

Memorandum of agreement

Entered into by and between

The Auditor-General of South Africa

duly established in terms of Section 181(1) (e) of the Constitution of the Republic of South Africa, 1996, read with the Public Audit Act, 2004 (Act No. 25 of 2004)

(Hereinafter referred to as the “AGSA”)

and

[•] , duly established and incorporated in terms of the laws of the Republic of South Africa, and bearing the registration number: [•]

(Hereinafter referred to as the “service provider”)

Contract number: AGSA

Memorandum of agreement

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Memorandum of agreement

1. Definitions and interpretation

- 1.1 In this agreement, unless inconsistent with or otherwise indicated by the context, the following terms shall have the meanings assigned to them and cognate expressions shall have corresponding meanings, namely:
- 1.1.1 **Agreement:** This written document together with all written and signed appendices, annexures, exhibits or amendments attached to it from time to time.
 - 1.1.2 **Amount payable:** A maximum amount of R[•] ([•] Rand) ([•] VAT).
 - 1.1.3 **Authorised representative of the AGSA:** Senior Manager: [•] Business Unit who is currently [•].
 - 1.1.4 **Business day:** Any day of the week excluding weekends and public holidays.
 - 1.1.5 **Business Executive:** A business executive of the AGSA or a head of a business unit of the AGSA.
 - 1.1.6 **Contractual term:** The period commencing on the date this agreement is signed by the last party and ending on [•] on which date it shall expire unless terminated by either party in terms of any right specified in this agreement.
 - 1.1.7 **Notice:** Notice by one party to the other in writing, which shall include, without limitation, paper-based or electronically rendered and communicated text.
 - 1.1.8 **Parties:** The AGSA and the service provider.
 - 1.1.9 **Public Audit Act:** Public Audit Act, 2004 (Act No. 25 of 2004).
 - 1.1.10 **Services:** Refers to the services the AGSA requires the service provider to provide as set out in clause 2.1 below.
 - 1.1.11 **VAT:** Value-added tax as governed by the Value-added Tax Act, 1991 (Act No. 89 of 1991).
- 1.2 Any reference to:
- 1.2.1 the singular shall include the plural and vice versa.
 - 1.2.2 natural persons shall include legal persons and vice versa.

- 1.2.3 any provision of a statute, rule or regulation shall be construed as a reference to that provision as amended or extended.
- 1.2.4 the parties shall include their respective members, directors, officers, employees, agents and sub-contractors.
- 1.3 If any provision in a definition is a substantive provision conferring rights or imposing obligations on any party, the effect shall be as if it were a substantive clause in the body of this agreement, notwithstanding that it is only contained in the definitions and interpretation clause.
- 1.4 If any period is referred to in this agreement by way of reference to a number of days, the days shall be reckoned exclusively of the first and inclusively of the last day unless the last day falls on a day which is not a business day, in which case the last day shall be the next succeeding business day.
- 1.5 In the event of a conflict where figures are referred to in numerals and in words, the words shall prevail.
- 1.6 If expressions have been defined in this agreement and they are found in a schedule or annexure to this agreement, which does not define the expression, they shall bear the same meaning as defined in this agreement.
- 1.7 Where a term is defined within the context of a particular clause in this agreement, the term defined, unless it is clear from the clause in question that it has limited application to the relevant clause, shall bear the meaning given to it for all purposes in terms of this agreement, notwithstanding that that term has not been defined in this interpretation clause.
- 1.8 The rule of construction that the contract shall be interpreted against the party responsible for the drafting or preparation of the agreement shall not apply.

2. Recordal

- 2.1 The AGSA requires a service provider to for the duration of this Agreement. The exact nature and extent of such service is captured fully in annexure A ([•] page(s)) attached hereto. The service provider has been advised, either orally or in writing, fully and properly by the AGSA of the full nature and extent of the services to be provided and knows and understands what the requirements are.

- 2.2 During the tender process to appoint a service provider to render this service, [•] was successful and duly notified as the preferred AGSA's service provider.
- 2.3 The request for bid, all appended documentation and the proposal in response thereto, read together, form the basis of this agreement.
- 2.4 The service provider confirms that it has the necessary expertise, knowledge, capacity and resources to meet the needs and expectations of the AGSA and to carry out its obligations on the terms and conditions set out in this agreement. The AGSA hereby appoints the service provider who hereby accepts the appointment, and the parties jointly agree to their obligations contained herein.
- 2.5 The parties therefore wish to record their agreement on the terms set out below.

3. Contractual term and termination

- 3.1 This agreement has commencement and end dates as set forth or contemplated under 'Contractual term' in clause one above, unless it is terminated by either party in terms of any right specified in this agreement.
- 3.2 If the AGSA is dissatisfied with the service of the service provider, the AGSA shall have the right to terminate the agreement after notifying the service provider in writing, allowing it seven (7) days (or if it is not reasonably possible to remedy the breach within seven (7) days, within such further period that is reasonable in the circumstances) to rectify the dissatisfactory service and failing such rectification of the dissatisfactory service, the agreement shall terminate. A repetition of such dissatisfactory service will automatically result in the right of the AGSA to terminate this agreement immediately.

4. Obligations of the service provider

- 4.1 The service provider is required to carry out all obligations envisaged in the recordal clause two above, for the duration of this agreement. The nature of the services to be rendered is generally set out in annexure A attached hereto, which contains details around most of the deliverables.
- 4.2 The service provider undertakes, where applicable, to protect, comply with, and adhere to, the AGSA's corporate identity specifications and branding principles.
- 4.3 The services must conform to the highest quality standards at all times.

- 4.4 It is a material term of this contract that the service provider will provide the services, on the dates and times required by the AGSA, which dates and times have been conveyed by the AGSA and agreed to by the service provider.
- 4.5 The service provider shall familiarise itself with all the functions, of the AGSA and shall provide the services within the contractual term. In addition, the service provider undertakes to conduct itself, during the contractual term of this agreement, in a professional and ethical manner in line with the Code of Professional Conduct and Ethics and the procedures on independence and ethical requirements of the AGSA.
- 4.6 The service provider guarantees that it shall perform all its duties professionally, and that all work prepared by it shall be conducted with the highest degree of skill, care and diligence expected of its profession or trade.
- 4.7 The service provider shall ensure, where applicable, that reasonable levels of care and responsibility are exercised when using items belonging to the AGSA in the performance of its obligations as set out in this agreement. Such items may not be used unless prior written permission has been received from the authorised representative of the AGSA.
- 4.8 The service provider shall conduct its affairs and activities in a manner to prevent any damage to the good name, reputation and standing of the AGSA, and may not undertake any activity which may, in the opinion of the AGSA, damage the good name, reputation and standing of the AGSA.
- 4.9 The service provider hereby accepts the appointment and undertakes to render the services in accordance with the terms of this agreement.

5. Obligations of the Auditor-General of South Africa

- 5.1 The AGSA shall make all the relevant information available, which may reasonably be required to assist the service provider to complete its tasks fully in this regard.
- 5.2 The AGSA shall ensure that there are, as far as possible, no delays occasioned by it which may impact directly on the services to be provided.
- 5.3 The AGSA shall ensure that in the event that the authorised representative is not available there is another person in authority of the same rank or higher, to deal with the service provider in the event of a query.

6. Additional work

- 6.1 No additional work is envisaged in terms of this agreement.
- 6.2 In the event that additional work is required, the service provider agrees not to undertake such additional work unless the AGSA has authorised such work in writing and an addendum to this agreement drawn by the AGSA, is executed by both parties, prior to the execution of the additional work. The addendum shall set out the full nature and extent of the additional work and the amount to be paid for the additional work, failing which the service provider shall not be remunerated for the additional work.

7. Payment and amounts payable

- 7.1 In consideration of the services to be rendered in terms of this agreement, the service provider shall be remunerated to the maximum amount set forth in 'Amount payable' under clause one above. The amounts stated in annexure B ([•] page) are fixed for the duration of this agreement, and the AGSA shall pay the service provider in terms of annexure B only for the actual services rendered by the service provider.
- 7.2 Provided that the service provider has delivered to the AGSA:
- 7.2.1 valid and current Tax Clearance and valid and current BBBEE Certificates/affidavits (and any other legislatively prescribed or accepted document), which may be used by the AGSA for any purpose in supporting a calculation during the AGSA's own BBBEE level evaluation) for the period/s when payment/s is/are expected, and
- 7.2.2 a valid and compliant VAT invoice accompanied by a statement on or before the 7th (seventh) day of any month, the AGSA shall pay, on average, 30 (thirty) days from the date of the service provider's invoice and statement being received by the AGSA, subject to clause 7.5 below (In respect of Exempt Micro Enterprises (EME's) and Qualifying Small Enterprises (QSE's), however, the AGSA shall pay, on average, 15 (Fifteen) days from the date of the service provider's invoice and statement being received by the AGSA, subject to clause 7.5 below).
- 7.3 Should the services be carried out in terms of this agreement to the satisfaction of the AGSA, and provided that the service provider submits an invoice and

statement which are verified and accepted by the AGSA, payment shall be made into the service provider's banking account.

7.4 The bank details of the service provider are:

Name of account: [•]

Account Number: [•]

Name of Bank: [•]

Branch Code: [•]

7.5 If the services in terms of this agreement, are, for any reason not carried out to the satisfaction of the AGSA by the service provider, or should the service provider fail to meet the deadline(s) set out herein, the AGSA shall withhold payment until the service provider meets the AGSA's new deadlines, expectations or requirements, subject to the right of the AGSA to impose a penalty on the service provider by reducing the amount of the fee payable to the service provider at a rate to be determined by the AGSA in its discretion. In exercising its discretion, the AGSA shall not be unreasonable and the penalty shall be subject to the Conventional Penalties Act, 1962 (Act 15 of 1962), provided further that the fault resulting in the delay is not attributable to the AGSA.

7.6 Any extra costs incurred by the service provider resulting from the service provider having to attend to queries arising from, or in respect of, work carried out, a delay in the execution of any task or any task not executed according to the satisfaction of the AGSA, shall be for the account of the service provider.

7.7 Without the prior written consent of the AGSA, the service provider shall not assign, transfer, pledge, hypothecate or otherwise encumber its rights to receive payment from the AGSA under this agreement for any reason whatsoever.

7.8 In the event of an overpayment to the service provider in terms of this agreement, the service provider shall be obliged to immediately repay such amount to the AGSA within three (3) days from being advised by the AGSA of such overpayment, alternatively becoming aware of such overpayment, whichever is the first to occur. If the service provider fails to make such payment within the three (3) days, interest shall accumulate on the amount due to the AGSA at the prime bank lending rate calculated monthly in advance.

8. Delays and extensions

- 8.1 Should circumstances arise which may cause a delay in, or deviation from, the performance by the service provider of its obligations under this agreement, the service provider shall:
 - 8.1.1 take all reasonable steps to avoid or reduce the delay
 - 8.1.2 provide the AGSA with immediate written notice of such circumstances and request an extension or condonation. Such written request shall fully set out the reasons for the anticipated delay and the anticipated time frame for the delays as well as the impact and deadlines of the deliverables as a whole.
- 8.2 The AGSA shall consider the request for extension or condonation, but shall be under no obligation to grant the request, except where the AGSA has contributed to or caused the delay.

9. Computer equipment

- 9.1 As far as it may be applicable herein, the service provider shall be required:
 - 9.1.1 to make use of its own computer hardware and software;
 - 9.1.2 to sign a confidentiality agreement with the AGSA in respect of any of the AGSA's software which it may use;
 - 9.1.3 to bear all hardware and computer-related training costs;
 - 9.1.4 upon termination of this agreement, to certify that the software provided by the AGSA has been removed from all its computers.
- 9.2 All rights in and to the software are reserved and retained by the AGSA, as the sole proprietor thereof.
- 9.3 The service provider is not granted a licence or any other rights, in or to the software.
- 9.4 The service provider shall be deemed to be in illegal possession of the software should it be found in possession of the said software after termination of this agreement.

10. Force majeure

- 10.1 If either party ("the affected party") is rendered unable, wholly or in part, by *force majeure*, to carry out any obligation under this agreement other than an

obligation to make monetary payments, such party shall give prompt notice to the other party of such *force majeure* with full particulars and insofar as is known the probable extent to which it will be unable to perform or be delayed in performing such obligation. Such obligation of the affected party shall be suspended insofar as it is affected by such *force majeure* during, but no longer than, the continuance thereof.

- 10.2 The affected party shall use all possible diligence to remove such *force majeure* as quickly and effectively as possible. In the event of a substantial and material portion of the overall obligation of a party being suspended for a period exceeding seven (7) days, either party shall be entitled to terminate the agreement in writing within seven (7) days.
- 10.3 The requirement that any *force majeure* shall be remedied with all possible diligence shall not require the settlement of strikes, lockouts or other labour difficulties by the party concerned on terms contrary to its reasonable wishes. How all such difficulties shall be handled shall be entirely within the discretion of the party concerned.
- 10.4 All time periods will be extended *pro rata* by the time of the *force majeure*, unless the *force majeure* exceeds thirty (30) days, in which event the agreement shall terminate automatically.

11. Indemnity

- 11.1 In terms of section 37(2) of the Occupational Health and Safety Act, 1993 (Act No. 85 of 1993), the parties record that the AGSA will not be liable for any act or omission committed by the service provider or any other person to whom the service provider is liable in terms of section 37(1) of the Occupational Health and Safety Act of 1993. The service provider indemnifies the AGSA against any liability arising in terms of section 37(1) of the Occupational Health and Safety Act of 1993, for any act or omission by the service provider.
- 11.2 The AGSA is not liable for any loss or damage as a result of the carrying out of any duty in good faith in terms of section 49 of the Public Audit Act.
- 11.3 The service provider hereby indemnifies the AGSA against all claims or loss, whether direct or consequential, of whatsoever nature and howsoever arising,

as a result of a failure by the service provider, its employees, agents, assignees or sub-contractors, to comply with the terms and conditions of this agreement.

12. Breach

- 12.1 With the exception of the rights contained in clause 3.2 above, if either party breaches any term of this agreement in any manner or consistently breaches any of the terms in such a manner which justifies the other party holding the view that its conduct is inconsistent with the intention or ability to carry out the terms of this agreement and fails to remedy such default within seven (7) days after receiving a written notice to do so (or if it is not reasonably possible to remedy the breach within seven (7) days, within such further period that is reasonable in the circumstances), the aggrieved party shall be entitled, without prejudice to any alternative right of action without further notice to cancel this agreement with immediate effect and recover from the other party damages for the breach and/or cancellation of this agreement.
- 12.2 The defaulting party shall be liable for any legal costs occasioned by the other party in any legal proceedings against the defaulting party. In any legal proceedings instituted by a party against the defaulting party arising from any aspect of this agreement, the defaulting party agrees to pay the other party's legal costs on a scale as between attorney and client, which shall include interest from the date of default at the prescribed rate of interest (in terms of the Prescribed Rate of Interest Act, 1975, Act No. 55 of 1975, compounded monthly in advance as well as collection charges at the maximum rate permissible by law. The defaulting party also agrees to pay all collection costs and tracing fees, where applicable.
- 12.3 The parties consent to the jurisdiction of a South African Magistrates Court in instances where the claim is equal to or less than one million rand (R1 000 000) and a South African High Court in all other instances with competent jurisdiction for the purpose of any action arising out of this agreement which either party may bring against the other.
- 12.4 Notwithstanding the above provisions relating to breach, in the event of any liquidation/sequestration/voluntary surrender or any insolvency-related application/proceedings being granted by a court with competent jurisdiction to grant such an order whether interim or final, the AGSA shall have the right to

cancel this agreement forthwith by written notice which shall be sent to the domicilium address of the service provider, cited below.

13. Dispute resolution

13.1 In the event of a dispute between the parties and if such dispute cannot be resolved by the immediate persons involved, it shall be referred within three (3) days of such failure to the respective business executive, Senior Manager of the Corporate Legal Services Centre of the AGSA, the respective senior manager/manager and two (2) representatives of the service provider. At a joint meeting, which the business executive shall chair, the attendees of the meeting, acting in terms of clause 16.7, shall try to resolve the dispute complained of within five (5) days of the dispute being referred to them. The business executive shall issue a written directive thereafter to the party/parties required to resolve the dispute as he/she deems appropriate. The directive issued by the business executive shall be final and binding upon the parties for the purposes of resolving the dispute.

13.2 Should the party/parties required to resolve the dispute in terms of 13.1 above fail to follow the written directive of the business executive within two (2) days of receipt of the directive in writing from the respective business executive (electronic mail included) requiring it to do so (or if it is not reasonably possible to follow the directive of the business executive within two (2) days, within such further period as the business executive has directed, in the circumstances), then the aggrieved party shall be entitled without notice, in addition to any other remedy available to it under law or under this agreement, to cancel this agreement or to claim specific performance for any obligation whether or not the due date for performance has arrived, in either event without prejudice to the aggrieved party's right to claim damages.

14. Copyright and intellectual property

14.1 Any document, report and material, including guidance produced for the purposes of this agreement, as well as this agreement, remain the property of the AGSA. The service provider may only have use of these reports and materials with the prior written permission of the AGSA.

14.2 Except for reports expressly prepared for publication, any product of the services released to the AGSA in any form or medium shall be supplied by the

service provider on the basis that it is for the AGSA's benefit and information only and that it shall not be copied, referred to or disclosed, in whole (except for the AGSA's own internal purposes) or in part, without the prior written consent of the service provider.

- 14.3 The services shall be provided on the basis that the service provider shall not quote the AGSA's name or reproduce the AGSA's logo in any form or medium without the prior written consent of the AGSA. The AGSA may disclose in whole any product of the services to its bankers and legal and other professional advisers for the purposes of seeking advice in relation to the services.
- 14.4 The service provider hereby indemnifies the AGSA against any action, claim, damages or legal action that may be instituted against the AGSA on the grounds of an alleged infringement of any copyright or any other intellectual property right in connection with the work outlined in this agreement.
- 14.5 All information, documents, recommendations, programmes, reports and other deliverables collected or compiled shall be regarded as confidential and may not be communicated or made available to any person outside the AGSA's service and may not be published, either during the currency of this agreement or after termination thereof, without the prior written consent of the AGSA.
- 14.6 The service provider undertakes to obtain the necessary consent from the proprietors or their licensees should it make use of the intellectual property of any other person.
- 14.7 The service provider further indemnifies the AGSA against any claim or action (including legal or other professional costs) caused by, or arising from, the failure to obtain such consent.
- 14.8 To the extent that the service provider uses any of its pre-existing proprietary tools and methodologies and/or other intellectual property in connection with the provision of the assignment, the AGSA shall receive no right to an interest in any such tools and methodologies or intellectual property, except to the extent that the parties otherwise separately agree in writing.

15. Confidentiality

- 15.1 Either party shall hold the other party's confidential information in the strictest of confidence for the duration of this agreement and after its termination, and shall

not make use thereof other than for the execution of this agreement. In the execution of this agreement either party may disclose to the other certain information relating to its business which the other party shall keep confidential in terms of this clause.

- 15.2 Neither party shall use the name of the other party to this agreement, either in publicity releases or advertising, or for any promotional purposes, without the prior written approval of the other.
- 15.3 Where this clause is contravened, the contravening party shall be liable for all losses and damages, excluding consequential losses, special damages, lost profits or loss of business foreseeable due to the nature of the infringement or this confidentiality clause.
- 15.4 The Parties shall comply, without deviation, with the relevant sections of the Protection of Personal Information Act, 2013 (Act No. 4 of 2013) in particular, the sections which set out the conditions for the lawful processing of personal information of each other.
- 15.5 The attention of the service provider is specifically directed to sections 18 (Protection of information), 50 (Disclosure of information) and 51 (Offences and penalties) of the Public Audit Act.

16. General provisions

- 16.1 This agreement, together with the attached annexure/s, constitutes the record of the agreement between the parties with regard to the subject matter hereof. In the event of a conflict in the interpretation of this main agreement and the attached annexure/s, the content of this main agreement shall prevail, in particular, with regards to additional work, scope creep and amounts payable in terms of this agreement.
- 16.2 The laws of the Republic of South Africa shall govern this agreement.
- 16.3 No addition to, alteration (in manuscript or otherwise), or variation, waiver, or novation of, this agreement, including this clause, shall be of any force unless an addendum is drafted and signed by the parties. The parties record for the sake of clarity any addition, alteration, variation, waiver or novation concluded electronically which are recognised in terms of the Electronic Communications and Transactions Act 25 of 2002 shall be excluded and shall not be recognised

by the parties. In the event that the service provider is unable to comply with the obligations in terms of this agreement the AGSA shall have the right to source the service or goods from any other third party.

- 16.4 Neither party shall be entitled to cede, assign or delegate any of its rights and/or obligations in terms of this agreement without the prior written approval of the other party, which consent shall not be unreasonably withheld.
- 16.5 No condonation, relaxation or indulgence afforded by any party to the other will prejudice the rights of the former and the former will not be prohibited from exercising such rights due to its actions.
- 16.6 The service provider is independent and is not an employee or agent of the AGSA and neither party shall have any authority to commit the other party contractually, nor shall any delict which either party may cause, place liability on the other. The service provider, its employees and agents shall therefore not be entitled to any benefits to which the employees of the AGSA may be entitled.
- 16.7 In the implementation of this agreement and in all dealings with each other, the parties undertake to observe the utmost good faith and to give full effect to the purpose of this agreement.
- 16.8 If any clause or portion of this agreement is held to be invalid or unenforceable, the remainder of this agreement shall remain unaffected and shall retain full force and effect.
- 16.9 The person signing this agreement in a representative capacity warrants his/her authority to do so and confirms that all the required internal approval(s) authorising him/her to enter into this agreement have been obtained.
- 16.10 In the event that subsistence and travelling expenses are envisaged in this agreement, such expenses will be paid strictly in terms of the AGSA's policy on subsistence and travelling at the time and all subsistence and travelling must be pre-approved by the authorised representative.
- 16.11 Notwithstanding any clause and/or any procedure/remedy contained herein, nothing contained in this agreement shall be construed to give the service provider the right as the sole and exclusive provider of any services or goods in

terms hereof, in instances when the service provider is unable for whatever reason to provide the goods or services or parts thereof.

- 16.12 The AGSA shall have the right not to engage, appoint or entertain the service provider for any other service which the service provider may respond to in the future, if the AGSA is of the opinion that the service provider has not performed to the expected standard/s or provided the quality of goods required in terms of this agreement.

17. Domicilia citandi et executandi and notices

- 17.1 All notices or correspondence in terms of this agreement shall be delivered by hand or sent by registered mail or transmitted by email or telefax and shall be addressed as below which the parties hereto choose as their respective *domicilium citandi et executandi*:

AGSA

The Chief Financial Officer

300 Middel Street

Nieuw Muckleneuk

Pretoria

0001

Tel. no.: (012) 426 8225

Fax no.: (012) 426 8257

Email: BongiN@agsa.co.za

Service provider:

[•]

[•]

[•]

[•]

[•]

[•]

Tel. no.: [•]

Fax no.: [•]

Email.:

- 17.2 Notice of change of address stated may be given by either party in writing and shall be delivered or sent or transmitted in accordance with clause 17.1 above by one party to the other.

- 17.3 Any notice to a party contained in a correctly addressed envelope and sent by prepaid registered post to it at its chosen address; or delivered by hand by a responsible person during ordinary business hours at its chosen address; or

transmitted by email or telefax to it at its chosen address; shall be deemed to have been received, in cases where it is sent by prepaid registered post, on the fourteenth (14th) business day after posting (unless the contrary is proved); in cases where it is delivered by hand, on the day of delivery; and in cases where it is transmitted by email or telefax, on the date of transmission.

**THUS DONE AND SIGNED IN _____ ON THIS _____ DAY OF _____
20__.**

FOR THE AGSA:

Witness:

Signature for AGSA

Signature of Witness

Full Names & Designation

Full Names & Telephone Number

**THUS DONE AND SIGNED IN _____ ON THIS _____ DAY OF _____
20__.**

FOR THE SERVICE PROVIDER:

Witness:

Signature for Service Provider

Signature of Witness

Full Names & Designation

Full Names & Telephone Number