

AGREEMENT FOR THE BUILD, OPERATE AND TRANSFER OF THE TSHWANE BROADBAND NETWORK (TBN) FOR THE CITY OF TSHWANE

entered into between

THE CITY OF TSHWANE

and

NEWSHELF 1327 PROPRIETARY LIMITED (IN THE PROCESS OF BEING RENAMED AS THOBELA TELECOMS (RF) PROPRIETARY LIMITED)

(Registration No. 2015/305488/07)

TABLE OF CONTENTS

Clause number and description	Page
1. DEFINITIONS.....	5
2. INTERPRETATION	14
3. BACKGROUND.....	15
4. CONDITIONS PRECEDENT.....	17
5. APPOINTMENT AND ACCEPTANCE	18
6. COMMENCEMENT AND DURATION	18
7. CONTRACT DOCUMENTS AND ORDER OF PRECEDENCE	18
8. STATUS OF TENDER DOCUMENTS	19
9. PERFORMANCE GUARANTEE	19
10. LICENCES	19
11. DESIGN OF THE NETWORK	21
12. CHANGES TO THE DESIGN	22
13. BUILD OF THE NETWORK.....	23
14. ACCEPTANCE OF THE NETWORK.....	24
15. PENALTIES	27
16. DEFECTS LIABILITY	27
17. BREAK-FIX OF FIBRE FROM THIRD PARTIES	28
18. OWNERSHIP AND TRANSFER OF THE NETWORK AND RISK.....	28
19. COMMERCIALISATION OF THE NETWORK	30
20. OPERATE SERVICES / MAINTENANCE SERVICES.....	32
21. ADDITIONAL SERVICES	33
22. SKILLS DEVELOPMENT, TRAINING AND COMMUNITY DEVELOPMENT	35
23. INNOVATION AND BEST PRACTICE	36
24. SERVICE PROVIDER WARRANTIES	36
25. GENERAL WARRANTIES.....	37
26. STAFF.....	38

27.	SUB-CONTRACTORS	38
28.	BLACK ECONOMIC EMPOWERMENT	39
29.	OTHER CONTRACTORS	39
30.	DATA BACKUP	40
31.	DATA SECURITY	41
32.	RESILIENCE, REDUNDANCY AND BUSINESS CONTINUITY	41
33.	INSURANCE	42
34.	COT APPROVED BUDGET	42
35.	INTELLECTUAL PROPERTY	43
36.	OBLIGATIONS OF COT	46
37.	INVOICE AND PAYMENT	50
38.	GOVERNANCE	52
39.	INFORMATION AND AUDIT ACCESS	53
40.	CONFIDENTIALITY	53
41.	LIMITATION OF LIABILITY	56
42.	BREACH	57
43.	NON-SOLICITATION	59
44.	CESSION AND ASSIGNMENT	59
45.	DELAYS	59
46.	FORCE MAJEURE	61
47.	EARLY TERMINATION	62
48.	FUNDERS' RIGHTS	64
49.	REPORTING	65
50.	CONTRACT MANAGEMENT	65
51.	DOMICILIA CITANDI ET EXECUTANDI	65
52.	GOVERNING LAW AND JURISDICTION	66
53.	RELATIONSHIP OF THE PARTIES	66
54.	CHANGES IN COT BUSINESS / LEGISLATION / INPUT COSTS / CPI	67
55.	INTEREST ON OVERDUE AMOUNTS	68
56.	SEVERABILITY	68
57.	GENERAL	68

58.	EXPERT DISPUTE RESOLUTION	69
59.	DISPUTE RESOLUTION AND ARBITRATION.....	71
60.	COUNTERPARTS	72
Annexure A	Infrastructure/network builds (network topology) inclusive architecture documents.....	74
Annexure B	The Existing Network	74
Annexure C	The Operate and Maintenance Services.....	74
Annexure D	Service Levels	74
Annexure E	Products and Services	74
Annexure F	Implementation Plan.....	74
Annexure G	Economic, Skills and Development plan	74
Annexure H	Training plan.....	74

PREAMBLE

This Agreement is made between:

The City of Tshwane, a municipality duly established by virtue of Notice 6766 of 1 October 2000 issued in terms of Section 12 (1) read with Section 14(2) of the Local Government Municipality Structures Act No 117 of 1998 as amended and published in Provincial Gazette extraordinary No. 141 of 10 October 2000, as amended by Notice No. 8698 of 2000 published in provincial Gazette extraordinary No 195 of 4 December 2000, herein represented by Mr Jason Ngobeni in his capacity as accounting officer;

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

and

Newsshelf 1327 Proprietary Limited (in the process of being renamed Thobela Telecoms (RF) Proprietary Limited), a company with limited liability duly incorporated under the laws of the Republic of South Africa under registration number 2015/305488/07, with its principle office at _____ herein represented by Tim Ellis in his capacity as a director of Newsshelf 1327 Proprietary Limited (in the process of being renamed Thobela Telecoms (RF) Proprietary Limited),

(hereinafter to be referred to as the "**Service Provider**").

PART A - INTRODUCTION

WHEREBY IT IS AGREED AS FOLLOWS:

1. DEFINITIONS

In this Agreement, unless the contrary is clearly indicated:

1.1. "**Acting as an Expert and not an Arbitrator**" means, in the context of any person determining any matter or dispute in terms of this Agreement, such person doing so on the following basis:

1.1.1. such person shall investigate the matter or dispute in such manner as he in his sole discretion considers appropriate, provided that each Party to the dispute shall have the right to make written representations to such person in relation to the matter or dispute;

1.1.1.1. in carrying out his investigations, such person shall be entitled to consult with any or all of the Parties, or with any other person and to take advice from any third party;

1.1.1.2. the determination of such person shall be final and binding on the Parties, save in instances of bias or manifest error;

- 1.1.1.3. the costs and charges (including but not limited to the attorney and own client costs) of such person shall be borne by that party which, in the sole discretion of such person, is the appropriate party to bear such costs and charges, provided that such person shall be entitled to direct that the costs and charges be borne by all or certain of the Parties, in such ratios as such person may determine;
- 1.2. "**Agreement**" means this Build, Operate and Transfer Agreement comprising these General Terms, the Tender Documents (but excluding any provisions of the Tender Documents which directly or indirectly impose obligations on the Service Provider (other than obligations required by legislation) which are contained in the Tender Documents but which are not contained in these General Terms), Addenda, Annexures, Purchase Orders, Change Orders and any other documents that may be incorporated into this Agreement as amended from time to time.
- 1.3. "**Addendum**" means a document that is used to record the details of any amendment to this Agreement;
- 1.4. "**Acceptance Criteria**" means:
 - 1.4.1. in relation to the Network, the criteria stated paragraph 4.2 in Annexure F against which the Network or a section of the Network will be tested in order to determine whether the Service Provider has met its obligations in terms of this Agreement with regard to the Build of the Network or that section;
 - 1.4.2. in relation to Deliverables, the criteria stated in the applicable Scope of Work against which the Deliverable will be tested in order to determine whether the Service Provider has met its obligations in terms of this Agreement with regard to the development of the Deliverable;
- 1.5. "**Acceptance Date**" means the date of acceptance by, or deemed acceptance by, COT of a section of or, where applicable, the whole Network as contemplated in clause 14;
- 1.6. "**Acceptance Tests**" means:
 - 1.6.1. in relation to the Network, the tests stated in Annexure F to be carried out on the Network or a section of the Network or such other tests as the Service Provider and COT may agree on in order to determine whether it meets its applicable Acceptance Criteria;
 - 1.6.2. in relation to Deliverables, the tests stated in the applicable Scope of Work to be carried out on the Deliverables or such other tests as the Service Provider and

COT may agree on in order to determine whether they meet their applicable Acceptance Criteria;

- 1.7. "**Acceptance Notice**" means a written notice issued by COT informing the Service Provider that it is satisfied with the results of the Acceptance Tests in respect of the Build of a section of or, where applicable, the whole Network in the form of that attached hereto as Annexure F;
- 1.8. "**Additional Services**" means any services not forming part of the Services at the Effective Date to be performed for COT by the Service Provider in connection with the Network;
- 1.9. "**Annexure**" means a document referred to in these General Terms as an Annexure;
- 1.10. "**Award Letter**" means the letter from COT to the Service Provider awarding it the Tender, as amended or supplemented;
- 1.11. "**Best Practices**" means a technique, methodology or practice that would be adopted by a Reasonable and Prudent Operator;
- 1.12. "**Build**" and "**Built**" means the complete supply and/or installation of the Network or a section of the Network as contemplated in Annexure F;
- 1.13. "**Business Day**" means any day except a Saturday, Sunday or official public holiday in South Africa;
- 1.14. "**Change Order**" means the document contemplated in clause 12;
- 1.15. "**Conditions Precedent**" means the conditions precedent set out in clause 4.1;
- 1.16. "**Confidential Information**" means all information or data of any nature whatsoever which the Receiving Party may obtain from the Disclosing Party and regardless of how such information is disclosed to the Receiving Party including, without limitation, orally, visually or by inspecting documentation, electronic data or other matter. The following is not Confidential Information:
 - 1.16.1. non-confidential information that is known to the Receiving Party prior to the date on which it is disclosed;
 - 1.16.2. information that is in the public domain prior to the date on which it is disclosed;
 - 1.16.3. information that enters the public domain subsequent to the date on which it is disclosed through no act or omission by the Receiving Party; and
 - 1.16.4. information that one Party authorises the other Party in writing to disclose;

- 1.17. "**Consumer Price Index**" means the CPI for all urban areas published by Statistics South Africa (which, from January 2009, replaced CPI for Historical Metropolitan and Other Urban Areas and CPIX published by Statistics South Africa) with the base year 2008 equalling 100 (one hundred), provided that in the event of the publication being discontinued, or of any change in the basis of computation of that index, an index prepared or recommended by a body which is independent from the Parties (selected by the Service Provider, acting reasonably) shall be adopted in the place of the Consumer Price Index;
- 1.18. "**COT**" has the meaning given to in the preamble of these General Terms;
- 1.19. "**COT Software**" means the COT Proprietary Software and all Third Party Software in respect of which COT is the licensee;
- 1.20. "**COT Proprietary Software**" means all software including any enhancement, modification and improvement thereof and related documentation, including software development and performance testing tools, which are owned by COT and which the Service Provider requires COT to provide to it in order to enable it to provide the Services;
- 1.21. "**CPEs**" means the customer premises equipment (referred to as a "CPE device" in Annexure A) contemplated in paragraph 1.3 of Annexure A;
- 1.22. "**Customer Edge Equipment (CEE)**" means the router located on COT's premises that provides the Ethernet interface between the COT's LAN and the relevant Network CPE;
- 1.23. "**Date of Signature**" means the date on which the last Party to do so in time signs this Agreement;
- 1.24. "**Defect**" means a material defect in a section of the Network which renders that section of the Network unfit for the purpose and use intended other than any defect that arises directly or indirectly as a result of and/or pursuant to or in connection with the Existing Network, or any section thereof (including, without limitation: any form of incompatibility between the Existing Network, or any section thereof, and the Network, or any section thereof; any failure to maintain the Existing Network, or any section thereof; and/or a design of the Existing Network, or any section thereof, which design in the Service Provider's opinion (acting reasonably) is incorrect);
- 1.25. "**Defects Notification Period**" means the period of 3 (three) months calculated from the date on which the relevant Defective section of the Network was accepted or deemed to have been accepted in terms of clause 14, during which COT may notify the Service Provider of a Defect;
- 1.26. "**Deliverable**" means a tangible or intangible item developed or procured by the Service Provider for delivery to COT, which is referred to as a Deliverable in a Scope of Work and

which, for the avoidance of doubt, does not form part of the Services or Equipment as at the Date of Signature;

- 1.27. "**Design**" means the approved design of the Network contained in Annexure A;
- 1.28. "**Direct Agreement**" means an agreement entered into or to be entered into between the COT, the Service Provider and the Funders, as contemplated in clause 48;
- 1.29. "**Disclosing Party**" means a Party or any person acting on behalf of that Party that discloses or provides Confidential Information to the Receiving Party under this Agreement;
- 1.30. "**Effective Date**" means the later of 29 February 2016 and the date upon which the Conditions Precedent are fulfilled or waived (as the case may be);
- 1.31. "**Encumbrance**" includes any mortgage bond, notarial bond, pledge, lien, hypothecation, assignment, cession in *securitatem debiti*, deposit by way of security or any other agreement or arrangement (whether conditional or not) which has or will have the effect of giving to one person a security interest in or preferential treatment in respect of another person's assets, but excludes statutory preferences, and "**Encumber**" shall be construed accordingly;
- 1.32. "**Equipment**" means any equipment or materials forming part of the Network but specifically excluding any fibre optic cable;
- 1.33. "**Existing Network**" means the existing fibre-optic broadband network described in Annexure B;
- 1.34. "**Expert**" means an Expert in the area under dispute appointed pursuant to the provisions of clause 58 below;
- 1.35. "**External Revenue**" means the revenue actually paid to the Service Provider from selling and providing services on the Network to External Third Parties in the immediately preceding financial year;
- 1.36. "**External Third Parties**" means any entity or person in the private sector and specifically excluding COT, MOEs and GOEs;
- 1.37. "**Funders**" means the party/ies providing funding to the Service Provider for the Build and operation of the Network;
- 1.38. "**Funding Agreement/s**" means the agreement/s entered into or to be entered into between the Service Provider and the Funders in terms of which, *inter alia*, the Funders will provide debt funding to the Service Provider for the Build and operation of the Network;

- 1.39. "**General Terms**" means this Agreement excluding Addenda, Annexures, the Tender Documents, Purchase Orders, Change Orders and any other document that may be incorporated into the Agreement;
- 1.40. "**GOE**" means any government and/or any entity that is directly or indirectly controlled by, under common control with or that control a government or a governmental entity. For purposes of this definition control includes direct or indirect ownership of or the right to exercise: (a) more than 50% (fifty percent) of the outstanding shares or securities entitled to vote for the election of directors or similar managing authority of the subject entity; or (b) more than 50% (fifty percent) of the voting rights held by the owners of the subject entity;
- 1.41. "**Integrate**", "**Integrated**" and "**Integration**" means bringing the relevant section of the terrestrial fibre optic cable of the Network to a point where it is capable of being connected to the Existing Network, however, the Service Provider shall not be required to make any changes and/or upgrades to the Existing Network (including, without limitation, changing or upgrading any space, power, cooling, reticulation and active or passive infrastructure of the Existing Network) in order for it to so be connected and if the Network cannot be connected to the Existing Network due to such changes and/or upgrades being required then the relevant section of the Network so affected by the Existing Network shall be interpreted under this Agreement as being fully available in all respects and COT shall not be able to withhold payment to the Service Provider of any amount under this Agreement as a direct or indirect result of such failure by COT change or upgrade the Existing Network. Without derogating from the foregoing, the Service Provider will, however, use its reasonable endeavours to ensure that its own human resources, as reasonably required under this Agreement, are provided in order to connect the Customer Edge Equipment (CEE) on the Existing Network provided that the aggregate amount of Customer Edge Equipment (CEE) on the Existing Network to be so connected shall not exceed that number of CPE ports available (as reflected in Annexure A) on the relevant CPE on the Network to be connected to the relevant section of the Existing Network and provided further that the Service Provider shall not be obliged to do so if: (a) COT's human resources, equipment, service providers and/or other resources that are reasonably required by the Service Provider in order to connect the Customer Edge Equipment (CEE) on the Existing Network are not available when the Service Provider requires; and/or (b) (in the opinion of the Service Provider, acting reasonably) the provision by it of such human resources may result in any delay of the Build and/or the provision of the Services under this Agreement and/or may result in it incurring any fees and/or costs in excess of those which it would have otherwise incurred had it not provided such human resources;
- 1.42. "**ICASA**" means the Independent Communications Authority of South Africa (or its successor body);

- 1.43. "**IRR**" means the internal rate of return of 24.95% (twenty four point nine five percent), which is the interest rate at which the net present value (NPV) of all cash flows (both positive and negative) from the investment to the shareholders of the Service Provider equal to zero;
- 1.44. "**Last Mile Operators**" means the entities that will provide services on the connectivity between the Network and the end-user where the end-user is not COT, GOEs or MOEs;
- 1.45. "**Laws**" means any statute, ordinance, judicial decision, executive order, regulation, common law, rule or by-law of any jurisdictions that are applicable to the relevant Party;
- 1.46. "**Losses**" mean all losses, damage/s, liabilities, costs, reasonable expenses, fines, penalties and claims;
- 1.47. "**Maintenance Services**" means the maintenance services set out in Annexure C;
- 1.48. "**Micro Enterprises**" means the micro enterprises (owned and managed as to at least 50.1% by underprivileged historically disadvantaged South Africans) within the Tshwane Metropolitan Area selected by the Service Provider in consultation with COT which meet the requirements set out in Annexure G, one such requirement being that such micro enterprise's gross annual turnover does not exceed R2,500,000.00 (two million five hundred thousand Rand). It being recorded and agreed that if a person (or a family member of such person, whether by blood or affinity), directly or indirectly, holds an interest in more than one such micro-enterprise then, for purposes of this Agreement, any such micro-enterprise shall only have met the requirements in Annexure G if the sum of each criterion contemplated in Annexure G is met in aggregate by all such micro-enterprises;
- 1.49. "**Minimum Threshold**" means 35 (thirty five) CPEs on the Network have been accepted, or are deemed to have been accepted, by the COT (as contemplated in clause 14);
- 1.50. "**MOE**" means any municipality and/or any municipal entities and any other entity that is directly or indirectly controlled by, under common control with or that control a municipality. For purposes of this definition control means direct or indirect ownership of or the right to exercise: (a) more than 50% (fifty percent) of the outstanding shares or securities entitled to vote for the election of directors or similar managing authority of the subject entity; or (b) more than 50% (fifty percent) of the voting rights held by the owners of the subject entity;
- 1.51. "**Network**" means the broadband network described in Annexure A to be Built and operated by the Service Provider in terms of this Agreement;
- 1.52. "**Offtake Amount**" means R244,000,000.00 (two hundred and forty-four million Rand) exclusive of VAT thereon;
- 1.53. "**Operate Services**" means the operate service set out in Annexure C;

- 1.54. "**Operational**" means a section of the Network which is capable of connectivity to the Existing Network and other user networks;
- 1.55. "**Parties**" means the parties to this Agreement, and a reference to "**Party**" is a reference to one of them as determined by the context;
- 1.56. "**Permitted Recipients**" means employees, directors, officers, professional advisors, agents, financiers and consultants of the Disclosing Party;
- 1.57. "**Physical Conditions**" means natural physical conditions and man-made and other physical obstructions and pollutants, which the Service Provider encounters at any Site in, on or around the Network when executing the civil engineering works and its other Services, including sub-surface, hydrological and climatic conditions;
- 1.58. "**Pass Through Profit Margin**" means the net profit after tax percentage as per the Service Provider's final financial model for the Funders in respect of the Funding provided to the Service Provider in terms of the Funding Agreement/s;
- 1.59. "**Prime Rate**" means the prime overdraft rate charged from time to time by the Service Provider's bankers to its corporate customers in the ordinary course, calculated on the basis of a 365 (three hundred and sixty five) day year and compounded monthly in arrears, as determined by any general manager of the aforesaid bank or his delegate, whose authority it shall not be necessary to prove;
- 1.60. "**Purchase Order**" means an order raised by COT requesting the Service Provider to supply, install and maintain Equipment signed by COT and the Service Provider;
- 1.61. "**Reasonable and Prudent Operator**" means a person seeking in good faith to perform its obligations and, in so doing and in the general conduct of its undertaking, exercising that degree of skill, diligence, prudence, responsibility and foresight which would reasonably and ordinarily be expected from an operator complying with all Laws, engaged in the same or a similar type of undertaking;
- 1.62. "**Receiving Party**" means the Party, or any person acting on behalf of that Party, that receives disclosure of any Confidential Information from the Disclosing Party under this Agreement;
- 1.63. "**Response Date**" means the date upon which the Service Provider issued its response to the request for proposal in respect of the tender;
- 1.64. "**Scope of Work**" means additional services containing the detail referred to in clause 21.1 and agreed in terms of clause 21.2;

- 1.65. "**Services**" mean collectively, the Network, the Operate Services and the Maintenance Services, but shall (for the avoidance of doubt) exclude Additional Services;
- 1.66. "**Service Levels**" means the quantitative and qualitative performance levels in respect of the Services which the Service Provider is required to achieve as stated in Annexure D;
- 1.67. "**Service Provider**" has the meaning given to it in the preamble of these General Terms;
- 1.68. "**Service Provider Proprietary Software**" means the software including any enhancement, modification and improvement thereof and related documentation, including software development and performance testing tools, which are owned by the Service Provider and which are used by the Service Provider to provide the Services;
- 1.69. "**Service Provider Software**" means the Service Provider Proprietary Software and the Third Party Software in respect of which the Service Provider is the licensee;
- 1.70. "**Sites**" means the sites referred to in Annexure A;
- 1.71. "**Staff**" means an employee or contractor of either Party and includes the employees and contractors of the Service Provider's sub-contractors;
- 1.72. "**Tender**" means tender number GICT01/2014/15 issued by COT for the build, operate and transfer of the Network;
- 1.73. "**Tender Documents**" means the Tender, the Award Letter and the Tender Response;
- 1.74. "**Tender Response**" means the response to the Tender by Altech Alcom Matomo (a division of Altech Radio Holdings Proprietary Limited) on behalf of the Service Provider;
- 1.75. "**Term**" means the period commencing on the Effective Date and ending on the earlier of:
 - 1.75.1. the 18th anniversary of the Effective Date; and
 - 1.75.2. the date upon which this Agreement is terminated or cancelled prior to the 18th anniversary of the Effective Date;
- 1.76. "**Third Party Software**" means the software including any enhancement, modification and improvement thereof and related documentation, including software development and performance testing tools, which is licensed by a Party from a third party which is required in respect of the Services;
- 1.77. "**Time for Completion**" means the end date (as updated, modified and/or extended from time to time in terms of this Agreement) by which the Build of the entire Network is to be completed as contemplated in Annexure F;

1.78. "**Unforeseeable**" means not reasonably foreseeable by the Service Provider as at the Response Date; and

1.79. "**VAT**" means value added tax chargeable under the Value Added Tax Act 89 of 1991 as amended.

2. **INTERPRETATION**

2.1. The table of contents in this Agreement is for convenience and reference only and may not be used in the interpretation of this Agreement.

2.2. In this Agreement, unless the contrary is clearly indicated:

2.2.1. reference to any gender includes the other genders;

2.2.2. reference to the singular includes the plural and vice versa;

2.2.3. reference to natural persons includes legal persons (incorporated or unincorporated) and vice versa;

2.2.4. any reference to an enactment is to that enactment as at the Date of Signature and as amended or re-enacted from time to time;

2.2.5. if any provision in a definition is a substantive provision conferring rights or imposing obligations on a Party then the same effect must be given to it as any other substantive provision in this Agreement notwithstanding that it is in the definition clause or used as a definition in any other clause of this Agreement;

2.2.6. any number of days that are prescribed must be reckoned exclusively of the first and inclusively of the last day unless the last day falls on a Saturday, Sunday or South African public holiday, in which case the last day is the next day which is not a Saturday, Sunday or South African public holiday;

2.2.7. if there is any conflict between figures referred to in numbers and in words then the reference in words must prevail;

2.2.8. if any term is defined within the context of any particular clause then the term so defined bears that defined meaning for all purposes in terms of this Agreement, notwithstanding that that term has not been defined in the definition clause, unless it is clear from the clause in question that the defined term applies to that clause only;

2.2.9. reference to a day, month or year is construed as a Gregorian calendar day, month or year;

2.2.10. expiry or termination of this Agreement does not affect any provision of this Agreement that expressly provides for its operation after expiry or termination of this Agreement or which of necessity must continue to have effect after expiry or termination of this Agreement, notwithstanding that the provision itself does not expressly provide for this;

2.2.11. the rule that an Agreement is interpreted against the party responsible for the drafting or preparation of the Agreement does not apply; and

2.2.12. should the Service Provider be liquidated or sequestrated then a reference in this Agreement to the Service Provider is also applicable to and binding upon the Service Provider's liquidator or trustee, as the case may be.

3. **BACKGROUND**

3.1. COT required a municipal broadband network and therefore issued the Tender.

3.2. Pursuant to the tender process, Altech Alcom Matomo (a division of Altech Radio Holdings Proprietary Limited), on behalf of the Service Provider (being the special purpose vehicle contemplated in the Tender Response), was awarded the Tender.

3.3. Pursuant to the Tender, it is envisaged that the Service Provider will use the Network to:

3.3.1. improve quality of life and empower residents;

3.3.2. prioritise delivery of Services to previously under-serviced areas and the Parties shall, from time to time, agree which Sites to prioritise;

3.3.3. promote job creation;

3.3.4. promote the development of small, medium and micro enterprises; and

3.3.5. provide discounted broadband services to Micro Enterprises;

3.3.6. enable the development and transfer of skills in the information, communication and technology sector.

3.4. Broadband impacts an area's economic output and GDP in multiple ways by:

3.4.1. enhancing the role of human capital through easier acquisition of knowledge and technical skills;

3.4.2. improving the efficiency and productivity of enterprises;

- 3.4.3. increasing community competitiveness by attracting knowledge-based businesses; and
 - 3.4.4. providing new and innovative technologies, services, applications and business models.
- 3.5. The COT acts as a driver of broadband demand and deployment by promoting and adopting the use of broadband in areas such as Government Services, Security, Tourism, Public Safety, Education, Agriculture, Teleworking and Healthcare.
- 3.6. In doing so, COT enables its constituents to have:
 - 3.6.1. more efficient service delivery;
 - 3.6.2. more reliable network capability;
 - 3.6.3. increased network & internet speed;
 - 3.6.4. enhanced triple play features;
 - 3.6.5. better E learning and E health service infrastructure; and
 - 3.6.6. improved network availability.
- 3.7. The Tender Response included the following companies Bona Electronic Solution Proprietary Limited, Huawei Technologies Africa Proprietary Limited, Vox Telecommunications Proprietary Limited, Fleetcall Proprietary Limited, Cloudseed Proprietary Limited, New GX Capital Holdings Proprietary Limited and Ulwembu La Se Kasi Holdings Proprietary Limited as partners and intended sub-contractors, subject to agreement with such sub-contractors.
- 3.8. This Agreement governs the terms under which the Network will be Built and operated by the Service Provider and the terms on which the Services will be provided to COT. The Network will provide COT with a cost effective solution with represents value for money as at the Date of Signature.
- 3.9. The Service Provider will obtain project finance for the Build phase of the Network and the Parties have entered into this Agreement on the basis that, as contemplated in clause 37 once the Minimum Threshold is achieved, then COT shall make payment to the Service Provider on the basis set out in this Agreement and COT hereby represents that it will, and undertakes to, comply with all of its obligations in this Agreement.
- 3.10. Pursuant to section 116 of the Municipal Finance Management Act, 2003 ("**MFMA**"), this Agreement shall be subject to a review once every 3 (three) years, calculated with effect from

the Effective Date, provided that any changes pursuant to such review shall be agreed in writing by both Parties.

4. **CONDITIONS PRECEDENT**

4.1. The whole of this Agreement, save for the provisions of clause 1, clause 2, this clause 4, clauses 6 to 8 (both inclusive), clause 25, clauses 40 to 44 (both inclusive), clause 47, clause 48, clauses 51 to 53 (both inclusive) and clauses 56 to 60 (both inclusive) which shall be of immediate force and effect on the Date of Signature, is subject to the following conditions precedent, that by not later than:

4.1.1. 31 March 2016 (or such extended time period as may be agreed in writing by the Parties in accordance with the provisions of clause 4.5):

4.1.1.1. the Service Provider has concluded the Funding Agreements, pursuant to which it has obtained all third party funding for the Build, operate and transfer of the Network, on terms and conditions acceptable to the Service Provider and the Service Provider has confirmed to COT in writing that it has obtained such funding;

4.1.1.2. COT, the Service Provider and the Funders have entered into the Direct Agreement on terms and conditions acceptable to the Service Provider; and

4.1.1.3. COT has provided written proof (satisfactory to the Service Provider, acting reasonably) to the Service Provider that a total of the Offtake Amount has been allocated in its approved budget to the project contemplated in this Agreement

4.1.2. 31 March 2016 (or such extended time period as may be agreed in writing by the Parties in accordance with the provisions of clause 4.5) the approval of this Agreement and the transactions contemplated by it in terms of section 33 of the Municipal Finance Management Act, 2003.

4.2. Forthwith after the Date of Signature, the Parties shall use their respective reasonable endeavours and co-operate in good faith to procure the fulfilment of the Conditions Precedent, to the extent that it is within their power to do so, as expeditiously as reasonably possible.

4.3. The Conditions Precedent contained in clause 4.1.1 have been inserted for the benefit of the Service Provider who will be entitled to waive fulfilment of such Condition Precedent (in whole or in part) by written notice to the COT by not later than the date set out in clause 4.1.1 (or

such extended time period as may the Service Provider may have notified the COT of in writing as pursuant to clause 4.1.1).

4.4. The Condition Precedent contained in clause 4.1.2 is a legislative requirement which may not be waived by the Parties.

4.5. Unless the Conditions Precedent have been fulfilled or (where applicable) waived by not later than the relevant dates for fulfilment thereof set out in clause 4.1.1 (or such later date or dates as the Parties may agree in writing on or before the relevant date/s by which they are required to be fulfilled), the provisions of this Agreement save for clause 1, clause 2, this clause 4, clauses 6 to 8 (both inclusive), clause 25, clauses 40 to 44 (both inclusive), clause 47, clause 48, clauses 51 to 53 (both inclusive) and clauses 56 to 60 (both inclusive) which will remain of full force and effect, will never become of any force or effect and the status quo ante will be restored as near as may be possible and none of the Parties will have any claim against any other in terms hereof or arising from the failure of the Conditions Precedent, save for any claims arising from a breach of clause 4.2 and/or any prior breach of any of the provisions of this Agreement which became effective prior to the Date of Signature.

5. **APPOINTMENT AND ACCEPTANCE**

The Service Provider is appointed to build the Network and to provide the Operate Services, Additional Services and Maintenance Services to COT and the Service Provider accepts the appointment upon the provisions of this Agreement and shall subject to the terms and conditions of this Agreement provide the relevant Services at least in accordance with the relevant Service Levels applicable to the relevant Services.

6. **COMMENCEMENT AND DURATION**

This Agreement, save for the provisions of clause 1, clause 2, clause 4, clauses 6 to 8 (both inclusive), clause 25, clauses 40 to 44 (both inclusive), clause 47, clause 48, clauses 51 to 53 (both inclusive) and clauses 56 to 60 (both inclusive) which shall be of immediate force and effect on the Date of Signature, commences on the Effective Date and, subject to clauses 42 and 45, endures for the Term.

7. **CONTRACT DOCUMENTS AND ORDER OF PRECEDENCE**

7.1. This Agreement consists of the following documents as amended from time to time as provided herein:

7.1.1. these General Terms;

7.1.2. Tender Documents; and

7.1.3. the Annexures.

7.2. In the case of any inconsistency, ambiguity or conflict between these General Terms and the Annexures, the provisions of these General Terms shall prevail over the provisions of the Annexures and, accordingly, the order of precedence of interpretation shall be:

7.2.1. these General Terms;

7.2.2. the Annexures.

7.3. In the event of a conflict between any of the Annexures, the Annexure having greatest focus on the matter in question shall have precedence.

7.4. If there is any conflict between:

7.4.1. these General Terms and the Tender Documents then these General Terms shall prevail;

7.4.2. the Annexures and the Tender Documents then the Annexures shall prevail.

8. **STATUS OF TENDER DOCUMENTS**

These General Terms arise pursuant to the Tender Documents and supersedes such documents; however, this Agreement shall never be interpreted in any manner which is contrary to the applicable supply chain legislative framework and the processes contemplated therein and no Party shall have any claims of any nature whatsoever against the other pursuant to any obligations imposed directly or indirectly on the Service Provider (other than obligations required by legislation) which are contained in the Tender Documents but which are not contained in these General Terms.

9. **PERFORMANCE GUARANTEE**

The Service Provider undertakes to procure that the sub-contractor responsible for the Build of the Network shall, in accordance with the engineering, procurement and construction agreement, provide a performance guarantee to the Funders in respect of the Build and the Service Provider will, within 5 (five) Business Days of being requested to do so in writing by COT, provide COT with proof (satisfactory to COT acting reasonably) that such performance guarantee is in place.

10. **LICENCES**

10.1. To the extent legally required in order to provide the relevant Services, the Service Provider shall use COT's Electronic Communications Network Licence and Electronic Communications Network Service Licence and COT shall do all such things as are required in order to enable the Service Provider to do so. Notwithstanding the foregoing, the Service Provider shall, to the extent legally possible: obtain its own Electronic Communications Network Licence and

Electronic Communications Network Service Licence in respect of the Services in the name of the Service Provider within 24 (twenty four) months of the Effective Date; and ensure that same is valid throughout the contract term. If COT's Electronic Communications Network Licence and/or Electronic Communications Network Service Licence are amended or revoked by ICASA then the Parties shall forthwith do all things within their reasonable power to ensure that a valid Electronic Communications Network Licence and/or Electronic Communications Network Service Licence (as the case may be) is obtained which will enable the Service Provider to render the Services.

- 10.2. In the event that an Application Protocol Interface (API) is required by the Service Provider and/or any of its sub-contractors in connection with this Agreement, then the COT shall at its own costs: (a) obtain all licences in respect of such Application Protocol Interface (API); (b) ensure that such licences permit COT to sub-license same to the Service Provider and its sub-contractors; and (c) sub-license all licences in respect of such Application Protocol Interface (API) to the Service Provider (or its sub-contractors, if the Service Provider requires same to be sub-licensed to its sub-contractors) as and when the Service Provider require in connection with this Agreement and the Services.
- 10.3. In the event that the Service Provider and/or any of its sub-contractors require any software licences (save in respect of the Services, which for the avoidance of doubt shall be at the cost of the Service Provider) in connection with this Agreement ("**Software Licences**"), then the COT shall at its own costs obtain such Software Licences. COT warrants that all such Software Licences shall permit the Service Provider and any of its sub-contractors to use the licenced software as and when they require in connection with this Agreement and the Services.
- 10.4. The Service Provider shall, in consultation with the COT, decide as to how the savings which the Service Provider has benefited from by making use of the COT's Electronic Communications Network Licence and Electronic Communications Network Service Licence will be used, by the Service Provider in accordance with Annexure G
- 10.5. COT acknowledges that the Software Licences are essential for the Service Provider to install and operate the operating system required in terms of this Agreement. Failure by COT to comply with this clause 10 shall, without prejudice to any other claims that the Service Provider may have against COT under this Agreement, exempt the Service Provider from incurring any penalties or any Losses, costs and expenses of any nature whatsoever in terms of this Agreement arising from the delay and an equal extension of time will be granted to the Service Provider for the applicable Services, provided that the Service Provider uses its reasonable endeavours to avoid or minimise the delay. If COT fails to comply with its obligations under this clause 10 and as a direct or indirect result thereof the Service Provider suffers or incurs any Losses of any nature whatsoever then the COT hereby indemnifies the Service Provider for all such Losses.

PART B – DESIGN-BUILD PHASE

11. DESIGN OF THE NETWORK

- 11.1. The Service Provider has designed and will, subject to the terms of this Agreement, Build the Network in accordance with, and the Network will have the characteristics stated in, Annexure A.
- 11.2. The Service Provider undertakes that:
 - 11.2.1. it has made all investigations and procured all information necessary and has applied its experience and judgement to design the Network, subject to the terms of this Agreement and the provision that this undertaking does not apply to relevant information in the possession of COT of which the Service Provider was not, and could not reasonably have been, aware;
 - 11.2.2. the Network will, subject to the terms of this Agreement, comply with the Tender save to the extent that in the judgment of the Service Provider, a variation approved by COT as contemplated in clause 12, is in the best interests of COT.
- 11.3. It is recorded and agreed that COT owns the Existing Network.
- 11.4. COT may (at COT's cost) instruct a service provider that is independent from both COT and the Service Provider (which independent service provider must be acceptable to both Parties acting reasonably) to perform an audit on the Existing Network and the Service Provider may participate in such audit and verify the audit findings. The aforesaid audit and the participation therein and/or the verification thereof by the service provider shall not absolve COT from any of its obligations under this Agreement. If the Service Provider agrees to make any changes and/or upgrades to the Existing Network (including, without limitation, changing or upgrading any space, power, cooling, reticulation and active or passive infrastructure of the Existing Network), there being no obligation upon the Service Provider to agree to do so, in order to Integrate the Existing Network with the Network then such services shall constitute Additional Services.
- 11.5. Subject to clause 11.6 and subject to the Service Provider being satisfied with the results of the audit contemplated in clause 11.4, the Service Provider shall Integrate the Existing Network with the Network.
- 11.6. Nothing in this Agreement is intended to affect title to the Existing Network. Notwithstanding the Service Provider's obligations hereunder to the extent that the Service Provider is required

to utilise or rely on the Existing Network then COT remains solely responsible, at its cost, to maintain the Existing Network and make any necessary investment in the Existing Network (including, without limitation, that COT shall do all such things, at its cost, as are necessary to ensure that the Service Provider is able, at no cost to the Service Provider, to integrate the Network with the Existing Network) and all services required in relation thereto in order to ensure that the Service Provider can meet its obligations under this Agreement and any other agreements entered into between COT and the Service Provider and/or its' sub-contractors, in any manner whatsoever, related to (or relevant to) the Services, the Network and/or the Equipment. If COT fails to comply with its obligations under this clause 11.6 and as a direct or indirect result thereof the Service Provider suffers or incurs: (a) any Losses of any nature whatsoever then the COT hereby indemnifies the Service Provider for all such Losses; (b) any delay in performing the Services and/or the Build hereunder then: (i) the Service Provider shall (for purposes of this Agreement) have discharged its obligations in full under this Agreement and the relevant section of the Network so affected by the Existing Network shall be interpreted under this Agreement as being fully available in all respects and COT shall not be able to withhold payment to the Service Provider of any amount under this Agreement as a direct or indirect result of such failure by COT change or upgrade the Existing Network; and (ii) notwithstanding anything to the contrary contained herein, for so long as COT is in breach of this clause 11.6, the Service Provider shall not be liable under this Agreement for failure to perform its obligations in respect of the relevant Services or section of the Build affected thereby and the Service Provider shall be entitled to additional time required by it for completion as a result of any such delay.

- 11.7. The Service Provider shall provide its project plan for each phase to the COT for sign-off prior to the time that the wayleaves or other right of way is approved to enable COT to ensure that the existing network infrastructure is ready for integration and connectivity to occur.

12. **CHANGES TO THE DESIGN**

- 12.1. Either Party may propose change to the Design. If requested by COT, the Service Provider will present a Change Order containing:
- 12.1.1. a description of the change;
 - 12.1.2. the impact of the change on pricing of the Build;
 - 12.1.3. the impact on timelines of the change or request, as applicable; and
 - 12.1.4. any other matters relevant to the change or request, as applicable.
- 12.2. The Service Provider will be entitled to charge a reasonable fee for (and COT shall, on demand by the Service Provider, reimburse the Service Provider for any costs incurred by the Service

Provider in) preparing: any Change Order; any amended Change Order contemplated in clause 12.4, and/or any amended Design which is not as a direct result of the Service Provider's negligence.

- 12.3. If COT approves the Change Order, it must be signed by COT's duly authorised representative. After signature of the Change Order, the Service Provider will prepare an amended Design and submit it to COT for approval. COT must inform the Service Provider in writing within 10 (ten) Business Days after the Service Provider has delivered same to it as to whether it accepts the amended Design. COT shall be deemed to have accepted the amended Design if it fails to inform the Service Provider that it does not accept the amended Design within the aforesaid 10 (ten) Business Day period. The time period within which the Service Provider is obliged to perform its obligations under this Agreement shall be extended for a period of time equal to the aggregate of: the period of time that COT takes to revert to it in writing as to whether it accepts the amended Design; the period of time that it takes for the Service Provider to prepare Change Orders and amended Change Orders; and the period of time that it takes that Service Provider to prepare an amended Design.
- 12.4. If, within the aforesaid 10 (ten) Business Day period contemplated in clause 12.3, COT informs the Service Provider that it does not accept the amended Design , COT must provide written reasons in sufficient detail to enable the Service Provider to understand the reasons for rejection and how the amended Design must be further amended so as to be accepted by COT – the Service Provider shall as soon as is reasonably possible thereafter amend the Change Order accordingly and deliver such amended Change Order to COT and the provisions of 12.3 shall apply in respect of such amended Change Order.
- 12.5. The signed Change Order and amended Design will be written variations to this Agreement in terms of clause 57.2 and the Service Provider will proceed with execution of the changes.

13. **BUILD OF THE NETWORK**

- 13.1. Subject to these General Terms, the Network will be Built in accordance with Annexure A. The Parties shall, from time to time, agree which sites to prioritise.
- 13.2. If the Service Provider becomes aware that it will not be able to comply, in a material respect, with the time to complete a section of the Network and such failure to comply will have a negative impact of a material nature then the Service Provider must notify COT thereof in writing, stating:
 - 13.2.1. the reasons for the delay; and
 - 13.2.2. the anticipated date upon which the deadline will be met.

- 13.3. To the extent that a change to the Design in terms of clause 13 includes a change to the Build of the Network, Annexure F will be deemed to have been amended to that extent.
- 13.4. To the extent that any delay during the Build is the result of circumstances beyond the reasonable control of the Service Provider, and such delay negatively impacts on the Service Provider's ability to achieve the time for completion of a section of the Network it shall be relieved of the obligation to comply with the timetable for the Build (including the Time for Completion) shall be adjusted to take account of any delay that cannot reasonably be made up without additional costs.
- 13.5. To the extent that a delay in the Build is the result of factors within the Service Provider's reasonable control and provided that no breach by COT of any of the provisions of this Agreement contributed to such delay, if the Service Provider is unable to make up the delay within a reasonable time (which shall mean that the entire Network is delivered on the Time for Completion) and the Service Provider fails to achieve the Time for Completion of the entire Network, the Service Provider shall become liable for the penalties in accordance with clause 15.

14. **ACCEPTANCE OF THE NETWORK**

- 14.1. The Network will be built in sections in accordance with the Design.
- 14.2. Upon completion of the Build of a section of or, where applicable, the whole Network, the Service Provider shall conduct Acceptance Tests in accordance with the acceptance test plan described in Annexure F ("**ATP**"). In order to pass the Acceptance Tests, the relevant section of the Network shall meet the Acceptance Criteria applicable to it as specified in Annexure F.
- 14.3. The Service Provider shall provide the COT with written notice no earlier than 14 (fourteen) days prior to any scheduled Acceptance Test, that such Acceptance Test shall be taking place. COT shall have the right, at its sole expense appoint an independent certifier to certify that the tests conducted by the Service Provider as a part of the ATP meet the acceptance criteria (which independent certifier shall, without obstructing the tests, participate and have access to all aspects of the tests including data and results). Within 10 (ten) days of the conclusion of the Acceptance Tests, the Service Provider shall provide COT with certified test results in accordance with the ATP. If COT does not have independent certifiers present at the time the Service Provider conducts the Acceptance Tests, the results of the tests conducted thereunder as certified by the Service Provider to COT shall be deemed valid and binding upon COT and that part of the Network built or relevant Section (as applicable) shall be deemed unconditionally accepted by COT upon receipt of the test results certifying that the Acceptance Criteria have been met and COT shall provide an Acceptance Notice within 10 (ten) days of receipt of such certified test results. If the written Acceptance Notice is not so

provided then that section of or, where applicable, the whole Network to which the Acceptance Tests relate shall be deemed to have been unconditionally accepted by COT.

- 14.4. If COT has participants present to witness the acceptance test COT and the Service Provider shall then jointly evaluate the measured results of the tests section by section. If the measured test results meet the Acceptance Criteria, then and in such event, COT shall unconditionally accept the test results for that section of or, where applicable, the whole Network to which the Acceptance Tests relate and provide with a written Acceptance Notice within 10 (ten) days of receipt of such certified test results or if COT does not provide the aforesaid Acceptance Notice within the aforesaid 10 (ten) day period then it shall be deemed to have unconditionally accepted the test results and to have provided the aforesaid Acceptance Notice.
- 14.5. If the measured test results do not meet the Acceptance Criteria, then within 10 (ten) days of the certified results being delivered by the Service Provider to COT, COT shall notify the Service Provider in writing that such results are unacceptable and shall specify in reasonable detail: (a) the relevant section/s of the Network that do not meet the Acceptance Criteria; and (b) reasons why COT believes that the relevant section/s of the Network that do not meet the Acceptance Criteria. Thereupon, the Service Provider shall take such reasonable action as shall be necessary to bring the operating standards of the unacceptable section/s of the Network within the Acceptance Criteria. If the Service Provider has not completed corrective action and brought the operating standards of such section/s of the Network within the Acceptance Criteria as soon as reasonably possible after and in any event within 60 (sixty) days of receipt by it of the aforesaid written notice from COT contemplated in clause 14.3, COT shall subsequently, on 10 (ten) days prior written notice to the Service Provider, be entitled to request the appointment of a suitably qualified and independent contractor with no vested interest in the project to assist the Service Provider to effect any corrective action necessary to bring the operating standards of the relevant section/s of the Network that do not meet the Acceptance Criteria within the Acceptance Criteria, in which event the Service Provider shall reimburse COT for any all mutually agreed, reasonable direct costs expended by COT therefore. Upon completion of corrective action by the Service Provider, or (if applicable) a suitably qualified and independent contractor, COT shall provide the Service Provider with an Acceptance Notice within 10 (ten) days of completion of such corrective action or if COT does not provide the aforesaid Acceptance Notice within the aforesaid 10 (ten) day period then it shall be deemed to have unconditionally accepted the test results and to have provided the aforesaid Acceptance Notice.
- 14.6. Subject to clause 14.7, if:

- 14.6.1. COT fails to provide the Acceptance Notice within the relevant time period set out in this clause 14 for it to do so and is consequently deemed to have to have unconditionally accepted the test results and to have provided the aforesaid Acceptance Notice of a section of or, where applicable, the whole Network then the date upon which COT is deemed to have issued the Acceptance Notice shall be deemed to be the last day upon which COT was entitled to issue the Acceptance Notice; or
 - 14.6.2. COT provides the Acceptance Notice within the relevant time period set out in this clause 14 but fails to date such Acceptance Notice, then COT shall be deemed to have dated such Acceptance Notice as the earlier of the date upon which: (a) the Service Provider receives such Acceptance Notice; or (b) the last day upon which COT is entitled to issue the Acceptance Notice.
- 14.7. If: (a) COT requires a section of Network to be used before an Acceptance Notice has been issued for such section; and/or (b) COT directly or indirectly causes any delay, or a delay is caused by any matter which is within the reasonable control of COT, which delay prevents the Service Provider from commencing Acceptance Tests in respect of the relevant section of the Network and/or the relevant Services, then:
 - 14.7.1. if clause 14.7(a) is applicable, COT shall be deemed to have: (a) unconditionally accepted such section of the Network in the state in which it is in upon the date on which it requires such section to be used (regardless of whether any acceptance testing has taken place in respect thereof); and (b) provided an Acceptance Notice in respect of such section of the Network;
 - 14.7.2. if clause 14.7(b) is applicable, COT shall be deemed to have: (a) unconditionally accepted such section of the Network and/or the relevant Services on the date on which the Service Provider would have commenced Acceptance Test in respect thereof but for the delay contemplated in clause 14.7(b) (regardless of whether any acceptance testing has taken place in respect thereof); and (b) provided an Acceptance Notice in respect of such section of the Network and/or the relevant Services; and
 - 14.7.3. if so requested by the Service Provider COT shall issue an Acceptance Notice for such section of the Network.

14.8. Upon acceptance by, or deemed acceptance by, COT of a section of or, where applicable, the whole Network as contemplated in this clause 14 the relevant section of or, where applicable, the whole Network shall be deemed to have been installed by the Service Provider in accordance with the Acceptance Criteria, and the Service Provider shall have no further liability to COT in respect of the Build thereof.

14.9. COT will be responsible for migrating its users and the services they use onto the Network however the Service Provider will cooperate fully as necessary with other providers of services to COT on the Network in respect of the migration.

15. **PENALTIES**

15.1. For any delay for which the Service Provider becomes liable in terms of clause 13.5 the Service Provider shall subject to clause 15.4 pay to COT a penalty, for every 30 day period which shall elapse between the Time for Completion and the Acceptance Date of the last section of the Network. The penalty shall be the direct damages actually suffered by COT as a result of such delay provided that the aggregate penalties in any particular year shall not exceed 1% (one percent) of the amount of fees actually received by the Service Provider from COT in the 12 (twelve) month period preceding the Time for Completion.

15.2. These penalties shall be the only damages due from the Service Provider for such default.

15.3. The Parties agree that the aforesaid penalty is reasonable and is a genuine estimate of the damages which COT is likely to suffer in the event of a delay.

15.4. If COT is entitled to and wishes to claim the penalties described in this clause, then it shall give the Service Provider written notice indicating the amount of the penalties payable, the reasons why it considers penalties are payable and attaching to it proof satisfactory to the Service Provider (acting reasonably) of the direct damages suffered by it as a result of such delay ("**COT's Notice**"). The Service Provider shall pay the penalties to COT within 30 (thirty) days of the date of receipt of COT's Notice which notice shall be accompanied by a valid tax invoice.

16. **DEFECTS LIABILITY**

16.1. The Equipment, sub-contractors and Staff of the Service Provider must be to the standards described in this Agreement and the Service Provider must carry out the Build with reasonable skill and care, using the good quality materials and products set out in Annexure A. Accordingly, if during the Defects Notification Period, a Defect occurs on a section of the Network and the COT has within the Defects Notification Period furnished the Service Provider with a written notice of such Defect and proof satisfactory to the Service Provider (acting reasonably) of such Defect, then the Service Provider shall execute all work required to search

for the cause of such Defect and remedy such Defect as soon as reasonably possible thereafter but not exceeding 90 (ninety) days, provided that the Service Provider does not experience circumstances beyond its reasonable control, in which case this time period will be extended.

16.2. All work referred to in clause 16.1 shall be executed at the cost of the Service Provider, unless that the work is attributable to:

16.2.1. any defect that arises directly or indirectly as a result of and/or pursuant to or in connection with the Existing Network, or any section thereof (including, without limitation: any form of incompatibility between the Existing Network, or any section thereof, and the Network, or any section thereof; any failure to maintain the Existing Network, or any section thereof; and/or a design of the Existing Network, or any section thereof, which design in the Service Provider's opinion (acting reasonably) is incorrect);

16.2.2. an act or omission by COT;

16.2.3. a Change Order requested by COT; and/or

16.2.4. damage caused to the Network or the Existing Network which is attributable to an act or omission on the part of COT.

16.3. If work referred to in clause 16.1 is attributable to any cause contemplated in clause 16.2, all work arising therefrom shall be executed at the risk and cost of COT.

17. **BREAK-FIX OF FIBRE FROM THIRD PARTIES**

17.1. The Network may incorporate fibre optic cable for which the Service Provider has concluded maintenance agreements and/or break-fix agreements with third parties ("**Third Party Agreements**").

17.2. If COT requests (in writing) the Service Provider to do so by not later than 12 (twelve) months prior to the expiry of the Term then the Service Provider shall render all reasonable assistance to COT to enable COT to meet with the relevant third parties to negotiate third party agreements which take effect from the expiry of the Term on such commercial terms and duration as COT and such third party may agree to.

18. **OWNERSHIP AND TRANSFER OF THE NETWORK AND RISK**

18.1. The Network and Equipment shall, pursuant to the Maintenance Services, have been maintained by the Service Provider as a Reasonable and Prudent Operator and at the end of

the Term legal title to and beneficial ownership of the Network and all of the Equipment (and benefit attaching thereto), shall pass from the Service Provider to COT: against payment by COT to the Service Provider of R1.00 (one Rand) and all taxes and costs for which the Service Provider is, or will be, liable pursuant to, or in connection with, the transfer and/or passing of legal title and beneficial ownership of the Network and all of the Equipment from the Service Provider to COT in terms of this clause 18.1; and provided that COT has made full and final payment to the Service Provider (without set-off, deduction or withholding of any nature whatsoever) of all amounts owing to the Service Provider under this Agreement (including without limitation the amounts owing by COT to the Service Provider in terms of clause 47, if clause 47 is applicable).

18.2. Upon the aforesaid transfer of ownership of the Network and the Equipment to COT (and benefit attaching thereto) passing from the Service Provider to COT:

18.2.1. there shall be no obligation on the Service Provider to provide any services in relation thereto. However, the Parties shall for a period of 30 days after the Term enter into good faith negotiations with one another in order to agree which services the Service Provider will render to COT after the Term and the terms and conditions on which such services will be rendered by the Service Provider to COT;

18.2.2. the Service Provider hereby cedes and delegates back to COT all of the rights and obligations ceded and delegated to it by COT in terms of this Agreement, which cession and delegation COT hereby accepts; and

18.2.3. the Service Provider hereby delegates all liabilities in respect of the Network and the Equipment to COT, which delegation COT hereby accepts.

18.3. Until the transfer of ownership of the Network and the Equipment to COT pursuant to clause 18.1:

18.3.1. full legal title and ownership of the entire Network (and all sections thereof and any item of material in respect thereof, including, without limitation, all ducting and fibre) and all the Equipment (and all components thereof) (the "**Relevant Assets**") shall vest in the Service Provider and the Parties hereby agree that it is their intention that none of the Relevant Assets shall accede to any property on which they are located and/or installed;

18.3.2. all risk in the Relevant Assets (or the relevant section thereof), as the case may be, shall be borne by COT with effect from the Acceptance

Date, save that in respect of any Losses caused directly or indirectly by COT and theft of Equipment from premise under the control of COT prior to the Acceptance Date COT shall be liable and shall re-imburse the Service Provider (on demand from the Service Provider) for any Losses suffered or incurred by the Service Provider pursuant thereto. COT hereby undertakes to do all things and provide the Service Provider with access to the relevant Network site/premises whenever the Service Provider requires same in order to deliver the Relevant Assets as aforesaid; and

18.3.3. all benefit attaching to the Relevant Assets accrue to the Service Provider.

18.4. Notwithstanding anything to the contrary contained herein, nothing shall prohibit the Service Provider from granting any Encumbrance over any Equipment and/or the Network (or a portion thereof).

19. **COMMERCIALISATION OF THE NETWORK**

19.1. The Service Provider recognises that the COT should be compensated for its role as the anchor customer for the long-term offtake and for its assistance with regard to marketing the Network to External Third Parties. Service Provider accordingly agrees to pay COT an incentive amount based on its External Sales which will be calculated in accordance with the formula as set forth in this clause 19.

19.2. The Service Provider shall be entitled to sell and provide services/products on the Network to anyone to whom it wishes to sell and provide such services/products and will, *inter alia*, thereby generate External Revenue and will pay the COT an amount based on its sales or provision of services on the Network to External Third Parties ("**External Sales**") and in this regard COT shall be entitled to 30% (thirty percent) of the net profit after tax (taking into account the tax benefits contemplated in "D" below) generated from External Revenue (as set out in an audit certificate issued by an audit firm to be agreed upon between the Parties, and failing such agreement, to be appointed by the chairman of the South African Institute of Chartered Accountants following referral of the matter to him by either Party reflecting such net profit after tax) ("**COT's Revenue Share**"), which COT Revenue Share shall accrue in accordance with and subject to clause 19.3. For the avoidance of doubt, the calculation of net profit after tax directly generated from External Revenue shall be as follows:

Net profit after tax = A – B – C – D

where:

"A" is External Revenue;

"B" is variable costs incurred in the production of External Sales;

"C" is the portion of fixed overheads (which includes but is not limited to maintenance costs, finance costs and infrastructure costs) incurred by Service Provider attributable to External Sales, as determined by the Service Provider and audited by an Expert appointed in accordance with clause 58.1; and

"D" is the estimated normal tax (as calculated in accordance with the Income Tax Act No.58 of 1962 (as amended or replaced from time to time)) payable on $A - B - C$ (which normal tax shall, for the avoidance of doubt, take account of any tax benefits that actually accrued to the Service Provider in respect of the External Revenue).

- 19.3. COT's Revenue Share shall accrue to COT on the last day of each financial year of the Service Provider if at such point in time, taking account of the Service Provider's working capital requirements and the Service Provider's capital expenditure requirements for the following 12 (twelve) months, the Service Provider has surplus cash available for distribution to its ordinary shareholders and is capable of declaring such surplus cash to its ordinary shareholders as a cash distribution without breaching: (a) any of its covenants to its Funders; and (b) any legislation applicable to the Service Provider, provided that if at such point in time the Service Provider does not have the required cash flow available to it to make such payment, then the Service Provider shall make such payment (or the relevant portion thereof) at the soonest point in time that it does have such cash flow.
- 19.4. COT's Revenue Share shall be payable by not later than 10 (ten) Business Days from date of signature by the auditors of the Service Provider of the annual financial statements of the Service Provider in respect of the relevant financial year in question.
- 19.5. The Service Provider shall, maintain a separate banking account for the duration of this Agreement in respect of the External Revenue.
- 19.6. The Network will contain ducts as described in Annexure A, one of which shall be available for use by the COT for the Network and the remaining capacity shall be available for commercialisation of the Network.

- 19.7. The Service Provider will implement infrastructure sharing on the Network, in accordance with the requirements of ICASA in respect of infrastructure sharing on such Network.

PART C – OPERATE PHASE

20. OPERATE SERVICES / MAINTENANCE SERVICES

- 20.1. The Service Provider will:

- 20.1.1. operate the Network (and initially its sections on an incremental basis), pursuant to the Operate Services, from the later of the Acceptance Date and the date upon which the first section of the Network becomes Operational until the end of the Term;
- 20.1.2. support and maintain the Network (and initially its sections on an incremental basis) from Acceptance of the first section until the end of the Term in accordance with Annexure C; and
- 20.1.3. in keeping with its obligations to maintain the Network and the Equipment in accordance with the standards of a Reasonable and Prudent Operator, conduct one refresh of the Network during the Term, as required, provided that the cost of such refresh shall not exceed 30% (thirty percent) of the Offtake Amount.

- 20.2. Notwithstanding any other provision in this Agreement or otherwise COT shall pay the minimum price for Operate Services and Maintenance Services as specified in clause 37.

- 20.3. The Service Provider shall be entitled to sell any transmission capacity to any other customers for the duration of this Agreement.

- 20.4. COT shall use its best endeavours to ensure that the Services are not used, by it nor any of its employees, directors or officers, in a manner which constitutes an infringement of any rights of the Service Provider, any of its shareholders, any of its funders, any of its suppliers and/or any of its sub-contractors or any other third party, or for any illegal, fraudulent or unauthorised activities.

- 20.5. COT shall further endeavour to ensure that it and its customers do not by any act or omission: damage; interfere with; or impede, the operation of the Operate Services.

- 20.6. Where COT is aware that there is any violation or contravention of the sort contemplated in this clause 20, it shall notify the Service Provider thereof as soon as is reasonably possible after it has become aware thereof and it shall reasonably co-operate with and provide the

Service Provider (and the relevant sub-contractor/s) with the necessary information to assist in identifying, preventing or remedying or rectifying such violation or contravention.

21. **ADDITIONAL SERVICES**

Scope of Work

21.1. From time to time COT may request Additional Services from the Service Provider. At COT's request, the Service Provider will prepare a proposed Scope of Work which must contain the following, as applicable:

- 21.1.1. comprehensive description of the Additional Services;
- 21.1.2. list of all Deliverables;
- 21.1.3. Acceptance Criteria and Acceptance Tests in respect of the Deliverables (these may be subsequently included as contemplated in clause 21.9);
- 21.1.4. commencement date and timetable for the delivery of the Additional Services including milestones for the provision of Deliverables;
- 21.1.5. technical specifications of Deliverables;
- 21.1.6. functional specifications of Deliverables;
- 21.1.7. service levels;
- 21.1.8. any required reports;
- 21.1.9. in the case of fixed price Additional Services, the amount payable for the Additional Services and timetable for payments;
- 21.1.10. in the case of variable price Additional Services, the rates payable and frequency of payments;
- 21.1.11. premises where Additional Services will be rendered;
- 21.1.12. human resources requirements;
- 21.1.13. proposed sub-contractors and their role;
- 21.1.14. the impact of the Additional Services on other Services, if any, including without limitation costs and timetables; and

21.1.15. any other matters relevant to the Additional Services.

21.2. COT will consider the proposed scope of work and revert to the Service Provider by either accepting or rejecting it or requesting amendments. The Parties will discuss the proposed scope of work in good faith with a view to agreeing amendments.

21.3. Additional Services will only be provided in terms of a Scope of Work signed and agreed by authorised representatives of both Parties.

21.4. Each Scope of Work will be given a sequential number commencing with Scope of Work 1.

21.5. Each Scope of Work will be a separate contract incorporating (*mutatis mutandis*) the terms of this Agreement other than those terms which by their nature are inapplicable to Additional Services.

21.6. The Scope of Work may be changed in terms of a Change Order.

21.7. COT hereby agrees to make payment to the Service Provider of all amounts calculated and invoiced in respect of the Additional Services pursuant to the Scope of Work and, unless otherwise agreed in the Scope of Work, all payments to be made for the Additional Services shall be made by COT to the Service Provider (without set-off, deduction or withholding of any nature whatsoever) within 30 (thirty) days of receipt by COT of the relevant invoice issued by the Service Provider in respect of such Additional Services.

21.8. Deliverables

21.9. Where Deliverables are subject to acceptance by COT, the Service Provider will propose Acceptance Criteria and Acceptance Tests applicable to the Deliverables in writing prior to the date of their submission to COT. The Parties will discuss any changes to the Acceptance Criteria and Acceptance Tests reasonably requested by COT and make written amendments accordingly. Agreed Acceptance Tests and Acceptance Criteria form part of the applicable Scope of Work.

21.10. Clause 14 applies to the Acceptance of Deliverables.

21.11. Benchmarking

21.11.1. COT may conduct a benchmarking investigation to assess the reasonableness of the pricing offered by the Service Provider in relation to any Additional Services.

21.11.2. The Service Provider shall have the right of first refusal to provide Additional Services, and should the Service Provider not match market

related pricing (and in this regard COT shall provide the Service Provider with all information and terms and conditions in respect of the Additional Services offered by others to COT in order to enable the Service Provider to determine what the terms and conditions in respect of the Additional Services offered by others to COT are and whether the Service Provider is able to match the market related pricing of the Additional Services), COT reserves the right to procure the Additional Services from third party service providers.

22. **SKILLS DEVELOPMENT, TRAINING AND COMMUNITY DEVELOPMENT**

- 22.1. The Service Provider will provide the training and skills development referred to in Annexure G to COT.
- 22.2. The Service Provider will undertake the community development activities referred to in Annexure G.
- 22.3. The Service Provider must give an annual written report to COT on its progress and achievements in relation to the community development activities referred to in Annexure G.
- 22.4. The Service Provider and COT shall from time to time meet to negotiate and agree on an appropriate substantial discount which the Service Provider will apply to Micro Enterprises or South African GOEs (as the case may be) in respect of broadband services supplied to them on the Network, provided that: (a) such substantial discount is capable of being ascertained and agreed by the Parties before they are passed onto such entities; (b) notwithstanding such substantial discounts being applied the Service Provider is able to maintain a level of profitability that is commercially viable for the Service Provider (in the opinion of the Service Provider (acting reasonably)); and (c) if as a result of the Service Provider applying any such discount, it is no longer commercially viable (in the opinion of the Service Provider (acting reasonably)) to be bound by this Agreement, then the Service Provider shall notify COT thereof in writing and COT and the Service Provider shall consult within 10 (ten) days after such notice is dispatched in order to find an appropriate solution which would make it commercially viable for the Service Provider (in the opinion of the Service Provider (acting reasonably)) to continue to be bound by this Agreement. If the Parties are unable to agree to an appropriate solution to make it commercially viable for the Service Provider (in the opinion of the Service Provider (acting reasonably)) to continue to be bound by this Agreement within 15 (fifteen) days of such meeting (or if such meeting does not take place) then the Service Provider may upon written notice to COT forthwith cancel this Agreement.
- 22.5. In respect of any discount applicable to South African GOEs to be agreed by the Parties in terms of clause 22.4 same shall be determined on a "like for like" basis. i.e. the scope,

duration, price, resources required by the Service Provider and all other terms and conditions applicable to the broadband services on the Network to which the substantial discount is to potentially be applied must be the same as the scope, duration, price, resources required by the Service Provider and all other terms and conditions applicable to the same broadband services on the Network provided by the Service Provider to other enterprises which are not South African GOEs.

23. INNOVATION AND BEST PRACTICE

The Service Provider shall use its reasonable endeavours to always apply Best Practices to the performance of its obligations under this Agreement.

24. SERVICE PROVIDER WARRANTIES

24.1. The Service Provider warrants that:

- 24.1.1. it is entitled and has full power and authority to enter into and perform this Agreement;
- 24.1.2. this Agreement and all other documents to be executed in accordance herewith constitute, or will when executed constitute, valid and binding obligations on the Service Provider in accordance with their terms.

24.2. The Service Provider warrants further that:

- 24.2.1. on the date on which ownership of Network and all of the Equipment is transferred from the Service Provider to COT pursuant to clause 18.1 the Service Provider has valid title to all material items of Equipment supplied under this Agreement and is able to transfer ownership to COT on payment in full of all amounts owing to the Service Provider under this Agreement as contemplated in clause 18.1;
- 24.2.2. on the date on which the Equipment supplied has been installed in the Network and has passed all Acceptance Tests it is suitable for its intended function in the Network;
- 24.2.3. the Service Provider will at all relevant times comply (and ensure that its Staff at all relevant times comply) with COT's material security, environmental and other office procedures as these apply to the Service Provider and its Staff provided that COT has (in writing) informed the Service Provider and its Staff of all of these procedures;

- 24.2.4. the Service Provider will at all material times ensure that all Staff appointed by themselves are sufficiently qualified and/or skilled to perform their duties;
 - 24.2.5. the Service Provider will be fully accountable for all actions taken by themselves and, as contemplated in clause 27.2, any sub-contractors which are appointed by the Service Provider who will be acting and considered to be an extension of the Service Provider;
 - 24.2.6. the Service Provider will not (and will ensure that its Staff do not) under any circumstances offer, promise or make any gift, payment, loan, reward, inducement, benefit or other advantage to any of COT's Staff.
- 24.3. No warranties or representations, express or implied or tacit, whether by law, contract or otherwise and whether it induced the contract or not, which are not set forth in this Agreement shall be binding on the Service Provider, and COT hereby irrevocably waives any right (common law or otherwise) that it may have to rely thereon.

25. **GENERAL WARRANTIES**

- 25.1. Each of the Parties hereby warrants to and in favour of the other that –
- 25.1.1. it has the legal capacity and has taken all necessary corporate action required to empower and authorise it to enter into this Agreement;
 - 25.1.2. this Agreement constitutes an agreement valid and binding on it and enforceable against it in accordance with its terms;
 - 25.1.3. the execution of this Agreement and the performance of its obligations hereunder does not and shall not –
 - 25.1.3.1. contravene any law or regulation to which that Party is subject;
 - 25.1.3.2. contravene any provision of that Party's constitutional documents; or
 - 25.1.3.3. conflict with, or constitute a breach of any of the provisions of any other agreement, obligation, restriction or undertaking which is binding on it; and
 - 25.1.4. to the best of its knowledge and belief, it is not aware of the existence of any fact or circumstance that may impair its ability to comply with all of its obligations in terms of this Agreement;

- 25.1.5. it is entering into this Agreement as principal (and not as agent or in any other capacity);
- 25.1.6. the natural person who signs and executes this Agreement on its behalf is validly and duly authorised to do so;
- 25.1.7. no other Party is acting as a fiduciary for it; and
- 25.1.8. it is not relying upon any statement or representation by or on behalf of any other Party, except those expressly set forth in this Agreement.

25.2. Each of the representations and warranties given by the Parties in terms of clause 25.1 shall:

- 25.2.1. be a separate warranty and will in no way be limited or restricted by inference from the terms of any other warranty or by any other words in this Agreement; and
- 25.2.2. continue and remain in force notwithstanding the completion of any or all the transactions contemplated in this Agreement.

25.3. A Party must, if requested by the other Party, furnish to the latter sufficient evidence of the authority of a person who takes any action or executes any documents under this Agreement on behalf of the Party so requested.

26. **STAFF**

26.1. The Service Provider will use appropriately skilled, qualified and experienced Staff to perform the Services.

26.2. The Service Provider retains the sole right to determine which Staff to use in order to render the Services.

27. **SUB-CONTRACTORS**

27.1. The Service Provider may: (a) subcontract portions of the Build of the Network and the Operate Services, Additional Services and Maintenance Services; and (b) agree with any of its sub-contractors that such sub-contractor (the "**Relevant Sub-Contractor**") is entitled to further subcontract the Services (or any aspect or portion thereof) and/or the Build (or any portion thereof) that the Service Provider subcontracted to it to sub-contractors of the Relevant Sub-Contractor.

27.2. Subcontracting does not relieve the Service Provider of any of its obligations under this Agreement and the Service Provider will at all times be held responsible for any of the sub-contractors which it appoints.

- 27.3. The written agreements concluded between the Service Provider and its sub-contractors (and the written agreements concluded between the Relevant Sub-Contractor and its sub-contractors), to whom Services under this Agreement are subcontracted must, in respect of the material obligations under those sub-contractor agreements, not be materially inconsistent with the material obligations placed on the Service Provider under this Agreement.
- 27.4. No subcontracting by the Service Provider shall release the Service Provider from its responsibility for its obligations under this Agreement. The Service Provider shall be responsible for the work and activities of each of its sub-contractors, including compliance with the terms of this Agreement and be responsible for all payments to its sub-contractors.
- 27.5. For the avoidance of doubt, Last Mile Operators will be appointed as required in due course and in consultation with the COT.

28. **BLACK ECONOMIC EMPOWERMENT**

- 28.1. The Service Provider is a level 2 contributor to broad-based black economic empowerment ("BBBEE") at the Effective Date and its BBBEE status must be evaluated annually by a reputable BBBEE evaluation agency.
- 28.2. A copy of the Service Provider's current BBBEE evaluation certificate must be given to COT at any time on request.

29. **OTHER CONTRACTORS**

- 29.1. COT shall ensure that its other suppliers and contractors co-operate with the Service Provider (and its' sub-contractors) in good faith and provide such assistance to the Service Provider (and its' sub-contractors) as is reasonably required by the Service Provider or its' sub-contractors. Where the Service Provider needs to liaise with such other suppliers and/or contractors, the Service Provider must deal with such persons in a professional and courteous manner and endeavour to maintain a good working relationship with them.
- 29.2. If a dispute between the Service Provider and another contractor and/or supplier to COT arises which impacts on the Services, the Service Provider will notify COT in writing. The notification must state:
- 29.2.1. the nature of the dispute;
 - 29.2.2. the date upon which the dispute arose;
 - 29.2.3. the effect of the dispute on the Services;

29.2.4. the steps taken by the Service Provider and/or its' sub-contractors to address the dispute; and

29.2.5. any other matter of relevance to the dispute.

29.3. The Service Provider will attempt to resolve the dispute, but if it is unable to do so COT will be entitled to assist by taking steps including:

29.3.1. convening a meeting between the Service Provider (and, if applicable, the relevant sub-contractor) and the other contractor/s and/or service providers; and

29.3.2. directing the steps to be taken by the other contractor/s and/or service providers to resolve the dispute.

29.4. The Service Provider and COT will use their respective reasonable endeavours in order to resolve the dispute as soon as is reasonably possible. However, the fact that COT has suppliers and contractors shall not release COT from its responsibility for its obligations under this Agreement and COT shall be responsible for the work and activities of each of its suppliers and contractors, including compliance with the terms of this Agreement and COT shall be responsible for all payments to its suppliers and contractors.

29.5. This clause 29 does not oblige the Service Provider to perform any services on behalf of another contractor and/or service provider of COT, to ensure their proper performance or incur additional costs; however, if the Service Provider does do so then COT shall, on demand from the Service Provider, re-imburse it for all reasonable fees, costs, expenses and liability suffered or incurred by the Service Provider in doing so, provided that the Service Provider submits proof to COT that it has performed such services and/or incurred such costs. The Service Provider shall not be liable for any failure or delay in performing its obligations under this Agreement, if such failure or delay is caused directly or indirectly as a result of any act or omission on the part of any of the contractors and/or suppliers of COT and if the Service Provider suffers any delay and/or incurs cost due to such conditions then the Service Provider shall be entitled to: (a) an extension of time for any such delay; and (b) payment by COT of any such costs (including any holding or standing time costs) suffered or incurred by it as a result of such delay.

30. **DATA BACKUP**

30.1. The Service Provider is required to back up COT's network configuration and operating systems in respect of the Network.

- 30.2. COT will back up its data regularly but if any data is lost or corrupted through the acts or omissions of the Service Provider or its sub-contractor, the Service Provider must at its own cost give all cooperation reasonably necessary to COT to restore the data.

31. DATA SECURITY

- 31.1. The Service Provider must employ security protocols appropriate to a municipal organisation such as COT carrying sensitive information on its networks in respect of the Network.

- 31.2. If the Service Provider becomes aware that the security of the Network has been compromised, the Service Provider must, as soon as is reasonably possible, notify COT in writing stating:

31.2.1. the date on which the security breach occurred and the person/s involved in perpetrating the security breach, if known;

31.2.2. the duration of the security breach;

31.2.3. what data was accessed by unauthorised persons;

31.2.4. remedial steps taken by the Service Provider to stem and remedy the security breach; and

31.2.5. the steps recommended by the Service Provider to be taken by COT to avoid or reduce prejudice to it or persons affected by the security breach.

- 31.3. The Service Provider must, as soon as is reasonably possible, take steps to stem and remedy the security breach after its discovery and confirm to COT in writing when it has done so. Pending full remediation of the security breach, the Service Provider must give COT regular written updates of its progress in this regard. The Service Provider must also give any further information reasonably required by COT relating to the security breach.

- 31.4. The Service Provider will give its full reasonable cooperation to COT in any investigation or inquiry instituted in respect of the security breach by COT, any regulator or law-enforcement authority.

32. RESILIENCE, REDUNDANCY AND BUSINESS CONTINUITY

- 32.1. The Network, the Operate Services and the Maintenance Services must have sufficient resilience and redundancy so that there is no foreseeable interruption caused by a failure of the Network to COT's business operations.

- 32.2. The Service Provider must have a business continuity plan to overcome any disruptions in the operation of the Network, the Operate Services and the Maintenance Services and a disaster

recovery plan which enables the Service Provider to continue to perform its obligations in terms of this Agreement.

- 32.3. The Service Provider will test its business continuity and disaster recovery plans at least every six months and report the outcome to COT in writing. If any of the tests are unsuccessful, the Service Provider must, as soon as is reasonably possible, update the affected business continuity or disaster recovery plan and conduct the tests and report to COT again.

33. **INSURANCE**

- 33.1. The Service Provider must procure from a reputable insurer and maintain for the duration of this Agreement, insurance adequate to cover its risks and potential liabilities in respect of the Services provided by it pursuant to this Agreement. Such insurance will include, without limitation:

33.1.1. public liability insurance in respect of claims for death or injury to persons and loss or damage to property;

33.1.2. insurance against loss or damage to its own assets used to perform its obligations in terms of this Agreement whether brought onto, stored or housed at the premises of COT or not;

33.1.3. business interruption insurance following damage to its own assets; and

33.1.4. asset insurance in respect of all Equipment procured for incorporation into the Network until such time as such Equipment has passed Acceptance Tests in respect thereof.

- 33.2. The Service Provider will provide written certification from its insurance broker that the required insurance is in place at any time on reasonable request from COT.

- 33.3. The Service Provider must ensure that all payments due by it in terms of the Compensation for Occupational Injuries and Diseases Act, 1993 are up to date throughout the terms of this Agreement and provide written proof upon the reasonable request of COT.

34. **COT APPROVED BUDGET**

At each point in time when COT's annual budget is approved, COT shall ensure that as part of such approved budget a sufficient budget amount is set aside for IT services which shall be used to pay the Service Provider all amounts that may be payable by it to the Service Provider under this Agreement during the period to which such budget relates (the "**Budget Allocation**"). COT shall, as soon as is reasonably possible after such approval, and in any event by not later than the 5th Business Day

thereafter provide the Service Provider with proof, satisfactory to the Service Provider (acting reasonably) of the Budget Allocation.

PART D - GENERAL

35. INTELLECTUAL PROPERTY

35.1. COT Software

- 35.1.1. COT hereby grants to the Service Provider a non-exclusive, non-transferable, royalty free, limited right to use:
 - 35.1.1.1. COT Propriety Software, including any modification or enhancements thereof, in the provisioning of the Service but then only to the extent strictly necessary; and
 - 35.1.1.2. without out derogating from clause 10, where permitted by applicable license agreements, the Third Party Software to be used in the provision of Services;
 - 35.1.1.3. the Service Provider may free of charge sublicense to its agents, sub-contractors and such sub-contractors' sub-contractors the limited right to use the COT Proprietary Software to the extent required for such persons or entities to fulfil its obligations to the Service Provider.
- 35.1.2. In all cases the Service Provider shall (as soon as is reasonably practicable) obtain the written transfer to COT, to the extent necessary, of any intellectual property rights acquired by its agents in the enhanced or modified COT Propriety Software or in the enhancements or modifications themselves.
- 35.1.3. All COT Propriety Software including any COT Proprietary Software enhanced or modified by the Service Provider or its agents remain the exclusive property of COT and the Service Provider shall not and it shall procure that its agents shall not, acquire any rights in such COT Proprietary Software save as expressly stated in this Agreement. To the extent necessary, the Service Provider hereby transfers all intellectual property rights in respect of COT Proprietary Software enhanced or modified by it or its agents to COT.
- 35.1.4. This Agreement constitutes the transfer by the Service Provider and acceptance of the transfer by the Service Provider and its agents of the intellectual property contemplated in this clause 35.1 to COT.

35.2. **Service Provider Software**

- 35.2.1. The Service Provider will grant to COT a non-exclusive, non-transferable, royalty free, limited right to use the Service Provider Proprietary Software during the Term to the extent necessary for COT to receive and benefit from the Services to the extent and as separately agreed between the Parties in writing.
- 35.2.2. All the Service Provider Proprietary Software and intellectual property used by the Service Provider in respect of the Services (other than the COT Propriety Software) is, or shall be, and shall remain, the exclusive property of the Service Provider or its third party licensor, as applicable, and (save as stated in clause 35.2.1) COT shall have no rights or interest in or to any of the Service Provider Proprietary Software and/or the aforementioned intellectual property.

35.3. **Changes to Service Provider Proprietary Software**

- 35.3.1. The Service Provider shall be free at any time to make any modifications and improvements of the their software or change the their software or the software licenced to it provided that this does not have a material negative impact on the Services or Service Levels. The Service Provider shall have all rights, title and interest, including ownership of copyright, to and in all modifications and improvements of the Service Provider Proprietary Software.

35.4. **Changes to COT Software**

- 35.4.1. The Service Provider shall have the right, where reasonably justified by technical, financial or other good faith considerations, to suggest modifications and improvements of the COT Software or changes to the COT Software, such suggestions to be dealt with by way of a Change Order *mutatis mutandis* in accordance with the procedure contemplated in clause 12. Any such modifications and improvements of COT Software to be carried out by the Service Provider shall be subject to a separate written agreement. Except if agreed otherwise in such separate agreement, COT shall have all right, title and interest, including ownership of copyright, and in all modifications and improvements of such COT Software with a non-exclusive, non-transferable, royalty free, limited right for the Service Provider to use (on the basis contemplated in

clause 35.1.1) such modifications and improvements in the provisioning of the Services.

35.5. Infringements

- 35.5.1. The Service Provider shall defend, indemnify and hold COT harmless from and against any and all loss, damage, reasonable cost, penalties and reasonable expenses incurred as a direct result of any claim, suit or proceeding ("**COT-Claim**") brought against COT based on the allegation that the use of Service Provider Software made by the Service Provider and provided to COT under this Agreement in accordance with the terms of this Agreement constitutes an infringement of any intellectual property rights of any third party.
- 35.5.2. COT shall defend, indemnify and hold the Service Provider harmless from and against any and all loss, damage, reasonable cost, penalties and reasonable expenses incurred as a direct result of any claim, suit or proceeding ("**Service Provider-Claim**", collectively with COT-Claim called "**Claim**") brought against the Service Provider based on the allegation that the use of COT Software in accordance with the terms of this Agreement constitutes an infringement of any intellectual property rights of any third party.
- 35.5.3. The Parties agree that:
- 35.5.3.1. the Party seeking to rely on an indemnity set out in clause 35.5.1 or 35.5.2 (the "**Indemnified Party**") shall as soon as reasonably practicable notify the other Party (the "**Indemnifying Party**") in writing of any Claim of which it has received notice;
- 35.5.3.2. the Indemnified Party shall not make any admission as to liability or compromise or agree to any settlement of any Claim without the prior written consent of the Indemnifying Party which consent shall not be unreasonably withheld or delayed; and
- 35.5.3.3. the Indemnifying Party shall, on its written request and at its own expense, be entitled to conduct all litigation arising from any Claim, conduct all settlement negotiations arising from any Claim and settle any Claim and the Indemnified Party shall, at the Indemnifying Party's request and expense, give the Indemnifying Party all reasonable assistance in connection with those negotiations and such litigation.

36. **OBLIGATIONS OF COT**

- 36.1. COT shall pay the Service Provider on the basis that as and when sections of the Network have been accepted, or deemed accepted, by COT (as contemplated in clause 14) then (provided that the Minimum Threshold has been achieved) COT shall make payment to the Service Provider in respect of such section as set out in clause 37 for the Services and/or Equipment.
- 36.2. The COT shall create a conducive environment for the Service Provider, by *inter alia*:
- 36.2.1. providing sufficient information to enable the Service Provider to perform its obligations under this Agreement;
 - 36.2.2. giving the Service Provider unfettered access to the physical area under its control, staff, relevant information, resources;
 - 36.2.3. facilitate the use of the Network to MOEs;
 - 36.2.4. assist in raising the profile of the Service Provider;
- 36.3. The COT may also assist the Service Provider with marketing the Network to GOEs.
- 36.4. Right of access to site / planning, zoning building permits and permission
- 36.4.1. COT shall provide the Service Provider timeous, unrestricted, unconditional and unlimited: (a) use of all of COT's assets; and (b) access to its premises and all other areas, necessary to enable the Service Provider to perform its obligations, subject always to COT's security policies and procedures and health and safety procedures in respect of such premises which have been communicated by COT to the Service Provider in writing prior to COT granting such use and/or access. The Service Provider undertakes to abide by same at all material times whilst in or on the premises of COT provided that COT has informed the Service Provider of such policies in writing.
 - 36.4.2. COT shall obtain the planning, zoning, building permit, or similar permission for the civil engineering works and for the Services, and any other permissions described in this Agreement as having been (or being) obtained by COT.
- 36.5. Rights of way / Site access

- 36.5.1. COT shall ensure that the Service Provider and its sub-contractors has timeous, unrestricted, unconditional and unlimited access to all Sites as and when required by the Service Provider (acting reasonably). COT shall: (a) on behalf of the Service Provider, apply in a timely fashion in respect of right of way (wayleave) applications necessary in order to enable the Service Provider to provide the Services; (b) provide the Service Provider with all approved wayleaves required by the Service Provider in respect of the Services; and (c) ensure timely approval of all wayleave applications. The Service Provider shall not be liable for any obligations and/or liabilities (including any financial obligations and/or liabilities) which may arise pursuant to, or in connection with, this clause 36.5.1 and all such obligations and/or liabilities shall be borne by COT.
- 36.5.2. COT shall provide to the Service Provider all information relating to rights of way in relation to COT rights of way and existing municipal services relevant to the Services (including, without limitation, designing, building and installing the Network) free of any application or registration fees to enable the Service Provider (and its sub-contractors) to provide such Services.
- 36.5.3. COT shall obtain all relevant service information including all such information from all relevant utility service providers/agencies controlled by COT and COT MOE's with regard to the position of those of their services which are adjacent to where the civil engineering works are to be carried out so as to ensure that the right of way (wayleave) application process progresses as expeditiously as possible.
- 36.5.4. COT shall provide the aforesaid information to the Service Provider in a timeous manner so as to allow the Service Provider to prepare the wayleave application documentation for the COT to make application for wayleave approval on behalf of the Service Provider.
- 36.6. In order to enable the Service Provider to discharge its obligations under this Agreement, COT shall:

 - 36.6.1. in a timely and structured manner, give the Service Provider (and its' sub-contractors) access to all of its information, books, records, facilities, equipment and infrastructure (including, without limitation, the Existing Network) as the Service Provider may reasonably require;

- 36.6.2. ensure that its personnel co-operate with the Service Provider (and its' sub-contractors);
 - 36.6.3. act reasonably and do all such things as are within its power to enable the Service Provider and its sub-contractors to provide the Services and the Build in accordance with the timetable for the provision thereof and without any delay; and
 - 36.6.4. cede and delegate to the Service Provider all rights and obligations that the Service Provider requires COT to cede and delegate to it in order to enable the Service Provider to comply with its obligations and/or enforce its rights under this Agreement.
- 36.7. If the Service Provider suffers delay and thereby incurs costs (which it cannot mitigate through the exercise of reasonable measures) as a result of a failure by COT to comply with its obligations under this clause 36, then the Service Provider shall be entitled to: (a) additional time required by it for completion as a result of any such delay; and (b) the payment of all additional costs incurred plus a profit margin that will enable the Service Provider maintain the Pass Through Profit Margin in respect of the Services and the Build.
- 36.8. In addition to any other obligations imposed on COT in terms of this Agreement, COT:
- 36.8.1. shall use the Network in compliance with all Laws, industry guidelines or codes which apply to the provision or use of any of the Services, or such other reasonable policies as may be notified to it by the Service Provider and as are applied generally by the Service Provider to its customers, from time to time;
 - 36.8.2. shall not commit nor attempt to commit any act or omission which directly or indirectly:
 - 36.8.2.1. causes any damage in any way to the technical infrastructure (or any part thereof) of: (a) the Service Provider or any of its sub-contractors; and/or (b) any third party supplier used by the Service Provider or any of its sub-contractors to provide any Services;
 - 36.8.2.2. impairs or precludes the Service Provider or any of its sub-contractors from being able to provide the Services in a reasonable and business-like manner;
 - 36.8.2.3. constitutes an abuse or malicious misuse of any of the Services; and/or

- 36.8.2.4. is calculated to have the effect of anything set out in clauses 36.8.2.1; 36.8.2.2; and/or 36.8.2.3.
- 36.8.3. is prohibited from selling, reselling or otherwise dealing with the Services, in relation to the Network, in any manner whatsoever, except for purposes of its own business prior to the end of the Term. Without limitation to the foregoing, any consideration, which COT may receive whilst acting in breach of this clause 36.8.3, shall be forfeited to the Service Provider;
- 36.8.4. shall use reasonable endeavours to prevent any person other than its employees or other parties authorised by the Service Provider, access to the Services through any of COT's equipment and/or personnel;
- 36.8.5. is prohibited from modifying any Equipment (including, but not limited to, router equipment supplied by the Service Provider and/or its sub-contractors and utilised by COT to receive any of the Services, in any way whatsoever, including the changing of any of the settings of such Equipment);
- 36.8.6. shall not use any of the Services in contravention of any Laws;
- 36.8.7. shall (free of charge) provide the Service Provider and its sub-contractors with full use of its equipment in respect of the Existing Network and any internet access service in the event that the Service Provider and/or any of its sub-contractors relies on any of these for the provision of any of the Services;
- 36.8.8. shall (at COT's cost) cut-over services on the Existing Network to the Service Provider, without delay, as soon as the Service to be provided by the Service Provider is available; and
- 36.8.9. shall (at COT's cost) be responsible for the communications strategy and public awareness programme in respect of the project contemplated in this Agreement but shall be obliged to consult with the Service Provider in this regard and take account of any comments that the Service Provider may (acting reasonably) have.
- 36.9. COT hereby warrants to the Service Provider that:
- 36.9.1. COT shall comply with all of its obligations under this Agreement (including, without limitation, those responsibilities for which it its

responsible in terms of the responsibility matrix contained in Annexure F);

36.9.2. to the best of COT's knowledge and belief, having made all reasonable enquiries, neither COT nor any of its employees engages or is found to have engaged in any dishonest, corrupt or fraudulent practice in respect of the Tender or any matter relevant thereto or in the execution of its obligations under this Agreement; and

36.9.3. as at the Effective Date it has not spent any portion of the Offtake Amount that has been allocated in its approved budget to the project contemplated in this Agreement on any other matter and that after the Effective Date it shall not utilise any portion of such amount for anything other than to comply with its obligations under this Agreement.

37. INVOICE AND PAYMENT

37.1. From the Effective Date until the Acceptance Date of the last section of the Network Built (the "**First Phase**"), COT hereby commits itself to (and warrants, represents and undertakes to the Service Provider that it shall) pay a monthly amount to the Service Provider as calculated in the formula set out in clause 37.2 (the "**Build Payment Formula**") - provided that in respect of the first 90% (ninety percent) CPEs of the Network (or if 90% (ninety percent) of such CPEs is not a whole number when divided by 35 (thirty five) then the nearest whole number of CPEs below such 90% (ninety percent) which when the relevant number of CPEs is divided by 35 (thirty five) results in a whole number) (the "**Relevant Percentage**") accepted by, or deemed acceptance by, COT as contemplated in clause 14:

37.1.1. the Service Provider shall only be entitled to issue its first invoice to COT for the amount calculated in accordance with the Build Payment Formula once the Minimum Threshold is achieved; and

37.1.2. after the Service Provider has issued the invoice contemplated in clause 37.1.1, the Service Provider shall only be entitled to invoice COT for the amount calculated in accordance with the Build Payment Formula if the number of CPEs of the Network accepted by, or deemed acceptance by, COT as contemplated in clause 14 to which such invoice relates exceeds the number of CPEs to which the immediately preceding invoice relates by at least the Minimum Threshold. After the Service Provider has invoiced COT for the Relevant Percentage of CPEs there shall be no prescribed minimum number of CPEs of the Network accepted by, or deemed acceptance by, COT as contemplated in clause 14 to be

achieved before the Service Provider is entitled to issue an invoice to COT for the amount calculated in accordance with the Build Payment Formula):

37.2. $A = (B \times (C/D))/12,$

Where:

"A" is the amount (exclusive of VAT) that COT must pay to the Service Provider monthly during the First Phase;

"B" is the Offtake Amount;

"C" is the number of CPEs of the Network accepted by, or deemed acceptance by, COT as contemplated in clause 14 at the point in time when the Service Provider issues the relevant invoice to COT; and

"D" is 400 (four hundred), being the number of CPEs that the Service Provider had, subject to the provisions of this Agreement, planned to have accepted by COT as reflected in Annexure F.

37.3. By way of example, in relation to the principle set out in clause 37.1, if the number of CPEs is 400, then for the first 360 CPEs which have been accepted by, or deemed accepted by, COT as contemplated in clause 14 the Service Provider shall only be entitled to invoice the COT in accordance with the Build Payment Formula for each 35 (thirty five) CPEs which have been accepted by, or deemed accepted by, COT as contemplated in clause 14. Thereafter, there shall be no prescribed minimum number of CPEs of the Network accepted by, or deemed acceptance by, COT as contemplated in clause 14 to be achieved before the Service Provider is entitled to issue an invoice to COT for the amount calculated in accordance with the Build Payment Formula.

37.4. If all of the CPEs are accepted by, or deemed acceptance by, COT as contemplated in clause 14, within the timetable set out in Annexure F, or such later date as may be applicable pursuant to such timetable being extended or amended under this Agreement but COT has paid the Service Provider less than the Offtake Amount per annum during the First Phase (the "**Shortfall**"), then COT shall pay such Shortfall to the Service Provider in 6 (six) equal monthly instalments at the same time as it is obliged to pay first 6 (six) instalments contemplated in clause 37.5.

37.5. As consideration for the Service Provider making the Services available to it, for the period commencing on the first Business Day after the end of the First Phase until the end of the Term, COT hereby commits itself to (and warrants, represents and undertakes to the Service

Provider that it shall) pay (subject to clause 37.4) the Offtake Amount per annum on the basis that as and when sections of the Network have been accepted, or are deemed to have been accepted, the COT shall make payment to the Service Provider in respect of such section regardless of whether the COT makes use of such section (namely regardless of whether or not COT actually utilises the Services) which annual amount shall be paid to the Service Provider in 12 (twelve) equal monthly instalments per annum on the first Business Day of each month.

37.6. It is hereby recorded and agreed that all fees and amounts set out in this Agreement and payable to the Service Provider are exclusive of VAT.

37.7. The Service Provider shall issue a tax invoice to COT in respect of the amounts payable by it pursuant to clauses 37.1, 37.4 and/or 37.5. The invoice shall contain:

37.7.1. a reference to this Agreement;

37.7.2. Purchase Order number, if applicable, as amended annually;

37.7.3. in respect of the Build, if Acceptance Notices have been signed by COT, then these will be attached as supporting documents;

37.7.4. name of bank, branch name or code and account number into which payment is to be made.

37.8. Any invoice that is issued in terms of this Agreement shall be paid within 30 (thirty) days of receipt by COT thereof.

37.9. The Service Provider shall be entitled to charge COT for any Additional Services provided by the Service Provider at COT's request (and for which a price is not provided in this Agreement, it being specifically recorded and agreed that this Agreement does not provide for any price for the Additional Services) at the price for such Additional Services set out in the Scope of Work (or such other price as agreed between COT and the Service Provider in writing) contemplated in clause 21.

37.10. COT shall not be entitled to set-off any obligation due by it under this Agreement against any obligation owed by the Service Provider to it.

38. **GOVERNANCE**

38.1. The Parties will establish a governance structure to facilitate their liaison with respect to this Agreement. The governance structure will reflect the needs of the Services and may be revised from time to time by agreement in writing between the Parties when appropriate to the requirements of the Services.

- 38.2. Each Party's representatives on any committee may appoint additional persons whose participation they require, either on a permanent or temporary basis.
- 38.3. Any committee will meet more frequently than scheduled upon the reasonable request of either Party.
- 38.4. Minutes of each meeting of the steering committee and operations committee must be kept by the Service Provider and distributed to COT's committee representatives within 5 (five) Business Days of each meeting.

39. **INFORMATION AND AUDIT ACCESS**

- 39.1. The Service Provider shall provide to the COT all information, documents, records and the like in the possession of, or available to, the Service Provider as may reasonably be requested by the COT for the purpose of complying with any of its statutory obligations including its reporting obligations under the MFMA, MSA and the Public Audit Act, 2004.
- 39.2. To this end the Service Provider shall use all reasonable endeavours to ensure that all such information in the possession of any counter-party to any project document shall be available to the COT and the Service Provider has included, or shall include, appropriate provisions to this effect in all project documents.
- 39.3. Without limiting the generality of the foregoing, the Service Provider shall:
 - 39.3.1. provide and shall procure that its sub-contractors shall provide all such information as the COT may reasonably require from time to time to enable the COT to provide reports and returns as required by law, including reports and returns regarding the physical condition of any Site occupied by the COT, health and safety, national security, and environmental safety; and
 - 39.3.2. note and facilitate the COT's compliance with the Promotion of Access to Information Act, 2000 in the event that the COT is required to provide information to any person pursuant to that Act.

40. **CONFIDENTIALITY**

- 40.1. Rights in Confidential Information
 - 40.1.1. The Parties acknowledge that each Party's Confidential Information is an asset in which that Party has proprietary or other rights or interests, the unauthorised disclosure of which may cause harm to the Disclosing Party.

40.1.2. The Receiving Party will not acquire any rights in respect of the Confidential Information of the Disclosing Party save as stated in this Agreement.

40.2. Disclosure of Confidential Information

40.2.1. The Receiving Party will not disclose Confidential Information of the Disclosing Party to any third party (other than a Permitted Recipient who has agreed in writing to be bound by the provisions of this clause 40) without the written consent of the Disclosing Party, save in accordance with this Agreement.

40.3. Either Party may authorise the other to disclose its Confidential Information to a third party other than a Permitted Recipient at any time provided that such permission will be valid:

40.3.1. only if given in writing;

40.3.2. for disclosure only to the third party identified in the written authorisation;
and

40.3.3. for that specific instance of disclosure only.

40.4. The Receiving Party may disclose the Confidential Information of the Disclosing Party in order to comply with law or the requirements of any stock exchange on which the shares of the Receiving Party or its holding company are listed. In these circumstances, the Receiving Party will:

40.4.1. limit the disclosure only to that which is necessary to comply with the law or stock exchange requirements;

40.4.2. advise the Disclosing Party in writing as soon as reasonably possible of the disclosure or intended disclosure specifying:

40.4.2.1. the Confidential Information subject to disclosure;

40.4.2.2. the reasons for the disclosure;

40.4.2.3. the law or stock exchange requirements under the direction of which the disclosure is made; and

40.4.2.4. where applicable and permitted by law, the identity of any third party requiring disclosure.

- 40.4.3. provide the Disclosing Party with all reasonable cooperation, at the cost of the Disclosing Party, in any steps taken by it to limit or prevent the disclosure.

Use of Confidential Information

- 40.5. The Parties will not use the Confidential Information of the other Party for any purpose other than:
 - 40.5.1. that for which it is disclosed in connection with the Services and/or the Build;
 - 40.5.2. as otherwise permitted by the Disclosing Party in writing; or
 - 40.5.3. in accordance with the provisions of this Agreement.

Standard of Care

- 40.6. The Receiving Party will receive and use the Disclosing Party's Confidential Information in such a way as to prevent any unauthorised access to it.
- 40.7. In the event that the Receiving Party becomes aware that the Disclosing Party's Confidential Information has been disclosed by it or its Permitted Recipients contrary to the terms of this Agreement, the Receiving Party must immediately:
 - 40.7.1. inform the Disclosing Party in writing specifying what Confidential Information has been disclosed, how and to whom it has or may have been disclosed, when the unauthorised disclosure took place and what steps will be taken to retrieve the Confidential Information and prevent future unauthorised disclosures;
 - 40.7.2. take such steps as are necessary or as the Disclosing Party directs to retrieve the Confidential Information from unauthorised persons and to prevent further unauthorised disclosure of the Confidential Information; and
 - 40.7.3. cooperate with the Disclosing Party in taking any steps taken by it to retrieve the Confidential Information from unauthorised persons and to prevent further disclosure of the Confidential Information.
- 40.8. Clause 40.7 is without prejudice to any rights of the Disclosing Party arising from the unauthorised disclosure of its Confidential Information.
- 40.9. Return of Confidential Information

40.9.1. Upon the request of the Disclosing Party, the Receiving Party must return, destroy or expunge from any storage device all Confidential Information:

40.9.1.1. other than documents prepared by the Receiving Party;

40.9.1.2. provided that if required by law or for purposes of the Services and/or the Build, the Receiving Party may retain one copy of the Confidential Information for the period so required.

40.10. Where the Disclosing Party has required destruction of the media containing Confidential Information the Receiving Party must, on request, confirm in writing that it has destroyed all Confidential Information and made reasonable efforts to expunge Confidential Information stored electronically from any storage device on which it was held.

40.11. All requests in terms of clause 40.9.1 must be complied with within 5 (five) Business Days.

40.12. Neither Party shall make any public announcements in respect of this Agreement (other than announcements which any Party is required by law or regulation) without the other Party's prior written consent.

41. **LIMITATION OF LIABILITY**

41.1. Neither of the Parties shall have any claims for any Losses whatsoever (including any claims under common law or otherwise) save as contemplated in this Agreement.

41.2. Notwithstanding anything to the contrary in this Agreement, under no circumstances shall either Party or any of its directors, officers, employees, agents or consultants be liable to the other Party for any incidental, consequential, special or indirect damages (including, without limitation, indirect lost profits, indirect lost revenue or loss of opportunity).

41.3. The Service Provider shall have no liability to COT in respect of any Losses which have not prescribed and which: (a) arise after the Term; and/or (b) arise during the Term if COT has not notified the Service Provider in writing of the relevant breach by not later than 12 (twelve) months after the last day of the Term.

41.4. Notwithstanding the warranties, representations and undertakings given by any party (the "**Warranting Party**") to the other Party (the "**Other Party**") under this Agreement or any other provision to the contrary in this Agreement, subject to clause 41.6, no liability shall attach to the Warranting Party in respect of any breach of this Agreement in relation to Losses:

41.4.1. if and to the extent that the breach giving rise to such Losses is as a result of:

- 41.4.1.1. any matter or thing done or omitted to be done pursuant to and in compliance with this Agreement or otherwise at the request in writing or with the approval in writing of the Other Party;
 - 41.4.1.2. any act or omission of the Other Party or its respective directors, officers, employees or agents or successors in title (other than acts or omissions pursuant to the Other Party enforcing its rights and/or complying with its obligations under this Agreement);
 - 41.4.1.3. the passing of, or any change in, (after the Date of Signature) any law or administrative practice of any governmental entity not actually (or prospectively) in effect at the Date of Signature;
 - 41.4.1.4. any change after the Date of Signature of any generally accepted interpretation or application of any Law or administrative practice; or
 - 41.4.1.5. a matter or circumstance which was actually known by the Other Party, its officers, directors and/or Staff as at the Date of Signature.
- 41.5. The limitations of the Warranting Party's liability in this clause 41 do not apply to Losses arising out of a breach of this Agreement due to the wilful misconduct on the part of the Warranting Party.
- 41.6. Nothing in this clause 41 or contained elsewhere in this Agreement shall:
- 41.6.1. in any way diminish the Other Party's common law obligation to mitigate its Losses; nor
 - 41.6.2. limit COT's liability whatsoever:
 - 41.6.2.1. to pay any amounts, fees, charges and/or expenses which fall due for payment by it under this Agreement (including without limitation all amounts to be paid by COT to the Service Provider in terms of clause 47); nor
 - 41.6.2.2. if the breach in question is a breach by COT of the warranty set out in clause 25 or clause 34.

42. **BREACH**

- 42.1. If a Party (the "**Breaching Party**") breaches a material term of this Agreement and fails to remedy such breach within 60 (sixty) days (save for a breach of any payment obligation in which case this time period shall be 10 (ten) Business Days) of being given written notice

requiring it to do so by the aggrieved Party, then the aggrieved Party is entitled, in addition to any other remedy available to it at law or under this Agreement, including obtaining an interdict, to:

42.1.1. subject to clause 42.2, cancel this Agreement provided that the aggrieved Party shall not be entitled to cancel this Agreement unless:

42.1.1.1. the breach by the Breaching Party is a breach of a term which goes to the root of this Agreement, it being recorded that (without limitation to any other breach of this Agreement which constitutes a breach of a term which goes to the root of the Agreement) it shall be a breach of a term which goes to the root of the Agreement if:

42.1.1.1.1. without COT's prior consent, the Service Provider:
(a) incorporates a subsidiary; or (b) trenches fibre-optic cable on the Network for any other purpose other than that contemplated in this Agreement; or

42.1.1.1.2. COT fails to make payment to the Service Provider of any amount due, owing and payable by COT to the Service Provider under this Agreement; or

42.1.1.2. bankruptcy or insolvency proceedings are instituted against the Breaching Party and such proceedings are not dismissed within 30 (thirty) days from the date of proceedings, or the Breaching Party makes a general assignment for the benefit of its creditors; or

42.1.2. to claim specific performance of any obligation in respect of which the due date for performance has arrived, in either event without prejudice to the aggrieved Party's right to claim damages subject to the provisions of clause 41.

42.2. For the avoidance of doubt, neither this clause 42 nor any other clause entitling COT to cancel or terminate this Agreement shall permit the COT to cancel or terminate this Agreement prior to the Funders having elected whether or not to exercise their step-in rights in accordance with the Direct Agreement contemplated in clause 48.

42.3. Subject to clause 42.2, this clause 42 shall not be interpreted as limiting the ability of either Party to terminate or cancel this Agreement if it is entitled to do so under any other clause of this Agreement.

43. **NON-SOLICITATION**

Neither party shall without the prior written consent of the other party, either during, or within 12 (twelve) months after termination or expiration of this Agreement, solicit for employment, whether directly or indirectly, any person who, at any time during the duration of this Agreement, was a member of the other party's Staff and who was directly involved with any activity relating to this Agreement.

44. **CESSION AND ASSIGNMENT**

44.1. Neither Party shall be entitled to cede or assign any of its rights or obligations in terms of this Agreement to any third party without the prior written consent of the other Party, which consent such Party shall not unreasonably withhold.

44.2. Save as expressly permitted hereunder and under the Funding Agreements, the Service Provider shall not, without the prior written approval of the COT, assign, cede, delegate, transfer or otherwise dispose of any right or obligation under this Agreement to any other person.

45. **DELAYS**

45.1. If at any point in time, the Service Provider is unable to perform any of its obligations under this Agreement as a result of anything which is outside of its control (including, without limitation, power failures, air-conditioning failures, acts or omissions by public and/or local authorities and/or the failure to obtain: third party landlord consents; access to buildings; and/or wayleave approval) but within COT's reasonable control or in respect of which COT has influence, then once the Service Provider notifies COT of such a scenario then COT shall use all reasonable endeavours to, together with the Service Provider, resolve such scenario or cause such scenario to cease to exist. If, within 5 (five) Business Days after the date upon which the Service Provider has notified COT of the aforesaid scenario, COT and the Service Provider have been unable to resolve same and as a consequence, the Service Provider is unable to perform the relevant Services or section of the Build affected by such scenario, then:

45.1.1. notwithstanding anything to the contrary contained herein, for so long as such scenario prevails, the Service Provider shall not be liable under this Agreement for failure to perform its obligations in respect of the relevant Services or section of the Build affected by such scenario and the Service Provider shall be entitled to additional time required by it for completion as a result of any such delay; and

45.1.2. COT shall make payment to the Service Provider: (a) in respect of that portion of the relevant Services or section of the Build completed; and (b) the payment of all additional costs (including holding or standing time

costs) incurred plus a profit margin that will enable the Service Provider maintain the Pass Through Profit Margin in respect of the Services and/or the Build (as the case may be).

45.2. If the Service Provider suffers any delay or incurs any additional cost over and above those quoted for as a result of: any Change Order or amended Change Order; any failure on the part of COT to provide the Service Provider with the correct information regarding requirements; COT omitting any information in circumstances where the Service Provider could not reasonably have known of the inaccuracy or omission of such information; and/or any factor or circumstance outside of the Service Provider's reasonable control, then:

45.2.1. the Service Provider shall be entitled to: (a) additional time required by it for completion as a result of any such delay; and (b) the payment of all additional costs (including holding or standing time costs) incurred plus a profit margin that will enable the Service Provider maintain the Pass Through Profit Margin in respect of the Services and/or the Build (as the case may be); and

45.2.2. the Parties shall consult on ways in which the changes may be implemented in order to have as little negative impact on the Services and/or the Build (as the case may be) and costs thereof as reasonably possible.

45.3. If there is any delay in the Services and/or the Build (as the case may be) as a result of circumstances beyond the reasonable control of the Service Provider and such delay negatively impacts on the Service Provider's ability to achieve the completion of Services and/or the Build (as the case may be) by the date for completion thereof as set out in this Agreement, then the Service Provider shall be relieved of the obligation to comply with the timetable and the timetable (including the timetable for completion of the entire Network) shall be adjusted to take account of any delay that cannot reasonably be made up without additional cost to the Service Provider.

45.4. If the Service Provider encounters Physical Conditions which are Unforeseeable in the context of the Build, operate and transfer of the Network (and the Services) as contemplated in this Agreement and suffers delay and/or incurs cost due to such conditions then the Service Provider shall be entitled to: (a) an extension of time for any such delay; and (b) payment by COT of any such costs including any holding or standing time costs.

45.5. Each Party shall use its reasonable endeavours to advise the other Party in advance of any known or probable future event or circumstances which may adversely affect the provision of

Services and/or the Build (as the case may be), increase the price or delay the execution of Services and/or the Build (as the case may be).

45.6. Notwithstanding anything to the contrary contained in this Agreement, where there is any delay pursuant to which the Service Provider is granted an extension of time to complete the Services and/or relieved from complying with its obligations under this Agreement for a period of time then such extension and/or relief shall extend the period of time which within which the Service Provider is obliged to provide the suspended or delayed Service in question and, in addition, the total period of time within which the Service Provider is obliged to have provided all of the Services under this Agreement (including the Time for Completion) shall automatically be extended by such period of time.

46. **FORCE MAJEURE**

46.1. If vis major or force majeure or *casus fortuitus* ("**Interrupting Circumstances**") cause delays in or failure or partial failure of performance by a Party of all or any of its obligations under this Agreement, then this Agreement or the affected portion thereof is suspended for the period during which the Interrupting Circumstances prevail. If the Interrupting Circumstances prevail for a period of more than 90 (ninety) consecutive days then either Party is entitled to cancel this Agreement on 5 (five) days written notice to the other Party. Without prejudice to COT's obligation to pay any fees and charges for Services performed and/or the Build as agreed herein and subject to COT's obligations set out in clause 20.2 and clause 47, neither Party shall in the event of cancellation under this clause 46.1, be liable to compensate the other Party due to such cancellation.

46.2. The Party relying on the Interrupting Circumstances (on whom the onus rests) must:

46.2.1. give notice specifying the nature and date of commencement of the Interrupting Circumstances to the other Party as soon as reasonably possible after the commencement thereof; and

46.2.2. give notice of the cessation of the Interrupting Circumstances within 2 (two) days after such cessation.

46.3. No Party is obliged to comply with obligations that are suspended during the period that the Interrupting Circumstances prevail.

46.4. The Party whose performance is interrupted by the Interrupting Circumstances is entitled to extend the Term by a period equal to the time that its performance is so interrupted, provided that such Party gives notice to that effect as provided above.

46.5. In this Agreement, vis major, force majeure and *casus fortuitus*:

- 46.5.1. include acts or omissions of any government or similar authority, customs official or authority, amendments by governmental authorities to any regulatory provision having the force of law, civil strife or disorder, riots, rebellions or revolutions, insurrection, sabotage, acts of war or public enemy, terrorism, prohibition of exports or imports, rationing of supplies, flooding, lightning, storms, fire, elements of nature or acts of God, epidemics, labour disputes or (without limitation *eiusdem generis*) any other circumstances beyond the reasonable control of the Party claiming force majeure or vis major and comprehended in the terms force majeure or vis major including errors or delays in services from the affected Party's agents and/or sub-contractors; but
- 46.5.2. exclude any lack of authorisation, licence, permit or approval necessary for the performance of an obligation under this Agreement.

47. **EARLY TERMINATION**

47.1. In the event of termination or cancellation of this Agreement prior to the 18th anniversary of the Effective Date for whatever reason or cause arising COT shall without prejudice to the Service Provider's other rights (including to payment of other amounts) in terms of this Agreement or otherwise, immediately pay to the Service Provider:

- 47.1.1. the value of the work done (including Services performed and/or the Build accepted or deemed accepted in terms of clause 14) by the Service Provider which shall include:
 - 47.1.1.1. the amounts payable for any work carried out (including Services performed or provided and/or the Build accepted or deemed accepted in terms of clause 14) for which a price is stated in this Agreement;
 - 47.1.1.2. the cost of equipment, materials and any plant ordered for the Network or for COT which have been delivered to the Service Provider and/or its sub-contractors or of which the Service Provider and/or its sub-contractors is liable to accept delivery: this equipment, materials and any plant shall become the property of (and be at the risk of) COT when all amounts owing to the Service Provider under or in terms of this Agreement including the equipment, materials and any plant have been paid for by COT and the Service Provider shall place the equipment, materials and any plant at COT's disposal;

- 47.1.1.3. the cost of removal of any temporary works and the Service Provider's equipment from the site and the return of these items to works in South Africa (or to any other destination at no greater cost);
 - 47.1.1.4. any other cost or liability which in the circumstances was reasonably incurred by the Service Provider and/or its sub-contractors in the expectation of completing this Agreement;
 - 47.1.1.5. all breakage fees and costs incurred by the Service Provider (including all breakage fees and costs payable by the Service Provider to its service providers, funders and/or its sub-contractors);
and
 - 47.1.1.6. the cost of repatriation of the Service Provider's and any of its sub-contractor's staff and labour employed wholly in connection with this Agreement as at the date of termination; and
- 47.1.2. if the termination or cancellation is as a result of a breach by COT of this Agreement or pursuant to clause 22.4 or as a result of any change in legislation: all amounts (together with all interest and penalties thereon) that the Service Provider is required to pay to the Funders, all equity raised by the Service Provider and any coupon thereon, all borrowing costs, hedging costs, transaction costs and the like plus an amount equal the amount which would be required by the Service Provider in order to achieve the IRR. For the avoidance of doubt, the termination amount shall exclude future earnings; or
- 47.1.3. if the termination or cancellation is as result of the Service Provider breaching this Agreement: all amounts (together, with all interest and penalties thereon) that the Service Provider is required to pay to the Funders, all equity raised by the Service Provider (other than any coupon thereon), all borrowing costs, hedging costs, transaction costs and the like; or
- 47.1.4. if the termination or cancellation is as result of the Force Majeure event contemplated in clause 46: all amounts (together, with all interest and penalties thereon) that the Service Provider is required to pay to the Funders, all equity raised by the Service Provider and any coupon thereon, all borrowing costs, hedging costs, transaction costs and the like plus an amount equal to 50% (fifty percent) of the amount which would be required by the Service Provider in order to achieve the IRR, For the

avoidance of doubt, the termination amount shall exclude future earnings.

47.2. If there is a dispute in respect of any aspect of this clause 47 (including, without limitation, the amount that COT is obliged to pay to the Service Provider and/or COT's right to terminate) then it shall be resolved in accordance with the dispute process contemplated in clause 59; however, for the avoidance of doubt COT shall not withhold payment of any amounts which are not in dispute and shall immediately make payment of such amounts on demand from the Service Provider.

47.3. If clause 47.1 applies and at such point in time the shareholders of the Service Provider have, pursuant to the project contemplated in this Agreement, actually achieved, realised and received an aggregate IRR of at least the aggregate IRR which they would have achieved, realised and received had this Agreement not been terminated or cancelled pursuant to clause 47.1 (the "**Break Even Point**") then, without derogating from the provisions of clause 47.1:

47.3.1. the Parties shall, within 10 (ten) Business Days of either of them sending a written notice to the other requesting a meeting, meet to agree that value of the Network at such point in time by applying a discount rate equal to the IRR to future cash flows (the "**Network Value**"). If the Parties do not meet within the aforesaid 10 (ten) Business Days or do meet within such period but fail to reach agreement on the Network Value within 5 (five) Business Days after so meeting then either Party shall be entitled to refer the matter to an Expert for determination in terms of clause 58. Within 10 (ten) Business Days of the date upon which the Network Value is agreed by the Parties or determined by an Expert pursuant to clause 58 (as the case may be), COT shall pay the Service Provider an amount equal to the Network Value.

47.3.2. For the avoidance of doubt, the total amount payable to the Service Provider shall in terms of this clause 47 shall never be less than the amount the Service Provider is required to pay to the Funders and any coupon thereon, including all borrowing costs, hedging costs and transaction costs.

48. **FUNDERS' RIGHTS**

As the Service Provider will, on the basis of the Funding Agreements procure project financing for the transactions set out in this Agreement, COT agrees that it shall enter into good faith negotiations with the Service Provider's lenders regarding conclusion and execution of a direct agreement on customary

terms (which will, *inter alia*, include the funder's step-in rights and the process to be followed in relation thereto) (the "**Direct Agreement**").

49. **REPORTING**

The Service Provider will provide quarterly reports to the City on Build progress, serviced areas, the SMME development in accordance with Annexure G and service level agreement reports.

50. **CONTRACT MANAGEMENT**

In accordance with section 116 of the MFMA, the COT shall appoint a contract management team which shall, on behalf of the COT, monitor on a monthly basis the performance under the Agreement, oversee the day-to-day management of the Agreement and otherwise ensure compliance with section 116 of the MFMA.

51. **DOMICILIA CITANDI ET EXECUTANDI**

51.1. The Parties choose as their domicilia citandi et executandi for all purposes under this Agreement, whether in respect of court process, notices or other documents or communications of whatsoever nature (including the exercise of any option), the following addresses:

51.1.1. COT: [•]

Physical: [•]

Postal: [•]

Fax: [•]

E-mail: [•]

For attention: [•]

51.1.2. Service Provider:

Physical: [•]

Postal: [•]

Fax: [•]

E-mail: [•]

For attention: [•]

- 51.2. Either Party may by notice to the other Party change the physical or postal address chosen as its *domicilium citandi et executandi* to another physical or postal address in the Republic of South Africa, provided that the change becomes effective on the 14th (fourteenth) working day from the deemed receipt of the notice by the other Party.
- 51.3. Any notice or communication required or permitted to be given in terms of this Agreement is valid and effective only if in writing.
- 51.4. A notice to a Party:
- 51.4.1. sent by prepaid registered post in a correctly addressed envelope to it at its chosen postal address is deemed to have been received on the 14th (fourteenth) Business Day after posting unless the contrary is proved;
 - 51.4.2. delivered by hand to a responsible person during ordinary business hours at the physical address chosen as its *domicilium citandi et executandi* is deemed to have been received on the day of delivery;
 - 51.4.3. sent by fax to its chosen fax number or e-mail address stipulated in clause 51.1, shall be deemed to have been received on: (a) the date of despatch if it is dispatched before 17h00; or (b) day after the date of dispatch if it is dispatched after 17h00, unless the contrary is proved.
- 51.5. Notwithstanding anything to the contrary herein contained a written notice or communication actually received by a Party is an adequate written notice or communication to it notwithstanding that it was not sent to or delivered at its chosen *domicilium citandi et executandi*.

52. **GOVERNING LAW AND JURISDICTION**

This Agreement is governed by and interpreted in accordance with the law of the Republic of South Africa and is subject to the non-exclusive jurisdiction of the High Court of South Africa (Gauteng Division, Pretoria).

53. **RELATIONSHIP OF THE PARTIES**

The Parties' relationship is that of independent contractors and is governed by this Agreement. Nothing in this Agreement is intended, nor may be interpreted or deemed to constitute any Party to be a partner, employee, agent or representative of the other Party. It is not the intention of the Parties to create, nor may this Agreement be construed to create any commercial or other partnership. No Party may act for or assume any obligation or responsibility on behalf of the other Party without the latter's prior written consent. No Party may hold itself out as a partner of the other Party.

54. CHANGES IN COT BUSINESS / LEGISLATION / INPUT COSTS / CPI

54.1. If: (a) COT wishes to alter the scope and/or the manner in which it conducts its business and/or affairs then before doing so COT shall notify the Service Provider thereof in writing; or (b) any changes are made to any Laws, and if the Service Provider (acting reasonably) believes that such alteration contemplated in (a) or change contemplated in (b) will impact upon the Service Provider's ability to provide the Services and/or the Build or the price at which the Service Provider provides the Services then:

54.1.1. the Service Provider shall be entitled to: (a) additional time for completion; and (b) the payment of all additional costs incurred plus a profit margin that will enable the Service Provider maintain the Pass Through Profit Margin in respect of the Services; and

54.1.2. the Parties shall consult on ways in which the changes may be implemented in order to have as little negative impact on the Services and costs thereof as reasonably possible.

54.2. The Parties agree that the Service Provider has priced the project contemplated in this Agreement on the assumptions that:

54.2.1. for the duration of the Term it will maintain the Pass Through Profit Margin on the reasonable input costs (including, without limitation, external to the Service Provider and outside of the Service Provider's control) incurred by it in complying with its obligations under this Agreement. Accordingly, COT agrees that if the reasonable input costs (including, without limitation, external to the Service Provider and outside of the Service Provider's control) incurred by the Service Provider in complying with its obligations under this Agreement increase then the Service Provider will be entitled to the payment of additional costs incurred plus a profit margin that will enable the Service Provider to maintain the Pass Through Profit Margin. Without limitation to the foregoing any currency exchange rate fluctuation, import/customs duty and/or statutory charges which results in the Service Provider paying a higher input cost than that contemplated in the Service Provider's financial model in respect of the project contemplated in this Agreement when the Tender Response was submitted shall constitute an increase in the input costs incurred by the Service Provider for purposes of this clause 54.2.1; and

54.2.2. COT makes payment of all amounts payable to the Service Provider under this Agreement as and when such amounts are due, owing and payable hereunder. Accordingly, notwithstanding anything to the contrary contained in this Agreement, if COT fails to pay any amounts owing by it to the Service Provider under this Agreement when such amounts become due, owing and payable then COT shall re-imburse the Service Provider (on demand from the Service Provider) for any Losses suffered or incurred by the Service Provider as a result thereof.

54.3. The Parties agree that all amounts to be paid by COT under this Agreement and any other agreements entered into between COT and the Service Provider and/or its' sub-contractors, in any manner whatsoever, related to (or relevant to) the Services and the Build, the Network and/or the Equipment shall be adjusted upwards annually on 1 January each year by the percentage by which the annual Consumer Price Index has increased over the immediately preceding 12 month period.

55. **INTEREST ON OVERDUE AMOUNTS**

Should any amount due, owing and payable by either Party under this Agreement fail to be made on the due date therefor then, without prejudice to such other rights as may accrue consequent upon such failure, such overdue amounts will bear interest at the Prime Rate plus 2% (two percent) from the due date for payment to the date of actual payment, which interest shall be payable simultaneously with payment of the due amount.

56. **SEVERABILITY**

Any provision in this Agreement which is illegal, invalid or unenforceable is ineffective to the extent of such prohibition or unenforceability and must be treated *pro non scripto* and severed from the balance of this Agreement, without invalidating the remaining provisions of this Agreement.

57. **GENERAL**

57.1. This Agreement constitutes the whole agreement between the Parties.

57.2. No consensual cancellation of this Agreement or settlement of any dispute arising under this Agreement, is binding unless recorded in a written document that clearly specifies the intention to cancel or settle and signed by a duly authorised representative of each Party.

57.3. No extension of time, waiver, relaxation, suspension of or discharge from any provision of this Agreement is binding unless recorded in a written document that clearly specifies the intention to extend, waive, relax, suspend or discharge and signed by the Party granting such extension, waiver, relaxation, suspension or discharge. Any extension, waiver, relaxation,

suspension or discharge must be construed as relating strictly to the matter in respect whereof it was given.

57.4. An extension of time, waiver, relaxation or suspension of any provision of this Agreement does not operate as an estoppel against any Party in respect of its rights under this Agreement, nor does it operate so as to preclude such Party thereafter from exercising its rights strictly in accordance with this Agreement.

57.5. The Service Provider's BBBEE status will be monitored on a bi-annual basis and should it be found to be unsatisfactory, the Service Provider must rectify their status in a reasonable period. Thereafter, if still unsatisfactory, the Agreement may be terminated.

57.6. Each Party must pay its own costs pertaining to the negotiation, drafting and execution of this Agreement.

58. **EXPERT DISPUTE RESOLUTION**

58.1. Procedure for appointment

The procedure for the appointment of an Expert shall be as follows:

58.1.1. the Party wishing to appoint or to refer a matter to an Expert shall give notice to the other Party that it is (in terms of clause 59.3) referring the matter to Expert determination;

58.1.2. the Parties shall meet and endeavour to agree upon a person to be the Expert;

58.1.3. if, within 5 (five) days from the date of the notice under clause 58.1.1 above, the Parties have failed to agree upon an Expert, the matter shall forthwith be referred by the Party wishing the appointment to be made to the President of the South African Association of Consulting Engineers if the dispute is of a technical nature or if of a commercial nature to the Chairman of the South African Institute of Chartered Accountants (each, an "**appointer**") who shall be requested to make the appointment of the Expert as soon as is reasonably possible but in any event within 5 (five) days and, in so doing, may take such independent advice as he thinks fit;

58.1.4. upon a person being appointed as Expert under the foregoing provisions, the Parties forthwith shall notify such person of his selection and shall request him to confirm within 2 (two) days whether or not he is willing and able to accept the appointment;

- 58.1.5. if such person is unwilling or unable to accept such appointment, or shall not have confirmed his willingness and ability to accept such appointment within such period of 2 (two) days, then (unless the Parties are able to agree upon the appointment of another Expert) either Party may, in the manner aforesaid, request the appointer to make an appointment or (as the case may be) a further appointment and the process shall be repeated until a person is found who accepts the appointment as Expert.

58.2. Qualifications and disqualifications

A person shall not be appointed as the Expert:

- 58.2.1. unless he is qualified by education, experience and training to determine the matter in dispute;
- 58.2.2. if he has an interest or duty which would materially conflict with his role (including being a director, officer, employee, consultant or supplier to either Party, contractor or to any Affiliate of either Party or contractor); or
- 58.2.3. if he is an employee or agent or former employee or agent of such person.

58.3. Procedures

- 58.3.1. The following procedures shall apply where an Expert's determination is sought:
- 58.3.1.1. the Expert shall determine the dispute Acting as an Expert and not an Arbitrator.
- 58.3.1.2. the Expert shall have the powers given to an arbitrator under section 14 of the Arbitration Act, No. 42 of 1965 (the "**Arbitration Act**") and, if such Arbitration Act or section is no longer in force, then the Expert shall have similar powers under any statutory provision which replaces such section, and if none does, the Expert shall have similar powers as if that section of such Arbitration Act were still in force;
- 58.3.1.3. each Party shall supply to the Expert such information as the Expert may request;
- 58.3.1.4. the Expert shall (subject to clause 58.3.1.5 below) make his decision as soon as reasonably practicable after receiving data, information and submissions which shall be supplied and made to him by the

Parties not later than 7 (seven) days after he has confirmed to the Parties acceptance of his appointment;

58.3.1.5. the Expert shall be entitled to obtain such independent advice and secretarial assistance as he may reasonably require; and

58.3.1.6. the Expert shall give full written reasons for his decision.

58.3.2. All communications between a Party and the Expert and/or the appointer shall be made in writing and a copy thereof provided simultaneously to the other Party. No meeting between the Expert and/or the appointer and the Parties or either of them shall take place unless both Parties have a reasonable opportunity to attend any such meeting.

59. **DISPUTE RESOLUTION AND ARBITRATION**

59.1. Should any difference or dispute, except in breach of an obligation in terms of this Agreement arise at any time between the Parties, the duly authorised senior officials of each Party shall meet within 5 (fourteen) Business Days, or such period as the Parties may agree, from the date on which the dispute arose to resolve the dispute amicably.

59.2. In the event of a dispute arising between the Parties, it will, pending resolution of the dispute, continue to fulfil all other obligations under this Agreement that is/are not in dispute.

59.3. If the dispute is not resolved at the meeting contemplated in clause 59.1, or extended meeting as the Parties may agree to in writing, or such meeting does not take place within the 5 (five) Business Day period contemplated in clause 59.1 or such later date at the Parties may agree in writing, then either of the Parties shall for a period of 10 (ten) Business Days thereafter be entitled to refer the dispute to Expert determination in terms of clause 58. If the matter is not referred to Expert determination within the aforesaid 10 (ten) Business Day period then either of the Parties shall be entitled to refer the matter to the Arbitration Foundation of Southern Africa ("**AFSA**") to be determined by arbitration in terms of the Rules of AFSA as amended from time to time (the "**Rules**"), such arbitration shall be held in Johannesburg.

59.4. The appointment of the arbitrator shall be agreed upon between the Parties in writing but, failing agreement between them, within a period of 10 (ten) Business Days after the arbitration has been demanded in terms of clause 59.3, above either Party shall be entitled to request the AFSA to make the appointment and, in making such appointment, to have regard to the nature of the dispute. If AFSA fails or refuses to make the nomination within 10 (ten) days, any Party may approach the High Court of South Africa to make such an appointment. To the extent necessary, the court is expressly empowered to do so.

- 59.5. There shall be one arbitrator who shall be a practicing senior counsel or, alternatively, a practicing attorney of not less than 15 (fifteen) years' experience as an attorney.
- 59.6. The arbitrator shall have the powers conferred upon an arbitrator under the Rules.
- 59.7. The arbitrator shall have the power to give default judgment if any Party fails to make submissions on due date and/or fails to appear at the arbitration, which judgment the arbitrator shall be entitled to rescind on good cause shown in terms of the legal principles applicable to rescission of judgments.
- 59.8. The decision of the arbitrator shall be subject to appeal by either Party giving the other written notice with the grounds of appeal within 15 (fifteen) Business Days of the single arbitrator's award. The appeal arbitration panel will consist of three arbitrators being practicing senior counsels or, alternatively, practicing attorneys of not less than 15 (fifteen) years' experience as attorneys. The appeal will be conducted in terms of the appeal rules of AFSA.
- 59.9. The Parties shall keep the evidence in the arbitration proceedings and any order made by any arbitrator confidential unless otherwise contemplated herein.
- 59.10. The arbitrator shall be obliged to give his award in writing fully supported by reasons.
- 59.11. The provisions of this clause are severable from the rest of this Agreement and shall remain in effect even if this Agreement is terminated for any reason.

60. **COUNTERPARTS**

This Agreement may be executed in counterparts, each of which will be an original and which together constitute the same agreement.

Signed by the Parties on the following dates and at the following places respectively:

FOR: **THE CITY OF TSHWANE**

Signature: _____
who warrants that he / she is duly authorised thereto

Name: _____

Position: _____

Date: _____

Place: _____

FOR: **NEWSHELF 1327 PROPRIETARY LIMITED (IN THE PROCESS OF BEING
RENAMED AS THOBELA TELECOMS (RF) PROPRIETARY LIMITED)**

Signature: _____
who warrants that he / she is duly authorised thereto

Name: _____

Position: _____

Date: _____

Place: _____

Annexure A Infrastructure/network builds (network topology) inclusive architecture documents

Annexure B The Existing Network

Annexure C The Operate and Maintenance Services

Annexure D Service Levels

Annexure E Products and Services

Annexure F Implementation Plan

- **Sign off process**
- **Project Plan**
- **Responsibility Matrix**
- **Implementation Plan Site Survey Procedure – building access**
- **Site Survey Procedure**
- **Site Survey Report**
- **Site Survey Sheet**

Annexure G Economic, Skills and Development plan

Annexure H Training plan

- **End User Training**
- **System Operations Manual**