p>Attention: .....</p>
<p><u>Physical Address:</u></p> <p>.....</p> <p>.....</p> <p>.....</p> <p>.....</p> <p>.....</p> <p>.....</p>	<p><u>Physical Address:</u></p> <p>.....</p> <p>.....</p> <p>.....</p> <p>.....</p> <p>.....</p> <p>.....</p>
<p><u>Fax Number:</u></p> <p>.....</p>	<p><u>Fax Number:</u></p> <p>.....</p>

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.

## **SCOPE OF WORK**

### **MAINTENANCE AND SOFTWARE UPGRADES AND SUPPORT**

The aim of this project is to provide maintenance and software support and upgrades for TPT's existing **Rubber Tyre Gantry (RTG) and Ship To Shore (STS)** simulators located at three of TPT's terminals namely:

- Cape Town Container Terminal
- Ngqura Container Terminal
- Durban Container terminal

#### **The following items need to be checked once the tender has been awarded:**

- The container that houses the simulator for wear and tear
- The door locks need to be replaced the front and rear doors
- The **computers 1 and 2** which are used by the instructor's station used during training sessions
- The communication devices
- The motion base
- The motors (all)
- The actuators ( all)
- The Couplings (all)
- Electrical wiring
- The host computer hardware
- The floor for damages
- The launch screens ( all on the motion base)
- The visual screens 6 of them but the right hand side screen has crack ( for viewing while training is taking underway also check the screens for scratches and damages
- The power junction box
- The consoles on which the controls are mounted brought closer to real crane as much as possible.
- Fittings
- Power supply
- Spares parts
- Any leaks

#### **The air conditioning system**

The system needs to be checked and tested to make sure it works properly to protect all the electronics that make the simulator work without getting too hot, it has been causing some problems by screen freeze and motions failures, especially now that the simulator is operating 24 hours a day.

### **Electrical:**

Only SABS approved products only, including sockets and switches must be used

### **Enhancements (to be tailor made specific to each container terminal)**

- **Pre-loaded scenario** as well as an option of developing new training scenario as is currently the case.
- Looking at the simulated virtual environment to replicate each of the terminals. configurations
- Bring the simulator features closer to the real machine features.
- Change the stacking yard to replicate our stacks layouts and slots configurations as it is difficult to train trainees with the current configurations.
- Introduce vessel properties with more functions or options such as manipulations capabilities to change a training sessions (include things like extreme weather conditions inclusive of sea swells simulations, rainy conditions etc.
- Day and night working enhancements (include crane lights and vessel lighting)
- Enhancing the RDT screen used for RTG operator training as current one does not prepare trainees for the real working world.
- Handling of uncontainerised cargo such as break bulk cargo by use of attachments applicable to each of the cranes types should be simulated.
- Handling of hatch covers scenarios under all conditions, can we also have where hatch covers are landed on the quay surface?
- Simulate other machines working in the same vicinity to enhance trainee alertness of his surroundings e.g. STS and RTG.
- Move orders manipulation should be made easier to sequence.
- Tandem lift capability for the STS.
- 3 d capability to enhance realistic depth perception strengths
- Built – in eye and hand coordination capability this can also be used as screening for the recruitment process.

### **Software Upgrades**

Respondent should ensure that the software provided is upgraded to the latest available versions and thereafter, for the duration of the contract, that all new releases and upgrades are provided and installed on the simulators based on user sign-off and agreement (in accordance with the TPT change control procedures).

### **Software and Hardware Support - Helpdesk**

Respondent to provide remote telephonic or other types of support (helpdesk) to ensure that software and hardware faults can be logged and resolution tracked. Timeframes for various levels of faults to be agreed.

Helpdesk to be available during working hours Monday to Friday (South African time).

### **Skills Transfer**

Transfer of knowledge and skills in respect of planned maintenance programs over the life cycle of the training simulators