



Registration No. 2000/026390/08

MEMORANDUM OF AGREEMENT

Between

**SOUTH AFRICAN NATIONAL BLOOD SERVICE NPC
REGISTRATION NUMBER: 2000/026390/08
(Hereinafter referred to as "SANBS")**

And

.....
**REGISTRATION NUMBER:
(Herein referred to as "the Service Provider")**



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SCHEDULE TO MEMORANDUM OF AGREEMENT

This schedule, the Main Agreement and the Annexures thereto shall form an integral part of this Agreement, as if specifically incorporated herein.

The **SANBS** herein described as

The **South African National Blood Services** an Entity non-profit company incorporated in terms of the Companies Act (Act No. 71 of 2008)
(Registration number: _____)

Physical address	Postal address
1 Constantia Boulevard Constantia Kloof Roodepoort 1709	Private Bag X14 Weltevreden park Roodepoort 1715
Fax number: N/A E-mail address: Marked for the attention of:	

(the Physical address is hereinafter referred to as SANBS' *domicilium citandi et executandi*)

The **Service Provider** herein described as:

_____ An entity registered in terms of the Companies Act (Act No. 71 of 2008)
(Registration number: _____)

Registered name:

Physical address	Postal address
Tel: Fax number: E-mail address: Marked for the attention of:	

(the Physical address is hereinafter referred to as the Entity's *domicilium citandi et executandi*)

Duration of the Contract:

Commencement Date:

The ____ day of _____

Termination:

The ____ day of _____

Total Amount payable to Service Provider:

R
(_____)

Service Provider's Dedicated Bank Account:

Account Holder:
Account Number:
Bank:
Branch Code:

CONTENTS:

- Main Agreement (General Terms and Conditions)
- Annexure A – Service Level Agreement
- Annexure B – Data Privacy
- Annexure C –



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1. PREAMBLE

WHEREAS SANBS requires specialised expertise and knowledge of the Service Provider to Provide the services of ...insert brief description of services...;

AND WHEREAS the Service Provider has represented to the SANBS that it has the suitable expertise, personnel, certification and skills required to deliver the Goods and services required by SANBS;

AND WHEREAS the SANBS hereby appoints the Service Provider to render Services from the Effective Date on a **non-exclusive basis**, which appointment the Service Provider accepts, subject to the terms and conditions under this Agreement.

AND WHEREAS SANBS is not precluded from obtaining Services that may be similar or identical to the Services from any other Service Providers and the Service Provider is not be restricted from providing the Goods and services that may be similar or identical to any third party.

AND WHEREAS The Parties accordingly wish to record in writing their agreement in respect of the above, in particular the terms and conditions upon which the Service Provider will deliver the Goods and Services.

2. DEFINITIONS AND INTERPRETATION

2.1 In this agreement, unless the context indicates a contrary intention, the following words and expressions bear the meanings assigned to them and cognate expressions bear corresponding meanings –

2.1.1 "**AFSA**" shall mean the Arbitration Foundation of Southern Africa;



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- 2.1.2 **"Agreement"** shall mean the agreement contained in this document, including all annexures and appendices (if any) hereto;
- 2.1.3 **"Best industry practice"** shall mean the exercise of such reasonable skill, care, prudence, efficiency, foresight and timeliness as would be expected from a reasonably and suitably skilled, trained and experienced person engaged in the same type of undertaking and for the same or similar circumstances;
- 2.1.4 **"BBBEE"** shall mean the principles of broad-based black economic empowerment as set out in the Broad-Based Black Economic Empowerment Act 53 of 2003;
- 2.1.5 **"Causal Event"** shall mean –
- 2.1.5.1 a compromise, scheme of arrangement or composition by the Service Provider with any or all of its creditors; or
 - 2.1.5.2 liquidation of the Service Provider or placement of the Service Provider under judicial management, whether provisionally or finally; or
 - 2.1.5.3 the placement of the Service Provider under business rescue proceedings or any similar administration, whether voluntarily or upon application by a third party; or
 - 2.1.5.4 a cessation, or a reasonable prospect of cessation (as the case may be), of the carrying on of the Service Provider's normal line of business; or
 - 2.1.5.5 the commission of any act or any omission which if it had been done or omitted to be done by a natural person would be an



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act of insolvency in terms of the Insolvency Act, 1936, whether or not the Service Provider is subject to the laws of the republic of South Africa;

2.1.5.6 the existence of circumstances which would allow for the Service Provider to be subject to any winding up (whether provisional or final), judicial management, dissolution, or business rescue proceedings (whether voluntary or upon application by a third party) (or, in respect of all the foregoing, any analogous arrangements under any law to which the Service Provider is subject) of the Service Provider under any law to which the Service Provider is subject regulating the bankruptcy, insolvency, winding up, judicial management, dissolution or rescue of corporate entities;

2.1.5.7 any disposal by the Service Provider of the whole or the greater part of its undertaking or assets (measured by value), including by way of a merger or amalgamation; or

2.1.5.8 subsequent to the Service Provider signing this Agreement, any person acquiring Control of the Service Provider;

2.1.6 "**Confidential Information**" shall mean any records, data or information (including personal information), of any nature tangible or intangible, oral or in writing and in any format or medium, which is collected, received, processed, stored or transmitted by the parties in any manner connected with the delivery of goods and services hereunder, or data which by its nature or content is identifiable as confidential and/or proprietary to the disclosing party and/or any third party, or which is provided or disclosed in confidence; and which the disclosing party or any person acting on his behalf may disclose or provide to the receiving party or which may come to the knowledge of the receiving party



by whatsoever means;

- 2.1.7 "**Consumer Price Index**" shall mean 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 (which index shall be agreed between the parties or failing which, shall be nominated by the South African Institute of Chartered Accountants on application by either party) the shall be adopted in the place of the consumer price index;
- 2.1.8 "**Control**" shall mean the ability, by virtue of ownership, right of appointment, right to control election or appointment, voting rights, the ability to control the exercise of voting rights, management agreement, or agreement of any kind, to control or direct, directly or indirectly, the board or executive body or decision making process or management of such entity;
- 2.1.9 "**Corrupt Activity**" shall mean the offering, giving, receiving, or soliciting of anything of value to influence the action of a SANBS employee in the procurement process or in Agreement execution; and as defined in the General conditions of contracting in the Treasury Framework for contracting;
- 2.1.10 "**Data Privacy Annexure**" means the annexure attached hereto as Annexure [B] and which sets out the Parties' obligations in respect of data privacy;
- 2.1.11 "**Delivery**" shall mean the supply of any of the goods and services by the Service Provider to SANBS;
- 2.1.12 "**Dispute**" shall mean any disagreement between the contractual parties relating to the contractual provisions and/or *obligation*;



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- 2.1.13 "**Documentation**" shall mean the documentation that SANBS would reasonably require to be provided by the Service Provider and includes all materials, documentation, specifications, technical manuals, user manuals, plans, flow diagrams, file descriptions and other written information that describes the function and use of the goods and services;
- 2.1.14 "**Effective Date**" shall mean, notwithstanding the signature date;
- 2.1.15 "**Fees**" shall mean the fees to be paid by SANBS to the Service Provider for delivering the goods and services, as detailed in annexure c hereto;
- 2.1.16 "**Force Majeure event**" shall mean any act of God (including fire, flood, earthquake, storm, hurricane or other natural disaster) war, invasion, act of foreign enemies, hostilities (regardless of whether war was declared), civil war, rebellion, revolution, insurrection, military or surged power or confiscation, terrorist activities, nationalisation, changes in laws, rules or regulations, government sanction, blockage, embargo, labour dispute, strike, lock out or interruption or failure of electricity or telephone service, unavailability of equipment and materials;
- 2.1.17 "**Fraudulent activity**" shall mean a misrepresentation of facts in order to influence a procurement process or to unduly receive a benefit in whatever form
- 2.1.18 "**Goods**" shall mean the goods ordered by SANBS and delivered by the Service Provider, namely...:
- 2.1.19 "**Intellectual Property**" shall mean any invention (whether or not patented), design, trademark, or copyright material (whether or not registered), goodwill, processes, process methodology and all other identical or similar intellectual property as may exist anywhere in the world and any applications for registration of such intellectual property, which specifically includes all



copyright, design rights and any other proprietary rights in and to any business plans and proposals, business processes and functional and technical specifications and any related material;

- 2.1.20 "**Key Personnel**" shall mean employee's, staff members or workers that are needed by a party to perform certain tasks or duties in achieving the contractual obligations;
- 2.1.21 "**Loss**" shall mean all losses, liabilities, costs, expenses, fines, damage, damages and claims, and all related costs and expenses (including legal fees on the scale as between attorney and own client, tracing and collection charges, costs of investigation, interest).
- 2.1.22 "**Parties**" shall mean the parties to this agreement collectively and individually referred to as Party;
- 2.1.23 "**Premises**" shall mean the SANBS head office located at 1 Constantia Boulevard, Constantia Kloof, Roodepoort or such other premises as SANBS may designate in writing;
- 2.1.24 "**Prime Rate**" shall mean the publicly quoted basic rate of interest, compounded monthly in arrears and calculated on a 365 (three hundred and sixty-five) day year irrespective of whether or not the year is a leap year, from time to time published by the bankers of SANBS at the relevant point in time as being its prime overdraft rate, as certified by any representative of that bank whose appointment and designation it shall not be necessary to prove;
- 2.1.25 "**Quarterly Report**" shall mean the report to be prepared by the Service Provider every three (3) months following the commencement, in accordance with the format prescribed by the SANBS from time to time;
- 2.1.26 "**SANBS**" shall mean the South African National Blood Service NPC, registration



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number 2000/026390/08, a non-profit organisation duly incorporated in the Republic of South Africa;

- 2.1.27 "**Services**" shall mean the services set out in Annexure A;
- 2.1.28 "**Service hours**" shall mean the hours between 08h00 and 17h00, Monday to Friday, excluding public holidays;
- 2.1.29 "**Service Level Agreement**" shall mean the service level agreement which is contained in Annexure A;
- 2.1.30 "**Service Level Requirements**" shall mean those service level requirements set out in Annexure A;
- 2.1.31 "**SERVICE PROVIDER**" shall mean, a private company duly incorporated under the laws of the Republic of South Africa;
- 2.1.32 "**Site**" shall mean the premises or such other site as SANBS may designate in writing;
- 2.1.33 "**Signature Date**" shall mean the date of signature of this agreement by the party last signing;
- 2.1.34 "**Staff**" shall mean any natural person who is either an employee, consultant or subcontractor of either party, and where the context requires, employees, consultants and subcontractors of a subcontractor;
- 2.1.35 "**Termination Date**" shall **mean** the date when the obligations under this contract terminate, being ..insert date....;
- 2.1.36 "**VAT**" shall mean value-added tax, chargeable under the Value Added Tax Act, 1991; and
- 2.1.37 "**Warranty Period**" shall mean, in relation to the goods and services, a period of



..... months.

2.1.38 "**Writing**" shall mean any typewritten or printed communication and excludes electronic communication as defined in the Electronic Communications and Transactions Act of 2002 as amended from time to time. "Written" shall have a corresponding meaning.

2.2 Any reference to-

2.2.1 any gender includes the other genders;

2.2.2 a natural person includes a juristic person and vice versa;

2.2.3 the singular includes the plural and vice versa;

2.2.4 a party includes a reference to that party's successors in title and assigns allowed at law; and

2.2.5 a reference to a consecutive series of two or more clauses is deemed to be inclusive of both the first and last mentioned clauses;

2.2.6 the headings of clauses in this Agreement are for reference purpose only and shall not be taken into account in construing the content thereof;

2.2.7 The preamble shall form an integral part of this Agreement;

2.2.8 "**business hours**" shall be construed as being the hours between 08h00 and 17h00 on any business day. any reference to time shall be based upon South African standard time; (utc +2)

2.2.9 "**days**" shall be construed as calendar days unless qualified by the word "business", in which instance a "business day" will be any day other than a Saturday, Sunday or public holiday as gazetted by the government of the republic of South Africa from time to time;



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2.2.10 "**months**" or "**years**" shall be construed as calendar months or years, as the case may be;

2.2.11 "**laws**" means all South African constitutions; statutes; regulations; by-laws; codes; ordinances; decrees; rules; judicial, arbitral, administrative, ministerial, departmental or regulatory judgements, orders, decisions, rulings, or awards; policies; voluntary restraints; guidelines; directives; compliance notices; abatement notices; agreements with, requirements of, or instructions by any governmental body; and the common law, and "law" shall have a similar meaning; and

2.2.12 "**person**" means any person, company, close corporation, trust, partnership or other entity whether or not having separate legal personality.

2.3 The words "include" and "including" mean "include without limitation" and "including without limitation". The use of the words "include" and "including" followed by a specific example or examples shall not be construed as limiting the meaning of the general wording preceding it.

2.4 Any substantive provision, conferring rights or imposing obligations on a party and appearing in any of the definitions in this clause 2 or elsewhere in this agreement, shall be given effect to as if it were a substantive provision in the body of the agreement.

2.5 Words and expressions defined in any clause shall, unless the application of any such word or expression is specifically limited to that clause, bear the meaning assigned to such word or expression throughout this agreement.

2.6 Unless otherwise provided, defined terms appearing in this Agreement in title case shall be given their meaning as defined, while the same terms appearing in lower case shall be interpreted in accordance with their plain English meaning.

2.7 A reference to any statutory enactment shall be construed as a reference to that



enactment as at the signature date and as amended or substituted from time to time.

- 2.8 Unless specifically otherwise provided, any number of days prescribed shall be determined by excluding the first and including the last day or, where the last day falls on a day that is not a business day, the succeeding business day.
- 2.9 If the due date for performance of any obligation in terms of this agreement is a day which is not a business day then (unless otherwise stipulated) the due date for performance of the relevant obligation shall be the immediately preceding business day.
- 2.10 Where figures are referred to in numerals and in words, and there is any conflict between the two, the words shall prevail, unless the context indicates a contrary intention.
- 2.11 The rule of construction that this agreement shall be interpreted against the party responsible for the drafting of this agreement, shall not apply.
- 2.12 No provision of this agreement shall (unless otherwise stipulated) constitute a stipulation for the benefit of any person (stipulatio alteri) who is not a party to this agreement.
- 2.13 The use of any expression in this agreement covering a process available under South African law, such as winding-up, shall, if either of the parties to this agreement is subject to the law of any other jurisdiction, be construed as including any equivalent or analogous proceedings under the law of such other jurisdiction.
- 2.14 Reference to "days" shall be construed as calendar days unless qualified by the word "business", in which instance a "business day" will be any day other than a Saturday, Sunday or public holiday as gazetted by the government of the Republic of South Africa from time to time.
- 2.15 In this Agreement wherever any number of days is prescribed, that number of days shall be calculated exclusively of the first and inclusively of the last day unless the last day falls on a Saturday, Sunday or public holiday, in which case the last day shall be the next succeeding day which is not a Saturday, Sunday or public holiday.



2.16 Any reference in this agreement to "this agreement" or any other agreement or document shall be construed as a reference to this agreement or, as the case may be, such other agreement or document, as amended, varied novated or supplemented from time to time.

2.17 In this agreement the words "clause" or "clauses" and "annexure" or "annexures" refer to clauses of and annexures to this agreement.

3. COMMENCEMENT AND DURATION

3.1 This Agreement shall come into effect on the Effective Date and shall terminate on Termination Date, unless extended beyond the Termination Date by written agreement between the Parties at least 30 days before Date of Termination;

3.2 In addition to any rights, in terms of this Agreement, SANBS has the right to terminate this Agreement at any time, for convenience, on 30 days' written notice to the Service Provider. SANBS shall have no liability to the Service Provider with respect to such termination, save that SANBS shall remain liable for payment in respect of any Services rendered by the Service Provider prior to the termination date.

3.3 In the event of termination by SANBS in terms of clause 16 below, the Service Provider shall have no claim against SANBS.

4. RELATIONSHIP

The relationship of the Parties in terms of this Agreement shall be that of independent contractors. No partnership or joint venture is hereby created between SANBS and the Service Provider. Neither Party shall be entitled to bind the credit of the other. Save as specifically herein contemplated, the Service Provider shall have no authority to assume any obligation of any kind on behalf of SANBS or to bind or commit SANBS in any way.



5. BRIBERY, CORRUPTION AND ANTI-COLLUSION

- 5.1. The Service Provider, its directors, officers, employees, representatives, professional advisers, contractors, sub-contractors or any related person (as defined in Section 2 of the Companies Act 71 of 2008) shall not –
- 5.1.1. offer, give or agree to give any person in the service of the SANBS or any other person indirectly or directly associated with this Agreement any gift or consideration of any kind as an inducement or reward for performing, or for having performed, any act in relation to the obtaining or execution of this Agreement or for showing or having shown, favour or disfavour to any person in relation to this Agreement or any other Agreement with the SANBS;
- 5.1.2. enter into this Agreement or any other agreement with the SANBS in connection with which commission has been paid or agreed to be paid by it or on its behalf, or to its knowledge, unless before the Agreement is executed particulars of any such commission and of the terms and conditions of any agreement for the payment thereof have been disclosed in writing to the SANBS and the written approval of the SANBS has been obtained; and
- 5.1.3. Collude with any other party or anyone who is in the service of the SANBS for the purpose of entering into this agreement.
- 5.2. The Service Provider agrees to keep accurate, full, and complete records that support the payments due under the Agreement and grants SANBS the right to inspect all of the Service Provider's books and records, including without limitation financial statements, the general ledger, all journals and registers, and all supporting business records of the transactions identified on such records relating to the Agreement.
- 5.3. The Agreement may be terminated by SANBS if the Service Provider breaches any of the representations contained in this clause and the obligations of SANBS to make any further payments under the Agreement shall be null and void.



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- 5.4. SANBS shall be entitled to terminate the Agreement forthwith if it is found that gifts and favours (for example business transactions/terms/conditions that are not freely available to the public, entertainment, gifts or otherwise) were given by the Service Provider, or any employee, agent or representative of the Service Provider to any officer or employee of SANBS (or family of such an officer or employee of SANBS) with a view toward securing the Agreement or securing the favourable treatment or terms by or from SANBS.
- 5.5. The Service Provider shall indemnify and hold SANBS harmless from and against any costs, fees, payment of interest, or other liabilities incurred in connection with or arising from the investigation of or defence against any litigation or other judicial, administrative, or other legal proceedings brought against SANBS as a result of acts or omissions by the Service Provider or any of its subcontractors or agents in violation of, or alleged to be in violation of, the anti-corruption laws of any jurisdiction.

6. ETHICS

- 6.1. The Service Provider is obliged to behave ethically and, in the context of its activity for SANBS, adhere to the principles of moral and professional behaviour enshrined in SANBS's Code of Ethics (hereinafter referred to as "Code of Ethics"), which is available from SANBS on request.
- 6.2. The Service Provider agrees to observe the conduct in the Code of Ethics during the fulfilment of the obligations arising out of or in connection with this Agreement and undertakes to ensure that the principles of the conduct expressed in the Code of Ethics will be equally respected and adhered to by all its affiliates, employees or persons in a similar position, and persons acting on its behalf.
- 6.3. SANBS is entitled to unilaterally change the wording of the Code of Ethics and such change does not require an amendment to this Agreement to be prepared.
- 6.4. The Service Provider agrees to keep abreast of changes to the Code of Ethics and familiarise itself with the current version of the Code of Ethics.



7. MEETINGS AND REPORTS

The Service Provider shall attend any and all meetings in connection with the Services at which the Service Provider's attendance is required by SANBS whether such meetings are scheduled or convened on an ad hoc basis. The Service Provider shall also compile and deliver to SANBS the reports required by SANBS in relation to the Services, whether such reports are required on a regular or ad hoc basis (See Annexure A hereto).

8. FEES, INVOICING AND PAYMENT

- 8.1. Payment of the Service Provider invoices shall be made by SANBS within 30 (thirty) days of receipt thereof by SANBS.
- 8.2. SANBS may withhold any amounts or portion thereof that it disputes in good faith. The Parties agree that they will endeavour to resolve the dispute within 10 (ten) Business Days. The Service Provider will provide the required supporting documentation as and when requested by SANBS.
- 8.3. The failure of SANBS to pay a disputed invoice, or to pay the disputed part of an invoice, shall not constitute a breach or default by SANBS.
- 8.4. Should the Parties be unable to resolve the dispute within the required timeframe the dispute will be dealt with in terms of clause 17 of this Agreement.
- 8.5. All Fees detailed in this Agreement are exclusive of VAT or any other tax (excluding income tax), levy or import duty payable by the Service Provider in connection therewith.

9. INDEMNITY AND LIMITATION OF LIABILITY

- 9.1. The SANBS shall have no obligations and/or responsibility to and in respect of any contractors appointed and /or third parties and the Service Provider hereby indemnifies the SANBS, its employees and agents against any claims whatsoever and howsoever arising out of this agreement.



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- 9.2. The Service Provider's total liability to SANBS shall be limited, in the aggregate, to, unless otherwise agreed upon to an amount equal 100% (one hundred percent) the total Fees payable and paid to the Service Provider.
- 9.3. In no event will either SANBS be liable for any direct, indirect, special or consequential damages, arising out of or relating to its breach of the Agreement, provided that if any special or consequential damages are included as part of a settlement or judgment against a SANBS hereto arising from a claim for which such SANBS is entitled to indemnification hereunder, such damages shall be limited to 20% (twenty percent) of the Fees paid to the Service Provider in terms of this Agreement in the preceding 1 (one) year.
- 9.4. The limitations of liability set forth in clauses 9.2 and 9.3 shall not apply with respect to:
- 9.4.1. Damages or occasioned by the fraud, wilful misconduct or gross negligence of the Party;
 - 9.4.2. claims that are the subject of indemnification under the Agreement;
 - 9.4.3. damages occasioned by a breach or violation of the Applicable Law by the Party;
 - 9.4.4. damages occasioned by the Party's breach of its confidentiality or data privacy and protection of personal information obligations, including those set out in Annexure [B], under the Agreement;
 - 9.4.5. damages which are caused by the Party's breach of the other Party's or any Third Party's Intellectual Property rights;
 - 9.4.6. damages arising from a breach by the Party of any warranties provided under the Agreement;
 - 9.4.7. damages associated with the Party being the cause of any damage to the other Party's property;



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- 9.4.8. damages in respect of any liability for death or personal injury resulting from the Party's wilful and / or gross negligent act; and
- 9.4.9. damages in respect of any liability that cannot be excluded in terms of any Applicable Law.
- 9.5. Any damages which may be suffered by any SANBS pursuant to the Agreement or the subject matter of it or them, shall be recoverable in accordance with the terms of this Agreement.

10. CONFIDENTIALITY

- 10.1. A Party which receives Confidential Information ("**the Receiving Party**") from the other Party ("**the Disclosing Party**") shall treat and hold it as confidential.
- 10.2. The Receiving Party undertakes and agrees that in order to protect the proprietary interests of the Disclosing Party in and to its Confidential Information,
- 10.3. The Receiving Party will not at any time without the prior written consent of the other Party, whether during the currency of this Agreement or at any time thereafter, either use any Confidential Information of the Disclosing Party or directly or indirectly divulge or disclose any Confidential Information of the Disclosing Party to third parties.
- 10.4. Instructions, drawings, notes, memoranda and records of whatever nature relating to the Confidential Information of the Disclosing Party which have or will come into the possession of the Receiving Party, will be and will at all times remain the sole and absolute property of the Disclosing Party.
- 10.5. The foregoing obligations will not apply to any information which –
- 10.5.1. is lawfully in the public domain at the time of disclosure to the Receiving Party;



- 10.5.2. subsequently becomes lawfully part of the public domain by publication or otherwise;
 - 10.5.3. subsequently becomes available to the Receiving Party from a source other than the Disclosing Party which is lawfully entitled without any restriction on disclosure to disclose such Confidential Information to the Receiving Party; or
 - 10.5.4. is disclosed pursuant to requirement or request by operation of law, regulation of court order.
- 10.6. The Disclosing Party may at any time on written request to the Receiving Party, require that the Receiving Party immediately return to the Disclosing Party any Confidential Information and may, in addition, require that the Receiving Party furnish a written statement to the effect that upon such return, it has not retained in its possession or under its control, either directly or indirectly, any such Confidential Information or material. Alternatively, the Receiving Party shall, as and when required by the Disclosing Party on written request to the Receiving Party, destroy all such Confidential Information and material and furnish the Disclosing Party with a written statement to the effect that the same has been destroyed. The Receiving Party shall comply with any request in terms of this within 7 (seven) days of receipt of such request.

11. SANBS DATA AND POPI COMPLIANCE

To the extent that the Parties will Process any Personal Information whatsoever, as such capitalised terms are defined in the Data Privacy Annexure, in terms of this Agreement, the Parties shall be bound by the provisions of the Data Privacy Annexure.

12. INTELLECTUAL PROPERTY RIGHTS

- 12.1. SANBS shall retain all title and interest in and to its proprietary Intellectual Property. The Service Provider shall not be permitted to use SANBS Intellectual Property for the benefit of any entities other than SANBS without the written consent of SANBS, which may be



withheld at SANBS' sole discretion. The Service Provider shall cease all use of SANBS' Intellectual Property as of the termination or expiration date of the Agreement.

12.2. The Service Provider hereby grants to SANBS an irrevocable, world-wide, fully paid-up, royalty-free, non-exclusive license to use any Service Provider Intellectual Property (including any Service Provider Proprietary Material) solely as necessary to use and receive the Goods and Services being provided to SANBS.

13. FORCE MAJEURE

- 13.1. Neither party will be held responsible or liable for any impossibility or partial impossibility of performance of this Agreement caused by a Force Majeure Event.
- 13.2. The party first affected by the Force Majeure Event must, immediately when it becomes aware of the occurrence thereof notify the other party in writing of the Force Majeure Event and must provide an estimate, which must be updated in writing from time to time while the Force Majeure Event persists, and when the Force Majeure Event can reasonably be expected to end.
- 13.3. Each party must take all reasonable steps by whatever means available to it, to resume the performance of its obligations under this Agreement as soon as is reasonably possible and must discuss with the other party ways and means to effectively overcome the Force Majeure Event.
- 13.4. If either party is unable to fulfil a material part of its obligations under this Agreement for a period of 15 (fifteen) days due to the Force Majeure Event, either party may, in its sole discretion, notwithstanding anything to the contrary stipulated in this Agreement, terminate this Agreement by written notice and without prejudice to either party's rights.

14. SERVICE PROVIDER WARRANTIES

- 14.1. The Service Provider warrants that –



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- 14.1.1. it shall at all times ensure that the Services comply in all respects with the technical and functional Specifications thereof as set out in Annexure A to this agreement;
- 14.1.2. it shall attend to its obligations in terms of the Service Level Agreement in a professional diligent manner, in accordance with the provisions contained in this agreement and in terms of the Best Industry Practice;
- 14.1.3. it shall employ an adequate number of Key Personnel who are appropriately experienced, qualified, competent, trained to deliver the Goods and Services in accordance with Best Industry Practice;
- 14.1.4. it shall ensure that all such Key Personnel are entitled to work in the Republic of South Africa or any other country in which the Services are performed;
- 14.1.5. it shall not knowingly or negligently act in a way which will result in it contravening any legislation or regulations applicable to it;
- 14.1.6. It shall ensure that it has appropriate governance, risk management and controls in place to perform in terms of this Agreement;
- 14.1.7. It shall ensure that all documents, data, software or other materials relevant to the Project are kept under secure conditions with appropriate back-up arrangements in place;
- 14.1.8. It will retain all documents, correspondence, records and other data relating to the Project and for a period of five (5) years following the date of termination of this Agreement;
- 14.1.9. All the documents it submitted as part of the tender process (including but not limited to its proposal, certificates) are correct and not fraudulent. In the even that SANBS finds that any of the Service Provider's documents submitted during the tender stage were false and fraudulent, SANBS reserves the right to terminate this agreement with immediate effect;
- 14.1.10. it shall at all times perform its responsibilities under this Agreement in a manner that does not infringe, or constitute an infringement or misappropriation of, any Intellectual Property



or other proprietary rights of any third party;

- 14.1.11. it (i) has in place and will maintain in place all the necessary licenses, certificates, authorisations, permits, approvals and consents that are required in terms of any applicable laws to deliver Services; and (ii) will comply in all material respects with the terms and conditions of (a) its licenses, certificates, authorisations, permits, approvals and consents;
- 14.1.12. it shall remain compliant with any relevant legislative or regulatory requirements (as may be amended from time to time) which are relevant to the performance of its responsibilities under the Agreement, including the standard of health, safety and security procedures and guidelines applicable to SANBS staff;
- 14.1.13. it shall deliver the Goods and perform Services without interruption and during Service Hours as agreed by the Parties;
- 14.1.14. it shall immediately notify the SANBS upon becoming aware of circumstances that may reasonably be expected to jeopardise the performance or timely performance of, or any part of, the Service or delivery of the Goods as required in this agreement;
- 14.1.15. it is the owner of the Goods with the requisite rights and title to transfer ownership of the Goods. Other than the Service Provider no person has right or option to acquire or claim possession, ownership or transfer of the Goods.
- 14.1.16. the Goods will not be encumbered; hypothecated, attached, or alienated whilst in possession of SANBS by it or any third party;
- 14.1.17. the Goods are fit for the purpose for which they will be used;
- 14.1.18. it (i) has in place and will maintain in place all the necessary licenses, certificates, authorisations, permits, approvals and consents that are required in terms of any applicable laws to deliver the Goods and Services; and (ii) will comply in all material respects with the terms and conditions of (a) its licenses,



certificates, authorisations, permits, approvals and consents;

14.1.19. it shall comply with any applicable SANBS policies and procedures which SANBS notifies the Service Provider of in Writing from time to time.

14.1.20. It will ensure that it is fully compliant with the BBBEE requirements for the duration of this Agreement;

14.1.21. It will have in place, as required by law, the necessary employee compensation insurance;

14.1.22. It indemnifies and holds harmless SANBS against all costs and expenses that SANBS may incur as a result of the Service Provider's non-compliance with the Compensation for Occupational Injuries and Diseases Act No. 130 of 1993;

14.1.23. it will comply with the requirements of Section 37(2) of the Occupational Health and Safety Act, 1993; and

14.1.24. if it fails to comply with any warranties set out herein, then such failure shall amount to a breach of the Agreement.

15. GENERAL WARRANTIES

15.1. Each of the Parties hereby warrants to and in favour of the other that –

15.1.1. it has the legal capacity and has taken all necessary corporate action required to empower and authorise it to enter into this Agreement;

15.1.2. this Agreement constitutes an agreement valid and binding on it and enforceable against it in accordance with its terms;

15.1.3. the execution of this Agreement and the performance of its obligations hereunder does not and shall not –



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- 15.1.3.1. contravene any law or regulation to which that Party is subject;
 - 15.1.3.2. contravene any provision of that Party's constitutional documents; or
 - 15.1.3.3. 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
 - 15.1.4. 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;
 - 15.1.5. it is entering into this Agreement as principal (and not as agent or in any other capacity);
 - 15.1.6. the natural person who signs and executes this Agreement on its behalf is validly and duly authorised to do so;
 - 15.1.7. no other party is acting as a fiduciary for it; and
 - 15.1.8. 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.
- 15.2. Each of the representations and warranties given by the Parties in terms of clause 15.1 shall –
- 15.2.1. 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;
 - 15.2.2. continue and remain in force notwithstanding the completion of any or all the transactions contemplated in this Agreement; and
 - 15.2.3. *prima facie* be deemed to be material and to be a material representation inducing the other Party to enter into this Agreement.



16. BREACH AND TERMINATION

- 16.1. If either Party commits a breach of this Agreement and fails to remedy such breach within 14 (fourteen) days, of notice thereof from the other, the notifying Party shall be entitled, in addition to any other rights and remedies that it may have in terms of the Agreement or otherwise, to terminate this Agreement upon written notice to the other, without prejudice to any claims which such Party may have for damages against the other.
- 16.2. If a Causal Event occurs, SANBS shall be entitled, but not obliged, to terminate this Agreement on written notice to the Service Provider, in which event such termination shall be without any liability to SANBS and without prejudice to any claims which SANBS may have for damages against the Service Provider.

17. DISPUTE RESOLUTION

- 17.1. Should any Dispute, disagreement or claim ("the dispute") arise between the parties concerning this Agreement, the parties shall endeavour to resolve the Dispute by negotiation at a mutual consultation.
- 17.2. This entails one of the parties inviting the other in writing to meet in an attempt to resolve the Dispute within fifteen (15) business days from date of the written invitation.
- 17.3. If the Dispute has not been resolved by such negotiation within twenty-one (21) business days of the commencement thereof, by agreement between the parties, then the parties shall -
- 17.3.1. submit the Dispute to mediation to be administered by the Arbitration Foundation of South Africa ("AFSA") upon such terms as agreed between the parties and the secretariat of AFSA. Each party will pay its own costs for mediation; and
- 17.3.2. failing agreement as aforesaid in clause 17.3 and within twenty-one (21) business days of the Dispute being submitted to mediation, the parties shall refer the Dispute to arbitration as provided for below.



- 17.4. The decision of the mediator shall become final and binding within twenty-one (21) business days of Delivery thereof to the parties, unless one or any of the parties disputes the mediator's decision by written notice to the other party within the aforesaid twenty-one (21) business day period, in which event the Dispute shall be referred to arbitration in accordance with the provisions of the clause below.
- 17.5. Failing agreement as referred to in the clauses above or in the event of either of the parties furnishing its notice of Dispute of the mediator's decision as envisaged in terms of the clause above, the Dispute shall be submitted to arbitration for final resolution in accordance with the rules of AFSA by an arbitrator or arbitrators appointed by AFSA.
- 17.6. The arbitrator will be an independent person agreed upon by the Parties and, failing such agreement within 10 (ten) business days after the date on which the arbitration is requested by a party, will be appointed by the chairman and failing him, any competent officer of the Arbitrator's Foundation of Southern Africa (AFSA) who may be requested on notice by any party to make the appointment at any time after the expiry of that 10 (ten) day period.
- 17.7. Following the appointment of the arbitrator, the parties shall meet with the said arbitrator and shall reach agreement as to the procedure to be followed during the arbitration proceedings.
- 17.8. The arbitration will be held in Johannesburg in accordance with the formalities and procedure settled by the arbitrator.
- 17.9. In the absence of an agreement between the parties or a ruling by the arbitrator, a party wishing to use any document, photograph, audio or video tape recording, or any other exhibit of a like nature (referred to in this clause as "the exhibits") must furnish particulars thereof to the arbitrator and the other parties to the arbitration no later than 10 (ten) days prior to the hearing fixed for the arbitration. The notice giving particulars must include an address at which the exhibits may be inspected and the party giving notice must, if



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requested to do so by the other party, provide a copy of any of the exhibits. The cost of making such copy will be costs in the arbitration.

- 17.10. The arbitrator will be entitled to make such award, including an award for specific performance, an interdict, damages or a penalty or otherwise as he in his sole discretion may deem fit and appropriate and to deal as he deems fit with the question of costs, including, if applicable, costs on the attorney and client scale, or own client scale, and his own fees.
- 17.11. Any Party may appeal the decision of the arbitrator or arbitrators in terms of the AFSA rules for commercial arbitration.
- 17.12. Nothing herein contained shall be deemed to prevent or prohibit a Party from applying to the appropriate court for urgent relief.
- 17.13. Any arbitration in terms of this clause 17 (including any appeal proceedings) shall be conducted on camera and the Parties shall treat as confidential the details of the dispute submitted to arbitration, the conduct of the arbitration proceedings and the outcome of the arbitration.
- 17.14. Each Party to this Agreement –
- 17.14.1. expressly consents to any arbitration in terms of this clause 17 being conducted as a matter of urgency; and
- 17.14.2. irrevocably authorises the other Party to apply, on behalf of both Parties, in writing, to the secretariat of AFSA in terms of article 23(1) of the AFSA rules for any such arbitration to be conducted on an urgent basis.
- 17.15. This clause 17 is severable from the rest of this Agreement and will continue to be binding on the Parties notwithstanding any termination or cancellation of the Agreement.
- 17.16. The Parties agree that the written demand by a Party in terms of this clause 17 that the



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dispute or difference be submitted to arbitration, is to be deemed to be a legal process for the purpose of interrupting extinctive prescription in terms of the Prescription Act, 1969.

17.17. If the dispute is of a purely technical nature or financial nature or which, by its nature, would in the opinion of both Parties be best dealt with by an expert it shall be referred to expert determination in terms of clause 17.18 if the Parties are unable to agree on whether a dispute is of a purely technical nature or financial nature or otherwise a matter that would be best dealt with by an expert or if the Parties are unable to agree on a suitable Expert to be appointed, the dispute shall be referred to arbitration as per this clause 17.

17.18. **Expert Determination**

If there is a dispute of:

17.18.1. a financial nature, it shall be referred to a suitably qualified financial expert (such as an auditor) nominated by both Parties in good faith who shall act as an expert and not as a mediator or arbitrator; or

17.18.2. any other matter which, by its nature, would in the opinion of both Parties be best dealt with by an expert and not an arbitrator, it shall be referred to a suitably qualified expert nominated and agreed to by both Parties in good faith who shall act as an expert and not as a mediator or arbitrator.

17.18.3. Whenever any person is required to act "as an expert and not as a mediator or arbitrator" in terms of this Agreement, then –

17.18.3.1. The charges, which shall be paid accordingly;

17.18.3.2. the expert shall be entitled to determine such methods and processes as he or it may, in his or its sole discretion, deem appropriate in the circumstances provided that the expert may not adopt any process which is manifestly biased, unfair or unreasonable;

17.18.3.3. the expert shall consult with the relevant Parties (provided that the extent of the



expert's consultation shall be in his or its sole discretion) prior to rendering a determination; and

17.18.3.4. having regard to the sensitivity of any confidential information, the expert shall be entitled to take advice from any person considered by him or it to have expert knowledge with reference to the matter in question.

18. NOTICES AND DOMICILIA

18.1. The Parties select as their respective *domicilia citandi et executandi*, as set out in the schedule of agreement, for the purposes of giving or sending any notice provided for or required under this Agreement.

18.2. Party may change its *domicilium* or its address for the purposes of notices to any other physical address or email by written notice to the other Party to that effect. Such change of address will be effective 5 (five) business days after receipt of such notice.

18.3. All notices to be given in terms of this Agreement will be given in writing, but it shall be competent to give notice by email or by hand.

18.4. If the Notice is delivered:

18.4.1. by hand during business hours, be presumed to have been received on the date of delivery. Any notice delivered after business hours or on a day which is not a business day will be presumed to have been received on the following business day; and

18.4.2. by email during business hours, be presumed to have been received on the same date as the date it was sent out. Any email sent after business hours or on a day which is not a business day will be presumed to have been received on the following business day.

18.5. Notwithstanding the above, any notice given in writing, and actually received by the Party



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to whom the notice is addressed, will be deemed to have been properly given and received, notwithstanding that such notice has not been given in accordance with this clause 17

19. APPLICABLE LAW AND JURISDICTION

- 19.1. This Agreement will in all respects be governed by and construed under the laws of the Republic of South Africa as amended from time to time.
- 19.2. Subject to clause 17, the Parties hereby consent and submit to the non-exclusive jurisdiction of the High Court of South Africa, Gauteng Local Division, (Johannesburg) in any dispute arising from or in connection with this Agreement.

20. GENERAL

20.1. Whole Agreement

- 20.1.1. This Agreement constitutes the whole of the agreement between the Parties relating to the matters dealt with herein and, save to the extent otherwise provided herein, no undertaking, representation, term or condition relating to the subject matter of this Agreement not incorporated in this Agreement shall be binding on either of the Parties.
- 20.1.2. This Agreement supersedes and replaces any and all agreements between the Parties (and other persons, as may be applicable) and undertakings given to or on behalf of the Parties (and other persons, as may be applicable) in relation to the subject matter hereof, unless expressly amended or otherwise agreed.

20.2. Variations to be in Writing

No addition to or variation, deletion, or agreed cancellation of all or any clauses or provisions of this Agreement will be of any force or effect unless in Writing and signed by the Parties.



20.3. **No Indulgences**

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

20.4. **No Waiver or Suspension of Rights**

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

20.5. **Provisions Severable**

All provisions and the various clauses of this Agreement are, notwithstanding the manner in which they have been grouped together or linked grammatically, severable from each other. Any provision or clause of this Agreement which is or becomes unenforceable in any jurisdiction, whether due to voidness, invalidity, illegality, unlawfulness or for any other reason whatever, shall, in such jurisdiction only and only to the extent that it is so unenforceable, be treated as *pro non scripto* and the remaining provisions and clauses of this Agreement shall remain of full force and effect. The Parties declare that it is their



intention that this Agreement would be executed without such unenforceable provision if they were aware of such unenforceability at the time of execution hereof.

20.6. **Continuing Effectiveness of Certain Provisions**

The expiration or termination of this Agreement shall not affect such of the provisions of this Agreement as expressly provide that they will operate after any such expiration or termination or which of necessity must continue to have effect after such expiration or termination, notwithstanding that the clauses themselves do not expressly provide for this.

20.7. **No Cession and Assignment**

Neither this Agreement nor any part, share or interest herein nor any rights or obligations hereunder may be ceded, delegated or assigned by either Party without the prior signed written consent (which consent may not be unreasonably withheld) of the other, save as otherwise provided herein.

20.8. **Benefit of Agreement**

This Agreement will also be for the benefit of and be binding upon the successors in title and permitted assigns of the Parties or either of them.

20.9. **penalties**

20.9.1. If the Service Provider fails to deliver or perform the Services to the satisfaction of SANBS, SANBS shall without prejudice to its rights and other remedies under this Agreement, deduct from the Fees, as a penalty an amount for each day of non-delivery or non-performance until actual delivery or performance. The percentage of the penalty is set out in Annexure A hereto.

20.10. **Sub-Contractors**

20.10.1. The Service Provider shall be entitled to sub-contract any component of the services



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contemplated in this Agreement, provided that SANBS' written consent is obtained 30 days prior to any subcontract agreement having been concluded, however, the Service Provider shall at all-time remain responsible and liable to SANBS for the fulfilment of any services sub-contracted and any subcontracting shall not absolve Service Provider from complying with its obligations in terms of this agreement or from the responsibility under this contract.

21. COSTS

Except as otherwise specifically provided herein, each Party will bear and pay its own legal costs and expenses of and incidental to the negotiation, drafting, preparation and implementation of this Agreement.

22. SIGNATURE

- 22.1. This Agreement is signed by the Parties on the dates and at the places indicated below.
- 22.2. This Agreement may be executed in counterparts, each of which shall be deemed an original, and all of which together shall constitute one and the same Agreement as at the date of signature of the Party last signing one of the counterparts.
- 22.3. The persons signing this Agreement in a representative capacity warrant their authority to do so.
- 22.4. The Parties record that it is not required for this Agreement to be valid and enforceable that a Party shall initial the pages of this Agreement and/or have its signature of this Agreement verified by a witness.



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SIGNED at _____ on _____ 2020

For and on behalf of **SANBS**

Signature

Name of Signatory

Designation of Signatory

Witness Signature

Name of witness

Designation of Witness

SIGNED at _____ on _____ 2020

For and on behalf of the **SERVICE PROVIDER**

Signature

Name of Signatory

Designation of Signatory

Witness Signature

Name of witness

Designation of Witness



ANNEXURE A: SERVICE LEVEL AGREEMENT (SLA)

1. CONTRACT MANAGEMENT

1.1. Introduction

This SLA sets out the structure of the relationship between the SANBS and the Service Provider in respect of the Services.

1.2. Objective

1.2.1. The purpose of this SLA is to describe the Goods and services required by the SANBS and for which the Service Provider is contracted to deliver. This SLA shall address the issues of when, where and how the delivery of Goods and services will take place, and the mechanisms to ensure that the delivery happens as per the agreement expectations.

1.2.2. It is the intention of the parties that this SLA may be amended from time to time to ensure effective and efficient delivery of Goods and services.

1.2.3. Notwithstanding the foregoing, this SLA may only be varied or amended by agreement between the parties in writing in accordance with this agreement.

1.3. Relationship Managers

1.3.1. Each Party will appoint a relationship manager who will be responsible for the ongoing monitoring and management of the relationship between the Parties and to serve as a link between the Parties. The relationship managers shall:

1.3.1.1. report to each other for the duration of this Agreement and shall ensure that any faulty or unacceptable performances of a Party is brought to the attention of the relevant relationship manager as soon as possible, to enable such Party to take suitable corrective action;

1.3.1.2. continually review the information exchange requirements of both Parties and agree



on the dates for review meetings; and

1.3.1.3. meet regularly to review the relationship and to provide feedback regarding any specific requirements or issues raised by their respective principals.

1.3.2. Where either Party requires any specific action or consent in terms of this Agreement, the relationship manager of that Party shall advise the relationship manager of the other party of such a request; and the relationship manager of the other Party shall take the necessary steps to ensure that the required action is taken or the required consent is given.

1.3.3. The relationship managers shall provide feedback regarding the relationship to their respective Management Teams.

1.4. **Meetings**

The relationship managers will, for the specific purpose of reviewing the SLA, meet at least on a **monthly** basis, to review the Service Levels achieved and to agree on any necessary steps required to rectify non-compliance with the Service Levels. Any amendments to the SLA shall be executed in writing and signed by both Parties.

1.5. **SERVICE LEVEL REQUIREMENTS:**

1.5.1. **key deliverables:**

The Service Provider is appointed, by the SANBS, to

1.5.2. [detailed breakdown of the services]

1.5.3. Subject to clause 20.9, the percentage of penalties applicable to this agreement is _____ calculated as follows:

1.5.3.1.

1.6. **Performance Management Metrics**

1.6.1. The Service Provider must report provide monthly performance reports to SANBS in a form specified by SANBS.

1.6.2. All issues, if not resolved by the nominated relationship manager, must be escalated to the



Senior Manager: Procurement FTC.

1.7. **Incident management**

1.7.1. Any incidents must be reported to SANBS within 5 working days of occurrence and the relationship manager must work together to resolve the problem and put in place measures that the incident most likely does not happen again.

2. **PAYMENT**

2.1. **Condition of Payment**

The SANBS will only pay the Service Provider within 30 days from receipt of the statement as per clause 8 of the Agreement. The SANBS may request that the Service Provider provide supporting source documents that will consist of proof provided by the Service Provider that the deliverables, as set out in the clause 1.5 of this Service Level Agreement.

2.2. **Disputed Payments**

2.2.1. Should the Parties dispute any fees:

- 2.2.1.1. the Parties shall immediately and on an expedited basis utilise clause 8.2 of the Agreement; and
- 2.2.1.2. SANBS shall only be entitled to withhold payment of the disputed portion of any amount or invoice payable to the Service Provider until the dispute is resolved. In the event that the dispute is settled in the Service Provider's favour, the SANBS agrees to pay to the Service Provider the agreed amount as per the terms of this Agreement.



ANNEXURE B: DATA PRIVACY

1 INTRODUCTION

This annexure sets out the roles and responsibilities of the Parties pursuant to POPI and applies to the extent that the Service Provider and/or SANBS, as applicable, shall be Processing Personal Information in terms of this Agreement.

2 DEFINITIONS

In this annexure, unless the context indicates otherwise, capitalised terms shall bear the following meanings –

- 2.1 "**Applicable Laws**" means any of the following, from time to time, to the extent it applies to a Party (including the performance, delivery, receipt or use of the products and/or services, as applicable and wherever occurring) —
- 2.1.1 any statute, regulation, policy, by-law, directive, notice or subordinate legislation (including treaties, multinational conventions and the like having the force of law);
 - 2.1.1.1 the common law;
 - 2.1.1.2 any binding court order, judgment or decree;
 - 2.1.1.3 any applicable industry code, policy or standard enforceable by law; or
 - 2.1.1.4 any applicable direction, policy or order that is given by a regulator;
- 2.2 "**Confidential Information**" means any information or data which by its nature or content is identifiable as sensitive, confidential and/or proprietary to the Disclosing Party and/or any third party or which is provided or disclosed in confidence and which the Disclosing Party or any person acting on its behalf may disclose or provide to the Receiving Party or which may come to the knowledge of the Receiving Party by whatsoever means. The Disclosing Party's Confidential Information shall include:



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- 2.2.1 information relating to strategic objectives and planning for both its existing and future needs;
- 2.2.2 information relating to either Party's business activities, business relationships, products, services, clients and Staff;
- 2.2.3 technical, scientific, commercial, financial and market information and trade secrets;
- 2.2.4 Intellectual Property that is proprietary to a Party or that is proprietary to a third party and in respect of which the Disclosing Party has rights of use or possession;
- 2.2.5 The Disclosing Party's plans, designs, drawings, functional and technical requirements and specifications;
- 2.2.6 information concerning faults or defects in either Party's systems, Infrastructure or the incidence of such faults or defects;
- 2.2.7 agreements to which either Party is a party.
- 2.2.8 Confidential Information excludes information or data which:
 - 2.2.8.1 is lawfully in the public domain or already in the possession of the Receiving Party from a source other than the Disclosing Party at the time of disclosure to the Receiving Party; or
 - 2.2.8.2 subsequently becomes lawfully part of the public domain by publication or otherwise; or
 - 2.2.8.3 subsequently becomes available to the Receiving Party from a source other than the Disclosing Party, which is lawfully entitled, without any restriction on disclosure, to disclose such Confidential Information; or
 - 2.2.8.4 is disclosed pursuant to a requirement or request by operation of law, regulation or court order; provided that the onus shall at all times rest on the Receiving Party to establish that such information falls within such exclusions and provided further that



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the information disclosed in terms of this Agreement will not be deemed to be within the foregoing exclusions merely because such information is embraced by more general information in the public domain or in a Party's possession.

- 2.2.9 The determination of whether information is Confidential Information shall not be affected by whether or not such information is subject to, or protected by, common law or statute related to copyright, patent, trade or otherwise;
- 2.3 "**Data Protection Legislation**" means any and all laws relating to the protection of data or of Personal Information relevant to a Party and shall include POPI as well as the protection of Personal Information principles agreed to in this Agreement;
- 2.4 "**Data Subject**" means the person to whom Personal Information relates;
- 2.5 "**Disclosing Party**" means the Party who discloses Confidential Information to the other Party in terms of this Agreement;
- 2.6 "**Good Industry Practice**" means, in relation to an obligation, undertaking, activity or a service, the exercise of the degree of skill, speed, care, diligence, judgment, prudence and foresight and the use of practices, controls, systems, technologies and processes, which would be expected from a party performing the same or similar obligation, undertaking, activity or service and utilising and complying with the relevant Data Protection Legislation and all Applicable Laws relating to the protection of Personal Information in force in South Africa and in such jurisdictions where the Parties' conduct business and/or fall within the scope of that jurisdiction;
- 2.7 "**Infrastructure**" means information technology and telecommunications infrastructure and systems, including computer and telecommunications networks, equipment, hardware, software, middleware, firmware, data, databases, peripherals, terminals and components;
- 2.8 "**Intellectual Property Rights**" includes all current and future intellectual property rights of any kind whatsoever and however embodied which may subsist or be capable of



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protection wheresoever in the world, including (without limitation) patents, trademarks, present and future rights of copyright, rights in and to designs, rights in and to inventions, topography rights, rights in and to trade secrets, rights in and to trade names, business names, domain names and logos, the right to keep information confidential and private, rights in and to Know-How, rights in and to databases (including rights of extraction), and all rights and forms of protection of a similar nature or having equivalent effect to any of them which may subsist or be capable of protection as at the signature date or thereafter wheresoever in the world, whether or not any of these is registered and including applications for any such rights or registration thereof and any goodwill related to or arising from such rights.

- 2.9 **"Know-How"** means all the ideas, designs, documents, diagrams, information, devices, technical and scientific data, secret and other Processes and methods used in connection with a Party's business, as well as all available information regarding research, marketing and promotion of the services of a Party, as well as all and any modifications or improvements to any of them;
- 2.10 **"Personal Information"** means information defined from time to time as Personal Information or data in any applicable Data Protection Legislation, including information relating to an identifiable, living, natural person and where it is applicable, an identifiable, existing juristic person, including:
- 2.10.1 information relating to the race, gender, sex, pregnancy, marital status, national, ethnic or social origin, colour, sexual orientation, age, physical or mental health, well-being, disability, religion, conscience, belief, culture, language and birth of the person;
- 2.10.2 information relating to the education or the medical, financial, criminal or employment history of the person;
- 2.10.3 any identifying number, symbol, e-mail address, physical address, telephone number, location information, online identifier or other particular assignment to the person;



- 2.10.4 the biometric information of the person;
- 2.10.5 the personal opinions, views or preferences of the person;
- 2.10.6 correspondence sent by the person that is implicitly or explicitly of a private or confidential nature or further correspondence that would reveal the contents of the original correspondence;
- 2.10.7 the views or opinions of another individual about the person; and
- 2.10.8 the name of the person if it appears with other Personal Information relating to the person or if the disclosure of the name itself would reveal information about that person;
- 2.11 "**POPI**" means Protection of Personal Information Act, No. 4 of 2013, as amended;
- 2.12 "**Process**" means any operation or set of operations including collecting, recording, organising, storing, updating, modifying, retrieving, consulting, using, disseminating by means of transmission, distribution or making available in any other form, merging, linking, as well as blocking, erasing or destroying and "**Processing**" and "**Processed**" shall have a corresponding meaning;
- 2.13 "**Receiving Party**" means the Party, other than the Disclosing Party, to the extent that it receives disclosure of any of the Confidential Information of the Disclosing Party in terms of this Agreement;
- 2.14 "**Special Personal Information**" means information concerning a child and Personal Information concerning the religious or philosophical beliefs, race or ethnic origin, trade union membership, political opinions, health, DNA, sexual life or criminal behaviour of a Data Subject;
- 2.15 "**Staff**" means any employee, independent contractor, agent, consultant, Subcontractor or other representative of a Party; and



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2.16 "**Subcontractor**" means a person other than the Service Provider or its Staff who is contracted or appointed by the Service Provider to perform any part of or to provide the products, perform the services or obligations undertaken by the Service Provider in terms of this Agreement, including its appointed sub-Processors.

3 INFORMATION SECURITY AND DATA PROTECTION

3.1 Each Party shall perform its obligations under this Agreement utilising security technologies and techniques in accordance with Applicable Laws and Good Industry Practice, including those relating to the prevention and detection of inappropriate use or access of Infrastructure or information including Personal Information and Confidential Information.

3.2 Without limiting the generality of the foregoing, each Party shall implement and/or use network management and maintenance applications and tools and appropriate intrusion prevention, intrusion detection, identity management, and encryption technologies where reasonable and appropriate to do so.

3.3 Each Party acknowledges the sensitive nature of the Personal Information to be exchanged under this Agreement and that where applicable some of the Personal Information may constitute Special Personal Information). Each Party shall ensure that its Staff shall not —

3.3.1 Process the Personal Information in any manner or for any purpose other than to the extent strictly necessary to perform its obligations under this Agreement; and/or

3.3.2 cause another Party to breach or contravene any applicable Data Protection Legislation or other Applicable Law.

3.4 Each Party must notify the other Party immediately in the event of non-compliance or breach of any applicable Data Protection Legislation, who will in turn notify any affected Parties affected, in accordance with internal procedures.



- 3.5 The Parties specifically record that all the Personal Information disclosed by a Party shall constitute Confidential Information of such Party.
- 3.6 Each Party warrants and undertakes in favour of each of the other Parties that it shall at all times strictly comply with all Data Protection Legislation which may be in force from time to time.
- 3.7 Without derogating from or limiting its further obligations in this Agreement, each Party further warrants that it shall ensure that all Infrastructure which it uses to provide, exchange or access any Personal Information, including all Infrastructure on which the Personal Information is Processed shall at all times be of a minimum standard required by Applicable Laws and Good Industry Practice.
- 3.8 Neither Party shall transfer or Process any Personal Information of the other Party across the border of South Africa without the prior written consent of the Party and Data Subject who disclosed such Personal Information.
- 3.9 Each Party shall take all reasonable and appropriate precautions necessary (having regard to Good Industry Practice, the requirements of Applicable Laws and the Parties' obligations under this Agreement) to preserve the integrity of the Personal Information and to prevent any unauthorised access, use, corruption or loss of the Personal Information in its possession or under its control or that of its Staff.
- 3.10 In order to give effect to the provisions of clause 3, each Party shall —
- 3.10.1 establish and maintain appropriate safeguards and verify that such safeguards are effectively implemented and are operating effectively;
- 3.10.2 conduct its own regular assessments to identify all reasonably foreseeable internal and external risks to the Personal Information in its possession or control ("**Data Risk Assessments**");



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- 3.10.3 update and align its safeguards with the risks identified during and/or pursuant to Data Risk Assessments;
- 3.10.4 verify that the updated and aligned safeguards are effectively implemented; and
- 3.10.5 generally ensure that the safeguards are continually updated in response to new risks or deficiencies in previously implemented safeguards and to remain current with Good Industry Practice.
- 3.11 The obligations in this clause 3 shall also apply to and extend to any Personal Information disclosed or received by a Party prior to the signature date of this Agreement.
- 3.12 Each Party warrants that, where it discloses Personal Information to the other Party, that it has obtained the necessary consent of the relevant Data Subject whose Personal Information it is disclosing under this Agreement and/or is otherwise authorised to make such disclosure to the other Party in accordance with Data Protection Legislation.
- 3.13 All SANBS specific data collected and processed by the Service Provider in the performance of its obligations under this Agreement shall remain the property of SANBS and shall be delivered to SANBS upon termination or expiry of this Agreement. SANBS hereby grants the Service Provider the right to use such SANBS specific data for purposes of complying with its obligations under this Agreement.
- 3.14 Where the Service Provider is required to Process any Personal Information belonging to SANBS, its customers, employees, patients, agents and/or any other member of SANBS Committee (both acting as responsible parties as defined in POPI), the Service Provider agrees to –
 - 3.14.1 act only in accordance with SANBS' instructions; and
 - 3.14.2 use appropriate technical and organisational measures to protect the Personal Information against unauthorised or unlawful Processing and against accidental loss, destruction, damage, theft, use or disclosure.



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3.15 Notwithstanding any other provision in this Agreement, this clause shall survive any termination, cancellation or expiration of this Agreement.