



When You Need It Most

## Contractor Relationship Terms

general terms for contractors providing goods or services to HELP

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Terms Version Number 1.0

## 1 Introduction

These terms are the general terms of the relationship between us and you. The terms cover any transactions where you provide goods or services to us. The commercial terms of any transaction will be contained in an order that incorporates these terms. Nothing in the terms obliges any party to enter into any orders. The parties will initial each page of this document, and then sign the relevant Order in full.

## 2 Definitions and interpretation

**Definitions.** In the agreement:

**agile development** means development that uses incremental, iterative work sequences known as sprints or Kanban pull-based flow to develop software;

**agreement** means the agreement between us and you, consisting of the terms and any orders the parties enter into;

**business day** means any day within business hours, other than a Saturday, a Sunday, or a holiday (including a public or bank holiday) in the jurisdiction where our entity that entered into the relevant order is based, and any other reference to a **day** means a calendar day;

**business hours** means our normal business hours on business days (9am to 5pm);

**contract year** means, in respect of an order, each successive 12 calendar month period during the term of the order, calculated from the effective date;

**deliverable** means any deliverable or work product that you create or delivers relating to the goods or services, including advice, a document, custom software or other material;

**delivery date** means the date of completion of each deliverable referred to in the corresponding order;

**effective date** means in respect of each order, the effective date stipulated in each order, in the absence of which it will be the date the order is accepted by us;

**existing material** means any code, forms, algorithms or materials developed by or for either party independently and outside of the agreement and provided during the course of the agreement;

**fees** means the fees, charges, or purchase consideration that we will pay to you in respect of goods or services you provide under orders;

**goods** mean any goods you provide to us, under orders;

**HELP** means "Hospital Emergency Lifestyle Products Pty Ltd"

**labour legislation** means all labour laws and regulations including the Labour Relations Act 66 of 1995, the Basic Conditions of Employment Act 75 of 1997, the Unemployment Insurance Act 63 of 2001, or any other relevant legislation that may normally apply to an employer-employee relationship;

**occupational laws** means all laws and regulations relating to:

- workers' compensation;
- compensation for occupational injuries and diseases; and
- occupational health and safety;

**OHS Act** means the Occupational Health and Safety Act 85 of 1993;

**order** means a goods or services order agreed to and signed by both the parties describing the specific goods or services that you will provide to us;

**our data** means our data (including personal information and confidential information) that:

- we (or any third party on our behalf) provides to you; or
- you generate, process, or supply to us in providing the services;

**our material** means any materials or media (in electronic or physical form) we (or our customers, or any third party on our behalf) provides or makes available to you for purposes of the agreement and includes our data;

**our policies** means any of our (or our customers') policies, practices, codes of conduct and procedures, including any applicable broad based black economic empowerment, security, information technology, health, safety and environmental policies (as amended from time to time) that may be of general application;

**parties** means the parties to this agreement being you and us, and **party** refers to either of us as the context requires;

**personnel** means any representative, including any director, employee, agent, affiliate, consultant, or contractor;

**privacy notice** means our notice regulating data use and protection, accessible from our website;

**SARS** means the South African Revenue Service;

**related** and **related persons** means natural and juristic persons who are connected to one another in the manner contemplated in applicable law;

**services** means any services you or related persons provide to us, under orders;

**service levels** means the levels according to which you will provide each service as agreed by the parties in writing and signed;

**sign, signed or signing** means the handwritten signature, an advanced electronic signature, or an electronic signature that the parties agree to use, of a party's duly authorised representatives;

**signature date** means the date of signature by the party signing last;

**site** means our physical premises referred to in an order, to which you will provide services or deliver the goods under the order;

**specification** means the specification (which may be in the form of a proposal, wire frame, project initiation document, functional specification, or technical specification) of the deliverable, which may be (i) in or attached to an order, or (ii) in writing, dated and signed by the parties;

**tax** means any:

- tax (including value added tax, income taxes, pay-as-you-earn tax or other taxes levied in any jurisdiction);
- duty (including stamp duty);
- tariff, rate, levy; or
- any other governmental charge or expense payable;

**technology** means any technology that a party has created, acquired or otherwise has rights in and may, in connection with the performance of that party's obligations under the agreement, employ, provide, modify, create or otherwise acquire rights in and includes any: concepts or ideas; methods or methodologies; procedures or processes; know-how or techniques; function, process, system, data, or object models; templates; the generalised features of the structure, sequence and organisation of software, user interfaces and screen designs; general purpose consulting and software tools, utilities, routines or frameworks; logic, coherence and methods of operation of systems; and patches or enhancements to open source libraries;

**terms** means the terms, consisting of:

- these contractor relationship terms; and

- any other relevant specific terms, policies, disclaimers, rules and notices that the parties agree on, (including any that may be applicable to any specific goods or services);

**third party contractor** means any contractor, supplier, vendor, service provider or licensor of a part of the goods or services, which is not a party to the agreement;

**third party software** means all third party software owned by a third party but legally licensed to you for use in providing the services;

**we, us, or our** means **HELP** or its subsidiary;

**writing or written** means the reproduction of information or data in physical form (includes handwritten documents, hard copy printouts and fax transmissions) or any mode of reproducing information or data in electronic form that the parties agree to use (like pdf or email), but excludes information or data in the form of email, text message or instant messaging;

**you or your** means the vendor or service provider that enters into an order and, if specified in the order, those related to it;

- 2.1 **Definitions in the order.** Words defined (or assigned a meaning) in an order will have that meaning in the terms, unless the context clearly indicates otherwise.
- 2.2 **Interpretation.** All headings are inserted for reference purposes only and must not affect the interpretation of the agreement. Whenever 'including' or 'include', or 'excluding' or 'exclude' follow a term together with specific examples or items, they will not limit its ambit. Terms other than those defined within the agreement will be given their plain English meaning. References to any law or enactment will include the enactment as re-enacted, amended, or extended. A reference to a person includes a natural and juristic person and a reference to a party includes the party's successors or permitted assigns. Unless otherwise stated in the agreement, when any number of days is prescribed in the agreement the first day will be excluded and the last day included. The rule of construction that an agreement must be interpreted against the party responsible for its drafting or preparation does not apply. GMT +2 will be used to calculate any times.
- 2.3 **Conflict.** If there is a conflict of meaning between these terms and any order, the order will prevail in respect of the relevant goods or services.

### 3 Duration

The terms will commence on the effective date specified in an order and continue until the termination date specified in the order, unless terminated earlier in terms of this agreement.

### 4 Orders

- 4.1 **Capacity.** You represent and warrant that you (and any person who makes an offer in an order):
- are old enough under applicable law to enter into the agreement;
  - are legally capable of concluding any transaction;
  - possess the legal right, full power, and authority to enter into the agreement;
  - are authorised to use the credentials required for any account;
  - will submit true, accurate and correct information to us.
- 4.2 **Invitation to do business.** The marketing of the goods or services by you is merely an invitation to do business or for you to make an offer to provide goods or services. The parties only conclude a valid and binding order when we accept the offer made by you.
- 4.3 **Cancel.** Unless otherwise agreed, we may cancel any order at any time in our absolute discretion, by giving 30 days notice.
- 4.4 **Time and place.** The parties conclude any agreement between each other at the time when our duly authorised representative accepts the relevant offer and at the place where we have our head office.
- 4.5 **Orders.** The terms in effect at the time you make an offer will govern the order. Each order will create a separate agreement. Despite that, we may consider the breach of any one order to constitute a breach of any or all orders.

### 5 Goods

- 5.1 **Sale.** We procure the goods from you on the terms of the agreement.
- 5.2 **Quality.** The goods supplied will:
- be new and made with good quality materials and workmanship;
  - conform with the quality, quantity, description of any agreed samples provided and with any particulars stated in the order
  - conform to any specification or other document referred to in the order.
- 5.3 **Failure in quality.** If the goods fail to meet the above requirements or any of your warranties or our instructions, specifications, drawings and data, we may reject or refuse to accept the goods or return them at any time without liability. We may return the goods at your cost and you will immediately return any payments made by us on request in writing. Payment for any goods will not be deemed an acceptance of the goods, and you will refund any payments made by us on request.
- 5.4 **Verification.** We may verify at source that the goods conform to specifications and other requirements of the order. This verification will not absolve you from any responsibilities under the order, affect our right to reject the goods or be used by you as evidence of effective quality control.

### 6 The services

- 6.1 **Service levels.** You will provide the services according to the agreed service levels.
- 6.2 **Verification.** This agreement is subject to a positive outcome of our integrity check verification process, which may include us checking your references, visa status of non-citizen employees, qualifications, criminal record, and financial soundness.

### 7 Acceptance Procedure

- 7.1 **Agile development.** This acceptance procedure may be amended in an order, particularly where we are following an agile methodology.
- 7.2 **Commencement and initial period.** We will acceptance test any deliverable based on our reasonable methods and endeavour to complete these within ten business days of delivery, unless otherwise agreed in writing.

- 7.3 **Assistance.** You will help us to complete the acceptance tests on request and reasonable notice.
- 7.4 **Variations.** We will report in writing any variances in any deliverable from its specification.
- 7.5 **Correction.** You will correct any variance in any deliverable as soon as possible and at your own cost.
- 7.6 **Additional period for testing.** We will have an additional period (equal to the initial period above) to conduct acceptance tests on any corrected deliverable.
- 7.7 **Acceptance confirmation.** We may, at any time, confirm in writing that we have accepted the deliverables.

## 8 Change control

- 8.1 **Changes to goods or services.** During the currency of an order, events may occur which require a change to the nature and scope of goods or services. The parties will not implement a change unless they comply with this clause.
- 8.2 **Change request.** A party may propose a change to the nature and scope of goods or services by sending a scope change document to the other party detailing the desired changes.
- 8.3 **Scope change document.** If a scope change document is made by:
  - us, we will specify the reasons for that change and describe the change in sufficient detail to enable you to formulate a response. You will investigate the likely impact of any proposed changes on the provision of goods or services and will provide us with a scope change proposal, including amended pricing and timeframes; or
  - you, you will detail in a scope change proposal the reasons for and impact of the change, the goods or services required to implement the change and the effect that the changes, if implemented, will have on the relevant order.
- 8.4 **Sign-off.** The parties will discuss and agree the proposed changes and make the necessary amendments to our scope change proposal. We will then consider the scope change proposal and may approve or reject it in writing within three business days. If we:
  - accept a scope change proposal, a duly authorised representatives of the parties will sign off the scope change proposal and it will be incorporated into the relevant order; or
  - reject a scope change proposal, we will continue to provide the goods or services on the existing terms.
- 8.5 **No change effective until sign-off.** No party may proceed with any change to an order until the change and all matters relating to the change have been agreed in writing between the parties. Pending sign-off, the parties will continue to perform their obligations without taking account of the proposed changes. No party must agree to any change, but a party will not unreasonably delay or withhold their agreement to a proposed change.
- 8.6 **Exception.** Amendments to the content of the agreement that do not directly impact the nature and scope of the goods or services will not be subject to this change control procedure, but the parties will execute them in writing.

## 9 Personnel

- 9.1 **Access.** With effect from the signature date, we will allow you and your personnel access (at all reasonable times) to the sites strictly for the purposes of fulfilling its obligations under orders.
- 9.2 **After-hours access.** You must request after-hours access from us in writing prior to such access, to which we will not unreasonably withhold consent.
- 9.3 **Compliance with our or our customers' policies.** You will comply (and ensure that your personnel comply) with our (or our customers') policies, health and safety at work rules and regulations, especially when on site. Our policies are incorporated into the agreement by this reference. You can access them from us on request.
- 9.4 **Allocation of resources.** You may allocate and re-allocate all non key personnel who provide services under the agreement. You may not re-allocate key personnel without our prior written consent. When reallocating or replacing any personnel, you must ensure that any replacement must have substantially similar qualifications to the original appointment, and that the provision or continuity of the services is not prejudiced in any way. On request, you will immediately replace any of your personnel who are not performing the services to our satisfaction.

## 10 Non-solicitation

- 10.1 **Restriction.** Unless otherwise agreed, no party will, during the currency of any order or for a period of 12 calendar months following termination, directly or indirectly solicit, offer employment to, employ, or contract in any manner with any personnel of the other party who were involved in the implementation or execution of the order.
- 10.2 **Recruitment fee.** If a party whose personnel is recruited (affected party):
  - consents to any such employment, the recruiting party (recruiting party) will pay the affected party a recruitment fee equal to 50% of the gross annual package (including any quantifiable bonuses or incentives and annualised if necessary) paid by the affected party to the member of personnel concerned (gross package); or
  - does not consent to any such employment, the recruiting party will, on written demand from the affected party, pay the affected party a recruitment fee equal to 60% of the gross package of the personnel concerned.

## 11 Your obligations

- 11.1 **Tools of trade.** You will at your expense:
  - provide transport for yourself (and the personnel); and
  - provide your own tools of the trade required to render the services.
- 11.2 **Requests and directions.** You (and your personnel) will comply with all of our reasonable requests and directions.
- 11.3 **Time sheets.** On request, your personnel will complete daily time sheets, which accurately record work durations and activities.
- 11.4 **Progress reports.** You must provide us with regular progress reports outlining any changes in direction, priorities or progress with the services. The frequency of the reports will be dealt with in an order.

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11.5 **Unprotected action.** You and your personnel will not take part in (or in any conduct in contemplation or furtherance of) any unprotected “protest action” or a “strike”, as defined in section 213 of the Labour Relations Act 66 of 1995. You will not participate in nor assist, directly or indirectly, in any other form of unprotected coercive collective action or inaction intended to induce you to alter any of your terms or conditions of employment or working conditions.

## 12 Indemnity and Insurance

- 12.1 **Indemnity.** You indemnify and hold us harmless against any loss or damage that we or our customers may suffer as a consequence of:
- any goods or services provided by you under the agreement;
  - a breach of any your warranties in the agreement;
  - any claim by, or on behalf of SARS in respect of any Taxes or unemployment insurance and associated penalties or interest that SARS, or its delegate, may seek to recover from us in respect of any amounts paid to you under the agreement; and
  - any liability in terms of section 198(4) of the Labour Relations Act 66 of 1995.
- 12.2 **General Insurance.** To meet any liability under the agreement, you must, take out and maintain adequate insurance cover against liability with a reputable insurance company to be approved by us in writing. You will pay the insurance premiums. You will show us the policy of insurance, the premium receipt and the insurance certificate on request. You will remain liable to us for any loss or damage caused to us as a result of the provision of the goods or services by you under the agreement or a breach of any of your warranties, which is not recoverable from the insurer or which we suffer or incur as a result of no or insufficient insurance cover for any reason. The insurance cover will prohibit the substitution of another party without our or the insurer’s written consent.
- 12.3 **Employer’s liability insurance.** If the order requires that you send your personnel to our or our customers’ premises for any purpose in connection with the order, then notwithstanding any degree of technical supervision exercised by us or our customers or any instructions issued by us or our customers, such personnel will remain your personnel alone. It is accordingly an express condition of the order that you take out and maintain in force for our benefit and yourself full employer’s liability insurance in respect of such personnel. You must provide us with written evidence of such insurance at any time on request and must notify us in writing of any change in this insurance.
- 12.4 **Public liability, product liability and financial loss insurance cover.** You must take out and maintain insurance cover with reputable insurers for adequate public liability insurance, product liability insurance and financial loss insurance for any liabilities arising out the provision of any goods under an order.
- 12.5 **No surety.** Supplier is not required to furnish any surety against satisfactory completion of this subcontract.

## 13 Assignment and subcontracting

- 13.1 **No assignment.** No party may delegate its duties under this agreement or assign its rights under this agreement, in whole or in part. We may assign this agreement to any successor or purchaser of our business or some of our assets, in which case we will notify you of such assignment.
- 13.2 **Exception.** Despite this clause, we may cede and assign all rights and obligations under this agreement to a related person without your prior written consent, provided that we notify you within a reasonable time of the event occurring.
- 13.3 **Our third party contractors.** We may sub-contract or delegate our obligations under this agreement to third party contractors. We will remain liable for performance of the third party contractors. No one may require us to disclose the terms (including payment terms) of any sub-contract entered into with respect to our obligations under this agreement.
- 13.4 **Your third party contractors.** You remain liable for performance of any of your third party contractors.

## 14 Relationship

- 14.1 **No temporary employment service or partnership.** Nothing in this agreement will be construed as constituting a temporary employment service or as creating a partnership between the parties and no party will have any authority to incur any liability on behalf of the other or to pledge the credit of the other party.
- 14.2 **No employment relationship.** Each party enters into the agreement as an independent contractor. The agreement does not create any other relationship, including employment for any purpose, partnership, agency, trust or joint venture relationship.
- 14.3 **No employment benefits.** You acknowledge that because you are not an employee, you will not be entitled to any benefits ordinarily enjoyed by our employees. These benefits include annual leave, sick leave, family responsibility leave, bonuses, medical aid, pension fund or unemployment insurance.
- 14.4 **No employee legislation applicable.** You further acknowledge that because you are not an employee, labour legislation will not apply to you.

## 15 Appointments and governance

- 15.1 **Appointment of representative.** On the effective date, each party will appoint a suitably qualified and responsible person to act as their representative. If a party does not appoint a representative and that party is a natural person, then that party will be its own representative. Otherwise, the natural person that is ordinarily responsible for the day-to-day administration of that party will be its representative.
- 15.2 **Function.** The representative’s responsibilities include to manage and coordinate the goods or services and to discuss and manage any changes.
- 15.3 **Replacement.** A party may, on seven calendar days’ written notice to the other, appoint an alternative representative who is suitably qualified and responsible.

## 16 Fees and payment

- 16.1 **Due dates.** We will pay the fees on the due date in the currency specified in the order.
- 16.2 **Manner of payment.** We will make payment in the manner specified in this agreement.
- 16.3 **Tax.** All fees include (and you will pay) all tax and any unemployment insurance.

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- 16.4 **Deductions.** The taxes and unemployment insurance will be deducted from all fees within one week of signature of any order, unless you prove to us that you are an independent contractor. No inference of an employment relationship can be drawn from our obligation to deduct the taxes and unemployment insurance.
- 16.5 **Costs to implement.** Unless otherwise stated, the parties will bear their own costs to implement (or perform their obligations under) the agreement.
- 16.6 **Expenses.** The terms relating to expenses will be set out in the order.
- 16.7 **Withholding payment.** We may withhold payment of any amounts if we dispute that delivery has been affected.

## 17 Performance and good faith

The parties will cooperate with each other and at all times act in good faith towards each other in performing this agreement and any orders.

## 18 Intellectual property

- 18.1 **Existing material.** Each party will own its existing material.
- 18.2 **Deliverables.** All right, title, and ownership to or of any deliverables are the sole property of or will vest in us. All moral rights are reserved. The parties may expressly agree to the contrary in any order.
- 18.3 **Grant of rights.** You irrevocably:
- cede, assign, or transfer to us all its rights, title and interest in any copyright in all works that are or may become eligible for copyright arising directly or indirectly from or incidental to the services;
  - cede, assign and transfer to us all right, title and interest in and to all inventions (including methodologies and products) made within the course and scope of the services under this agreement;
  - grant to us the exclusive right to alter and adapt the work;
  - assign to us the rights conferred upon you as author by section 20(1) of the Copyright Act, 98 of 1978;
  - undertakes, when requested by us, to execute all instruments and to do all things as may be necessary to vest copyright and ownership of deliverables in us and if you fail to comply with any request by us within seven days, you irrevocably nominate, constitute and appoint us to be your agent, with power to sign all documents and do all other acts, matters and things as may be necessary to give due and proper effect to the terms of this clause; and
  - grant to us the exclusive right to alter and adapt the work.
- 18.4 **Use of your technology.** If we use any of your technology in connection with work we do for our customer, your technology will remain your property and we will not acquire any right or interest in it.
- 18.5 **Use of our technology.** If you use any of our technology in connection with your performance under an order, our technology will remain our property and you will not acquire any right or interest in it. If required, we may grant you a non-transferable, non-exclusive licence in writing to use our technology in connection with the deliverable as agreed in the relevant order.
- 18.6 **Licence.** We grant you a revocable, non-transferable and non-exclusive licence in respect of any intellectual property that may be needed to supply the services to us or our customers.
- 18.7 **Copying of deliverables.** You may only duplicate (or reproduce in any manner or form) a deliverable or make any adaptations or translations of a deliverable with our prior written consent, which may be withheld.
- 18.8 **Other rights.** Neither party will obtain any rights in the existing material or intellectual property of the other party that was not created in performing the agreement or existed before the commencement of the agreement, unless a licence is granted.
- 18.9 **Trademarks.** Our logo and sub-logos, marks, and trade names are our trademarks and no person may use them without permission. Any other trademark or trade name that may appear on our marketing material is the property of its respective owner.
- 18.10 **Prosecution.** All violations of proprietary rights or the agreement will be prosecuted to the fullest extent permissible under applicable law.

## 19 Intellectual property infringement

- 19.1 **No infringement of third party rights.** You warrant that no aspect of the services will infringe any patent, design, copyright, trade secret or other proprietary right of any third party.
- 19.2 **Defence.** You will defend us against any claims made by any third party that any services infringe its patent, design, copyright, or trade mark and will pay the amount of any resulting adverse final judgment (or settlement to which you consent). You will reimburse us with all costs incurred by us in connection with assisting you with the defence of the action immediately on demand (including attorneys fees on an attorney and own client basis). We will notify you of the claim in writing and you will have sole control over its defence or settlement.
- 19.3 **Consequences of successful claim by third parties.** If any third party succeeds in its claim for the infringement of any intellectual property rights, you may within 30 calendar days of the infringing item having been found to so infringe:
- obtain for us the right to continue using the infringing item or the parts that constitute the infringement; or
  - replace the infringing item or the parts that constitute the infringement with another product that does not infringe and that in all respects operates substantially in accordance with its specifications; or
  - alter the infringing item in a way as to render it non infringing while still in all respects operating substantially in accordance with its specifications; or
  - withdraw the infringing item and refund us all fees paid by us to you under the relevant order specifically with regard to the infringing item in the preceding 12 calendar month period.
- 19.4 **Survival.** This clause will survive termination of the agreement.

## 20 Confidential information

- 20.1 **Responsibility to keep information confidential.** Each party must keep confidential any information it receives from the other party or under this agreement.

- 20.2 **The receiving party's responsibilities.** The party that receives confidential information agrees to protect the interests of the party it is from, and will:
- only use it to comply with its responsibilities under this agreement;
  - only give the information to any of its employees or agents that need it, and only give as much of it as they need;
  - use reasonable security procedures to make sure employees or agents keep the information confidential;
  - get promises of confidentiality from those employees or agents who need access to the information;
  - not reveal the information to anyone else; and
  - not use it for any purpose other than this agreement.
- 20.3 **End of this agreement.** At the end of an agreement, the parties will give back to the other all originals and copies of confidential information of the other that they have. If the other agrees, they may destroy the confidential information they have.
- 20.4 **Exceptions.** These responsibilities will not apply to any information that:
- is lawfully in the public domain (available to the general public) when a party received it;
  - lawfully becomes part of the public domain afterwards;
  - is given to the receiving party afterwards by a different person who is allowed to reveal the confidential information; or
  - is given to comply with a court order or other legal duty.
- 20.5 **Indemnity.** You indemnify us against any loss or damage that we may suffer because of a breach of this clause by you or your employees or agents.
- 20.6 **Survival.** This clause about confidential information is separate from the rest of this agreement and remains valid for five years after the end of this agreement.

## 21 Our data and data protection compliance

- 21.1 **Legal obligations.** The parties are each responsible for complying with their respective obligations under applicable laws governing privacy and data protection. The parties both acknowledge that they are not investigating the steps the other is taking to comply with any applicable privacy and data protection laws.
- 21.2 **Use of Personal Information.** The manner in which you might use our (or our customers') personal information must be disclosed in your privacy policy, which must be given to us on request. If we are not satisfied with the level of your privacy you provide or if we disagree with anything in your privacy policy, we are entitled not to accept these terms and we may not use your services.
- 21.3 **Operator.** Where you process personal information for us (as our operator or data processor) you will do so in accordance with any specific terms that we may impose on you.
- 21.4 **Trans-border data flows.** You may not transfer any of our (or our customers') personal information or our data across a country border without our prior written consent.
- 21.5 **Indemnity.** You agree to indemnify, defend, and hold us (and our customers, those related to us, and our personnel) harmless from and against any claim, demand, loss, damage, cost, or liability (including legal costs) arising out of or relating to your failure to comply with your obligations under this clause. If permissible under applicable law, legal costs will be on an attorney and own client basis. In this clause "related" means natural and juristic persons who are connected to one another in the manner contemplated in applicable law.
- 21.6 **Access.** On a party's reasonable written request, the other party will provide the requesting party with the information that it has regarding our or our customers' data and its processing that is necessary to enable the requesting party to comply with its obligations under this clause and the applicable laws. The requesting party will reimburse the other party for its reasonable charges for its assistance.
- 21.7 **Preservation of integrity of our material.** Both parties will preserve the integrity of our material and prevent any unauthorised access, corruption or loss of our material.
- 21.8 **Return of data.** On termination of any order, each party will return to the other party in the form in which it was received all of the other party's data or information provided to the party for the purpose of the performance of the relevant order.

## 22 Limitation of liability

- 22.1 **Direct damages limited.** To the extent permitted by applicable law, regardless of the form (whether in contract, delict or any other legal theory) in which any legal action may be brought, our maximum liability for direct damages will be an amount equal to the total fees already paid (or due and payable) by us to you in respect of this agreement for the period six months preceding the claim. The aggregate amounts for all claims will not be greater than the maximum amount.
- 22.2 **Indirect damages excluded.** To the extent permitted by applicable law, in no event will a party be liable for any indirect, incidental, special or consequential damages or losses (whether foreseeable or unforeseeable) of any kind (including loss of profits, loss of goodwill, damages relating to lost or damaged data or software, loss of use, damages relating to downtime or costs of substitute products) arising from this agreement.
- 22.3 **This limitation of liability clause prevails.** To avoid all doubt, and despite the conflict provisions in clause 2.3 of these terms, no order can ever supersede the limitation of our liability and the exclusion of indirect damages in this clause.
- 22.4 **We are not liable for your default.** We will not be liable for any loss or damage suffered by you arising out of or in connection with any breach of the agreement by you or any act, misrepresentation, error or omission made by or on behalf of you or your personnel.
- 22.5 **Indemnity.** You agree to indemnify, defend and hold us (and our personnel) harmless against any and all:
- loss of or damage to any property or injury to or death of any person; and
  - loss, damage (including attorneys' fees on an attorney and own client basis), costs and expenses that we may suffer or incur arising directly or indirectly from: (i) any wilful misconduct or fraud by you or your personnel; or (ii) a breach by you of our proprietary or confidential information, or intellectual property.
- 22.6 **Liability.** Without limiting liability, neither party will be liable to the other for any loss that it may suffer as a result of theft, fraud, or other criminal act by a party or its personnel.
- 22.7 **Severability.** This clause is separate and divisible from the rest of this agreement and remains effective even if this agreement ends or is invalid.

## 23 Your warranties

### 23.1 **You warrant that:**

- you and your personnel will possess and have the right to use knowledge and expertise sufficient to enable us to provide the services;
- you will employ a sufficient number of suitably trained personnel to provide the services and to achieve the service levels; and
- you will provide the services in accordance with all applicable laws, enactments, and regulations.
- you and your personnel will not knowingly introduce any malicious software into our material or our systems.
- you have not been induced to enter into the agreement by any prior representations, warranties or guarantees (whether oral or in writing), except as expressly contained in the agreement;
- by entering into an order you are not acting in breach of any agreement to which you are a party;

**and you agree to indemnify, defend, and hold us harmless (and those related to us and our personnel, co-branders or other partners) from and against any claim for damages by any third party as a result of the breach of these warranties, including all legal costs. If permissible under applicable law, legal costs will be on an attorney and own client basis.**

23.2 **Equipment undertaking.** You acknowledge that any equipment that we (or our customer) may supply to you will remain our property. We reserve the right to claim for any damaged, lost or stolen equipment from you where, in our opinion, you were negligent and as a result the equipment was damaged, lost or stolen.

## 24 Non-competition and exclusivity

24.1 **Acknowledgement.** You acknowledge that:

- during the course of the agreement you will acquire knowledge of and be privy to our and our customers confidential information;
- during the course of the agreement you will be exposed to our customers; and
- the use or disclosure by you (or your personnel) of confidential information or the solicitation by you (or your personnel) of our customers could materially prejudice us (or our customers).
- you would not have had access to our customers without our intervention and that we are the sole cause of your engagement to provide services to our customers;
- this restraint was material in our decision to engage you and we would not have engaged you if you had not agreed to be bound by this restraint in its entirety;
- you fully understand the nature and effect of this restraint and that you have taken legal advice as its import and effect.

24.2 **Restraint necessary.** Accordingly, you acknowledge that these restraints are necessary to protect our proprietary and legitimate interests.

24.3 **Definitions.** For the purposes of this clause:

- **competitive activity** means any activity which is the same as, similar to or in competition with the project undertaken by us or you in terms of the agreement, specifically the development of software;
- **entity** includes any association, business, close corporation, company, concern, enterprise, firm, partnership, person, sole proprietorship, trust, undertaking, voluntary association or similar entity, whether corporate or incorporate;
- **restraint period** means the duration of the agreement and 60 months calculated from the termination of the agreement;
- **territory** means the whole world.

24.4 **Restraint.** To protect our interests, you and your personnel will not during the restraint period, directly or indirectly, in any capacity:

- be interested or engaged in or by any entity directly or indirectly engaged or interested in any competitive activity in the territory; or
- solicit the business of or provide goods or services that involve the competitive activity to anybody, without our written consent which may be withheld in our sole discretion.

24.5 **Further acknowledgements.** You acknowledge and agree that:

- the subject matter, restraint period and territory of the restraints (interpreted in their widest sense) are reasonable;
- the restraints impose separate, severable and independent restraints in respect of:
- each of the years falling within the restraint period;
- each state, province, division or council area, municipal area, magisterial district, town and locality falling within the territory;
- each activity falling within the ambit of a competitive activity; and
- each capacity in relation to the competitive activity which it is prohibited from undertaking.

24.6 **Widest interpretation.** The restraints will be given the widest possible interpretation and invalidity or unenforceability of any one or combination of restraints (including the restraints interpreted in their widest cumulative senses) will not affect the validity and enforceability of the other restraints or any combination of the restraints.

24.7 **Non-exclusivity for other services.** For clarity, the exclusivity and restraint relate only to services related to the competitive activity. You may undertake to perform other services for other entities provided by doing so you would not be in breach of the agreement.

## 25 Third party non-disclosure agreements

25.1 **Reciprocal agreements.** Our customers sometimes require that we sign non-disclosure agreements before starting a project. Before beginning any work on any project for us, you will sign a similar non-disclosure agreement between yourself and us. This entire clause is reciprocal, and we will sign any non-disclosure agreements you may require us to sign, and you have the same rights against us as we have against you.

25.2 **Deemed signature.** If you have not signed a non-disclosure agreement (or fail to do so) for a project, but we have entered into one with the client, you will be deemed to have signed the non-disclosure agreement and you irrevocably appoint us as your agent and give the authority to sign a non-disclosure agreement on your behalf.

25.3 **Indemnity.** You indemnify us against any loss or damage that we may suffer because of a breach of this clause by you or your employees or agents.

25.4 **Survival.** This clause is separate from the rest of this agreement and remains valid for five years after the end of this agreement.



## 26 General warranty

Both parties warrant that they have the legal right and full power and authority to execute and deliver, and to exercise their rights and perform their obligations under the agreement;

## 27 Occupational laws

- 27.1 **Compliance.** You will at all times comply fully with all applicable labour legislation and occupational laws, which includes you obtaining cover for all personnel of yours suffering bodily injury (including death) by accident or disease, which arises out of or in connection with the performance of the agreement by you. If you are unsure:
- which occupational laws (or any parts) apply; or
  - how to comply fully with all applicable occupational laws,
- you must notify us immediately in writing.
- 27.2 **Agreement.** Where context allows, the agreement between us (or employer as defined in the OHS Act) and you (or mandatory as defined in the OHS Act) in this clause constitutes the agreement in writing referred to in section 37(2) of the OHS Act.
- 27.3 **Indemnity.** You indemnify us and our personnel if you fail to effect and maintain a program of compliance with occupational laws and we:
- incur liability or fines; or
  - are required by law to provide benefits to or pay assessments in respect of you, your personnel (or their heirs or legal representatives).

## 28 Breach and termination

- 28.1 If a party:
- does not fix any breach of this agreement (failure to comply with it) within 14 days of receiving written notice from the other party to do so;
  - breaches this agreement materially twice or more in any six month period;
  - is insolvent (bankrupt), or has some legal disability, for example, if they are placed under administration;
  - takes steps to deregister itself (close down) or is deregistered;
  - makes any settlement or arrangement with its creditors; or
  - fails to pay a court order against it (does not satisfy a writ of execution) for more than one million rand, within 21 days;
- then the other party may, without prejudice to any of its rights:
- claim specific performance of this agreement (make the party comply with this agreement); or
  - immediately cancel this agreement in writing; and
  - claim damages from the other party, including any claim for any fees already due.
- 28.2 **Termination for convenience.** We may, in our discretion, terminate the agreement or a specific order, upon at least 30 days prior written notice to you.
- 28.3 **Termination for cancellation of main contract.** We may terminate this agreement and any related orders if our customer cancels the main contract with us (in respect of which you provide the goods or services), subject to any periods of notice required to be given in terms of the main contract.
- 28.4 **Summary termination of services.** We may terminate this agreement summarily at any time by giving written notice to you where we, in our sole discretion are:
- of the opinion that the services being rendered by you are of such a standard that they fail to meet our requirements; or
  - of the opinion that the services being provided by you have been provided in an unprofessional manner; or
  - of the opinion that your personnel have conducted themselves in an unprofessional manner; or
  - of the opinion that any action or inaction by you is damaging our good name and reputation.
- 28.5 **Severability.** This clause is separate and divisible from the rest of this agreement and remains effective even if this agreement ends or is invalid.

## 29 Effects of termination

- 29.1 **Duties on termination.** On termination, cancellation, or expiry of this agreement:
- you will stop providing the goods or services; and
  - each party will deliver to the other party, or at the other party's option destroy (and procure the delivery or destruction by third party contractors of) all originals and copies of confidential information and proprietary materials in its or their possession or under its or their control.
- 29.2 **Continuation of goods or services.** If you continue to provide the goods or services after expiry of this agreement with our knowledge and consent, this agreement will continue to apply as if this agreement had not expired, unless the parties agree otherwise.
- 29.3 **Transfer management.** If we terminate this agreement due to a material breach by you, or if either party has terminated this agreement on notice, you must provide assistance to us to enable us to effect a smooth non-disruptive transition to another contractor as we in our discretion may decide. To this end, you will for a period of 30 days from the date of termination specifically:
- make your personnel available to provide assistance, advice and guidance to the new service provider or us (or our customer) as the case may be;
  - provide, on an ad-hoc basis, the services that you were providing under the order until the new service provider or we (or our customer) are capable of performing the services.
- 29.4 **No expectation.** You acknowledge and confirm that no expectation has been created by anyone, by the agreement or any other agreement, entitling you or your personnel to expect:
- continued service for any period whether definite or indefinite;
  - the renewal or extension of the term of any agreement; or
  - the conclusion of any further agreements between us.

- 29.5 **Non dismissal.** Any expiry or termination of the agreement or any order, for any reason, will not be capable of being regarded as a “dismissal” as defined in the Labour Relations Act 66 of 1995 nor will you or any of your personnel be entitled to the payment of any remuneration or compensation of any nature, including redundancy or other compensatory payments.
- 29.6 **Survival.** The termination, cancellation, or expiry of this agreement will not affect the enforceability of the terms that are intended to operate after expiry or termination.

## 30 Resolving disputes

- 30.1 **Definitions.** For the purposes of this clause:
- 30.1.1 **AFSA** means the Arbitration Foundation of Southern Africa (or its successor or body nominated in writing by it in its place).
- 30.1.2 **LCIA** means the London Court of International Arbitration (or its successor or body nominated in writing by it in its place).
- 30.2 **Notifying each other.** Any dispute concerning this agreement (including interpretation and application) exists once a party notifies the other in writing, detailing the nature of the dispute and requesting that it be resolved as per this clause.
- 30.3 **Negotiation.** The parties will first try to resolve the dispute informally by email, phone or other methods.
- 30.4 **Conciliation.** If negotiation fails, we may refer the dispute to conciliation (talks in which an agreed neutral third party tries to help the parties agree on how to end the dispute).
- 30.5 **Arbitration. If conciliation fails the parties may** (including any appeal against the arbitrator’s decision) to arbitration (a hearing after which a neutral third party makes a binding decision about the dispute). If arbitration is with any entity of ours located:
  - in South Africa, we must refer the dispute within 15 days under AFSA’s latest rules for expedited arbitrations. The arbitration will be held in English in Johannesburg. The parties will agree and appoint one arbitrator. If the parties cannot agree on the arbitrator within 10 days after the referral, the secretariat of AFSA will appoint the arbitrator.
- 30.6 **Legal costs.** Any legal costs (attorneys and advocates fees and the costs of experts and witnesses) incurred by the parties in the arbitration will be recoverable on the attorney and own-client scale.
- 30.7 **Costs of arbitration.** The costs of the arbitration proceedings, including the fees of the arbitrator/arbitrators, will be borne equally between the parties, unless the arbitrator’s award provides otherwise.
- 30.8 **Agree otherwise in an order.** The parties may agree otherwise in an order.
- 30.9 **Periods.** The parties may agree in writing to change the periods for negotiation or mediation.
- 30.10 **Urgent interim relief.** This clause will not stop a party from applying to court for urgent interim relief (temporary help) while the dispute resolution process is being finalised. An example might be an interdict (type of court order).
- 30.11 **Severability.** This clause is separate and divisible from the rest of this agreement and remains effective even if this agreement ends or is invalid.

## 31 Notices and domicile

- 31.1 **Notices.** The parties will send all notices, authorisations, disclosures, acknowledgements, or requests by hand delivery, prepaid registered post, fax, or email to an address or number given in the relevant order.
- 31.2 **Service (delivery) address for legal documents.** Each party chooses its street addresses and numbers as its *domicilium citandi et executandi* (its address for the service of any document used in legal action) for this agreement.
- 31.3 **Change of addresses or numbers.** Each party may change the addresses or numbers in the specific terms to any other addresses or numbers by writing to the other party 14 days before the change.
- 31.4 **Deemed delivery.** Notice will be considered to be delivered on the date shown on any hand-delivered, prepaid registered post, courier, fax or email confirmation of delivery.
- 31.5 **Notice actually received.** If a party actually receives any notice or other communication, this will be good enough.

## 32 Force majeure

- 32.1 **Parties not liable.** No party is responsible for any breach of this agreement caused by circumstances beyond its control, including flood, fire, earthquake, war, tempest, hurricane, industrial action, government restrictions or ‘acts of God’.
- 32.2 **Party affected to notify other party.** If there is an event of force majeure, the party affected will tell the other immediately of:
  - the cause, nature and extent of the circumstances;
  - the expected duration of the circumstances; and
  - the extent to which its performance will be affected;
and they will meet within seven days to negotiate other ways to carry out any affected responsibilities under this agreement. The parties will continue to comply with the responsibilities that are not affected by the circumstances.
- 32.3 **Right to cancel.** If a party cannot fulfil a material (significant) part of its responsibilities under this agreement for more than 30 days because of force majeure, the other party may cancel this agreement, without liability to the affected party, on seven days’ written notice.

## 33 General

- 33.1 **Entire agreement.** The agreement is the entire agreement between the parties on the subject.
- 33.2 **Signed in part.** The agreement and orders may be signed in two or more counterparts, and the signed counterparts, taken together, will constitute a binding agreement between the parties.
- 33.3 **Changes to the terms.** No change to the terms is effective unless in writing and signed by both parties.
- 33.4 **Waiver (giving up of rights).** Any favour we may allow you will not affect or substitute any of our rights against you.

- 33.5 **Severability.** If any term is void (invalid), unenforceable, or illegal, the term may be severed (removed) from and will not affect the rest of this agreement if it does not change its purpose.
- 33.6 **Governing law.** South African law governs this agreement.
- 33.7 **Jurisdiction for our action.** You consent to the jurisdiction of the South African courts in respect of any action or proceedings we may bring against you in connection with this agreement, even if the action or proceedings would otherwise be beyond its jurisdiction, without prejudice to our right to institute any action in any other court having jurisdiction.
- 33.8 **Jurisdiction for your action.** If you bring an action to enforce any order entered into you must bring it in South Africa;
- 33.9 **Costs.** Each party is responsible for its own costs of drafting and negotiating this agreement.
- 33.10 **No right to reference.** Neither party may reference the other in any communications with third parties without the other party's prior written consent.
- 33.11 **Publicity.** A party will not make any announcement or statement to the press about this agreement, without first getting written permission from the other party.
- 33.12 **Acceptance of privacy notice.** By signing this agreement, you confirm that you have read, understood and agree to be bound by the terms of our privacy notice.
- 33.13 **Survival.** The termination, cancellation, or expiry of this agreement will not affect the enforceability of the terms that are intended to operate after expiry or termination.