STATEMENT

I, the undersigned,

ROBERTO GONSALVES

do hereby state that:

1. I am a Chartered Accountant and the Managing Director of Mergence Corporate Solutions (Pty) Ltd (previously known as Cadiz Corporate Solutions (Pty) Ltd ("Cadiz"). I was employed in the Cadiz group since November 1998 (now Mergence since January 2019). Prior to that I was a partner at PricewaterhouseCoopers.

2. I have been requested by the Commission to submit a statement in relation to Business Expansion Structured Products (Pty) Limited (registration number 2009/028420/07) and BEX Structured Products (Pty) Ltd" (registration number 2000/028999/07) (referred to interchangeably as "BEX" in this statement).

3. The facts contained in this statement are both true and correct, and within my personal knowledge, unless the context provides otherwise. Where facts were provided by third parties, they are presented in the belief that they are true and correct and, in my considered opinion, I have no reason to believe otherwise.

INTRODUCTION

4. During July 2012, Transnet (SOC) Limited ("Transnet") issued open tenders for the acquisition of 599 electric locomotives and 465 diesel locomotives, totalling 1064 locomotives, to support its aged locomotive fleet.

5. Cadiz formed part of a consortium that submitted a bid for the tender to supply the 1064 locomotives to Transnet. The consortium was led by CRRC SA Rolling Stock (Pty) Limited ("CRRC SA") (the "Company"), formerly known as CNR Rolling Stock South Africa (Pty) Limited ("CNRRSSA"). I am a non-executive director of this company.

6. At the outset I would like to explain the structure of CNRRSSA, as, in various sections of this statement, I refer *inter alia* to the majority and minority shareholders and executive directors and minority non-executive directors of this Company.

7. The directors of the CRRC SA are as follows:

   7.1. Gang Wang (Jeff Wang) (executive)

   7.2. Tao Yu (Tony Yu) (executive)

   7.3. Feng Yu (non-executive)

   7.4. Gang Zhao (non-executive)

   7.5. Lulamile Lincoln Xate (minority non-executive director)

   7.6. Rowlen Ethelbert Von Gericke (minority non-executive director)

   7.7. Roberto Gonsalves (myself) (minority non-executive director)

8. The shareholding in CRRC SA is structured as follows:

   8.1. China North Rail Corporation (CNR) – 66%, represented by the persons referred to in par 7.1 to 7.4 above;

   8.2. Endinamix (Pty) Ltd – 30%, represented by Lulamile Xate (minority shareholder)

   8.3. Global Railway Africa (Pty) Ltd - 2%, represented by Rowlen von Gericke (minority shareholder)

8.4. Cadiz - 2%, represented by me (minority shareholder).

9. The shareholding in Endinamix is structured as follows:

9.1. Linontando (Pty) Limited (20%)

9.2. Kopano Ke Matla (Pty) Limited (20%)

9.3. Makana Investment Corporation (Pty) Limited (20%)

9.4. Azon Rail (Pty) Limited (13.33%)

9.5. Lineta Investments CC (MJ Nobanda) (6.67%)

9.6. Global Railway Africa (Pty) Ltd (10%)

9.7. Cadiz (10%).

10. I wish to point out that the day to day operations and business of the Company are run by the first two directors, namely Gang Wang (CEO) and Tao Yu (CFO). The directors representing the minority shareholders were all minority non-executive directors of CRRC SA, and as such not involved in the operations and day do day business, except for attending Board meetings.

11. On 9 August 2012, CNRRSSA informed Transnet that they would tender for the supply of both electric and diesel locomotives to Transnet.

12. On 30 April 2013 CNRRSSA submitted their tender to Transnet.

13. During the tender evaluation process Transnet decided to split the award of the 465 diesel locomotives on a 50/50 basis and awarded the supply of 233 locomotives to Bombardier and 232 locomotives to our consortium, CNRRSSA.

14. On 17 March 2014, CNRRSSA entered into a Locomotive Supply Agreement with Transnet for the manufacturing of 232 Class 45D electric locomotives. See **Annexure RG1**.

PROPOSED "RELOCATION" TO DURBAN

15. The Locomotive Supply Agreement stipulated that the "Contractor Facility" for CNRRSSA to manufacture/assemble the locomotives at any one of two Transnet Freight Rail (TFR) locomotive manufacturing facilities, namely in Koedoespoort Pretoria or Bay-Head in Durban. However, in line with the tender, CNRRSSA had already based its costing on the assembly of the locomotives at Koedoespoort.

16. During March 2014 Transnet requested CNRRSSA to provide them with a proposed costing of the impact of manufacturing/assembling the locomotives at the Bay-Head facility in Durban instead of the Koedoespoort facility in Pretoria, and the Amended and Restated Locomotive Supply Agreement referred to Bay-Head as the "Contractor Facility". It is to be noted that at this point CNRRSSA had not as yet physically started operating in Koedoespoort. See **Annexures RG2 and RG3**.

17. On 11 March 2014 CNRRSSA responded to Transnet and provided the costing of the impact to manufacturing/assembling the locomotives at the Bay-Head plant in Durban. The total cost of locating to Durban came to an amount of R9 755 600.00. Refer **Annexure RG3**.

18. The calculation of the extra costs related to the "relocation" from Koedoespoort to Bay-Head was performed by us as the consortium members (CNR, Endinamix, Global and Cadiz) and we took the costs like transportation, flights, office and accommodation, etc., into consideration The revised costs also took into consideration the savings that would arise, i.e. importing to Durban and not Pretoria meant less transport costs.

AGREEMENT WITH BEX

19. On 23 April 2015 CNRRSSA appointed an entity styled Business Expansion Structured Products (Pty) Limited (registration number 2009/028420/07) ("BEX") to act as an intermediary for purposes of negotiating a contract with Transnet for the claim of the costs of "relocating" CNRRSSA's locomotive manufacturing /assembly to the Durban facility.

20. The appointment of BEX was made despite us as the minority non-executive CRRC directors expressing our serious reservations and offering considerable opposition to the appointment of BEX on the basis that we, the minority non-executive CRRC directors, had not been consulted on this before. The potential BEX fee was outrageous, there was no indication that a tender process had been followed and there was no clear rationale as to why the Company was entitled to a relocation claim.

21. However, the directors nominated by CNR/CRRC who control the board, nevertheless proceeded to vote in favour of such appointment of BEX. See **Annexure RG4**.

22. The background to the appointment of BEX can be summarised as follows:

    22.1. The appointment process commenced on 8 April 2015 when a draft BEX agreement dated 8 March 2015 ("Draft Business Development Services Agreement") was received by the minority non-executive CRRC directors by e-mail from CNRRSSA in which BEX suggested the following in paragraph 7.2: *"The Company agrees that BEX will be entitled for an agency commission equivalent to the difference between the price excluding VAT awarded to the Company by TFR and the price benchmark of R280 million excluding VAT. For example if the price awarded is R650 million, then BEX will be entitled to an agency commission of R370 million."* See **Annexure RG5**.

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22.2. On 8 April 2015 a partially signed written round robin resolution (signed by the CRRC directors but not the minority non-executive CRRC directors) was circulated by CNRRSSA. We as the minority non-executive CRRC directors were requested to sign the resolution *"...in order to enter into the Agency Agreement in relation to the relocation of the manufacturing facility ....."* See **Annexure RG6**.

22.3. It was assumed at the time that the reference to an "Agency Agreement" in the resolution was in fact intended to be a reference to the proposed Draft Business Development Services Agreement to be concluded with "BEX Structured Products (Pty) Ltd" (registration number 2000/028999/07). As indicated above, the resolution received by e-mail had already been signed by all the CRRC directors.

22.4. At the Board meeting of 10 April 2015, the minority non-executive CRRC directors objected strongly to the company entering into an agreement with BEX and requested that their dissent be expressly noted and minuted. The reasons cited by the minority non-executive CRRC directors included the fact that the minority non-executive CRRC directors had not been consulted on this before, the potential BEX fee was outrageous, there was no indication that a tender process had been followed and there was no clear rationale as to why the Company was entitled to a relocation claim. See **Annexure RG7**.

22.5. Notwithstanding the objections of the minority non-executive CRCC directors, CNRRSSA nevertheless proceeded to sign the agreement with BEX (note that the agreement was signed with BEX as opposed to BEX Structured Products (Pty) Ltd, the entity named in the Draft Business Development Services Agreement) on 23 April 2015. See **Annexure RG8**.

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23. It subsequently came to our attention as the minority non-executive CRRC directors that BEX is an Exempted Micro Enterprise based on the BEE Verification Certificate issued to it on 30 April 2015 and that the company had never traded before that. See **Annexure RG9**.

24. Furthermore, it was noted that the sole director of BEX, Mark Shaw, was only appointed on 15 April 2015. See **Annexure RG10**.

25. It also become clear from the Draft Business Services Agreement that CNRRSSA and BEX "benchmarked" the cost to CNRRSSA of locating its business activities at the Bay-Head depot in Durban at R280 million. Although it is not clear when and how these calculations were arrived at (i.e. the R280 million benchmark), a document reflecting how the "Estimated Cost Increase" amounting to R287 028 121 was calculated was received via e-mail on 21 April 2015. See **Annexure RG11**. (Note that the minority non-executive CRRC directors received several documents from Hogan Lovells on 2 November 2017 that purportedly supported the R280m calculation. These documents were attached to a letter from Hogan Lovells dated 4 September 2017 and addressed to KPMG in response to a Reportable Irregularity reported by KPMG to the Independent Regularity Board of Auditors ("IRBA") in respect of the BEX matter (refer to paragraph 42 below)).

26. The BEX proposal and costings were subsequently represented by CNRRSSA to Transnet which culminated in CNRRSSA concluding an agreement with Transnet in terms of which Transnet agreed to bear the cost of relocation and establishment by CNRRSSA of its business at the Bay-Head depot in an amount of R719 090 548, less a 10% discount, amounting to R647 181 494 (which is close to the above mentioned R650m). See **Annexure RG12**.

27. It appears, based on an invoice from BEX dated 7 September 2015, that the CNRRSSA benchmark was somehow increased from R280 million recorded in the signed Business Service Agreement dated 23 April 2015 to an amount of R580 million, although this was

never presented to us during the board meeting of CNRRSSA. Consequently BEX earned a fee of R67 181 494, excluding VAT. See **Annexure RG13**.

28. It was not clear to us as the minority non-executive CRRC directors why, having negotiated the terms of an agreement with Transnet as extensive and complex as the Locomotive Supply Agreement, and despite having access to considerable rail rolling stock experience within its shareholder base, CNRRSSA nevertheless felt it necessary to appoint an intermediary such as BEX which appears to have been a newly formed company with no trading history and little or no background in the assembly, manufacture, maintenance or operation of locomotives or any other experience in the rail industry, to negotiate a second (directly related) agreement (which we subsequently noted was referred to as a "Variation Order") with Transnet and furthermore to do so on such significantly generous terms to BEX. See **Annexure RG14**.

29. Although the Variation Order may be financially beneficial for CNRRSSA it remains unclear to the minority non-executive CRRC directors how or why such agreement was concluded, given that the Locomotive Supply Agreement envisages and provides for CNRRSSA to establish its operations at the Bay-Head depot and for the supply of locomotives to take place at Bay-Head on a fixed price basis which already included the amount of R9 755 600 (total for all 232 locomotives) for the envisaged relocation from Koedoespoort in Pretoria (as already anticipated when the tender was submitted) to Durban (as instructed by Transnet during the latter stages of the tender negotiations).

30. In addition, the Locomotive Supply Agreement also already makes separate provision for the supply of spares, tools and test equipment by CNRRSSA to Transnet in relation to an agreed Master Spares List and a Master Tools and Test Equipment List and based

on prices and values to be agreed by the parties so the Variation Order cannot be meant to cover the costs related to spares, tools or test equipment.

31. The minority non-executive CRRC directors and minority shareholders of CNRRSSA regarded the Variation Order and the appointment of BEX as perplexing. Furthermore, the appointment of BEX was not undertaken in accordance with the terms of the Memorandum of Incorporation of CNRRSSA which provides (in clause 4.1.3.27) that CNRRSSA may not conclude a contract that is outside of the ordinary course of the "Business" of CNRRSSA without *inter alia* the consent in writing of shareholders holding 70% of the voting rights that are exercisable by shareholders. See **Annexure RG15**. As no such consent was sought or obtained, the minority shareholders (having a 34% shareholding) are of the view that the appointment of BEX was concluded by CNRRSSA without the requisite authority.

32. The minority shareholders wrote to the board of directors of CNRRSSA and to CRRC on 8 June 2016, highlighting all the issues above. The letter expressed great concern that the CRRC directors had not responded to any of the previous correspondence from the minority non-executive CRRC directors requesting explanations for the above issues. See **Annexure RG16**.

33. The minority shareholders and minority non-executive CRRC directors informed the Company that they considered the issues raised by them to be important and would be scheduling a meeting with Transnet to discuss the matter.

34. On 16 August 2016 Von Gericke (Global), Whiting (Global), Xate (Endinamix) and myself (Cadiz) met with Siyabonga Gama, the Group Chief Executive Officer of Transnet, Garry Pita, Group Chief Financial Officer of Transnet and Ndiphiwe Silinga Group Legal and Compliance Officer of Transnet to discuss the above issues. It is important to note that at this stage the minority non-executive CRRC directors had not had sight of the Variation Order (as this was only seen later when received from Hogan Lovells) which

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had been signed by Gama on 23 July 2015. At the conclusion of the meeting with Transnet, the minority non-executive CRRC directors were requested to provide Transnet with copies of all documents they had related to the BEX matter.

35. On 13 September 2016 Xate and I met with Silinga to hand over copies of the requested documents. The same documents were also emailed to Silinga on the same day. See **Annexure RG17**.

36. On 12 October 2016 Silinga called and informed me that Transnet Engineering ("TE") was conducting two audits to find out (i) why CNRRRSSA had not paid TE a portion of the R647m that the company had received from TFR, as TE was a sub-contractor to CNRRSSA; and (ii) how the R647m was arrived at as certain amounts seem to have been duplicated.

37. On 8 December 2016 Silinga informed the minority non-executive CRRC directors that Transnet had appointed Harold Jacobs of Werksmans to investigate the BEX matter and would be contacting us for interviews.

38. On 14 December 2016 the minority non-executive CRRC directors met with Werksmans and shared all the information they had on the BEX matter.

39. On 31 January 2017 Werksmans emailed the minority non-executive CRRC directors and Transnet letting them know that the investigations were ongoing. The minority non-executive CRRC directors followed up a few times with Transnet and Werksmans to find out what the status of the investigations were and offered to assist where they could.

40. On 2 March 2017, Silinga wrote to the minority non-executive CRRC directors as follows in response to a letter from the Company to Transnet indicating that the relationship

between the shareholders of the Company had improved. The CEO of CNRRSSA, Jeff Wang, had indicated that Transnet sought such a letter (see **Annexure RG18**):

"Dear Sirs

The attached letter from CNR Rolling Stock SA to the Group Chief Executive of Transnet, Mr Gama, co-signed by Messrs Gang Wang and Lulamile Xate, refers.

In essence the letter seems to advise that all differences between the shareholders of CNR Rolling Stock SA have been resolved and that there now exists a good working relationship between the parties.

As a direct result of the differences that existed between the shareholders you laid a complaint against what you suspected to be an untoward conduct by the entity and/or some of its shareholders in relation to the relocation costs to a plant in Durban. Transnet through its external attorneys initiated an investigation which is still at its initial stages.

In light of the tone of the attached letter, we would be pleased to hear from you whether the resolved differences include the issues raised in your complaint. In the circumstances, Transnet would like to know whether you are still pursuing or withdrawing the complaint.

Regards,"

41. On 28 March 2017 the minority shareholders responded as follows (See **Annexure RG19**):

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Dear Sir

CNR ROLLING STOCK SOUTH AFRICA (PTY) LTD ("CNRRSSA" or "the Company")

Your email dated 2 March 2017 and the CNRRSSA letter dated 21 February 2017 (attached to your email) refer.

We thank you for reaching out to us in order to clarify what the CNRRSSA letter may mean in respect of the BEX issue we raised with the executives of Transnet on 13 September 2016. At said meeting we raised two items we wished to discuss with Transnet management.

The first issue related to the relationship and co-operation between CNR, as the major shareholder in the Company, and the minority shareholders in the Company. We are pleased to be able to report to you that significant progress has been made by all parties to ensure that the parties obtain a better understanding of the needs of the respective shareholders and their representatives on the board of the Company, from a corporate governance and stakeholder interest perspective. The aim of the letter was to convey this message to Transnet. The second issue related to the BEX issue and the impact on the minority directors. An original draft of the abovementioned CNRRSSA letter made reference to the BEX issue but this was removed by Mr. Xate as the minority directors and the minority shareholders have deliberately not engaged with CNR on this issue, given that Transnet is undergoing its investigation. We therefore respectfully encourage you to continue along this road until a satisfactory outcome is reached and will continue to co-operate fully with you in this respect.

42. On 22 September 2017 Daisy Zhang from CNRRSSA called me to say that KPMG was considering issuing a reportable irregularity letter (hereinafter referred to as the "second RI").

43. I subsequently called Fred von Eckardstein, the KPMG partner responsible for the audit of CNRRSSA to find out more about the second RI. During the call, Von Eckardstein mentioned that he was considering a reportable irregularity in respect of certain project management fees and that this was not the first reportable irregularity that he had reported on.

44. The first reportable irregularity (dated 12 June 2017) dealt with the BEX issue, which the minority non-executive CRRC directors only found out about on 28 September 2017 (the BEX issue is hereinafter referred to as the "first RI"). See **Annexure RG20**.

45. I sent a follow-up email to Von Eckardstein on 22 September 2017 (See **Annexure RG21**):

"Dear Fred

Thank you for taking my call earlier today. You mentioned that there was a previous Reportable Irregularity as well. None of the South African directors (myself, Lulamile Xate or Rowlen von Gericke) were aware that we had an issue with this Reportable Irregularity until yesterday and had no idea of the previous Reportable Irregularity until you mentioned it to me today. Please send us the previous Reportable Irregularity as well as all related correspondence with the company. As mentioned on the call to you, we (myself, Lulamile Xate and Rowlen von Gericke) would like to meet with you as soon as possible and have requested that management set this up for quite a while. We will in the meantime ensure that the company responds fully to this Reportable Irregularity.

Regards"

46. On 27 September 2017 Endinamix held a board meeting to discuss the latest developments. The board expressed their concern that the CRRC directors and CRRC had not informed any of the other directors or shareholders about the first RI. A meeting between the Company, KPMG, the shareholders and legal advisors was requested.

47. On 28 September 2017, I spoke with Charles Yu of Hogan Lovells who informed me that the first RI had to do with BEX, and that Hogan Lovells no longer wished to act for CNRRSSA on the first RI as one of the BEX directors had apparently had a relationship with the Guptas. Hogan Lovells had assisted CNRRSSA to draft a response to the first RI and they felt that KPMG may be satisfied with the response.

48. On 10 October 2017 we as the minority non-executive CRRC directors, KPMG, and a legal advisor for the minority non-executive CRRC directors met to discuss the first RI and second RI. The minority non-executive CRRC directors made it clear to KPMG that they shared similar concerns with KPMG on the first RI, but not the second RI.

49. On 20 October 2017 the CNRRSSA Board responded to KPMG on the second RI. To date no response has been received from IRBA on either the first or the second RI. See **Annexure RG22.**

50. On 27 October 2017 KPMG notified CNRRSSA that they had resigned as the Company's auditor. See **Annexure RG23**.

51. On 1 November 2017 there was yet another meeting with Werksmans where the minority non-executive CRRC directors and their legal advisor provided Werksmans with a complete history of the BEX matter.

52. Following this meeting the minority non-executive CRRC directors decided to report the BEX issue, in terms of the Section 34 of the PREVENTION AND COMBATTING OF CORRUPT ACTIVITIES ACT 12 OF 2004 (AS AMENDED) to the Hawks. The documents were handed to Lt. Col Percy Ueckermann of the Germiston branch of the DPCI section on 29 November 2017. See **Annexure RG24**.

53. A few months later Captain Frank Rangwashe of the Commercial Crime of Serious Economic Offences Unit of the Hawks in Pretoria came to see Von Gericke at his office in Kempton Park in connection with this matter and wanted to know more about the issue. Since then no further contact has been made by the authorities in connection with the reported matter.

54. On 25 September 2018 at a CNRRSSA board meeting (where the replacement of KPMG, the status of the audited financial statements and how the RI's had been dealt with were major agenda items), we as the minority non-executive CRRC directors were informed that J Theron & Pietersen Inc had been appointed as the Company's auditors and the 2017 audited financial statements were presented. Naturally this took us as the minority non-executive CRRC directors by complete surprise as we had not approved

the appointment of the auditors (which they demanded they have a say in) or the financial statements.

55. On 26 September 2018 Robbie Gonsalves wrote as follows to the audit partner, Nadia Pietersen: "We had a board meeting yesterday and were a little surprised when the signed audited AFS's were presented for 2017 as we have not had a board meeting since Dec last year. As far as I can recall even the Dec 2015 were not yet approved. We need to understand how the BEX payment has been treated and how we deal with the RI's. We explained this all to Jeff and his team yesterday." See **Annexure RG25**.

56. On 27 September 2018, Stephen Nthite, a director of Endinamix, wrote to the CRRC SA board on behalf of the Endinamix board wherein the following, inter alia, was stated (see **Annexure RG26**):

> b. We as Endinamix we regard the payment of R67 181 494 (including VAT) to BEX as a bribe to induce the award of this tender. This is a breach of your fiduciary duties as Directors of CNR. We therefore demand that CNR take the following minimum measures to reverse and correct this situation:
>
> i. You report this matter in terms of the Prevention and Combating of Corrupt Activities Act 12 of 2004 (PCCA Act).
> ii. You report this matter to the SAPS (HAWKS) as having been the subject of extortion by BEX.
> iii. You report the behaviour of BEX in terms of the Financial Intelligence Centre Act 38 of 2001 (FICA).
> iv. Any other measures necessary to recover the monies that you paid to BEX.
>
> 5. Our position as Endinamix is simply that unless CNR demonstrates a willingness to correct the BEX matter and all the other issues raised above by the Endinamix directors we are not willing to sign and confirm any BEE credentials of the Joint Venture as we will be complicit in the very things we are complaining about and we will demand the resignation of the Endinamix Board Member who sits on your board as that amounts to a conflict of interest.

57. On 3 October 2018, Xate and I, together with Jeff Wang and other representatives of CNRRSSA met with Pietersen. It was obvious from the discussions that Pietersen had not been fully informed of the nature of the first RI. Over the next few days she was provided with all supporting documents related to both RI's.

58. On 8 October 2018 we were informed by J Theron & Pietersen Inc that they had retracted the 2015, 2016 and 2018 annual financial statements *"…. as a result of information that came to our attention after the finalisation of the above mentioned audit reports…"*. In addition the auditors notified us that they *"… will need to reopen the December 2015 audit…."*. See **Annexure RG27**.

59. On 15 October 2018 I wrote to Pietersen and made it clear to her that: *"Regarding BEX, we (the directors representing the minority directors ie Lulamile Xate (Endinamix), Rowlen von Gericke (Global) and Robbie Gonsalves (Cadiz)) were dissenting directors when the board voted on the BEX contract ie we did not support the contract and do not support that the payment made to BEX was a bona-fide payment for services rendered to CRRCSARS. For this reason we wanted to know how this payment was going to be disclosed in the Dec 2015 AFS's. We have, as yet, not received a response from CRRCSARS on the 27/9 letter."* See **Annexure RG28**.

60. On 22 March 2019 the Company sent me a copy of the draft audited annual financial statements in respect of the year ended 31 December 2018. The draft independent auditor's report contains the following emphasis of matter in respect of the first RI (the BEX matter) and it appears that the second RI (project management fees) has been disposed of. See **Annexure RG29**.

Emphasis of matter

We draw attention to the following circumstance.

A reportable irregularity has been submitted to the regulatory board by the predecessor auditor (KPMG Inc) in terms of the defination of a reportable irregularity in section 1 of the Auditing Professions Act of 2005, and the procedures as outlined in section 45. The outcome of the matter is still to be resolved.

Particulars of the reportable irregularity are:

1. According to the information received, the proposal by CNR Rolling Stock South Africa (Pty) Ltd to Transnet SOC Ltd for the "Analysis of cost increase for locomotive delivery and locomotive factory location from Pretoria, Gauten to Durban, Kwazulu Natal in terms of Manufacturing facility relocation for Class 45D Locomotives Supply Project" significantly misrepresented the cost to Transnet. Transnet issued a variation order on 23 July 2015 accepting the proposal.
2. CNR entered into a Business Development Services Agreement with Business Expansion Structured Products (Pty) Ltd (registration no. 2009/020420/07)("BEX") on 25 April 2015 relating to the proposal mentioned in 1. above and made payments to BEX which appear to lack sound commercial substance and purpose.

Our firm has engaged in undertaking further investigation of the matter and have since been limited to perform the duties due to lack of access to requested information.

Our opinion is not modified in respect of this matter.

ROBERTO GONSALVES

DATE: 14 April 2019

ANNEXURE "RG 1"

EXHIBIT 1

7431671_2

EXECUTION

LOCOMOTIVE SUPPLY AGREEMENT

17 MARCH, 2014

between

TRANSNET SOC LTD

(acting through its Transnet Freight Rail division)

and

FRIEDSHELF 1507 PROPRIETARY LIMITED

(and, subject to a name change, to be known and registered as CNR ROLLLING STOCK SOUTH AFRICA PROPRIETARY LIMTED)

relating to the design, manufacture, test and supply of up to 232 Diesel Locomotives

7431871_2

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THIS SUPPLY AGREEMENT is made on 17 March, 2014 between:

(1) **TRANSNET SOC LTD** (acting through its **Transnet Freight Rail** division), a public company incorporated in South Africa (registration number 1990/000900/30) and referred to in Section 2 of the Legal Succession to the South African Transport Services Act, No 9 of 1989 (the **Company**); and

(2) **FRIEDSHELF 1507 PROPRIETARY LIMITED**, a company registered under the laws of South Africa (registration number 2014/016892/07) and, subject to a name change, to be known and registered as **CNR ROLLING STOCK SOUTH AFRICA PROPRIETARY LIMITED** (the **Contractor**).

PREAMBLE

Pursuant to a Request for Proposal issued by the Company on 23 July 2012 under reference number TFRAC-HO-8609 (the **RFP**), the Company has appointed the Contractor and the Contractor has accepted such appointment, to design, manufacture, test and supply up to 232 Diesel Locomotives to the Company on the terms set out in this Agreement and the other Project Documents.

1. **Interpretation**

1.1 **Definitions**

In this Agreement and in any schedules to this Agreement, unless the contrary intention appears, the following words and expressions have the meanings assigned to them hereunder and cognate expressions shall have corresponding meanings, namely:

Acceptance or Accept means:

(a) in relation to any Locomotive, the acceptance of that Locomotive by the Company in accordance with Clause 7 (Handover and Acceptance), which acceptance shall occur upon the signing of an Acceptance Certificate for that Locomotive; and

(b) in relation to any Spare, Tool or item of Test Equipment the acceptance of that Spare, Tool or item of Test Equipment by the Company in accordance with Clause 16 (Spares, Change-Out Spares, Tools and Test Equipment);

Acceptance Certificate means a certificate, substantially in the form of Pro Forma 2 of Schedule 8 (Pro Formas), issued by the Company to the Contractor, upon Acceptance of a

Locomotive;

Acceptance Date	means, in relation to each Locomotive, the date on which an Acceptance Certificate for that Locomotive is issued or the date on which such Locomotive is deemed to be accepted pursuant to Clause 7 (Handover and Acceptance);
Acceptance Instalment	means in relation to a Locomotive, the amount of the Contract Price payable for that Locomotive pursuant to Schedule 1 (Pricing and Payment Terms) upon the issue of an Acceptance Certificate in relation to such Locomotive;
Acceptance Period	has the meaning given to it in paragraph 5.6 of Part 8 (Testing), Schedule 3 (Agreement Management), as such period may be adjusted in relation to any Locomotive subject to Excess Handover pursuant to Clause 7.2 (Handover and Acceptance of Excess Locomotives);
Acceptance Tests	means a series of tests described in the Test Programme to be conducted on each Locomotive by the Company after issuance of a Commissioning Certificate for that Locomotive;
Acceptance Test Criteria	means the objective pass and fail criteria for each of the Acceptance Tests as described in the Test Schedule for each Acceptance Test;
Accepted Locomotive	means a Locomotive in respect of which an Acceptance Certificate has been issued;
Advanced Delivery	has the meaning given to it in Clause 9.3 (Early Delivery);
Advance Payment Bond	means an irrevocable, on-demand bond to be issued substantially in the form of Schedule 14 (Form of Advance Payment Bond), in favour of the Company by a bank reasonably acceptable to the Company with a long term issuer default credit rating (by Moody's Investors Service Limited or Fitch Ratings Limited or any successor to their respective ratings business or any other ratings agency approved by the Company) of at least A- (in the case of Fitch Ratings Limited) and A3 (in the case of Moody's Investor Services Limited) (international credit rating for international banks and national credit rating for local banks), for an amount, from time to time, equal to:

(a) the sum of all Milestone Payments made by

the Company to the Contractor under this Agreement (except, in respect of each Locomotive, the Acceptance Instalment and any amounts constituting payments or repayments by the Company to the Contractor of any retentions held by the Company under and in accordance with this Agreement, relating to each such Locomotive) at that time;

less

(b) a pro-rata reduction for the Contract Price for each Locomotive which is an Accepted Locomotive at that time;

(c) the sum of all milestone payments (as that term is defined in the TE Key Sub-Contract) made by the Contractor to TE under the TE Key Sub-Contract at the relevant time,

acceptable to the Company and otherwise on terms and conditions reasonably;

Affected Locomotive has the meaning given to it in Clause 7.9.1.2 (*Affected Locomotive*) of this Agreement;

Affiliate means, in relation to any person, a Subsidiary of that person or a Holding Company of that person, or any other Subsidiary of that Holding Company;

Agreement means this locomotive supply agreement as well as all Schedules hereto (including any document or information contained in electronic format on any CD-ROM dated the date of this Agreement and initialled by each Party to identify that CD-ROM and the documents or information contained in it as forming part of the relevant Schedule);

Agreement Period means the period commencing on the Effective Date and ending (unless terminated earlier in accordance with the provisions of this Agreement) on the Expiry Date applicable to the final Batch;

Applicable Rate means:

(a) in relation to Delay Penalties and Delay Penalty Credits, the rates set out in Clause 9.4 (Rate of Delay Penalties and Delay Penalty Credits); and

(b) in relation to Non Compliance Penalties, the

rates set out in Clause 20.5 (Non-Compliance Penalties);

Background Information	means all and any documents, drawings, plans or other information made available to the Contractor or the Guarantor or to any member of the Guarantor's group by the Company and/or its agents or employees in connection with the negotiation and preparation of this Agreement and during the process of competitive bidding which preceded such negotiation and preparation;
Batch	means, in relation to each Delivery Year, all of the Locomotives Accepted in that Delivery Year;
Batch Value	means an amount equal to the Contract Price per Locomotive in the relevant Delivery Year, multiplied by the number of Locomotives Accepted or scheduled to be Accepted in that Delivery Year (based on the original Master Programme issued or to be issued by the Contractor in accordance with Clause 2.2.2.13 (Commencement) and attached hereto as Schedule 5 (Master Programme);
B-BBEE	means broad-based black economic empowerment;
B-BBEE Act	means the Broad-Based Black Economic Empowerment Act, No. 53 of 2003;
BEE Party	Endinamix Proprietary Limited, registration number 2013/161941/07
Black Person	means, subject to the provisions of the B-BBEE Act and any further qualifications imposed by the Codes, African, Coloured or Indian persons who are natural persons and:

(a) are citizens of the Republic of South Africa by birth or descent;

(b) are citizens of the Republic of South Africa by naturalisation before the commencement date of the Constitution of the Republic of South Africa Act, No 200 of 1993; or

(c) became citizens of the Republic of South Africa after the commencement date of the Constitution of the Republic of South Africa Act, No 200 of 1993, but who, but for the Apartheid policy that has been in place prior

	to that date, would have been entitled to acquire citizenship by naturalisation prior to that date;
Business Day	means any day other than a Saturday, Sunday or any public holiday recognised in South Africa in terms of the Public Holidays Act, No. 36 of 1994 or, if different, any officially recognised public holiday in the jurisdiction of incorporation of the Contractor and/or the Guarantor (as notified to the Company);
Bond	means any Advance Payment Bond or SD Bond including any replacement thereof, from time to time, in accordance with Clause 14.9 (Replacement Bond);
Change in Law	means any introduction, amendment, repeal or other change in a law, regulation, enactment, or Necessary Consent, by a Relevant Authority, after the date of this Agreement;
Change-Out Spares	has the meaning given to it in Clause 16.1 (Spares and Change-Out Spares);
Climate Change Strategy or CCS	means the environmental programme of Transnet SOC Ltd which focuses on identifying and developing opportunities for generating energy savings, reducing carbon emissions and identifying areas for further research and innovation in the renewal energy and other green technologies environment;
Codes	means the Codes of Good Practice issued in terms of Section 9 of the B-BBEE Act;
Commission or Commissioning	means, in relation to a Locomotive, the successful completion of the Commissioning Tests by the Contractor for that Locomotive in accordance with Clause 7 (Handover and Acceptance) and the Test Programme;
Commissioned Locomotive	means a Locomotive in respect of which a Commissioning Certificate has been issued;
Commissioning Certificate	means, in relation to a Locomotive, a certificate, substantially in the form of Pro Forma 1 of Schedule 8 (Pro Formas), issued by the Contractor to the Company upon successful completion of the Commissioning Tests for that Locomotive;
Commissioning Tests	means a series of tests described in the Test Programme to be conducted on each Locomotive

by the Contractor in advance of Handover;

Commissioning Test Criteria	means the objective pass and fail criteria for each of the Commissioning Tests as described in the Test Schedule for each Commissioning Test;
Companies Act	means the Companies Act, 2008 including all regulations promulgated under that act;
Company's Representative	means the representative(s) for the time being of the Company appointed pursuant to Part 1 (Appointment of Representatives and Steering Committee) of Schedule 3 (Agreement Management);
Components	means, whether or not from time to time installed on any Locomotive and whether or not title thereto has passed to the Company, any component, furnishing, equipment, part or item from the OEM comprising part of a Locomotive or delivered pursuant to this Agreement in connection with a Locomotive, including all Spares;
Contract Price	means: (a) in relation to a Locomotive, the amount specified in Schedule 1 (Pricing and Payment Terms) excluding VAT, and as adjusted from time to time by the application of Clause 8.12 (Duties on Importation) and Part 7 (Variations) of Schedule 3 (Agreement Management); (b) in relation to Spares, Tools and Test Equipment, the price for each such Spare, Tool or item of Test Equipment specified in the Master Tools and Test Equipment List, excluding VAT and as Indexed;
Contractor Default	means the events listed in Clause 21.1 (Breach and Termination);
Contractor Facility	means the facility at Koedoespoort, Gauteng or Bay-Head, Durban as notified in writing by the Contractor to the Company;
Contractor's Representative	means the representative(s) for the time being of the Contractor appointed pursuant to Part 1 (Appointment of Representatives and Steering Committee) of Schedule 3 (Agreement Management);

Constitutional Documents	means, in relation to any person, the current and up-to-date constitutional documents of that person in terms of which that person is established and/or registered with the Relevant Authorities (including, without limitation, if that person is a company, its certificate of incorporation, certificate to commence business, any certificates of change of name issued in respect of that person and its memorandum and articles of association or, if that person is a partnership or joint venture, the agreement by which it is constituted or, if that person is a trust, the registered trust deed and letters of authority issued in respect of that person by the Master of the High Court of South Africa, or equivalent documents of any person incorporated or resident outside South Africa);
Corrective Action Reports	has the meaning given to it in paragraph 1.4 of Schedule 3 (Agreement Management), Part 9 (Quality Assurance);
Customs Act	means the Customs and Excise Act, no 91 of 1964;
Data Book	means, in relation to each Locomotive and/or Component of such Locomotive, a record kept by the Contractor of: (a) the results of all tests (excluding the Acceptance Tests) carried out by the Contractor under this Agreement; (b) all certificates contemplated in terms of this Agreement; (c) and all Necessary Consents, in each case, for each such Locomotive and/or Component thereof;
Defect	means, in respect of a Locomotive or Component, that such Locomotive or Component does not: (a) comply with the Specification; or (b) comply with the requirements of this Agreement in any material respect; or (c) is not Fit for the Purpose, whether as a consequence of faulty or inadequate design, faulty materials, bad workmanship or as a

	consequence of any other reason attributable to the Contractor's or its sub-contractors' work, and shall (where appropriate) include a reference to Potential Fleet Defect and Fleet Defect and Defective shall be construed accordingly;
Delay	has the meaning given to it in Clause 9.1.1 (Delayed Delivery);
Delay Event	has the meaning given to it in Clause 9.9 (Potential Grounds for Extension);
Delayed Locomotive	means any Locomotive not handed over by its Scheduled Handover Date (provided that such Locomotive shall cease to be a Delayed Locomotive on the date on which it is actually handed over) or Accepted by its Scheduled Acceptance Date;
Delay Penalty	means a penalty imposed by the Company on the Contractor under Clause 9.1 (Delayed Delivery);
Delay Penalty Cap	has the meaning given to it in Clause 9.2 (Delay Penalty Cap);
Delay Penalty Credit	has the meaning given to it in Clause 9.3 (Early Delivery);
Delay Penalty Certificate	means a certificate substantially in the form of Pro Forma 4 of Schedule 8 (Pro Formas) issued by the Contractor pursuant to Clause 9.6 (Delay Penalty Certificate);
Delay Penalty Period	means each consecutive period of 3 (three) calendar months following the Effective Date and ending on the last day of March, June, September and December of each year, provided that, when all Locomotives to be Delivered under this Agreement have been Accepted, the last such period shall end on the Acceptance Date of the final Locomotive;
Delayed Locomotive Penalty Date	means, in respect of any Locomotive, the first day after its Scheduled Acceptance Date;
Deliverable Materials	means the Master Programme, Documentation Plan, Documentation Register, all Testing Documentation, all Manuals, the Software, each Data Book, the Training Programme, all Training Materials, all Progress Reports, all Necessary Consents and Quality Assurance Documentation, all as updated and amended under this Agreement

	from time to time, but excluding the Technical Materials and the Escrow Materials;
Delivery	in respect of a Locomotive, or any Spare, Tool or item of Test Equipment, shall occur on Acceptance of that Locomotive, Spare, Tool and item of Test Equipment (as applicable) and Delivered shall have the corresponding meaning;
Delivery Point	means the delivery point in relation to the Locomotives, Spares, Tool or Test Equipment (as applicable), namely the depot at Koedoespoort, Gauteng, the depot at Bay-Head, Durban or such other location in South Africa as may be agreed between the Contractor and the Company from time to time;
Delivery Year	means a period of 12 (twelve) months, the first such period commencing on the first day of the month immediately following Acceptance of the First Locomotive and each subsequent period commencing on the anniversary of such date;
Depots	means, individually or collectively, the depots on the Network owned or operated by the Company in South Africa;
Design Programme	means a programme of design work to be undertaken by the Contractor in accordance with Part 6 (Design Process), Schedule 3 (Agreement Management);
Design Review	means the process described in Part 6 (Design Review) of Schedule 3 (Agreement Management);
Dispute	has the meaning given to it in Clause 26.1.1 (Dispute Resolution);
Documentation Plan	has the meaning given to it in paragraph 3.1 of Schedule 3 (Agreement Management), Part 11 (Documentation, Documentation Standards and Documentation Control);
Documentation Register	has meaning given to it in paragraph 2.1 of Schedule 3 (Agreement Management), Part 11 (Documentation, Documentation Standards and Documentation Control);
Effective Date	means the first Business Day following the fulfilment or waiver (as applicable) of all the suspensive conditions contained in Clause 2

	(Commencement);
Engineer	means the person appointed as such by the Company in accordance with Part 1 (Appointment of Representatives and Steering Committee) of Schedule 3 (Agreement Management) or such other person for the time being discharging the duties of that office;
Engineer's Representative	means any resident engineer or assistant of the Engineer appointed from time to time by the Company in accordance with Part 1 (Appointment of Representatives and Steering Committee) of Schedule 3 (Agreement Management);
Environment	means air, water or land (including, without limitation, air, water and land within natural or man-made structures above or below ground);
Environmental law	means all or any laws (whether civil, criminal or administrative), statutes, treaties, regulations, directives, decisions or by-laws which are at any time and from time to time in force in South Africa and which relate to the Environment;
Escrow Agent	means the escrow agent that is the party to the Escrow Agreement;
Escrow Agreement	means the escrow agreement between the Contractor, the Company and the Escrow Agent substantially in the form of Schedule 11 (Form of Escrow Agreement);
Escrow Materials	has the meaning given to it in the Escrow Agreement;
Excess Handover	has the meaning given to it in Clause 7.7.1 (Handover and Acceptance of Excess Locomotives);
Excluded Matter	means any: (a) Improper Use; (b) crash or collision involving any Locomotive which is not attributable to the Contractor, the Guarantor or any member of the Guarantor's group, Sub-Contractor, employees, agents or representatives of any of the foregoing acting in such capacity, or any Defect or Fleet Defect;

(c) fair wear and tear; and

(d) any failure to maintain the Locomotives in accordance with the relevant Manuals and/or the Maintenance Plan (provided, the same shall have been provided and maintained by the Contractor in accordance with this Agreement);

Exercisable Voting Rights means, with respect to any entity, a Black Person's claim against such entity representing such person's voting and other decision-making rights and entitlements as shareholder in such entity, measured in accordance with the flow-through and/or modified flow-through principles, as the case may be, as set out in the Codes; In this regard a Black Person's entitlement to receive any payment or part payment from such entity that is not in the nature of participation interests in such entity and is:

(a) not arms-length;

(b) not market-related;

(c) mala fide;

(d) without a commercial rationale; or

(e) intended to circumvent the provisions of the Codes or the objectives of the B-BBEE Act,

must be ignored;

Expiry Date means, in relation to each Batch, the last day of the Fleet Defect Protection Period for such Batch;

Extended Warranty Period has the meaning given to it in Clause 10.10.3 (Option to Extend);

Failed Locomotive has the meaning given to it in Clause 7.4.1 (Rejection Notice);

Fault means, in relation to a Locomotive, that Locomotive becomes inoperable for more than 30 (thirty) minutes or experiences any delay which results in an aggregate increase in its journey time of more than 30 (thirty) minutes, in each case due to a failure of any nature or another circumstance which compromises the safety of that Locomotive, provided that a Fault shall not arise where and

excludes:

(a) any damage to or breakdown of any Locomotive caused by Improper Use (including any damage to or breakdown of a Locomotive resulting from derailments or collisions); or

(b) any damage to or breakdown of any Locomotive which resulted from the operational environment and circumstances under the control of the Company including (but not limited to) defective or inappropriate ground facilities including track; or

(c) a Force Majeure Event; or

(d) any damage to or breakdown of a Locomotive or the degradation in performance of a Locomotive caused as a direct result of the use of a part, component, product or repair procedure that was not provided by or approved for use by the Contractor or any supplier of, or Sub-Contractor to, the Contractor; or

(e) any damage to or breakdown of a Locomotive resulting from a failure where, following the occurrence of a previous failure of the same nature, the Locomotive was not timeously returned to a service facility for proper assessment and diagnostic analysis in circumstances where such previous failure is determined to be the cause of the current failure;

Fault-Free Running means 3 (three) consecutive round trips (on a portion of the Network and of a distance, in each case, described in the Test Programme) of running in its final proposed configuration without any service affecting Faults. Without limiting or derogating from the Test Programme, each round trip shall consist of a return journey as part of a revenue earning train (with the number of Locomotives and wagons forming part of such train) determined by the Company in accordance with its standard train design philosophies in place from time to time;

First Article Inspection means, in relation to any prototype of any Component, system, sub-system or cubicle, an inspection performed by the Company prior to any Type Tests being carried out on or mass production of such Component, system, sub-system or cubicle, in each case for the purposes of evaluating quality and compliance with the Specification;

Fit for the Purpose means, in relation to any Locomotive, Spare, Tool or Test Equipment, that:

(a) it meets, in all material aspects, the Specification or, in the case of Spares, the requirements of Clause 16.1.12 (Spares, Change-Out Spares, Tools and Test Equipment); and

(b) is fit for operation in revenue services;

First Locomotive means, unless otherwise qualified by reference to a particular Batch, the first Locomotive of the first Batch;

Fleet means, in relation to each Batch, the aggregate number of Locomotives in such Batch in respect of which an Acceptance Certificate has been issued at any time, provided that no measure of Fleet performance in respect of a Batch shall be made until the Fleet Performance Commencement Date;

Fleet Availability means, on any relevant day and in relation to a Batch, the number of operational Locomotives in such Batch which are available for service on that day expressed as a percentage of the Fleet where the target is to achieve monthly Fleet Availability of more than 95% (ninety five per cent) within 6 (six) months after the Fleet Performance Commencement Date. Monthly Fleet Availability shall be calculated at the end of each calendar month as the average of the Fleet Availability for each day during that calendar month. Daily Fleet Availability shall be calculated in terms of the following formula:

$$Z = X \div Y \times 100$$

where:

Z = daily Fleet Availability;

X = the number of Locomotives in that Batch

that have been in actual operation for at least 1 (one) month at the relevant time, which are available for service on that day;

Y = the total number of Locomotives at the relevant time constituting the Fleet of Locomotives in that Batch (but excluding all Locomotives which became Accepted Locomotives in the relevant month),

and the number of those Locomotives which are available for service on any applicable day shall be deemed to be the average of the number of Locomotives which are available for service at 06h00 on that day and the number of Locomotives which are available for service at 18h00 on that day (where a Locomotive will be considered to be available for service if it is not at a maintenance depot); provided that Locomotives which are not operational due to the following causes shall be excluded for purposes of calculating Fleet Availability:

(a) the circumstances envisaged in (a) to (e) of the definition of Fault above;

(b) a Locomotive that is not operational as a result of it not having been maintained in accordance with the Manuals;

(c) a Locomotive held for an abnormal period of time due to operational causes outside the control of the Contractor (such as transit time, shop dwell time and labour availability);

(d) a Locomotive that is not operational as a result of any crash or collision which is not attributable to (i) the Contractor, the Guarantor or any member of the Guarantor's group, Sub-Contractors, employees, agents or representatives of any of the foregoing acting in such capacity, or (ii) any Defect or Fleet Defect;

For the purposes of (c) above, if a Locomotive is not operational as a result of shop dwell time, directly attributable to the following causes, which are outside the control of the Contractor, such dwell time will be considered abnormal (it being acknowledged that the onus shall be on the

Contract to substantiate and prove such abnormal shop dwell time):

(i) unavailability of adequately trained labour for Locomotive maintenance;

(ii) unavailability of repair facility equipment (such as cranes) required for Locomotive maintenance;

(iii) in relation to shop dwell time caused by unavailability of parts or materials required for Locomotive maintenance provided that said parts or materials are available either (a) within any Transnet SOC Ltd facility or warehouse in South Africa; or (b) within the facilities used for new Locomotive production where said parts or materials could be borrowed from the production inventory;

Fleet Availability Retention Release Date means, in relation to each Batch, the earlier of the date on which the Fleet Availability Target for that Batch is achieved and the last day of the Fleet Defect Protection Period applicable to that Batch;

Fleet Availability Target has the meaning given to it in Clause 11 (Mission Reliability and Fleet Reliability);

Fleet Defect means, in relation to a Batch (comprising at least 25 (twenty five) or more Locomotives in such Batch), a Defect in a Component of a Locomotive in that Batch which occurs as a result of the same Defect in any period of 12 months during the Fleet Defect Protection Period for that Batch:

(a) in 15% or more of the same Components or, in the case of the Locomotive's sub-systems, the power control converter on such Locomotives in such Batch, or

(b) where such Component is a traction motor, in 7.5% or more of the same Components of the Locomotives in such Batch;

Fleet Defect Protection Period means the period commencing on the Acceptance of the First Locomotive and, in relation to each Batch, ending 2 (two) years after the date on which the Warranty Period (but not including any further warranty period pursuant to Clauses 10.2.3or any Extended Warranty Period) for the last Locomotive Accepted in such Batch expires;

Fleet Performance Commencement Date means, in relation to a Batch, the date on which 20 (twenty) per cent of the Accepted Locomotives in that Batch have been in operation by the Company for at least one month;

Force Majeure Event means, in relation to either the Company or the Contractor, the occurrence of any of the following:

(a) circumstances of war (whether declared or not), invasion, or acts of sabotage and of a foreign enemy, sanction, embargo or Government order;

(b) rebellion, revolution, riot, act of terrorism or insurrection;

(c) industrial action or strike affecting the Contractor, any Sub-contractor or the Company, including any national or federal or regional strike or any strike affecting the entire railway industry in the jurisdiction concerned; but excluding any industrial action or strike (whether official or unofficial, legal or illegal, protected or unprotected):

(i) exclusively involving the staff of the Contractor or the Company (as applicable) and/or any other member of its Group who are employed in any of their respective plants, factories, offices or other workplaces and are involved in the performance of its obligations under the Project Documents , or the management or administration of such performance; or

(ii) where the dispute originated from or commenced in any plant or workplace of the Contractor or the Company (as applicable) and/or any other member of its Group, however widely such industrial action, strike and/or labour dispute may subsequently extend, is related to the conduct of the Contractor or the Company (as applicable) or that of any member of its Group and involving the staff of the Contractor or the Company (as applicable) and/or any member of its Group who are involved in the performance of its obligations under

the Project Documents,

except that, in relation to a force majeure claimed by the Contractor under paragraph (c) above, sub-paragraphs (i) and (ii) above, shall not apply to any such strike or industrial action involving the staff of TE (in its capacity as Sub-contractor to the Contractor);

(d) natural disasters such as violent storms, hurricanes, earthquakes, tidal waves or other perils of the sea (including any rough sea conditions which delay any sea transport activities), extraordinary floods or destruction by lightning;

(e) explosions, fires or vandalism (provided, in each case, that the relevant facility was protected by all appropriate security and health and safety measures and precautions against such event, to a level at least conforming with Legal Requirements and good business practice),

(f) nuclear contamination or ionising radiation;

(g) chemical or biological contamination from any of the events referred to in paragraph (f) above

which, in each case, renders impossible or illegal the performance of any of the obligations of the Contractor or the Company under this Agreement or the other Project Documents;

Fuel Consumption Penalty has the meaning given to it in Schedule 18 (Fuel Consumption Warranty);

Further Recognition Development Commitments means, in relation to B-BBEE, the commitments (incorporated in Part 1 (SD Bid Document) of Schedule 4 (Socio-Economic Obligations)) identified by the Contractor in line with the requirements of the RFP describing the initiatives and targets set by the Contactor in enhancing its B-BBEE credentials and scorecard;

Good Industry Practice means in relation to the performance of any activity to which this standard is applied, the exercise of that degree of skill, diligence, prudence and foresight as would reasonably and ordinarily be expected from a skilled and experienced contractor (internationally engaged in the same type of

Initial Spare Value	has the meaning given to it in paragraph 2 of Schedule 1 (Pricing and Payment Terms);
Initial Test Equipment Value	has the meaning given to it in paragraph 3 of Schedule 1 (Pricing and Payment Terms);
Initial Tools Value	has the meaning given to it in paragraph 3 of Schedule 1 (Pricing and Payment Terms);
Insolvency Event	in relation to any person, means:

(a) it is, or is deemed for the purposes of any Legal Requirements, to be insolvent or unable to pay its debts as they fall due; or

(b) it admits an inability to pay its debts as they fall due; or

(c) a moratorium is declared in respect of any of its indebtedness; or

(d) any step (including a petition, proposal or convening of a meeting) is taken with a view to a moratorium or a general composition or similar arrangement with its creditors; or

(e) a meeting of its shareholders, directors or other officers is convened for the purpose of considering any resolution for, to bring an application for or to file documents with a court or any registrar for, its winding-up, judicial management or dissolution or any such resolution is passed; or

(f) any person brings an application, or files documents with a court or any registrar, for its winding-up, judicial management or dissolution; or

(g) an order for its winding-up or judicial management (whether on a provisional or final basis), dissolution or reorganisation (by way of a scheme of arrangement or otherwise) is made; or

(h) any liquidator, judicial manager or similar officer is appointed in respect of such person; or

(i) its shareholders, directors or other officers request the appointment of, or give notice of

their intention to appoint, a liquidator, judicial manager or similar officer; or

(f) any other analogous step or procedure is taken in any jurisdiction;

Intellectual Property Rights means all intellectual property rights including, without limitation:

(a) any know-how, patent, trade mark, service mark, design, invention, trading or business name, domain name, topographical rights or any rights of a similar nature;

(b) any copyright and any other intellectual property rights in any data base;

(c) any such rights in the Specification, drawings and technical descriptions, Software, research and development data, manufacturing methods and data, formulae, algorithms, prototypes and research materials; and

(d) any interest and rights to use (including by way of licence) in the above,

in each case whether registered or not, and includes any related application;

Key Personnel means those personnel of the Contractor (and/or any Sub-Contractor) agreed with the Company as being key and referred to as key personnel in Part 3 (the Project Manager) of Schedule 3 (Agreement Management);

Key Sub-Contract means any Sub-Contract entered or to be entered into by any Sub-Contactor for any of the equipment, a list of which is required to be prepared by the Contractor pursuant to Clause 14.3 (Key Sub-Contracts) and attached to this Agreement as Schedule 9 (Key Sub-Contracts);

Key Sub-Contractor means any Sub-Contractor who enters into a Key Sub-Contract;

Legal Requirements	means any legislation (including regulations or by-laws) of national, provincial or municipal spheres of government applicable to this Agreement (or any agreement or document referred to in this Agreement), the Locomotives, Spares, Tools and/or Test Equipment, including, without limitation, Industry Standards (whether in existence on the date of this Agreement or which come into existence following the date of this Agreement), including any order or determination having the force of law, made in terms of such legislation by the applicable Relevant Authority;
Lender	means:
	(a) any financial institution (including any export credit agency) which from time to time agrees to provide financing facilities to, or for the benefit of, the Company in respect of the Locomotives or any person referred to in (c) below and/or for whose benefit Security over, or rights in the nature of Security relating to the Locomotives and/or this Agreement and/or any agreement entered into pursuant to the terms of this Agreement is granted; or
	(b) any financial institution which from time to time serves as security agent and/or trustee for one or more financial institutions falling within (a) above; or
	(c) with respect to the Locomotives, the owner of such Locomotives (if not the Company) and any other person (other than a person falling within (a) or (b) above and excluding any operator of all or any of the Locomotives) who has a leasehold, proprietary or security interest in such Locomotives;
Location	means the Network, the Depots, the Stations or any one or more of them, as applicable;
Locomotives	means collectively or individually, the locomotives to be manufactured and supplied to the Company by the Contractor in accordance with this Agreement, with each individual locomotive being identified by its vehicle number;
Maintenance Plan	means the final maintenance plan adopted in accordance with Clause 15.2 (Maintenance Plan)

as revised from time to time in agreement between the Parties;

Manuals means those manuals developed by the Contractor in relation to the Locomotives and referred to in paragraph 6 of Schedule 3 (Agreement Management), Part 11 (Documentation, Documentation Standards and Documentation Control);

Master Programme means the programme required to be prepared by the Contractor pursuant to the provisions of Part 13 (Programme Management) of Schedule 3 (Agreement Management) and attached to this Agreement as Schedule 5 (Master Programme), as may be adjusted from time to time in accordance with this Agreement;

Master Spares List has the meaning given to it in Clause 16.1.1 (Spares);

Master Tools and Test Equipment List has the meaning given to it in Clause 16.3.1 (Tools and Test Equipment);

Milestone has the meaning given to it in paragraph 1.2.1 of Schedule 1 (Pricing and Payment Terms);

Milestone Date has the meaning given to it in paragraph 1.2.1 of Schedule 1 (Pricing and Payment Terms);

Milestone Payment has the meaning given to it in paragraph 1.2.1 of Schedule 1 (Pricing and Payment Terms);

Mission Reliability in relation to a Batch, means the average number of Faults per Locomotive in such Batch in relation to distance travelled expressed as Faults per million kilometres travelled where the target is to achieve on average less than or equal to 15 (fifteen) Faults per million Locomotive kilometres travelled by the Fleet. Mission Reliability shall be measured for each calendar month using the following formula:

$$Z = X + Y \times 1{,}000{,}000$$

where:

Z = Mission Reliability;

X = number of Faults reported and confirmed in relation to the Fleet for the calendar month being measured (on the basis that the Faults

reported and confirmed during the relevant calendar month for any Locomotive in such Batch that has not achieved a minimum average monthly travelling distance of 5,000 kilometres as at the end of that calendar month, shall not be counted in the Fault measurement for that calendar month);

Y = total distance travelled by the Fleet for the calendar month being measured (on the basis that the distance travelled during the relevant calendar month by any Locomotive in such Batch that has not achieved a minimum average monthly travelling distance of 5,000 kilometres as at the end of that calendar month, shall not be counted in the distance measurement for that calendar month),

and where average monthly travelling distance of a Locomotive in such Batch for any calendar month which expires after commencement of Phase 2 of the Mission Reliability measurement process (as contemplated in Clause 11 (Mission Reliability and Fleet Availability), shall be determined using the following formula:

$$A = B + C$$

where:

A = the average monthly travelling distance of that Locomotive for the relevant calendar month;

B = the total distance travelled by that Locomotive during the 6 (six) months immediately preceding the date of calculation (or during such shorter period as may then have expired since the date on which Phase 2 of the Mission Reliability measurement process commenced);

C = the number of calendar months expired in the period referred to in variable B above;

Mission Reliability Retention Release Date means, in relation to each Batch, the earlier of the date on which the Mission Reliability Target for that Batch is achieved and the last day of the Fleet Defect Protection Period applicable to that Batch;

Mission Reliability has the meaning given to it in Clause 11.5 (Mission

Target	Reliability and Fleet Availability);
month	means a period starting on one day in a Gregorian calendar month and ending on the numerically corresponding day in the next succeeding calendar month, provided that where any such period would otherwise end on a day which is not a Business Day, it shall end on the next succeeding Business Day, unless that Business Day falls in the calendar month succeeding that in which it would otherwise have ended, in which case, it shall end on the immediately preceding Business Day, provided that if a period starts on the last Business Day in a calendar month or if there is no numerically corresponding day in the month in which that period ends, that period shall end on the last Business Day in that later month (and all references to months shall be construed accordingly);
Monthly Test Programme	has the meaning given to it in Clause 6.3(Monthly Test Programme);
Necessary Consents	means all approvals, permissions, consents, licences, certificates and authorisations (whether statutory or otherwise and whether issued by the RSR, any other Regulatory Authority or otherwise) which are required from time to time for the purpose of carrying out the Works;
Network	means the rail network owned by the Company and which is situated in South Africa;
Non Compliance Penalty	means a penalty imposed by the Company on the Contractor under Clause 20.5 (Non-Compliance Penalties);
Non Compliance Penalty Cap	has the meaning given to it in Clause 20.7 (Non-Compliance Penalty Cap);
Non Compliance Penalty Certificate	means a certificate substantially in the form of Pro Forma 31 of Schedule 8 (Pro Formas) issued by the Contractor pursuant to Clause 20.8 (Non Compliance Penalty Certificate);
OEM	means original equipment manufacturer;
Payment Certificate	means a certificate issued by the Engineer pursuant to paragraph 3.5.6 (Certification of Milestone Payments) of Schedule 1 (Pricing and Payment Terms;

Parent Guarantee	means the guarantee provided by the Guarantor in favour of the Company substantially in the form of Schedule 15 (Form of Parent Guarantee);
Party or Parties	means the Company and/or the Contractor, as the case may be;
Participation Interests	means, with respect to the Contractor, the relative interests of the OEM and the BEE Party in the economic benefits of the Contractor;
Penalties	means, collectively a Delay Penalty, a Non Compliance Penalty, a Fuel Consumption Penalty or, at the end of the Fleet Defect Protection Period, any amount payable by the Contractor to the Company under Clause 11.5.5 (Mission Reliability and Fleet Availability);
Performance Audit	means an audit by the Company of the Contractor's performance in fulfilling its obligations in respect of the Technical Materials and/or the provision and deposition of the Escrow Materials;
Permitted Sub-licensee	has the meaning given to it in Clause 13.2.1 (Intellectual Property Rights);
Potential Fleet Defect	means a Defect in a Component which occurs as a result of the same fault in any period of 12 months during the Fleet Defect Protection Period: (a) in 10% or more of the same Components within the Fleet, or (b) where such Component is a traction motor, in 5% or more of the same Components within the Fleet; or (c) which the Company reasonably believes (having consulted with the Contractor) will thereafter become a Fleet Defect;
Prime Rate	means, at any relevant time, the publicly quoted prime overdraft rate of the Standard Bank of South Africa Limited at that time, being the nominal rate of interest per annum at which that bank lends money on unsecured overdraft to corporate borrowers, expressed as a nominal annual rate compounded monthly in arrears (a certificate from any manager of that bank, whose appointment or authority need not be proved, as to the prime rate at any time and the usual way in which it is calculated and compounded at such time, in the

	absence of clerical or manifest error, will be prima facie proof of that rate);
Project Documents	means this Agreement, the Escrow Agreement, each Security Document and any other document or agreement designated as such by the Parties;
Project Manager	means the person appointed as such by the Contractor in accordance with Part 1 (Appointment of Representatives and Steering Committees) of Schedule 3 (Agreement Management);
Project Manager's Representative	means the person appointed as such from time to time by the Project Manager in accordance with Part 1 (Appointment of Representatives and Steering Committees) of Schedule 3 (Agreement Management);
Progress Report	has the meaning given to it in paragraph 3.1.3 of Schedule 3 (Agreement Management), Part 5 (Management Communications/Meetings);
Quality Assurance Documentation	means the documentation produced as a consequence of the Quality Assurance Plan, including testing and inspection records and approvals, certificates of conformity, Corrective Action Reports and auditing records;
Quality Assurance Plan	has the meaning given to it in paragraph 2 of Schedule 3 (Agreement Management), Part 9 (Quality Assurance);
Rectified	means, in relation to any Component, the repair, modification, redesign, amendment, rectification or replacement of a Defect such that the Defect no longer exists and "Rectification" shall have the corresponding meaning;
Rectification Work	means, in relation to any Component, the removal thereof and all works of repair, modification, redesign, amendment and/or rectification of such Component, including the testing thereof, to ensure that the relevant Defect no longer exists;
Release Event	has the meaning given to it in the Escrow Agreement;
Relevant Authority	means the Government of the Republic of South Africa, whether at national, provincial or local level, or any governmental ministry, department or agency, or any other public authority, body, entity or functionary having jurisdiction under the laws

	and/or regulations of the Republic of South Africa over any matter arising from or relevant to this Agreement and the other Project Documents;
Representatives	means the Company's Representatives and the Contractor's Representatives or any of them, as the context may require, each with the roles and authorities set forth in Part 2 (the Engineer) and Part 3 (the Project Manager) of Schedule 3 (Agreement Management) respectively;
Required Insurance Policies	means the insurance policies referred to in Clause 18.2 (Responsibility for the Locomotives and Insurance);
Retention Amounts	means the amounts payable by the Company to the Contractor under paragraph 1.2.1 of Schedule 1 (Pricing and Payment Terms) on the Fleet Availability Retention Release Date, the Mission Reliability Retention Release Date and on Expiry of the Agreement Period (as applicable);
Reviewable Design	means the materials, documents and information submitted by the Contractor under Part 6 (Design Process) of Schedule 3 (Agreement Management);
RSR	means the South African Railway Safety Regulator constituted under and in terms of the National Railway Safety Regulator Act, 2002 and any successor body;
Safety Event	means where, as a result of any accident occurring to, or any failure, fault or defect or other event, in each case, affecting safety on or in connection with, the Locomotives, any remedial or other work is, in the reasonable opinion of the Engineer, urgently necessary to (i) ensure compliance with any Legal Requirement or any recommendation, finding, report or other requirement by the RSR or any other Relevant Authority or any declared or formal internal Transnet policy or (ii) obtain or maintain any Necessary Consent;
Sale Contract	has the meaning given to it in Clause 1.6 (Master Agreement);
SD Value	means the total monetary value of the commitments made by the Contractor under the SD Plan;
Security	means any right of ownership, lien, mortgage, charge, pledge, hypothecation, allotment, security

	interest, right of possession, right of detention, right of set-off, assignment by way of security or other encumbrance;
Security Documents	means the Advance Payment Bond, the Parent Guarantee and the SD Bond, and a reference to Security Document means any one of them;
Scheduled Acceptance Date	means in relation a Locomotive, the date specified for Acceptance of that Locomotive, such dates to be prepared by the Contractor pursuant to Clause 7 (Handover and Acceptance) and attached to this Agreement as Part 2 (Scheduled Acceptance Dates) of Schedule 2 (Scheduled Handover and Scheduled Acceptance Dates), as extended by any period of extension granted to the Contractor pursuant to Clause 9.9 (Potential Grounds for Extension) or, in the case of a Locomotive subject to Excess Handover as a result of Handover of that Locomotive prior to its Scheduled Handover Date, pursuant to Clause 7.7 (Handover and Acceptance of Excess Locomotives), pursuant to Part 7 (Variations) of Schedule 3 or to the Company pursuant to Clause 9.22 (Potential Grounds for Company Extension);
Scheduled Handover Date	means in relation to a Locomotive, the date specified for Handover of that Locomotive, such dates to be prepared by the Contractor pursuant to Clause 7 and attached to this Agreement as Part 1 (Scheduled Handover Dates) of Schedule 2 (Scheduled Handover and Scheduled Acceptance Dates) as extended by any period of extension granted to the Contractor pursuant to Clause 9.9 (Potential Grounds for Extension) , or pursuant to Part 7 (Variations) of Schedule 3 or to the Company pursuant to Clause 9.22 (Potential Grounds for Company Extension);
Software	means a machine readable, in object code form only, computer programme or compilation of data that is fixed in any tangible medium of expression or any storage medium from which the programme may be perceived, reproduced or otherwise communicated, either directly, or with the aid of a machine readable device, and shall include without limitation, the software relating to the locomotive management system, propulsion and traction systems and auxiliary control equipment and any of the Contractor's other proprietary software used in the ordinary operation of the Locomotives and any optional software to enhance the operation of the

Locomotives, as well as any upgrades or revisions of such software which the Contractor provides in fulfilment of a specific written commitment or otherwise (save that nothing in this definition shall be deemed to create an obligation on the part of the Contractor to provide any support, upgrades, or revisions to any such software, except as otherwise agreed in this Agreement or in writing between the Contractor and the Company);

Spares means spare Components listed in Schedule 6 (Spares, Tools and Test Equipment) for any Locomotive purchased by the Company from the Contractor from time to time pursuant to Clause 16.1 (Spares) and paragraph 2 of Schedule 1 (Pricing and Payment Terms), including all Tools and Test Equipment;

Specification means the technical specification of the Locomotives set out in Schedule 16 (Specification);

Specific Change in Law means a Change in Law:

(a) which is a change that directly affects the Works or the ability of the Contractor to perform its obligations in relation to the Works; and

(b) having an impact on the costs (including the profit for the Contractor) or timing of performance of the Works,

provided that such Change in Law shall not be a Specific Change in Law where:

(i) it relates to the internal working practices of the Contractor or any Sub-Contractor and/or the works, factory or premises of the Contractor or any Sub-Contractor; or

(ii) it is a change in income or corporate taxes or the introduction of a tax affecting companies generally, or a change in VAT (but, for the avoidance of doubt, this shall not be construed so as to prohibit a Party from levying VAT on taxable supplies made from time to time under this Agreement at the prevailing rate); or

(iii) it should have been reasonably foreseeable on the Effective Date by an experienced contractor performing operations similar to

the ones relating to the Works, on the basis of draft Bills, green or white papers in each case, published in any Government Gazette:

(aa) prior to the Effective Date;

(bb) that does not have a materially different effect to the relevant Change in Law;

Stations means, individually and collectively, the stations on the Network owned or operated by the Company in South Africa;

Steering Committee means the joint oversight and liaison committee of the Parties established in accordance with Part 1 (Appointment of Representatives and Steering Committee) of Schedule 3 (Agreement Management);

Subsidiary means a subsidiary as defined in the Companies Act and shall include any person who would, but for not being a company under the Companies Act, qualify as a subsidiary as defined in the Companies Act;

Sub-Contract means any agreement entered into with a sub-contractor in connection with the Works;

Sub-Contractor means any party to a Sub-Contract other than the Contractor;

Supplier Development Bond or SD Bond means, in relation to any Non Compliance Penalty obligations for Supplier Development under Clause 20.5 (Non-Compliance Penalties), an irrevocable, on-demand bond to be issued substantially in the form of Schedule 12 (Form of Supplier Development Bond) in favour of the Company by a bank reasonably acceptable to the Company with a long term issuer default credit rating (by Moody's Investors Service Limited or Fitch Ratings Limited or any successor to their respective ratings business or any other ratings agency approved by the Company) of at least A- (in the case of Fitch Ratings Limited) and A3 (in the case of Moody's Investor Services Limited) (International credit rating for international banks and national credit rating for local banks) and otherwise acceptable to the Company (in its sole and absolute discretion);

Supplier Development means the Department of Public Enterprise

Programme or SDP supported programme focussing on the development of local and regional suppliers including,

(a) enhancement of the competitiveness, capacity and capability of the South African and regional supply base; and

(b) the empowerment of previously disadvantaged individuals and enterprises,

and which replaces the National Industrial Participation Programme;

SD Plan has the meaning given to it in Clause 20.4.1 (Socio-Economic Obligations);

Tax Invoice has the meaning given to that term in section 20 of the Value-Added Tax Act, No. 89 of 1991;

Taxation means any form of taxation, levy, charge, duty or impost whenever created, imposed, levied or deducted, whether in South Africa or elsewhere and includes (without limitation):

(a) any charge, tax, duty or levy on or in respect of income, profits or gains or providing for any charge or liability to income tax, profit tax, corporation tax, advance corporation tax, capital gains tax, VAT, customs and other import duties, excise duty, stamp duty, stamp duty reserve tax capital duty, capital transfer tax, inheritance tax, national insurance or social security contributions, registration fees and payments, all other similar liabilities and generally any tax, duty, impost, levy of any amount payable to the reserve, customs, fiscal or governmental authorities, whether in South Africa or elsewhere; and

(b) all costs, expenses, penalties, fines, charges and interest payments incidental to any Taxation and any payment made or liability incurred under any settlement of any claim for taxation,

and **Tax** and **Taxable** (and other cognate expressions) shall be construed accordingly;

TE means Transnet Engineering, an operating division of Transnet SOC Ltd, a public company

	Incorporated in South Africa (registration number 1990/000900/30) and referred to in Section 2 of the Legal Succession to the South African Transport Services Act, No 9 of 1989;
Technical Materials	means the materials listed in Schedule 10 (Technical Materials);
Tender	means the written response to the RFP by the Contractor dated 30 April, 2013;
Test Equipment	means the equipment developed to test dimensions, functionality and input and output parameters of the Locomotives and the equipment fitted thereto purchased by the Company from the Contractor from time to time pursuant to Clause 16.3 (Tools and Test Equipment) and paragraph 2 of Schedule 1 (Pricing and Payment Terms);
Test Philosophy	has the meaning given to it in paragraph 2 of Part 8 (Testing), Schedule 3 (Agreement Management);
Test Programme	means the programme of action: (a) which delivers the requirements of the Test Philosophy; and (b) which describes the tests to be undertaken by the Contractor in Part 8 (Testing) of Schedule 3 (Agreement Management);
Test Reports	has the meaning given to in paragraph 7.1 of Part 8 (Testing), Schedule 3 (Agreement Management);
Test Schedule	has the meaning given to it in paragraph 4.1 of Part 8 (Testing), Schedule 3 (Agreement Management);
Testing Documentation	means the Test Programme (including the Monthly Test Programme), Test Schedules, Test Reports and other documentation relating to the testing of the Locomotives required to be delivered by the Contractor under Part 8 (Testing) of Schedule 3 (Agreement Management);
Tools	means the tools purchased by the Company from the Contractor from time to time pursuant to Clause 16.3 (Tools and Test Equipment) and paragraph 3 of Schedule 1 (Pricing and Payment Terms);
Tools and Test	has the meaning given to it in Clause 16.3.3 (Tools

Equipment Order	and Test Equipment);
Total Contract Price	means: (a) in respect of all the Locomotives, the aggregate Contract Price for all Locomotives, excluding VAT; (b) in respect of the Spares (including consumables), the Initial Spares Value, excluding VAT; (c) in respect of the Tools, the Initial Tools Value, excluding VAT; and (d) in respect of the Test Equipment, the Initial Test Equipment Value, excluding VAT, or the aggregate thereof as the context may require;
Training	means the training to be provided by the Contractor to the Company personnel in accordance with Part 12 (Training) of Schedule 3 (Agreement Management);
Variation	means any Required Variation, Company Proposed Variation or Contractor Proposed Variation (in each case as defined in Part 7 (Variations) of Schedule 3 (Agreement Management);
Variation Acceleration Saving	means the cost saving to the Contractor of an acceleration of the Scheduled Acceptance Date as a result of the implementation of a Variation;
Variation Capital Costs	means the sum of any (in each case resulting from the relevant Variation): (a) Variation Manufacturing Price; and (b) Variation Delay Cost; less the sum of any: (c) Variation Manufacturing Saving; and (d) Variation Acceleration Saving. and being a positive sum;

Variation Delay Costs	means the cost to the Contractor of delay to the Scheduled Acceptance Date as a result of the implementation of a Variation;
Variation Manufacturing Price	means the price for the design, manufacture and implementation of the Variation;
Variation Manufacturing Saving	means the saving in the design, manufacture and commissioning cost, which will arise as a result of complying with the Variation;
Variation Order	means an order issued by the Engineer pursuant to Part 7 (Variations) of Schedule 3 (Agreement Management);
Variation Process	means the process for making Variations set out in Part 7 (Variations) of Schedule 3 (Agreement Management);
Variation Savings	means the sum of any (in each case resulting from the relevant Variation): (a) Variation Manufacturing Price; and (b) Variation Delay Cost; less the sum of any: (c) Variation Manufacturing Saving; and (d) Variation Acceleration Saving, and being a negative sum;
VAT	means value-added tax charged and levied in terms of the Value Added Tax Act, No. 89 of 1991;
Warranty Period	means: (a) in relation to each Locomotive (including each Component of such Locomotive, other than the traction motors referred to in (b) below and the Spares referred to in (c) below), the period ending on the earlier to occur of: (i) 24 (twenty four) months commencing on the Acceptance Date of such Locomotive; or (ii) the achievement of 400,000 kms in

respect of that Locomotive,

as extended by and in accordance with any exercise of the Option under Clause 10.10 (Option to Extend);

(b) in relation to each traction motor fitted to a Locomotive (whether at Acceptance of that Locomotive or at any time thereafter during the period referred to in this paragraph (b), including any traction motor in relation to which the warranty period for such traction motor expired pursuant to paragraph (c)(ii) below), a period of 6 (six) years commencing on the Acceptance Date of that Locomotive;

(c) in relation to each Spare (including any traction motor not having been fitted to a Locomotive pursuant to paragraph (b) above), the period ending on the earlier to occur of:

(i) 18 (eighteen) months after being placed in service by the Company; or

(ii) 21 (twenty one) months after Acceptance of that Spare;

Works means all works (including the work necessary to obtain Necessary Consents) to be undertaken in order to achieve the design, construction, Commissioning and Delivery of the Locomotives or Components thereof in accordance with this Agreement and the other Project Documents, including the securing of facilities and equipment in which such construction will occur;

Works Test Certificate means a certificate, substantially in the form set out in Pro Forma 3 of Schedule 8 (Pro Formas), to be issued by the Engineer to the Contractor on successful completion of the Works Tests;

Works Tests means tests identified as such in the Test Programme.

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1.2 **Construction**

1.2.1 In this Agreement unless inconsistent with the context, any reference to:

1.2.1.1 one gender include a reference to the others;

1.2.1.2 the singular includes the plural and vice versa;

1.2.1.3 natural persons include juristic persons and vice versa;

1.2.1.4 an **amendment** includes an amendment, supplement, novation, re-enactment, replacement, restatement or variation and amend will be construed accordingly;

1.2.1.5 **assets** includes businesses, undertakings, securities, properties, revenues or rights of every description and whether present or future, actual or contingent;

1.2.1.6 an **authorisation** includes an authorisation, consent, approval, resolution, permit, licence, exemption, filing, registration or notarisation as the same may be amended, modified, supplemented or replaced from time to time and to any proper order, instruction, requirement or decision of any Relevant Authority given, made or issued under it;

1.2.1.7 a Default being **continuing** means that it has not been remedied within any applicable remedy period or waived;

1.2.1.8 a **guarantee** means any guarantee, bond, letter of credit, indemnity or similar assurance against financial loss, or any obligation, direct or indirect, actual or contingent, to purchase or assume any indebtedness of any person or to make an investment in or loan to any person or to purchase assets of any person, where, in each case, that obligation is assumed in order to maintain or assist the ability of that person to meet any of its indebtedness;

1.2.1.9 a **person** includes any individual, company, corporation, unincorporated association or body (including a partnership, trust, fund, joint venture or consortium), government, state, agency, organisation or other entity whether or not having separate legal personality;

1.2.1.10 a **regulation** includes any regulation, rule, official directive, request or guideline (whether or not having the force of law but, if not having the force of law, being of a type with which any person to which it applies is accustomed to comply) of any governmental, inter-governmental or supranational body, agency, department or regulatory, self-regulatory or other authority or organisation;

1.2.1.11 a provision of law is a reference to that provision as extended, applied, amended, re-amended or re-enacted from time to time,

whether before or after the date of this Agreement, and includes any subordinate legislation;

1.2.1.12 a Party or any other person includes its successors in title, permitted assigns and permitted transferees;

1.2.1.13 a year shall be regarded as a reference to a period of 12 (twelve) consecutive months and, unless stated otherwise, yearly shall refer to a year commencing on the Effective Date or any anniversary of the Effective Date;

1.2.1.14 ZAR, Rand or R means the lawful currency, from time to time, of South Africa;

1.2.1.15 agree or agreed or any derivative thereof shall be interpreted to mean an agreement in writing signed by both Parties;

1.2.1.16 in writing or written means any typewritten or printed communication (whether comprising words, figures or drawings) including any facsimile or electronic mail (except for any legal processes or notices referred to in Clause 28.1 (General)) to the address of the recipient;

1.2.1.17 the Engineer is to be construed as a reference to the Company acting through the Engineer;

1.2.1.18 this Agreement shall include a reference to the Schedules, the Annexures and any document or information contained in electronic format on any CD-ROM dated the date of this Agreement and initialled by each Party to identify that CD-ROM and the documents or information contained in it as forming part of a Schedule or Annexure;

1.2.1.19 this Agreement and each other Project Document includes (without prejudice to any prohibition on amendments) all amendments (however fundamental) to such document from time to time, whether before or after the date of this Agreement;

1.2.1.20 a time of day is a reference to Johannesburg time; and

1.2.1.21 the Company shall, unless expressly stated to the contrary, be interpreted to mean Transnet Freight Rail only and shall exclude any other division, trading entity or Affiliate including, without limitation, TE.

1.2.2 Headings to Clauses and Schedules are for convenience only and shall not, in any way, affect the interpretation of this Agreement.

1.2.3 The use of the word including followed by specific examples will not be construed as limiting the meaning of the general wording preceding it, and the *eiusdem generis* rule must not be applied in the interpretation of such general wording or such specific examples.

1.2.4 The rule of construction that an agreement is to be interpreted against the Party responsible for the drafting or preparation thereof must not be used in the interpretation of this Agreement.

1.2.5 Any number of days prescribed in this Agreement must be calculated by including the first and excluding the last day, unless that last day falls on a day that is not a Business Day, in which case, if the last day is a payment date, the last day will instead be the next Business Day in the same calendar month (if there is one) or the preceding Business Day (if there is not), or, if the last day is not a payment date, the last day will instead be the next Business Day.

1.2.6 A reference to a **month** or **months** is a reference to a period starting on one day in a calendar month and ending on the day preceding the numerically corresponding day in the next calendar month or the calendar month in which it is to end, except that:

1.2.6.1 if the numerically corresponding day is not a Business Day, the period will end on the next Business Day in that month (if there is one) or the preceding Business Day (if there is not);

1.2.6.2 if there is no numerically corresponding day in that month, that period will end on the last Business Day in that month; and

1.2.6.3 notwithstanding (a) above, a period which commences on the last Business Day of a month will end on the last Business Day in the next month or the calendar month in which it is to end, as appropriate.

1.2.7 If any provision contained or appearing in a definition is a substantive provision conferring rights or imposing obligations on any Party, effect shall be given to it as if it were a substantive provision of this Agreement, notwithstanding the fact that it is contained in or appears in such definition.

1.2.8 Unless the contrary intention appears a reference to any amount of money to be paid by either Party in terms of this Agreement shall be exclusive of VAT.

1.2.9 Where a Party is required to provide any consent or approval or agree to the actions of another Party, the request for such consent or approval or agreement must be in writing and such consent or approval or agreement must be in writing and shall not be unreasonably withheld or delayed.

1.2.10 The expiry or termination of this Agreement will not affect those of its provisions which expressly provide that they will continue in force or which of necessity must continue to apply after that expiry or termination.

1.2.11 Where figures are referred to in numerals and in words, if there is any conflict between the two, the words shall prevail.

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1.2.12 Any notice to be given by either Party in connection with this Agreement shall be in writing.

1.2.13 Any reference to the Company or the Company Representatives or to rights exercised by or on behalf of the Company or by the Company Representatives shall be construed as references to Transnet SOC Ltd, operating as the Company.

1.2.14 Notwithstanding the appointment by the Contractor of any Sub-Contractor, delegate, or agent in accordance with this Agreement, the Contractor remains fully liable, as principal, under this Agreement and will obtain no relief for any failure, on the part of any such delegate or agent, to perform under this Agreement.

1.3 **Conflicts**

In the event of any conflict or contradiction between the main body of this Agreement and the Schedules, the provision in the body of this Agreement shall take precedence. In the event of any conflict or contradiction between a provision of one Schedule and that of another, the Schedules shall take precedence in the following order or priority:

1.3.1 Appendix A (Negotiations Outcome) of Schedule 16 (Specification);

1.3.2 Schedule 2 (Scheduled Handover and Scheduled Acceptance Dates);

1.3.3 Schedule 5 (the Master Programme);

1.3.4 the Test Programme (developed in accordance with Clause 6.1 (Test Programme);

1.3.5 the following technical Schedules and documents namely, the Design Programme, Documentation Plan, the Quality Assurance Plan, Test Schedule, with no order of priority as between them;

1.3.6 Appendix B (Line by Line Response to RFP Requirements) of Schedule 16 (Specification);

1.3.7 all other Schedules to this Agreement, with no order of priority as between them,

and any updated or amended Schedule permitted under this Agreement shall override the earlier Schedule so updated or amended.

1.4 **Sub-Contractor Compliance**

Where any provision of this Agreement requires the Contractor to procure that its Sub-Contractors comply with a particular obligation, such requirement shall be construed as follows:

1.4.1 in the case of any Sub-Contractor which is the Guarantor or a subsidiary of the Guarantor, an absolute obligation to procure such compliance; and

1.4.2 in the case of any other Sub-Contractor, an obligation to use all reasonable endeavours to procure such compliance.

1.5 **Contractor Delegation**

Without in any way derogating from, or limiting, the Contractor's obligations under this Agreement and the other Project Documents to which it is party, the Contractor shall be entitled to delegate the performance of its obligations under such Project Document in whole or in part to any subsidiary or holding company of the Contractor. Notwithstanding any appointment of a delegate, or agent, the Contractor remains fully liable, as principal, under this Agreement and each such other Project Document and, except as expressly set out in this Agreement, will obtain no relief for any failure, on the part of any such delegate or agent, to perform under this Agreement.

1.6 **Master Agreement**

The Contractor and the Company agree and acknowledge that the obligation of the Contractor to sell, and the obligation of the Company to purchase, each Locomotive in accordance with the terms of this Agreement constitutes a separate and severable contract of sale and purchase in relation to such Locomotive (each a **Sale Contract**) and, accordingly, *inter alia*:

1.6.1 the obligation of the Contractor to transfer title to, and the Company to take title to and pay for, each Locomotive pursuant to this Agreement shall, once such obligations have been fully performed in accordance with the terms of this Agreement, in each case operate as the complete performance of those obligations under the Sale Contract relating to that Locomotive regardless of the extent of, and without prejudice to the rights of the Parties in relation to, the performance by the Contractor or the Company of their other separate obligations under the Sale Contract in respect of that Locomotive or any of the other Locomotives; and

1.6.2 any references in this Agreement to this Agreement shall (insofar as the context admits) include a reference to any relevant Sale Contract or Sale Contracts.

2. Commencement

2.1 This Agreement shall commence on the Effective Date.

2.2 Notwithstanding the date of this Agreement, the whole of this Agreement, save for the provisions of this Clause 2.2, the Preamble, Clauses 1 (Interpretation), Part 1 of Schedule 3 (Agreement Management), 21 (Breach and Termination), 22 (Limitation of Liability), 26 (Dispute Resolution), 29 (Cession and Assignment), 30 (Applicable Law), 27 (Confidentiality), 28 (Notices), 32 (Mitigation), and 33 (Miscellaneous) which shall be of immediate force and

effect, will be suspended until each of the following suspensive conditions has been fully satisfied or waived in writing:

2.2.1 the Company shall have confirmed in writing to the Contractor (by providing certified copies of the relevant source documents) that:

2.2.1.1 the Company board of directors (constituting the accounting authority of the Company for the purposes of Public Finance Management Act, No 1 of 1999 (PFMA)) has in terms of section 66(3)(b) of the PFMA, approved the purchase of the Locomotives and its entry into the Project Documents to which it is a party; and

2.2.1.2 it has obtained such requisite approval/s in terms of section 54(2)(d) of the PFMA for the implementation of the Works as contemplated in this Agreement and the other Project Documents to the extent such approval is required;

2.2.2 the Contractor shall have delivered to the Company certified copies of the following documents (in form and substance reasonably satisfactory to the Company):

2.2.2.1 the Constitutional Documents of the Contractor, including the shareholders agreement (in form and substance satisfactory to the Company) with the BEE Party;

2.2.2.2 the Constitutional Documents of each member of the Contractor;

2.2.2.3 resolutions by the shareholders and the directors of the Contractor authorising (A) the establishment of the Contractor and their participation in the Contractor as members of the Contractor; (B) the Contractor's entry into each Project Document to which it is a party and (C) the giving of the financial assistance under the Parent Guarantee;

2.2.2.4 the original of an up-to-date and valid Tax Clearance Certificate issued by the South African Revenue Service in respect of the Contractor and each member of the Contractor incorporated in South Africa;

2.2.2.5 an up-to-date and valid extract of the register of members of the Contractor and the BEE Party;

2.2.2.6 a copy of an up-to-date and valid B-BBEE Accreditation Certificate;

2.2.2.7 the original duly executed Parent Guarantee; and

2.2.2.8 the original duly executed and unconditional Advance Payment Bond;

2.2.2.9 the original duly executed and unconditional SD Bond for an amount not less than the amount referred to in Clause 20.7.1 (Non Compliance Penalty Cap);

2.2.2.10 a legal opinion in favour of and in form and substance satisfactory to the Company on, *inter alia*, the power, capacity and authority of the Guarantor to enter into the Parent Guarantee and the enforceability of the Parent Guarantee under the laws of the jurisdiction of incorporation of the Guarantor;

2.2.2.11 a letter from the insurance brokers for the Contractor confirming that the coverage required by Clause 18 (Responsibilities of the Locomotives and Insurance) is, to the extent required by this Agreement, in place and effective;

2.2.2.12 documents evidencing that the Contractor has obtained the approval of the Reserve Bank of South Africa in respect of all matters under this Agreement that require such approval; and

2.2.2.13 delivery by the Contractor of the Master Programme and an organisational chart describing the responsibilities and reporting lines of the Key Personnel.

2.3 Each Party shall use its reasonable endeavours to procure the fulfilment of the suspensive conditions contained herein and, insofar as any suspensive condition is required to be fulfilled by the relevant Party, such Party will in good faith take all reasonable action with a view to fulfilment thereof or finalising any and all required amendments or issues in respect thereof as expeditiously as possible.

2.4 Unless all the suspensive conditions are satisfied or waived (if capable at law of being waived) within 20 Business Days of the date of this Agreement (or such other period specified for the fulfilment thereof in this Clause 2.2 above), the rights and obligations of the Parties under this Agreement will not come into force; provided however that (i) such period may be extended for such additional period as the Parties may in writing agree, and (ii) the provisions of this Clause 2.4 and those clauses specified in Clause 2.2 shall remain of full force and effect.

2.5 The conditions in Clauses 2.2.2 to 2.2.2.8 (inclusive) have been stipulated for the benefit of the Company. The Company shall accordingly be entitled to waive fulfilment of any of such condition by giving written notice to that effect to the Contractor.

2.6 A breach of a Party's obligations under Clause 2.3 shall not entitle the other Party (the Aggrieved Party) to claim damages from the other Party in connection with revenue or profits which would have accrued to the Aggrieved Party had the breach not occurred and had this Agreement been duly completed.

2.7 The Scheduled Handover Dates and Scheduled Acceptance Dates listed in Schedule 2 assume an Effective Date of 31 March, 2014. If the Effective Date occurs on a date after 31 March, 2014, then within 5 Business Days of the actual Effective Date, the Contractor shall prepare and submit to the Company a revised Schedule 2 taking into account when the Effective Date actually occurred (such extension being equal to the number of days between 31

March, 2014 and the Effective Date), provided no such extension or revision beyond the 20 Business Day period referred to in Clause 2.4 is permitted, except for such further period as may be agreed in writing by the Parties in accordance with Clause 2.4, which shall then be the date on which the Master Programme commences.

3. **Representations and Warranties**

3.1 Each Party represents and warrants to the other Party that:

3.1.1 it is duly incorporated and validly existing under the laws of its jurisdiction of incorporation;

3.1.2 it has the power to own its assets and carry on its business as it is being conducted;

3.1.3 it has the power and legal capacity and has taken all corporate action necessary to execute each Project Document to which it is a party, to perform its obligations and to exercise its rights under each of them, and each such agreement constitutes its legally binding, valid and enforceable obligation;

3.1.4 the documents delivered or to be delivered under Clause 2 (Commencement) are true and accurate, in full force and effect and no proposals are outstanding to amend those documents;

3.1.5 it is not in breach of any of the terms of this Agreement or any other Project Document to which it is a party to an extent which would materially adversely affect its ability to perform its obligations hereunder and thereunder;

3.1.6 the entering into or performance of its obligations or exercising of its rights under this Agreement and each other Project Document to which it is a party will not breach any law or regulation applicable to it, its constitutional documents or any document which is binding on it or any of its assets or would constitute a default or termination event (however described) under any such document, in each case to an extent or in a manner which would materially adversely affect its ability to perform its obligations hereunder and thereunder,

3.1.7 to the best of its knowledge, information and belief:

3.1.7.1 no material matter exists which might give rise to a civil, criminal, arbitration, administrative or other proceeding in any jurisdiction;

3.1.7.2 there is no material outstanding order, decree, arbitral award or decision of a court, tribunal, arbitrator or governmental agency in any jurisdiction against it; and

3.1.7.3 no material civil, criminal, arbitration, administrative or other proceeding in any jurisdiction is pending or threatened by or against it,

which in any such case would affect its capacity to fulfil its obligations under this Agreement and/or any other Project Document to which it is a party;

3.1.8 the execution, delivery and performance by it of this Agreement and each other Project Document to which it is a party constitutes private and commercial acts, rather than public or governmental or sovereign acts;

3.1.9 it is generally subject to civil and commercial law and to legal proceedings, and neither it nor any of its assets is entitled to any immunity (governmental, sovereign or otherwise) from any set-off, judgment, execution, attachment or other legal process relating to its commercial or private law arrangements as are provided for in the Project Documents;

3.1.10 should any proceedings be brought against it or any of its assets in any jurisdiction in connection with the Project Documents, no immunity (governmental, sovereign or otherwise) from such proceedings shall be claimed by or on behalf of that Party or with respect to its assets, to the maximum extent permitted by law (including, without limitation, any future governmental decree or legal notification);

3.1.11 to the maximum extent permitted by law (including, without limitation, any future governmental decree or legal notification), it waives any right of immunity (governmental, sovereign or otherwise) which it or any of its assets may have in the future; and

3.1.12 it consents generally, in respect of the enforcement of any judgment against it in any proceedings brought against it or any of its assets in any jurisdiction in connection with the Project Documents, to the giving of any relief or the issue of any process in connection with such proceedings including, without limitation and to the maximum extent permitted by law (including, without limitation, any future governmental decree or legal notification), the making, enforcement or execution against or in respect of any property whatsoever (irrespective of its use or intended use) of any order or judgment which may be made or given in such proceedings; and

3.1.13 in the case of the Contractor only:

3.1.13.1 all information contained in the Tender was prepared and submitted in good faith after careful consideration, was true and accurate in all material respects as at its date or (if appropriate) as at the date (if any) at which it was stated to be given;

3.1.13.2 the Tender did not omit as at its date any information the omission of which would make the Tender untrue or misleading in any material respect;

3.1.13.3 nothing has occurred since the date of the Tender which renders any of the material information in the Tender untrue or misleading

in any material respect in the context of the transaction contemplated by the Project Documents;

3.1.13.4 it has at least a Level 4 B-BBEE accreditation (measured in terms of the Department of Trade and Industry B-BBEE Codes of Good Practice).

3.2 **Representations Continuing**

Each of the representations and warranties in this Clause 3 shall survive after the execution of this Agreement.

4. **Purpose, Consideration and Duration**

4.1 **Purpose**

This Agreement sets out, *inter alia*, the terms on which the Contractor has agreed to sell each Locomotive to the Company.

4.2 **Consideration**

In consideration of the Contractor's various commitments and obligations under this Agreement, the Company has agreed to purchase and pay for each Locomotive in accordance with and subject to the terms of this Agreement.

4.3 **Agreement Period**

4.3.1 This Agreement shall continue for the Agreement Period.

4.3.2 Neither Party shall have any right to terminate this Agreement or any part of this Agreement except in accordance with the express terms of this Agreement.

5. **Contractor's Principal Obligations**

5.1 **General**

The Contractor shall design, manufacture, engineer, supply, test, commission, sell and deliver each Locomotive:

5.1.1 in accordance with the Specification (notwithstanding any rights of the Company in relation to Reviewable Design) and the Master Programme;

5.1.2 to achieve the design life specified in Clause 5.2 (Design Life);

5.1.3 in accordance with all due skill, care, diligence, prudence and foresight to be expected of appropriately qualified and experienced professional designers and engineers with experience in carrying out work of a similar scope, type, nature and complexity to that required under this Agreement;

5.1.4 in a safe manner and free (to the extent possible using the best modern design and engineering principles and practices) from any material risk to the health and well-being of persons using, operating or maintaining, or involved in the management of the Locomotives;

5.1.5 such that each Locomotive is Fit for the Purpose;

5.1.6 using materials and goods which are new and of sound, good and satisfactory quality such that each Locomotive will be of new manufacture and of sound, good and satisfactory quality; and

5.1.7 in accordance with the best modern principles and practices in the activity concerned, Good Industry Practice, in relation to each Batch, as at the date of issue of the Acceptance Certificate for the first Locomotive in such Batch and, subject to Clause 12.2 (Change in Law), all Necessary Consents and Legal Requirements.

5.2 **Design Life**

5.2.1 The Contractor agrees to use and cause its affiliates to use, as applicable, reasonable skill and care in designing the Locomotives, with a view to producing a design life of:

5.2.1.1 not less than 35 years in respect of the Locomotive platform (being the underframe) and bodyshell, and

5.2.1.2 not less than 30 years in respect of the Locomotive (other than the platform and bodyshell),

it being recognised that:

(i) certain Components will require replacement during such period as a result of fair wear and tear;

(ii) such agreement on the part of the Contractor excludes any Excluded Matter to the extent that such Excluded Matter materially adversely affects such design life; and

(iii) the assumption referred to in Clause 5.2.1.2 shall not apply to time-expired Components.

5.2.2 The Contractor's obligations are excluded by any Improper Use of the Locomotives by the Company to the extent such circumstances materially and adversely affect the design life of the Locomotives.

5.3 **Acceptance and Approval**

In performing its obligations under Clause 5.1, the Contractor shall comply with the procedures for Acceptance set out in Clause 7 (Handover and Acceptance) and Schedule 3 (Agreement Management).

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5.4 **Training, documentation and information**

The Contractor shall comply with all training, documentation production and standards, and information provision obligations set out in Schedule 3 (Agreement Management).

5.5 **Specification**

5.5.1 The Specification sets forth the Company's requirements in relation to the Locomotives.

5.5.2 The Contractor shall perform its obligations under this Agreement to achieve the Specification in relation to the Locomotives.

5.5.3 The Specification may only be amended by way of a Variation Order concluded in accordance with the Variation Process.

5.5.4 The Company does not give any warranty (express or implied) as to the completeness or accuracy of any Background Information and such information is provided to the Contractor on the basis that it has conducted its own due diligence and taken its own advice with respect to its ability to rely on the Background Information for the purpose of producing the Specification or otherwise.

5.5.5 Neither the Company nor any of its agents, employees or contractors shall be liable to the Contractor in contract, delict (including negligence or breach of statutory duty), or otherwise as a result of any inaccuracy, omission, or inadequacy of any kind in the Background Information.

5.6 **Spares and Special Tools**

The Parties shall perform their respective obligations set out in Schedule 1 (Pricing and Payment Terms).

5.7 **Fuel Efficiency**

5.7.1 The Contractor hereby guarantees that each Locomotive shall achieve the fuel efficiency targetsset out in Schedule 18 (Fuel Consumption Warranty) (the Fuel Consumption Warranty).

5.7.2 The Company shall, at its discretion, require certain Locomotives to be tested under and in accordance with the provisions of Schedule 18 (Fuel Efficiency Warranty).

5.7.3 If the Locomotives are tested in accordance with Schedule 18 (Energy Efficiency Warranty), and such tests reveal that the Locomotives do not meet the Fuel Consumption Warranty, the Contractor shall pay to the Company the Fuel Consumption Penalties (under and as defined in Schedule 18 (Fuel Consumption Warranty)) within ten (ten) Business Days of its receipt of written notice requiring it to do so, together with a Tax Invoice for the amount of such Fuel Consumption Penalty. Such written notice shall be accompanied by a certificate from the Engineer of

the Company, whose appointment or authority need not be proved, certifying the Fuel Consumption Penalties then due. Such certificate will be *prima facie* proof of those Energy Efficiency Penalties.

5.7.4 The Company may set off any Fuel Consumption Penalties owing to it by the Contractor under Clause 5.7.3 against any amount owing to the Contractor by the Company.

5.7.5 The maximum amount of the Contractor's liability to pay Fuel Consumption Penalties under this Clause 5.7 read with Schedule 18 (Fuel Consumption Warranty) shall not exceed one per cent of the Total Contract Price for all Locomotives. For the purposes of this Clause 5.7 and Schedule 18 (Fuel Consumption Warranty) only, the Total Contract Price for all Locomotives shall be Indexed on each Indexation Date using CPI (being the weighted average of the consumer price index as published from time to time by Statistics South Africa (or its successor), being referred to as "CPI - All items for metropolitan areas" in Statistical Release PO141.1).

6. Testing and Commissioning

6.1 Test Programme

The Contractor shall develop the Test Programme in accordance with paragraph 3 of Part 8 (Testing) of Schedule 3 (Agreement Management).

6.2 Works Tests

6.2.1 The Contractor shall carry out the Works Tests in accordance with the Test Programme.

6.2.2 If the Engineer has attended a Works Test and the Company, acting reasonably and in good faith, disputes that a Works Test was successfully completed, then:

6.2.2.1 the Company may issue a notice in writing setting out with reasonable specificity the basis on which it disputes that such Works Test was successfully completed;

6.2.2.2 upon receipt of such a written notice (and subject to Clause 26 (Dispute Resolution), and notwithstanding that the Contractor may have issued a Work Test Certificate in respect of any Component pursuant to that test, the Contractor shall not ship any such Component to South Africa or use it for the manufacturing of a Locomotive without the written agreement of the Company.

6.3 Monthly Test Programme

The Contractor shall on a monthly basis, submit to the Engineer a schedule of tests to be carried out for each Locomotive, derived from the Test Programme, but adjusted to take into account progress at the beginning of each month (**Monthly Test Programme**). If any changes to the Monthly Test Programme

are necessitated by the state of progress of the Works Test at any time during any relevant month, the Contractor shall notify the Engineer in writing as follows.

6.3.1 if the change relates to the testing of a Locomotive at a location within South Africa, the Contractor must give the Engineer at least 5 (five) Business Days' prior notice thereof;

6.3.2 if the change relates to the testing of a Locomotive at a location outside South Africa, the Contractor must give the Engineer at least 40 (forty) days' prior notice thereof.

6.4 **Access Rights and Inspection**

6.4.1 At all reasonable times and upon reasonable notice by the Company to the Contractor, while the Works are being carried on, the Engineer and other authorised inspectors of the Company (including the RSR on request by the Company) shall have reasonable access to the premises of the Contractor where the Works are being carried out for the purpose of observing the Works, the progress thereof and the testing and inspection of the Locomotives as part of the Works Tests and/or the Commissioning Tests. Such access and rights of observation shall:

6.4.1.1 be limited to areas directly concerned with the Works and shall not include restricted areas where development work or work of a proprietary nature is being conducted (for the avoidance of doubt, areas where tests and inspections are agreed to be performed, as described in the Monthly Test Programme, will not be considered a restricted area for the purposes hereof); and

6.4.1.2 may not be exercised in a way which unreasonably interferes with the Contractor's operations.

6.4.2 Any notice by the Company under this Clause shall set out the date(s) of the intended visit(s) and the number of persons that will attend that visit on behalf of the Company. If the Company's Representatives fail to attend any testing or inspection as scheduled in the Monthly Test Programme (as may be changed only by notice in accordance with Clause 6.3 (Monthly Test Programme), the Contractor shall not be obliged to reschedule or re-perform the relevant test or an inspection.

6.4.3 Should the Engineer wish to inspect the progress of Works carried out by overseas suppliers, the Engineer shall give the Contractor 10 (ten) Business Days' notice of his intention to do so, and the Contractor shall make all reasonable efforts to secure access to such suppliers on behalf of the Company. The Company shall bear all costs and expenses, including without limitation all travel and living expenses, incurred in connection with the aforesaid inspection, testing and access by the Company's Representative to the Contractor's and supplier's sites, save that the Guarantor and/or its suppliers may offer casual meals on-site during the course of any inspection at their respective facilities and/or local transportation, in their sole discretion. Such inspection or testing, if

made, shall not release the Contractor from its obligations under this Agreement, except as otherwise agreed by both Parties. All Representatives from the Company visiting the Contractor Facility (except the TRE Facility) must agree to all rules and safety requirements applicable to such facility.

6.5 **Commissioning Tests**

6.5.1 The Contractor shall carry out the Commissioning Tests in accordance with the Test Programme.

6.5.2 Prior to the commencement of the Works Tests and Commissioning Tests, the Contractor shall provide a checklist to the Engineer of any additional tests that were conducted on the Components and sub-assemblies used in any Locomotive not otherwise provided in the Test Programme.

6.6 **Responsibilities**

6.6.1 The Contractor will be responsible, at its cost, for the servicing of each Locomotive as required for the completion of the Works Tests and Commissioning Tests.

6.6.2 Except as expressly set out in this Agreement, the Contractor shall be liable for and shall pay all costs and expenses of or incidental to the carrying out and completion of the Works Tests and Commissioning Tests.

6.6.3 Except as expressly set out in this Agreement, the Company shall be liable for and shall pay all costs and expenses incurred by it in carrying out and completing the Acceptance Tests including, without limitation, all sand, drivers, track and power supply access, wagons or trains that may be required to conduct such Acceptance Tests.

7. **Handover and Acceptance**

7.1 **Locomotive Handover**

7.1.1 If a Locomotive meets all Commissioning Test Criteria, the Contractor shall be entitled to obtain and the Engineer shall be obliged to issue a Commissioning Certificate with respect to that Locomotive.

7.1.2 Upon a Locomotive becoming a Commissioned Locomotive, the Contractor shall issue a Handover Notice to the Company specifying the Scheduled Handover Date for that Locomotive and shall present such Locomotive for Handover at the Delivery Point on that Scheduled Handover Date.

7.1.3 The Scheduled Handover Dates with respect to the Locomotives as at the date hereof are set out in Part 1 (Scheduled Handover Dates) of Schedule 2 (Scheduled Handover and Scheduled Acceptance Dates).

Such dates may be subject to adjustment only pursuant to Clause 2.7 (Commencement) and Clause 9.9 (Potential Grounds for Extension).

7.2 **Acceptance**

7.2.1 Following physical delivery of each Locomotive to the Delivery Point and upon each such Locomotive becoming a Commissioned Locomotive, the Company shall conduct the Acceptance Tests (with the assistance of the Contractor to the extent necessary) in accordance with and within the time periods contemplated by the provisions of paragraph 5.6 of Part 8 (Testing) of Schedule 3 (Agreement Management), the Test Programme and this Clause 7.

7.2.2 The Scheduled Acceptance Dates with respect to the Locomotives as at the Effective Date are set out in Part 2 (Scheduled Acceptance Dates) of Schedule 2 (Scheduled Handover and Acceptance Dates). Such dates may be subject to adjustment only pursuant to Clause 2.7 (Commencement), Clause 7.7 (Handover and Acceptance of Excess Locomotives) and Clause 9.9 (Potential Grounds for Extension).

7.2.3 Without derogating from any of the Contractor's obligations in relation to the Acceptance of the Locomotives, the Company shall obtain, at its cost, any Necessary Consent required to obtain exclusive use of train paths for the purpose of carrying out the Acceptance Tests. The Contractor shall make available and provide to the Company in a timely manner all assistance, information and documents necessary for a locomotive manufacturer to provide and which may be required or reasonably requested by the Company to obtain any such Necessary Consent.

7.2.4 The Company will give reasonable prior notice, in accordance with Part 8 (Testing) of Schedule 3 (Agreement Management), to the Contractor of the time of each such Acceptance Test and the Contractor shall be given reasonable opportunity to attend and witness (at its cost) each such Acceptance Test.

7.2.5 In relation to the Type Testing that precedes the Acceptance Testing of the 6 (six) Locomotives referred to in paragraph 5.2 (Type Tests) of Part 8 (Testing) of Schedule 3 (Agreement Management) the Contractor will provide engineering personnel and testing equipment, to be determined and agreed and included in the Test Programme, necessary to perform these evaluations and will, in relation to each such test submit a Test Schedule to the Company, for the Company's information, at least 1 (one) month prior to commencement of the Type Testing (in accordance with paragraph 4 (Test Descriptions) of Part 8 (Testing) of Schedule 3 (Agreement Management). The Company will make available to the Contractor (at the Contractor's cost) 1 (one) of the Company's test cars to house instrumentation (subject to space limitations), access to a Company testing facility to perform test set up, and such personnel as may be necessary to assist with the application of instrumentation on to the test car and Locomotive. The Company will also provide (at the

Contractor's cost) crews, up to 2 (two) Locomotives, and track time/access.

7.2.6 If;

7.2.6.1 a Locomotive completes and passes all its initial and (as relevant) all repeat Acceptance Tests (including the Fault-Free Running) in accordance with the relevant criteria described in the Test Programme and/or Test Schedule applicable to such Acceptance Test (including any criteria of the RSR); and

7.2.6.2 to the extent the Company has notified the Contractor of the occurrence of a Fleet Defect in accordance with Clause 10.4 (Fleet Defects) or of a Potential Fleet Defect in accordance with Clause 10.5 (Potential Fleet Defects), the Contractor has demonstrated to the satisfaction of the Company that the relevant Fleet Defect or Potential Fleet Defect (as applicable) is not present and will not be present in such Locomotive; and

7.2.6.3 none of the circumstances described in Clause 7.3 (Derogation from requirement to issue an Acceptance Certificate) exist with respect to such Locomotive,

then the Contractor shall be entitled to obtain and the Company shall be obliged to issue an Acceptance Certificate with respect to that Locomotive.

7.2.7 Until the Company has Accepted each of the Locomotives referred to in paragraph 5.6.1.1 of Part 8 (Testing) of Schedule 3 (Agreement Management) in accordance with Clause 7.2.6 above:

7.2.7.1 the Acceptance Tests for the remaining Locomotives shall not commence; and

7.2.7.2 the Company shall be under no obligation to commence such Acceptance Tests (notwithstanding that Handover in respect of such Locomotives may have occurred).

7.2.8 Clause 7.2.7 shall not prevent the Contractor from submitting the remaining Locomotives for Handover in accordance with Clause 7.1 (Locomotive Handover).

7.3 Derogation from requirement to issue an Acceptance Certificate

If any Locomotive completes and passes all its initial or all repeat Acceptance Tests, but, any of the following circumstances exist on the date on which the Engineer would, but for this Clause 7.3, be required to issue an Acceptance Certificate under Clause 7.2.6 in respect of that Locomotive:

7.3.1 any Necessary Consent in respect of that Locomotive to enable its entry into revenue earning service and operation (without any restrictions, qualifications and/or conditions) has not been obtained; and/or

7.3.2 those relevant parts of the Deliverable Materials (together with such further items of Deliverable Materials as may be agreed between the Parties not less than 180 days before the Scheduled Acceptance Date for the first Locomotive) relating to the manufacture, testing and quality assurance of that Locomotive, or relating to the training of personnel in relation to the operation and maintenance of that Locomotive (including all relevant Manuals) have not been received by and to the satisfaction of the Engineer; and/or

7.3.3 that Locomotive does not fully comply with the Specification in all respects,

then the Engineer shall not be obliged to issue an Acceptance Certificate for that Locomotive pursuant to Clause 7.2.6.

7.4 **Rejection Notice**

7.4.1 If the Engineer has not issued an Acceptance Certificate in accordance with Clause 7.2.6, the Engineer shall issue a Rejection Notice in respect of that Locomotive (a **Failed Locomotive**). The Rejection Notice shall state clearly the reasons for rejecting the Locomotive and set out the conditions, qualifications, requirements, open issues and/or Rectification Work that must be satisfied for the issue of an Acceptance Certificate.

7.4.2 In respect of a Failed Locomotive, the Contractor shall promptly:

7.4.2.1 carry out all Rectification Work on such Locomotive necessary to enable such Locomotive to complete and pass the Acceptance Tests; and/or

7.4.2.2 satisfy any other matters, conditions, qualifications, requirements, remedial works and/or open issues,

specified in such Rejection Notice and/or needed for the issue of an Acceptance Certificate in relation to such Locomotive.

7.4.3 In carrying out any repeat Acceptance Tests the Engineer may re-conduct any successful Acceptance Tests if, in the reasonable opinion of the Engineer, any Rectification Work could reasonably impact on any aspect of that Locomotive's compliance with the Specification which has already been tested.

7.4.4 In respect of any Rectification Work referred to in Clause 7.4.2:

7.4.4.1 where such Rectification Work is capable of being carried out on site, the Contractor shall carry out such remedial work and the Acceptance Tests shall continue (if in the reasonable opinion of the Engineer it is safe and practicable to do so);

7.4.4.2 where carrying out the Rectification Work on site is not possible or the failure of an Acceptance Test prevents the continuation of the Acceptance Tests the Company shall make the relevant

Locomotive available to the Contractor at the Company's facilities for rectification and resubmission or where necessary, at the request of the Contractor, return such Locomotive to the Contractor's facility for rectification.

7.4.5 Without prejudice to Clause 9.1 (Delayed Delivery) time afforded to the Contractor to perform Rectification Work and to carry out repeat Acceptance Tests shall not be counted against the time limits set forth in paragraph 5.7 of Part 8 (Testing), Schedule 3 (Agreement Management) for the Company to complete the Acceptance Tests and those time limits will be extended for a corresponding period.

7.5 **Failed Locomotive**

If following the Rectification Works referred to in Clause 7.4 (Rejection Notice) and any repeat Acceptance Tests, the Contractor fails to obtain an Acceptance Certificate in accordance with Clause 7.2.6, then the Company may:

7.5.1 in its sole discretion, give the Contractor a further opportunity to repair or modify the Failed Locomotive and to thereafter re-submit such Failed Locomotive for Acceptance without prejudice to Clause 9 (Delayed and Early Delivery);

7.5.2 notwithstanding the failure of the Locomotive to reach Acceptance, Accept the Failed Locomotive based on an agreed reduction in the Contract Price for that Locomotive without prejudice to Clause 9 (Delayed and Early Delivery); or

7.5.3 reject the Failed Locomotive and either:

7.5.3.1 require the Contractor to replace the Failed Locomotive with a new locomotive on the same terms and conditions (in which case, such new locomotive shall, for all purposes, be a Locomotive and Clause 9 (Delayed and Early Delivery) shall apply to such Locomotive until its Acceptance); or

7.5.3.2 against delivery of the Failed Locomotive to the Contractor at the Delivery Point, implement Clause 21.4.4 (Breach and Termination) in respect of that Failed Locomotive (and in such circumstances that Locomotive shall cease to incur Delay Penalties from such date and the Company shall be entitled to call for repayment of the relevant Milestone Payments and such other amounts contemplated in Clause 21.4.4 under the Advance Payment Bond).

7.6 **Non Permitted Use**

Until the Company has issued an Acceptance Certificate for a particular Locomotive, the Company shall not use or permit that Locomotive to be used for purposes other than for Acceptance Tests. For purposes of this Agreement, any of the following acts with respect to any Locomotive occurring prior to the issue of the Acceptance Certificate for the relevant Locomotive

shall constitute non-permitted use (**Non-Permitted Use**) and, as a consequence of which, such Locomotive shall be deemed to be Accepted.

7.6.1 the use of a Locomotive for any purpose other than for purposes of conducting the Acceptance Tests in accordance with the Test Programme;

7.6.2 the commencement of commercial operations of any nature whatsoever, excluding operations forming part of Commissioning or Acceptance Tests, as contemplated in the Test Programme when a Locomotive is required to be linked to revenue-earning trains;

7.6.3 unauthorised repair or alteration of any part of the Locomotive by the Company; and

7.6.4 movement of the Locomotive on run lines and/or to places not anticipated in the Test Programme.

7.7 **Handover and Acceptance of Excess Locomotives**

7.7.1 Without prejudice to the obligations of the Contractor to Handover a Locomotive by its Scheduled Handover Date, the Contractor may, in addition to the Locomotives scheduled for Handover in a particular month in accordance with Schedule 2 (Scheduled Handover and Scheduled Acceptance Dates), Handover additional Locomotives (an **Excess Handover**), either as a result of an early Handover of Locomotives or as a result of the Handover of Delayed Locomotives, in accordance with the procedures set out in this Clause 7.7.

7.7.2 The Contractor may not submit for Handover in any one calendar month more than 6 (six) Locomotives that are the subject of Excess Handover and otherwise in accordance with this Clause.

7.7.3 The Contractor shall provide at least 10 (ten) Business Days' written notice, or such lesser notice as the Parties may agree (an **Excess Handover Notice**) of any proposed Excess Handover.

7.7.4 An Excess Handover Notice must specify the dates on which the Contractor expects to make an Excess Handover.

7.7.5 The Contractor and the Company shall meet within 5 (five) Business Days of receipt of an Excess Handover Notice to agree on the start date of Acceptance Testing for the Locomotives that are subject to Excess Handover and, where the number of Locomotives that are subject to Excess Handover exceeds four, the period within which Acceptance Testing in respect of the Locomotives exceeding that number must be completed. For the purposes of this Clause 7.7, the start dates of and periods for Acceptance Testing shall be determined subject to the following:

7.7.5.1 if the number of Locomotives that are subject to Excess Handover is less than or equal to 2 (two), then the Company shall complete

Acceptance Testing of each such Locomotive within the original 21 Business Day Acceptance Period for that Locomotive;

7.7.5.2 if the number of Locomotives that are subject to Excess Handover is greater than 2 (two) but not more than 4 (four), then:

7.7.5.2.1 the Company shall complete the Acceptance Tests for the first 2 (two) of those Locomotives within the original 21 Business Day Acceptance Period plus, 5 (five) Business Days from their Handover; and

7.7.5.2.2 the Company shall complete the Acceptance Tests for the next 2 (two) of those Locomotives within the original 21 Business Day Acceptance Period plus 10 (ten) Business Days from their Handover;

7.7.5.3 if the number of Locomotives that are subject to Excess Handover is greater than 4 (four), then the Company shall complete the Acceptance Tests for those Locomotives which are in excess of 4 (four) as soon as reasonably practicable and otherwise as the Parties may agree in writing.

7.7.6 Provided a Locomotive, subject to Excess Handover, is not rejected by the Company under Clause 7.4 (Rejection Notice), the Acceptance of any such Locomotive shall take place on the earlier of:

7.7.6.1 that Locomotive meeting all Acceptance Test Criteria; and

7.7.6.2 that Locomotive being used for any Non-Permitted Use (as defined in Clause 7.6 above).

7.7.7 The procedure for the Acceptance of any Locomotive that is the subject of an Early Handover will be identical to the Acceptance procedure for all other Locomotives. Notwithstanding the Excess Handover of a Locomotive, the Milestone Payments that the Company must make with respect to that Locomotive shall be due on, and not before, the dates set forth for such payments in Schedule 1 (Pricing and Payment Terms).

7.8 Other Tests

7.8.1 During the manufacturing of the Locomotives the Contractor may conduct various tests in respect of the Components other than the Works Tests, Commissioning Tests and Acceptance Test (Other Tests).

7.8.2 Any certificate or tests results issued by the Contractor in relation to tests conducted by the Contractor will be filed in the relevant Data Book for each Locomotive. The Engineer may at his discretion elect to witness any or all of the Other Tests at the Company's expense.

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7.9 Affected Locomotives

7.9.1 If, during the Works Tests, Commissioning Tests or Acceptance Tests, or at any time during the Fleet Defect Protection Period, a failure or fault or defect in respect of a Component of any Locomotive (**Relevant Component**) is identified, which:

7.9.1.1 renders that Locomotive unsafe or otherwise causes that Locomotive to deviate materially from the Specification; and

7.9.1.2 affects certain Locomotives or (based on experience with other Locomotives) may potentially affect Locomotives including those that are being tested for Acceptance and those that have been Accepted,

any such Locomotive will be an Affected Locomotive for the purpose of this Agreement (an **Affected Locomotive**) and the provisions of this Clause 7.9 will apply.

7.9.2 The Company will:

7.9.2.1 remove an Affected Locomotive that has already been Accepted from service and make the Affected Locomotive available to the Contractor (at the Company's expense) for rectification by the Contractor of the failure or fault or defect; or

7.9.2.2 where the identified failure or fault or defect is capable of rectification by making field repairs and does not render the Affected Locomotive unsafe, make the Affected Locomotive available to the Contractor (at the Company's expense), without having to take the Affected Locomotive out of service.

7.9.3 The Contractor shall:

7.9.3.1 in a manner considered appropriate by the Contractor, attend to the rectification of all Affected Locomotives that have not been Accepted, to enable them to meet the requirements for the Commissioning Certificate or the Acceptance Certificate, as the case may be, and resubmit them for appropriate tests pursuant to the applicable provisions of this Agreement;

7.9.3.2 in the case of an Affected Locomotive that has been already Accepted, carry out its obligations under Clause 10 (Defects and Fleet Defects); and

7.9.3.3 if any Affected Locomotive is capable of being remedied by changing the computer software used in respect of the control systems of that Locomotive, the Contractor shall, provided no other Rectification Work is capable of solely rectifying such failure, fault or defect, use all reasonable efforts to effect such changes promptly. All changes to computer software which the Contractor is required to make under this Clause, shall be provided to the

Company free of charge during the Fleet Defect Protection Period and, thereafter, at a price agreed between the Parties from time to time.

7.9.4 With respect to any Affected Locomotive that has not been Accepted, should:

7.9.4.1 the Relevant Component or Affected Locomotive, upon its re-submission for Commissioning or Acceptance, still have the failure or fault or defect referred to in Clause 7.9.1.1 and 7.9.1.2 above; or

7.9.4.2 the Contractor fail to resubmit the Affected Locomotives by the time stipulated in the Contractor's Rectification plan.

then the Company shall resubmit the Relevant Component or Affected Locomotive for additional remedial activities until the Relevant Component or Affected Locomotive achieves the goals described in Clause 7.9.3 above or, in the case of an Affected Locomotive which becomes a Failed Locomotive, such Locomotive shall be treated in accordance with the provisions of Clause 7.5 (Failed Locomotive).

8. Risk, Title Transfer and Payments

8.1 Risk of Loss, theft or Damage

8.1.1 All risk of loss, theft or damage to each Locomotive (and any Components forming part thereof) shall pass to the Company on Handover.

8.1.2 Notwithstanding Clause 8.1.1, the Contractor will be responsible for all risk of loss, theft or damage to any Locomotive (including any Component thereof) during the period that Locomotive is in the possession of the Contractor for the purposes of carrying out any remedial work pursuant to the Contractor's obligations in terms of this Agreement, whether prior to or after Acceptance.

8.1.3 All risk in and to the Spares, Tools and Test Equipment will pass to the Company on the Delivery thereof.

8.2 Title Transfer

8.2.1 The Contractor shall transfer title to each Locomotive to the Company, free from any Security, by physical delivery at the Delivery Point upon payment of the Acceptance Instalment for such Locomotive, and provided that all other amounts which shall have then become due and payable by the Company to the Contractor under this Agreement and which are not the subject of a continuing Dispute in accordance with Clause 26 (Dispute Resolution), have been paid in full.

8.2.2 The Parties agree that, if the Company obtains third-party funding to finance its financial obligations under this Agreement and the Lender

requires, as Security for such funding, that ownership of a Locomotive be passed to it against payment to the Contractor of the Contract Price for that Locomotive, the Contractor will, provided the Company has notified the Contractor that it has ceded its rights to receive ownership to the Lender, transfer title in that Locomotive to the Lender in accordance with Clause 8.2.1.

8.3 **Payments to the Contractor**

8.3.1 **Requirements of Schedule 1**

8.3.1.1 In consideration of the performance by the Contractor of its obligations under this Agreement, the Company hereby agrees to pay to the Contractor the Total Contract Price.

8.3.1.2 The Company shall make the Milestone Payments to the Contractor in accordance with Schedule 1 (Pricing and Payment Terms), and this Clause 8.3.

8.3.2 **Variation of Contract Price**

8.3.2.1 The Contract Price for each Locomotive Spare, Tools and/or Test Equipment may only be varied and such variation shall be determined in accordance with the Variation Process and not otherwise.

8.3.2.2 The Contractor shall be deemed to have satisfied itself, before the date of this Agreement, with regard to the Specification, the extent and nature of its obligations under this Agreement, and the correctness and sufficiency of the rates and prices used by the Contractor in arriving at the agreement on the Total Contract Price and, in general, to have obtained all required information as to the risks, contingencies and other circumstances, which may influence or affect the Total Contract Price. No claim and/or adjustment to the Total Contract Price by the Contractor will be considered in respect of insufficient and/or incomplete information (including rates and prices) and/or assumptions made on account of the Specification or the Works, materials or services to be performed or supplied being different from those assumed by it in compiling the Total Contract Price, subject to Part 7 (Variations) of Schedule 3 (Agreement Management) or Clause 12.2 (Change in Law).

8.3.3 **Tax Invoice**

8.3.3.1 The Company shall not be obliged to make any payment until the Company has received a duly completed original, valid and undisputed Tax Invoice from the Contractor in respect of the same in accordance with paragraph 3.3 of Schedule 1 (Pricing and Payment Terms).

8.3.3.2 The Tax Invoices submitted by the Contractor shall be accompanied by a statement containing the following information in the sequence listed below (Statement):

8.3.3.2.1 the relevant Milestone Payment as set out in paragraph 1.2 of Schedule 1 (Pricing and Payment Terms) on achieving the Milestone relating to the payment claimed as part of the Statement;

8.3.3.2.2 any other additions or deductions which may have become due under this Agreement (including, without limitation, any such deductions of amounts retained in respect of Delay Penalties under Clause 9 (Delayed and Early Delivery));

8.3.3.2.3 deductions of amounts included in previous Statements which are subsequently established to have been incorrectly included in the previous Statements.

8.3.3.3 The Contractor shall only be entitled to payment of a Tax Invoice for an amount equal to the amount shown in the accompanying Statement.

8.3.4 **Payments Inclusive**

Save as expressly provided otherwise in this Agreement, the Milestone Payments payable by the Company are inclusive of:

8.3.4.1 all fees payable by the Contractor in connection with this Agreement (including all legal and other professional advisers' fees);

8.3.4.2 where applicable, all rail, freight and other similar charges to the Delivery Point, including:

8.3.4.2.1 ocean freight and related demurrage and penalties, if incurred;

8.3.4.2.2 marine risk insurance;

8.3.4.2.3 handling charges;

8.3.4.2.4 dock dues;

8.3.4.2.5 documentation and agency charges;

8.3.4.2.6 railage, or otherwise road transportation from port of discharge; and

8.3.4.2.7 all duties and other charges on importation of the Locomotives, including all customs and *ad valorem* duties (subject to Clause 8.12 (Duties on Importation)),

which, where those charges are based on estimates of weights and dimensions, are based on those estimates as calculated by the Contractor and, in the event of such estimates being exceeded by the actual weights or dimensions other than by reason of a Variation Order in respect of a Company Proposed Variation, the Company shall not be liable to pay to the Contractor the associated increased costs over and above the Total Contract Price; and

8.3.4.3 all other costs and charges of whatever nature in relation to the provision of the Locomotives in accordance with this Agreement.

8.4 **Currency and Mode of Payments**

8.4.1 All payments under this Agreement shall be in South African Rand.

8.4.2 The currency of the account into which payments are made shall be in South African Rand.

8.4.3 All payments under this Agreement shall be made by same day electronic transfer (or such other form of electronic transfer as may be agreed between the Parties) to such account in South Africa of the payee Party notified by it to the paying Party from time to time.

8.5 **Overpayments and Deductions**

No payment made by either Party to the other under this Agreement shall prevent the paying Party from recovering any amount overpaid or wrongfully paid by the paying Party under this Agreement and/or related agreements (however that payment may have arisen) including, but not limited to, those paid by mistake of law or of fact.

8.6 **VAT**

8.6.1 All payments (including payments on account of the Total Contract Price) under this Agreement are exclusive of VAT. Where any payment by the Contractor to the Company or by the Company to the Contractor pursuant to this Agreement constitutes consideration for a taxable supply made by the Company or the Contractor (as the case may be) for the purposes of VAT or there is otherwise made under the terms of this Agreement a taxable supply for such purposes, then that payment shall be increased by, or (as the case may be) there shall be payable at the time of payment for such supply by the Party to which such supply is made, the amount of VAT properly chargeable on such supply, subject to prior receipt by the relevant Party of a Tax Invoice in respect of such VAT.

8.6.2 Where, however, a Tax Invoice in respect of such VAT is received by the relevant Party at a subsequent date, the amount of such VAT shall thereupon be due and payable by such Party; provided that where any payment is abated under the provisions of this Agreement any VAT payable by the Company pursuant to this Agreement shall be no greater

than the VAT properly chargeable on the net amount of the payment as so abated (but so that the above provisions of this Clause 8.6 shall not apply where, and to the extent that, such abatement does not reduce the value of the relevant supply made by the Contractor for VAT purposes for which the payment is consideration).

8.6.3 Under this Agreement, where any amount representing a previous payment or part of it (whether or not identifiable) is rebated to the Company, then, where and to the extent that such rebate is treated as reducing the value of any supply by the Contractor for VAT purposes for which the relevant payment is consideration (or is treated as consideration for any supply by the Company for VAT purposes) an amount in respect of VAT at the appropriate rate on such rebate shall also be repaid to the Company, to the extent that the Contractor is entitled to issue a credit note for VAT purposes in respect of the same.

8.7 Default Interest

8.7.1 Each Party (the defaulting party) shall pay interest at Prime Default Rate) to the other Party (before as well as after judgment) on any amount due by the defaulting party under this Agreement which is not paid by the defaulting party on the due date, for the period commencing on the first day after the due date and ending on (and including) the date of actual payment.

8.7.2 Interest shall be compounded monthly and calculated on the basis of the actual number of days elapsed and a 365 day year.

8.7.3 Where interest is payable at the Default Rate (under this Clause 8.7), it shall be paid in the currency in which the relevant late payment was due to be made.

8.8 Gross-up

If any deduction or withholding is required by any Legal Requirement in relation to any payment hereunder, but excluding the Milestone Payments, the paying Party shall increase the payment made to the payee Party so that the net amount received and retained by the payee Party after that deduction or withholding (and after taking account of any further deduction or withholding which is required and which arises as a consequence of the increase) shall be equal to the full amount which the payee Party would have received and retained if no such deduction or withholding had applied, provided that:

8.8.1 if a Party receives, realises, utilises and retains a Tax benefit by reason of any deduction or withholding in respect of which the other Party has been obliged by this Clause 8.8 to pay an additional amount or compensating sum, the relevant party shall pay to the other Party (to the extent that the relevant party can do so without prejudicing the amount of that benefit or the right of the relevant Party to obtain any other benefit, relief or allowance which may be available to it) such amount, if any, as shall leave the relevant party in no better and no worse position

than the relevant Party would have been in had the deduction or withholding not been required; and

8.8.2 neither Party shall be obliged to make any increase in any payment pursuant to this Clause 8.8:

8.8.2.1 to the extent that the obligation of the paying Party to deduct or withhold Tax would not have arisen but for the unreasonable failure of the payee Party to comply on a timely basis with a reasonable request by the paying Party to file or provide the paying Party with any claim forms or to give any notice or certificate or take any other similar action (in any such case) specifically identified by the paying Party which would have enabled the relevant payment to have been made without such withholding or deduction, being, in any such case, an action which would not result in any increased liability to Taxation or the loss of any relief from Taxation or to any other material cost to the paying Party or any member of its group;

8.8.2.2 to the extent that the obligation of the paying Party to deduct or withhold Tax would not have arisen but for any failure by the payee Party to comply with its obligations under, or breach by the payee Party of any representation or warranty given by it under, this Agreement;

8.8.2.3 to the extent that the obligation of the paying Party to deduct or withhold Tax would not have arisen but for any transfer by the payee Party of any of its rights or interests under this Agreement; or

8.8.2.4 in respect of any Tax deducted or withheld from interest payable pursuant to Clause 8.7 (Default Interest).

8.9 **Set-off**

8.9.1 Except as provided in this Clause 8.9, Clause 12.11 (Failure to Carry Out Work), Clause 12.12 (Urgent Remedial Work) and Clause 17.7.2 (Payment of Penalties), each Party is entitled to set-off or counterclaim as against payments due to the other Party only if the other Party has breached any of its material obligations under this Agreement (including, in the case of the Company, if a Contractor Default has occurred or in the case of the Contractor, if a Company Default has occurred).

8.9.2 For the purposes of this Clause 8.9, a Party may only apply set-off in respect of a liquidated claim which has become due from the other Party under this Agreement against a liquidated claim or obligation which is owed by that Party

8.9.3 The Contractor may set-off any undisputed, liquidated claim owed to it by TE under the TE Key Sub-Contract against any claim the Company may have against the Contractor under and in accordance with this Agreement (each a **Company Claim**), provided:

8.9.3.1 the Parties agree to such set-off at the time;

8.9.3.2 such Company Claim is caused by a breach by TE of its obligations under the TE Key Sub-Contract;

8.9.3.3 a Contractor Default (other than the Contractor Default relating to the Company Claim which is the subject of this Clause 8.9.3) has not occurred and is continuing at the time of such set-off; and

8.9.3.4 any balance due in respect of the Company Claim after applying such set-off shall be paid by the Contractor to the Company in accordance the terms of this Agreement applying to such Company Claim.

8.9.4 Save as otherwise set out in Clause 8.9.3, the Contractor may not set-off any payment amount or liability due to the Company against any claim the Contractor has against, or amount or liability due to the Contractor by TE.

8.9.5 The Company may set-off any undisputed, liquidated claim owed to TE by the Contractor under the TE Key Sub-Contract against any claim owed by the Company to the Contractor under and in accordance with this Agreement (each a **Contractor Claim**), provided:

8.9.5.1 the Parties agree to such set-off at the time;

8.9.5.2 a Company Default (other than the Company Default relating to the Contractor Claim which is the subject of this Clause 8.9.5) has not occurred and is continuing at the time of such set-off; and

8.9.5.3 any balance due in respect of the Contractor Claim after applying such set-off shall be paid by the Company to the Contractor in accordance the terms of this Agreement applying to such Company Claim.

8.9.6 Save as otherwise set out in Clause 8.9.5, the Company may not set-off any payment amount or liability due to TE under the TE Key Sub-Contract against any claim the Contractor has against, or amount or liability due to the Contractor by the Company under this Agreement.

8.10 Time for Payments

8.10.1 Where any provision of this Agreement requires an amount to be paid by a Party such amount shall (unless expressly stated otherwise) be paid by such Party within 10 Business Days after receipt by it of a Tax Invoice, unless such Party Disputes the amount demanded in which case such Dispute shall be treated *mutatis mutandis* in accordance with Clause 26 (Dispute Resolution).

8.10.2 If the due date for any payment would otherwise be a day which is not a Business Day, the due date shall be the Business Day immediately following the original due date.

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8.11 **Hedging of Foreign Currency Exposures**

8.11.1 The Contractor shall, in its discretion, determine whether it wishes to enter into any interest rate or foreign currency hedging arrangements in relation to the performance of its and/or the Guarantor's obligations under the Project Documents or the transactions contemplated thereby (**Hedging Contracts**).

8.11.2 In relation to any such Hedging Contract, the Contractor confirms that:

8.11.2.1 it has the sole responsibility for the implementation and management of each such Hedging Contract;

8.11.2.2 the Company has no liability, financial or otherwise, to the Contractor or any other person under or in connection with the Hedging Contracts;

8.11.2.3 it has made its own independent appraisal of all risks arising under or in connection with the Hedging Contracts (including the financial condition and affairs of the relevant hedge counterparty); and

8.11.2.4 it has not relied on any information provided to it by the Company in connection with the relevant hedge counterparty or the Hedging Contracts.

8.12 **Duties on Importation**

8.12.1 The Contractor shall disclose to the Company in writing:

8.12.1.1 those amounts included in the Contract Price for each Locomotive which represent the amount provided by the Contractor for customs duties and *ad valorem* duties on Components imported to South Africa;

8.12.1.2 those amounts of customs duties and *ad valorem* duties which, after having used all reasonable endeavours to reduce those charges, as permissible under the Customs Act and related legislation, the Contractor actually incurs on the importation of Components to South Africa.

8.12.2 For the purpose of allowing the Company to verify customs duties and *ad valorem* duties incurred by the Contractor, the Contractor shall provide to the Company copies of all relevant supporting documentation reasonably required to do so, including:

8.12.2.1 a certificate from tax advisors appointed by the Company (supplied or provided in 6 monthly intervals) confirming that the tariff headings and associated customs duties are correct;

8.12.2.2 a schedule of supplier invoices (custom duty costs);

8.12.2.3 proof of payment of customs duties and/or *ad valorem* duties as provided by the Contractor's clearing agent to the South African Revenue Service; and

8.12.2.4 customs clearance documentation for each consignment of Components imported to South Africa, containing a bill of entry and customs release notification, transportation documentation (an airway bill or bill of lading), a commercial invoice, a packing list, clearing instructions and customs worksheets.

8.12.3 The Contractor shall use all reasonable endeavours and cooperate with the Company and any applicable Relevant Authority to lawfully minimise customs duties and *ad valorem* duties included in the Contract Price for each Locomotive, including but without limiting the generality of the foregoing, by taking the following steps:

8.12.3.1 before any Components are imported to South Africa, the Contractor must prepare and deliver to the Company a schedule which identifies all Components (which shall include the full description of such Components and their appropriate tariff headings) that may be subject to customs duties, so as to enable the Company to verify such tariff headings and the Contractor's potential customs duty liability in respect of those imported Components. This calculation will identify imported Components which can be cleared under an applicable industrial rebate facility available under the Customs Act and imported Components which will be subject to customs duties;

8.12.3.2 the Contractor shall ensure, prior to the first importation of Components to South Africa, that it complies with all applicable registration and licensing requirements under the Customs Act and related legislation in order to benefit to the fullest extent possible from the applicable industrial rebate facility, rebate items and/or alternative customs duty rebate or savings mechanisms available;

8.12.3.3 in complying with Clause 8.12.3.2 (but without limiting its generality), the Contractor shall use Rebate Item 317.12 (as defined in the Customs Act) which is the full rebate of customs duties of goods imported under tariff heading 84.81 and 85.00 of schedule 1 of the Customs Act used in the manufacture of railway and tramway locomotives, rolling stock and parts thereof. The Contractor will utilise the facility store licensed by the South African Revenue Service (the **Rebate Store**);

8.12.3.4 the Contractor shall comply with all information disclosure, filing and record-keeping requirements under the Customs Act and related legislation in order to benefit to the fullest extent possible from the applicable industrial rebate facility, rebate items and/or alternative customs duty rebate or savings mechanisms available, in particular, but without limiting the generality of this Clause 8.12.3.4, the Contractor shall:

8.12.3.4.1 at its cost, register, license and set up the Rebate Store with the South African Revenue Service Controller of Customs and Excise (**the Controller**);

8.12.3.4.2 record the receipts and disposals of goods in the rebate register;

8.12.3.4.3 ensure that the rebate register is up to date;

8.12.3.4.4 advise the Controller of any changes relating to the Rebate Store;

8.12.3.4.5 retain and maintain physical documentation relating to the goods entered under rebate of customs duty; and

8.12.3.4.6 comply, in all respects, with the Customs Act, the Rules to the Customs Act and Rebate Item 317.12.

8.12.4 If the amount of the Contract Price for each Locomotive which represents the Contractor's provision for these charges (as referred to in Clause 8.12.1.1) exceeds the amounts of customs duties and *ad valorem* duties actually incurred by the Contractor (as referred to in Clause 8.12.1.2), the Contract Price for each Locomotive shall be reduced by an amount equal to 75% (seventy five per cent) of the difference.

8.12.5 The Company shall not be liable to reimburse to the Contractor (by inclusion in the Contract Price for each Locomotive or otherwise) any customs duties or *ad valorem* duties incurred by the Contractor as a result of any negligent act or omission by the Contractor or any failure by the Contractor to comply with this Clause 8.12).

8.13 **Guarantee, Security and Financial Assurance**

The Contractor will provide the Company with the duly executed and effective originals of the following documents, as required under Clause 2.2 (Commencement):

8.13.1 the Parent Guarantee;

8.13.2 the Advance Payment Bond; and

8.13.3 the SD Bond

8.14 **Export Credit Agency Supported Finance**

8.14.1 In order to finance its payment obligations under this Agreement, the Company may raise debt funding (an **ECA Facility**) from one or more Lenders, with the benefit of export credit agency (ECA) credit support.

8.14.2 The Contractor undertakes:

8.14.2.1 to provide (and/or cause the Guarantor to provide, as applicable) to the Company and the Lenders that may participate in the ECA Facility all such assistance as is generally required to provide for the purposes of obtaining ECA support;

8.14.2.2 not to do or (as supplier of the relevant eligible goods or services) omit to do anything, which may adversely affect the Company's prospects of qualifying for or, once obtained, maintaining ECA credit support.

8.14.3 All cost, expenses, charges and liabilities incurred by the Company in establishing an ECA Facility shall be for its own account.

8.14.4 Notwithstanding the provisions of this Clause 8.14, if any Milestone Payment payable under this Agreement becomes due for payment before finance under an ECA Facility is committed and available to be drawn to fund that payment:

8.14.4.1 the Company's obligation to discharge that Milestone Payment on its due date shall not be affected; and

8.14.4.2 the Company may fund any such Milestone Payment from whatever available sources it may select.

8.15 Unlawful claims

If the Company unlawfully or fraudulently makes a demand under a Bond or submits a claim under a Bond before the expiry of any applicable remedy period under this Agreement or any relevant Project Document, the Company shall be liable for and shall pay to the Contractor all proven out of pocket costs and expenses incurred by the Contractor as a direct result of such unlawful, fraudulent or premature claim. This Clause is without prejudice to any other rights or remedies the Contractor may have in law in such circumstances.

9. Delayed and Early Delivery

9.1 Delayed Delivery

9.1.1 If the Acceptance of a Locomotive occurs after its Scheduled Acceptance Date (a **Delay**), the Contractor shall (subject to Clause 9.2 (Delay Penalty Cap), pay a Delay Penalty to the Company in respect of that Delayed Locomotive at the Applicable Rate.

9.1.2 Delay Penalties shall be calculated and accrue at the Applicable Rate of the Contract Price per Delayed Locomotive per month (with proportional adjustments for any partial month), on a day-to-day basis from the applicable Delayed Locomotive Penalty Date until (and inclusive of):

9.1.2.1 the Acceptance Date of that Delayed Locomotive; or if earlier

9.1.2.2 this Agreement being terminated pursuant to Clause 21.1.5 (Contractor Default).

9.2 **Delay Penalty Cap**

In relation to all Locomotives comprised in any Batch, the maximum amount of the Contractor's liability to pay Delay Penalties under this Clause 9 (Delayed and Early Delivery) shall not exceed 10.00 (ten) per cent of the Batch Value (**Delay Penalty Cap**).

9.3 **Early Delivery**

If the Acceptance of a Locomotive occurs prior to its Scheduled Acceptance Date (an **Advanced Delivery**), any Delay Penalty which accrues in respect of another Locomotive which is a Delayed Locomotive shall be reduced by an amount (the **Delay Penalty Credit**) equal to the Applicable Rate, calculated from the first day following the Acceptance Date for such Locomotive until (and inclusive of) the Scheduled Acceptance Date.

9.4 **Rate of Delay Penalties and Delay Penalty Credits**

Delay Penalties or Delay Penalty Credits (as applicable) shall accrue at the following Applicable Rates:

9.4.1 for the first 30 (thirty) days of any Delay or Advance Delivery, a rate of 0.5 (one half) per cent in accordance with Clause 9.1.2;

9.4.2 for any period of Delay or Advance Delivery greater than 30 days but less than or equal to 60 days, a rate of 1 (one) per cent in accordance with Clause 9.1.2;

9.4.3 for any period of Delay or Advance Delivery greater than 60 days but less than or equal to 90 days, a rate of 1.5 (one and a half) per cent in accordance with Clause 9.1.2; and

9.4.4 for any period of Delay or Advance Delivery greater than 90 days, a rate of 2 (two) per cent in accordance with Clause 9.1.2.

9.5 **Delay Penalty Offset**

9.5.1 Delay Penalties which accrue during a Delay Penalty Period shall be reduced by Delay Penalty Credits which arise during that period The amount by which:

9.5.1.1 the total amount of Delay Penalties which accrue during a Delay Penalty Period exceeds the total amount of Delay Penalty Credits which arise during that period, shall constitute a debt due by the Contractor to the Company and shall be payable in accordance with Clause 9.7 below; and

9.5.1.2 the total amount of Delay Penalty Credits which arise during a Delay Penalty Period exceeds the total amount of Delay Penalties which accrue during that period (and, if no Delay Penalties accrue during a Delay Penalty Period, the amount of all Delay Penalty Credits which would have arisen but for that fact), shall be carried

forward to the next or any subsequent Delay Penalty Period and reduce any Delay Penalties which may accrue during that period

9.5.2 The Company shall not be liable to make any payment to the Contractor in respect of any Delay Penalty Credits which may arise during the term of this Agreement.

9.6 **Delay Penalty Certificate**

9.6.1 If any Delay Penalty or Delay Penalty Credit arises during a Delay Penalty Period, the Engineer shall issue a Delay Penalty Certificate on the last day of that Delay Penalty Period, indicating (a) the Delay Penalties which have accrued during that period; (b) the Delay Penalty Credits which have arisen during that period; (c) the net amount, if any, of Delay Penalties payable by the Contractor for that Delay Penalty Period; and (d) the net amount, if any, of Delay Penalty Credits that are to be carried forward to the next Delay Penalty Period.

9.6.2 A Delay Penalty Certificate shall be *prima facie* proof of the matters to which it relates.

9.7 **Payment of Delay Penalties**

9.7.1 The Contractor shall pay the Delay Penalties indicated in the Delay Penalty Certificate within 10 (ten) Business Days of the Company issuing a Tax Invoice to the Contractor for the amount set out in that certificate. If, following a Delay Penalty Period, the Company does not issue a Tax Invoice to the Contractor for Delay Penalties accrued during that period, those Delay Penalties (if any) or Delay Penalty Credits (if any) shall be carried forward to and applied in the next or any subsequent Delay Penalty Period.

9.7.2 The Delay Penalties set forth in this Clause 9 are stated exclusive of VAT. Any VAT payable on Delay Penalties will be for the account of the Contractor. If any Delay Penalties become payable to the Company, it must issue a Tax Invoice to the Contractor in respect of those Delay Penalties plus VAT at the applicable rate.

9.8 **Exclusive Remedy**

Without prejudice to the Company's right and remedies under this Agreement or at law (including its right to terminate this Agreement under Clause 21.1.5 (Breach and Termination)), if the Acceptance of a Locomotive occurs on a date later than its Scheduled Acceptance Date, then, the Contractor's only obligation and the Company's only remedy in respect of any claims arising as a result of that delay shall be Delay Penalties.

9.9 **Potential Grounds for Extension**

9.9.1 If the Master Programme is, or is reasonably likely to be, delayed by any of the following (each a **Delay Event**):

9.9.1.1 a disturbance to the progress of the Works for which the Company is directly responsible or which is directly attributable to a breach by the Company of its obligations under this Agreement and which (in either case) has an adverse effect on the Contractor's ability to perform its obligations; or

9.9.1.2 a Specific Change in Law which adversely affects the timely performance of the Contractor's obligations under this Agreement or the other Project Documents to which it is a party, other than any Specific Change in Law which would not have had to be complied with if the Master Programme had not been delayed as a result of the Contractor failing to perform any of its obligations under this Agreement; or

9.9.1.3 the occurrence of a Force Majeure Event preventing performance of the Contractor's obligations under the Project Documents; or

9.9.1.4 a Delay in Acceptance of any Locomotive caused by the operation of Clause 7.2.7 (Acceptance), other than to the extent attributable to the Company having issued a Rejection Notice in respect of a Locomotive in accordance with Clause 7.4 (Rejection Notice) or to the occurrence of any event contemplated in Clause 7.3 (Derogation from requirement to issue an Acceptance Certificate) in respect of a Locomotive,

then the Engineer shall determine in accordance with Clause 9.16 (Grant and Notice of Extension) whether the Contractor is entitled to an extension of any Scheduled Handover Date or any Scheduled Acceptance Date (as applicable).

9.9.2 If any event arising under Clause 9.9.1.1 causes the costs to the Contractor of completing its obligations to be increased, such increase shall be treated as a Contractor Proposed Variation (as defined in Part 7 (Variations) of Schedule 3 (Agreement Management)) and the amount of such increase (if any) shall be determined in accordance with the Variation Process.

9.10 **Notice of Delay Events**

The Contractor shall give written notice (except in cases of emergency where oral notice shall suffice, provided that such notice shall be confirmed in writing as soon as practicable thereafter) to the Engineer (substantially in the form of Pro Forma 7 of Schedule 8 (Pro Formas)):

9.10.1 of the occurrence and details in respect of the Delay Event;

9.10.2 as soon as the Contractor can reasonably foresee such a Delay Event occurring.

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9.11 Recording of Claims

On receipt of any notice under Clause 9.10 (Notice of Delay Events), the Engineer shall allocate a unique number to the claim (which he shall notify to the Contractor) and he shall also maintain a sequentially numbered register of all claims made, and extensions of time granted, under this Clause 9.11. All subsequent correspondence between the Parties in relation to any claim made, or extension of time granted, under this Clause 9.11 shall bear the relevant allocated number.

9.12 Timing of Claims

Any notice given under Clause 9.10, shall not be given later than 5 (five) Business Days after the Contractor becomes aware of the occurrence of such Delay Event.

9.13 Mitigation of Delay

Any right of the Contractor to pursue a claim for an extension of time in respect of the effects of a Delay Event shall be conditional on the Contractor using and continuing to use all reasonable endeavours to avoid or reduce the effects or likely effects of a Delay Event.

9.14 Particulars of Claims

9.14.1 As soon as practicable, but, in any event (subject to Clause 9.14.2), within 30 Business Days after the date by which notice is required to be given under Clause 9.12 (Timing of Claims), the Contractor shall submit further written notice to the Engineer (substantially in the form of Pro Forma 8 of Schedule 8 (Pro Formas).

9.14.2 If the Delay Event ends during such 30 Business Day period, the Contractor shall submit such particulars of claim within 10 Business Days after the date on which the Delay Event ends.

9.15 Exclusion for Contractor Breach or Pre-Signing Events

9.15.1 The Contractor shall not be entitled to an extension of time if and to the extent that the Delay Event is directly attributable to any breach by the Contractor of its obligations under the Project Documents or any related agreements or any act or omission of any supplier to or Sub-Contractor in connection with the Project Documents or any related agreement.

9.15.2 The Contractor acknowledges that the reference to a Delay Event is a reference to such event or circumstance occurring after the Effective Date.

9.16 Grant and Notice of Extension

If the Engineer considers that the Contractor is fairly entitled to an extension of time to any Scheduled Handover Date or Scheduled Acceptance Date then,

within 10 Business Days, or such further time as may be reasonable in the circumstances, after:

9.16.1 receipt of a notice under Clause 9.10 (Notice of Delay Events); or

9.16.2 where an event has a continuing effect or where the Engineer anticipates a significant delay before the actual effect of a Delay Event becomes ascertainable and the Engineer considers that an interim extension of time should be granted, receipt of such particulars as, in the Engineer's opinion, are sufficient for him to determine whether the Contractor is fairly entitled to such an extension of time,

the Engineer shall determine, grant and notify to the Contractor that extension by written notice and any such extension shall amend the Master Programme and the relevant Scheduled Handover Date and/or the Scheduled Acceptance Date (as applicable).

9.17 **Notice of Rejection of Claim**

If the Engineer decides that the Contractor is not entitled to an extension of time, the Engineer shall notify the Contractor accordingly as soon as reasonably practicable in writing and if the Contractor disputes such decision, the parties shall deal with such Dispute in accordance with Clause 26 (Dispute Resolution).

9.18 **Exclusion of Consequential Effect**

Any extension of time given by the Engineer under this Clause 9 to a Scheduled Handover Date or a Scheduled Acceptance Date shall not of itself entitle the Contractor to an extension to any other Scheduled Handover Date or Scheduled Handover Date or any other period. The Contractor must make a claim under this Clause 9 for an extension of time to each Scheduled Handover Date or Scheduled Acceptance Date (as applicable) to which it considers it is, or may become, entitled under this Clause 9. Nothing in this Clause 9 shall prevent the Engineer, once he has given an extension under this Clause 9.16 (Grant and Notice of Extension) to a Scheduled Handover Date or Scheduled Acceptance Date, from including within that extension (in his absolute discretion) an extension to any other Scheduled Handover Date or Scheduled Acceptance Date, in which case any notice given under Clause 9.16 (Grant and Notice of Extension) will reflect this.

9.19 **Full Satisfaction**

Any extension of time granted by the Engineer to the Contractor and any compensation paid by the Company to the Contractor pursuant to Clause 9.9.2, shall be in full compensation and satisfaction for any loss sustained or sustainable by the Contractor in respect of any matter or thing in connection with which that extension is granted.

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9.20 Engineer's Additional Discretion

The Engineer may grant an extension of time at any time, whether prospective or retrospective, whether interim or in full, and whether or not the Contractor has made any claim for an extension of time and the Engineer shall not be bound by or limited to the grounds (if any) set out in the Contractor's claim.

9.21 Scope

The Contractor may not make a claim for an extension of time under this Clause 9 in circumstances where the occurrence of a Delay Event has resulted in the Contractor or the Engineer issuing a Notice of Variation under Part 7 (Variations), of Schedule 3 (Agreement Management). In those circumstances, any claim for an extension of time shall be made, and any extension of time shall be granted, in accordance with the procedure set out in that paragraph.

9.22 Potential Grounds for Company Extension

9.22.1 The Company may, from time to time, by written notice to the Contractor, vary the Master Programme by extending the Scheduled Handover Date and Scheduled Acceptance Date for any Locomotive (each a **Deferred Locomotive**) or the Delivery of any Spare, Tool or item of Test Equipment in accordance with this Clause 9.22 (each extension, a **Deferral**).

9.22.2 If the Company is considering a Deferral, at least two months prior to the Exercise Date the Company may issue a notice to the Contractor informing the Contractor that it is considering invoking this Clause 9.22 (a **Provisional Deferral Notice**), such notice stating the potential number of Deferred Locomotives, the Storage Period (as defined below) being considered and requesting the Contractor to provide a written quotation for the indicative Storage Costs and any proposals in relation to the location and site of the Storage Facility. The Company shall assist and co-operate with the Contractor in identifying suitable Storage Facility options.

9.22.3 The Contractor shall provide such quotation (accompanied by reasonably detailed supporting evidence) to the Company as soon as practicable but in any event not later than one month prior to the relevant Exercise Date. The quotation shall include, to the extent applicable, the indicative financing costs referred to in paragraph (vi) below of the definition of "Storage Costs", quoted by the relevant lenders.

9.22.4 Having regard to such quotation, if the Company elects to implement a Deferral under and in accordance with this Clause 9.22, the Company shall notify the Contractor in writing of such Deferral (a **Deferral Notice**) on or before the Exercise Date applicable to the relevant Delivery Year.

9.22.5 Where a Deferral Notice is issued by the Company the following provisions shall apply:

9.22.5.1 the Deferral Notice may be issued in respect of all or any of the Locomotives scheduled for Handover and Acceptance in that Delivery Year;

9.22.5.2 the Deferral Notice shall state the number and identify (by serial number of available) of the Deferred Locomotives and the period of extension applicable to each such Deferred Locomotive (such period being no more than Maximum Storage Period;

9.22.5.3 notwithstanding such Deferral Notice , the Contractor shall continue the manufacture and production of the Deferred Locomotives in accordance with this Agreement, except that:

1.1.1.1.1 any Deferred Locomotive which receives a Commissioning Certificate shall not be presented for Handover in accordance with Clause 7.1 (Locomotive Handover); and

1.1.1.1.2 the Company shall not be required to carry out the Acceptance Tests in respect of that Deferred Locomotive or be obliged to Accept that Deferred Locomotive, in each case, under and in accordance with Clause 7.2 (Acceptance);

9.22.5.4 the Contractor shall place each Deferred Locomotive which becomes a Commissioned Locomotive into storage in the Storage Facility and shall store and maintain each such Deferred Locomotive in accordance with the Storage Conditions until the Scheduled Handover Date (as set out in the Deferral Notice) applicable to that Deferred Locomotive.

9.22.6 The Contractor shall during the Storage Period (and for a maximum period of one month thereafter) invoice the Company at the end of each such month for the Storage Costs and the Company shall pay such invoiced Storage Costs in accordance with the payment terms set out in this Agreement.

9.22.7 The Contractor will be responsible for all risk of loss, theft, or damage to any Deferred Locomotive whilst in storage and all such risk in and to the Deferred Locomotives shall pass to the Company on Handover of that Deferred Locomotive.

9.22.8 Upon expiry of the Storage Period in respect of each Deferred Locomotive, the Contractor shall re-Commission that Deferred Locomotive such that a Commissioning Certificate may be issued for that Deferred Locomotive in accordance with Clause **Error! Reference source not found.** (Handover and Acceptance). Thereafter and upon Handover of that Deferred Locomotive to the Company, the Company shall conduct the Acceptance Tests and otherwise follow the processes set out in Clause **Error! Reference source not found.** (Handover and Acceptance) in respect of that Deferred Locomotive).The Contractor shall transfer title to each Deferred Locomotive to the Company in accordance with Clause 8.2 (Title Transfer).

9.22.9 Payment by the Company of the Storage Costs constitute the entire liability of the Company in respect of any claims by the Contractor relating to the storage arrangements referred to in this Clause 9.22.

9.22.10 The Company may shorten or extend the Storage Period, provided, in the case of an extension, such period of extension does not exceed the Maximum Storage Period.

9.22.11 If, pursuant to Clause 9.22.10, the Company is considering a variation of any existing Storage Period, the Company may notify the Contractor in writing thereof, such notice stating the potential new Storage Period being considered and requesting the Contractor to provide a written quotation for the indicative Storage Period Adjustment Costs. Having regard to such quotation, if the Company elects to adjust such Storage Period under and in accordance with this Clause 9.22, the Company shall notify the Contractor in thereof stating the revised Storage Period and such Storage Period shall be deemed to be adjusted accordingly.

9.22.12 The Contractor may issue a Tax Invoice for the one-off Storage Period Adjustment Costs and the Company shall pay such invoiced Storage Period Adjustment Costs in accordance with the payment terms set out in this Agreement. Any ongoing Storage Period Adjustment Costs shall be invoiced and paid in accordance with the provisions of this Clause 9.22 applicable to the payment of the Storage Costs.

9.22.13 The Contractor shall not be liable for any Storage Costs or any increase in such Storage Costs incurred or suffered by the Contractor to the extent caused by or attributable to:

9.22.13.1 a breach by the Contractor of any of its obligations under this Clause 9.22 or any other provision of this Agreement or other Project Document;

9.22.13.2 the failure by the Contractor, any Affiliate of the Contractor or any Sub-Contractor to comply with any Legal Requirement or Necessary Consent (or any limits imposed by such Legal Requirement or Necessary Consent);

9.22.13.3 the negligence, fraud or willful misconduct of the Contractor, any Affiliate of the Contractor or any Sub-Contractor;

9.22.13.4 in the case of the insurances in respect of the Deferred Locomotives or the Storage Facility, any increase in the insurance premia payable by the Contractor in respect of such Insurances as a result of any failure to comply with such insurance policies, or any act or omission by the Contractor, any Affiliate of the Contractor or any Sub-Contractor which brings any particular insured liability within the scope of an exclusion or exception; or

9.22.13.5 in the case of the financing costs referred to in sub-paragraph (vi) of the definition of "Storage Costs" any breach by the Contractor of

any of its obligations under or in connection with such financing arrangements.

For the purposes of this Clause 9.22:

Exercise Date means in relation to a Delivery Year, six months prior to the beginning of each such Delivery Year.

Hedging Costs means, without duplication or penalty, all direct costs and losses incurred by the Contractor (as certified by the auditors of the Contractor if required by the Company) as a result of maintaining any currency hedging instrument for the duration of the storage period or, where such hedging instrument has a maturity date which occurs prior to the expiry of the storage period, any direct costs and losses incurred by Contractor as a result of extending or rolling such hedging instrument in order to hedge its currency risks for the remaining storage period.

Hedging Gains means all net profits earned by the Contractor (as certified by the auditors of the Contractor, if required by the Company) pursuant to terminating, closing-out, maintaining, extending or rolling any currency hedging instrument entered into by the Contractor in order to hedge its currency risks during the storage period.

Maximum Storage Period means, in relation to each Deferred Locomotive, a period of 12 months, from the Scheduled Handover Date applicable to that Deferred Locomotive.

Re-Commissioning Costs in respect of a Deferred Locomotive, means the costs incurred by the Contractor in re-Commissioning that Deferred Locomotive, provided that (i) such costs shall not be more than the costs incurred by the Contractor in carrying out the Commissioning of any Locomotive which is not a Deferred Locomotive and (ii) shall costs shall not include the costs of any repairs or remedial work to that Deferred Locomotive required as a result of the Contractor's failure to store such Deferred Locomotive in accordance with the Storage Conditions;

Storage Conditions means the conditions of storage and the required maintenance activities in respect of the Deferred Locomotives to be agreed between the Parties and documented in a separate storage agreement to be entered into between the Parties as soon as practicable but in any event not later than 180 (one hundred and eighty) days after the Effective Date.

Storage Costs comprise, in respect of each Deferred Locomotive, the aggregate amount of all direct, proven costs and expenses reasonably incurred by the Contractor in respect of each such Deferred Locomotive as:

1.1.1.1 the Contractor shall certify (accompanied by reasonably detailed supporting evidence) that the Contractor has incurred as a result of the storage arrangements referred to in this Clause 9.22; and

1.1.1.2 fall into any one or more of the following categories of costs and expenses:

1.1.1.2.1 one-off costs of preparing that Deferred Locomotive for storage;

1.1.1.2.2 the agreed monthly storage costs incurred by the Contractor in respect of the Storage Facility (including, without limitation, all insurance premiums and security expenses);

1.1.1.2.3 in respect of each Deferred Locomotive, interest (at the Prime Rate) on the Acceptance Installment for that Deferred Locomotive which the Contractor would have received for the period from the date on which the Contractor would have received such Acceptance Installment, but for the deferral of the Acceptance of that Deferred Locomotive under this Clause 9.22, to the date of actual Acceptance of that Deferred Locomotive Acceptance;

1.1.1.2.4 Hedging Costs, less any Hedging Gains;

1.1.1.2.5 Re-Commissioning Costs;

1.1.1.2.6 any financing costs and charges incurred by the Contractor in funding the on-ongoing manufacture of Locomotives as a result of the deferral of the Deferred Locomotives in accordance with this Clause 9.22;

1.1.1.2.7 the costs and expenses incurred by the Contractor in having to extend the warranties provided to it by the Sub-Contractors of the Contractor in relation to the Deferred Locomotives;

1.1.1.2.8 any costs and expenses incurred by the Contractor in carrying out any maintenance activities contemplated in the definition of "Storage Conditions" above;

1.1.1.2.9 any Storage Period Adjustment Costs;

1.1.1.2.10 the costs and expenses incurred by the Contractor in obtaining and preparing the written quotations referred to in this Clause 9.22 (which shall be payable by the Company irrespective of whether or not the Company elects to invoke this Clause 9.22 in respect of such quotation).

Storage Facility means one or more appropriate facilities to be identified by the Parties for the purpose of storing the Deferred Locomotives in accordance with this Clause 9.22.

Storage Period means the period referred to in Clause 9.22.5.2, as adjusted pursuant to Clause 9.22.11.

Storage Period Adjustment Costs means, as a direct result of any shortening or extension of the then applicable Storage Period:

1.1.1.2.1 any and all costs, expenses, prepayment penalties, break costs and other amounts of a similar nature suffered or incurred by the Contractor under the financing arrangements contemplated in sub-paragraph (vi) of the definition of "Storage Costs"; and

1.1.1.2.2 (without double counting) any of the costs and expenses referred to in sub-paragraphs (ii), (iii), (iv), (vi), (vii) and (viii) of the definition of "Storage Costs".

10. Warranty Regime

10.1 General

10.1.1 Subject to Clause 10.1.2, the provisions of this Clause 10 shall apply without prejudice to or derogation from and in addition to the other rights of the Company under the Project Documents.

10.1.2 The warranties set out in Clauses 10.2 and 10.3 are, to the extent permitted by applicable law, exclusive and are in lieu of all other warranties and guarantees in relation to Defects or Fleet Defects, whether written, oral, implied or statutory. To the extent permitted by applicable law, no implied or statutory warranty of merchantability or fitness for a particular purpose applies.

10.1.3 The warranties set out in Clauses 10.2 and 10.3 shall not apply to work carried out by (i) the Company, or (ii) a third party pursuant to Clause 12.11 (Failure to carry out work) or Clause 12.12 (Urgent Remedial work) or paragraphs 2.5 or 3.5 of Part 7 (Variations), Schedule 3 (Agreement Management) and the Contractor has not directed or supervised the work implementing the Required Variation or, as the case may be, the Company Proposed Variation.

10.1.4 If, at any time during an applicable Warranty Period, the Company discovers a Defect or, during the Fleet Defect Protection Period, it discovers a Potential Fleet Defect or Fleet Defect, in a Locomotive or Component, the Company shall notify the Contractor as soon as it is reasonably in a position to do so, of the existence and nature of such and shall adhere to the Contractor's reasonable advice, if any, on how to mitigate any adverse effect on the Locomotive or other Components arising from such Defect.

10.2 Defects

10.2.1 The provisions of this Clause 10.2 shall apply in relation to any Defect which arises, occurs or becomes apparent at any time during the applicable Warranty Period.

10.2.2 The Contractor shall, without undue delay having regard to the nature of the work required and the impact of the delay to the Company's operational requirements and, in any event, within 20 Business Days of written notice thereof, at its own cost, execute or, if agreed by the Parties, procure the execution (at no cost to the Company) of all Rectification Work to ensure that the relevant Defect no longer exists or, if not reasonably possible to do so within such 20 Business Day period, provide a Rectification plan for that Defect and, thereafter, diligently execute such plan in accordance with its terms.

10.2.3 After the Defect is Rectified there shall commence in respect of the relevant Component a further Warranty Period of a duration of 24 (twenty four) months (or, where such Component is a Spare, 18 (eighteen) months) during which the provisions of this Clause 10.2 shall apply *mutatis mutandis*.

10.3 **Post Warranty Period Defects**

10.3.1 The provisions of this Clause 10.3 shall apply in relation to any Defect (except any Defect which is a Fleet Defect, regulated under Clauses 10.4 (Fleet Defects) and Potential Fleet Defect regulated under 10.5 (Potential Fleet Defects)) which:

10.3.1.1 arises, occurs or becomes apparent in a major assembly or control system;

10.3.1.2 which is not readily identifiable by the Company; and

10.3.1.3 arises at any time after the applicable Warranty Period.

10.3.2 The Contactor shall, if required by the Company in writing, investigate, search and conduct a thorough fault finding exercise to identify the Defect and the cause of such Defect and as soon as practicable, provide direction and advice in relation to the Rectification of such Defect including:

10.3.2.1 to recommend a revision to the preventative Maintenance Plan to ensure the risk of the re-occurrence of such Defect is nullified;

10.3.2.2 if required by the Company, a Rectification plan (including any necessary design change); and

10.3.2.3 a market related quote for repairing the Defect.

10.3.3 If the Rectification plan (to the extent requested) and quote is accepted by the Company, the Contractor shall commence the Rectification Works at a mutually agreeable time and place.

10.3.4 The Company may, after receiving the Rectification plan and the Contractor's quotation under Clause 10.3 procure Rectification of the Defect, provided that the Company shall maintain the Rectification plan as confidential and not disclose it to any other contractor who may

undertake any Rectification (unless otherwise agreed by the Contractor in writing).

10.4 **Fleet Defects**

10.4.1 The provisions of this Clause 10.4 shall apply in relation to any Fleet Defect in a particular Batch which arises, occurs or becomes apparent at any time during the Fleet Defect Protection Period applicable to that Batch. The Company shall promptly notify the Contractor if it becomes aware of any such Defect.

10.4.2 Prior to the classification of any Defect as a Fleet Defect, the Contractor shall be given the opportunity to take part in the analysis of such Defect.

10.4.3 If the Parties agree that a Defect constitutes a Fleet Defect, the Contractor shall propose a Rectification plan (which will include a thorough fault finding analysis to ascertain the cause of any Fleet Defect) to the Company within 10 Business Days of the date of receipt of the notice referred to in Clause 10.4.1, and the Parties shall negotiate in good faith and agree such Rectification plan within 30 (thirty) Business Days of its submission to the Company.

10.4.4 If the Parties agree on the Rectification plan, the Contractor shall implement and adhere to its provisions and the following shall apply:

10.4.4.1 the Contractor shall, at its own cost, execute or, if agreed by the Parties, procure the execution (at no cost to the Company) of the Rectification Works to ensure that the risk of the occurrence of the relevant Fleet Defect is nullified (including, in the case of Spares, Rectifying such Spares or replacing them with new Spares) and that such Fleet Defect is not present in all Accepted Locomotives, all Accepted Components and all Locomotives and/or Components to be Delivered under this Agreement, all such works to be completed in accordance with the Rectification plan;

10.4.4.2 if any Component is Rectified under this Clause 10.4 during the initial Warranty Period applicable to that Component, a Defect warranty with a period of 30 (thirty) months (or, where such Component is a Spare, 18 (eighteen) months) commencing on the completion of such Rectification shall automatically arise in relation to such Component and bind the Contractor to which all the provisions (including as to further warranty periods) of Clause 10.2 (Defects) shall apply *mutatis mutandis*; and

10.4.4.3 further Locomotives will be Accepted in accordance with Clause 7.2 (Acceptance), provided that:

10.4.4.3.1 the other requirements set out in Clause 7.2.6 are satisfied;

10.4.4.3.2 the Company is satisfied that the Contractor is implementing the Rectification plan in accordance with its terms; and

10.4.4.3.3 the Contractor has demonstrated to the Company that the Fleet Defect has been successfully eliminated from at least one Accepted Locomotive affected by such Fleet Defect.

10.4.5 If, following expiry of the Warranty Period for a Locomotive in a Batch or Component of such Locomotive, any Defect or other failure of that Locomotive or Component arises, occurs or becomes apparent which, during the Fleet Defect Protection Period applicable to that Locomotive, is later classified as a Fleet Defect, the Contractor will reimburse the Company for all reasonable expenses incurred by it to Rectify that Defect or other failure before it became a Fleet Defect.

10.5 **Potential Fleet Defects**

10.5.1 If a Potential Fleet Defect arises, occurs or becomes apparent at any time during the Warranty Period for a Locomotive in a Batch or Component of such Locomotive, the Company shall promptly notify the Contractor of such Defect.

10.5.2 Prior to the classification of any Defect as a Potential Fleet Defect, the Contractor shall be given the opportunity to take part in the analysis of such Defect.

10.5.3 If the Parties agree that a Defect constitutes a Potential Fleet Defect, the Contractor shall promptly:

10.5.3.1 investigate, search, and conduct a thorough fault finding exercise to ascertain the cause of such Potential Fleet Defect;

10.5.3.2 based on the exercise referred to in Clause 10.5.3.1:

10.5.3.2.1 advise the Company whether or not the Defect concerned should be considered a Fleet Defect;

10.5.3.2.2 the likelihood of such Defect becoming a Fleet Defect; and

10.5.3.2.3 recommend a revision to the preventative Maintenance Plan to ensure the risk of its occurrence is nullified; and

10.5.3.3 at its own cost, execute or, if agreed by the Parties, procure the execution (at no cost to the Company) of all Rectification Works (including, in the case of Spares, Rectifying such Spares or replacing them with new Spares) to ensure that such Potential Fleet Defect is not present in Accepted Locomotives affected by such Potential Fleet Defect and all Locomotives and/or Components to be Delivered under this Agreement.

10.5.4 Further Locomotives will be Accepted in accordance with Clause 7.2 (Acceptance), provided that:

10.5.4.1 the other requirements set out in Clause 7.2.6 are satisfied; and

10.5.4.2 the Contractor has demonstrated to the Company that the Potential Fleet Defect has been successfully eliminated from at least one Accepted Locomotive affected by such Fleet Defect.

10.5.5 If any Component is Rectified under Clause 10.5 during the initial Warranty Period applicable to that Component, a Defect warranty with a period of 30 (thirty) months (or, where such Component is a Spare, 18 (eighteen) months) commencing on the completion of such Rectification shall automatically arise in relation to such Component and bind the Contractor to which all the provisions (including as to further warranty periods) of Clause 10.2 (Defects) shall apply *mutatis mutandis*.

10.5.6 If a Potential Fleet Defect arises, occurs or becomes apparent at any time after the Warranty Period for a Locomotive or a Component, Clause 10.3 (Post Warranty Period Defects) shall apply *mutatis mutandis*, save that the Contractor shall, as part of the direction and advice referred to in Clause 10.3.2, advise the Company whether or not the Defect concerned should be considered a Fleet Defect and, if not, the likelihood of such Defect becoming a Fleet Defect.

10.6 Disputes

If the Parties are unable to agree a Rectification plan or whether a Defect, Potential Fleet Defect or Fleet Defect has occurred or the duration of any Warranty Period, the matter shall be treated as a Dispute in accordance with Clause 26 (Dispute Resolution) save that such Dispute shall immediately be referred to the Steering Committee in accordance with Clause 26.2.1.3 (Dispute Resolution) and:

10.6.1 the Contractor shall promptly provide to the Company all data available to the Contractor in respect of that damage, defect, fault, failure, breakage or performance degradation (including the diagnostic processes used by the Contractor to determine the root cause thereof);

10.6.2 the Contractor shall attend to the Rectification of that damage, defect, fault, failure, breakage or performance degradation as if it is a Defect or a Fleet Defect;

10.6.3 if the matter is determined substantially in favour of the Contractor, the Company shall reimburse the Contractor for all costs reasonably incurred by the Contractor in attending to the Rectification of that damage, defect, fault, failure, breakage or performance degradation.

10.6.4 Where a Dispute relates to whether a Fleet Defect has occurred, for the avoidance of doubt, any Delay Penalties solely attributable to work carried out to Locomotives yet to be Accepted shall continue to accrue, provided that if such Dispute is determined in favour of the Contractor, the Company shall repay to the Contractor an amount equal to such Delay Penalties together with any accrued interest (calculated at the Prime Rate), for the period commencing on the date which such Delay Penalties were received by the Company and ending on the date on

which the Company pays such amount to the Contractor in terms of the outcome of such Dispute resolution.

10.7 Contractor's Obligations

10.7.1 The obligations of the Contractor under this Clause 10 (Warranty Regime) shall apply to Locomotives and Components supplied by or on behalf of the Contractor only.

10.7.2 The Contractor shall have no responsibility to the Company under this Clause 10 (Warranty Regime) in respect of any alleged Defect which is directly attributable to:

10.7.2.1 any Excluded Matter;

10.7.2.2 the use by the Company of spares on a Locomotive not otherwise approved by the Contractor or sourced from the original equipment manufacturer of such spare;

10.7.2.3 the use by the Company of lubricants, oil and water additives on a Locomotive not otherwise recommended by the Contractor, provided that the lubricants, oil and water additives recommended for use by the Contractor shall be readily available in South Africa or that the Contractor shall upon request by the Company recommend suitable alternatives;

10.7.2.4 repairs by the Company to a Locomotive or Component otherwise than in accordance with the Maintenance Plan (to the extent such repairs are expressly covered by Maintenance Plan) and the Statement of Work (defined in Clause 15.3.1.2 (Repairs)); or,

10.7.2.5 work carried out to a Locomotive or Component by a third party pursuant to Clauses 12.11 (Failure to Carry Out Work) and 12.12 (Urgent Remedial Work) in each case where the Contractor has not approved or supervised or directed such work.

10.8 Completion of Rectification Work

The Contractor shall be obliged to complete all Rectification Work in respect of Defects (which arise, occur or become apparent during the applicable Warranty Period) and Potential Fleet Defects or Fleet Defects (which arise, occur or become apparent during the Fleet Defect Protection Period) in accordance with agreed timetables and with minimum disruption to the operation of the Locomotives regardless of whether such work can be completed prior to the expiry of the applicable Warranty Period or Fleet Defect Protection Period (as appropriate).

10.9 Supply of Data

The Contractor shall, during the Fleet Defect Protection Period, record, maintain and provide to the Company on a monthly basis or at such other times as the Company may reasonably request, appropriate data relating to

Defects, Potential Fleet Defects, Fleet Defects, Faults and other failures and breakages of whatever nature (including any such failure or breakage attributable to the actions or omissions of the Company or its employees) suffered by any Locomotive or Component as a result of which any Component has been or is required to be repaired or replaced. For the avoidance of doubt, the provision of data shall include, but not be limited to, that data that can be discovered during trouble shooting exercises conducted by the Contractor on site while the Locomotives are at the Company's facilities. Such data shall be treated, by the Company, with the same level of care and protection as it treats its own confidential information.

10.10 Option to Extend

The Contractor hereby grants to the Company an option to extend the Warranty Period referred to in paragraph (a) of the definition of Warranty Period (the Option) on the following terms and conditions:

10.10.1 the Option shall be exercised by the Company by giving written notice to that effect (the Option Notice) to the Contractor not less than 30 (thirty) days prior to the expiry of the initial Warranty Period in respect of the first Locomotive;

10.10.2 the Option may be exercised in respect of all the Locomotives only;

10.10.3 the Option Notice shall specify the period by which the initial Warranty Period is extended, being, at the election of the Company, a period of 12 (twelve) or 24 (twenty four) months (the Extended Warranty Period);

10.10.4 the same Extended Warranty Period shall apply to all the Locomotives;

10.10.5 subject to Clause 10.10.8, the Extended Warranty Period in respect of each Locomotive shall commence on and with effect from expiry of the initial Warranty Period in respect of that Locomotive;

10.10.6 the aggregate cost of the Extended Warranty Period shall be calculated in accordance with the following formula:

$A = B \times C \times D$

where:

A = the aggregate cost to the Company (in ZAR) of exercising the Option (the Option Price)

B = the agreed cost, per year of extending the Warranty Period, namely 3% (three per cent) of the Contract Price per Locomotive

C = the number of years by which the Warranty Period is extended

D = the number of Locomotives in respect of which the Extended Warranty Period applies

10.10.7 the Option Price shall be payable by the Company to the Contractor within 30 (thirty) days of the date of the Option Notice by electronic transfer into a local bank account of the Contractor nominated by the Contractor for this purpose;

10.10.8 upon receipt by the Contractor of the Option Notice and the Option Price, the Initial Warranty Period referred to in paragraph (a) of the definition of Warranty Period, shall be deemed to have been extended by the Extended Warranty Period on the terms and conditions of this Clause 10.10 without the need for any further steps or action taken by either party;

10.10.9 the provisions of Clause 10.2 (Defects) shall apply, *mutatis mutandis*, to the Extended Warranty Period except that:

10.10.9.1 the provisions of Clauses 10.2.3 shall not apply to any Defect arising in the Extended Warranty Period; and

10.10.9.2 no Extended Warranty Period in respect of any Locomotive, may extend beyond the expiry of the Fleet Defect Protection Period.

11. Mission Reliability and Fleet Availability

11.1 For the purposes of this Clause 11 only, **Batch** means, in relation to each Delivery Year, all of the Locomotives Accepted or scheduled to be Accepted in accordance with the Master Programme, in that Delivery Year.

11.2 Within a reasonable period after Acceptance of the First Locomotive, but before the Fleet Performance Commencement Date for this first Batch, the Contractor will participate with the Company to establish the type of data, source of data and frequency of recording of such data, which is required to calculate the Mission Reliability and Fleet Availability.

11.3 The Contractor's Representatives shall participate on a daily basis in the actual identification, verification and recordal of the abovementioned data and in agreement with the Company's Representative, of each failure that constitutes a Fault.

11.4 Reliability and Fleet Availability for each Batch shall be measured over 3 (three) phases during the Fleet Defect Protection Period applicable to that Batch as follows (except that Phase 1 shall apply to the first Batch only):

11.4.1 **Phase 1**

Phase 1 covers the Mission Reliability testing of the first 20 (twenty) per cent of Locomotives in the first Batch and will take place during the period starting from the Acceptance Date of First Locomotive up to the Acceptance Date of the last Locomotive making up such percentage. The objectives of the Parties during Phase 1 are:

11.4.1.1 to verify the suitability of the data recording procedures and systems for the objective measurement of Mission Reliability and to amend the procedures and systems as and where necessary;

11.4.1.2 to undertake joint investigations into the causes of failures in order to identify whether such failures originate from faulty design, manufacturing deficiencies, faulty maintenance practices and/or operational malpractices or other causes; and

11.4.1.3 to undertake corrective action.

11.4.2 Phase 2

11.4.2.1 Phase 2, in respect of each Batch, covers the period commencing on the Fleet Performance Commencement Date for that Batch up to the date which falls 6 (six) months after Acceptance of the last Locomotive in that Batch.

11.4.2.2 The official recording of the Fleet Availability and Mission Reliability in relation to a Batch shall commence at the start of Phase 2 for that Batch.

11.4.2.3 The objective of the Parties during Phase 2 is to improve the Fleet Availability and Mission Reliability of the Locomotives in each Batch through the identification and Rectification of design shortcomings and manufacturing errors as well as improvement in maintenance and operational practices.

11.4.2.4 The target levels to be achieved for each Batch before the end of Phase 2 for that Batch are:

11.4.2.4.1 Mission Reliability: 15 (fifteen) Faults per million kilometres travelled by the Fleet (the **Mission Reliability Target**); and

11.4.2.4.2 Fleet Availability: 95% (ninety five per cent) (the **Fleet Availability Target**).

11.4.3 Defects and Fleet Defects which are identified during Phase 2, shall be dealt with in accordance with Clause 10 (Warranty Regimes).

11.4.4 A review meeting will take place at the end of every month to:

11.4.4.1 verify the validity of the Fleet Availability and Mission Reliability data collected during the month;

11.4.4.2 analyse the data to determine the 5 (five) highest reliability or availability focus issues for such month;

11.4.4.3 classify the focus issues in relation to operation-related / defective material / Potential Fleet Defect or other classifications and decide upon a specific course of actions needed (by the Company or by

the Contractor) to eliminate the related Defects / failures / poor maintenance practices;

11.4.4.4 review the data supplied by the Contractor to the Company pursuant to Clause 10.9 (Warranty Regimes);

11.4.4.5 review the status of determined actions of the previous month's focus issues and the results of measures applied; and

11.4.4.6 review the maintenance practices / procedures as required to determine whether these are affecting Availability.

11.4.5 The Contractor undertakes that, in relation to a Batch, should the target levels set out above for Mission Reliability and Fleet Availability not be achieved at the end of Phase 2 applicable to that Batch, the Contractor shall continue to lead the investigative work as an urgent matter, with the Company's active support, in order to identify the cause(s) of non-achievement of the targets within 6 (six) months of commencing any such investigation, including a continuation of the monthly review meetings described in Clause 11.4.4.

11.4.6 In relation to each Batch, should the cause of non-achievement of the targets for Mission Reliability and Fleet Availability be a Defect or Fleet Defect that is identified prior to the expiration of the Fleet Defect Protection Period applicable to that Batch, it will be dealt with as set out in Clause 10 (Warranty Regime).

11.5 Phase 3

11.5.1 Phase 3 for each Batch in relation to Fleet Availability and Mission Reliability respectively, commences when, following Acceptance of 50 (fifty) per cent of the Locomotives in that Batch, the Fleet Availability Target and Mission Reliability Target (each being independent of the other) is achieved in respect of that Batch for the first time on a monthly basis and ends at the date when their respective target levels have been achieved in respect of that Batch on a rolling 6 (six) month basis. For the avoidance of doubt, Phase 3 for a Batch may commence at any time after the Acceptance of 50 (fifty) per cent of the Locomotives in that Batch and may therefore commence while Phase 2 is still continuing.

11.5.2 Notwithstanding anything to the contrary herein contained, the end date for Phase 3 in relation to a Batch shall not extend beyond the end of the Fleet Defect Protection Period applicable to that Batch.

11.5.3 At the end of Phase 3 the Contractor's obligation to lead the investigations in respect of failure to achieve the set targets ceases. The obligation in terms of Defects and Fleet Defects, however, remains in force as per Clause 10 (Warranty Regime).

11.5.4 If, by the end of Phase 3 relating to a Batch, the Mission Reliability Target and the Fleet Availability Target have been achieved, the Contractor will have no further obligations under this Clause 11 in

respect of Mission Reliability and Fleet Availability, except as set out in Clause 11.4.5.

11.5.5 If at the end of the Fleet Defect Protection Period applicable to a Batch, an assessment of the Fleet Availability and the Mission Reliability of the Fleet in that Batch, as measured on a monthly basis for the 6 (six) months ended on the last day of that Fleet Defect Protection Period shows that:

11.5.5.1 the average monthly Fleet Availability, as measured for that 6 month period, has fallen below a level of 85 (eighty five) per cent; or

11.5.5.2 the average monthly Mission Reliability, as measured for that 6 month period, amounted to 20 (twenty) Faults or more per 1,000,000 (one million) kilometres travelled by the Fleet in that Batch,

the Contractor shall pay to the Company, on demand, an amount equal to 1.5 (one and a half) per cent of the Total Contract Price for all Locomotives for failing to achieve the Fleet Availability and similarly 1.5 (one and a half) per cent of the Total Contract Price for all Locomotives for failing to achieve the Mission Reliability.

11.5.6 Receipt by the Company of the payment in Clause 11.5.5 will discharge in full all the obligations of the Contractor in respect of the Fleet Availability and the Mission Reliability of the Fleet in the relevant Batch.

11.5.7 For the avoidance of doubt, no failure on the part of the Fleet to achieve the Mission Reliability Target and/or the Fleet Availability Target shall constitute a breach of this Agreement nor entitle the Company to damages or to claim any amount, other than as provided in this Clause 11.

12. Lawful and Safe Operation

12.1 Compliance with Laws

The Contractor shall design, manufacture, engineer, supply, test, commission, sell, deliver and provide the Locomotives and all Training in a manner which does not infringe:

12.1.1 any Legal Requirements and/or Necessary Consents; or

12.1.2 any Instructions or directions properly issued by the Engineer in accordance with this Agreement (provided compliance with such instructions or directions will not result in an infringement of any Legal Requirements and/or Necessary Consents),

and so as not to cause, or contribute in any manner to, a breach by the Company of any obligations which it may have in relation to the foregoing.

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12.2 Change in Law

12.2.1 Subject to Clause 12.2.4, on the occurrence of any Specific Change in Law which requires the Contractor to carry out Works affecting the Locomotives (being any work of alteration, addition, dismantling or variation in the quality or function of the Locomotives) which are not works which the Contractor would otherwise (but for the occurrence of a Specific Change in Law) be required to undertake to comply with its obligations under this Agreement, then:

12.2.1.1 any increase, in the cost to the Contractor of performing its obligations under this Agreement directly attributable to such Specific Change in Law shall be borne by the Company, provided satisfactory evidence of such costs, properly incurred, shall have been provided to the Company;

12.2.1.2 any delay in the Master Programme directly attributable to such Specific Change in Law shall constitute a grounds for an extension of the Master Programme and entitle the Contractor to an extension of time to comply with any Milestone delayed by Such change in Law in accordance with Clause 9.9 (Potential Grounds for Extension); and

12.2.1.3 any saving or reduction in the Contract Price of each Locomotive effected by such Specific Change in Law, shall be enjoyed by the Company,

in each case, determined in accordance with paragraph 3 of Part 7 (Variations), Schedule 3 (Agreement Management).

12.2.2 On the occurrence of a Change in Law, which is not a Specific Change in Law, but requires the Contractor to carry out Works affecting the Locomotives (being any work of alteration, addition, dismantling or variation in the quality or function of the Locomotives) which are not works which the Contractor would otherwise (but for the occurrence of such Change in Law) be required to undertake to comply with its obligations under this Agreement, then:

12.2.2.1 any effect on the cost to the Contractor of performing its obligations under this Agreement shall be borne or enjoyed solely by the Contractor; and

12.2.2.2 any delay in the Master Programme directly attributable to such Specific Change in Law shall not constitute a grounds for an extension of the Master Programme and shall not entitle the Contractor to an extension of time to comply with any Milestone.

12.2.3 Any claim for an extension of time or any claim for an increase or decrease (as applicable) in the Total Contract Price shall be made and granted or rejected (as applicable) in accordance with the procedure set out in paragraph 3 of Part 7 (Variations), Schedule 3 (Agreement Management).

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12.2.4 The Contractor shall, without prejudice to its general obligation to comply with the terms of this Agreement:

12.2.4.1 use all reasonable endeavours to take advantage of any positive or beneficial effects of any Change in Law and take all reasonable steps to maximise any reduction in costs arising from such Change in Law;

12.2.4.2 use all reasonable endeavours to mitigate the negative or detrimental effects of any Change in law on the performance of the Contractor's obligations under this Agreement and take all reasonable steps to minimise any increase in costs arising from such Change in Law.

12.2.5 The Contractor shall not be able to rely on the relief afforded to it pursuant to Clause 12.2.1 above to the extent that it is not able to perform, or has not in fact performed, its obligations under this Agreement due to its failure (if any) to comply with its obligations under Clause 12.2.4.

12.3 **Title to Modifications**

To the extent the Contractor undertakes any modifications or rectifications to any Accepted Locomotive pursuant to the Variation Process or otherwise in accordance with this Agreement, and any new, Components or modifications are installed and/or affixed to such Accepted Locomotive, the Contractor shall transfer title to such new Component or modification in accordance with Clause 8 (Risk, Title Transfer and Payments) upon installation of such new Component or modification upon the Accepted Locomotive provided that to the extent that the Company is required to make payment for such modification or Rectification under the terms of the Variation Order, it has effected payment.

12.4 **Licences and Fees**

The Contractor shall give all notices and pay all fees, including, but not limited to, licence application and renewal fees required to be given or paid by any Legal Requirements in relation to the provision of the Locomotives or necessary for the proper performance of the Contractor's duties and obligations under this Agreement. Any effect of the occurrence of a Change in Law in relation to the cost to the Contractor of giving of notice and/or payment (including amount) of fees shall be subject to Clause 12.2. (Change in Law).

12.5 **Hazardous Substances**

12.5.1 The Contractor shall not use or permit the use of any Hazardous Substances in the construction of Locomotives unless:

12.5.1.1 their use is permitted by any other provision of this Agreement and under all relevant Legal Requirement;

12.5.1.2 the Contractor has given the Engineer not less than 10 Business Days' notice of how such Hazardous Substances have been or are intended to be used and giving full details of the precautions to be taken by persons on the delivery of such Hazardous Substances and their subsequent storage, handling and use; and

12.5.1.3 neither the use of such Hazardous Substances nor such precautions shall prevent the manufacture or delivery of the Locomotives or preclude the intended use of the Locomotives,

provided that the Contractor shall not be in breach of this Clause 12.5 if it uses or permits to be used any substance or material in the construction of any particular Locomotive which are Hazardous Substances if, at all times during the period of construction of such Locomotive: (i) no reasonable and skilled manufacturer, after reasonable inquiry, would have known that such substance or material might be harmful or prejudicial to the Environment or human health or any living organism, and (ii) such substance or material did not at such time fall within paragraphs (a) or (b) of the definition of Hazardous Substances.

12.5.2 If the Contractor determines that it wishes not to use a particular material or substance in the manufacture of some or all of the Locomotives on the basis that the Contractor has a reasonable concern that it may constitute a Hazardous Substance, but such substance is not regulated by Environmental Law and does not require investigation or remedial action under Environmental Law, the Contractor shall promptly notify the Company, and:

12.5.2.1 if the Company agrees to such non-use, the allocation between the Parties of any additional cost to the Contractor of such non-use (including the cost of removal of such materials or substance and the cost of replacement with substitute materials or substances) shall be determined in accordance with Clause 12.2 (Change in Law) as if a Change in Law prohibiting such use had occurred with an Effective Date on the date of such agreement; and

12.5.2.2 if the Company notifies the Contractor in writing that it nevertheless wishes the Contractor to use such material or substance, the Contractor shall not be in breach of its obligations under Clause 5.1 (Contractor's Principal Obligations) or otherwise by virtue of delivering such Locomotives to the Company incorporating such material or substance, and the Company shall indemnify the Contractor against all claims by a third party, losses, damages, penalties, fines, costs and expenses suffered or incurred by the Contractor, arising out of, or in connection with, the use of such materials or substances.

12.6 **Compliance with Environmental Laws**

Subject to Clauses 12.2 (Change in Law) and 12.5 (Hazardous Substances), the Contractor shall comply with all Environmental Laws and procure, insofar as practicable and lawful, that such Components of the Locomotives and the

Spares, Tools and Test Equipment as are appropriate for ultimate recycling under current best practice are clearly and permanently marked for this purpose, and that all other Components and the Spares, Tools and Tool Equipment are capable of being disposed of safely and without risk of damage to the Environment.

12.7 **Legal Requirements**

Subject to Clause 11.3 (Change in Law), all resources, goods, materials, work procedures, facilities and any other matter provided and/or undertaken by the Contractor or any Sub-Contractor in connection with the Locomotives, not otherwise specified in Schedule 3 (Agreement Management) or the other provisions of this Agreement, shall be in accordance with all Legal Requirements for the Agreement Period.

12.8 **Noise and Disturbance**

All operations necessary for the execution of the Contractor's duties and obligations under this Agreement shall be carried on without unreasonable noise and disturbance and so as not to interfere unnecessarily or improperly with traffic or the convenience of the public or the access to, use and occupation of, public or private roads or footpaths to or of properties of any person.

12.9 **No Alcohol or Drugs**

The Contractor shall not at any time give, sell or barter any alcoholic liquor or drugs at the Location or permit any such sale, gift or barter to be made by any Sub-Contractor or any employee or agent of the Contractor at the Location. The Contractor and its employees and agents shall observe and comply with the Company's policy and rules on alcohol and drugs as notified to the Contractor from time to time.

12.10 **Compliance with Laws**

Where the Engineer has reasonable grounds to believe that any of the Contractor's designs, workmanship, materials or goods, or any other resource, facility or item provided by the Contractor in connection with this Agreement, may be Defective, the Contractor shall demonstrate to the Engineer's satisfaction on request that all design, workmanship, materials, goods, resources, facilities and items are not defective and comply with all Legal Requirements from time to time (subject to Clauses 12.2 (Change in Law) and 12.5 (Hazardous Substances)) and the requirements of this Agreement. If the Contractor is able to demonstrate such compliance, the Company shall be liable for and shall pay the reasonable costs actually incurred by the Contractor in respect of such demonstration, provided that if the Engineer disputes such compliance, such dispute shall constitute a Dispute and be resolved in accordance with Clause 26 (Dispute Resolution). If such Dispute is determined in favour of the Contractor, the Company shall thereupon pay the costs referred to in this Clause 12.10.

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12.11 Failure to Carry Out Work

12.11.1 Notwithstanding any other provision of this Agreement, if the Contractor fails to carry out any activity required under this Agreement or refuses to comply with any requirement of the Company and/or the Engineer under this Agreement within the specified period (or, if no period is specified, within a reasonable time), the Company may (but without limiting the Company's other remedies under this Agreement) give the Contractor notice in writing, substantially in the form set out in Pro Forma 23 of Schedule 8 (Pro Formas), requiring the Contractor to remedy that failure, carry out that activity or comply with such requirement of the Company within the timeframe contemplated by such notice (or such shorter timeframe as the Company considers reasonably necessary). If the Contractor fails to comply with the requirements of the Company specified in that notice, the Company may carry out any such activity or requirement using its own and/or third party personnel and resources, and the Contractor shall co-operate with the Company and/or any third party to enable the timely achievement of any such matters.

12.11.2 The Company shall give notice to the Contractor of the identity of the person(s) who the Company has nominated to carry out any work identified in Clause 12.11.1. Save as expressly set out in Clause 10.7.2.5, the Contractor shall not be entitled to any relief of the performance of its obligations under this Agreement as a result of the fact that this work has been carried out by the Company's nominated third party.

12.11.3 Without prejudice to any other right or remedy of the Company under this Agreement, all expenditure properly and reasonably incurred by the Company in having such activity or requirement carried out (including, without limitation, any VAT which is irrecoverable under Clause 8.6 (VAT)) shall be recoverable as a debt by the Company from the Contractor and the Company may (without prejudice to any other method of recovery provided under this Agreement) deduct such amounts from any amount due to the Contractor under this Agreement.

12.12 Urgent Remedial Work

If, after the occurrence of a Safety Event, and following consultation with the Contractor (where reasonably practicable), the Contractor is unable or unwilling promptly to do such remedial or other work which is necessary to such Safety Event (or where the occurrence of a Force Majeure Event prevents the Contractor from undertaking any such remedial or other work), then the Engineer may authorise the carrying out of that remedial or other work by a person other than the Contractor. If the remedial or other work so authorised by the Engineer is work which the Contractor was liable to do under this Agreement, all expenditure properly and reasonably incurred in carrying out that work shall be recoverable as a debt by the Company from the Contractor and the Company may (without prejudice to any other method of recovery provided under this Agreement) deduct such amounts from any amount due to the Contractor under this Agreement. The Company shall:

12.12.1 ensure that any such remedial work is carried out by appropriately qualified and experienced contractors; and

12.12.2 where reasonably practicable and provided no Contractor Default has occurred, use reasonable endeavors to cede any rights the Company may have under any agreement entered into between the Company and such person relating to such remedial work.

13. Intellectual Property Rights

13.1 Licences granted by Contractor to the Company

13.1.1 In respect of each Locomotive the Contractor hereby grants to the Company, subject to the restrictions set out elsewhere in this Clause 13, a non exclusive, irrevocable fully paid-up licence (with the right to grant sub-licences as provided in Clause 13.2), to use the Deliverable Materials, the Technical Materials and the Escrow Materials (but in relation to Escrow Materials only upon the occurrence of a Safety Event or a Release Event and only if and to the extent that use of any such Escrow Materials is strictly necessary for the achievement of the relevant purpose) for the purposes set out in Clause 13.1.3, for use with and for the life of each such Locomotive, in each case restricted to the territory of South Africa.

13.1.2 Copyright and all other Intellectual Property Rights in the Escrow Materials, Technical Materials and Deliverable Materials will at all times remain vested with the Contractor and/or its licensors.

13.1.3 The licensed purposes are as follows:

13.1.3.1 to use and operate the Locomotives (which includes for the purposes of training personnel);

13.1.3.2 where the Company has not entered into an agreement with the Contractor for the maintenance of the Locomotives (provided such agreement has not been terminated as a result of a breach by the Contractor or where a third party is appointed under Clause 12.11 (Failure to carry out work), to service, maintain, repair, overhaul and modify (at the Company's own risk) the Locomotives, or to have such actions performed by a Permitted Sub-licensee;

13.1.3.3 to remedy a Safety Event or have such Safety Event remedied by a Permitted Sub-licensee including (but subject to Clause 13.3 and only so far and for so long as is reasonably necessary for such purpose) by manufacturing or procuring the manufacture of any piece of equipment or Component forming part of the Locomotive;

13.1.3.4 to comply with the request of a Relevant Authority acting under Legal Requirements for access to the Deliverable Materials, the Technical Materials and the Escrow Materials;

13.1.3.5 excluding the Software, to make a reasonable number of copies for back-up purposes (provided that the Company must reproduce on any such copy the copyright notice and any other proprietary legends that were on the original copy);

13.1.3.6 to copy and, where the Company has not entered into an agreement with the Contractor for the maintenance of the Locomotives (provided such agreement has not been terminated as a result of a breach by the Contractor or where a third party is appointed under Clause 12.11 (Failure to carry out work), to modify (at the Company's own risk) the Deliverable Materials, the Technical Materials and the Escrow Materials in each case solely to the extent necessary to perform any of the above (including without limitation for the production of Manuals);

13.1.3.7 in relation to the Technical Materials, to use such materials for the performance of a Performance Audit in accordance with Clause 13.3.7.

13.1.4 Subject to Clause 21.4.5.7, none of the licences granted under this Clause 13.1.3 shall extend to the completion of the manufacture of the Locomotives.

13.1.5 Unless expressly authorised in writing by the Contractor, in no circumstances shall the Company reverse engineer the Software or create derivative works based on the Software or rent, lease or distribute the Software and shall procure the same is not done by anyone on its behalf.

13.2 **Sub-licences**

13.2.1 The Company is permitted to grant sub-licences of the licences granted under this Agreement to use the Deliverable Materials, the Technical Materials and Escrow Materials to any lessee or subsequent operator of the Locomotives, or any other person carrying out any of the licensed purposes described in Clause 13.1.3 for and on behalf of the Company, lessee or subsequent operator (each a Permitted Sub-licensee) on the terms set out in Clause 13.1, but only to the extent that the granting of such sub-licence is reasonably necessary to enable the Company to procure and/or permit the performance of one or more of the purposes for which the Company is granted a licence under Clause 13.1 and then only to the extent that the Permitted Sub-Licensee agrees in writing to adhere to the provisions of this Clauses 13 and 27 (Confidentiality).

13.2.2 Any sub-licence referred to in Clause 13.2.1 shall automatically terminate upon the expiry or termination of the equivalent licence granted to the Company and the rights granted by the sub-license shall in no event be broader than the rights granted to the Company by the applicable license.

13.2.3 Sub-licences of the Deliverable Materials, the Technical Materials and Escrow Materials to Permitted Sub-Licensees may only be granted for

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so long as the Permitted Sub-Licensee is contracted by the Company to perform one or more of the purposes for which the Company is granted a licence under Clause 13.1 or to perform consultancy work to the Company.

13.3 **Technical Materials set up and operation**

13.3.1 The Contractor shall assemble the Technical Materials (in existence as at the date of this Agreement) no later than 180 (one hundred and eighty) Business Days (or such longer period as the Parties may agree in writing) after the date of this Agreement.

13.3.2 The Technical Materials will be kept at the Contractor Facility in South Africa (and if TE is a Key-Subcontractor, at TE) in either case, in a secure facility under the supervision of the Contractor.

13.3.3 The Contractor will, upon request by the Company supply a reasonable number of copies of the Technical Materials free of charge where reasonably required for the purposes of a Performance Audit or in response to a request from a Relevant Authority acting under applicable law. Where copies of the Technical Resource Materials are required by the Company for any other licenced purpose, the Contractor reserves the right to make a reasonable charge to the Company for the costs of providing such copies, except that no charge shall be made for one paper copy of, and (to the extent that such Technical Materials can reasonably be provided in CD-Rom format) one CD-Rom containing, the Technical Materials (and any updates thereof).

13.3.4 The Contractor shall ensure that the computer systems on which the Technical Materials are stored (and the format in which they are stored) conform to Industry Standards and that the Technical Materials are capable of being read on software which conforms to Industry Standards and allow access immediately in an emergency (and in other cases, as soon as practicable thereafter) for the licensees and any sub-licensees in accordance with Clauses 13.1 and 13.2 and to the appropriate data held within such computer systems.. The Contractor shall when the Company so requests promptly inform the Company of the nature of such computer systems.

13.3.5 The Contractor shall ensure that the Technical Materials created subsequent to the date of this Agreement shall be dealt with, upon their creation, acquisition or updating, in accordance with the terms of this Agreement.

13.3.6 The Contractor shall create a duplicate of the Technical Materials, for back-up and disaster recovery purposes, in accordance with best industry practice at its own expense. The Contractor shall inform the Engineer of the location where the duplicate is held from time to time. The Contractor's obligations to create and update the Technical Materials shall apply to the duplicate.

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13.3.7 The Company may request access to the Technical Materials (including those held on computer systems) in order to carry out a Performance Audit. The first Performance Audit may take place no earlier than 90 Business Days after the creation of the Technical Materials in accordance with this Clause 13.3. Any such request shall be made with reasonable notice to the Contractor, shall be made in writing and shall indicate with reasonable clarity those Technical Materials, or types of Technical Materials, which are required for review. The Company shall act reasonably in making and framing any such request and shall, in particular, only request those Technical Materials which it reasonably considers are needed for the purpose of the Performance Audit in question. As part of its Performance Audit request notice, the Company shall state the identity of all individuals who shall be responsible for carrying out a Performance Audit. Where the Contractor disputes that the Party requesting a Performance Audit is acting reasonably in relation to the requirements of this Clause 13.3.7 either Party may refer such dispute for resolution in accordance with Clause 26 (Dispute Resolution).

13.3.8 Upon the occurrence of a Safety Event, Escrow Release Event, a request by a Relevant Authority acting under applicable law for access to the Technical Materials or a request by the Company to use the Technical Materials for the purposes licensed, the Contractor shall immediately (in the case of an emergency) and as soon as reasonably practicable after such request (in all other cases), grant access to the Technical Materials. Any request shall be made in writing and indicate with reasonable clarity those Technical Materials being requested. The requesting party shall request only those Technical Materials it reasonably considers necessary for the purposes in question. If the Contractor disputes whether the requesting party is acting reasonably, it shall not be entitled to withhold access to the Technical Materials but rather shall grant access and may refer the Dispute for resolution in accordance with Clause 26 (Dispute Resolution).

13.3.9 Immediately upon the expiry of the Agreement Period or termination by the Company of this Agreement in accordance with Clause 21.4 (Consequences of Contractor Default), provided that the Company shall have paid to the Contractor all sums (other than sums the subject of a bona fide Dispute) due to it under this Agreement and the Company shall not have entered into an agreement for the servicing, maintenance, repair or overhauling of any of the Locomotives with the Contractor, the Contractor shall deliver a copy of the Technical Materials to the Company.

13.3.10 The Contractor shall establish a catalogue (in a format approved by the Engineer) of all Technical Materials. The Contractor shall send the first version of the catalogue to the Company upon the creation of the Technical Materials and thereafter shall distribute a copy to the Company of the most recent version of the catalogue promptly on request by the Company (and in any event, every 6 (six) months).

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13.4 Safety Event

If a Safety Event occurs which:

13.4.1 prevents the use of a material portion of any Batch; and

13.4.2 requires access to the Escrow Materials to rectify that Safety Event,

provided that where the Contractor:

13.4.2.1 is unable or unwilling to promptly do such remedial work; or

13.4.2.2 having been given the opportunity to quote on rectifying that Safety Event, has failed to provide a quote within the time period specified in such request (or in the absence of a specified period within a reasonable period, taking into account the circumstances of such request); or

13.4.2.3 provides a quote within such period but subsequently withdraws the same,

then the Contractor shall release a copy of the Escrow Materials necessary to remedy such Safety Event.

13.5 Transfer of licenses

Each of the licenses granted to the Company by the Contractor under Clause 13.1.3 shall be assignable in whole or in part to any purchaser or transferee or Lender or lessee of all or any of the Locomotives in accordance with Clause 29 (Cession and Assignment), provided that (i) any transferee shall not be a competitor of the Contractor and (ii) any such assignment shall not place any more onerous obligations on the Contractor than existed prior to the assignment. The Company shall ensure that any person to whom the benefit of any licence is assigned takes such assignment subject to the limitations of such licence.

13.6 Intellectual Property Rights Warranties

The Contractor warrants to the Company that:

13.6.1 the Contractor has licensed to the Company all Intellectual Property Rights necessary to use, operate, service and maintain the Locomotives;

13.6.2 the Deliverable Materials and the Technical Materials are sufficient to enable the Company to use, operate, service, maintain, repair and overhaul the Locomotives; and

13.6.3 the design, construction and use of the Locomotives shall not infringe any Intellectual Property Rights of third parties, provided that the Contractor shall have no liability to the Company in respect of any Intellectual Property Rights infringement to the extent that it results from:

13.6.3.1 breach by the Company of the Company's obligations under this Agreement; or

13.6.3.2 Improper Use of the Locomotives; or

13.6.3.3 modifications to the Locomotives other than by or on behalf of the Contractor.

13.7 **Obsolescence**

Either Party shall promptly advise the other if it becomes aware of the obsolescence or scheduled obsolescence of any Component of the Locomotives (including any Component supplied by any of its suppliers). Without derogating from any other obligation of the Contractor under this Clause 13.7, if any Component ordered by the Company becomes obsolete prior to such order, the Contractor shall assist the Company (as the Company may reasonably require) in sourcing such obsolete Component from an alternative supplier.

13.8 **Third Party Intellectual Property**

The Contractor undertakes to obtain, by way of licence or otherwise, the right to use and to license to the Company (without payment of royalty and for the life of the Locomotives) to use (and to grant sub-licences to a Permitted Sub-licensee) all Intellectual Property Rights required by the Contractor for the performance of the Project Documents and by the Company for the licensed purposes set out in Clause 13.1.3.

13.9 **General**

13.9.1 To the extent that any documentation, Software or other material is supplied by, or on behalf of, the Contractor to the Company or installed in or used on the Locomotives in either case in the provision of any service (maintenance or otherwise), that documentation, Software or material shall be deemed to be included in the definition of Deliverable Materials, Technical Materials or Escrow Materials (as applicable) as if the relevant documentation, Software or material was created pursuant to this Agreement and the rights or obligations set out in this Clause 13 shall apply accordingly.

13.9.2 Whenever there is a request from the Relevant Authority that would result in the release to the Relevant Authority of the Escrow Materials, then, where practicable, prior to that release taking place, the Contractor shall be given a reasonable opportunity to discuss the release of those materials directly to the Relevant Authority in such a way that the Contractor is directly in control of and can minimize the adverse consequences of that release. The Contractor shall act in a timely manner in respect of such discussions and disclosures to the Relevant Authority.

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13.10 **Intellectual Property Rights Indemnities**

13.10.1 The Contractor hereby indemnifies the Company for the Company itself, and in respect of any claims arising against the Company under a similar indemnity given or to be given by the Company to its Permitted Sub-licensees in relation to the infringement or alleged infringement of any Intellectual Property Rights of any third party caused by the Company or any of its Permitted Sub-licensees using the licences granted to them in accordance with this Clause 13 except that the Contractor shall not be required to indemnify the Company in respect of modifications made by the Company or any Permitted Sub-licensee to the subject matter of a licence.

13.10.2 The Contractor hereby indemnifies the Company in relation to the infringement or alleged infringement of any Intellectual Property Rights of any third party by the design, construction or use, operation, service, maintenance, repair and overhaul of the Locomotives or any Component thereof except that the Contractor shall not be required to indemnify any person:

13.10.2.1 in respect of (A) modifications made to the Locomotives which are not made by or on behalf of the Contractor, or (B) arising out of Improper Use;

13.10.2.2 to the extent that the infringement or alleged infringement relates to and is caused as a result of use by the Company of material which was not supplied by or on behalf of the Contractor; and

13.10.2.3 to the extent that the infringement or alleged infringement results from breach by the Company of its obligations under this Agreement.

13.10.3 The Contractor shall fully indemnify and keep indemnified the Company within 5 (five) Business Days of demand against any action, claim demand, proceeding, cost, charge or expense (including reasonable legal expenses on an attorney client basis), and against all costs and damages of any kind which the Company may incur in connection with any actual or threatened proceedings before any court or arbitration body, arising from or incurred by the Company by reason of the matter which is the subject of the indemnity in question.

13.10.4 The Contractor shall be entitled to control all proceedings in relation to any claim for which it has granted an indemnity under Clause 13.10.3. Should the Company receive a claim for which it wishes to call upon an indemnity granted under Clause 13.10.3, it must:

13.10.4.1 notify the Contractor promptly of such claim;

13.10.4.2 not admit liability in relation to or settle such claim without the Contractor's prior written consent;

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13.10.4.3 allow the Contractor to conduct or settle such claim as it sees fit; and

13.10.4.4 provide all reasonable assistance to the Contractor in connection with its handling of such claim.

13.10.5 Without prejudice to Clause 13.10.1 where the design or construction of the Locomotives by the Contractor or the use, operation, service, maintenance, repair, overhaul or modification of the Locomotives by the Company in accordance with this Agreement infringes the Intellectual Property Rights of a third party, the Contractor shall promptly and at its cost either:

13.10.5.1 procure the licence of such Intellectual Property Rights to prevent the further infringement of such Intellectual Property Rights on the same terms as the relevant licence set out in Clause 13.1 (without payment (other than by and at the cost of Contractor) of any royalty or similar obligation by any person); or

13.10.5.2 modify the Locomotives so that no Intellectual Property Rights of a third party are infringed (in each case, without the Contractor committing a further breach of its obligations in respect of the Locomotives).

13.11 Escrow Agreement

Save as otherwise expressly set out in this Clause 13, the terms of the Company's (and any Relevant Authority's, if applicable) access to the Escrow Materials are as set out in the Escrow Agreement. The Contractor shall and shall procure that the Escrow Agent shall, enter into the Escrow Agreement as soon as reasonably possibly, but in any event within six months of the Effective Date.

14. Contractor Covenants

14.1 Tax Clearance Certificate

The Contractor shall provide to the Company on each anniversary of the Effective Date, an up-to-date and valid original Tax Clearance Certificate issued by the South African Revenue Service in respect of the Contractor.

14.2 Exchange Control Approval

The Contractor shall provide to the Company evidence reasonably satisfactory to the Company that the Contractor has complied with all applicable requirements of the Exchange Control Department of the South African Reserve Bank, from time to time, in relation to the importation of Components and related goods and services to South Africa in connection with this Agreement and the Contractor's payment obligations in respect thereof.

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14.3 **Key Sub-Contracts**

The Contractor shall:

14.3.1 give written notice to the Company of the identity of the Key Sub-Contractor(s) (and notice in relation to the Key Sub-Contracts as at the Effective Date as set out in Schedule 9 (Key Sub-Contractors) is hereby given); and

14.3.2 give written notice to the Company of the terms of each Key Sub-Contract which relate:

14.3.2.1 to the Master Programme; or

14.3.2.2 the Specification,

together with any changes thereto relating to the Master Programme or Specification from time to time which would affect the Contractor's ability to comply with its obligations under this Agreement.

14.4 **Removal of Personnel**

14.4.1 The Engineer may require the Contractor by written notice to suspend any employee of the Contractor or of any Sub-Contractor from working in connection with this Agreement who, in the reasonable opinion of the Engineer:

14.4.1.1 misconducts himself;

14.4.1.2 is incompetent or negligent in the performance of his duties or any other conditions of this Agreement; or

14.4.1.3 persists in any conduct which is prejudicial to safety or health.

14.4.2 In the event of such request, the Contractor shall take immediate action to arrange for either the removal of such person and replacement by a competent substitute, or the retraining of such person, provide always that the Contractor shall not re-deploy such person until it has demonstrated to the Engineer's satisfaction that such re-training has been successfully completed.

14.4.3 The cost of such removal and replacement or retraining shall be borne by the Contractor.

14.5 **Information, Assistance, Necessary Consents and Personnel**

14.5.1 The Contractor shall make available and provide to the Company (or to such third parties in South Africa as the Company may direct) in a timely manner all assistance, advice, documents, evidence and information which is necessary or desirable for a locomotive manufacturer to provide, and which may from time to time be required under any Legal

Requirement, or Necessary Consent or reasonably requested by the Company, in order:

14.5.1.1 for the Contractor or the Company (depending on which party is required to obtain the same under any Legal Requirement) to obtain any Necessary Consent;

14.5.1.2 to enable the Locomotives to obtain all Necessary Consents to enter revenue earning service;

14.5.1.3 that all such Necessary Consents referred to in Clause 14.5.1.1 and Clause 14.5.1.2, continue to be complied with and maintained in full force and effect in connection with the Locomotives;

14.5.1.4 to enable the Company to address, pursue or settle any dispute with the RSR in connection with the Locomotives; and

or that is otherwise reasonably requested from time to time by the Company in connection with the supply of the Locomotives.

14.5.2 To the extent that, in complying with any such requirement or request in relation to any Locomotive, the Contractor shall incur any costs and expenses, such costs and expenses shall be borne as follows:

14.5.2.1 from and including the Effective Date up to and including the expiry of the Warranty Period in relation to the last Locomotive, by the Contractor; and

14.5.2.2 thereafter, to the extent that such compliance requires not more than five Business Days' work on the part of an appropriately qualified person, by the Contractor or, to the extent that such compliance requires more than five Business Days' work on the part of an appropriately qualified person, by the Company, to the extent that the relevant costs and expenses which are actually incurred by the Contractor exceed those incurred by the Contractor during and in respect of the appropriately qualified person's first five Business Days of work and to the extent that the relevant costs and expenses are evidenced and reasonable.

14.5.3 The Contractor shall also procure that all Sub-Contractors provide such assistance, advice, documents, evidence and information as is referred to in Clause 14.5.1.

14.5.4 The Contractor shall render to the Engineer free of charge:

14.5.4.1 such technical assistance and advice in relation to any Locomotive comprised in any Batch as the Engineer may reasonably require at any time up to the date of issue of an Acceptance Certificate for the last Locomotive comprised in such Batch, solely for the use of or on behalf of the Company; and

14.5.4.2 in accordance with Part 12 (Training) of Schedule 3 (Agreement Management), information in respect of the training of personnel and/or Company Employees by the Contractor.

14.5.5 On the reasonable request of the Company in relation to any Batch, the Contractor shall make available to the Company, free of charge to the Company, personnel of appropriate competence, expertise and qualifications (employed either by the Contractor or any relevant Sub-Contractor) up to the date of issue of the Acceptance Certificate for the last Locomotive comprised in such Batch, for the purposes of dealing with matters referred to in this Agreement. In particular (without limitation) such personnel shall:

14.5.5.1 attend meetings with any Relevant Authority; and

14.5.5.2 provide (as reasonably requested by the Company) reports, information, advice and/or assistance in relation to matters referred to in this Agreement, including (but not limited to) prior to and/or following any such meeting.

14.5.6 The Company shall assist the Contractor in carrying out its obligations under this Clause 14.5, on the reasonable request of the Contractor, by:

14.5.6.1 attending meetings with qualified personnel;

14.5.6.2 providing information; and

14.5.6.3 executing documents,

provided that in each case the extent of such assistance is reasonable in all the circumstances and such attendance, provision of information or execution of documents could not otherwise have been carried out by the Contractor itself.

14.5.7 The Contractor shall ensure that any instructions given by or on behalf of the Company to the Contractor, and which are to be executed by the Contractor or any Sub-Contractor, are executed in a manner that complies with all Necessary Consents.

14.6 **Sufficient Personnel**

14.6.1 For the Agreement Period, the Contractor shall give or provide all necessary superintendence by a suitable number of persons with adequate knowledge of the operations and work required for the provision of the Locomotives, in accordance with this Agreement.

14.6.2 The Contractor shall provide sufficient personnel appropriate to the size, nature and type of work to be carried out under this Agreement and shall provide:

14.6.2.1 such information relating to the organisation, management and supervision of personnel undertaking the Contractor's obligations

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on the Contractor's behalf as reasonably required under this Agreement; and

14.6.2.2 such further information as the Engineer may reasonably request from time to time relating to the organisation, management and supervision of personnel undertaking the Contractor's obligations.

14.6.3 For the Agreement Period, the Contractor shall procure that the Key Personnel devote as much of their working time as is necessary to ensure proper performance of the Contractor's obligations under this Agreement. The Contractor may not make any change in Key Personnel without the consent of the Engineer, not to be unreasonably withheld or delayed, the Engineer having due regard to the qualifications, skills and experience of the proposed successor.

14.7 **Qualifications of Personnel**

The Contractor shall employ or cause to be employed in connection with this Agreement and in the superintendence of its performance only persons who are skilled and experienced in their professions and trades.

14.8 **Documentation and Technical Assistance**

14.8.1 **Records**

14.8.1.1 Without prejudice to Clause 17.1 (Incorporation of Schedule 3 (Agreement Management) and the obligation to comply with Schedule 3 (Agreement Management), the Contractor shall, and shall procure that all its Sub-Contractors shall, maintain a true and correct set of records of personnel and all activities relating to the performance of this Agreement and a complete, up to date and orderly documentary record of all transactions entered into by the Contractor for the purposes of this Agreement, in accordance with and as described in more detail in Schedule 3 (Agreement Management) and maintain all such other information reasonably required by the Engineer and/or specified in this Agreement. All such information, records and documentation envisaged in this clause 14.8.1.1 (Documentation) shall be available at all reasonable times for inspection by the Engineer.

14.8.1.2 Notwithstanding Clause 33.4 (English Language), the Contractor shall be relieved of the obligation to provide documents under this Agreement in the English language where:

14.8.1.2.1 the document originates from a Sub-Contractor who is located in a territory which is not English speaking; and

14.8.1.2.2 the document is not an Operating Manual, technical record or fault finding guide, does not constitute Deliverable Documentation or is not otherwise required to be produced or maintained under any Legal Requirement from time to

time in force in South Africa (whether or not by the Contractor or the Company).

14.8.1.3 Where any document or information which falls within the Escrow Materials is not in the English language and the Company requires access to that document or information as a result of the request of a Relevant Authority acting under Legal Requirement then the Contractor undertakes to produce or procure an accurate translation into the English language of that document or information forthwith upon notice of such requirement by the Company, or the Relevant Authority provided that in the event that such requirement of the Company or the Relevant Authority arises as a result of a Change in Law. Clause 12.2 (Change in Law) shall apply in relation to the cost of the translation.

14.8.2 **Requirements under Schedule 3 (Agreement Management)**

Without prejudice to Clause 14.5 (Information, Assistance, Necessary Consents and Personnel), the Contractor shall prepare and provide to the Company all those parts of the Documentation as are detailed in Schedule 3 Agreement Management, in accordance with the provisions in that Schedule.

14.8.3 **Contractor's Responsibilities re Documentation**

The Contractor shall bear the cost of and be responsible for:

14.8.3.1 correcting any mistake, inaccuracy, discrepancy or omission in the Documentation whether or not the same shall have been approved by the Engineer, without any undue delay; and

14.8.3.2 preparing any of the Documentation or submitting it to the Engineer as a result of any failure of the Contractor properly to prepare any of the Documentation or submit it to the Engineer in due time.

14.8.4 **No Derogation from Contractor's Obligations**

Subject to Clause 17.5 (Effects of Approvals), neither the submission of the Documentation nor review, comment, approval or disapproval by the Engineer of the Documentation (or any part of it) shall relieve the Contractor of any of its responsibilities under this Agreement.

14.8.5 **Retention Period**

The Contractor shall, and shall procure that all Sub-Contractors shall, retain all records referred to in this Clause 14.8 (and any other records which the Contractor is required to keep under this Agreement) for a period of not less than six years after expiry or earlier termination of this Agreement. The Company may audit any and all of those records at any reasonable time upon reasonable notice during the Agreement Period

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and during the six year period following the Expiry Date or earlier termination of this Agreement (as the case may be).

14.9 **Replacement Bond**

14.9.1 If, in relation to any Bond (the **Existing Bond**) a Bond Expiry Date or a Credit Event occurs, the Contractor will:

14.9.1.1 in the case of a Bond Expiry Date, procure the issue of Replacement Bond no later than 20 (twenty) Business Days prior to the occurrence of such Bond Expiry Date; and

14.9.1.2 in the case of a Credit Event, procure the issue of a Replacement Bond no later than 20 (twenty) Business Days after the occurrence of such Credit Event.

14.9.2 Each Replacement Bond shall:

14.9.2.1 be issued on substantially the same, but no less beneficial, terms as the Existing Bond;

14.9.2.2 be issued for an amount not less that the remaining amount required to be guaranteed under such Bond in accordance with the requirements of this Agreement and the Existing Bond; and

14.9.2.3 be effective on and from the Bond Expiry Date or, in the case of Credit Event, by no later than the last day of the period referred to in Clause 14.9.1.2.

14.9.3 The cost of issuing a Replacement Bond shall be borne by the Contractor, including the reasonable costs incurred by the Company where the draft Replacement Bond provided to the Company does not comply with Clause 14.9.2

In this Clause 14.9:

Bond Expiry Date means in relation to any Bond, any date during the Agreement Period on which that Bond terminates and/or expires for any reason whatsoever, other than where the bonded amount (as contemplated and defined in such Bond) is reduced to zero in accordance with its terms.

Credit Event means, in relation to any Bond and for so long as that Bond is in place, the credit rating of the issuer of that Bond falls, at any time, below the minimum credit rating specified in the definition of the relevant Bond (as contained in this Agreement).

Replacement Bond means a replacement Bond issued on the terms set out in this Clause 14.9 and otherwise in compliance with the requirements

of this Agreement by a bank with a credit rating at least equal to the minimum credit rating specified in the definition (contained in this Agreement) applicable to the relevant Bond.

15. Maintenance & Repairs

15.1 Maintenance Services

15.1.1 It is recorded that the Contractor is able to provide comprehensive maintenance services to the Company in respect of the Locomotives.

15.1.2 If the Company so requires by notice in writing to the Contractor, the Contractor shall submit to the Company a detailed proposal for the provision of all maintenance services required under the Maintenance Plan in respect of the Locomotives.

15.1.3 If the Company wishes to implement a proposal by the Contractor for the provision of maintenance services in respect of the Locomotives, it may require that the Parties enter into negotiations for a period of not more than 30 (thirty) Business Days or such longer time as may be agreed in writing with a view to agreeing the terms and conditions of an agreement (the **Maintenance Service Agreement** or **MSA**) to govern the provision of maintenance services by the Contractor to the Company and any consequential amendments to the terms of this Agreement. Each Party undertakes to enter into and conduct such negotiations in good faith.

15.2 Maintenance Plan

15.2.1 The Contractor shall develop a Maintenance Plan which shall consist of two instruction manuals, namely the "*Maintenance and Lubrication Guide*", and the "*Component Overhaul Schedule*" and submit the outline Maintenance Plan for the Company's review in accordance with the timing set out in the Master Programme.

15.2.2 The Engineer shall, if he so chooses, give comments within 10 (ten) Business Days after receipt of the Maintenance Plan. If the Engineer comments on the Maintenance Plan, the Parties shall meet within 10 (ten) Business Days thereafter to review and discuss such comments. To the extent that the Parties agree, as a result of such meeting, that the Maintenance Plan should be revised, the Contractor shall revise the Maintenance Plan within 20 (twenty) Business Days after such meeting. Such revised Maintenance Plan shall constitute the Maintenance Plan for all purposes of this Agreement.

15.2.3 The Contractor shall, on the Company's request provide to the Company all the necessary equipment, at the Contractor's price, in order to enable the Company to implement the Maintenance Plan.

15.3 Repairs

15.3.1 If during the Agreement Period any damage to a Locomotive occurs, arising from an accident or otherwise:

15.3.1.1 the Company shall notify the Contractor in writing of such event,

15.3.1.2 the Company and the Contractor shall jointly and promptly develop a statement of work specifying the work necessary to repair such damage (the **Statement of Work**);

15.3.1.3 the Contractor shall prepare and submit a quote to the Company within the time period specified in the notice referred to in Clause 15.3.1.1 and if no such time period is specified, within a reasonable time period, based on the hourly rates set out in Schedule 17 (Contractor Hourly Labour Rates), taking into account the nature and extent of the repairs specified in the Statement of Work and listing the personnel (including the capacities of such personnel) required to carry out such repairs.

15.3.2 If the quote is accepted by the Company, the Contractor shall commence the repairs at a mutually agreeable time and place.

15.3.3 If the quote is not accepted by the Company, the Company may procure the repair of such damage using the Statement of Work.

15.3.4 The Company shall reimburse the Contractor for all reasonably incurred costs and expenses (accompanied by reasonably detailed supporting evidence thereof) incurred in the preparation of the Statement of Work.

16. Spares, Change-Out Spares, Tools and Test Equipment

16.1 Spares

16.1.1 The Contractor and the Company shall consult with each other with a view to agreeing, as soon as reasonably practicable after the Effective Date but in any event no later than 30 days after finalisation of the design of the Locomotives in accordance with Part 6 (Design Process) of Schedule 3 (Agreement Management), a master spares list setting out the type, quantity and price of Spares to be purchased by the Company and provided by the Contractor to the Company under this Agreement, such list, once finalised, to be attached to this Agreement as Part 1 of Schedule 6 (Spares, Tools and Test Equipment) (the **Master Spares List**).

16.1.2 The Contractor shall compile the Master Spares List in accordance with the following principles:

16.1.2.1 each Spare shall bear an individual part number (**Part Number**);

16.1.2.2 each Spare shall be priced and identified separately on the Master Spares List;

16.1.2.3 the price for each Spare shall be inclusive of VAT and quoted on an as delivered basis, inclusive of all necessary postage, packaging, carriage, insurance and freight costs and any custom

duties and *ad valorem* duties paid on their importation if applicable (the Spares Sale Price);

16.1.2.4 the Master Spares List shall specify:

16.1.2.4.1 the delivery lead time for each Spare;

16.1.2.4.2 the anticipated annual usage of all Spares; and

16.1.2.4.3 the required float size in respect of Spares necessary for the proper maintenance of the Locomotives in accordance with the Manuals, including, without limitation, to ensure sufficient Spares to support future component overhauls or contingency components with long delivery lead times; and

16.1.2.4.4 each Spare comprising the Initial Spares Order (defined below) including any capital spare shall be identified.

16.1.3 The Spares Sale Price shall be fixed for the first 12 months (such period commencing on the Effective Date and thereafter indexed.

16.1.4 The anticipated annual usage of the Spares and the required float size may, in consultation with the Company, be adjusted by the Contractor based on the Maintenance Plan (once agreed) and taking into account actual usage of the Locomotives by the Company and the operating conditions of the Locomotives.

16.1.5 Subject to Clauses 16.1.3 and 16.1.4, once agreed in accordance with Clause 16.1.1, the Master Spares List may not be varied, amended and/or supplemented without the prior written consent of the Company (such consent not to be unreasonably withheld or delayed).

16.1.6 The Company may order and purchase and the Contractor shall procure the availability, sell and deliver to the Company the Spares so ordered, in accordance with this Clause 16.1.

16.1.7 The Contractor and the Company shall consult with each other with a view to agreeing, as soon as reasonably practicable after the Effective Date an Initial order of Spares (including capital spares) setting out the type and quantity thereof up to the value set out in Schedule 1 (Pricing and Payment Terms) (the Initial Spares Order).

16.1.8 The Company shall purchase and the Contractor shall sell and deliver to the Company, the Spares listed in the Initial Spares Order in accordance with Schedule 1 (Pricing and Payment Terms).

16.1.9 In addition to the Initial Spares Order, the Company may, from time to time, order and purchase Spares by written notice to the Contractor, specifying the type and quantity of the Spares so ordered.

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16.1.10 Within 5 (five) Business Days of receipt of any order referred to in Clause 16.1.7, the Contractor shall confirm receipt of such order and the expected date for delivery of each of the Spares so ordered.

16.1.11 The Contractor shall Deliver the Spares to the Company at the Delivery Point in the quantities so ordered and within a period which corresponds to the delivery lead time specified for the items so ordered in the Master Spares List, or if no such lead time is specified within a reasonable period.

16.1.12 The Contractor shall design, manufacture, engineer, supply, test, commission, sell, deliver, provide, modify and/or alter the Spares:

16.1.12.1 such that the Spares do not prejudice compliance of the Locomotives to which such Spares are fitted or to be fitted with the Specification for such Locomotive and so as not to prejudice the design life of the Locomotives specified in Clause 5 (Contactor's Principal Obligators);

16.1.12.2 in accordance with all due skill, care, diligence, prudence and foresight to be expected of appropriately qualified and experienced professional designers and engineers with experience in carrying out work of a similar scope, type, nature and complexity to that required under this Agreement;

16.1.12.3 in accordance with, and so that the Spares shall function in accordance with, the best modern design and engineering principles and practices in the activity concerned;

16.1.12.4 in a safe manner and free (to the extent possible using the best modern design and engineering principles and practices) from any material risk to the health and well-being of persons using, operating or maintaining, or involved in the management of the Spares, free from any material risk of pollution, nuisance, interference or hazard;

16.1.12.5 using materials and goods which are new and of sound, good and satisfactory quality such that the Spares will be of new manufacture and of sound, good and satisfactory quality;

16.1.12.6 in accordance with the best modern principles and practices in the activity concerned and Good Industry Practice) and all Legal Requirements; and

16.1.12.7 so that each Spare is fit for operation and/or use for the purposes of enabling the Company to use the Locomotive in revenue service.

16.1.13 The Contractor:

16.1.13.1 confirms to the Company that all Spares shall have the benefit of the warranty regime substantially on the terms set out in Clause 10 (Warranty Regime);

16.1.13.2 shall ensure that all Spares are supplied to the same design including and all modifications as the Components fitted to the Accepted Locomotives;

16.1.13.3 shall ensure that any and all modifications carried out to the Locomotives by the Contractor are also applied to the Spares; and

16.1.13.4 shall maintain records of these modifications undertaken by the Contractor and the resulting configuration.

16.1.14 Notwithstanding anything to the contrary contained in this Agreement, the Parties acknowledge and agree that the Company may, after expiry of the Agreement Period and at any time thereafter, purchase Spares directly from the original equipment manufacturer or supplier of that Spare.

16.2 **Change-out Spares**

16.2.1 The Contractor shall at all times during the Fleet Defect Protection Period, provide, maintain and replenish from time to time, at the expense and risk of the Contractor, a quantity and variety of Spares as is necessary to:

16.2.1.1 enable the Contractor to repair any Defect and to perform its other obligations under Clause 10 (Warranty Regime);

16.2.1.2 enable the Contractor to perform its obligations under Clause 11 (Mission Reliability and Fleet Availability); and

16.2.1.3 ensure that no failure to meet the Fleet Availability Target under Clause 11 (Mission Reliability and Fleet Availability) arises as a result of the unavailability of such Spares (the **Change-out Spares**).

16.2.2 All Change-out Spares shall be stored at the Delivery Point.

16.2.3 The Company shall be entitled to inspect and audit the Change-out Spares and their values from time to time. Without prejudice to such rights of the Company, the Contractor agrees to promptly deliver to the Company on prior written request an inventory of Change-out Spares together with a written confirmation that such inventory is accurate as of the date such inventory was generated.

16.2.4 On expiry of the Fleet Defect Protection Period, the Contractor shall offer for sale to the Company any Change-Out Spares remaining at the end of such period on such terms as the Contractor and the Company may agree.

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16.3 **Tools and Test Equipment**

16.3.1 The Company and the Contractor shall consult with each other with a view to agreeing, as soon as reasonably practicable after the Effective Date but in any event no later than 30 days after finalisation of the design of the Locomotives in accordance with Part 6 (Design Process) of Schedule 3 (Agreement Management), on the type, quantity and price of Tools and Test Equipment to be provided to the Company by the Contractor under this Agreement, which will be reflected in an agreed list drawn up by the Contractor and delivered to the Company, such list, once finalised, to be attached to this Agreement as Part 2 (Tools) and Part 3 (Test Equipment) of Schedule 6 (the **Master Tools and Test Equipment List**).

16.3.2 The Contractor shall compile the Master Tools and Test Equipment List in accordance with the following principles:

16.3.2.1 each Tool and item of Test Equipment shall be priced and identified separately on the Master Tools and Test Equipment List; and

16.3.2.2 the quantity to be ordered of Tools and Test Equipment shall be determined by the Contractor (in consultation with the Company), provided that the total value of the priced Master Tools and Test Equipment List shall not exceed the Recommended Tools Value (in the case of the Tools) and the Recommended Test Equipment Value (in the case of the Test Equipment) in, each case, as defined in Schedule 1 (Pricing and Payment Terms).

16.3.3 The Company shall purchase and the Contractor shall procure the availability, sell and deliver to the Company, the Tools and Test Equipment listed in the Tools and Test Equipment Order in accordance with Schedule 1 (Pricing and Payment Terms).

16.3.4 The Company may, from time to time, order and purchase additional Tools and Test Equipment by written notice to the Contractor, specifying the type and quantity of Tools and/or Test Equipment so ordered.

16.3.5 The Contractor shall Deliver the Tools and Test Equipment to the Company at the Delivery Point in the quantities so ordered and within a period which corresponds to the delivery lead time specified for the items so ordered in Part 2 (in the case of Tools) and Part 3 (in the case of Test Equipment) of Schedule 6 (Spare, Tools and Test Equipment), or if no such lead time is specified within a reasonable period.

16.4 **General**

16.4.1 **Inspection**

16.4.1.1 Upon arrival of any Spare, Tool or Test Equipment at the Delivery Point, the Contractor shall present the same to the Company or, if so requested by the Company, to the Company's nominee (the

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Relevant Person) for verification of correct items and quantities, and of condition.

16.4.1.2 The Relevant Person shall sign a delivery note in respect of those Spares, Tools and Test Equipment complying with the quantities, quality and condition required under this Agreement. Signature of such delivery note shall, for all purposes of this Agreement, constitute Acceptance of that Spare, Tool or item of Test Equipment (as applicable).

16.4.1.3 If, in the reasonable opinion of the Relevant Person, any Spare, Tool or item of Test Equipment delivered is not of the type and in the quantity ordered or is not in compliance with the condition required under this Agreement condition, the Relevant Person shall issue a rejection certificate in respect of the relevant Spare, Tool or Test Equipment stating the reasons for its rejection.

16.4.1.4 Upon the Company issuing of a rejection certificate under Clause 16.4.1.3, the Contractor shall remove the relevant Spare, Tool or Test Equipment (as applicable) from the Delivery Point and substitute such rejected Spare, Tool or Test Equipment as soon as reasonably practicable with Spares, Tools and/or Test Equipment capable of being accepted pursuant to Clause 16.4.1.3, and present such substitute Spare, Tool or Test Equipment to the Relevant Person for verification and inspection, whereupon the procedure contemplated by Clauses 16.4.1.2 and 16.4.1.3 shall recommence.

16.5 **Risk**

All risk of loss, theft or damage to any Spare, Tool or Test Equipment shall pass to the Company on signature of a delivery note in respect of such Spare, Tool or Test Equipment (as applicable).

16.6 **Title Transfer**

The Contractor shall transfer title to all Spares, Tools and Test Equipment with full title guarantee, free from any encumbrance (other than any encumbrance created by the Company), by physical delivery at the Delivery Point upon payment, in accordance with Schedule 1 (Pricing and Payment Terms) of the amount for such Spare, Tool or Test Equipment.

17. Contract Management

17.1 Incorporation of Schedule 3 (Agreement Management)

The Company and the Contractor will comply with all of their respective obligations set out in Schedule 3 (Agreement Management).

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17.2 **Obligations Cumulative**

Each of the Contractor's and the Company's obligations in Schedule 3 (Agreement Management) are in addition to, and shall not limit, its other obligations under this Agreement. Satisfactory performance of its obligations under Schedule 3 (Agreement Management) (or any of them) shall not discharge the Contractor or, as the case may be, the Company from any failure to perform its other obligations under this Agreement.

17.3 **Contractor's Obligations not Affected**

Without prejudice to the Contractor's rights under Clauses 9.9 (Potential Grounds for Extension) and 21.8 (Damages), no act of, or omission by, the Engineer in performing any of his duties under and in accordance with this Agreement shall operate to relieve the Contractor of any of the duties, responsibilities, obligations or liabilities imposed on the Contractor by any of the provisions of this Agreement.

17.4 **Reasonable Exercise of Engineer's Discretions**

Wherever in this Agreement the Engineer is required to make any determination or to exercise his discretion by the giving of decisions, opinions or consents or to express satisfaction or approval or otherwise take any action, the Engineer shall exercise such discretion fairly and reasonably within the terms of this Agreement (save where this Agreement expressly states that he or it is to have absolute or sole discretion), and having regard to all the circumstances provided that it shall not be unfair or unreasonable for the Engineer to refuse to issue an Acceptance Certificate if the conditions of Clause 7.2.6 (Acceptance) are not met.

17.5 **Effect of Approvals**

17.5.1 Where the Company, the Engineer or the Engineer's Representative (or the agent of any of them) has become obliged to issue a certificate in accordance with this Agreement or any other Project Document, it shall do so promptly and in any event within five Business Days of having become so obliged. Provided all the criteria have been met for the issuance of such certificate in accordance with this Agreement, such certificate shall be deemed to have been signed and issued by the Company, the Engineer, the Engineer's Representative or the relevant agent (as applicable) on expiry of such five Business Day period.

17.5.2 Any approval, consent or certificate given or issued by the Company, the Engineer or Company Representative (or agent of any of them) under and in accordance with this Agreement or any other Project Document shall take effect in accordance with its terms but shall not relieve the Contractor from any liability to the Company arising out of, or connected with, the performance or non-performance of the Contractor's obligations under this Agreement, except that the issue of an approval, consent or certificate shall constitute discharge by the Contractor of its obligation to obtain such approval, consent or certificate.

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17.6 **Third Party Instructions**

Notwithstanding any other provision of this Agreement, the Contractor undertakes that it shall not accept any instructions from any Relevant Authority which, if implemented, could cause a Variation to the Specification or to any other provision of this Agreement unless:

17.6.1 the Project Manager has given his prior written consent (such consent not to be unreasonably withheld or delayed); or

17.6.2 the acceptance of instructions is required by the provisions of any Legal Requirements, in which case the Contractor undertakes to give notice to the Company of the acceptance of instructions as soon as is reasonably practicable.

17.7 **Payment of Penalties**

17.7.1 The Contractor shall pay any Penalty incurred by it under and in accordance this Agreement (as indicated in the relevant Penalty certificate where applicable) within 10 (ten) Business Days of the Company issuing a Tax Invoice to the Contractor for the amount set out in that certificate. If the Contractor disputes the incurral, or the amount, of any Penalty levied by the Company under this Agreement, the matter will be treated as a Dispute in accordance with Clause 26 (Dispute Resolution) and the Contractor shall pay such amount to the Company in accordance with this Clause 17.7 (notwithstanding such Dispute). If such Dispute is determined substantially in favour of the Contractor, the Company shall repay to the Contractor an amount equal to the Penalties so paid (or that portion of the Penalties which were found not to have been validly incurred by the Contractor), together with interest at the Prime Rate on such amount from the date of payment of such Penalty by the Contractor to the date of reimbursement of such Penalty (or portion thereof) by the Company.

17.7.2 Should the Contractor fail to pay any Penalty in accordance with Clause 17.7.1, such amount shall be regarded as a matured obligation due by the Contractor for the purposes of Clause 8.9 (Set-Off) and the Company shall be entitled to deduct the amount not paid by the Contractor from the next Milestone Payment or any other payment or amount then due by the Company to the Contractor.

18. **Responsibility for the Locomotives and Insurance**

18.1 **General Obligations**

The Contractor shall be responsible for each Locomotive completely manufactured or in the course of manufacture and for all materials acquired by or delivered to the Contractor or any Sub-Contractor in connection with this Agreement whether the property of the Contractor or any Sub-Contractor or the Company whether on the Contractor's, or any Sub-Contractor's, premises or in transit until such time as risk in the relevant Locomotive passes to the Company in accordance with Clause 8 (Risk, Title Transfer and Payments)

(but without prejudice to Clause 10 (Warranty Regime)) The Contractor shall be responsible for the replacement of each Locomotive or part thereof or material which shall be lost, destroyed or damaged by any cause whatsoever prior to the passing of risk in relation to such Locomotive in accordance with Clause 8 (Risk, Title Transfer and Payments).

18.2 **Scope of Coverage**

The Contractor shall, at its own expense, provide and maintain as a minimum the following cover in form and substance satisfactory to the Company:

18.2.1 in the name of the Contractor (and provided, always, that the Company is named as an additional insured thereunder), **Property Damage Insurance** against destruction, damage or loss from any cause whatsoever of the Locomotives, whether completely manufactured or in the course of manufacture and all materials, equipment, machinery, spares and other items acquired by or delivered to the Contractor or any Sub-Contractor in connection with this Agreement and shall keep them so insured for the full replacement value of such Locomotives and materials in accordance with Clause 18.3 (Duration).

18.2.2 in the name of the Contractor (and provided, always, that the Company is named as an additional insured thereunder), **Marine and Air Cargo Insurance** (including all risks property insurance for all insurable risks of physical loss or damage) in respect of the Locomotives, whether completely manufactured or in the course of manufacture and all materials, equipment, machinery, spares and other items in connection with this Agreement whilst in transit or temporary storage en route from country of origin anywhere in the world until completion of unloading at the Delivery Point;

18.2.3 in the name of the Contractor (and provided, always, that the Company is named as an additional insured thereunder), insurance in terms of the provisions of the **Compensation for Occupational Injuries and Diseases** Act No. 130 of 1993 as may be amended or in terms of any similar Workers Compensation and Unemployment Insurance enactments in the Contractor's or Subcontractor's operational, manufacturing or assembly locations (the **Facilities**);

18.2.4 **Production Insurance** cover for the Locomotives;

18.2.5 **Third Party Liability Insurance** in form and substance satisfactory to the Company in an amount not less than R1,000,000 (one million) in respect of each and every occurrence. The Contractor shall procure that such third party liability insurances are in place no later than 3 (three months) prior to Handover of the first Locomotive.

18.3 **Duration**

The Contractor shall procure that the insurances described in Clause 18.2 (Scope of Coverage) are in place no later than the date of this Agreement and in each case remains in effect in respect of each Locomotive until risk in that

Locomotive passes to the Company in accordance with Clause 8 (Risk, Title Transfer and Payments) or in the case of the insurances described in paragraphs 18.2.4 and 18.2.5, until an Acceptance Certificate is issued in respect of the final Locomotive.

18.4 **Policies and Premium Receipts**

The Contractor shall:

18.4.1 provide to the Company on the date and promptly on request from time to time a certificate of insurance or other evidence satisfactory to the Company that the insurances required by this Clause 18 are in force and properly maintained in accordance with this Agreement;

18.4.2 ensure that all potential and appointed Sub-Contractors are aware of the whole contents of this Clause 18; and

18.4.3 enforce the compliance by Sub-Contractors with this Clause 18 where applicable.

18.5 **Insurance Proceeds**

18.5.1 All monies received under any policy or policies of insurance in respect of destruction or damage or loss of any Locomotives or materials as described in Clauses 18.2.1 and 18.2.2 or such proportion of the monies received as is applicable thereto, shall be applied by the Contractor in or towards the replacement of such Locomotives or materials lost, destroyed or damaged, but this provision shall not affect the Contractor's liability under this Agreement.

18.5.2 In respect of any amount which becomes payable as a result of a claim in respect of public liability insurances, the amount of any deductible shall be paid directly to the relevant insurer to facilitate settlement of that claim.

18.5.3 **Third Party Liability Insurance for Drivers**

The Contractor shall, at its cost and expense, procure that such insurances in respect of the Company's Train Drivers in each Contractor Facility are effected by the Effective Date, and are maintained for such period as training for Train Drivers takes place at such facility pursuant to the terms of this Agreement.

19. **Training**

The Company and the Contractor shall comply with their respective obligations set out in Part 12 (Training) of Schedule 3 (Agreement Management).

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20. Socio-Economic Obligations

20.1 Supplier Development

20.1.1 It is a fundamental requirement of the RFP that the Contractor contributes to the Supplier Development Programme, as applied by Transnet SOC Ltd.

20.1.2 In response to this requirement, the Contractor undertakes to implement the SD initiatives described in Part 1 (SD Bid Document) of Schedule 4 (Socio-Economic Obligations).

20.2 Not Used

20.3 Broad-based Black Economic Empowerment

20.3.1 It is a fundamental requirement of the RFP that the Contractor complies with its social obligations with respect to the government's Broad-based Black Economic Empowerment (B-BBEE) policy.

20.3.2 In response to this requirement, the Contractor undertakes to implement and comply with the Further Recognition Development Commitments, the contents of which are described in Part 1 (SD Bid Document) of Schedule 4 (Socio-Economic Obligations).

20.3.3 Without derogating from the generality of Clause 20.3.2, the Contractor shall at all times maintain, as a minimum, a Level 4 accreditation (measured in terms of the Department of Trade and Industry B-BBEE Codes of Good Practice). Throughout the Agreement Period, the Contractor shall provide to the Company as soon as reasonably possible (but in any event no later than 10 Business Days) after each anniversary of the Effective Date, an up-to-date and valid B-BBEE accreditation certificate in respect of the Contractor, evidencing compliance with the covenant contained in this Clause 20.3.3.

20.4 SD Plan & CCS Plan

20.4.1 The Contractor shall develop and present to the Company, in writing, a detailed plan (in relation to the Supplier Development Programme, the SD Plan and in relation to the Climate Change Strategy, the CCS Plan and together, the Plans) setting out the nature, extent and estimated monetary value of the SD and CCS commitments which the Contractor is prepared to undertake, the details as to how the Contractor proposes to achieve such commitments as well as mechanisms and procedures to allow for access to information and verification of the Contractor's compliance with the respective Plans.

20.4.2 The terms of the Plans and monetary value of the commitments thereunder shall not (unless otherwise agreed in writing) be more onerous to the Contractor or be less or less favourable to the Company than:

20.4.2.1 in the case of the SD Plan, the commitments made by the Contractor in Part 1 (SD Bid Document) of Schedule 4 (Socio-Economic Obligations); and

20.4.2.2 in the case of the CCS Plan, the commitments made by the Contractor in Part 2 (CCS Bid Document) of Schedule 4 (Socio-Economic Obligations).

20.4.3 The Parties undertake to negotiate in good faith with a view to agreeing the content of the Plans by no later than the date which falls 120 (one hundred and twenty) Business Days after the Effective Date (or such later date as the Company may consent to in writing).

20.4.4 If the Parties (acting reasonably and in good faith with due consideration to the initiatives proposed by the Contractor in Schedule 4 (Socio-Economic Obligations) fail to reach agreement on either of both Plans within 120 (one hundred and twenty) Business Days of the Effective Date, it shall constitute a Contractor Event of Default and Clause 21.4 (Breach and Termination) shall apply.

20.4.5 The Contractor shall for the duration of this Agreement comply with each of the Plans and the Further Recognition Development Commitments. Each Plan and the Further Recognition Development Commitments may be updated (subject to Clause 20.4.2) from time to time by agreement between the Parties without the need to amend this Agreement.

20.4.6 The Contractor shall:

20.4.6.1 monitor, audit, and record in an auditable manner, its own implementation and compliance with the Plans and the Further Recognition Development Commitments; and

20.4.6.2 provide the Engineer with such information as the Engineer may reasonably request concerning the implementation by the Contractor thereof.

20.4.7 The Engineer must report to the Contractor and the Company at the end of every 3 (three) months as to whether or not the Engineer reasonably considers, based on the information available to it, that the Contractor has during such time complied with the Plans and the Further Recognition Development Commitments and the extent, if any, to which the Contractor has not so complied.

20.4.8 Without prejudice to the Company's rights under Clause 21:

20.4.8.1 if the Engineer reasonably considers that the Contractor is not at any time complying with any Plan or the Further Recognition Development Commitments, the Engineer may make such recommendations as he considers reasonably appropriate to the Contractor as to the steps he reasonably considers should be taken by the Contractor in order for the Contractor to remedy such non-compliance and the time period within which such steps must

be taken. If such recommendations are not implemented by the Contractor in accordance with such recommendations, then the Engineer must report that non-compliance to the Company;

20.4.8.2 the Company may, at any time, request a meeting with the Contractor to consider any non-compliance reported to it by the Engineer or which otherwise comes to its attention. Both Parties must attend such a meeting and negotiate in good faith with a view to reach agreement on the steps or actions that the Contractor must undertake in order to remedy that non-compliance.

20.5 Non Compliance Penalties

20.5.1 If the Contractor fails, at any time, to achieve its commitments under and in accordance with any Plan or under the Further Recognition Development Commitments, including any recommendations of the Engineer under Clause 20.4.8.1 (a Non Compliance), the Contractor shall, subject to Clause 20.7 (Non Compliance Penalty Cap), pay a Non Compliance Penalty to the Company in respect of such Non Compliance at the Applicable Rate.

20.5.2 Non Compliance Penalties shall be calculated as a percentage of the SD Value attributable to the unperformed commitment of the Contractor under the relevant Plan as at the date on which such Non-Compliance Penalty is calculated, and accrue at the Applicable Rate per week until:

20.5.2.1 the date on which the Contractor has remedied such Non Compliance by complying with the relevant Plan and/or the Further Recognition Development Commitments(as applicable); or if earlier

20.5.2.2 the date on which this Agreement is terminated pursuant to Clause 21.1.6 (Contractor Default).

20.6 Rate of Non Compliance Penalties

20.6.1 In relation to each Plan, Non Compliance Penalties shall accrue at the following Applicable Rates:

20.6.1.1 for the first week (or part thereof), a rate of 1.00 (one) per cent per annum calculated in accordance with Clause 20.5.2;

20.6.1.2 for the second week (or part thereof), a rate of 2.00. (two) per cent per annum calculated in accordance with Clause 20.5.2;

20.6.1.3 for the third week (or part thereof), a rate of 3.00 (three) per cent per annum calculated in accordance with Clause 20.5.2;

20.6.1.4 for the fourth week (or part thereof), a rate of 4.00 (four) per cent per annum calculated in accordance with Clause 20.5.2; and

20.6.1.5 for any period of Non Compliance after the fourth week a rate of 5.00 (five) per cent per annum calculated in accordance with Clause 20.5.2.

20.6.2 In relation to the Further Recognition Development Commitments, Non Compliance Penalties shall accrue at the following Applicable Rates:

20.6.2.1 for the first week (or part thereof), a rate of 2.0 (two) per cent per annum of the SD Value;

20.6.2.2 for the second week (or part thereof), a rate of 4.00 (four) per cent per annum of the SD Value;

20.6.2.3 for the third week (or part thereof), a rate of 6.00 (six) per cent per annum of the SD Value;

20.6.2.4 for the fourth week (or part thereof), a rate of 8.00 (eight) per cent per annum of the SD Value; and

20.6.2.5 for any period of Non Compliance after the fourth week, a rate of 10.00 (ten) per cent per annum of the SD Value.

20.7 **Non Compliance Penalty Cap**

The maximum amount of the Contractor's liability to pay Non Compliance Penalties under this Clause 20 shall not exceed:

20.7.1 in the case of either Plan, 2.5 (two and half) per cent of the SD Value; and

20.7.2 in the case of the Further Recognition Development Commitments, 7.5 (seven and a half) per cent of the SD Value,

(each a **Non Compliance Penalty Cap**).

20.8 **Non Compliance Penalty Certificate**

20.8.1 If any Non Compliance Penalty arises, the Engineer shall issue a Non Compliance Penalty Certificate on the last day of each week during such Non Compliance indicating the Non Compliance Penalties which have accrued during that period.

20.8.2 A Non Compliance Penalty Certificate shall be *prima facie* proof of the matters to which it relates. If the Contractor disputes any of the amounts set out in a Non Compliance Penalty Certificate the dispute shall be resolved in accordance with Clause 26 (Dispute Resolution).

20.9 **Payment of Non Compliance Penalties**

20.9.1 Subject to Clause 20.8.2, the Contractor shall pay the Non Compliance Penalties indicated in the Non Compliance Penalty Certificate within 10

(ten) Business Days of the Company issuing a Tax Invoice to the Contractor for the amount set out in that certificate. If the Company does not issue a Tax Invoice to the Contractor for Non Compliance Penalties accrued during any relevant period, those Non Compliance Penalties shall be carried forward to the next period.

20.9.2 The Contractor shall pay the amount due under Clause 20.5 within 10 days after receipt of an invoice from the Company, failing which the Company shall, without prejudice to any other rights of the Company under this Agreement, be entitled to call for payment under the SD Bond.

20.9.3 Should the Contractor fail to pay any Non Compliance Penalties within the time indicated in Clauses 20.9.1 or 20.9.2 (as applicable), the Company shall, without prejudice to any other rights of the Company under this Agreement, be entitled to:

20.9.3.1 deduct the amount not paid by the Contractor from the next Milestone Payment; and/or

20.9.3.2 claim the amount not paid or deducted from the next Milestone Payment under the SD Bond.

20.9.4 The Non Compliance Penalties set forth in this Clause 20 are stated exclusive of VAT. Any VAT payable on Non Compliance Penalties will be for the account of the Contractor.

20.10 **Exclusive Remedy**

20.10.1 The Contractor's obligation to pay Non Compliance Penalties constitutes the entire liability of the Contractor and rights of the Company arising out of or attributable to such non-compliance, provided that limitation shall not limit, prejudice or derogate from:

20.10.1.1 the Company's rights under Clause 21.4 (Consequences of Contractor Default) and 21.7 (Final Accounts) in circumstances where the relevant Non Compliance Penalty Cap has been reached as contemplated in Clause 21.1.6 (Contractor Default); and

20.10.1.2 the Company's rights under this Agreement in respect of any other breach or non-performance by the Contractor of its obligations under this Agreement.

20.10.2 Provided that the Contractor pays the amount under Clause 20.9 (Payment of Non Compliance Penalties), the Company shall not be entitled to terminate this Agreement.

20.10.3 The Contractor acknowledges that the payments under Clause 20.9 (Payment of Non Compliance Penalties) represent a genuine pre-estimate of the prejudice suffered by the Company

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20.11 **B-BBEE and Contractor Corporate Structure**

20.11.1 The factors which influenced the Company's decision to enter into this Agreement with the Contractor include, *inter alia*, the corporate and organisational structure of the Contractor and the way in which it facilitates B-BBEE participation.

20.11.2 The Contractor must notify the Company forthwith of any change in the relative Participation Interests and provide to the Company any information which it may reasonably require (which the Contractor is reasonably able to provide) in respect of any actual or (if the Contractor has knowledge thereof) proposed acquisition, disposal, transfer or other change of ownership of a legal or beneficial interest in the Contractor or the BEE Party.

20.11.3 The Contractor will not implement or permit to occur to any material change in the Participation Interests without the Company's written consent, not to be unreasonably withheld or delayed. It shall be reasonable for the Company to withhold its consent to a proposed change in Participation Interests, if the proposed transferee or holder of any new Participation Interests does not meet the contracting policy requirements of the Company from time to time or adversely effects (or reasonably likely to adversely affect) the Contractors commitments (or the achievement of such commitments) under the Further Recognition Development Commitments. The Company shall notify the Contractor whether it consents to the transfer of Participation Interests within 20 (twenty) Business Days having received notice thereof from the Contractor.

20.11.4 Notwithstanding Clause 20.11.3, the Company shall not unreasonably refuse its consent to any change of relative Participation Interests which involves the transfer of Participation Interests to Black Persons intended to produce compliance with the Further Recognition Development Commitments.

20.11.5 The Contractor shall procure that the Guarantor notifies the Company of any material change in the ownership interests of the Guarantor in any South African subsidiary which is a member of the Contractor.

For purposes of this Clause, material change means any direct or indirect change in part and/or in aggregate at any time over the duration of the Agreement involving 15% of the total Participation Interests of the Contractor and includes a change involving the encumbrance of Participation Interests or the legal and beneficial ownership of the BEE Party.

21. **Breach and Termination**

21.1 **Contractor Default**

Each of the following events or circumstances is a **Contractor Default:**

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21.1.1 the Contractor fails to commence the Works within 30 (thirty) days of the agreed date for commencement in accordance with the Master Programme or such extended date as agreed between the Parties in accordance with the terms of this Agreement; or

21.1.2 the Parties fail to reach agreement on either Plan in accordance with Clause 20 (Socio-Economic Obligations); or

21.1.3 the Contractor commits any other material breach or persistent breach of the terms of the Project Documents (other than as referred to elsewhere in this Clause 21.1 or where expressly described as an event of default of the Contractor (howsoever defined) under that Project Document); or

21.1.4 if, at any time and in relation to any Batch:

21.1.4.1 more than 20 (twenty) per cent. of the Locomotives in such Batch have not been Commissioned within 30 days of their Scheduled Handover Dates;

21.1.4.2 more than 20 (twenty) per cent. of the Locomotives in such Batch are Failed Locomotives; or

21.1.5 if in relation to any Batch, the aggregate of the Delay Penalties paid and/or due and payable by the Contractor under Clause 9 (Delayed and Early Delivery) (whether or not paid) equal or exceed the Delay Penalty Cap for such Batch;

21.1.6 if the aggregate of the Non Compliance Penalties paid and/or due and payable by the Contractor under Clause 20.5 (Non Compliance Penalties) (whether or not paid) equal or exceed the applicable Non Compliance Penalty Cap,

and, in each case if capable of being remedied, fails to remedy such breach within 20 Business Days of the earlier of the Company giving notice of the breach to the Contractor or the Contractor becoming aware of such breach; or

21.1.7 the Contractor fails to comply with any of its payment obligations under this Agreement such that an undisputed sum in an aggregate amount of at least R500,000 is outstanding for a period of at least 5 Business Days after the Due Date (or Due Dates) relating to such aggregate amount; or

21.1.8 a cession or assignment of the rights and/or obligations of the Contractor under this Agreement occurs in breach of Clause 29 (Cession or Assignment); or

21.1.9 a Security Document is breached or repudiated by the party providing such security or it is or becomes unlawful for a party to a Security Document to perform any of its obligations under those documents or instruments, or any of them becomes ineffective or unenforceable or is alleged by such party to have become ineffective or unenforceable; or

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21.1.10 any Bond terminates or expires or a Credit Event in relation to the issuer of that Bond occurs, in either case, in circumstances where no Replacement Bond is provided to the Contractor in accordance with Clause 14.9 (Replacement Bond);

21.1.11 the Contractor repudiates or rescinds a Project Document or evidences an intention to repudiate or rescind a Project Document or abandons the manufacture of the Locomotives;

21.1.12 an Insolvency Event occurs in respect of the Contractor, the Guarantor or any other party to a Security Document; or

21.1.13 any representation or warranty made by the Contractor in terms of Clause 3 (Representations and Warranties) or by the Guarantor in terms of clause 3 (Representations and Warranties) of the Parent Guarantee is or proves to be incorrect or misleading in any material respect when made or deemed to be repeated.

21.2 **Company Default**

Each of the following events or circumstances is a **Company Default**:

21.2.1 an Insolvency Event occurs in respect of the Company; or

21.2.2 the Company fails to comply with any of its payment obligations under this Agreement on the due date for payment such that an undisputed sum in an aggregate amount of at least R5,000,000 is outstanding for a period at least 5 Business Days after the Due Date (or Due Dates) relating to such aggregate amount. This Clause 21.2.2 shall not apply to a payment default under Clause 8.15 (Unlawful claims).

21.3 **No-Fault Termination Events**

Each of the following events or circumstances is a **No-Fault Termination Event**:

21.3.1 a Force Majeure Event; and

21.3.2 where this Agreement is terminated under Clause 33.8.5 (Illegality).

21.4 **Consequences of Contractor Default**

21.4.1 If a Contractor Default has occurred and is continuing, the Company shall be entitled, without prejudice to any other rights or remedies it may have in law:

21.4.1.1 to terminate this Agreement (in whole or in part in respect of any Locomotive) with immediate effect by written notice to the Contractor; or

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21.4.1.2 serve written notice of default on the Contractor requiring the Contractor, at the option of the Company, to either:

21.4.1.2.1 remedy such breach or circumstance referred to in that notice of default within 20 (twenty) Business Days of that notice (or such longer period as may be agreed in writing by the Company in its absolute discretion); or

21.4.1.2.2 within 5 (five) Business Days after that notice, to put forward a reasonable programme to remedy the breach or circumstance, such programme to be in writing and to specify the proposed remedy in reasonable detail and the latest date by which it is proposed that that remedy shall be completed,

and if either of the time periods set out in Clause 21.4.1.2.1 or 21.4.1.2.2 above are not observed, or if such remedial programme is not acceptable to the Company, the Company shall be entitled to exercise the termination rights set out in Clause 21.4.1.1; and/or

21.4.1.3 exercise its rights under each of the Parent Guarantee, the Advance Payment Bond or the SD in accordance with its terms.

21.4.2 If the Company chooses not to serve a termination notice pursuant to Clause 21.4.1, the Company shall not be taken to have waived any of its rights under this Agreement and the other Project Documents.

21.4.3 If any Contractor Default occurs and the Company does not wish to terminate this Agreement, the Company shall be entitled to exercise the rights set out in Clause 12.11 (Failure to Carry Out Work), without having to serve a notice of termination pursuant to Clause 21.4.1.1 to activate such rights, but subject to the requirement to give notice to the Contractor in accordance with Clause 12.11 (Failure to Carry Out Work).

21.4.4 If the Company terminates this Agreement under Clause 21.4.1.1 in respect of any one or more (but not all) of the Locomotives, the Contractor shall immediately pay to the Company (but without prejudice to the rights of the Company under Clause 21.8 (Damages) an amount equal to all Milestone Payments paid by the Company to the Contractor under this Agreement in respect of the Locomotives to which the termination applies (which the Company shall certify accompanied by reasonably detailed supporting evidence) together with:

21.4.4.1 interest on each such Milestone Payment for the period since the date on which the Company paid such Milestone Payment to the Contractor, at such rate as is equal to the rate paid by the Company to its Lenders in respect of the Locomotives (as certified by the Company and accompanied by reasonable evidence) or in the case where there is no such financing, at the Prime Rate; and

21.4.4.2 any and all broken funding costs or losses incurred by the Company to its Lenders (including, without limitation, all legal costs and other out-of-pocket expenses incurred by the Lenders and/or the Company in connection with such termination) in respect of the Locomotives and/or any Spares, Tools and/or Test Equipment by virtue of such termination, or as a result of any repayment or prepayment required in connection with such termination.

21.4.5 If the Company terminates the whole of this Agreement under Clause 21.4.1 above:

21.4.5.1 all work on the Locomotives shall cease;

21.4.5.2 the Contractor shall convey to the Company all Locomotives which have been Commissioned before the date of termination;

21.4.5.3 if, on the date of termination, the value of Locomotives which have been Accepted before and to that date and the value of those Locomotives which are conveyed to the Company in accordance with Clause 21.4.5.2:

21.4.5.3.1 is less than the sum of the Milestone Payments made by the Company to that date, the Contractor shall refund the difference to the Company and pay that amount within 10 (ten) Business Days of receipt of demand;

21.4.5.3.2 exceeds the sum of the Milestone Payments made by the Company to that date, the Company shall, subject to the Contractor having paid all amounts and performed all other obligations owed by the Contractor to the Company under this Agreement (including, without limitation, the payment of damages suffered by the Company contemplated in Clause 21.8 (Damages)), pay the difference to the Contractor within 10 (ten) Business Days of receipt of a Tax Invoice for the relevant amount;

21.4.5.4 the Contractor shall, on demand by the Company, deliver to the Company (or its nominee) all Deliverable Materials which should have been delivered to the Company at that time;

21.4.5.5 ownership of all Deliverable Materials which have been delivered to the Company or should at that time have been delivered to the Company shall vest in the Company (or its nominee);

21.4.5.6 the Contractor shall indemnify the Company and hold it harmless in relation to all losses, actions, claims, demands, costs, charges and expenses arising directly out of any action or claim by any person whose contract with the Contractor is terminated as a result of the effect of this Clause 21.4; and

21.4.5.7 the Company may elect to complete the manufacture and supply (in terms of the Specification) of Locomotives which have not been

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Delivered on the date of termination, as set out in Clause 21.4.6 below.

21.4.6 If the Company elects to complete the manufacture and supply of Locomotives pursuant to Clause 21.4.5.7, the following shall apply:

21.4.6.1 the Contractor shall immediately prepare a final account (which shall be subject to Dispute) in accordance with Clause 21.7 (Final Accounts) and the Company shall pay to the Contractor an amount equal to the difference (if any) between the amount certified by the Engineer under Clause 21.7 (Final Accounts) and the total amount of all Milestone Payments which have been paid to the Contractor at that time;

21.4.6.2 upon payment to the Contractor of amounts owing to it under Clause 21.4.5.3.2, the Company shall be entitled (and the Contractor shall permit it) to take possession of and to remove from the premises of the Contractor any Locomotive in its state of completion and any Components or materials intended to be incorporated in or fixed to it which the Contractor then holds or subsequently receives (all in their state of completion at the time of removal) and, against receipt by the Contractor of that payment, title to that Locomotive, those Components and materials will pass to the Company; and

21.4.6.3 the Contractor shall promptly licence and provide to the Company all Intellectual Property Rights necessary for (but for the sole purpose of) completing the manufacture and supply of the Locomotives.

21.5 **Consequences of a Company Default**

21.5.1 If a Company Default has occurred and is continuing, the Contractor may, by written notice to the Company, without prejudice to any other rights or remedies it may have in law:

21.5.1.1 in the case of a Company Default under Clause 21.2.1 terminate this Agreement with immediate effect;

21.5.1.2 in the case of a Company Default under Clause 21.2.2 , require that the Company remedy that Company Default within 10 (ten) Business Days. If the Company fails to remedy that Company Default within the prescribed period, the Contractor may terminate this Agreement with immediate effect by written notice to the Company and claim damages in terms of Clause 21.8.2.

21.5.2 On termination of this Agreement under Clause 21.5.1, the consequences of termination set out in Clauses 21.4.5 and 21.4.6 shall apply.

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21.6 Consequences of a No-Fault Termination Event

21.6.1 On the occurrence of a No-Fault Termination Event, the following shall apply:

21.6.1.1 if that No-Fault Termination Event is a Force Majeure Event, either Party may terminate this Agreement in accordance with Clause 25 (Force Majeure); and

21.6.1.2 in the case of each such No-Fault Termination Event, the consequences of termination set out in Clauses 21.4.5 (excluding 21.4.5.6) and 21.4.6 shall apply in their entirety, save that the Company shall be entitled only to complete the manufacture of those Locomotives in respect of which assembly had commenced on the date of termination and the licence provided by the Contractor to the Company under Clause 21.4.6.3 shall be restricted accordingly.

21.6.2 Each Party hereby expressly agrees in favour of the other Party, that it shall have no right to claim damages (whether in contract, warranty, delict or otherwise) from the other Party for any loss or harm suffered by it pursuant to a termination of this Agreement as a result of a No-Fault Termination Event.

21.7 Final Accounts

Upon the termination of this Agreement under Clauses 7.10 (Suspension, Postponement and Change in Quantities of Delivery of Locomotives) or 21.4 (Consequences of Contractor Default), 21.5 (Consequences of Company Default) or 21.6 (Consequences of a No-Fault Termination Event), or 21.10 (Termination by Company) the following will apply:

21.7.1 the Contractor must promptly prepare a final account (which shall be subject to Dispute), indicating all Work done to the date of termination, including Works already certified by the Engineer as part of the previous Payment Certificates issued in terms of Clause 8 (Risk, Title, Transfer and Payments);

21.7.2 the Contractor shall indicate in the final account:

21.7.2.1 all of the Milestones reached for which Payment Certificates have been issued by the Engineer;

21.7.2.2 all of the further Milestones reached since the last Payment Certificate was issued by the Engineer, giving details in respect of such Works or Milestones as to comply with the requirements for a statement in terms of Clause 8 (Risk, Title, Transfer and Payments); and

21.7.2.3 any other Works that have been completed, but not to the level to comply with the requirements of the next Milestone, including all Work performed by the Contractor in relation to the design,

manufacture and assembly of the Locomotives for which payment was or is claimed by the Contractor and not yet paid;

21.7.3 the Engineer must authorise payment in respect of all Milestones and other elements of the final account contemplated by Clause 21.7.2 and, in addition, must consider the following:

21.7.3.1 the Works referred to in Clause 21.7.2.2, and must certify and authorise payment of any further Milestone that has been achieved in accordance with Clause 8 (Risk, Title, Transfer and Payments) and the powers conferred on the Engineer under this Agreement in relation to the certification of payments for Milestones); and

21.7.3.2 the Works referred to in Clause 21.7.2.3, and, if satisfied that the Works have been carried out in compliance with the Contractor obligations under this Agreement, determine the value of those Works, having due regard to prevailing market values of, and rates applicable to, those Works, considering the quantities and quality thereof. Any such value determined by the Engineer will be the certified value of those Works for purposes of determining the amount of payments due to the Contractor under this clause, provided that the Contractor may dispute that value, in which case the matter must be referred for resolution under Clause 26 (Dispute Resolution);

21.7.4 if the Engineer does not agree with that final account, either Party may refer the matter for resolution in accordance with Clause 26 (Dispute Resolution).

21.8 **Damages**

Nothing contained in this Agreement:

21.8.1 shall detract from either Party's obligation to mitigate its damages suffered in consequence of a breach of this Agreement by the other Party; or

21.8.2 shall, subject to Clauses 8 (Delay Penalties), 21.6 (Consequences of a No-Fault Termination Event), 22 (Limitation of Liability) and any other limitation of liability provided for in this Agreement, affect the rights of either Party to claim damages from the other for all losses or harm suffered as a result of a breach of this Agreement.

21.9 **Accrued Rights**

Termination of this Agreement shall not affect any accrued rights and obligations under this Agreement and the other Project Documents as at the date of termination. Termination of this Agreement (whether in whole or in part) under Clauses 21.4.1 (Consequences of Contractor Default), 21.5.1 (Consequences of Company Default), 21.6 (Consequences of a No-Fault Termination) and/or 33.8 (Illegality) shall be without prejudice to all rights of the Company under Clauses 7 (Handover and Acceptance), 10 (Warranty

Regime), 13 (Intellectual Property Rights) and 23 (Indemnities) whether the same shall have accrued prior to, or shall accrue subsequent to, termination.

22. Limitation of Liability

22.1 Liability of the Contractor

22.1.1 The total liability of the Contractor under or in connection with the Project Documents, whether in contract, warranty, delict (including, without limitation, negligence or patent infringement) or otherwise shall be limited as follows:

22.1.1.1 in the case of liability under Clause 5.7 (Fuel Efficiency), Clause 7.5 (Failed Locomotive), Clause 9 (Delayed and Early Delivery), Clause 11 (Mission Reliability and Fleet Availability) and Clause 20 (Socio-Economic Obligations) and notwithstanding anything to the contrary in this Agreement, in accordance with such clauses' own regime for penalties and/or claims and/or limitations of liabilities which shall operate independently of this Clause 22 and any limitations set forth herein;

22.1.1.2 in relation to Clause 10 (Warranty Regime), solely to the cost of making good or carrying out any, modification, amendment, rectification, replacement and/or repair required under that Clause; and

22.1.1.3 in relation to any breach of any other obligation under this Agreement whether fundamental or otherwise (excluding those set forth in or referred to in clause 25 (Force Majeure), Clauses 22.1.1.1 and 22.1.1.2) in relation to any particular Batch, to an overall limit of 15 (fifteen) per cent. of the Batch Value in aggregate for all claims or events affecting or relating to the Locomotives in such Batch, whether or not express reference is made to this Clause 22.1.1.3 in any provision of any Project Document.

22.2 Liability of the Company

22.2.1 The total liability of the Company under or in connection with the Project Documents, whether in contract, warranty, delict (including, without limitation, negligence or patent infringement) or otherwise, shall, in relation to any Batch,shall be limited to 15% (fifteen per cent) of the Batch Value in aggregate for all claims or events affecting or relating to the Locomotives in such Batch, whether or not express reference is made to this Clause 22.2.1 in any provision of any Project Document. However, such limitation shall not apply to the following:

22.2.1.1 the liability of the Company for payment of the Total Contract Price in respect of Locomotives that have been Accepted;

22.2.1.2 the liability of the Company for payment of the purchase price for Spares, Tools and Test Equipment not otherwise forming part of the Total Contract Price, which have been Accepted;

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22.2.1.3 the liability of the Company for payment of the amounts contemplated in Clause 25 (Force Majeure); and

22.2.1.4 any liability of the Company arising from any indemnity for third party claims against the Contractor under Clause 13 (Intellectual Property Rights), Clause 23.2 (Company's Principal Indemnity).

22.3 **Consequential Loss**

Neither Party shall be liable to the other, whether arising from breach of contract, delict or otherwise, for any Indirect Loss, except for any element of revenue or profit which has been included within the calculation of any penalty regime under any Project Document or any similar or other amount expressly payable by either Party under or in connection with any Project Document.

22.4 **No Double Counting**

Neither the Company nor the Contractor shall be entitled to recover any amount from the other under a Project Document (by way of indemnity or otherwise) if and to the extent it has previously recovered for the same loss or damage under that Project Document or any other Project Document or otherwise.

22.5 **General**

22.5.1 The limitations of liability specified in this Clause 22 shall not include:

22.5.1.1 any interest at the Default Rate which becomes payable on any overdue amounts;

22.5.1.2 any additional amount either Party is required to pay to the other Party pursuant to Clause 8 (Risk, Title, Transfer and Payments);

22.5.1.3 any VAT payable; nor

22.5.1.4 in the case of the Contractor only, any amounts payable by the Contractor to the Company under Clause 21.4 (Consequences of Contractor Default) constituting a refund (in full or partially) to the Company of any Milestone Payments paid by the Company to the Contractor in respect of Locomotives to which termination of this Agreement applies,

each of which amounts shall be payable in addition to and on top of such limitations of liability.

22.5.2 Nothing in this Clause 22 shall limit any liability for personal injury or death and damage to property belonging to third parties.

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23. Indemnities

23.1 Contractor's Principal Indemnity

23.1.1 Subject to Clause 23.4 (Exclusions), if and to the extent the performance or non-performance by the Contractor (or any person on its behalf) of this Agreement, or any act, omission, breach or neglect on the part of the Contractor, the Guarantor or any subcontractor or any member of their respective groups, or any of their respective employees, agents or representatives acting in such capacity:

23.1.1.1 causes personal injury to, or the death of, or loss or damage to any person (other than the Company) or any property or rights of such person or causes any liability or penalty to the Relevant Authority or results in the breach of any Legal Requirement or Necessary Consent; or

23.1.1.2 causes or results in the Company being liable for any harm pursuant to section 61 of the Consumer Protection Act, 68 of 2008 (the **CPA**);

23.1.1.3 causes loss or damage to the Company or any property rights of the Company or causes the Company to breach any Legal Requirement or Necessary Consent,

the Contractor shall indemnify the Company against any loss or damage suffered by the Company directly in connection therewith.

23.2 Company's Principal Indemnity

Subject to Clause 23.4 (Exclusions), if and to the extent any unlawful or negligent act or omission or breach of this Agreement by the Company or any of its employees, agents or representatives acting in such capacity:

23.2.1 causes personal injury to, or the death of, or loss or damage to any person (other than the Contractor) or any property or rights of such person; or

23.2.2 causes or results in the Contractor being liable for any harm pursuant to section 61 of the CPA,

the Company shall indemnify the Contractor against any loss or damage suffered by the Contractor directly in connection therewith.

23.3 **Spares Indemnity**

The Contractor shall indemnify the Company on demand against any third party claims, or other liabilities, damages, fines or penalties, which the Company may at any time suffer or incur in respect of death or personal injury, or damage to property, resulting from the possession, custody, maintenance or repair of the Spares Tools or items of Test Equipment by the Contractor or any other person on its behalf.

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23.4 **Exclusions**

The following exclusions to indemnities provided in terms of this Clause 23.4 shall apply:

23.4.1 neither Party shall be liable to indemnify the other Party (being the Indemnified Party) against any claim from third parties to the extent that it results from any intentional act of the Indemnified Party or negligent act or omission, or from any failure to comply with Clause 32 (Mitigation) on the part of the Indemnified Party or its employees or its agents;

23.4.2 the Company shall not indemnify the Contractor against any claims for death or injury or property damage under Clause 23.2 (Company's Principal Indemnity), to the extent that those claims are caused by the Contractor's wilful default, grossly negligent or negligent act or omission or arise in relation to any Locomotive when in the possession of the Contractor, its Sub-Contractors or suppliers or its or their respective agents or employees;

23.4.3 the indemnity granted by the Company to the Contractor under Clause 23.2 (Company's Principal Indemnity) is granted on the understanding and basis that the Contractor has an obligation to and/or has satisfied itself that it is able to design, manufacture and Commission the Locomotives, in accordance with the Specification and the other requirements of this Agreement.

23.5 **Further Indemnity Provisions**

23.5.1 The indemnities set out in this Clause 23 shall include all direct costs and expenses (including legal expenses on the scale as between attorney and client) incurred by the Indemnified Party as a result of any claim against which it is indemnified in terms of this Clause 23, subject always to Clause 22 (Limitation of Liability).

23.5.2 An Indemnified Party shall not admit any liability in respect of any claim which may be made in respect of any indemnified loss. In the event of such admission being made without the prior written authority of the Indemnifying Party so to admit, the indemnity given under this clause shall be rendered null and void to the extent that, but for the admission, the Indemnified Party would not have been liable in common law for such a claim.

23.5.3 The Indemnified Party shall notify the Indemnifying Party in writing of any such claim within 10 (ten) Business Days after the Indemnified Party becomes aware of such claim or an event reasonably expected to give rise to a claim to enable the Indemnifying Party to contest such claim. Failure by the Indemnified Party to notify the Indemnifying Party in terms of this Clause 23.5.3 shall not take away or render invalid or result in the prescription of the rights or claims of the Indemnified Party against the Indemnifying Party in terms of this Clause 23 except to the extent that the Indemnified Party is prejudiced by such delay.

23.5.4 In connection with any proceedings related to a matter (other than against the Indemnifying Party) to be indemnified under this Clause 23, the Party seeking indemnification shall use such advisors chosen by the Indemnifying Party and, if the Indemnifying Party requests, allow the Indemnifying Party to conduct the proceedings in the name of the Indemnified Party, who shall render all reasonable assistance to the Indemnifying Party. Notwithstanding the foregoing, the Indemnified Party shall only settle such claim with the consent of the Indemnifying Party, which consent shall not be unreasonably withheld or delayed.

23.5.5 The Indemnifying Party shall be obliged to pay the Indemnified Party the amount of any indemnified loss suffered or incurred by the Indemnified Party as soon as payment by the Indemnified Party becomes due and payable to the relevant third party.

23.5.6 The provisions of this Clause 23 shall survive the termination of this Agreement.

23.6 **Adjustment for after-Tax Liabilities**

Any amount payable (whether by the Contractor to the Company or vice versa) under this Agreement by way of indemnity or reimbursement (but not otherwise) shall be of such amount as is sufficient to place the recipient (indemnified party) in the same after-Tax position as it would have been in had the loss, liability, damage, claim, cost or expense giving rise to the indemnity or reimbursement not arisen (and so that, without limitation, the indemnity or reimbursement obligation of the other party (indemnifying party) shall include irrecoverable VAT in respect of those costs or expenses but shall (notwithstanding any other provision of this Agreement) exclude VAT other than irrecoverable VAT.

23.7 **Accounting Assumptions**

For the purposes of determining, under Clause 23.6 (Adjustment after Tax Liabilities), what amount is required to put the indemnified party in the after-Tax position therein referred to, it shall be assumed (irrespective of whether it is in fact the case) that, to the extent that it can do so consistently with the requirements of all Legal Requirements, published South African Revenue Service practice of general application and applicable rules of generally accepted accounting practice, the indemnified party draws up its accounts and submits its tax returns and computations on such a basis as would not require the amount of the indemnity or reimbursement payment to be increased by reason of any liability to Tax, and in calculating the amount of any irrecoverable VAT it shall further be assumed that:

23.7.1 the indemnified party is registered for the purposes of VAT (whether separate or as a member of a group registration);

23.7.2 neither the indemnified party nor any member of any VAT group registration including the indemnified party carries on any businesses or activities other than those contemplated by this Agreement; and

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23.7.3 the Indemnified party (and where applicable the representative member of a group registration including the indemnified party) has carried out its obligations under the VAT legislation to make proper VAT returns on a timely basis including, without limitation, the due and timely claiming of credit for input tax available to it and the due and timely supplying of documents and information properly required by any VAT authority.

23.8 **Further Adjustments**

If it is subsequently established, in the case of any payment to which Clause 23.6 (Adjustment after Tax Liabilities) applies, that the Tax position of the indemnified party is (but without prejudice to Clause 23.7 (Accounting Assumptions)) in any respect different from that assumed for the purposes of calculating the initial amount of the payment, such adjustments, and repayments or further payments, shall be made as are required to take account of that difference.

23.9 **Payments to Third Parties**

If any payment by one Party to a third party is made in respect of an obligation under this Agreement to indemnify or reimburse the other Party and gives rise to an increased Tax liability for the other Party, Clauses 23.6 (Adjustment after Tax Liabilities) to 23.8 (Further Adjustments) shall apply as if the payment had actually been made to the other Party.

23.10 **Notice of Indemnity Claims**

The Company shall promptly notify the Contractor of any incident of which it is aware giving rise to a claim against the Company or any claim being made or action brought against the Company arising out of the matters in respect of which the Company is entitled to an indemnity from the Contractor under Clause 23.6 (Adjustment for after-Tax Liabilities).

23.11 **Limitation**

Each of the indemnities contained in this Clause 23 shall apply to the maximum extent permitted by applicable law.

24. **Handling of Incidents**

24.1 **Company Response**

24.1.1 Subject to Clause 24.2 (Defence by the Contractor), the Company may respond to any incident and, in the case of any claim being made or action brought against the Company, conduct the negotiation for the settlement of any such claim or action and conduct any litigation or proceedings that may arise from any such claim or action.

24.1.2 The Contractor shall not make any admission or take any action which might be prejudicial to that negotiation or proceedings without the prior written consent of the Company.

24.1.3 If a claim, action or demand is made against the Company (**Relevant Claim**) in respect of which the Contractor is liable to indemnify the Company under the terms of this Agreement, the Company shall notify the Contractor as soon as is reasonably practicable on becoming aware of the fact of the Relevant Claim, stating in reasonable detail the nature of the matter.

24.2 **Defence by the Contractor**

On notification by the Company under Clause 24.1 (Company Response) of a Relevant Claim, the Contractor shall have the right to assume the defence of that Relevant Claim upon giving notice to the Company to that effect within 20 Business Days after receipt of the notice referred to in Clause 24.1.2, and to accept, settle, compromise or otherwise deal with such Relevant Claim as it sees fit; provided always that it shall:

24.2.1 keep the Company informed as to the state of the conduct of the Relevant Claim at reasonable intervals and on enquiry by the Company;

24.2.2 conduct the Relevant Claim having consulted with the Company and taking account of the reasonable requests of the Company;

24.2.3 indemnify on demand the Company against all losses, claims, damages, cost, expenses and liabilities of the Company arising as a result of the conduct or result of the Relevant Claim by the Contractor or of any acceptance, settlement, compromise or other arrangement reached in relation to the Relevant Claim;

24.2.4 notify the Company of the fact, and terms, of any settlement, compromise or other arrangement in relation to the Relevant Claim; and

24.2.5 not settle, compromise or consent to any entry of judgment with respect to the conduct of any Relevant Claim without the prior written consent of the Company (such consent not to be unreasonably withheld) where the settlement, compromise or consent refers to the Company and does not contain restrictions acceptable to the Company to prevent either the disclosure of the terms of the settlement, compromise or consent or the making of any further statement in relation to the proceedings to which it relates.

24.3 **Subrogation to Company's Rights**

Where subrogation would otherwise arise under any Legal Requirements and, subject to any relevant contractual obligation of the Company, the Contractor shall be subrogated to the rights of the Company to recover against the person making the Relevant Claim, provided that the Contractor shall indemnify the Company on demand against all losses, claims, damages, costs, expense and liabilities of the Company arising as a result of such subrogation.

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24.4 Assistance

Subject to Clause 24.2.3, each of the Contractor and the Company shall give reasonable assistance to the other in the defence or conduct of any Relevant Claim against a third party referred to in this Clause 24, whether the Relevant Claim is conducted by the Contractor or the Company.

24.5 Company's Rights against Others

Where the Contractor at any time pays or is liable to pay an amount (Indemnity Amount) to the Company to satisfy the liability of the Contractor to indemnify the Company under this Agreement, if the Indemnity Amount satisfies in full the losses, claims, damages, costs and liabilities of, and claims against, the Company arising out of the event or breach of this Agreement giving rise to the liability of the Contractor to indemnify the Company (Indemnity Event) and the Company is or subsequently becomes entitled to recover from some other person any sum in respect of the Indemnity Event, then, provided that the Company's losses, damages, costs, liabilities and liabilities for claims made against it by third parties in relation to the Indemnity Event have been permanently satisfied in full by the Indemnity Amount:

24.5.1 the Company shall, to the extent that it is aware of the existence of such rights of recovery against the other person, give notice to the Contractor of such rights;

24.5.2 the Contractor shall have the right to take over the conduct of any claim for such recovery against that other person upon giving notice to the Company to that effect within 20 Business Days after receipt of the notice referred to in Clause 24.5.1 and to accept, settle, compromise or otherwise deal with such claim as it sees fit, provided always that it shall:

24.5.2.1 keep the Company informed as to the state of the conduct of the claim at reasonable intervals and on enquiry by the Company;

24.5.2.2 conduct the claim having consulted with the Company, and taking account of the reasonable requests of the Company;

24.5.2.3 indemnify on demand the Company against all losses, claims, damages, costs, expenses and liabilities of the Company arising as a result of the conduct or result of the claim by the Contractor or of any acceptance, settlement, compromise or other arrangement reached in relation to the claim;

24.5.2.4 notify the Company of the fact, and the terms, of any settlement, compromise or other arrangement in relation to the claim;

24.5.2.5 not settle, compromise or consent to any entry of judgement with respect to the conduct of any such claim without the prior written consent of the Company (such consent not to be unreasonably withheld) where the settlement, compromise or consent refers to the Company and does not contain restrictions acceptable to the Company to prevent either the disclosure of the terms of the

settlement, compromise or consent or the making of any further statement in relation to the proceedings to which it relates;

24.5.2.6 where subrogation would otherwise arise under any Legal Requirement and subject to any relevant contractual obligation of the Company the Contractor shall be subrogated to the rights of the Company to recover against such other person provided that the Contractor shall indemnify on demand the Company against all losses, claims, damages, costs, expenses and liabilities of the Company arising as a result of such subrogation; and

24.5.2.7 subject to Clause 24.5.2.4, each of the Contractor and the Company shall give reasonable assistance to the other in the defence or conduct of any claim against a third party referred to in this Clause 24.5 (Company's rights against Others) whether such claim is conducted by the Contractor or the Company.

24.6 Claims against the Contractor

24.6.1 If a claim, action or demand is made against the Contractor (an **Agreement Claim**) in respect of which the Company is liable to indemnify or pay the Contractor under the terms of this Agreement, the Contractor shall notify the Company as soon as is reasonably practicable on becoming aware of the fact of the Agreement Claim, stating in reasonable detail the nature of the matter.

24.6.2 Subject to Clause 24.7 (Defence by the Company), the Contractor may conduct the negotiation for the settlement of any such Agreement Claim and conduct any litigation or proceedings that may arise from any such Agreement Claim.

24.6.3 Subject to Clause 24.7 (Defence by the Company), the Company shall not make any admission or take any action which might be prejudicial to that negotiation or proceedings without the prior written consent of the Contractor.

24.7 Defence by the Company

On notification by the Contractor under Clause 24.6 (Claims Against the Contractor) of an Agreement Claim, the Company shall have the right to assume the defence of that Agreement Claim upon giving notice to the Contractor to that effect within 20 (twenty) Business Days after receipt of the notice referred to in Clause 24.6 (Claims Against the Contractor), and to accept, settle, compromise or otherwise deal with such Agreement Claim as is sees fit, provided always that it shall:

24.7.1 keep the Contractor informed as to the state of the conduct of the Agreement Claim at reasonable intervals and on enquiry by the Contractor;

24.7.2 conduct the claim having consulted with the Contractor and taking account of the reasonable requests of the Contractor;

24.7.3 indemnify on demand the Contractor against all losses, claims, damages, costs, expenses and liabilities of the Contractor arising as a result of the conduct or result of the Agreement Claim by the Company or of any acceptance, settlement, compromise or other arrangement in relation to the Agreement Claim;

24.7.4 notify the Contractor of the fact, and terms, of any settlement, compromise or other arrangement in relation to the Agreement Claim; and

24.7.5 not settle, compromise or consent to any entry of judgment with respect to the conduct of any Agreement Claim without the prior written consent of the Contractor (such consent not to be unreasonably withheld) where the settlement, compromise or consent refers to the Contractor and does not contain restrictions acceptable to the Contractor to prevent either the disclosure of the terms of the Settlement, compromise or consent or the making of any further statement in relation to the proceedings to which it relates.

24.8 Subrogation to Contractor's Rights

Where subrogation would otherwise arise under Legal Requirements and, subject to any relevant contractual obligation of the Contractor, the Company shall be subrogated to the rights of the Contractor to recover against the person making the Agreement Claim provided that the Company shall indemnify on demand the Contractor against all losses, claims, damages, costs, expenses and liabilities of the Contractor arising as a result of such subrogation.

24.9 Assistance

Subject to Clause 24.7.3, each of the Company and the Contractor shall give reasonable assistance to the other in the defence or conduct of any Agreement Claim against a third party referred to in this Clause 24, whether the Agreement Claim is conducted by the Company or the Contractor.

24.10 Contractor's Rights against Others

Where the Company at any time pays or is liable to pay an amount (**Indemnity Sum**) to the Contractor to satisfy the liability of the Company to indemnify the Contractor under this Agreement, if the Indemnity Sum satisfies in full the losses, claims, damages, costs and liabilities of, and claims against, the Contractor arising out of the event or breach of this Agreement giving rise to the liability of the Company to indemnify the Contractor (**Indemnity Occurrence**) and the Contractor is or subsequently becomes entitled to recover from some other person any sum in respect of the Indemnity Occurrence, then, provided that the Contractor's losses, damages, costs, liabilities and liabilities for claims made against it by third parties in relation to the Indemnity Occurrence have been permanently satisfied in full by the Indemnity Sum:

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24.10.1 the Contractor shall, to the extent that it is aware of the existence of such rights of recovering against that other person give notice to the Company of such rights,

24.10.2 the Company shall have the right to take over the conduct of any claim for such recovering against that other person upon giving notice to the Contractor to that effect within 20 (twenty) Business Days of receipt of the notice referred to in Clause 24.10.1 and to accept, settle, compromise or otherwise deal with such claim as it sees fit, provided always that it shall:

24.10.2.1 keep the Contractor informed as to the state of the conduct of the claim at reasonable intervals and on enquiry by the Contractor;

24.10.2.2 conduct the claim having consulted with the Contractor and taking account of the reasonable requests of the Contractor;

24.10.2.3 indemnify on demand the Contractor against all losses, claims, damages, costs, expenses and liabilities of the Contractor arising as a result of the conduct or result of the conduct or result of the claim by the Company or of any acceptance, settlement, compromise or other of any acceptance, settlement, compromise or other arrangement reached in relation to the claim; and

24.10.2.4 notify the Contractor of the fact, and the terms, of any settlement, compromise or other arrangement in relation to the claim;

24.10.2.5 not settle, compromise or consent to any entry of judgment with respect to the conduct of any such claim without the prior written consent of the Contractor (such consent not to be unreasonably withheld) where the settlement, compromise or consent refers to the Contractor and does not contain restrictions acceptable to the Contractor to prevent either the disclosure of the terms of the settlement, compromise or consent or the making of any further statement in relation to the proceedings to which it relates; and

24.10.2.6 where subrogation would otherwise arise under Legal Requirements, and subject to any relevant contractual obligation of the Contractor, the Company shall be subrogated to the rights of the Contractor to recover against such other person provided that the Company shall indemnify on demand the Contractor against all losses, claims, damages, costs, expenses and liabilities of the Company arising as a result of such subrogation; and

24.10.2.7 subject to Clause 24.10.2.3, each of the Contractor and the Company shall give reasonable assistance to the other in the defence or conduct of any claim against a third party referred to in this Clause 24.10 (Contractor's rights against Others), whether such claim is conducted by the Contractor or the Company.

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24.11 Control of Information

In relation to any incident, claim or action referred to in this Clause 24 (Handling of Incidents), the Parties shall agree all dealings with the information media in respect of the relevant incident or event to which the claim or action relates.

25. Force Majeure

25.1 Effect of Force Majeure

25.1.1 Neither Party shall be in breach or otherwise liable to the other Party in any manner whatsoever for a failure on its part to perform any of its obligations in terms of the Project Documents due as a direct result of a Force Majeure Event.

25.1.2 Subject to Clause 25.3 (Termination Option), the date for performance of the contractual obligation which has been delayed by the Force Majeure Event (the **Affected Obligation**) shall be deemed suspended for so long as such obligation is affected by such Force Majeure Event and relief from liability for non-performance by reason of the provisions of this Clause 25 shall commence on the date upon which the Party seeking relief (the **Affected Party**) gives written notice in terms of Clause 25.2 (Notice and Mitigation) and shall terminate on the date on which the Force Majeure Event ceases to exist.

25.1.3 The Affected Party shall not be entitled to payment from the other Party in respect of extra costs and expenses incurred by virtue of the Force Majeure Event or in relation to any steps taken by the Affected Party in mitigating the effects of the Force Majeure Event.

25.1.4 Where the Affected Obligation is a payment obligation under this Agreement, the Affected Party shall, in addition, pay to the other Party, at the time the delayed payment is actually made, an amount equal to the amount received as interest by the Affected Party on the delayed payment.

25.1.5 The Contractor acknowledges that, to the extent, and for the period which, it is unable to provide the Locomotives, the Company is not liable to make the Milestone Payments or part thereof, except in respect of any obligation fully performed by the Contractor for which a payment is due by the Company in terms of this Agreement.

25.1.6 Where the Affected Obligation is an obligation due by the Contractor under this Agreement, until the provision of such obligation is resumed by the Contractor, the Company is entitled to obtain or procure the provision of the affected obligations from any third party in accordance with Clause 12.11 (Failure to Carry Out Work). The Contractor agrees to give all reasonable assistance to enable the third party to provide or procure the provision of the Affected Obligations.

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25.2 **Notice and Mitigation**

25.2.1 The Affected Party shall:

25.2.1.1 immediately give written notice to the other Party substantially in the form of Pro Forma 18 of Schedule 8 (Pro Formas) (in the case of the Company) and substantially in the form of Pro Forma 7 of Schedule 8 (Pro Formas) (in the case of the Contractor); and

25.2.1.2 at all times use, at its own cost, all reasonable endeavours to mitigate the effect of the Force Majeure Event (including complying with the request of the Engineer), and to continue to perform its obligations under the Project Documents and keep the other Party informed of those steps provided that where the Affected Party is the Contractor and the Force Majeure Event is of a type described in paragraph (c) of the definition of Force Majeure Event involving the staff of a Sub-Contractor, then the Contractor shall use its best endeavours to take the action referred to in this paragraph 25.2.1.2;

25.2.2 The Affected Party shall give notice to the other Party forthwith (upon becoming aware of the same) upon the event ending or being removed or its existence no longer preventing performance of the affected obligations. The Affected Party shall continue the full performance of those obligations not affected by the Force Majeure Event and shall resume the full performance of those affected obligations as soon as possible thereafter.

25.3 **Termination Option**

If a Force Majeure Event occurs which prevents either Party from carrying out all or substantially all of its obligations for more than 6 (six) consecutive months, either Party shall have the right to terminate this Agreement by giving 20 (twenty) Business Days written notice to the other Party, in which case the provisions of Clause 21.6 (Consequences of a No-Fault Termination Event) will apply.

25.4 **Disputed Force Majeure Event**

25.4.1 If the recipient of a notice given under Clause 25.2 (Notice and Mitigation) disputes that:

25.4.1.1 a Force Majeure Event has occurred;

25.4.1.2 the effect of such Force Majeure Event; or

25.4.1.3 the period for which the Scheduled Acceptance Date is to be extended,

then it shall give written notice to the Affected Party, the Parties shall deal with the matter in accordance with Clause 26 (Dispute Resolution).

25.4.2 The Force Majeure Event shall not excuse:

25.4.2.1 any obligation on the part of a Party to make payment to the other Party of any sum that that has accrued and has become due and payable under this Agreement; or

25.4.2.2 any breach or default,

in each case, which occurred prior to the occurrence of the Force Majeure Event or any breach or default which occurred prior to the event of Force Majeure Event.

26. Dispute Resolution

26.1 Initial Negotiations and Escalation Procedure

26.1.1 The Parties shall attempt in good faith to resolve promptly any dispute or claim arising out of or relating to the Project Documents or the existence, breach, termination or validity thereof (a **Dispute**) by mutual consultation and negotiation as follows:

26.1.1.1 any Dispute shall, in the first instance, be referred by notice in writing (the **Notice of Dispute**) from the referring Party to the other Party and within 10 Business Days of the date the Notice of Dispute is received the Party receiving the Notice of Dispute shall deliver to the other Party a written response to the Notice of Dispute (the **Response**). Both the Notice of Dispute and Response shall include a statement of the position of the Party preparing the Notice of Dispute or Response and shall annex any documents relied upon by that Party;

26.1.1.2 within 5 (five) Business Days of receiving a Response to a Notice of Dispute, or if no Response is delivered, within 5 (five) Business Days of the date upon which the time for delivery of a Response expired, the Representatives shall meet at mutually acceptable times and places to discuss and try to reach agreement on a resolution to the Dispute; and

26.1.1.3 if the Representatives are unable or fail to, reach agreement to resolve the Dispute within 5 (five) Business Days of the date for commencing their discussions pursuant to Clause 26.5.1.2, then within 5 (five) Business Days the Steering Committee shall meet at mutually acceptable times and places to discuss and try to reach agreement on a resolution to the Dispute.

26.1.2 All negotiations and discussions pursuant to Clause 26.1 are confidential and shall be treated as compromise and settlement negotiations for the purpose of any applicable rules of evidence.

26.1.3 If the Steering Committee is unable to, or fails to, meet and/or resolve the Dispute pursuant to Clause 26.1.1.3 within 5 (five) Business Days (or such longer period as the Steering Committee may agree), the Dispute

shall be referred to and settled by arbitration in accordance with Clause 26.3 (Arbitration), unless the Parties agree to refer the Dispute to an expert for a non-binding opinion in accordance with Clause 26.2 below.

26.2 **Expert Opinion**

Where a referral of a Dispute to an expert, for a non-binding opinion, is made pursuant to Clause 26.1.3:

26.2.1 the expert shall in the case of a Dispute of:

26.2.1.1 a technical nature, be an engineer or engineering company with not less than ten (10) years' experience in the design, manufacture or operation of locomotives; or

26.2.1.2 a financial nature, be a financial adviser or financial advisory company with relevant experience in providing advice on project financing transactions similar to or of a higher magnitude than the Works, in the rail transport sector, of not less than 15 (fifteen) years; or

26.2.1.3 a purely legal nature, be an attorney or advocate with relevant experience in transactions involving design, manufacture and supply of equipment, and having practised as an attorney or advocate in commercial litigation for not less than 15 (fifteen) years;

26.2.2 the expert shall be appointed by agreement between the Parties, based on 4 (four) nominations, with each Party nominating 2 (two) potential experts. If the Parties cannot agree on the expert, then the expert shall:

26.2.2.1 in the case of a Dispute of a technical nature, be appointed by the Chairperson for the time being of the Engineering Council of South Africa;

26.2.2.2 in the case of a dispute of a financial nature, be appointed by the Chairperson for the time being of the South African Institute of Chartered Accountants; or

26.2.2.3 in the case of a dispute of a legal nature, be appointed by the Secretariat of the Arbitration Foundation of Southern Africa;

26.2.3 the expert shall be entitled at his or her discretion to secure such additional advice and/or information as he/she may require in order to give the opinion required by the Parties;

26.2.4 the expert shall give his/her opinion within 20 (twenty) Business Days of the referral of the Dispute for expert opinion in terms of this Clause 26.2. If no opinion is received by the time referred to in this Clause 26.2, the Dispute shall proceed to arbitration in terms of Clause 26.3 (Arbitration) below unless the Parties agree otherwise.

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26.3 Arbitration

26.3.1 Subject to Clause 26.4 (Court Proceedings), any Dispute, if not resolved through consultation of the Parties in accordance with Clause 26.1 (Initial Negotiations and Escalation Procedures) or by the rendering of an Expert Opinion in accordance with Clause 26.2 (Expert Opinion), shall be settled in terms of the South African Arbitration Act, No. 42 of 1965 (as amended) but with the application of the Rules of the Arbitration Foundation of Southern Africa (the Rules) by 3 (three) arbitrators appointed in accordance with the Rules.

26.3.2 The arbitrators, one nominated by the Contractor, one nominated by the Company and another appointed by the Arbitration Foundation of South Africa, who shall be a neutral party possessing expertise with respect to the issues raised in the dispute, shall apply South African Law.

26.3.3 The arbitration and all communications in connection therewith shall be in the English language.

26.3.4 The arbitration shall take place at a location agreed between the Parties prior to the commencement of arbitral proceedings, or in the absence of agreement, in Johannesburg, South Africa.

26.3.5 The arbitral award shall be subject to appeal as provided for by the rules of the High Court. The Parties consent to the arbitral award being made an order of court of competent jurisdiction. A Party shall be entitled to request that a costs order be made against the other Party as part of the arbitration award.

26.4 Court Proceedings

Nothing contained in this Clause 26 shall prohibit any of the Parties from approaching the court of competent jurisdiction to apply for interim or conservatory relief (but not monetary damages) or to seek relief in the form of an interdict or determination relating to the interpretation or application of this Clause 26, provided that such court is satisfied that such proceedings have not been brought frivolously or vexatiously, and that it is appropriate for such relief to be adjudicated by the court, as opposed to arbitration in terms of this Agreement.

26.5 Consolidation of Proceedings

26.5.1 If, in respect of a Dispute or any other dispute relating to a Sub-Contactor, Key Sub-Contract or otherwise:

26.5.1.1 there are issues raised which are substantially the same as, or connected with, issues raised in any other existing and continuing Dispute (in this Clause, an **Existing Dispute**) or any related difference, controversy, claim or dispute of whatever nature arising under, out of or in connection with a Key Sub-Contract (including, without limitation, any question of breach, interpretation, validity,

effect, performance or termination of such Key Sub-Contract) (in this Clause, a **Related Dispute**); or

26.5.1.2 some common question of law or fact arises in the Existing Dispute and the Related Dispute; or

26.5.1.3 the rights to relief claimed in the Existing Dispute and the Related Dispute are in respect of, or arise out of, the same event or set of circumstances,

then the Related Dispute (whether prior to or after having been referred for determination by arbitration or by a court in accordance with the preceding provisions of this Clause 26) shall on the application of any party to the Existing Dispute or Related Dispute be referred to the arbitral tribunal or court relating to the Existing Dispute to determine whether (i) the Related Dispute should be heard at the same time as the Existing Dispute by the arbitral tribunal or court to which the Existing Dispute has been referred and (ii) the terms of such referral.

26.5.2 If an Existing Dispute or a Related Dispute arises which is, or is to be, referred to arbitration or to a court and there exists another dispute to which one or more of the grounds set out in Clauses 26.5.1.1 to 26.5.1.3 (inclusive) applies and that other dispute arises under, out of or in connection with an agreement to which one or more of the Parties is a party, then the provisions of Clause 26.5.1 shall apply, *mutatis mutandis*, to the determination of that other dispute; provided that: (i) such other agreement contains provisions for the consolidation of proceedings or concurrent hearings on terms substantially similar to the terms of this Clause 26.5; and (ii) the parties to the Existing Dispute or Related Dispute all provide their prior written consent to the consolidation of proceedings or concurrent hearings in relation to the Existing Dispute or Related Dispute and the dispute under such other agreement. A dispute under another agreement which satisfies all of the requirements of this sub-clause shall be treated as a Dispute for the purposes of this Clause 26.5.

26.5.3 Any party to an Existing Dispute or Related Dispute as provided for in Clause 26.5.1 above may, acting reasonably, object to any proposed consolidation or ordering of concurrent hearings in relation to those disputes and where an objection is exercised, (in the case of arbitral proceedings) the relevant proceedings shall not be consolidated unless the relevant tribunal considers such objection has been raised unreasonably by the relevant Party. For the avoidance of doubt: (i) no Existing Dispute shall be consolidated with a Subsequent Dispute where one of those has been referred to arbitration, and the other to court; and (ii) the provisions of this Clause 26.5.3 shall not apply to the proposed consolidation of disputes to which the provisions of Clause 26.5.2 apply.

26.5.4 If proceedings are not consolidated pursuant to Clause 26.5.1 above, concurrent hearing of those proceedings may, on application by any party who is a party to those proceedings, be ordered on such terms as may be agreed by the relevant party or parties (in the case of arbitration)

or, in the absence of such agreement, as directed by the relevant arbitral tribunals, and in any event as directed by the relevant court. In the absence of agreement between the relevant arbitral tribunals, the directions under this Clause 26.5.4 shall be made by arbitral tribunal for the Existing Dispute. For the avoidance of doubt, the provisions of this Clause 26.5.4 shall not apply to any proposed consolidation of disputes to which the provisions of Clause 26.5.2 apply.

26.5.5 Each of the Parties acknowledges that the tribunals or courts hearing concurrent proceedings may communicate with each other to enable them to decide the terms on which such hearings are to be conducted and to the extent necessary to permit such communication the Parties waive their rights of confidentiality of proceedings.

26.5.6 Proceedings to which any Party is a party which are neither consolidated nor ordered to be heard concurrently shall remain confidential to the Party or Parties, as the case may be, party to such hearings. Where consolidation of proceedings or concurrent hearings in respect of proceedings involving any Party have been ordered, such proceedings shall cease to be confidential as between the parties involved in such proceedings but shall otherwise remain confidential for all other purposes.

27. Confidentiality

27.1 For the purpose of this Clause 27 the following definitions shall apply:

27.1.1 **Confidential Information** means all information of a commercial, proprietary or sensitive nature (whether recorded or not), including in particular any information relating to the know-how, trade secrets, products or business of the Company or the Contractor;

27.1.2 **Disclosing Party** means the Party making disclosure of the Confidential Information and **Receiving Party** means the Party receiving the Confidential Information.

27.2 During the term of this Agreement and after its termination or expiration for any reason whatsoever, the Receiving Party shall:

27.2.1 maintain the confidentiality of the Confidential Information of the Disclosing Party;

27.2.2 not disclose the Confidential Information of the Disclosing Party to any person other than with the prior written consent of the Disclosing Party or in accordance the provisions of this Agreement; and

27.2.3 not use the Confidential Information of the Disclosing Party for any purpose other than the performance of its obligations under this Agreement.

27.3 During the term of this Agreement, the Receiving Party may disclose the Confidential Information of the Disclosing Party to the Receiving Party's

employees, professional advisers and subcontractors only to the extent that it is reasonably necessary for the purposes of the implementation of this Agreement.

27.4 The Receiving Party shall make sure that each recipient of the Confidential Information of the Disclosing Party complies with all the Receiving Party's obligations of confidentiality under this Agreement as if the recipient were the Receiving Party under the terms of this Agreement.

27.5 The obligations of the Parties under this Clause 27 shall survive the expiry or termination of this Agreement for a period of 4 (four) years after termination of this Agreement.

27.6 The Parties agree that the Disclosing Party shall be entitled to the remedies of interdict and specific performance for any threatened or actual breach of this Clause 27 by the Receiving Party.

28. Notices

28.1 The Parties choose as their *domicilia citandi et executandi* and as addresses their respective street addresses hereunder (or such other address, not being a post office box or poste restante, of which the Party concerned may notify the other in writing). All legal process and notices given under the Project Documents may validly be served or delivered at such addresses and at no other addresses. For the avoidance of doubt, the Parties may not serve or deliver any legal process by way of electronic mail.

28.1.1 The Company:

Transnet SOC Ltd
Inyanda House
21 Wellington Road
Parktown
Johannesburg, 2193

Facsimile No: +27 11 554 9594

Attention: General Counsel

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28.1.2 **The Contractor:**

Global House

60 Tulbagh Road

Kempton Park

1630

Facsimile No: 011 396 159

Attention: Rowlen von Gericke

A change in domicilium by either party shall only take effect 5 (five) Business Days after receipt of written notice of such change by the other Party.

28.2 Any notice or correspondence given in terms of the Project Documents shall be in writing and shall:

28.2.1 if delivered by hand, be deemed to have been received by the addressee 1 (one) Business Day after the date of delivery;

28.2.2 if posted, be deemed to have been received by the addressee 5 (five) Business Days after dispatch;

28.2.3 if sent by facsimile, be deemed to have been received by the addressee 1 (one) hour after its successful transmission or, if outside normal business hours, 1 (one) hour after the start of normal business hours on the next Business Day;

28.2.4 if sent by electronic mail, be deemed to have been received by the addressee 1 (one) hour after its successful transmission or, if outside normal business hours, 1 (one) hour after the start of normal business hours on the next Business Day.

29. **Cession and Assignment**

29.1 Subject to the provisions of Clause 29.2, neither Party shall be entitled to cede, assign or delegate this Agreement or any of its rights or obligations under this Agreement to any third party without the prior written consent of the other Party.

29.2 Notwithstanding the provisions of Clause 29.1, the Company may, in respect this Agreement and any other Project Document to which the Contractor is a party:

29.2.1 cede it rights and interests thereunder, without the consent of the Contractor, for the purposes of raising finance from banks and financial institutions (including any export credit agency) in order to fund its payment obligations under the Project Documents; and

29.2.2 cede any of its rights and/or delegate any of its obligations thereunder, without the consent of the Contractor, to an Affiliate of the Company, provided that the Company has established to the Contractor's reasonable satisfaction that the relevant transferee has sufficient financial resources and capacity to meet the obligations of the Company under the Project Documents.

29.3 The Contractor shall not be entitled to sub-contract any part of its obligations under this Agreement without the prior written consent of the Company, provided that:

29.3.1 no such consent shall be required by the Contractor when sub-contracting any part of its obligations to a Key Sub-Contractor;

29.3.2 should the Contractor sub-contract any part of its obligations under this Agreement, such sub-contracting arrangement shall not relieve the Contractor of any of its obligations or liabilities hereunder and the Contractor shall be liable for any act of its subcontractors regardless of whether such acts are negligent or otherwise.

30. Applicable Law

30.1 This Agreement shall be governed by and construed and interpreted in accordance with the laws of the Republic of South Africa and all disputes, proceedings and other matters relating thereto shall be dealt with and resolved in accordance with such laws.

30.2 Subject to Clause 26 (Dispute Resolution), the Parties consent and submit to the jurisdiction of the South Gauteng High Court, Johannesburg, in respect of all or any legal proceedings referred to in Clause 26.4 (Court Proceedings) arising from or concerning the Project Documents.

30.3 The Parties agree that the High Court of South Africa (South Gauteng High Court, Johannesburg) is the most appropriate and convenient court to settle any Dispute contemplated in Clause 26.4 (Court Proceedings). The Parties agree not to argue to the contrary and waive objection to this court on the grounds of inconvenient forum or otherwise in relation to such proceedings.

30.4 To the extent allowed by law, the Company may take:

30.4.1 such proceedings in any other court; and

30.4.2 concurrent proceedings in any number of jurisdictions.

31. Survival

Notwithstanding the termination or expiry of this Agreement, the provisions of Clauses 1, 2, 5, 10, 8.4 to 8.10 (inclusive), 13, 14.8.5, 21.4 to 21.9 (inclusive), 22, 23, 24, 26 to 30 (inclusive), 32 and 33 shall expressly survive such termination or expiry and continue in full force and effect along with any other Clauses of and any Schedules to this Agreement necessary to give full and proper effect to those Clauses.

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32. Mitigation

32.1 Each of the Company and the Contractor shall at all times take all reasonable steps to minimise and mitigate any loss for which the relevant Party is entitled to bring a claim or other recourse against the other Party pursuant to the Project Documents.

32.2 The provisions of this Clause 32 or any other Clauses in this Agreement pertaining to mitigation are not intended to place any lesser duty upon a Party to mitigate, than either Party has in terms of common law. It is not the Parties' intention to exclude their common-law duty to mitigate.

33. Miscellaneous

33.1 Non Reliance

The Parties acknowledges that, in entering into this Agreement, they have not relied and will not rely on any statements, representations, warranties or undertakings not expressly set out in this Agreement, including (without limitation) any statements, representations, warranties or undertakings in the invitations and instructions to tenderers issued by the other Party or the other documents made available by the other Party prior to execution of this Agreement.

33.2 Indulgences

No extension of time, indulgence, compromise or other arrangement granted or allowed by either Party shall constitute a waiver or novation of or in any way prejudice that Party's rights in terms of the Project Documents nor constitute an estoppel.

33.3 Costs and Expenses

Each Party shall pay its own costs in connection with the preparation and drafting of this Agreement and the other Project Documents.

33.4 English language

This Agreement is written in the English language and any subsequent communication between the Parties in relation to the Project Documents shall be in English and in no other language whatsoever.

33.5 Waiver of Immunity

Each Party irrevocably and unconditionally:

33.5.1 agrees not to claim any immunity from proceedings brought against it in relation to the Project Documents and to ensure that no such claim is made on its behalf;

33.5.2 consents generally to the giving of any relief or the issue of any process in connection with those proceedings; and

33.5.3 waives all rights of immunity in respect of it or its assets.

33.6 **Counterparts**

Each Project Document may be executed by the Parties in separate counterparts, each of which, when executed and delivered, shall be an original, but all such counterparts shall together constitute one and the same instrument. All signatures need not be contained in the same counterpart. Signatures received by facsimile or electronic mail shall have the same force and effect as original, inked signatures.

33.7 **Entire Contract**

33.7.1 This Agreement and all attachments, schedules, exhibits and supplements hereto and read together with the other Project Documents constitute the entire agreement between the Company and the Contractor regarding the design, manufacture, sale, purchase and operation of the Locomotives and supersedes any and all previous agreements and understandings between the Parties in relation to the subject matter of the Project Documents.

33.7.2 Neither Party shall have the right to vary a Project Document or any part of it except in accordance with the express provisions of Part 6 of Schedule 3 or by an instrument in writing, signed by duly authorized representatives of both Parties. Neither Party shall assert any claim with respect to any term not expressly included herein.

33.8 **Illegality**

33.8.1 If at any time any one or more of the provisions of a Project Document is or becomes invalid, illegal or unenforceable in any respect under any Legal Requirement, the validity, legality and enforceability of the remaining provisions of such Project shall not in any way be affected or impaired.

33.8.2 If at any time after the date of this Agreement either Party becomes aware that:

33.8.2.1 any material provision of a Project Document (the **Invalid Provision**) has become invalid, illegal or unenforceable; and/or

33.8.2.2 a Change in Law after the date of this Agreement makes or will make it unlawful or impossible, without breaching the affected Legal Requirement, for a Party (the **Affected Party**) to perform all or a material part of its obligations under that Project Document,

such Party shall promptly notify the other Party.

33.8.3 Without prejudice to any other terms of the Project Documents, the Parties shall promptly consult in good faith with a view to agreeing as soon as reasonably practicable:

33.8.3.1 in the case of Clause 33.8.2.1, one or more provisions (the **New Provisions**) in lieu of the Invalid Provision such as will, so far as is possible under any Legal Requirement, have the same commercial effect as the Invalid Provision would have had if it had not been illegal, unenforceable or invalid; and/or

33.8.3.2 in the case of Clause 33.8.2.2, any methods of avoiding the effects of any such matter, including the making of a Variation, and, subject to obtaining any necessary consents, transferring the Affected Party's rights and obligations under that Project Document to another person not affected by that Legal Requirement, provided such person and the terms of transfer are acceptable to the other Party in its absolute discretion.

33.8.4 Nothing in this Clause 33.8 shall impose any legal liability on the Affected Party or the other Party to implement or agree to the implementation of any such matters.

33.8.5 If the Parties are unable to agree in writing a method of resolving the illegality, invalidity or unenforceability on terms acceptable to both Parties within 30 Business Days after the date of issuance of the notice referred to in Clause 33.8.2, either Party shall (subject to Clause 33.8.3) be entitled to terminate this Agreement by notice in writing.

33.8.6 In the case of Clause 33.8.2.2, the Affected Party shall only be entitled to terminate this Agreement at any time (whether or not within such 30 (thirty) Business Days period) on or after the date on which it becomes unlawful or impossible, without breaching a Legal Requirement, for the Affected Party to perform all or a material part of its obligations under this Agreement. On such date, this Agreement shall terminate in relation to all the Locomotives and the provisions of Clause 21.6 (Consequences of a No-Fault Termination Event) shall apply.

33.9 **Further Assurances**

The Parties and their Representatives shall at all times co-operate with one another to facilitate the implementation of the Project Documents. Whenever this Agreement requires or permits any Representative to exercise his discretion or take any action which may affect the rights of the other Party, such Representative shall exercise such discretion:

33.9.1 within the time stipulated for the exercise of the discretion or if not stipulated within a reasonable time; and

33.9.2 in good faith.

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33.10 Sub-Contracting: Continuing Liability of the Contractor

Any sub-contracting by the Contractor of its obligations shall be strictly in accordance with this Agreement. The appointment or authorisation by the Contractor of any Sub-Contractor, agent, officer or employee shall not relieve the Contractor of any obligation under this Agreement, and (subject to Clause 1.4) the acts and omissions of any such Sub-Contractor, agent, officer or employee shall, for the purposes of this Agreement, be deemed to be the acts and omissions of the Contractor.

SIGNATURE PAGE

Thus signed and executed by the Parties and witnessed on the following dates and at the following places respectively:

For and on behalf of

TRANSNET SOC LTD

Signature: ..... Date: 17.3.14.

Name: B. MOLEFE. Place: Johannesburg

Capacity: Chief Executive Officer - Transnet SOC LTD (Duly authorised hereto)

As witness:

Signature: ..... Date: 17/3/14

Name: ..... Place Johannesburg

For and on behalf of:

FRIEDSHELF 1507 PROPRIETARY LIMITED (and, subject to a name change, to be known and registered as **CNR ROLLLING STOCK SOUTH AFRICA PROPRIETARY LIMTED)**

Signature: ..... Date: 17 Mar 2014

Name: WONG GONG Place Johannesburg

Capacity:

As witness:

Signature: ..... Date: 17th March 2014

Name: MARTIN VAN GERKLE Place: Johannesburg

ANNEXURE "RG 2"

1

CNR 中国北车

CNR CONSORTIUM/UNINCORPORATED JOINT VENTURE

Ms Lindiwe Mdletswe
Commodity Manager
Supply Chain
Transnet Freight Rail
Johannesburg

10 March 2014

Dear Lindiwe

465 new Diesel Locomotives for General Freight – Cost Impact of Manufacturing in Durban

With reference to the TFR request relating to the CNR response for the cost impact of building the locomotives in Durban, we would like to point out that our original quotation is based upon building the locomotives in Koedoespoort or Germiston. We understand from TE that the Koedoespoort facility has already been allocated but CNR would like to request that before a final decision is made regarding this matter that we are granted site visits for both Durban and Germiston.

As regards the request for the cost impact of this decision, CNR would like to point out that our preliminary studies show that the cost of building the locomotive in Durban will be higher than the cost of building the locomotive in Germiston.

Yours sincerely

Rowlen von Gericke
On Behalf of CNR Consortium

Care of: Global House, 60 Tolbagh Road, Kempton Park 1620
P.O. Box 10285, Aston Manor, Kempton Park, 1619

Tel: +27 11 230 1300
Fax: +27 11 398 1594
Email: Rowlen@globalgroups.org

ANNEXURE "RG 3"

CNR 中国北车

CNR CONSORTIUM

11 March 2014

Attention: Lindiwe Mdletshe
Transnet Freight Rail
Acquisition Council

465 New Diesel Locomotives for General Freight – Impact of Locating in Durban

Dear Lindiwe and Garry

Further to our previous email in this regard. Following the request from TFR for CNR Consortium to consider the Durban facilities for manufacture of locomotives, the following calculations were made:

IMPACT OF MANUFACTURING IN DURBAN VS JOHANNESBURG

TRANSPORT COSTS

	Saving	Extra Cost	Comment
Engine		R 8 000.00	Engine imported but testing done in JHB
Propulsion System		R 16 000.00	ABB is located in JHB. 40% is imported portion, assembly in JHB
Brakes		R 8 000.00	Knorr Bremse located in JHB.
Chinese components supplier	R 8 000.00		Imported components from Dalian
Locomotive Gears		R 4 000.00	Based in JHB
Air Conditioner		R 4 000.00	Based in JHB
Wheels + Axles	R 8 000.00		Imported components
Refrigerator		R 500.00	Based in JHB
U-tubes and gear case	R 4 000.00		Rotacon based in Durban
Communications equipment		R 200.00	Located in JHB
Total	R 20 000.00	R 40 700.00	
Difference per locomotive		R 20 700.00	
Extra Cost on Locomotives		R 4 077 900.00	

Care of: Global House, 60 Tulbagh Road, Kempton Park 1630
P.O. Box 10285, Aston Manor, Kempton Park, 1619

Tel: +27 11 230 1900
Fax: +27 11 396 1594
Email: Rowlen@globalgroups.org

Imported Locomotive

Saving on Imported Locomotives (20)	R 1 000 000.00		Fully built locomotives
Saving on Kits (15)	R 285 000.00		Bogie, under-frame and body panels imported from Dalian
Total	**R 1 285 000.00**		
Total Extra Transport Costs		R 2 792 900.00	

Transport Cost is calculated based on 32ton at R19 000 and 28T at R16 000 per trip.

FLIGHTS AND ACCOMODATION

Minimum of 4 people to fly (F) to Durban every week from JHB		R 1 320 000.00
Accomodation (A)		R 960 000.00
Extra F & A cost		R 2 280 000.00

Office Costs		
New Office set up for 60 personnel		R 604 800.00

Total Extra Costs of locating in Durban	**R**	**9 755 600.00**

The above costs only relates to the measurable financial implications. Please bear in mind that there is always be a considerable amount of immeasurable financial losses that will be incurred due to relocating to Durban.

Furthermore, it will be very inconvenient and counterproductive to split our resources between Johannesburg and Durban.

For these reasons we request that the manufacturing should be done at Koedoespoort. Knowing the Koedoespoort facility well, I was wondering whether it will be possible to utilise the old Koedoespoort East foundry facility.

The CNR Consortium is of the opinion that the project can be better managed and executed in the Koedoespoort facility given its proximity to the existing offices.

Kind regards

Rowlen von Gericke
On behalf of CNR Consortium / Unincorporated Joint Venture

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ANNEXURE "RG 4"

CNR ROLLING STOCK SOUTH AFRICA PROPRIETARY LIMITED

(Registration Number: 2014/016892/07)

(the "Company")

NOTICE OF SUBMISSION OF WRITTEN RESOLUTIONS IN TERMS OF SECTION 74 OF THE COMPANIES ACT, NO 71 OF 2008 FOR CONSIDERATION BY THE BOARD OF DIRECTORS OF THE COMPANY

WHEREAS

1. The following resolutions are submitted for the written approval by the directors of the Company in terms of section 74 of the Companies Act, No 71 of 2008 as amended (the "Companies Act"). Accordingly, the resolutions set out in this notice must be adopted by written consent of a majority of the directors, given in person, or by electronic communication (as defined in the Companies Act) (by signing Annexure A).

2. The board of directors of the Company wish to pass the following written resolutions as a matter of urgency, and as required in accordance with clause 30 of the Company's memorandum of incorporation ("MOI"), in order to enter into the Supplementary Agreement in relation to the Locomotive Supply Subcontracting Agreement between the Company and CNR (Hong Kong) Corporation Limited. (the "Agreement").

3. A draft of the Agreementhas beenreviewed by all of the directors of the Company and is attached hereto as Annexure B.

4. **RESOLUTION NUMBER 1 – Approval of entering into the Agreement**

   For purposes of compliance with the requirements of clause 30 of the Company's MOI, the directors wish to approve the entering into of the Agreement, a draft of such Agreement being attached hereto as Annexure B, by and between the Company and CNR (Hong Kong) Corporation Limited.

5. **RESOLUTION NUMBER 2– Authorizing the signing and execution of the Agreement**

   The directors wish to authorize Mr. Wang Gang to sign and execute the Agreement on behalf of the Company.

2 of 7

NOW WHEREFORE IT IS TO BE RESOLVED THAT:

4. for purposes of compliance with the requirements of clause 30 of the Company's MOI, the entering into of the Agreement by the Company, a draft of such Agreement being attached hereto as Annexure B, to be entered into between the Company and CNR Hong Kong Corporation Limited, is hereby approved;

5. Mr. Wang Gang is hereby authorized to sign and execute the Agreement on behalf of the Company.

SIGNED BY _____

ON BEHALF OF THE COMPANY

CAPACITY: DIRECTOR OF THE COMPANY

DATE: 18/Feb 2015

Annexure A

WRITTEN RESOLUTIONS IN TERMS OF SECTION 74 OF THE COMPANIES ACT, NO 71 OF 2008FOR CONSIDERATION BY THE BOARD OF DIRECTORS OF THE COMPANY

NOW WHEREFORE IT IS TO BE RESOLVED THAT:

1. for purposes of compliance with the requirements of clause 30 of the Company's MOI, the entering into of the Agreement by the Company, a draft of such Agreement being attached hereto as **Annexure B**, to be entered into between the Company and CNR (Hong Kong) Corporation Limited, is hereby approved;

2. Mr. Wang Gang is hereby authorized to sign and execute the Agreement on behalf of the Company.

Resolution Numbers -	**Date**	**Signature**	
1.		**For**	**Against**
Gang Wang	18/Feb/2015		
Lulamile Lincoln Xate			
Tao Yu	18/02-2015		
Rowlen Ethelbert Von Gericke			
Feng Yu			
Roberto Gonsalves			
Gang Zhao			
2.		**For**	**Against**
Gang Wang	18/Feb/2015		
Lulamile Lincoln Xate			
Tao Yu	18/02-2015		
Rowlen Ethelbert Von Gericke			
Feng Yu			

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Resolution Numbers -	Date	Signature	
Roberto Gonsalves			
Gang Zhao			

ANNEXURE "RG 5"

3

BUSINESS DEVELOPMENT SERVICES AGREEMENT

CNR ROLLING STOCK SOUTH AFRICA PTY LTD.
(Regn. No. _____)

with

BEX STRUCTURED PRODUCTS PTY LTD.
(Regn. No. 2000/028999/07)

Or its NOMINEE

AGREEMENT DATE: MAR 08, 2015

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This Agreement is entered into by and between the following parties:

BEX STRUCTURED PRODUCTS PTY LTD (hereinafter, referred to as "BEX") (which expression includes its associates, subsidiaries, affiliates, successors and permitted assigns), a company duly incorporated and existing under the Companies Act in South Africa, and having its registered offices at **1st Floor, 24 Crescent Drive, Melrose Arch 2076, Johannesburg,** duly authorised and represented by Mr. Marc Bond.

and

CNR ROLLING STOCK SOUTH AFRICA PTY LIMITED (hereinafter referred to as the "Company") (which expression includes its successors and permitted assigns), a company duly incorporated and existing under the Companies Act in South Africa, and having its office address at_____, duly authorised and represented by the person signing this Agreement., duly authorised and represented by Mr. _____, signing this Agreement.

(Hereinafter, BEX and the Company may be individually referred to as a **"Party"**, and collectively as **"the Parties".**)

WHEREAS:

A. BEX, a professional service advisory business that specialises in business enterprise optimisation using financial modelling, derivatives and engineering techniques, with its long subsisting relationships in the territory of South Africa (hereinafter **"The Territory"**) has acquired a familiarity with regulatory, social, cultural and political framework whereby it is capable to closely co-ordinate with the designated authorities to comprehend the applicable Government policies, identify the opportunities of participation in various Government and Private projects, lend consultancy on participating in various tenders and bidding processes and thus facilitating trade of goods and services concerning such projects.

   The **COMPANY** is a global company specializing in the manufacture of Locomotives and Spare Parts for the same, with a focus on emerging markets. The COMPANY has approached BEX to provide advisory services in respect of the Project, for expanding their business in the Territory and help it in achieving their BEE (Black Economic Empowerment) objectives in the Territory on a long-term basis.

B. The Parties have, after mutual discussions, acknowledged and agreed that they have suitable and complementary resources to jointly harness the opportunities in the Territory through a Business Development Services Agreement, whereby BEX will play active role in providing advisory services in respect of the Project, Business development and BEE structuring and management in the Territory.

C. In view of the above-set background, the Parties have agreed to reduce in writing their mutual understanding and their respective fundamental interests, rights, duties, obligations and liabilities in relation to the agency, their respective roles in this regard, the terms and conditions on which the Parties would implement the agency relationship and certain other matters thereto.

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1. Definitions and Interpretation

1.1. Definitions

Certain terms are defined within the recitals and within the body text of this Agreement. In addition, the following terms shall have the following meaning:

"Affiliate"	means, with respect to any Person, any other Person that, directly or indirectly, through one or more intermediaries, controls or is controlled by or is under common control with such person.
"Agreement"	means this Agreement, including the recitals and schedules hereto, as the same may be varied or amended from time to time in writing by agreement of the Parties;
"Agreement Date"	shall mean and refer to **MARCH 08, 2015**; being the date of execution of this Agreement;
"Business Day"	means any day on which banking institutions in South Africa are open for business.
"Force Majeure"	means any of the following events or occurrences: (i) Acts of God, such as fires, floods, thunderstorms, earthquakes, unusually severe weather and natural catastrophes; (ii) civil disturbances, such as strikes, lock outs and riots; (iii) acts of aggression, such as explosions, wars, and terrorism which are not foreseen; or (iv) acts of government or actions of regulatory bodies which significantly inhibit or prohibit either Party from performing their obligations under this Agreement.
"Person"	includes any individual, company, corporation, firm, partnership, consortium, joint venture or association, whether a body corporate or an unincorporated association of persons.
"Product"	means the Company's related products and Services.
"Project"	**shall mean the change in scope whereby Transnet Engineering (TE) requires the Company to change the location of the local manufacture programme from the TE Spartan Pretoria facility to their Durban facility.**
"Territory"	means Republic of South Africa.
"Third Party"	means a person who is not a Party to this Agreement and does not include Affiliates of any of the Parties.

"Nominee"	means any juristic person or Company that may be nominated by BEX with the prior written consent of CNR from time to time to continue with and fulfil the obligations of this Agreement and/or to provide the necessary Invoices for executing the commercial aspects of this Agreement.
"BEE"	means Black Economic Empowerment as set out in the BEE Charter of the Republic of South Africa.

1.2. Interpretation

1.2.1. References to this Agreement or to any other instrument shall be a reference to this Agreement or that other instrument as amended, varied, novated, or substituted from time to time.

1.2.2. The headings in this Agreement are for ease of reference only and shall not affect the interpretation or construction of this Agreement.

1.2.3. References to Recitals, Clauses and Schedules are references to recitals, clauses and sub clauses and schedules to this Agreement.

1.2.4. Words importing the singular number shall include the plural and vice versa and words importing the masculine gender shall include the feminine and the neuter gender and vice versa.

1.2.5. Each of the representations and warranties provided in this Agreement are independent of other representations and warranties and unless the contrary is expressly stated, no Clause in this Agreement limits the extent or application of another Clause.

1.2.6. "In writing" includes any communication made by letter or fax or e-mail.

1.2.7. The words "include", "including" and "in particular" shall be construed as being by way of illustration or emphasis only and shall not be construed as, nor shall they take effect as limiting the generality of any preceding words.

1.2.8. References to a person shall be construed so as to include:

1.2.8.1. individual, firm, partnership, trust, joint venture, company, corporation, body corporate, unincorporated body, association, organization, any government, or state or any agency of a government or state, or any local or municipal authority or other governmental body (whether or not in each case having separate legal personality);

1.2.8.2. that person's successors in title and assigns or transferees permitted in accordance with the terms of this Agreement; and

1.2.9. References to a person's representatives shall be to its officers, employees, legal or other professional advisers, sub-contractors, agents, attorneys and other duly authorized representatives.

1.2.10. References to statutory provisions shall be construed as references to those provisions as are respectively amended or re-enacted or as their application is modified by other provisions (whether before or after the date of this Agreement) from time to time and shall include any provisions of which they are re-enactments (whether with or without modification).

1.2.11. All warranties, representations, indemnities, covenants, guarantees, stipulations, undertakings, agreements and obligations given or entered into by more than one person are given or entered into severally unless otherwise specified.

1.2.12. In the event that the date on which any act or obligation specified in this Agreement to be performed falls on a day which is not a Business Day, then the date on which the act or obligation is to be effected or performed shall take place on the next Business Day.

1.2.13. This Agreement is the result of negotiations between, and has been reviewed by, the Parties and their respective counsel. Accordingly, this Agreement shall be deemed to be the product of the Parties, and there shall be no presumption that an ambiguity should be construed in favour of or against any Party solely as a result of such Party's actual or alleged role in the drafting of this Agreement.

2. Preamble

2.1. Whereas the TE requires the Company to change the location of the local manufacture programme from the TE Koedoespoort Gauteng facility to their Bay-Head Durban facility.

2.2. And whereas the Company has approached BEX to assess and formulate the entire strategy and planning to quantify and benchmark the costs associated with the re-location as per Clause 2.1.

2.3. And whereas BEX has agreed to undertake the work at their sole risk and at no cost to the Company if the agreed benchmark costs are not realized from Transnet Freight Rail (TFR).

2.4. After extensive research and negotiations with both the Company & TFR, BEX and the Company have agreed that the benchmark costs for the Project will be fixed at R280 million (Rands Two hundred and eighty million only) excluding VAT.

2.5. Since BEX has undertaken to negotiate and finalize the deal with TFR on risk basis, it is agreed between both parties that BEX be entitled to an agency commission equivalent to the difference between the price excluding VAT awarded to the Company by TFR and the price benchmark of R280 million excluding VAT as detailed in Clause 7.

3. Scope and Purpose of the Agreement and key principles

3.1. The Parties have entered into this Agreement to record their mutual understanding as regards their relationship and the manner in which such relationship shall be effectuated and implemented through this Agreement.

3.2. The scope of this Agreement is the regulation of the rights and relationships of the Parties, both among themselves and with respect to Third Parties, with the aim of

identifying, preparing and executing deals to supply the Company's locomotives and services in the Territory.

3.3. In order to achieve their joint commercial objective, the Parties shall operate this Agreement as per the terms and conditions set out herein.

3.4. Each Party agrees to co-operate with the other Party on the best effort basis.

3.5. Each Party hereby agrees and undertakes towards the other Party to perform and observe all of the provisions of this Agreement.

3.6. The Parties acknowledge that the broad parameters for the conduct of this Agreement (subject always to the terms and conditions of this Agreement) is to enable increase of the market share of Company's Services in the Territory and enhancement of the economic value of the Parties.

4. **General Conditions of appointment**

4.1. The Company hereby appoints BEX to provide advisory and consulting services in respect of the Project and to aid Business Development and to assist in achieving the Company's BEE objectives in in the Territory.

4.2. The Parties hereby agree and acknowledge that they are independent contractors. No partnership, joint venture or employment is created or implied by this Agreement.

5. **Duties and Responsibilities of BEX**

5.1. BEX shall provide advisory services in respect of the Project and will assist in preparing the Bid documentation in respect to the Project on risk basis.

5.2. BEX shall assist the Company to improve its market share in the Territory.

5.3. BEX shall not make any representation on behalf of the Company except in conformity with the written instructions issued by the Company.

5.4. BEX will have a period of one year from the Agreement Date to deliver the Project, failing which this agreement will automatically terminate and the Parties can then decide on its resurrection or not, by written agreement.

5.5. BEX will inform the Company timeously in writing if it wishes to appoint a nominee to carry on with the provisions of this Agreement in its place and the appointment of nominee shall be effected after the written consent of CNR.

6. **Duties and Responsibilities of the Company**

6.1. The Company shall on its own make necessary submissions of proposals and documents as per the requirements of the bidding documents, wherever applicable, in the most competitive manner.

6.2. The Company shall be responsible to study, understand and interpret the requirements of the bids or offers on its own or in conjunction with its Partners and BEX shall in no way be liable for any misconstruction of any clause mentioned therein.

6.3. The Company shall alone be responsible for complying with all conditions and for all after sale support services to TFR and BEX shall not be obligated for any consequent liabilities arising out of the same, whatsoever.

7. Remuneration, payment terms etc.

7.1. For the Project Scope deviation (referred herein above), BEX shall assist the Company to negotiate the best possible price with TFR based on a minimum price benchmark of R280 million (Rands Two Hundred and Eighty million only) excluding VAT.

7.2. The Company agrees that BEX will be entitled for an agency commission equivalent to the difference between the price excluding VAT awarded to the Company by TFR and the price benchmark of R280 million excluding VAT. For example if the price awarded is R650 million, then BEX will be entitled to an agency commission of R370 million. The Company price will be fixed at R280 Million irrespective of whether the total Project value is negotiated lower than the R650 million by TFR.

7.3. BEX shall be entitled to agency commission irrespective of the fact whether the supply is of main product or any spare part or ancillary item thereto.

7.4. The agency commission as stated above shall get due and payable in proportionate tranches as and when payment is received by the Company.

7.5. The company shall pay BEX within 10 business days after receiving the invoice and the BEX banking details as per clause 12 from BEX.

8. Term and Termination

8.1. This Agreement shall be effective from the Agreement Date and will remain valid till the time the Company remains eligible for award of the scope deviation by reason of the fact that the original Project has been awarded to the Company or is not called off before execution. However, once the Agreement for the scope deviation is signed by Company within the validity of this Agreement, this Agreement shall be automatically extended and shall remain in force until full payment due to BEX under this Agreement is made by the Company.

8.2. Notwithstanding the aforementioned, if either Party hereto commits a breach of this Agreement or defaults in the performance of any obligation hereof, and if such default or breach is evidenced and not rectified within 14 (fourteen) business days after the same has been called to the attention of the defaulting Party by a written notice from the other Party; then the non-defaulting Party, at its option, may thereupon terminate this Agreement by submitting a written notice to the other Party.

8.3. Any expiration or termination of this Agreement pursuant to Clause 7.2 shall be without prejudice to any other rights or remedies to which a Party may be entitled hereunder or at law and shall not affect any accrued rights or liabilities of either Party.

9. Liability provisions

9.1. Each Party undertakes to cause its employees, agents, and Affiliates, as long as they are associated with terms of this Agreement, to respect and comply with this Agreement.

In any case, each Party undertakes to collaborate in good faith with each other to avoid or minimize any disadvantage or harm affecting the other Party.

9.2. The provisions of Clause 9 shall continue to apply following the expiration or termination of this Agreement and for a period of Five (5) years thereafter.

10. **Confidentiality**

10.1. During the course of this Agreement, one Party (the "Discloser") may, on a case-by-case basis, disclose to the other Party (the "Recipient") certain Confidential Information all of which shall be regarded as confidential. "**Confidential Information**" means any information as the Discloser may from time to time provide (or have supplied or disclosed on its behalf) to the Recipient, including all financial or other information relating to its business affairs or the business affairs of the Affiliates, whether orally or in a written, physical or visual form, regarding the products, activities, including (without limitation) data, software systems, information technology, products, applications together with analyses, compilations, forecasts, studies or other documents prepared by the Discloser (including, but not limited to, lawyers, accountants, consultants and financial advisers) and/or its Representatives which contain or otherwise reflect information about the Discloser and/or its Affiliates.

10.2. The Recipient shall at all times during the term of this Agreement and for a period of five (5) years following its termination, hold all Confidential Information which it acquires from Discloser under the terms of this Agreement, or otherwise, in strict confidence and shall not disclose such information to any third party or duplicate, transfer, or use directly or indirectly, the Confidential Information other than in Recipient's performance of its obligations under this Agreement.

The foregoing restrictions shall not apply to any information which: (i) is or becomes generally available to the public other than as a result of a breach of obligation by Recipient; or (ii) is lawfully acquired from a third party who owes no obligation of confidence in respect of the information; or (iii) Recipient is required to disclose by law (provided that Recipient shall assert the confidential nature of the information and give immediate written notice to Discloser and assist Discloser in obtaining a protective order against such disclosure).

10.3. Upon request of Discloser, or upon the expiration or any earlier termination of this Agreement, Recipient shall promptly return all copies of the Confidential Information in whatever form or media, to Discloser or, at the direction of Discloser, destroy the same. Recipient shall certify in writing to Discloser such return or destruction within ten (10) days of the date of Discloser's request.

10.4. Subject to all other terms of this agreement, this Agreement and its Annexes are also Confidential Information and either party shall not disclose, advertise or publish the terms or conditions of this Agreement or the Annexes without the prior written consent of the other party.

11. **Miscellaneous**

11.1. All notices required or permitted to be given under this Agreement shall be in writing, shall be given to the other Party and shall be deemed given to a Party when:

11.1.1. delivered to the appropriate address by hand or by overnight courier service (costs prepaid);

11.1.2. received by the addressee, if sent by certified mail, return receipt requested;

in each case to the following addresses and marked to the attention of the person (by name or title) designated below (or to such other address, facsimile number or person as a Party may designate by notice to the other Party):

BEX:
BEXStructured Products Pty Ltd
For the attention of: Mr. Marc Brand
Address: 24 Crescent Drive, Melrose Arch 2076, Johannesburg

The Company:
CNR ROLLING STOCK PTY LTD.
For the attention of: Mr. _____
Address: _____

All correspondence, exchange of information, documents between the Parties, with Customers / third parties shall take place in English language.

11.2. No Party may assign any interest, benefit, right or obligation under this Agreement to any Person without having obtained the prior written consent of the other Party. It shall be a condition of any assignment that the assigning Party gives prior written notice to the other Party and to the Third Party including any Authority (if required by Law or any contract) of its intention and that such Person, provides prior written confirmation that it does not object to such intended assignment, and with respect to an assignment to non-Affiliates that the other Party provides prior written confirmation that it does not object to such intended assignment. Furthermore, it shall be a condition of any assignment that the new participant shall have to ratify this Agreement in writing and accept to be bound by and adhere to the provisions of this Agreement, and in any event of assignment to an Affiliate as specified above, the assigning Party shall continue to guarantee the performance of the new participant under this Agreement and in any event of assignment, it shall also continue to be bound by the exclusivity and confidentiality provisions set forth herein.

11.3. If any provision of this Agreement is or becomes illegal, unenforceable or invalid under the law of any jurisdiction applicable to the Parties, neither the legality, validity or enforceability of the remaining provisions of this Agreement nor the legality, validity or enforceability of such provision under the law of any other jurisdiction shall be in any way affected or impaired thereby; provided, however, that if such severability materially changes the economic benefits of this Agreement to a Party, the Parties shall negotiate an equitable adjustment in the provisions of this Agreement in good faith.

11.4. This Agreement (including any annexes thereof) sets forth the full and complete understanding of the Parties as of the date of execution of this Agreement and supersedes all other prior negotiations, agreements, and understandings of the Parties with respect thereto. No Party shall be bound by any other obligations, conditions or representations with respect to the subject matter of this Agreement.

11.5. No waiver of any of the provisions of this Agreement shall be deemed to be or constitute a waiver of any other provision whether similar or not. No single waiver shall constitute a continuing waiver.

11.6. Neither this Agreement nor any of the terms hereof may be amended, supplemented, waived or discharged unless the Parties so agree in writing.

11.7. Nothing in this Agreement, except to the extent explicitly provided, shall be construed to create an association, trust, partnership, joint venture, or other fiduciary relationship between the Parties or to impose a trust or partnership duty, obligation or liability between the Parties. No Party shall by virtue of this Agreement be deemed to be the representative of the other Party for any purpose whatsoever, and no Party shall have the power or authority as agent or in any other capacity to represent, act for, bind, or otherwise create or assume any obligation on behalf of any other Party for any purpose whatsoever, except specifically agreed in writing by the other Party.

11.8. This Agreement may be executed in one or more duplicate counterparts and when executed by all of the Parties shall constitute a single binding agreement.

11.9. Neither Party hereto shall be liable for any failure to perform its obligations under this Agreement due to a Force Majeure event. In the event of Force Majeure the Parties shall evaluate the obligations affected by the Force Majeure event, and shall mutually agree in writing on the measures to be taken or on the effect of such Force Majeure event on the Parties' obligations hereunder. The Parties may agree that performance of a Party's obligations shall be suspended during the period of existence of such Force Majeure event as well as the period reasonably required thereafter to resume the performance of the obligation. The Parties shall use their best reasonable efforts to minimize the consequences of this Force Majeure. In the event of Force Majeure the Parties, shall discuss and mutually agree on the continued co-operation between the parties, including the necessity of termination of this Agreement.

11.10. Nothing expressed or implied in this Agreement is intended or shall be construed to create or extend any rights or benefits to any third party, other than the Parties hereto excluding clause 12.

11.11. Except to the extent of indemnification obligations related to Third Party claims, neither Party hereunder shall be liable for special, incidental, exemplary, indirect, punitive or consequential damages arising out of a Party's performance or non-performance under this Agreement, whether based on or claimed under contract, tort (including such Party's own negligence) or any other theory at law or in equity.

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12. **BEX Banking details**

The Banking details will be mentioned in each invoice provided by BEX to the Company.

Any changes to the above banking details of BEX will be advised by BEX to the Company in writing. In the event of the Company receiving what appears to be an instruction from BEX, amending the BEX banking details, the Company shall only be entitled to act upon such instruction if it was received in writing from, or confirmed in writing with, the signatory to this Agreement.

13. **Binding Effect**

With effect from the Agreement Date, this Agreement shall become unconditional and a legal, valid and binding obligation of each of the Parties.

14. **Signature in counterparts**

This Agreement may be executed in counterparts, each of which shall be deemed to be an original and which together shall constitute one and the same Agreement.

IN WITNESS WHEREOF the Parties have executed this Agreement on the date and at the place mentioned below.

SIGNED AT _____ ON THIS THE 8TH DAY OF MARCH 2015

For and on behalf of **BEXSTRUCTURED PRODUCTS PTY LTD:**

Name: MR. MARC BRAND Designation: **Authorized Signatory**

Signature: _____

AS WITNESS:

1. _____

SIGNED AT _____ ON THIS THE _____ DAY OF MARCH 2015

For and on behalf of **CNR ROLLING STOCK PTYLTD..**

Name: _____ Designation: **Authorized Signatory**

Signature: _____

AS WITNESS:

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1._____

Annexure – A

Statement of Advisory Services to be provided by BEX to CNR ROLLING STOCK SOUTH AFRICA PTY LTD. (CNR) in respect of the Project as defined in Clause 1.1 of this Agreement

BEX, with its long subsisting relationships in the territory of South Africa has agreed to provide CNR with the following services as part of its Advisory and Consulting Services on the Project:

1. Conduct detailed research on the costs associated with the Project on risk basis
2. Negotiate with TFR and assist the Company to conclude the deal with TFR on the Project at the agreed minimum benchmark price of R280 million excluding VAT.
3. Assist CNR in preparing the Bid documentation and negotiating with TFR on pricing levels in relation to the Project.
4. Advise CNR on the regulatory, social, cultural and political framework in South Africa with respect to the Project.
5. Identify the various opportunities of participation in various Government and Private projects, leading to the shortlisting and focus on the current Project as contemplated in this Agreement.
6. Closely co-ordinate with the designated authorities to comprehend the applicable Government policies and advise CNR accordingly to ensure smooth execution of the Project.
7. Provide consultancy on participating in the Tenders and bidding processes related to the Project.
8. Assist CNR in increasing their footprint in Government and Private Projects in South Africa.

It is hereby noted and agreed between the parties that the above services are provided as a pre-Project service and will conclude on CNR signing the Contract for the Project with TRANSNET. BEX will provide necessary proof of delivery of the above services as required by CNR.

ANNEXURE "RG 6"

CNR ROLLING STOCK SOUTH AFRICA PROPRIETARY LIMITED

(Registration Number: 2014/016892/07)

(the "**Company**")

NOTICE OF SUBMISSION OF WRITTEN RESOLUTIONS IN TERMS OF SECTION 74 OF THE COMPANIES ACT, NO 71 OF 2008 FOR CONSIDERATION BY THE BOARD OF DIRECTORS OF THE COMPANY

WHEREAS

1. The following resolutions are submitted for the written approval by the directors of the Company in terms of section 74 of the Companies Act, No 71 of 2008 as amended (the "**Companies Act**"). Accordingly, the resolutions set out in this notice must be adopted by written consent of a majority of the directors, given in person, or by electronic communication (as defined in the Companies Act) (by signing Annexure A).

2. The board of directors of the Company wish to pass the following written resolutions as a matter of urgency, and as required in accordance with clause 30 of the Company's memorandum of incorporation ("**MOI**"), in order to enter into the Agency Agreement in relation to the relocation of the manufacturing facility of Transnet Engineering Division ("TE") from the Koedoespoort facility Gauteng to Bay-Head Durban(the "**Agreement**"), under the provisions of which, the agent will assist the Company to negotiate with Transnet (acting through TFR) and facilitate the award of costs associated with the relocation aforementioned, and the Company will pay the agent agency commission as provided in the Agreement.

3. **RESOLUTION NUMBER 1 – *Approval of entering into the Agreement***

   For purposes of compliance with the requirements of clause 30 of the Company's MOI, the directors wish to approve the entering into of the Agreement.

4. **RESOLUTION NUMBER 2– Authorizing the signing and execution of the Agreement**

   The directors wish to authorize Mr. Wang Gang to sign and execute the Agreement on behalf of the Company, including the payment required in the Agreement.

NOW WHEREFORE IT IS TO BE RESOLVED THAT:

Annexure A

WRITTEN RESOLUTIONS IN TERMS OF SECTION 74 OF THE COMPANIES ACT, NO 71 OF 2008FOR CONSIDERATION BY THE BOARD OF DIRECTORS OF THE COMPANY

NOW WHEREFORE IT IS TO BE RESOLVED THAT:

1. for purposes of compliance with the requirements of clause 30 of the Company's MOI, the entering into of the Agreement by the Company is hereby approved;

2. Mr. Wang Gang is hereby authorized to sign and execute the Agreementon behalf of the Company, including the payment required in the Agreement.

Resolution Numbers -	Date	Signature	
1.		For	Against
Gang Wang		20/Apr/2015	
Lulamile Lincoln Xate			
Tao Yu	20/Apr-2015		
Rowlen Ethelbert Von Gericke			
Feng Yu	2015.4.20		
Roberto Gonsalves			
Gang Zhao	20/Apr.2015		
2.		For	Against
Gang Wang	20/Apr.2015		
Lulamile Lincoln Xate			
Tao Yu	20/Apr.-2015		
Rowlen Ethelbert Von Gericke			
Feng Yu	2015.4.20		
Roberto Gonsalves			
Gang Zhao	20/Apr.2015		

3. for purposes of compliance with the requirements of clause 30 of the Company's MOI, the entering into of the Agreement by the Company is hereby approved;

4. Mr. Wang Gang is hereby authorized to sign and execute the Agreement on behalf of the Company, including the payment required in the Agreement.

SIGNED BY _____

ON BEHALF OF THE COMPANY

CAPACITY: DIRECTOR OF THE COMPANY

DATE: 8 April 2015

ANNEXURE "RG 7"

MINUTES OF A MEETING OF THE DIRECTORS OF CNR ROLLING STOCK SOUTH AFRICA PROPRIETARY LIMITED HELD AT 3RD FLOOR, 95 GRAYSTON DRIVE, SANDTON, JOHANNESBURG, ON THURSDAY, 8 OCTOBER 13, 2015 AT 09H00

ATTENDANCE

Present:

Gang Wang	**(GW)**
Tao Yu	**(TY)**
Lulamile Lincoln Xate	**(LLX)**
Stan Whiting (Alternate to Rowlen Ethelbert Von Gericke)	**(SW)**
Roberto Gonsalves	**(RG)**
Feng Yu (dial in)	**(FY)**
Gang Zhao (dial in)	**(GZ)**
Meiling Wang (dial in)	**(MW)**
Ning Zhou	**(NZ)**
Jane Dong	**(JD)**

1. **Opening of the Meeting**

1.1. **TY**, as the Chairman of the Board, welcomed all who were present at the meeting, and declared that **FY**, **GZ** and **MW** would dial in the meeting.

2. **Confirmation of Quorum**

2.1. The quorum requirements of the Board were confirmed by those present at the meeting.

2.2. **GW** declared that he had personal financial interest in respect of Resolution Number 4. **TY** declared that he had personal financial interest in respect of Resolution Number 3. All of the other directors present responded that they did not have any business interest, or personal financial interest to declare.

3. **Confirmation of Agenda**

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From protocol perspective, **SW** and **RG** proposed to do with the outstanding issues of the previous board meeting. TY proposed to go through firstly today's agenda and come back to the outstanding matters of the previous board meeting, some of which were actually covered in today's agenda. All directors agreed with this.

4. **Administrative issues**

4.1. Resolution 1 – the resolution was approved after the CEO (Gang Wang) confirmed that the Products Supply Agreement contains:

1) the original delivery dates;

2) a contract price of 86,353,759.00 US Dollars;

3) SA law has been applied; and

4) the prices, which can be adjusted in accordance with the final design, are within acceptable deviations from those contained in the Locomotive Supply Agreement ("LSA").

LLX, SW and RW expressed their concern on the delivery schedule.

CNRRSSA is requesting an extension of the delivery dates by 6 months or so. All the directors agreed that **this needed to be agreed with TFR and signed.** Once agreed with TFR, the delivery schedule of the Product Supply Agreement can be updated on a back-to-back basis.

4.2. Resolution 2 –the Related Party Transactions relating to items bought by CNRRSSA from TE and SA local companies and supplied to CNR Hong Kong and CNR Dalian. Approval of this resolution by all directors is only being sought for items on *Annexure C (List of Related Party Transactions)* of *Schedule 1 (NOTICE OF THE MEETING)*.

4.3. Resolution 3 – **MW** reminded of the board that **TY** will leave the meeting due to the personal financial interest. The other directors refused **TY** to leave the meeting. The resolution is approved by **GW**, **LLX**, **RG**, **SW**, **FY**, and **GZ** after the clarification that R2.04 million is the total cost to the Company, which consists of a fixed basic annual salary of R1.5 million and a fixed annual bonus of R540,000. The board can decide an extra performance bonus for CFO.The remuneration will be escalated by 8% per year.

4.4. Resolution 4 –**MW** reminded of the board that **GW** will leave the meeting due to the personal financial interest. The other directors refused **GW** to leave the meeting. The resolution is approved by **TY**, **LLX**, **RG**, **SW**, **FY**, and **GZ** after the clarification that R2.1 million is the total cost to the Company, which consists of a fixed basic annual salary of R1.5 million and a fixed annual bonus of R540,000. The board can decide an extra performance bonus for CEO. The remuneration will be escalated by 8% per year.

4.5. Resolution 5 – The resolution is approved by all the directors.

5. **Project Progress Report to the Board**

5.1. Design Freeze

GW introduced the progress of Design Freeze to the Board. He introduced that this had been completed and TFR was invoiced 5% of the total contract price of the LSA, and this had been paid by TFR (including VAT).

The directors agreed that the shareholders needed to consider the implications on the PMA Fees and Share Capital of the Company.

5.2. Durban Relocation

GW introduced to the Board the progress of Durban Relocation. With the assistance by BEX to the negotiation with TFR, the Company finally negotiated for R647m to be paid by TFR. Half has been received and the other half will be received as and when locomotives are delivered to TFR. BEX has been paid a fee of R67m for the services provided, plus VAT.**SW**, **RG** and **LLX** requested that it be noted that they did not sign the resolution for the BEX mandate. **GW** to provide the board members with a copy of the Variation Order by TFR..

SW, RG and LLX re-iterated that their concerns with the BEX contract. GW provided the relevant documents of BEX to the directors, such as Cor39 and BEE Credential Certificate. Also, the estimated cost for Durban Relocation, the BEX Proposal and Reason for Selecting BEX have already been provided to the directors in April.

GW expressed that the only reason that the other directors approved this is that it is beneficial to the Company. In case there're concerns for **SW**, **RG** and **LLX**, they can decided on their own judgment.

5.3. Delivery Schedule

GW introduced that the delivery of the first 20 locomotives was to be delayed for about 4 months due to the manufacture facility relocation to Durban, which lacked of skill and manufacturing experience and needed long workshop preparation. This also happened in other OEM project in Durban. The Company also requested TE to submit a reliable delivery schedule in consideration of the Durban relocation, and was still waiting for TE's confirmation. It was about 6 months' delay or more.The directors agreed that it was imperative that the amended schedule needs to be agreed and signed if the delivery dates are being moved out,

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because the schedule in the LSA would apply until a revised delivery schedule had been signed by the parties.

6. **SD Report**

GW introduced the progress of SD and the SD target was 64%, to which Local Content can be added. Management confirmed that this is achievable. **SW** expressed concern that Yonge needed to invest R340m in order to be able to achieve the SD target.

7. **General Discussion Points at the Meeting**

7.1. **GW** briefed the merge between CNR and CSR and future shareholder change from CNR to CRRC.

All the directors approved this item.

7.2. **GW** and **TY** expressed the concern to settle the dispatch of three black women to the Company by the local shareholders as soon as possible. **GW** proposed a deadline for this, which is the middle of December, 2015.

LLX will re-engage with the Endinamix CEO candidate and arrange an interview with the CEO/CFO of the Company. Global and Cadiz to recruit people as well.

7.3. AFS's – The board ratifed the round-robin resolution approving the audited annual financial statements.

7.4. Taxes – It was noted that the **Grant Thonston** revised the tax computation based on what was discussed at the last board meeting. Management will either negotiate the fee on GT's proposal for the Transfer Pricing proposal or obtain another quote. Either way this urgent matter needs to be finalised. **SW**, **RG** and **LLX** accepted **Grant Thonston**'s proposal.

7.5. BEE Improvement Plan – Management will employ more Black employees in Johannesburg and Durban to ensure compliance with LSA BEE targets. In addition, procurement from local suppliers will be increased. Management confirmed that they are aware of the BEE targets.

7.6. Directors' Fees – The directors agreed that the directors' fee to be R100,000. The directors need to consider to invoice whether in person or by a company.

7.7. Agenda items- The directors agreed that the agenda must include the matters arising from the previous board meeting.

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8. **Date of Next Board Meeting**

8.1. The directors agreed that the next board meeting would be held at 26th Jan of 2016.

9. **Closing of the Meeting**

The meeting was closed at 12:00 am.

_____ **Date:** _____

Tao Yu
Chairperson

R67

CNNRRSA Board Meeting

6 May 2016

1. **Approval of previous minutes**
   - Disagree that board approved fees of R100 000. This does not accord with the proposal sent to the board which was approved at the last board meeting and covered out-of-pocket expenses for Cadiz and Lulamile Xate.
   - The principles were agreed to by the board and the FD undertook to pay Cadiz next week. Lulamile Xate to claim his out-of-pocket expenses as well.

2. **Secondments**
   - The Company is happy with all three employee (1 x Global, 1 x Cadiz and Babalwa Dludlu for Endinamix).
   - Company has agreed that Babalwa Dludlu will meet with the Company to finalise her appointment as well as the other 2 employees.
   - Shareholders will send the Company a letter confirming the employees and their salary. Babalwa Dludlu will co-ordinate this.
   - The Salary Deduct Method per Resolution 9 means that the Company will pay the agreed TCC and deduct these from the future Project Management Fees.

3. **Matters Arising**
   - Grant Thornton: The mandate has been signed. Meeting with GT to take place on 16 May. The SA directors stressed the importance of finalising the Transfer Pricing policy as soon as possible as this has been on the agenda for a while.
   - CA to be employed – agreed with the principle. They are speaking with a few candidates.

4. **Financials**
   - Cash Flows: The following adjustments are required
     a) Formatting of numbers
     b) Opening and closing cash balances
   - Income Statement and Balance Sheet – to be linked to the cash flow budget and emailed to board.

5. **R600m loan**
   - Security will be provided by a parent company guarantee. This is being done for hedging purposes. The board requires the terms and conditions of this loan to be presented before approval can be granted.
   - Management needs to provide clarity on the company's hedging policy. The borrowing is only one aspect. What percentage is being loaned? How? When?
   - The Company needs to respond to the Cadiz document on the hedging strategies by 13 May 2016. Failing this Lulamile Xate will resign from the board.

6. **Resolution number 4**
   - This addendum is not approved as this requires 40% of the contract to be paid within 7 days. We may not have the R600m loan by then and the Company may not wish to hedge all in one go.

7. **Resolution number 5**
   - Not approved. This is the cost of testing for 21 locomotives only. Contract needs to specify what the R5.7m covers. The Company wants to negotiate with Dalian with regards to the balance of the locomotives as the cost per locomotive is too high.

8. **Resolution number 7**
   - Approved

9. **Resolution number 8**
   - The SA directors to send questions on the financial statements to management.
   - KPMG to meet with board to discuss the financial statements.
   - SA directors requested a copy of the BEX report submitted to TFR. Made it clear that the shareholders have not approved the BEX contract. This was provided to the SA directors during the meeting. RvG requested that Jeff Wang produces a timeline of the various discussions that took place between the company and TFR as well as the company and BEX. This document needs to list the contents of the discussions as well as the outcomes.

10. **Resolution number 11**
    - Only approval to the extent that the resolutions 1 -10 have been approved.

ANNEXURE "RG 8"

E

BUSINESS DEVELOPMENT SERVICES AGREEMENT

CNR ROLLING STOCK SOUTH AFRICA PTY LTD.
(Registration No. 2014/016892/07)

with

BUSINESS EXPANSION STRUCTURED PRODUCTS PTY LTD.
(Registration No. 2009/020420/07)

AGREEMENT DATE: APRIL 25, 2015

2

This Agreement is entered into by and between the following parties:

BUSINESS EXPANSION STRUCTURED PRODUCTS PTY LTD (hereinafter, referred to as "BEX") (which expression includes its associates, subsidiaries, affiliates, successors and permitted assigns), a company duly incorporated and existing under the Companies Act in South Africa, and having its registered offices at 1st Floor, 24 Crescent Drive, Melrose Arch 2076, Johannesburg, duly authorised and represented by Mr. Mark Shaw

and

CNR ROLLING STOCK SOUTH AFRICA PTY LIMITED (hereinafter referred to as the "Company") (which expression includes its successors and permitted assignees), a company duly incorporated and existing under the Companies Act in South Africa, and having its office address at 3rd floor, 95 Grayston Drive, Sandton 2196, Johannesburg, South Africa, duly authorised and represented by the person signing this Agreement., duly authorised and represented by Mr. Gang Wang, signing this Agreement.

(Hereinafter, BEX and the Company may be individually referred to as a "Party", and collectively as "the Parties".)

WHEREAS:

A. BEX, a professional service advisory business that specialises in business enterprise optimisation using financial modelling, derivatives and engineering techniques, with its long subsisting relationships in the territory of South Africa (hereinafter "The Territory") has acquired a familiarity with regulatory, social, cultural and political framework whereby it is capable to closely co-ordinate with the designated authorities to comprehend the applicable Government policies, identify the opportunities of participation in various Government and Private projects, lend consultancy on participating in various tenders and bidding processes and thus facilitating trade of goods and services concerning such projects.

The COMPANY is a global company specializing in the manufacture of Locomotives and Spare Parts for the same, with a focus on emerging markets. The COMPANY has approached BEX to provide advisory services in respect of the Project and for expanding their business in the Territory and help it in achieving their BEE (Black Economic Empowerment) objectives in the Territory on a long-term basis.

B. The Parties have, after mutual discussions, acknowledged and agreed that they have suitable and complementary resources to jointly harness the opportunities in the Territory through this Business Development Services Agreement, whereby BEX will play an active role in providing advisory services in respect of the Project, Business development and BEE structuring and management in the Territory.

C. In view of the above-set background, the Parties have agreed to reduce in writing their mutual understanding and their respective fundamental interests, rights, duties, obligations and liabilities in relation to the agency, their respective roles in this regard, the terms and conditions on which the Parties would implement the agency relationship and certain other matters thereto.

1. **Definitions and Interpretation**

1.1. Definitions

Certain terms are defined within the recitals and within the body text of this Agreement. In addition, the following terms shall have the following meaning:

"Affiliate"	means, with respect to any Person, any other Person that, directly or indirectly, through one or more intermediaries, controls or is controlled by or is under common control with such person.
"Agency Commission"	the difference between the price excluding VAT awarded to the Company by TFR and the Project Benchmark Costs of R580 million excluding VAT
"Agreement"	means this Agreement, including the recitals and schedules hereto, as the same may be varied or amended from time to time in writing by agreement of the Parties;
"Agreement Date"	shall mean and refer to APRIL 25, 2015; being the date of execution of this Agreement;
"BEE"	means Black Economic Empowerment as set out in the BEE Charter of the Republic of South Africa.
"Business Day"	means any day on which banking institutions in South Africa are open for business.
"Force Majeure"	means any of the following events or occurrences: (i) Acts of God, such as fires, floods, thunderstorms, earthquakes, unusually severe weather and natural catastrophes; (ii) civil disturbances, such as strikes, lock outs and riots; (iii) acts of aggression, such as explosions, wars, and terrorism which are not foreseen; or (iv) acts of government or actions of regulatory bodies which significantly inhibit or prohibit either Party from performing their obligations under this Agreement.
"Nominee"	means any juristic person or company that may be nominated by BEX with the prior written consent of CNR from time to time to continue with and fulfil the obligations of this Agreement and/or to provide the necessary services and any expertise required for executing the commercial aspects of this Agreement.
"Person"	includes any individual, company, corporation, firm, partnership, consortium, joint venture or association, whether a body corporate or an unincorporated association of persons.
"Price"	shall mean the amount paid by TFR for the implementation

	of the project
"Product"	means the Company's related products and Services.
"Project"	shall mean the change in scope whereby Transnet Engineering (TE) a division of Transnet SOC Limited requires the Company to change the location of the local manufacture programme from the TE Koedoespoort Gauteng facility to their Bay-Head Durban facility.
"Project Benchmark Costs"	shall mean R580m (Five hundred and eighty million Rand) excluding VAT
"Scope Deviation"	shall mean costs associated with the implementation of the Project
"Territory"	means Republic of South Africa.
"Third Party"	means a person who is not a Party to this Agreement and does not include Affiliates of any of the Parties.
"TFR"	means Transnet Freight Rail, a division of Transnet SOC Limited

1.2. Interpretation

1.2.1. References to this Agreement or to any other instrument shall be a reference to this Agreement or that other instrument as amended, varied, novated, or substituted from time to time.

1.2.2. The headings in this Agreement are for ease of reference only and shall not affect the interpretation or construction of this Agreement.

1.2.3. References to Recitals, Clauses and Schedules are references to recitals, clauses and sub clauses and schedules to this Agreement.

1.2.4. Words importing the singular number shall include the plural and vice versa and words importing the masculine gender shall include the feminine and the neuter gender and vice versa.

1.2.5. Each of the representations and warranties provided in this Agreement are independent of other representations and warranties and unless the contrary is expressly stated, no Clause in this Agreement limits the extent or application of another Clause.

1.2.6. "In writing" includes any communication made by letter or fax or e-mail.

1.2.7. The words "include", "including" and "in particular" shall be construed as being by way of illustration or emphasis only and shall not be construed as, nor shall they take effect as limiting the generality of any preceding words.

1.2.8. References to a person shall be construed so as to include:

1.2.8.1. individual, firm, partnership, trust, joint venture, company, corporation, body corporate, unincorporated body, association, organization, any government, or state or any agency of a government or state, or any local or municipal authority or other governmental body (whether or not in each case having separate legal personality);

1.2.8.2. that person's successors in title and assigns or transferees permitted in accordance with the terms of this Agreement; and

1.2.9. References to a person's representatives shall be to its officers, employees, legal or other professional advisers, sub-contractors, agents, attorneys and other duly authorized representatives.

1.2.10. References to statutory provisions shall be construed as references to those provisions as are respectively amended or re-enacted or as their application is modified by other provisions (whether before or after the date of this Agreement) from time to time and shall include any provisions of which they are re-enactments (whether with or without modification).

1.2.11. All warranties, representations, indemnities, covenants, guarantees, stipulations, undertakings, agreements and obligations given or entered into by more than one person are given or entered into severally unless otherwise specified.

1.2.12. In the event that the date on which any act or obligation specified in this Agreement to be performed falls on a day which is not a Business Day, then the date on which the act or obligation is to be effected or performed shall take place on the next Business Day.

1.2.13. This Agreement is the result of negotiations between, and has been reviewed by, the Parties and their respective counsel. Accordingly, this Agreement shall be deemed to be the product of the Parties, and there shall be no presumption that an ambiguity should be construed in favour of or against any Party solely as a result of such Party's actual or alleged role in the drafting of this Agreement.

2. Preamble

2.1. Whereas TE requires the Company to change the location of the local manufacture programme from the TE Koedoespoort Gauteng facility to their Bay-Head Durban facility.

2.2. And whereas the Company has approached BEX to assess and formulate the entire strategy and planning to quantify and benchmark the costs associated with the re-location as per Clause 2.1.

2.3. And whereas BEX has agreed to undertake the work at their sole risk and at no cost to the Company if the agreed Project Benchmark Costs are not recovered from Transnet Freight Rail (TFR).
2.4. After extensive research and negotiations with both the Company & TFR, BEX and the Company have agreed that the Project Benchmark Costs will be fixed at R580 million (Rands Five hundred and eighty million only) excluding VAT.
2.5. Since BEX has undertaken to negotiate and finalize the deal with TFR on a risk basis, it is agreed between both parties that BEX be entitled to an Agency Commission as detailed in Clause 6.

3. Scope and Purpose of the Agreement and key principles

3.1. The Parties have entered into this Agreement to record their mutual understanding as regards their relationship and the manner in which the Project shall be implemented through this Agreement.
3.2. The scope of this Agreement is the regulation of the rights and relationships of the Parties, both among themselves and with respect to Third Parties, with the aim of executing the Project and other services in the Territory.
3.3. In order to achieve their joint commercial objectives, the Parties shall operate this Agreement as per the terms and conditions set out herein.
3.4. Each Party agrees to co-operate with the other Party on a best effort basis.
3.5. Each Party hereby agrees and undertakes towards the other Party to perform and observe all of the provisions of this Agreement.
3.6. The Parties acknowledge that the broad parameters for the conduct of this Agreement (subject always to the terms and conditions of this Agreement) is to implement the Project in the Territory and to enhance the economic value of the Parties.

4. General Conditions of appointment

4.1. The Company hereby appoints BEX to provide advisory and consulting services in respect of the Project and to aid Business Development and to assist in achieving the Company's BEE objectives in the Territory.
4.2. The Parties hereby agree and acknowledge that they are independent contractors. No partnership, joint venture or employment is created or implied by this Agreement.

5. Duties and Responsibilities of BEX

5.1. BEX shall provide advisory services in respect of the Project and will assist in the implementation of the processes related to the Project on a risk basis.
5.2. BEX shall assist the Company to achieve its objectives in the Territory.
5.3. BEX shall not make any representation on behalf of the Company except in conformity with express written permission from the Company.
5.4. BEX will have two years from the Agreement Date to implement the Project
5.5. BEX will inform the Company timeously in writing if it wishes to appoint a nominee or assign the provisions of this Agreement. The appointment of such nominee or assignee shall be effected after the written consent of the Company.

6. Remuneration, payment terms etc.

6.1. For the Project Scope deviation (referred hereinabove), BEX shall assist the Company to negotiate the best possible price with TFR based on the Project Benchmark Cost of R580 million (Rands Five Hundred and Eighty million only) excluding VAT.

6.2. The Company agrees that BEX will be entitled to an agency commission equivalent to the difference between the price excluding VAT awarded to the Company by TFR and the Project Benchmark Cost of R580 million excluding VAT. For example if the price awarded is R680 million, then BEX will be entitled to an agency commission of R100 million(excluding VAT) i.e. R680m less R580m.

6.3. The Company will be entitled to the Project Benchmark Cost of R580 Million irrespective of whether the total Project value is negotiated lower than the R680 million by TFR.

6.4. BEX shall be entitled to the agency commission irrespective of whether the Project Benchmark Cost arise from the supply of services, main product or any spare part or ancillary item thereto.

6.5. The agency commission as stated above will be due and payable in full as and when i) the Company and TFR has entered into an agreement that the Company will be awarded the Price more than the Project Benchmark Costs by TFR, and ii) the first payment of the Price is received by the Company.

6.6. The company shall pay BEX within 10 business days after from receipt of the invoice from BEX.

7. Term and Termination

7.1. This Agreement shall be effective from the Agreement Date and will remain valid for a period of two years and for such time that the Company remain eligible for the award of the Scope Deviation.

7.2. Once the agreement for the Scope Deviation has been signed by the Company, this Agreement shall remain in force until full payment due to BEX under this Agreement is made by the Company.

7.3. If either Party hereto commits a breach of this Agreement or defaults in the performance of its obligations, and if such default or breach is not rectified within 14 (fourteen) business days after the same has been called to the attention of the defaulting Party by a written notice from the other Party; then the non-defaulting Party, at its option, may declare a dispute and hereby consent to the arbitration being dealt with in terms of the expedited Rules of arbitration of AFSA within 30 days. The arbitration shall be determined in accordance with the provisions of South African law and the Parties submit to South African jurisdiction for the purpose of this arbitration

7.4. Any expiration or termination of this Agreement pursuant to Clause 7.2 shall be without prejudice to any other rights or remedies to which a Party may be entitled hereunder or at law and shall not affect any accrued rights or liabilities of either Party.

8. Liability provisions

8.1. Each Party undertakes to cause its employees, agents, and Affiliates, as long as they are associated with terms of this Agreement, to respect and comply with this Agreement.

In any case, each Party undertakes to collaborate in good faith with each other to avoid or minimize any disadvantage or harm affecting the other Party.

8.2. The provisions of Clause 8 shall continue to apply following the expiration or termination of this Agreement and for a period of Five (5) years thereafter.

9. Confidentiality

9.1. During the course of this Agreement, one Party (the "Discloser") may, on a case-by-case basis, disclose to the other Party (the "Recipient") certain Confidential Information all of which shall be regarded as confidential. "Confidential Information" means any information as the Discloser may from time to time provide (or have supplied or disclosed on its behalf) to the Recipient, including all financial or other information relating to its business affairs or the business affairs of the Affiliates, whether orally or in a written, physical or visual form, regarding the products, activities, including (without limitation) data, software systems, information technology, products, applications together with analyses, compilations, forecasts, studies or other documents prepared by the Discloser (including, but not limited to, lawyers, accountants, consultants and financial advisers) and/or its Representatives which contain or otherwise reflect information about the Discloser and/or its Affiliates.

9.2. The Recipient shall at all times during the term of this Agreement and for a period of five (5) years following its termination, hold all Confidential Information which it acquires from Discloser under the terms of this Agreement, or otherwise, in strict confidence and shall not disclose such information to any third party or duplicate, transfer, or use directly or indirectly, the Confidential Information other than in Recipient's performance of its obligations under this Agreement.

The foregoing restrictions shall not apply to any information which: (i) is or becomes generally available to the public other than as a result of a breach of obligation by Recipient; or (ii) is lawfully acquired from a third party who owes no obligation of confidence in respect of the information; or (iii) Recipient is required to disclose by law (provided that Recipient shall assert the confidential nature of the Information and give immediate written notice to Discloser and assist Discloser in obtaining a protective order against such disclosure).

9.3. Upon request of Discloser, or upon the expiration or any earlier termination of this Agreement, Recipient shall promptly return all copies of the Confidential Information in whatever form or media, to Discloser or, at the direction of Discloser, destroy the same. Recipient shall certify in writing to Discloser such return or destruction within ten (10) days of the date of Discloser's request.

9.4. Subject to all other terms of this agreement, this Agreement and its Annexes are also Confidential Information and either party shall not disclose, advertise or publish the terms or conditions of this Agreement or the Annexes without the prior written consent of the other party.

10. Miscellaneous

10.1. All notices required or permitted to be given under this Agreement shall be in writing, shall be given to the other Party and shall be deemed given to a Party when:

10.1.1. delivered to the appropriate address by hand and by email or by overnight courier service (costs prepaid);

in each case to the following addresses and marked to the attention of the person (by name or title) designated below (or to such other email address, facsimile number or person as a Party may designate by notice to the other Party):

BEX:
BEX Structured Products Pty Ltd
For the attention of: Mr. Mark Shaw
Address: 24 Crescent Drive, Melrose Arch 2076, Johannesburg and by email at enquiries@bexstructuredproducts.co.za

The Company:
CNR ROLLING STOCK PTY LTD.
For the attention of: Mr. Gang Wang
Address: 3rd Floor, 95 Grayston Drive, Sandton, 2196, Johannesburg

All correspondence, exchange of information, documents between the Parties, with Customers / third parties shall take place in English language.

10.2. No Party may assign any interest, benefit, right or obligation under this Agreement to any Person without having obtained the prior written consent of the other Party which consent shall not be unreasonably withheld. In the event of assignment as specified above, the assigning Party shall continue to guarantee the performance of the new participant under this Agreement and in any event of assignment, it shall also continue to be bound by the exclusivity and confidentiality provisions set forth herein.

10.3. If any provision of this Agreement is or becomes illegal, unenforceable or invalid under the law of any jurisdiction applicable to the Parties, neither the legality, validity or enforceability of the remaining provisions of this Agreement nor the legality, validity or enforceability of such provision under the law of any other jurisdiction shall be in any way affected or impaired thereby; provided, however, that if such severability materially changes the economic benefits of this Agreement to a Party, the Parties shall negotiate an equitable adjustment in the provisions of this Agreement in good faith.

10.4. This Agreement (including any annexes thereof) sets forth the full and complete understanding of the Parties as of the date of execution of this Agreement and supersedes all other prior negotiations, agreements, and understandings of the Parties with respect thereto. No Party shall be bound by any other obligations, conditions or representations with respect to the subject matter of this Agreement.

10.5. No waiver of any of the provisions of this Agreement shall be deemed to be or constitute a waiver of any other provision whether similar or not. No single waiver shall constitute a continuing waiver.

10.6. Neither this Agreement nor any of the terms hereof may be amended, supplemented, waived or discharged unless the Parties so agree in writing.

10.7. This Agreement may be executed in one or more duplicate counterparts and when executed by all of the Parties shall constitute a single binding agreement.

10.8. Neither Party hereto shall be liable for any failure to perform its obligations under this Agreement due to a Force Majeure event. In the event of Force Majeure the Parties shall evaluate the obligations affected by the Force Majeure event, and shall mutually agree in writing on the measures to be taken or on the effect of such Force Majeure event on the Parties' obligations hereunder. The Parties may agree that performance of a Party's obligations shall be suspended during the period of existence of such Force Majeure event as well as the period reasonably required thereafter to resume the performance of the obligation. The Parties shall use their best reasonable efforts to minimize the consequences of this Force Majeure. In the event of Force Majeure the Parties, shall discuss and mutually agree on the continued co-operation between the parties, including the necessity of termination of this Agreement.

10.9. Except to the extent of indemnification obligations related to Third Party claims, neither Party hereunder shall be liable for special, incidental, exemplary, indirect, punitive or consequential damages arising out of a Party's performance or non-performance under this Agreement, whether based on or claimed under contract, tort (including such Party's own negligence) or any other theory at law or in equity.

11. <u>BEX Banking details</u>

The Banking details will be mentioned in each invoice provided by BEX to the Company.

Any changes to the above banking details of BEX will be advised by BEX to the Company in writing. In the event of the Company receiving what appears to be an instruction from BEX, amending the BEX banking details, the Company shall only be entitled to act upon such instruction if it was received in writing from, or confirmed in writing with, the signatory to this Agreement.

12. <u>Binding Effect</u>

With effect from the Agreement Date, this Agreement shall become unconditional and a legal, valid and binding obligation of each of the Parties.

13. Signature in counterparts

This Agreement may be executed in counterparts, each of which shall be deemed to be an original and which together shall constitute one and the same Agreement.

IN WITNESS WHEREOF the Parties have executed this Agreement on the date and at the place mentioned below.

SIGNED AT PARKTOWN ON THIS THE 25th DAY OF APRIL 2015

For and on behalf of BEX STRUCTURED PRODUCTS PTY LTD:

Name: MR. MARK SHAW Designation: Authorized Signatory

Signature: _____

AS WITNESS:

1. _____

SIGNED AT Sydney ON THIS THE 25th DAY OF APRIL 2015

For and on behalf of CNR ROLLING STOCK SOUTH AFRICA PTY LTD..

Name: MR. GANG WANG Designation: Authorized Signatory

Signature: _____

AS WITNESS:

_____

Annexure – A

Details of Services to be provided by BEX to THE COMPANY in respect of the Project

BEX, and its associates have significant relationships in the Territory BEX has agreed to provide the Company with the following services as part of its Advisory and Consulting Services on the Project:

1. Conduct detailed research on the costs associated with the Project on a risk basis
2. Negotiate and assist the Company to conclude the project at the minimum benchmark cost of R580 million excluding VAT.
3. Advise the Company on the regulatory, social, cultural and political framework in South Africa with respect to the Project.
4. In addition to the Project, identify various opportunities to participate in similar projects.
5. Closely co-ordinate with appropriate counterparties to advise on applicable Government policies and advise the Company on successful execution and implementation of the Project.
6. In addition to the Project, assist the Company in increasing their access to in Government and Private Projects in the Territory
7. Assist the Company in relation to the Project to achieve the Price. If requested by the Company, BEX will attend the meeting with the Company in regard to giving report, analysis, explanation and presentation to TFR.
8. Provide project plan, information, data, or documents relating to the accounting records or other necessary data, documents or analysis on the Project.

ANNEXURE "RG 9"

TICHAUER & BLOCH
Chartered Accountants (SA)
IRBA NUMBER: 936677E
21 7th Avenue, Parktown North
PO Box 464 Parklands 2121
Telephone – (011) 442-6623 Fax – (011) 442-4985

Certification Date: April 30 2015 **Date: April 29 2016**

BEE Verification Certificate

of exemption for Micro Enterprises

BUSINESS EXPANSION STRUCTURED PRODUCTS (PROPRIETARY) LIMITED

Reg. no: 2009/020420/07

Johannesburg, Gauteng

Scorecard Verification: Final Codes of Good Practice Gazetted - 9 February 2007

BEE Status - ***Broad Based*** **Level: 4 Contributor**
100% recognition

Company identification status: Exempted micro enterprise, i.e., turnover R 5m and below.

Signature

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ANNEXURE "RG 10"

CoR 14.3

Certificate issued by the Companies and Intellectual Property Commission on Tuesday, May 19, 2015 12:56
Certificate of Confirmation

Companies and Intellectual Property Commission
a division of the dtic Group

Registration number	2009/020420/07
Enterprise Name	BUSINESS EXPANSION STRUCTURED PRODUCTS (PTY) LTD

Auditor

Name	TICHAUER AND BLOCH
Postal Address	PO BOX 464 PARKLANDS 2121

Active Directors / Officers

Surname and first names	ID number or date of birth	Director type	Appointment date	Addresses
SHAW, MARK	7405275078081	Director	15/04/2015	Postal: PO BOX 464, PARKLANDS, JOHANNESBURG, GAUTENG, 2121 Residential: 9 BONAIRE, 115 3RD AVENUE, FAIRLANDS, GAUTENG, 2195
LEGAL FRONTIERS (CORPORATE SERVICES) CC, as a secretary of M2009020420	B2000051024	Secretary (Companies and CC's)	22/10/2009	Postal: PO BOX 464, PARKLANDS, 2193 Residential: 21-7TH AVENUE, PARKTOWN NORTH, 2193

ANNEXURE "RG 11"

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南非项目德班搬迁增加
Proposal Estimated Cost Increased on Durb
based on original projec

序号 No.	名称 Description	增加金额（总计） Increased amount(total)
1	增加运输费用 Increased logistics cost	45, 100, 000
2	增加德班建立办事处和旅行费用 Increased cost for setupfacilities in Durban & travelling	27, 300, 000
3	全新、新设厂区的工艺布局技术指导，技术支持费用（比指导已有厂区需要等多的技术支持和指导）Increased Cost on technical support & guide on brandnew process layout(compared with the KDS)	60, 750, 000
4	培训全新生产厂员工的难度和费用增加（新生培训的深度和广度与既有熟练员工不同） Difficulty and cost increased on traning the new emplyees	31, 800, 000
5	供应商的机车生产现场服务成本增加 Increased cost for site service on site by supplier	47, 470, 000
6	我方延迟收到货款，货款的时间价值. Increased Financial cost for postpone the delivery due to the relocation	48, 000, 000
7	保险费用增加 Increased insurance cost	272, 685
8	通货膨胀Inflation	26, 335, 435. 88

费用预算

an Relocation(increased cost ct, Draft)

备注 Remark
办事处房租：120万每年*7=840万；住宿房租（150人日次/月）：1500兰特/人日次*150人日次/月*12个月*7年=1890万兰特 Office rental:1.2 million Rand/year*7years=8.4 million Rand; Accommodation cost (150 man-day per month):R1500/man-day* 150man-days per month*12 months *7years =18.9million Rand
技术支持费用：800R（小时费率）*7.5小时*30人*270个工作日 增加住宿费用：1500兰特/人日次*30*270=12,150,000兰特 Technical Service:800R(hour rate)*7.5hours*30persons*270 working day=48.6 million;Additional Accommodation Cost: R1500/man-day *30 persons *270 business days=R12,150,000
每台多15万兰特*212台=3180万兰特；（可以从培训TE人总数上验证一下）；培训总人数： 150,000 per loco increased * 212 locomotives=R31.8million in total; (to be verified on TE training)
现场服务按照采购总额（除TE)的10%计算，搬迁导致增长10%计算。 On site service will be calculated according to 10%of procument amount(excludes TE), and the relocation will increase 10%.
保险成本增加20% 9089504240*0.0003=272685.127 Insurance cost is increased by 20%(to confirm the original insurance amount)

	总计	287,028,121

ANNEXURE "RG 12"

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Analysis of Cost Increase

for

Locomotive Delivery

and

Locomotive Factory Relocation

from

Pretoria, Gauteng to Durban, Kwa-Zulu Natal

In terms of

Manufacturing Facility Relocation for Class 45D Locomotives Supply Project

July 2015

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2196 Sandton Johannesburg

Executive Summary

We have been requested to analyse the Cost Increase for the Locomotive Delivery and Locomotive Factory relocation in terms of Manufacturing Facility Relocation for Class 45D Locomotives Supply Project. The decision to relocate from Pretoria, Gauteng to Durban, Kwa-Zulu Natal will cost an estimated R719 090 548.

On this amount we happy to offer a settlement discount of 10% amounting to R71 909 054 Therefore the reduced amount due to CNR after deducting the settlement discount amounts to R647 181 494.

In order to align the balance of the payment with the project execution, the settlement discount assumes the following settlement terms.

- 50% payable within 14 days of signature and the balance R323 590 747
- 50% payable in 24 equal instalments of R13 482 948 ("the relocation payment") commencing the end of the first month that the project commences
- Therefore CNR RS SA will invoice for 24 monthly instalments of R13 482 948
- Please note that the relocation payment will be invoiced separately from the milestone payment invoice as per the Locomotive Supply Agreement for the manufacture of the 212 locomotives ("the LSA"), which will be paid as per the document approved by Transnet. In addition, the relocation payment should not reduce nor increase or affect the milestone payment stipulated in the LSA.

Description	Cost (R)	% of total
Labour costs	54 367 333	8%
Material costs	223 982 441	31%
Logistical costs	6 420 941	1%
Technical support	70 000 000	10%
Transportation	94 194 785	13%
Delta to Warehouse costs	75 650 745	10%
Other costs	194 474 302	27%
Total	719 090 548	100%

Due to the tight time for preparation, there are some elements which affect this Durban relocation project, we reserve the opportunity to give the clarification.

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Introduction

In order to be able to relocate the entire operation of manufacturing, production, assembly and servicing from Pretoria to Durban, there are several incremental costs, risks and material changes that will need to be considered.

During the execution of this project, in order to complete the technology transferring, manufacturing, training, testing and maintenance tasks for this locomotive project successfully, as well as the empowerment of the black economy, the manufacturing facilities are relocated from Pretoria to Durban. Thus this proposal is submitted. This proposal is seen as the project document as per the contract.

These considerations can be broken down into:

- Labour costs
- Material costs
- Operational and logistical effects
- Technical support
- Physical transportation of materials and resources
- Incremental warehousing costs
- Financing and risk costs due to time constraints and delays.

Each of these areas carry a substantial weight on the total cost of relocation, considering the move from a skilled factory with high-end technology in a nationally-central location to an environment where locomotive manufacturing skills are limited and supply of manufacturing engineers is limited. Added to that, being the largest industrial port in South Africa, industrial property is highly sought after, especially in and around railway areas due to the high traffic on the railway lines between Durban and Johannesburg.

The largest non-operational and logistical cost faced is also the 5-month delay in production of entire 232 locomotive, which is placing substantial currency-hedging risk, import and inflationary risk, insurance, and training costs.

All-in-all, there will also be ancillary benefits in using the same team to relocate as will be running the day-to-day operations in Durban. This will minimise team friction, hand-over wastage and delays, lack of accountability and a host of expertise-related risks.

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Below is a breakdown of each of the above-mentioned sections, justifying the detailed cost analysis of the relocation project

Cost Breakdown

The total cost implications of the relocation and the inherent costs of relocating manufacture to Durban from Pretoria amount to an estimated R719m. Importantly, this amounts to less than 10% of the total Class 45D locomotive manufacturing project. The attached outline details and explains the R719m.

Labour Costs

Total cost R54.4m: 8% of relocation costs

The amount is broken down below. This is ~8% of total relocation cost.

- Manufacturing costs, amounting to R38.3m, relate to the added size of each team that will be required in order to complete each locomotive build. Due to the lack of skills and experience in Durban, the average team size per locomotive (of 25) will need to be increased to 31 (i.e. 6 additional mentorships from CNR) in order to maintain production levels of 12 locomotives per month, which is imperative for the success of the project. The increase in team size accounting for the R38.3m over the period of production is available on request.
- Quality assurance relates to the increase in supervision labour required to inspect and monitor production of locomotives due to the lack of experience in the new Durban factory. An additional 6 specialists from CNR will be required to mentor and supervise the production of 12 locomotives per month, with each supervisor monitoring the production of up to 2 locomotives at a time. This additional cost amounts to R4.6m over the period.
- Customer Service Team ("CST") will need to increase marginally to account for the increase in pressure derived from dealing with more supplier and client issues from a remote location. This will require an additional 8 agents and the setting up of a CST infrastructure sufficient to manage the CST requirements. This will total R8.1m over the period.
- Program management for the relocation and new operation will require an additional 3 senior managers due the substantial increase in team size, logistical complexity and supervision. This will amount to an additional R3.4m over move and the initial production phase.

Labour Costs	Manufacturing related costs	(Avg Cost per Emp * Num Durban Emp Required) - (Avg Cost per Emp * Num Pretoria Emp Required)	38 280 000

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	QA	Num Supervisors * Cost per Supervisor	4 640 000
	Customer service	Additional Emp * Cost	8 064 000
	Program mgt	Senior Managers Req * Cost Per Manager	3 383 333
Total			54 367 333

Material Costs

Total cost R224m: 31% of relocation costs

Additional material costs amount to R203m as a result of the relocation. This has the largest impact on relocation, amounting to ~30% of relocation cost.

- Inflationary costs equating to R203m will be incurred, based on a 5-month delay. This is calculated using the South African inflation rate of 5.5%pa, decomposed to 2.3% over the 5 months.
- Incremental estimated procurement costs of R21m. Considering than certain raw materials will not be available in South African warehouses at the outset of the project, and considering the target of 12 locomotives per month, we estimate 3 months' storage to various warehouse suppliers will cost approximately 9% per annum over the 5-month delay.

Material Cost	Inflation due to schedule shift	5-month Inflation * Total Project Cost	203 034 165
	Additional procurement costs	Raw Materials * 5 months Financing Cost * % of Stock on Hand for 3 Months	20 948 276
Total			223 982 441

Operational & Logistics Costs

Total cost R6.4m: <1% of relocation costs

Impact of changes to logistics and operations will amount to R6.4m. This is ~<1% of total relocation cost.

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- Administrative costs to re-work logistics will be required, as the roll-out and execution of the relocation and final manufacturing project will need to be altered. This amounts to R1.7m.

- A new environment will require to be thoroughly tested in order to maintain the required level of quality and delivery. This will amount to R475k.
- Additional staff travel costs due to the move will amount to an estimated R2m.
- Higher inventory requirements will be required due to the distance from Gauteng. This will result in a cost of R2.2m.

Logistics Costs	Admin costs to re-work logistics	As per Fixed Quotation	1 731 158
	Dry run in new environment		474 576
	Additional travel costs		2 024 410
	Higher inventory - cost of capital		2 190 797
Total			6 420 941

Technical Support

Total cost R70m: 10% of relocation costs

Additional technical support will be required, amounting to R70m. This is 10% of total relocation cost.

- The additional technical support comprises the additional technical and engineering teams that will need to be available on the ground beyond the initial ~19month production phase. These specialised teams will be in addition to the requirement from the Pretoria plant due to the lack of expertise in maintenance and post-production servicing currently available in Durban. This will amount to R38.5m.
- There will also be an increased cost of on-site service by suppliers due to the increase in travel and relocation of Gauteng-based suppliers. This is estimated at R31.5m over the pre- and post-production periods.

Technical Support	Increased cost of tech support	As per Fixed Quotation	28 000 000
	Engineering		10 500 000
	Increased cost of on-site service by local small business supplier		31 500 000

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Total			70 000 000

Transportation

Total cost R94.2m: 13% of relocation costs

Physical transportation from Pretoria to Durban will amount to R94.2m. This is ~10% of total relocation cost.

- There will be a R567k cost saving to being based in Durban due to proximity to an industrial port.
- Physical transportation of assembly parts of locomotives is estimated at R64.8m, explained as follows: the cost of road logistics in South Africa is estimated at (average) 5% of pre-transport costs. Assuming the project is transporting ~R1.3b worth of raw materials. The total is thus estimated at R64.8m.
- Short-term insurance on the value of transported goods will amount to R22.5m, based on industry-level Goods in Transit insurance premiums of between 0.2% and 0.8% of value.
- Transport protection, express shipments (for time-sensitive delivery), Trucks for handover and Testing goods when received are directly inherited costs of the relocation, amounting to incremental costs of R7.5m.

Transportation	International shipments	As per Fixed Quotation	-567 104
	Engine - Durban	% Cost of Road Logistics * Cost of Raw Local Materials	64 800 000
	Brake System - Durban		
	Traction Chain - Durban		
	Delta supply chain - Durban		
	Insurance	Insurance Premium % * Total Insurable Value	22 500 000
	Transport protection	As per Fixed Quotation	3 283 231
	Express shipments		895 427
	Truck for handover		1 492 378
	Locos testing		1 790 853
Total			94 194 785

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Incremental

Warehousing Costs

Total cost R75.7m: 10% of relocation costs

Additional warehousing costs will amount to R75.7m, which is ~10% of total relocation cost.

- As a result of the scarcity of prime industrial factories in Durban, the cost per square metre is substantially higher than Pretoria by between R35/sqm-R55/sqm. This will result in an increase in lease cost of R16.8m over the long-term period.
- Fencing, security and office furniture of R300k.
- Office construction and civil works upgrades will amount to R3.9m, based on estimated office space of ~850sqm.
- The project necessitates that ~5-15% of total factory space is used for shelving and storage. This will result in an additional cost of R12m. This is based on a calculated build cost of R11,200/sqm.
- Additional forklifts and stacking trucks will be required that would not have been as necessary or as costly in Pretoria. This will amount to 20 forklifts and trucks in total, at a cost of R5.3m.
- Additional delivery vehicles and (new) systems to be implemented in the new factory will amount to R7m.
- Additional staff & personnel will be required, incurring a substantial relocation cost to bring in skilled labour from Gauteng (~90 personnel). With incentive salaries and a relocation incentive, this amounts to R24.5m.
- Due to the lack of experience of the new teams, external labour and professional consulting/supervisory teams will need to be brought in. Four of these engineering consultants will be needed during the primary production phase, costing R5.8m.

Delta to warehouse costs	Additional Lease costs	Incremental Cost Per Sqm * Total Sqm	16 800 000
	Fencing/Security	As per Fixed Quotation	110 395
	Civil works upgrades/office construction	Office Sqm * Rate per Sqm	3 927 000
	Office & warehouse furniture	As per Fixed Quotation	188 899
	Racks & Shelving	% of Sqm * Cost per Sqm	11 962 500
	Local forklifts/stacker	(Cost per Truck * Num Trucks) + (Cost	5 300 000

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	trucks	per Forklift * Num Forklifts)	
	Additional delivery vehicles	As per Fixed Quotation	3 924 552
	Technology & inventory systems	As per Fixed Quotation	3 133 999
	Additional staff & personnel	(Team To Be Relocated * Salary Increase) + Once-off Relocation Incentive	24 503 400
	Extra outside labour & services	Engineer Consulting Fees * Num Engineers	5 800 000
Total			75 650 745

Financing & Risk Costs

Total cost R194m: 27% of relocation costs

Financing costs are the second biggest cost to the relocation, amounting to R194m, or ~27% of total relocation cost.

- Labour inflation due to the 5-month delay and the additional required resources amounts to R1.8m, based on 5.5%pa CPI.
- Finance cost as a result of rolling over forward currency (USD) contracts are estimated at R87m. The buy and sell spread on forward contracts equals 2 x ZAR 0.12.
- Bond /debt instrument costs increase will amount to R18m based on cash flow risk and upfront payments.
- Contingency risk of 4% on assumptions, amounting to R25.9m.
- There will be increased insurance costs amounting to R2.8m due to the relocation and new teams involved.
- Training costs of additional teams and new staff will be required, amounting to R3.6m, based on industry standard of 6% training costs.
- There is a risk provision of 9%, amounting to R54.7m. This risk is primarily focused around the pressure the relocation will put on the final locomotive production project. The overall effect on a large-scale relocation, with new teams, staff, specialists, expertise and a less-known environment will create substantial risk in meeting deliverables and timelines.

Finance Costs	Labour inflation original contract	Additional Staff Costs * CPI	1 810 405
	Finance costs on forward contracts	% Premium * 2 *ZAR 0.12 Spread on USD	87 750 000
	Bond costs increase	Duties * Total Value Added	18 000 000

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	Contingency	4% on Cost	25 867 599
	Increased insurance costs	As per Fixed Quotation	2 750 000
	Increased training costs	Std % Training Cost * Value of Additional Staff	3 587 623
	Risk provision increase project	9% on Cost	54 708 676
Total			194 474 302

Costing Summary

The above-mentioned breakdown, detailed in the attached cost spread-sheet, outlines the need for the further investment of R719m for the relocation of operations and manufacture to Durban. Any costs attributable to TE with regards to the Durban relocation have not been taken into account in the cost of R 719m.

Although this is a marginal cost in terms of the total project, it should be treated as material to the final project production. In order to not impact on the quality of service, manufacture and delivery of this crucial element of the total locomotive project, it makes sound business sense to maintain the same teams throughout the relocation and manufacture, allowing the seamless handover between the two phases, and maintaining the level of skill and experience throughout.

The above breakdown should address any issues pertaining to the costs of the relocation taking into account a 5month delay. If not, please do not hesitate to contact us for further details, relating to any or all of the summarised figures.

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CNR Rolling Stock South Africa
China Construction Bank Building
93 Grayston Drive
2196 Sandton Johannesburg

Definition

1. TRANSNET SOC LTD(acting through its Transnet Freight Rail division), a public company incorporated in South Africa (registration number 1990/000900/30) and referred to in Section 2 of the Legal Succession to the South African Transport Services Act, No 9 of 1989 (the Company);
2. CNR RS SA , a company registered under the laws of South Africa(registration number 2014/016892/07) and, subject to a name change, to be known and registered as CNR ROLLING STOCK SOUTH AFRICA PROPRIETARY LIMITED (the Contractor);
3. TE, means Transnet SOC Limited acting through its TRANSNET ENGINEERING Division (registration number 1990/000900/30) (the "Subcontractor");
4. Local Supplier, means the suppliers in South Africa other than TE;
5. Locomotive, means collectively or individually, the locomotives to be manufactured and supplied to the Company by the Contractor in accordance with this Agreement, with each individual locomotive being identified by its vehicle number;
6. Training, means the training to be provided by the Contractor to the Company personnel in accordance with Part 12 (Training) of Schedule 3 (Agreement Management);

CNR Rolling Stock South Africa (Pty) Ltd Reg 2014/158612/07 V+

CNR Rolling Stock South Africa

CNR Rolling Stock South Africa
China Construction Bank Building
95 Greyston Drive
2196 Sandton Johannesburg

Mr. Jeff Wang

Chief Executive Officer

CNR Rolling Stock (Pty) South Africa

Mr. Anoj Singh

Chief Financial Officer

Transnet SOC Limited

Contact Detail

Jeff Wang (CEO)
Tel: 27 61 9846361(SA)
0086 13940991125(CHINA)
Mail Add.: lockwa@163.com

Communication Manager

Jane Dong
Tel: 27 61 9847989(SA)
0086 13689583606 (CHINA)
Mail Add: cnrssapm@163.com

Boke
Tel: 27 61 9849185(SA)
0086 15941169206 (CHINA)
Mail Add:boke_piao@163.com

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	Costs	% of Total Relocation	Notes
Labour Costs	R 54,367,333	8%	19
Manufacturing cost increase	R 38,220,000	5%	3
Increase quality assurance	R 4,640,000	1%	3
Customer service	R 8,084,000	1%	3
Program management	R 3,383,333	0%	3
Material Cost	R 223,092,441	31%	
Inflation due to schedule shift	R 203,034,165	28%	2
Additional procurement costs	R 20,948,276	3%	2
Logistics Costs	R 6,420,941	1%	
Admin costs to re-work logistics	R 1,731,158	0%	Fixed Quotation
Dry run in new environment	R 474,576	0%	Fixed Quotation
Additional travel costs	R 2,024,410	0%	Fixed Quotation
Higher inventory - cost of capital	R 2,190,797	0%	Fixed Quotation
Technical Support	R 70,000,000	10%	
Increased cost of tech support	R 28,000,000	4%	3
Engineering	R 10,500,000	1%	3
Increased cost of on-site service by suppliers	R 31,500,000	4%	3
Transportation	R 94,194,785	13%	
International shipments	-R 557,104	0%	Fixed Quotation
Parts Transportation to Durban	R 64,800,000	9%	6
Insurance	R 22,500,000	3%	4
Transport protection	R 3,283,231	0%	Fixed Quotation
Express shipments	R 895,427	0%	Fixed Quotation
Truck for handover	R 1,492,378	0%	Fixed Quotation
Locos testing	R 1,790,853	0%	Fixed Quotation
Delta to warehouse costs	R 75,650,715	11%	
Additional Lease costs	R 16,800,000	2%	5
Fencing/Security	R 110,395	0%	Fixed Quotation
Civil works upgrades/office constr	R 3,927,000	1%	5
Office & warehouse furniture	R 188,899	0%	Fixed Quotation
Racks & Shelving	R 11,962,500	2%	5
Additional forklifts/stacker trucks	R 5,300,000	1%	5
Additional delivery vehicles	R 3,924,652	1%	Fixed Quotation
Technology & inventory systems	R 3,139,999	0%	Fixed Quotation
Additional staff & personnel	R 24,503,400	3%	3
Extra outside labour & services	R 6,800,000	1%	3
Other Costs	R 194,474,302	27%	
Labour inflation original contract	R 1,610,105	0%	3
Finance costs on forward contracts	R 87,750,000	12%	4
Bond costs increase	R 18,000,000	3%	4
Contingency	R 25,857,599	4%	Contingency Risk - Fixed %
Increased insurance costs	R 2,750,000	0%	Fixed Quotation
Increased training costs	R 3,587,623	0%	3
Risk provision increase project	R 54,708,676	8%	Standard Risk - Fixed %
Total	R 719,090,548		

CNR Rolling Stock
South Africa

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China Construction Bank Building
95 Grayston Drive
2196 Sandton Johannesburg
cnrrss@gmail.com

Global Variables		
Diesel Locomotive		232 locomotives
Locomotive Weight		200 tons
Project Value	9,000,000,000	
SA Value	4,950,000,000	
Delay		5 mths

CNR Rolling Stock South Africa

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China Construction Bank Building
85 Grayston Drive
2196 Sandton Johannesburg
corresopn@163.com

Inflation		
Annual Inflation	5.5% SARB CPI	
5 Months Inflation	2.3%	
		(CNR imported cost &Local
Total Cost	9,000,000,000	supplier cost)
Inflation	203,034,165	

Additional Cost		
Materials	3,600,000,000	
interest	9% pa	
Cost	135,000,000	
% on hand	16%	
	20,948,276	

ons & Variables	
Loco	25
os	232
Month	12
m Locos pa	300
Months	19
	Per Loco
	5
	17
	3
per Employee	17,600
	10,000
	20,000
	35,000
d Avg	*19,800*
t per Team	495,000
t pa	5,940,000

i Training Costs	
l Staff	24,503,400
ring Related cost	38,280,000
	62,783,400
l Training	6%
Total	3,587,623
ployee Cost	700,000
A	40,000
	6%

inexperience	
Locos pa	12
Supervisor	
rom CNR	2
Supervisors	6
Supervisor pa	40,000
	4,640,000

35% Portion of Total costs for Labour	
9,000,000,000	Total Value
30%	Margin
6,300,000,000	Costs
2,205,000,000	Labour
48,743,378	Labour Inflation

5,051,603	Calculated Inflation
223,920,575	Total Original Labour Cost
11,309	Total FTE (over period)

Extra outside labour & services	
Engineering Consulting	
Fees pa	900,000
pm	75,000
Period	1,450,000
Number of Experts	4
Total	5,800,000

Labour inflation original contract	
Additional Payments	
for Staff	80,250,733
Inflation	2.3%
Total Cost	1,810,405

Long Term Maintenance Consulting	
Years	4
Avg Salary	1,000,000
Number of Engineers, T	20
	70,000,000 pa
Weighting	
CNR Tech Support	8
CNR Engineers	3
Local Small Business	
Supplier	9

Customer Service (increase in #)	
Additional team	8
Cost	12,000
	8,064,000

Mix Change Due To Inexperience & CNR Additional skill training/mentorship Support		
	Old	New
Unskilled	5	5
Skilled	17	20
Managers	3	6
Per Loco	25	31
Direct Labour per Loco	*495,000*	*660,000*
Total Cost	114,840,000	153,120,000
Diff	38,280,000	

Additional staff & personnel	
Relocation %	30%
Total CNR Team	300
Relocated Team	90
Salary Growth	25%
Relocation Cost	100,000
Total Cost	17,613,000
Additional CNR Staff	72
Incremental Salary	20%
Total Cost	6,890,400
Grand Total	24,503,400

Program management		
Senior Manager for Relocation	700,000	pa
	58,333	pm
Total	1,127,778	
Number	3	
Total Cost	3,383,333	

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CNR Rolling Stock South Africa

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2196 Sandton Johannesburg
cnrrsacpm@163.com

Bond cost increase	
Total Value	9,000,000,000
Value Added (margin)	20%
Total Value Added	1,800,000,000
Duty	1%
Duty Amount	18,000,000

Forward Contract Cost		
Imported Value	4,050,000,000	
12c Spread on Fwd	0.13	
Paying Double for Buy-	0.26	Rand to the USD
R/USD	12	ZAR/USD
Additional Cost %	2.2%	
Total Cost	87,750,000	

Insurance on Transportation	
Standard Insurance	20,000,000
Insurance	50,000
	0.25%
Value	9,000,000,000
Insurance	22,500,000

Rolling Stock
South Africa

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cnrrssasm@163.com

Additional Lease costs				
	600,000	R pa		
Industrial Rent Pta	150,000	5,000	sqm	30
Industrial Rent Dur	350,000	5,000	sqm	70
Diff	200,000			
	16,800,000			

Racks & Shelving	
17%	of sqm
5,000	sqm
14,500	cost per sqm
11,962,500	

Small Office	
	850 sqm
	55 R/sqm
3,927,000	

Local forklifts/stacker trucks		
#	R	
15	120,000	lifts
5	700,000	trucks
	5,300,000	

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South Africa

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Parts Transportation to Durban		
Cost of Road Logistics	5%	of Total Costs
Total Imported Materia	40%	of Costs
Total Imported Value	4,050,000,000	*original cost*
Margin	20%	
Total Costs	3,240,000,000	
Materials from Costs	1,296,000,000	
Logistics on Materials	64,800,000	

CNR Rolling Stock South Africa

CNR Rolling Stock South Africa
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Key References			
	South African Reserve Bank	www.resbank.co.za	Macro-economic analysis on trends, growth in manufacture, currency risk, inflation and interest movements and general market speculation on risk.
	Stats SA	www.statssa.gov.za	
	Fin24	www.fin24.com	
	JSE News	www.jse.co.za	
Transportation References			
	Department of Transport	www.transport.gov.za	
	Durban Clearing	www.durbanclearing.co.za	
	Road Freight Logistics	www.rfllogistics.co.za	
	South African Railways	www.southafricanrailways.co.za	
Finance Costs			
	South African Reserve Bank	www.resbank.co.za	
	Consulting with various finance experts		*consulting*
	Standard Bank		
	SAGFin		
	Bidvest Bank		
Labour Related Research			
	SA Board for People Practices		
	EVA Solutions	www.evasolutions.co.za	
	Exceed HR Consulting	www.exceed.co.za	
Property Research			
	Seeff Property Agency	www.seeff.co.za	*agency*
	Property24	www.property24.com	*non-agency*
	Standard Bank Property		*banking portfolio assistance*
	Nedbank Preferred Property Guide		*banking portfolio assistance*
	FNB Property		*banking portfolio assistance*
	Industrial Listings	www.industriallistings.co.za	
	SA Commercial Property News	sa.sacommercialpropnews.co.za	
Factory & Materials Costs			
	Industry experts in manufacture		*consulting*
	Industry experts in mining & efficiencies		*consulting*
	Industry experts in cost-optimisation		*consulting*
	Trading Economics	www.tradingeconomics.co.za	
	Manufacturing Circle	www.manufacturingcircle.co.za	

ANNEXURE "RG 13"

Business Expansion Structured Products (Pty)Ltd 1st Floor 24 Crescent Drive Melrose Arch 2076 VAT 4740259264	**Tax Invoice** Date 07/09/15 Page 1 Document No INA10082

CNR Rolling Stock South Africa (Pty) Ltd 3rd Floor 95 Grayston Drive Sandton 2196 VAT 4660265242	Att : Allen Lee -CNR Rolling Stock South Africa (Pty) Ltd 3rd Floor, 95 Grayston Drive Sandton Email: liyongzhikuaiji@163.com

Account	Your Reference	Tax Exempt	
CNR001		N	Exclusive

Code	Description	Ex VAT Price
1000000	Re: Agency commission with respect to the project scope deviation associated with changing the location of Transport engineering's local manufacture programme from the TE Koedoespoort Gauteng facility to their Bay-Head Durban facility	
	Total agency commission: The price awarded to CNR by TFR for the Project Scope deviation ZAR	647,181,494.00
	Less: the project benchmark cost per the Business Services Agreement between CNR and BEX dated 23 April 2015 ZAR	580,000,000.00
	Total agency commission due to BEX (ex VAT) ZAR	67,181,494.00
	Work performed in terms of Scope Deviation in terms of Business Services Agreement- Business enterprise optimization and advisory services including: a) Conduct detailed market research and produce a comprehensive cost analysis with detailed explanations with regard to changing the location of Transport engineering's local manufacture programme from the TE Koedoespoort Gauteng facility to their Bay-Head Durban facility on a risk basis ("the Project") c) Advise on the social, cultural and political framework in South Africa and to identify various opportunities to participate in similar projects d) To co-ordinate with appropriate counterparties to advise on applicable Government policies with regard to the successful execution and implementation of the Project	

Banking Details Standard Bank, Rosebank Branch Code 004305 Account Number 002 054 833 Payable upon presentation	

Sub Total		67,181,494.00
Discount @	0.00%	0.00
Amount Excl Tax		67,181,494.00
Tax		9,405,409.16
Total		76,586,903.16

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ANNEXURE "RG 14"

H

Siyabonga Gama, Acting Group Chief Executive

TRANSNET

Mr Jeff Wang
CNR Rolling Stock South Africa
95 Grayston Drive
Sandton
Johannesburg
2196

Dear Sir,

Variation order to finalise the relocation of the construction of 233 Class 45D locomotives by CNR Rolling Stock South Africa (CNR) to TEs facilities in Durban

Your proposal dated July 2015 regarding the above refers.

This letter serves to confirm the acceptance of the Variation Order issued by Transnet in accordance Paragraph 2, Schedule 3, Part 7 clause no.2 (Company Proposed Variations) of the Locomotive Supply Agreement between Transnet SCO Limited and CNR Rolling Stock South Africa dated 17 March 2014.

Accepted Variation Order is as follows:

1. TFR Class 45D: Locomotive Supply Agreement - Durban Variation Order for an amount of R647 181 494.00.

2. Proposed payment terms as follows:

   - 50% payable within 14 days of signature amounting to R323 590 747.00. The remainder, being 50% payable in 24 equal instalments of R13 482 948.00 ("the relocation payment") commencing the end of the first month that the project commences provided that the project is on track.

   - Therefore CNR RS SA will invoice for 24 monthly instalments of R13 482 948.00.

Kindly submit detailed invoicing based on the variation order and payment terms stipulated.

Yours Sincerely,

Siyabonga Gama
Acting Group Chief Executive
Date: 2015.07.23

Transnet SOC Ltd
Registration Number
1990/000900/30

Carlton Centre
150 Commissioner Street
Johannesburg
2001

P.O. Box 72501
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South Africa, 2122
T +27 11 308 3001
F +27 11 308 2638

Directors: LC Mabaso (Chairperson) S Molefe* (Group Chief Executive) Y Forbes GJ Mahlalela PEB Matlhaiga N Mbele ZA Nagdee VH Tshonyane MR Bakela SD Shanu SD Stegman PG Williams A Singh* (Group Chief Financial Officer)
*Executive
Group Company Secretary: ANC Cebe

www.transnet.net

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ANNEXURE "RG 15"

RG 15

Republic of South Africa

Companies Act, 2008

MEMORANDUM OF INCORPORATION FOR A PRIVATE COMPANY

Name of Company: CNR Rolling Stock South Africa Proprietary Limited

Registration No.: 2014/016892/07

This MOI was adopted by Special Resolution passed on [•] in substitution for the existing memorandum of incorporation of the Company.

30/09/2014
CERTIFIED A TRUE COPY
OF THE ORIGINAL

Michael Stanley Webb
Commissioner of Oaths
Ex-Officio, Practising Attorney RSA
Hogan Lovells (South Africa)
22 Fredman Drive
Sandton

4.1.3.12.2. salaries and other benefits (insofar as not approved in the Company's annual budget or that Director's service agreement);

4.1.3.13. any material changes to any of the fees, salaries or other remuneration payable to senior management including directors, whether such material changes apply to an individual or in aggregate;

4.1.3.14. any material amendment, variation or substitution of any Director's service or employment agreements;

4.1.3.15. subject to the provisions of clause 15.1, all Shareholders will vote in favour of approving any change in control in a Shareholder provided that such change in control has been approved by Transnet in terms of the Locomotive Supply Agreement and by the counterparties to the Project Documents, as the case may be, where such approval is required;

4.1.3.16. the sale or other disposal of all or more than 20% (twenty percent) of the Company's immovable property, plant and/or equipment (including but not limited to the goodwill of the Company and/or any of its intangible assets) whether or not in the ordinary course of business;

4.1.3.17. the sale or other disposal of the whole or more than 20% (twenty percent) of the Business;

4.1.3.18. the creation and/or modification of any mortgage, pledge, notarial bond or other lawful Encumbrance over any of the assets of the Company other than as provided for in the Project Documents or in the ordinary course of the Business;

4.1.3.19. the taking over or acquisition of the whole of a substantial part of the business of any other person or any merger or amalgamation with other companies or with any other business which would constitute a material transaction for the Company having regard to its assets and Business;

4.1.3.20. the granting by the Company of any power of attorney outside the ordinary course of the Business;

30/09/2014
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OF THE ORIGINAL

Michael Stanley Webb
Commissioner of Oaths
Ex-Officio, Practising Attorney RSA
Hogan Lovells (South Africa)
22 Fredman Drive
Sandton

RG 15

4.1.3.21. the placing into business rescue, liquidation or winding up, de-registration or permanent discontinuation of any of the activities of the Business of the Company;

4.1.3.22. the use of the Company or in any way engaging its credit except on account of or for the exclusive benefit of the Company;

4.1.3.23. the incurral by the Company of any material foreign exchange exposure other than in the ordinary course of the Business;

4.1.3.24. a compromise generally with the Company's creditors;

4.1.3.25. the listing of the Company;

4.1.3.26. (i) termination of (ii) amendment to or waiver of any rights in respect of the milestone payments in; the Locomotive Supply Agreement (as defined therein);

4.1.3.27. the conclusion of any contract outside the ordinary course of the Business;

30/09/2014
CERTIFIED A TRUE COPY
OF THE ORIGINAL

4.1.3.28. the institution of any legal proceedings other than those arising in the ordinary course of business;

4.1.3.29. the incorporation or acquisition of a subsidiary of the Company;

Michael Stanley Webb
Commissioner of Oaths
Ex-Officio, Practising Attorney RSA
Hogan Lovells (South Africa)
22 Fredman Drive
Sandton

4.1.3.30. the alteration, discontinuation, suspension of the Business or acquisition of any other business, whether directly or indirectly, by means of a share or asset purchase, or otherwise.

4.2. Subject to any provision to the contrary in this MOI, and notwithstanding the omission from this MOI of any provision to that effect, the Company may do anything which the Companies Act empowers a company to do.

5. RESTRICTIVE CONDITIONS IN ACCORDANCE WITH SECTION 15(2)(b) OF THE COMPANIES ACT

5.1. The Company has the sole purpose, object and business of undertaking the Business, the Project in accordance with the terms and conditions of the Project Documents.

SM

WS

ANNEXURE "RG 16"

Attention:
Board of Directors
CNR Rolling Stock South Africa (Pty) Ltd
c/o Jeff Wang

and

China Railway Rolling Stock Corporation Limited ("CRRC")
c/o Mr Wang (wangguojun@crrcgc.cc)

Re Appointment of Business Expansion Structured Products (Pty) Ltd

1. We refer to the recent appointment of Business Expansion Structured Products (Pty) Ltd (registration number 2009/028420/07) ("BEX") by CNR Rolling Stock South Africa (Pty) Ltd ("CNRRSSA" or the "Company"), although we note that the Company is in the process of changing its name.

2. This letter is addressed by Endinamix (Pty) Ltd, Global Railway Africa (Pty) Ltd and Cadiz Corporate Solutions (Pty) Ltd, in their capacities as shareholders of CNRRSSA, to the board of directors of CNRRSSA and to China Railway Rolling Stock Corporation Ltd ("CRRC"). Please note that Cadiz Special Projects (Pty) Ltd has transferred the economic benefit of the shares held by it in the Company to Cadiz Corporate Solutions (Pty) Ltd although we are unsure if the company secretary has affected this transfer yet.

3. It has come to our attention that CNRRSSA recently concluded an agreement with BEX in terms of which CNRRSSA appointed BEX to act as an intermediary for purposes of negotiating a contract with Transnet SOC Ltd ("Transnet") relating to the cost of locating and operating CNRRSSA's locomotive assembly business at Transnet Rail Engineering's Bay-Head depot in Durban, Kwazulu-Natal.

4. It has also come to our attention that despite all of the board members nominated by the minority shareholders of CNRRSSA ("non-CRRC directors") expressing serious reservations and offering considerable opposition to the appointment of BEX, the directors nominated by CRRC ("CRCC directors") nevertheless proceeded to vote in favour of such appointment.

5. On 8 April 8 2015 a draft BEX agreement dated 8 March 2015 ("Draft Business Development Services Agreement") was received by e-mail from CNRRSSA in which BEX suggested the following in paragraph 7.2: "The Company agrees that BEX will be entitled for an agency commission equivalent to the difference between the price excluding VAT awarded to the Company by TFR and the price benchmark of R280 million excluding VAT. For example if the price awarded is R650 million, then BEX will be entitled to an agency commission of R370 million."

6. On 8 April 2015 a partially signed written round robin resolution was circulated by CNRRSSA and non-CRRC directors were requested to sign the resolution "in order to enter into the Agency Agreement in relation to the relocation of the manufacturing facility .....".

7. It was assumed at the time that the reference to an "Agency Agreement" in the resolution was in fact intended to be a reference to the proposed Draft Business Development Services Agreement to be concluded with

"BEX Structured Products (Pty) Ltd", registration number 2000/028999/07. The resolution received by e-mail had already been signed by all the CRRC directors.

8. At the board meeting of 10 April 2015 the non-CRRC directors objected strongly to the Company entering into an agreement with BEX and requested that their dissent be expressly noted and minuted.

9. Notwithstanding the objections of the non-CRCC directors, CNRRSSA nevertheless proceeded to sign the agreement with BEX (as opposed to BEX Structured Products (Pty) Ltd) on 23 April 2015.

10. It also appears that BEX is an Exempted Micro Enterprise based on the BEE Verification Certificate issued to it on 30 April 2015 and that the company had never traded before that.

11. Furthermore, the sole director, Mark Shaw, was only appointed on 15 April 2015.

12. It has also become clear from the Draft Business Services Agreement that CNRRSSA and BEX "benchmarked" the cost to CNRRSSA of locating its business activities at the Bay-Head depot in Durban at R280 million. Although it is not clear when these calculations were arrived at, a document reflecting how the "Estimated Cost Increase" amounting to R287 028 121 was calculated was only received via e-mail on 21 April 2015.

13. BEX subsequently proceeded to represent CNRRSSA in discussions with Transnet which culminated in CNRRSSA concluding an agreement with Transnet in terms of which Transnet agreed to bear the cost of location and establishment by CNRRSSA of its business at the Bay-Head depot in an amount close to the above mentioned R650m (the actual amount being R647 181 494).

14. It appears, based on an invoice from BEX dated 7 July 2015, that the CNRRSSA benchmark was somehow increased from R280 million recorded in the signed Business Service Agreement dated 23 April 2015 to an amount of R580 million, although this was never presented to the board of CNRRSSA. Consequently BEX earned a fee of R67 181 494, excluding VAT.

15. It is not clear to us why, having negotiated the terms of an agreement with Transnet as extensive and complex as the Locomotive Supply Agreement and despite having access to considerable rail rolling stock experience within its shareholder base, CNRRSSA nevertheless felt it necessary to appoint an intermediary such as BEX which appears to have been a newly formed company with no trading history and little or no background in the assembly, manufacture, maintenance or operation of locomotives or any other experience in the rail industry, to negotiate a second (directly related) agreement with Transnet and furthermore to do so on such significantly generous terms.

16. Although the second agreement concluded with Transnet may be financially beneficial for CNRRSSA it is remains unclear how or why such agreement was concluded given that the Locomotive Supply Agreement

envisages and provides for CNRRSSA to establish its operations at the Bay-Head depot and for the supply of locomotives to take place at Bay-Head on a fixed price basis. In addition, the agreement also already makes separate provision for the supply of spares, tools and test equipment by CNRRSSA to Transnet in relation to an agreed Master Spares List and a Master Tools and Test Equipment List and based on prices and values to be agreed by the parties.

17. As shareholders of CNRRSSA we regard this transaction and more especially the appointment of BEX as perplexing. Furthermore, such transaction was not undertaken in accordance with the terms of the Memorandum of Incorporation of CNRRSSA which provides (in clause 4.1.3.27) that CNRRSSA may not conclude a contract that is outside of the ordinary course of the "Business" of CNRRSSA without inter alia the consent in writing of shareholders holding 70% (seventy percent) of the voting rights that are exercisable by shareholders. As no such consent was sought or obtained we are of the view that this transaction was concluded by CNRRSSA without the requisite authority.

18. Of great concern to us is the fact that the CRRC directors have not responded to any of the previous correspondence from the non CRRC directors requesting explanations for this transaction. Unless this matter is addressed appropriately within 10 business days of delivery, it is our intention to follow our rights and to act in the best interests of CNRRSSA.

19. Furthermore, we believe this matter to be of significant importance and as such we will be scheduling a meeting with Transnet to discuss the matter.

Yours sincerely

Signed by LL Kate, director, for and on behalf of Endinamix (Pty) Ltd

Date 8/06/2016

Signed by RE Von Gericke, director, for and on behalf of Global Railway Africa (Pty) Ltd

Date 7 June 2016

Signed by R Gonsalves, director, for and on behalf of Cadiz Corporate Solutions (Pty) Ltd

Date 7 June 2016

ANNEXURE "RG 17"

RG-271

RG 17

Robbie Gonsalves

From: Robbie Gonsalves
Sent: Tuesday, 20 September 2016 10:23
To: Ndiphiwe Silinga (ndiphiwe.silinga@transnet.net)
Cc: Stan Whiting; Lulamile Xate (Lulamile@xatell.co.za)
Subject: BEX

Dear Ndiphiwe

Thank you for making the time to meet with us. As indicated to you we enclose a soft copy of the documents we provided to you at the meeting.

Regards

<<

Documents for cover sheet for BEX transaction.pdf (2.4MB)
Cover sheet for relevant BEX documentation.docx (22.3KB)

(2.4MB)

>>

74 pages

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CNR CONSORTIUM/UNINCORPORATED JOINT VENTURE

74 Pages

Ms Lindiwe Mdletswe
Commodity Manager
Supply Chain
Transnet Freight Rail
Johannesburg

10 March 2014

Dear Lindiwe

465 new Diesel Locomotives for General Freight – Cost Impact of Manufacturing in Durban

With reference to the TFR request relating to the CNR response for the cost impact of building the locomotives in Durban, we would like to point out that our original quotation is based upon building the locomotives in Koedoespoort or Germiston. We understand from TE that the Koedoespoort facility has already been allocated but CNR would like to request that before a final decision is made regarding this matter that we are granted site visits for both Durban and Germiston.

As regards the request for the cost impact of this decision, CNR would like to point out that our preliminary studies show that the cost of building the locomotive in Durban will be higher than the cost of building the locomotive in Germiston.

Yours sincerely

Rowlan von Gericke
On Behalf of CNR Consortium

Care of: Global House, 60 Tulbagh Road, Kempton Park 1620
P.O. Box 10285, Aston Manor, Kempton Park, 1679

Tel: +27 11 390 1900
Fax: +27 11 398 1594
Email: Rowlen@globalgroups.org

Documents and Notes as requested by Transnet

re the CNRRSSA/BEX transaction

Document 1

This point is intended to add clarity to the ensuing discussion in that CNRRSSA have received correspondence from two different legal entities which we will identify as BEX 1 and BEX 2. The supporting documentation for this point is tabled in Document 11 below.

These companies are

BEX STRUCTURED PRODUCTS PTY LTD (registration number 2000/028999/07) (BEX 1)

BUSINESS EXPANSION STRUCTURED PRODUCTS (registration number 2009/028420/07) (BEX 2)

Document 2 (Page 6a-1 to 6a-3)

Resolution received as attached in E-Mail dated 8 April 2015 requesting that the directors should sign the resolution in order for CNRRSSA to appoint "The Agent" (BEX 1) to assist CNRRSSA to negotiate with TFR and facilitate the award of cost associated with the relocation"

Document 3 (Page 6b1- 6b12)

Also attached to the E-mail dated 8 April 2015 was a "BUSINESS DEVELOPMENT SERVICE AGREEMENT" from BEX 1 dated 8 March 2015.

In this agreement, Clause 7.2 reads as follows: *"The Company (CNRRSSA) agrees that BEX 1 will be entitled for an agency commission equivalent to the difference between the price awarded to the Company and the price benchmark of R280m. For example, if the price awarded is R650m, then BEX 1 will be entitled to an agency commission of R370m. The Company price will be fixed at R280m irrespective of whether the total project value is negotiated lower than the R650m by TFR."*

- Note 3a
    - At that stage the 3 SA Directors (Meaning Endinamix, Cadiz and Global) were not aware where the R280m figure originated or where it was coming from
    - The 3 SA Directors did not sign the resolution.
    - At the directors meeting that followed and was held on 11 April 2015, mention was made by CNRRSSA that they attempted to get R280m from Transnet but that it was rejected.
        - No indication was given at that stage how CNRRSSA arrived at the R280m
    - The 3 SA Directors again rejected the proposal completely.

Document 4 (page 8c-1 to 8c-3)

On 20 April 2015 the 3 SA Directors again received a request from CNRRSSA asking them to sign the same resolution listed in Document 2 above allowing CNRRSSA to appoint BEX 1.

This was once again not signed.

RG-19

Document 5 (Page 8d-1 to 8d-15)

Also on 20 April 2015, a proposal dated 2 February 2015, called "PROPOSAL TO CNR TO PROVIDE CONSULTANCY SERVICES IN RELATION TO PROJECT COSTING LEADING TO AWARD OF COST BY TE TO CNRRSSA FOR PLANT RELOCATION", submitted to CNR by BEX 1 was received.

- Note 5a
  - Interesting to note that this document is dated 2 February 2015 whist the first proposal the directors received is dated 8 March, 2015. (See document 3 above).
  - Page 7 (of 15) of the second proposal lists different cost options.

Document 6 (Page 8-3)

In an E-mail dated 21 April 2015 the 3 SA Directors received, for the first time, an attachment to the E-mail named "Proposed Estimated Cost increase on Durban Relocation" which show the calculations CNRRSSA made for the relocation.

The total amount was R287 028 121.

Document 7 (Page 8b-1)

Also on 21 April 2015, CNRRSSA sent their document named "Process of Choosing BEX (not referring to which specific BEX) as TE Durban negotiating agent"

In this document CNRRSSA states that they are "inclined" to rather use the BEX "Benchmark" option as set up in the proposal document (document 5 above) from BEX dated 2 February 2015.

Document 8 (page 8/3a to 8/3c)

A Board meeting was scheduled for 6 May 2016. Before this meeting CNRRSSA again requested the 3 SA Directors to sign the same resolution mentioned in Document 2 and Document 4 above allowing CNRRSSA to appoint BEX (no specific BEX company is listed).

- Note 8a
  - The 3 SA Directors again did not sign the resolution
  - At this time the 3 SA directors had already learned that CNRRSSA had in any case signed with BEX 2.

Document 9 (Document marked 14)

The report submitted to Transnet by CNRRSSA called "ANALYSIS OF COST INCREASE FOR LOCOMOTIVE DELIVERY AND LOCOMOTIVE FACTORY RELOCATION FROM PRETORIA, GAUTENG TO DURBAN, KWA-ZULU NATAL. Dated July 2015.

- Note 9a
  - According to CNRRSSA, this document was drawn by CNRRSSA in collaboration with BEX 2
  - The purpose of this document is summarized under the heading "Costing Summary" on page 10 of 12 of the document
    - In short it is said in the document: "The abovementioned breakdown, detailed in the attached cost spread sheets, outlines the need for the further investment of R719m for the relocation of operations and manufacture to Durban"

RG17

Document 10

After a CNRRSSA Board Meeting held on the 6 May 2016, a letter dated 9 June 2016 was sent to CNRRSSA by the 3 SA Directors regarding the transaction with BEX 2.

- Note 10a
  - From the financials received at the Board meeting it was evident that CNRRSSA had already received R323 590 747 of the R647 181 494 that was approved by TFR and that BEX 2 had already received R67 181 494 from CNRRSSA.
  - To date (22 August 2016) no response has been received from CNRSSA to this letter.

Document 11

This batch of information pertains to the concerns of the 3 SA Directors as regards the legitimacy of the company CNRRSSA entered into an agreement with.

The CNRRSSA directors signed the agreement with BUSINESS EXPANSION STRUCTURED PRODUCTS (registration number 2009/028420/07) (BEX 2) and not BEX STRUCTURED PRODUCTS PTY LTD (registration number 2000/028999/07) (BEX 1) the company that originally quoted.

It appears that BEX 2 is an Exempted Micro Enterprise based on the BEE Verification certificate issued on 30 April 2015 and that the company had never traded before that.

The sole director, Mark Shaw, was only appointed on 15 April 2015.

ANNEXURE "RG 18"

-----Original Message-----
From: Ndiphiwe Silinga Transnet Corporate JHB [mailto:Ndiphiwe.Silinga@transnet.net]
Sent: Thursday, March 2, 2017 12:13 PM
To: Lulamile Xate (Lulamile@xatell.co.za) <Lulamile@xatell.co.za>; Rowlen von Gericke <Rowlen@globalgroups.org>; Robbie Gonsalves <Robbie.Gonsalves@cadiz.co.za>
Subject: A LETTER FROM CNR ROLLING STOCK SA

Dear Sirs

The attached letter from CNR Rolling Stock SA to the Group Chief Executive of Transnet, Mr Gama, co-signed by Messrs Gang Wang and Lulamile Xate, refers.

In essence the letter seems to advise that all differences between the shareholders of CNR Rolling Stock SA have been resolved and that there now exists a good working relationship between the parties.

As a direct result of the differences that existed between the shareholders you laid a complaint against what you suspected to be an untoward conduct by the entity and/or some of its shareholders in relation to the relocation costs to a plant in Durban. Transnet through its external attorneys initiated an investigation which is still at its initial stages.

In light of the tone of the attached letter, we would be pleased to hear from you whether the resolved differences include the issues raised in your complaint. In the circumstances, Transnet would like to know whether you are still pursuing or withdrawing the complaint.

Regards,

Ndiphiwe Silinga

ANNEXURE "RG 19"

28 March 2017

Mr Ndiphiwe Silinga

TRANSNET SOC Ltd
Group Executive: Legal & Compliance
45th Floor, Room 4518
Carlton Centre
150 Commissioner Street
Johannesburg 2001

Dear Sir

CNR ROLLING STOCK SOUTH AFRICA (PTY) LTD ("CNRRSSA" or "the Company")

Your email dated 2 March 2017 and the CNRRSSA letter dated 21 February 2017 (attached to your email) refer.

We thank you for reaching out to us in order to clarify what the CNRRSSA letter may mean in respect of the BEX issue we raised with the executives of Transnet on 13 September 2016. At said meeting we raised two items we wished to discuss with Transnet management.

The first issue related to the relationship and co-operation between CNR, as the major shareholder in the Company, and the minority shareholders in the Company. We are pleased to be able to report to you that significant progress has been made by all parties to ensure that the parties obtain a better understanding of the needs of the respective shareholders and their representatives on the board of the Company, from a corporate governance and stakeholder interest perspective. The aim of the letter was to convey this message to Transnet. The second issue related to the BEX issue and the impact on the minority directors. An original draft of the abovementioned CNRRSSA letter made reference to the BEX issue but this was removed by Mr. Xate as the minority directors and the minority shareholders have deliberately not engaged with CNR on this issue, given that Transnet is undergoing its investigation. We therefore respectfully encourage you to continue along this road until a satisfactory outcome is reached and will continue to co-operate fully with you in this respect.

Yours faithfully

Lulamile Xate – personally and on behalf of Endinamix

Rowlen von Gericke –on behalf of Global

Robbie Gonsalves – personally and on behalf of Cadiz

ANNEXURE "RG 20"

Hogan Lovells

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Fred von Eckardstein
KPMG Inc

Per email: fred.voneckardstein@kpmg.co.za

Our ref 4433869
Matter ref JOBURG

04 September 2017

Dear Fred

REPORTABLE IRREGULARITY: CRRC ROLLING STOCK SA (PTY) LTD ("OUR CLIENT")

1 **INTRODUCTION**

1.1 We refer to your letter of 12 June 2017 addressed to our client, your letters dated 12 June 2017 and 11 July 2017 addressed to the Independent Regulatory Board of Auditors and the meeting held on Monday 14 August 2017, and attended by me by way of a conference call link (**"the meeting"**).

1.2 In the meeting, we discussed the alleged "reportable irregularity" arising from a proposal which our client prepared for Transnet SOC Limited (**"Transnet"**) and a business development services agreement entered into between our client and Business Expansion Structured Products Proprietary Limited (**"BEX"**).

1.3 We understand that, at this time and on the basis of information provided to you, you are of the view that the proposal and the agreement contain alleged irregularities for the following reasons:

(a) the proposal significantly misrepresented to Transnet the cost of the relocation of a manufacturing facility from Pretoria to Durban; and

(b) a payment made by our client to BEX appears to "lack sound commercial substance and purpose".

1.4 Following the discussions at the meeting, it appears to us that you have not been given all the information and context surrounding the proposal, and the agreement, that you need to properly assess these documents, and we undertook to liaise with our client, and

gather information and documentation with a view to addressing the allegations you have raised, and which allegations are disputed by our client

1.5 We will set out the further information that we have received from our client, below

2. **BACKGROUND AND RELATIONSHIP BETWEEN TRANSNET, OUR CLIENT AND BEX**

Our client has instructed us as follows:

2.1 As you know, during March 2014, Transnet awarded contracts to four equipment manufacturers, including Bombardier Transportation South Africa ("**Bombardier**"), to provide locomotives, the majority of which are to be manufactured in Pretoria or Durban, and our client was awarded a contract to manufacture and supply 232 diesel locomotives

2.2 Following the award of this contract to our client, Transnet approached both our client and Bombardier to request a variation to the original contract. The variation concerned the relocation of the Transnet locomotive manufacturing facility from Pretoria to Durban, and our client prepared a proposal and costing for this variation ("**The Project**")

2.3 We understand that our client and Bombardier were approached by Transnet as they are the primary users of the manufacturing facility, although a part of the space is also used by Transnet. Our client has no knowledge of whether or not Bombardier submitted a proposal to Transnet

2.4 Our client, having been asked to provide a proposal to Transnet, felt obliged to respond. Accordingly, our client put together a brief proposal to Transnet dated 28 January 2015, and a copy is attached as **Annexure A**

2.5 As you will see from Annexure A, our client at this stage had only managed to put together a high-level proposal, which did not contain any breakdown of the costs of the Project. This proposal was discussed with a multidisciplinary team appointed by Transnet ("**the Transnet Team**") who advised that this proposal was not detailed enough as Transnet required more information and costing

2.6 Our client then submitted a revised proposal to Transnet, which is dated 1 February 2015 and is attached as **Annexure B**. This proposal provided that "*the cost will be more than R100,000,000*" but did not provide any detailed break-down of the costs. At this stage, our client was not in a position to provide a detailed cost break-down, as a relocation of the type contemplated, was beyond its day to day expertise

2.7 This revised proposal (Annexure B) was also discussed at a meeting between representatives of our client and the Transnet Team. Again, Transnet advised our client that the proposal was not comprehensive enough for them to properly consider

2.8 It should also be noted that our client is a Chinese Headquartered Manufacturing Group and it is accordingly not familiar with local costing and conditions.

2.9 At this meeting, Transnet's Team advised our client to prepare a more professional proposal setting out *inter alia*:

(a) what would be required to complete the relocation of the manufacturing facility and the implementation of the Project;

(b) all of the ancillary issues which would need to be considered as part of the relocation (for example, insurance, warehousing costs, financing etc); and

(c) a detailed breakdown of the various project components with a more detailed analysis of the costs comprising each component of the Project

2.10 In a further effort to meet Transnet's requirements, our client then compiled a more detailed cost estimate, which was finalised in March 2015, and a copy of this is attached as **Annexure C**. You will see from Annexure C that our client attempted to make a further and more detailed proposal. However, this cost estimate, while more detailed than what had previously been submitted to Transnet, remained nothing more than an estimate, on an uninformed basis, of the costs, estimated by our client's factory engineers, based on what they believed a similar project would cost in China. In preparing this submission, our client's factory engineers, failed to factor in the significantly higher costs applicable in South Africa (such as increased labour costs).

2.11 Once again, this more detailed cost estimate set out in Annexure C, was not satisfactory to Transnet.

2.12 Our client and BEX had originally met in 2014, shortly after our client was awarded the original contract by Transnet, at a railway exhibition. At that time, our client exchanged business cards with BEX.

2.13 Subsequently, BEX visited our client at their offices to see whether BEX could assist our client with its business and this meeting was initiated by BEX, not by our client.

2.14 At this meeting our client mentioned to BEX that our client had been asked to provide Transnet with a proposal for the relocation of Transnet's manufacturing facility and that our client had been experiencing difficulty in putting together a proposal which met Transnet's requirements.

2.15 BEX offered to assist our client in putting together the required proposal and a cost breakdown which would meet Transnet's requirements. Our client was of the view that if BEX could provide the skill and expertise required to put a satisfactory proposal together for Transnet, our client was prepared to engage with them.

2.16 BEX provided our client with a copy of its company profile, a copy of which is attached as **Annexure D**, which our client was comfortable with. As our client was under substantial time pressure to submit a detailed proposal to Transnet as Transnet's financial year end was approaching, and as our client was unable to provide a proposal in the form required by Transnet, it required BEX's services in order to be able to do so.

2.17 In accordance with our client's request, BEX then analysed the project, and carefully considered the costing and applicable models and methodologies, and confirmed with our client that the estimated breakeven cost of the Project would be R580 million. This is, of course, higher than the R318 million which our client had calculated but, as mentioned above, this figure was an approximation of what the project would cost if it were undertaken in China, without looking at what the costs in South Africa would be. The main drivers to which the increased costs can be attributed are:

(a) labour costs,

(b) the impact of timing;

(c) hedging and risk management costs; and

(d) additional and material costs to be allocated to upgrading and renovating the Durban facility to ensure parity between it and the high quality of Transnet's Pretoria manufacturing facility

2.18 Our client and BEX thereafter entered into a business development services agreement, pursuant to which BEX agreed to provide certain services in terms of the agreement attached as **Annexure E**.

RS

2.19 With respect to the fee that BEX would receive for providing these services our client did not want to take any risk itself in terms of having to absorb additional fees from BEX. Our client was in no way assured of being the successful project bidder and, had it agreed to pay BEX's fees upfront, it would have been out of pocket had it not been successful in its bid.

2.20 As our client needed BEX's services in order to properly respond to Transnet's request for proposal, our client agreed a risk-sharing arrangement with BEX. As you know, it was ultimately agreed (as recorded in the Business Services agreement) that inter alia:

(a) BEX would assist our client in negotiating the "best possible price" with Transnet, based on the Project benchmark cost of R580 million (this being the minimum amount which our client would need to receive in order not to make a loss from the Project),

(b) BEX would be entitled to an "agency commission" equal to the difference between the price awarded by Transnet and the project benchmark cost,

(c) Our client would be guaranteed its R580 million – i.e. if the total price agreed to by Transnet was R580 million or less, our client would have been entitled to the full price to be paid by Transnet and BEX would not have received any fee for their services

2.21 Our client was of the view at the time that Transnet would not agree to a project cost of R580 million and that the final project cost might be lower than this Based on our clients prior business experience. that our client believed that Transnet would require a discount on this amount Thus our client believed that the final project cost would be closer to, R580 million Hence they believed there was very little risk for them in agreeing an "upside" fee arrangement with BEX

2.22 As to why our client was prepared to undertake this project on a break-even basis, our client has advised that they were prepared to do so, for strategic reasons. Our client had already been awarded a contract to provide 232 locomotives to Transnet and hoped to secure future work in South Africa. Being prepared to undertake the relocation project on a cost-neutral basis could further assist our client in securing any such future work In addition, our client is ultimately a State-owned company in China and its mandate and strategy is to encourage investment outside of China. Hence the focus was on trying to ensure that our client did not make a loss as a result of the implementation of the Project, rather than trying to make a profit, and our client approached the matter on a strategic long term basis. It is clear from the above that there are cultural differences in how Chinese companies and South African companies do business and which has not been factored in by you

2 23 After consulting with BEX, our client then issued a further project proposal and costing to Transnet, attached as Annexure F While our client, based on advice received from BEX, believed that its break-even cost for the project was R580 million, the proposal submitted to Transnet contained a project cost of R635 851 786 to provide for cost increases due to labour costs, hedging and etc and caused by the lengthy period required to execute the Project, and further to enable our client to accommodate any reductions in our clients proposed Project cost, that might be required by Transnet, and without necessarily putting our client into a position where our client would make a loss on the Project.

2 24 Unavoidably, and due to a time extension by Transnet, a further proposal, marked Annexure G, was required to be submitted to Transnet in an amount of R719 090 548, but building in a discount that would reduce the project cost to R647 181 494, and

Transnet accepted that the additional costs had arisen as a result of the extension by Transnet, and Transnet accepted the price and discount that our client had proposed

2.25 Our client's proposal (Annexure G) was accepted by Transnet, and we attach Transnet's written acceptance as **Annexure H**. While our client is not privy to the facts on which Transnet based its decision to accept our client's proposal, it is likely that the time pressure that Transnet was under to initiate the relocation of the manufacturing facility and thereafter to start the Project as soon as possible may have played a part. Transnet itself refers to an *"extremely tight delivery schedule"* associated with this project (see **Annexure I**). Also, our client further assumed that Transnet would have considered bids from other parties for this project – particularly as our client was aware that Bombardier was approached to submit a proposal. Our client assumes that, in light of this, its proposal must have been favourable as compared to any other proposals that Transnet might have received, bearing in mind that our client's benchmark cost of R580 million was calculated on a breakeven basis, and that other bidders would not have submitted bids on this basis and would accordingly have built a profit margin into their bids. While our client anticipated that Transnet would push back on its proposal and try to reduce this, Transnet accepted that our client had already built in a 10% discount, and appeared comfortable with this.

2.26 Following Transnet's acceptance of our client's proposal, in an amount which was higher than what our client believed Transnet would agree to, our client issued an invoice to Transnet (see **Annexure J**) and BEX issued an invoice for its "fee" to our client – please see **Annexure K**.

2.27 We have asked our client as to whether, when the project price of R647 181 494 had been agreed to by Transnet, there had been any discussions with BEX about reducing the commission payable to BEX under the business development services agreement.

2.28 Our client has advised us that they did consider this and even, had a discussion with Mr Mark Shaw of BEX in which they raised their concerns that with hindsight the commission payable to BEX might be high. However, Mr Mark Shaw dismissed this, and on the basis that the fee or commission payable to BEX had already been contractually agreed. Our client then raised the issue with its parent company in China. The parent company asked what the likelihood of litigation would be if they tried to reduce the commission payable to BEX and our client advised that this was likely. On this basis, wishing to avoid protracted litigation and possible damage to its reputation, our client's parent company instructed our client not to pursue a claim or request for a reduction of the commission payable to BEX.

2.29 Ultimately, our client is of the view that, had they known at the outset that Transnet would have agreed to a project fee exceeding R580 million, they would not have been happy with, nor agreed to, the fee arrangements agreed with BEX as set out in the business development services agreement. At the time, our client was of the bona fide belief that the final project fee would be closer to R580 million, and did not contemplate that it could be significantly higher than this.

3 In conclusion, we trust that the above information provides you with a better context and understanding of the transactions which have been reported as alleged "material irregularities", and we reiterate that our client disputes that there were grounds to do so. Ultimately, BEX did receive a substantial commission for the services it provided to the company but, and as indicated above, there are commercial and bona fide reasons for this.

4 We further remind you of the so-called "business judgment rule" in terms of which it is presumed that in making a business decision, the directors of a company acted on an informed basis, in good faith and in the honest belief that the action taken was in the best

interests of the company. It is evident from the information provided to you that, at all relevant times, Our client's management acted in the best interests of the company, and with the requisite degree of care, skill and diligence in respect of its dealings with Transnet and BEX, and any allegation to suggest that our client and/or its directors acted irregularly or in breach of their fiduciary duties are unmeritorious and specifically denied. Our client expressly denies that they were party to improper dealings, and have advised us that the transactions referred to herein are *bona fide* arms-length transactions between willing contractors.

5. In light of what is detailed herein, our client is of the view that it would not be proper or correct for KPMG to qualify its current draft financial statements, nor revise our clients financial statements for the prior financial year.

Yours sincerely

Vaughn Harrison

Partner

"X 1"

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12 June 2017

Members of CNR Rolling Stock South Africa (Pty) Ltd
China Construction Bank Building
95 Grayston Drive
Sandton
2196

Dear Members

REPORTABLE IRREGULARITY

This letter is in accordance with the requirements of the Auditing Profession Act, No. 26 of 2005, (the Act), section 45 – *Duty to report on irregularities*.

The Act defines a reportable irregularity as any unlawful act or omission committed by any person responsible for the management of an entity, which -

(a) has caused or is likely to cause material financial loss to the entity or to any partner, member, shareholder, creditor or investor of the entity in respect of his, her or its dealings with the entity; or
(b) is fraudulent or amounts to theft; or
(c) represents a material breach of any fiduciary duty owed by such person to the entity or any partner, member, shareholder, creditor or investor of the entity under any law applying to the entity or the conduct or management thereof.

I have reason to believe that a reportable irregularity has taken or is taking place and, as required by the Act, I have reported particulars of the irregularity to the Independent Regulatory Board for Auditors (IRBA) in a written report dated 12 June 2017 a copy of which is attached. As indicated in that letter, I am not at present able to make a legal determination in respect of the suspected unlawful act or omission, but have exercised professional judgement, based on the evidence or information which has come to my knowledge, including undertaking further investigations of information as were considered necessary in the circumstances.

The Act requires me as soon as is reasonably possible, but no later than 30 days from the date of the individual auditor's report which was forwarded to the IRBA, to send another report to the IRBA which must include:

1. A statement that I am of the opinion that:
(a) no reportable irregularity is taking place; or
(b) the suspected reportable irregularity is no longer taking place and that adequate steps have been taken for the prevention or recovery of any loss as a result thereof, if relevant; or
(c) the reportable irregularity is continuing.

WC

KPMG

2. Detailed particulars and information supporting the statement above.

Please note that, where the reportable irregularity is continuing, the IRBA has a responsibility to notify any appropriate regulator in writing of the details of the reportable irregularity and to provide it with a copy of my report.

I invite you to discuss my report to the IRBA, at a meeting to be arranged as soon as possible, and at that meeting I will afford you the opportunity to make representations in respect of my report.

Please acknowledge receipt of this report.

Yours faithfully

F. von Eckardstein.

KPMG Inc.
Fred von Eckardstein
Registered Auditor
Director

IRBA number: 355186
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12 June 2017

Mr Imran Vanker
The Director: Standards
Independent Regulatory Board of Auditors
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Greenstone
1616

Building 2
Greenstone Hill Office Park
Emerald Boulevard
Modderfontein
1609

Email: ristandards@irba.co.za

Telephone: 087 940 8800

Dear Sir

FIRST REPORT: REPORTABLE IRREGULARITY
Name of entity audited: CNR Rolling Stock South Africa (Pty) Ltd
Registration number of entity: 2014/016892/07

My firm has been engaged by CNR Rolling Stock South Africa (Pty) Ltd to audit the company's annual financial statements

I have reason to believe that a reportable irregularity, as defined in the Auditing Profession Act, has taken, or is taking place. I am not able to make a legal determination in respect of the suspected unlawful act or omission, but have exercised professional judgement, based on the evidence or information which has come to my attention including undertaking further investigations of information as were considered necessary in the circumstances.

Particulars of the reportable irregularity are:

1. According to information that we have received the proposal by CNR Rolling Stock South Africa (Pty) Ltd to Transnet SOC Ltd ('Transnet') for the 'Analysis of cost increase for locomotive delivery and locomotive factory location from Pretoria, Gauteng to Durban, Kwa-Zulu Natal in terms of Manufacturing Facility Relocation for Class 45D Locomotives Supply Project' significantly misrepresented the cost to Transnet. Transnet issued a variation order on 23 July 2015 accepting the proposal.

KPMG

2. CNR entered into a Business Development Services Agreement with Business Expansion Structured Products (Pty) Ltd (registration no. 2009/020420/07) ("BEX") on 25 April 2015 relating to the proposal mentioned in 1. above and made payments to BEX which appear to lack sound commercial substance and purpose.

Please acknowledge receipt of this report.

Yours faithfully

F. von Eckardstein.

KPMG Inc.
Fred von Eckardstein
Registered Auditor
Director

IRBA number: 355186
Direct email address: fred.voneckardstein@kpmg.co.za
Direct telephone number: 083 297 8921

ANNEXURE "RG 21"

RG 21

Robbie Gonsalves

From: Robbie Gonsalves
Sent: Friday, 22 September 2017 17:28
To: Von Eckardstein, Fred; DLOCO??Jeff Wang; ??(????); daisy; liyongzhikuaiji@163.com; Rowlen von Gericke (rowlen@globalgroups.org); Lulamile Xate (Lulamile@xatell.co.za)
Cc: Friedman, Dean; Fouche, Leon; Mojela, Thabo; MacKenzie, Cherrene; Morris, Neil
Subject: RE: Reportable Irregularity 22.09.2017

Dear Fred

Thank you for taking my call earlier today. You mentioned that there was a previous Reportable Irregularity as well. None of the South African directors (myself, Lulamile Xate or Rowlen von Gericke) were aware that we had an issue with this Reportable Irregularity until yesterday and had no idea of the previous Reportable Irregularity until you mentioned it to me today. Please send us the previous Reportable Irregularity as well as all related correspondence with the company. As mentioned on the call to you, we (myself, Lulamile Xate and Rowlen von Gericke) would like to meet with you as soon as possible and have requested that management set this up for quite a while. We will in the meantime ensure that the company responds fully to this Reportable Irregularity.

Regards

From: Von Eckardstein, Fred [mailto:fred.voneckardstein@kpmg.co.za]
Sent: 22 September 2017 02:18 PM
To: DLOCO??Jeff Wang; ??(????); daisy; liyongzhikuaiji@163.com; Robbie Gonsalves
Cc: Friedman, Dean; Fouche, Leon; Mojela, Thabo; MacKenzie, Cherrene; Morris, Neil
Subject: Reportable Irregularity 22.09.2017

Dear All,

As discussed on Wednesday, please find Reportable Irregularity attached.

Regards

Fred von Eckardstein
Partner
Sector Head-Construction, Industrial & Automotive Markets

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ANNEXURE "RG 22"

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20 October 2017

Mr Fred von Eckardstein
KPMG Inc.
KPMG Crescent
85 Empire Road, Parktown
2193

Email: fred.voneckardstein@kpmg.co.za

Dear Sir

REPORTABLE IRREGULARITY

Your letter dated 22 September 2017 refers. This response has been complied by the directors representing the South African shareholders of CRRC SA Rolling Stock (Pty) Ltd (**"CRRCSARS"**) (previously known as CNR Rolling Stock South Africa (Pty) Ltd (**'CNRRSSA"**) (the **"Company"**) but has been reviewed by Wang (Jeff) Wang, the CEO. We have sought the assistance of Endinamix and their members in responding to your concerns and sincerely trust that this matter has been adequately dealt with to your satisfaction. As per your request we have outlined the history of the consortium, the taxation issues and the commercial aspects of the Project Management Agreement.

We submit that what follows below unequivocally demonstrate that no reportable irregularity as envisaged in section 45 of the Auditing Profession Act 26 of 2005 occurred or is occurring and furthermore that the relevant agreement does have commercial substance and does not fall foul of section 80 of the Income Tax Act.

1. **History of Consortium**

   Transnet Freight Rail (**"Transnet"**) issued the Request for Proposal (**"RFP'**) for the Projects (meaning the supply of **1064** locomotives made up of (i) the supply of 465 diesel locomotives to Transnet pursuant to the RFP issued under tender number: TFRAC-HO-8609 (diesel locomotives), and (ii) the supply of 599 dual voltage electric locomotives to Transnet pursuant to the RFP issued under tender number: TFRAC-HO-8608 (electric locomotives)) on 23 July 2012. The Company became to be successful in the supply of 232 (of the 465) diesel locomotives to Transnet (**"the project"**) after partnering with Global Rail, Cadiz and Endinamix (**"SA shareholders"**).

   The initial contact between CNR and Global Rail commenced with the first tender for the supply of 95 electrical locomotives (which was not successful but established a solid relationship between these two parties).

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1) The supply of 95 Electrical Locos ("**T95**") came to Global Rail's knowledge on 7 December 2011.
2) Global Rail procured the tender documents and obtained these on 22 December 2011.
3) Global Rail decided to work with CNR and CRCC (not CRRC) (both companies which Global Rail knew well) and decided to meet them in China. These meetings took place from 4 January 2012.
4) After the meeting Global Rail started interacting on the tender with TFR from 10 January 2012. In total there were 480 email communications. The emails and documents are obviously too voluminous to print but we invite KPMG to either come inspect these email and documents or let us know how they would like to view these.
5) On 21 January the first email correspondence was received from Dalian.
6) Dalian personnel arrived in SA on 30 January 2012.
7) Global Rail undertook all the technical discussions with different component suppliers in SA.
8) Global Rail completed the Supplier Development calculations.
9) The bid was submitted on 12 January 2012.
10) On 21 June 2012 Global Rail received a letter from TFR (dated 19 June 2012) saying we were not successful in the tender. The reason, according to TFR was that the bid did not meet the minimum Supplier Threshold of 60%.
11) On 9 July 2012 this consortium addressed a letter to TFR (Dated 9 July) complaining about the reasons provided for not being awarded the T95 tender.
12) On 27 July 2012 Global received a letter from TFR dated 26 July 2012 saying that they will explain in detail later. This explanation was never received.
13) On 22 Oct 2012 Engineering News published an article that CSR had won the tender.

The relevance and importance of this (unsuccessful) T95 tender is that all parties concerned gained invaluable experience and review with and into the tender process and legislative requirements which was eventually applied in the 1064 Tender dealt with below.

Cadiz Special Projects Limited (a wholly-owned subsidiary of Cadiz Holdings Limited at the time), acting through its Cadiz Corporate Solutions division ("**Cadiz**") entered into a consortium agreement with The Beijing Axis ("**TBA**") based in Beijing, China on 4 December 2009. The legal relationship of Cadiz and The Beijing Axis is one of joint contractors) in terms whereof Cadiz and The Beijing Axis (China) share whatever fees it may earn from transactions between Cadiz clients and Chinese investors/buyers/funders. Matt Pieterse of TBA (who was based in Beijing at the time) had known Ilza van Niekerk (of Global Rail) for over twenty years and

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connected Global Rail and Cadiz. Cadiz and TBA offered the following services to the T95 consortium.

In respect of its appointment as financial advisor to the Consortium for the T95 tender, Cadiz/TBA offered to provide the following services:

- Cadiz/TBA will co-ordinate the tender submission in respect of Section 3: Clause 31 and Clause 32: Financial Offer and Other Pertinent Information, where such information is applicable, and where Cadiz/TBA needs to involve other members of the Consortium for the information required Cadiz/TBA will do so;
- Cadiz/TBA will brief and liaise with all other professional advisors, which may include legal, insurance, accounting and tax advisors, where their input is required in terms of Section 3: Clause 31 and Clause 32;
- Brief and liaise with the relevant South African regulatory authorities;
- Brief the Consortium as to various alternative structuring strategies and local governance issues, if required;
- Assist in obtaining Performance Boards and Financial Guarantees, where required;
- Address exchange rate risk and other risks to the proposed funding structure and propose hedging strategies, where required;
- Construct the financial model, cash flow projections and funding model, where required in Section 3, with all the technical inputs thereto to be provided by the Consortium;
- Collate information required for and prepare the financial model databook required in Section 3;
- Source possible funders (in co-operation if so required) in respect of the Project; and
- Obtaining term sheets from funders, where required.

As CNR, Global Rail and Cadiz had worked so well together on the T95 tender it stood to reason that they would work together on the 1064 Tender as well. What follows is the history of the 1064 Tender

1) 17 July 2012. Global Rail became aware of the tender for 1064 locomotives. This was for 599 Electric and 465 Diesel Locomotives.
2) 17 July 2012. Global forwarded the document mentioned above to madam Ouyang Jingping of CNR HQ (hereafter referred to as Ouyang), the same Chinese company under which Dalian (CNR-Dalian) the locomotive manufacturer falls and with whom Global Rail co-operated with for the T95 tender (Note: this time we decided not to involve CRCC as we had done for the T95 tender).
3) 8 July 2012 Global Rail and Cadiz received a message back from Ouyang advising us that she was preparing a draft to her executives for the two (599 and 465) loco projects. In this message she immediately asked for assistance on:

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a. Summary of the two projects
b. BEE requirements
c. SD
d. LC
e. Risk analysis
f. Delivery, etc.

4) 8 August 2012. Global Rail and Cadiz received an email from Dalian (Jeff Wang, who was also involved with the T95 tender) advising is that the first people from Dalian (including Ouyang) will arrive in SA to start working with Global Rail and Cadiz on the project.
5) 8 August 2012. Global Rail and Cadiz received feedback from Ernie Lai-King of ENS advising us that Mr John Ferraz will be the person from ENS that will be involved with this tender process.
6) 9 August 2012. Global Rail and Cadiz received an email from Ouyang with an attachment named "Scope of Work" which also included ENS (refer **Annexure 1.3**). In the email Ouyang mentioned that the "Consortium should be led by you" (Meaning Rowlen von Gericke)
7) 9 August 2012. An email was sent to Transnet Freight Rail ("**TFR**") advising them that we will quote on both the 465 Diesel as well as 599 Electric Locos.
8) 10 August 2012. Ouyang confirmed receiving the "Executive Summaries" from Global Rail.
9) 16 August 2012. First communication with Transnet Engineering ("**TE**") arranging to set up a meeting on the work that they could possibly do for the Planned Consortium. In the process many emails were received and sent from RvG and others within the Global Group.
10) From 23 August 2012 Global Rail started communications with and having multiple meetings with South African companies/manufacturers as well as international companies based in South Africa. These companies are, amongst others:
    a. Transnet Engineering for manufacture of Locomotive bodies
    b. Union Carriage and Wagon (UCW) for manufacture of Locomotive bodies
    c. DCD Dorbyl for manufacture of Locomotive bodies
    d. MTU for the supply of Engines
    e. Cummins for the supply of Engines
    f. Knorr Bremse for the supply of brake equipment
    g. Wabtec for the supply of brake equipment
    h. Booyco for the supply of brake equipment
    i. Donkin Fans for the supply of fans
    j. ABB for the supply of electrical components such as Traction Motors, Main Generators, Control Systems etc.

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k. Timken for the supply of wheels
l. SWASAP for the supply of axles
m. Green Radiators for the supply of Radiators
n. Rotacon for the supply of gear casings

11) 14 September 2012. The first Bill of Materials (BOM) sent from Global Rail to CNR on possible contractors (including South African manufacturers) (refer **Annexure 1.4**)
12) 26 September 2012. CNR responds to BOM and undertakes to supply specifications.
13) 31 January 2013. Responsibility Matrix sent to all concerned (refer **Annexure 1.5**).
14) Between the time RFP was received (17 July 2012) and the time the tender was submitted (30 April 2013), 205 emails were exchanged between Global Rail/Cadiz and CNR. Most correspondence was technical and financial.
15) Between the time the tender was submitted (30 April 2013) until the time the negotiations commenced (4 February 2014 for 465 Diesel Locomotives), 327 emails was exchanged between the parties.
16) From the time of negotiations (4 February 2014 for 465 Diesel Locomotives) to the time the contract (for 232 locos) was signed (17 March 2014), 950 emails were exchanged.
17) From the time the tender for 232 Locos was signed (17 March 2014) up to present (18 October 2017) 1224 emails were exchanged between the parties.
18) The following activities demonstrate Global's intimate involvement with the tender process:
    a. **Prior to as well as the tender process for both 465 Diesel as well as 599 Electric Locomotives**
        i. Global took the lead in all technical matters i.e. negotiations with suppliers as mentioned above (files and email correspondence available for review at Global's offices)
        ii. Handling ALL correspondence, (in collaborations with CNR Dalian and CNR HQ) with Transnet (files and email correspondence available for review at Global's offices)
        iii. Playing a major role in deciding, in collaboration with CNR Dalian, which component manufacturers to be used (files and email correspondence available for review at Global's offices)
        iv. Handling all correspondence with CNR on technical matters (files and email correspondence available for review at Global's offices)
        v. Taking the lead in compiling the Bill of Material (BOM), with full support of CNR Dalian which is by far the most important document from which the price of the locomotive is determined as well as

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Local Content and Supplier Development (files and email correspondence available for review at Global's offices)

vi. Taking the lead (from within Global's own ranks) as well as involving another company specializing with Supplier Development (SD) matters which was one of the "cornerstone" requirements for the tender to be successful (files and email correspondence available for review at Global's offices).
vii. Taking the lead (supported by CNR Dalian) in making sure that the Local Content, which was another "cornerstone" requirement for the successful evaluation of the tender.
viii. Using local South African expertise in Diesel and Electric Locos to compile the comments in the tender documents on the technical aspects of the two tenders.
ix. Compiling the final tender documentation and making sure that each and every document in the tender files was submitted as required. This in itself was a major task which can be seen from the 4 (four) lever-arch files available in Global's offices for each tender.
x. Making office space available and providing Chinese food for a few weeks for more than 20 Chinese people that were at Global's offices during the tender process.
xi. Providing transportation.
xii. Using Global's "in house" legal representative (Eugene Nyssen assisted by Gerrit Bekker) to assist CNR on legal matters.
xiii. Assisting Chinese personnel all the time with the obtaining of visas.

b. **Between the period when the tender was submitted and before negotiations started:**
   i. Handled all communications with Transnet in collaboration with CNR Dalian and CNR HQ (files and email correspondence available for review at Global's offices).
   ii. Handled all other communications in collaboration with CNR (files and email correspondence available for review at Global's offices).
   iii. Handled all technical discussion with South African suppliers during this period.

c. **During the negotiating period (staring 4 February 2014) and signing of the supply agreement (17 March 2014)**
   i. As the negotiations started during the China New Year festival, Global assisted in obtaining visas for the personnel from Dalian.
   ii. Handled the first meeting (with the support of Cadiz and ENS) and the negotiation meetings with Transnet at Weber Wetzel's offices.

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iii. Global was the main negotiator (on the technical matters) in close association with CNR. At the negotiating table there were normally the following people "around the table":
- At least 5 people from Transnet
- Webber Wentzel
- Up to six senior people from CNR
- From Global:
  - Rowlen von Gericke (always)
  - Eugene Nysschen (always)
  - One or two other people depending on what was to be discussed
- From Cadiz
  - Robbie Gonsalves (always)
  - Sam Mokorosi (always)
  - One or two other people depending on what was to be discussed
- From ENS
  - John Ferraz (when legal matters were discussed)
- From Endinamix
  - Lulamile Xate

iv. Leading all discussions with CNR (in collaboration with Cadiz should the matter involve financial matters) after a negotiation session with Transnet to prepare feedback to Transnet (in collaboration with CNR) either in a letter form or in preparation for the next day's negotiation with Transnet (copies of correspondence available for review at Global's offices).

v. 950 e-mail messages were exchanged during this period (email correspondence available for review at Global's offices).

vi. Leading discussions with technical companies to reduce prices as required by Transnet during the negotiations.

d. **In the period following the signing of the Locomotive Supply Contract with Transnet for the supply 232 Diesel Locomotives.**

i. A project management team was formed with CNR Dalian including 4 people from Global.

ii. Preparation of the Project Management document.

iii. This team was very active in all discussions with CNR Dalian until such time when CNR was capable of handling the project management themselves (all correspondence and ddocumentation available for review at Global's offices in this regard).

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iv. From the time the Locomotive Supply Contract was signed and during Global's period involved with the Project Management and thereafter (up to date) a total of 1224 emails were sent/received and are available for review.

The Consortium Agreement (**Annexure 1.1**) was initially signed between CNR, Global Rail and Cadiz ("**Original Consortium Members**") on 29 April 2013. At this stage the BEE Consortium had not been formalised as the Original Consortium Members insisted on ensuring that the BEE Consortium comprised of members who had the necessary experience and credentials and who could add significant value to the project.
Shortly after the Consortium Agreement was signed, an Accession Agreement (**Annexure 1.2**) was signed by the Original Consortium Members and Endinamix (being the BEE Consortium).

It is very clear from the Consortium and Accession Agreements that:

a. The Parties or Consortium (CNR, Global Rail, Cadiz and Endinamix) had to deal exclusively with one another in relation to the preparation and submission of the proposals and in relation to the negotiation, execution and implementation of and of the agreements with Transnet or Transnet Engineering.

b. Endinamix (the BEE member) was to become a party to and be bound by the terms of the Consortium Agreement and became a member of the Consortium.

c. In lieu of the Supplier Development bond contributions, Global Rail and Cadiz had to contribute the following services, without charge, to the Consortium (at that time we were still tendering for the 599 Electric Locos as well as 465 Diesel Locomotives):

   i. Marketing of the products and services of the Heavy Duty plant to Prasa, Transnet and other potential customers;

   ii. The administration associated with the establishment of any project company; and

   iii. The liaising with the taxation authorities for each project company established.

d. CNR demanded that the other the Consortium Members comply with the following responsibilities as they did not have the knowledge or experience to establish a project company in South Africa and to comply with all the necessary rules and regulations, including BEE legislation. CNR relied very heavily on the local knowledge and expertise of the South African members of the Consortium, not only at this early stage but

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throughout the entire process that led to the eventual award of the DLoco tender. The responsibilities of Cadiz, Global Rail and Endinamix were allocated as follows:–

- Global Rail –

i. Act as overall project manager for the Consortium in respect of the preparation and submission of the Proposals (responses to the RFPs) which will include, inter alia, the preparation of project timetables and the collation and submission of the documentation for the submission of the Proposals.

ii. Negotiate with all possible South African manufacturers to possibly become suppliers to this venture.

iii. Management of the technical aspects of the Contracts (agreements with TFR and TE) including delivery timelines and supply strategy.

iv. Maximise the Supplier Development score for the Proposals.

v. Assisting with supplier development proposal/s, local content documentation as well as B-BBEE scorecard.

vi. Assist with all legal matters.

vii. Global employed Mr Iain Kerr (an electrical locomotive expert) and used his expertise to ensure that the CNR design complied with the TFR Electric locomotive specification.

- Cadiz –

i. Assist with the financial aspects of the manufacturing activities of the Consortium. Specifically for the Total Cost of Ownership model ("**TCO**"), Cadiz shall collate, aggregate and prepare the TCO model based on the inputs we obtain from Dalian and CNR.

ii. Brief the Consortium as to various alternative local structuring strategies and all South African governance issues surrounding the manufacturing activities of the Consortium.

iii. Negotiate the terms and conditions of all agreements that may be required to implement the activities of the Consortium.

iv. Life cycle costing of the locomotive.

v. Engage with the potential funders to the Contracts, if so required.

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vi. Assist CNR raise Chinese financing such as export financing for Chinese capital goods.

vii. Brief and liaise with all other professional advisors including tax and legal.

- Endinamix –

i. Assist with the completion, preparation and submission of the Proposals, specifically the technical and B-BBEE and Supplier Development aspects of the Proposals.

ii. Assist the Consortium, where required, with local assembly, maintenance, service and repair of locomotives, as agreed with Transnet.

iii. Assist the Consortium, where possible, with project management of the technical aspects of the Proposals and the Contracts, including delivery timelines and supply strategy, for which Global Rail shall be remunerated separately. Assist with communications with Transnet.

iv. Assist with regulatory approvals, where required.

v. Facilitation and coordination of meetings with the Government and other local institutions.

vi. Effective flow of communications and correspondences between the Parties.

e. To ensure the effective management, direction and control over the activities and the operations of the Consortium a Management Committee was formed.

f. The Management Committee comprised at least one duly authorised representative from each Party. The Management Committee had the following representatives ("**Party Representative**") from each Party:

Global Rail:	Mr Rowlen von Gericke;
Cadiz:	Mr Robbie Gonsalves; and
Endinamix:	Mr Lulamile Xate.

g. During **Phase 1** (meaning the period from the Signature Date of the Consortium Agreement until Transnet notified the Consortium whether or not one or both of the Proposals has been accepted by Transnet) the Parties had to each bear their own costs and expenses incurred in the performance of their obligations under the Consortium Agreement. In the event that the Consortium Agreement was terminated, Global Rail,

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Cadiz, and Endinamix had to bear the percentage of the costs and fees of Simanye (Pty) Ltd (BEE consultants) and the costs of purchasing each RFP from Transnet. Furthermore in the event that the Consortium Agreement was terminated and Endinamix was unable to pay its share of the costs and expenses, Global Rail and Cadiz had to bear a disproportionate share of such costs and expenses. Lastly, a large portion of the very high fees and costs of the attorneys of the Consortium, namely Edward Nathan Sonnenberg, had to be paid by Global Rail and Cadiz in the event of the Consortium not being successful.

2. Taxation impact of the PMA fee

We note that KPMG issued a clean opinion on the financial statements of the Company in respect of the year ended 28 February 2015 on 14 September 2015 (refer **Annexure 2.1**). These financial statements reflect that the Company had a loss before tax of R23 119 131 (refer **Annexure 2.2**). The R50m PMA Fee is included in this loss. Thus the Company was only able to deduct R26 880 869 of the PMA Fee in the year ended 28 February 2015. The 10 month period ended 31 December 2015 also reflects a loss position and likewise the year ended 31 December 2016. Thus the Company has not been able to deduct R26.9m of expenses for at least 32 months. However Endinamix has included the full R50m PMA Fee in its tax return in respect of the year ended 28 February 2015 (**Annexure 2.3**). Furthermore we enclose a tax clearance certificate from SARS (dated 10 October 2017) reflecting that the Company is in good standing (**Annexure 2.4**). Should the shareholders in Endinamix wished to have avoided income tax in any way then the PMA Fees could have been structured as preference dividends. In fact preference shares were considered at one stage during the negotiations between the SA shareholders and CNR but as the shareholders were aware that the company would suffer losses in the first few years of the project, they were advised that preference shares could be viewed as a tax avoidance structure. Finally, Endinamix paid output VAT on the PMA Fee as reflected in the attached ITR14 (**Annexure 2.5**).

The table below reflects the additional taxable income (and related income tax) that was paid as a result of the PMA Fee.

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	Company	Endinamix	Sum
Tax without PMA Fees			
Taxable income before PMA Fees	R 26 880 869	R 0	R 26 880 869
Tax at 28%	R 7 526 643	R 0	R 7 526 643
Tax with PMA Fees			
Taxable income before PMA Fees	R 26 880 869	R 0	R 26 880 869
PMA Fees	-R 50 000 000	R 50 000 000	R 0
Taxable (loss)/income after PMA Fees	-R 23 119 131	R 50 000 000	R 26 880 869
Tax at 28%	R 0	R 14 000 000	R 14 000 000
Increase in taxation			R 6 473 357

Annexure 2.6 is an email from Robbie Gonsalves to the Financial Director of the Company dated 9 May 2016. You will see that at the 6 May 2016 board meeting, the following had been discussed:

a) The directors representing the SA Shareholders ("**Minority Directors**") requested a meeting with KPMG (this meeting never took place) to discuss the financial statements; and
b) The Minority Directors were always concerned that the income tax and VAT amounts due in respect of the PMA Fees were accurate and regularised.

The above communication reflects that the Minority Directors were committed to ensuring that the annual financial statements, income tax and VAT returns correctly dealt with the PMA Fees correctly.

3. **Project Management Agreement ("PMA")**

From the time Transnet issued the Request for Proposal ("**RFP**") on 23 July 2012 until the time that the Locomotive Supply Agreement ("**LSA**") was signed on 17 March 2014, thousands of hours were spent by the Endinamix members on both **Phase 1** (i.e. from 23 July 2012 until early Jan 2014), when Transnet informed the CNR Consortium that they were successful in the bid (subject to final pricing and definitive agreements being negotiated) and **Phase 2** (the finalisation of the final price and negotiations of the terms and conditions of all the definitive agreements with TE and TFR).

Endinamix is made up of the following parties:

- Cadiz Corporate Solutions (Cadiz)
- Global Railway Africa (Global Rail)
- Azon Rail
- Kopano Ke Matla

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- Linontando Investments
- Makana Investment Corporation
- Lineta Investments

The members of Endinamix were selected because of their credentials and skills they were able to bring to the consortium. In selecting the members of the consortium, the following credentials were sought:

ENDINAMIX CAPABILITIES	DETAILS
Financial and transaction support	Financial strategies Funding options Financial risk management Transaction advice Corporate governance
BBEEE and local participation support	Black Economic Empowerment support Local strategies
Rolling stock component supply	Bogies (castings) Wheels Traction motors Brake blocks
Rolling stock overhaul and upgrades	Refurbishment of large components Refurbishment and upgrade of rolling stock
Logistics and transportation	Road support services Supply chain and logistics support
Fabrication and machined steel component supply	Various fabricated steel components
Rolling stock maintenance support	Ongoing maintenance support – both body and underframe
Project management services	Project management support Quality control and management Stakeholder management
Supplier development strategies and implementation	SD commitment implementation support

The abbreviated profiles of the Endinamix consortium members follow:

Global Railway Africa (Pty) Ltd

- The Global Group comprises a number of private companies in South Africa (SA) that conducts its business worldwide.

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- Global's business includes the research, development, manufacture and supply of railway and rail related products, comprising mostly Railway Rolling Stock.
- Global commenced business in 1996 and have very successfully grown into a diversified group of companies. Although these different companies have versatile capabilities, they remain intricately and strategically complementary to each other.
- Global Railway Africa (Global or GRA) has a specific focus to design, supply, manufacture, maintain and support rail and rail related products for customers in Southern Africa, Africa and internationally. This include locomotives.
- Global has an exemplary track record in the supply of rolling stock services and components to private companies and SOCs in South Africa.
- Global has, for instance, since its inception, provided in excess of 360 000 components (including 9000 axles, bolsters, side frames and various other small and large castings) to Transnet Engineering with not a single quality related NCR. These were supplied from Chinese suppliers, including companies falling under CNR, which made Global well known to Chinese companies, including Dalian
- In pursuit of Transnet Engineering's demand for ever decreasing prices, Global engaged manufacturers in China and worked closely with these suppliers to optimise and sometimes completely overhaul their processes to meet Transnet Engineering's higher standards, meet Global quality requirements and reduce the overall cost of components to TE.
- GRA's pricing and QA record bears testimony to the success of these initiatives.
- In 2005 Global also, very successfully, completely refurbished 4 locomotives in Sudan
- In 2008, Transnet Engineering raised concerns about their ageing locomotive fleet, specifically that there were several locomotive designs, each with their own traction motor and these becoming more difficult and expensive to maintain.
- Global worked with Traction Motor manufacturers around the world and finally selected a suitable and reliable Chinese Traction Motor manufacturer to develop a universal traction motor to fit to the 7E locomotives.
- Importantly, Global took the lead in the design of the critical Traction motor-locomotive interface which allowed the single traction motor to be used in multiple locomotives. Global won the bid for this work and delivered and supported 200 of these traction motors since 2008.
- Leveraging years of experience as the Engineer in charge of the Diesel locomotive fleet of more than 1400 Spoornet Diesel locomotives (during the time when Rowlen von Gericke was still with Spoornet/Transnet) and which included refurbishment and maintenance, Mr. Rowlen von Gericke (CEO of Global) offered to CNR an unique review to Diesel locomotive performance

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and maintenance requirements in South Africa for the locomotive bid for 465 Diesel Locomotives.

- When CNR were approached by Mr von Gericke to partner for the Loco tender, (starting with the 95 Locomotive bid) it was an obvious choice for them to accept, because of Global's technical design capabilities, experience in TFR/TE standards and protocols along with their reputation in and experience working with Chinese based manufacturers.
- During the preliminary design and tender process, Global employed locomotive experts and worked closely with TFR and TE to develop and clarify specifications and local requirements.
- Global has the ability to work closely with the OEM (CNR/Dalian) to ensure that these were correctly interpreted.
- Global has the ability to handle the technical communication with TFR/TE in order to ensure a quality product meeting TFR's specifications and expectations.
- Global has over the years been approached by various OEMs in China (and indeed the world) to consult, partner or represent them in South and Southern Africa.
- Global has become the technical partner of choice for supplying rolling stock products and solutions into Africa.

Cadiz Corporate Solutions (Pty) Ltd (CCS)

Cadiz Corporate Solutions was previously a division of Cadiz Special Projects Limited, a wholly owned subsidiary of Cadiz Holdings Limited, a leading specialist financial services group listed on the JSE (Cadiz is now a separate company known as Cadiz Corporate Solutions (Pty) Ltd) . Founded in 1993, the group specialises in research and trading in the equity derivatives and fixed income markets, quantitative research, stock broking, asset management and structured solutions for the corporate, institutional and retail markets. Cadiz Holdings Limited is a Level 3 B-BBEE Contributor.

CCS provides a multi-disciplinary approach to providing strategic advice to South African organisations and parastatals in relation to:

- Corporate Restructuring;
- Capital Raising;
- Black Economic Empowerment;
- Business Valuations; and
- Derivative Strategies.

4

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To further enhance our value proposition, we have concluded strategic partnerships with advisory firms in China (The Beijing Axis) and India (Eternus Capital), giving us access to investors from both of the rising Asian giants. Since the conclusion of these partnerships, CCS has been responsible for arranging a number of visits by Chinese and Indian investors to South Africa. Simultaneously CCS has arranged for a number of South African corporates to visit Chinese investors in Beijing.

CCS has successfully executed some of the largest and high profile transactions in South Africa in excess of R100 billion over the past ten years. We are recognised for our independence, thought leadership and innovation.

Kopano Ke Matla Investment Company ***(The Kopano profile is attached as Annexure 1.1)***

The Kopano Ke Matla Investment Company ("**Kopano**") was established in 1996 by the Kopano Ke Matla Trust ("**Kopano Trust**") which was established as the ownership and governance vehicle for COSATU's investment activities. The sole beneficiary of Kopano Trust is the Congress of South Africa Trade Unions ("COSATU"). COSATU was launched in December 1985, with current membership exceeding 2 million workers. Kopano are Level 1 B-BBEE contributor.

Kopano envisages a continuum that begins with the pursuit of opportunities, whilst ultimately securing the participation of black business in the mainstream economy.

Kopano is currently involved in a few strategic sectors of the economy including resources and technology, communications and property through various subsidiary companies.

Kopano prides itself in being the discerning business' partnership of choice for a number of reasons such as:

- Broad Based BEE: The union's members, allies and associates ensures BBBEE on a level unparalleled;
- Immune to political and personality leadership change: Kopano by virtue of COSATU's national standing will remain central to the country's economic success;
- Strong balance of cash and assets: Kopano's financial standing to date remains stable and poised for future growth;
- Access to captive markets: 220 000 potential SMME businesses with an alliance partner; and
- Kopano further subscribes to the key economic and development imperatives as determined by the millennium goals, the Polokwane resolutions and

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COSATU's key conference resolutions. Kopano seeks to establish and further their involvement in this key growth sector.

Linontando Investments ("Linontando")

The company was formed by women who are already successful entrepreneurs in different sectors. It is a response to the government's call for women to take up the challenge of economic emancipation through actively participating in the growth of the economy of the country. Linontando is a Level 3 B-BBEE contributor.

Linontando's vision is to provide value adding engineering solutions to rolling stock and rail related products through manufacturing, upgrade, maintenance and refurbishments. Linontando would like to make a contribution to the sustainability of rail transport as the preferred and efficient mode of transport.

Linontando's services are packaged in order to add value to our partners and customers:

- Design and manufacturing of parts and equipment for motor coaches;
- Rolling stock overhaul and upgrades;
- Signalling
- Refurbishment on motor coaches and plain trailers general overhauls of motor coaches and plain trailers;
- Supplier of brake systems for carriage and freight stock of railway rolling stock;
- Rail operations and management;
- Rail maintenance and inspection technologies;
- Quality control and management.

Makana Investment Corporation (Pty) Ltd ("MIC")

In order to enable Makana Trust to meet its objectives it formed MIC as a diversified commercial investment holding company in 1997.

MIC represents a worthy cause, provides a network of influential stakeholders, creates value in its ventures, identifies talent in previously disadvantaged groups and creates and maintains professional and focussed working relationships with all its stakeholders.

Makana Trust supports the ex-Political Prisoners Committee (EPPC), which has an estimated 52,829 beneficiaries (3,364 former political prisoners and a further estimated 49,465 of their dependants, of which 3,086 are registered on the EPPC database). Approximately 40% of all ex-political prisoners are estimated to be disabled

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or chronically ill. Its activities include providing bursaries, funeral costs and caring for the orphans of ex-political prisoners and their family members.

MIC is over 98% black owned and qualifies as a broad based ownership scheme and is a Level 1 B-BBEE contributor, which is the highest possible BBEEE accreditation.

MIC is an investment company with stake in various entities. Makana gets involved in the management of a number of its subsidiaries. One such subsidiary is Sebenza Forwarding and Shipping (Pty) Ltd. Sebenza is a customs clearing and freight forwarding entity. Sebenza is involved in managing and arranging logistics for big and small players in a number of entities. Within the rail industry, Sebenza has managed a number of projects including:

- The movement of PRASA locomotives purchased from Spain;
- Movement and storage of TATA steel rail tracks

In all these projects MIC arranged the transportation, the customs clearing and the whole logistics up to the point of delivery. They also financed the customs duty and VAT in access of R100 million. Sebenza is managed by Xolani Sithole, who also serves on the Endinamix board and as CFO of Makana. Through Sebenza, Makana has expertise around logistics for local transport needs and international movement of cargo and parts. Sebenza has global reach to over 300 locations and has been in business for over 20 years.

Azon Rail (Pty) Ltd ***(The Azon Rail profile is attached as Annexure 1.2)***

Azon Rail is a partnership of two African Women executives who, through their working experience for the largest freight railway company in Africa, have a combined industry experience of over 30 years in railway operations management.

Experience and expertise include:

- Rail operations
  - Train service planning and execution
  - Rail safety and risk management
  - Crew management
  - Rolling stock optimisation
- Rail infrastructure management
- People management
- Supply chain optimisation
- Business improvement and execution
- Process re-engineering

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- Project management.

Azon Rail is a Level 4 B-BBEE certified company.

Lineta Investments

- Masters in Economic Geography, Wits University 1998
- Honours in Economic Geography, Wits University 1996
- Bachelor of Physical Education, Wits University 1995

Lineta is owned by Mr Mpumelelo Julius Nobanda (ID No. 7106065849083). Julius was born in Libode a small town in the Eastern Cape. He was educated in Ntlaza Junior School and Chief Henry Boklein Senior School. He passed Standard 10 with distinction in Biology.

His professional career started as research assistant at Wits University, Development Economist and he is now a business pPerson. Mr Nobanda has a working experience in excess of 14 years. The following roles are worth mentioning:

- Managing Director Lineta Investments also trading as Ntlaza Cement Worx.
- Former Executive Director and shareholder to Global Railway Africa (Pty) Ltd (2007-2014). Responsible for Supplier Development and B-BBEE initiatives for rail sector projects.
- Executive Director– MAN Ferrostaal Southern Africa, responsible for new business in South and Southern Africa (2005-2007).
- Executive & Regional Manager – Eastern Cape Development Corporation, responsible for project development and economic interventions for the Eastern Cape (2002-2005).
- Director – Department of Trade and Industry, responsible for LED initiatives.
- Project Manager – SDI Program, responsible for the "Unpackaging of Mega Projects" in SDIs and IDZs.
- Non-Executive Board member of Singisi Forest Products, a subsidiary of Hansmerensky Group.
- Lecturer and Junior Lecturer, Wits and Vista University Soweto Campus.
- Researcher for Ebert Stiftung Institute and Land and Agriculture Policy Centre (LAPC).
- Recipient of a research grant from International Development Research Centre (IDRC) of Canada, for a paper presented at the Trade and Industrial Policy Strategies (TIPS).
- Author of an unpublished paper on Informal Clothing: The case of Down Town Johannesburg.

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- Author of a published paper on Manufacturing in Soweto: small-scale metal workers (see Urban Forum, 1998, Vol. 9 No. 2, p. 241-252).

Mr Nobanda is also in possession of the following skills:

1. Financial management and analytical skills
2. Project management
3. Legal analysis and management of contracts
4. Commercial analysis pertaining to contracts
5. Management of human capital
6. Business management
7. Leadership

The following people were and are involved on the Project from each of the Endinamix members:

Company	Individuals
Cadiz Corporate Solutions	Robbie Gonsalves Sam Mokorosi BC van Rooyen Jaco Olivier Vicky Lai Charl Schmahl Tshegofatso Sekgwele
Global Railway Africa	Rowlen von Gericke Martin von Gericke Johan von Gericke Chris von Gericke Ilza van Niekerk Marius van Niekerk Stan Whiting Jamie Backhouse Heinrich Pienaar Johan Schutte Nerosha Sewsunker Eugene Nysschen Iain Kerr Christophe Marina Gerhard Bekker Richard Bradfield
Azon Rail	Babalwa Dludlu

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Kopano Ke Matla	Eugene Robson Prabir Badal Stephen Ntithe Riad Khan
Linontando Investments	Tholakele Dlamini Lindiwe Ngcobo Nana Sabelo
Makana Investment Corporation	Lulamile Xate Xolani Sithole John Nassel-Henderson Peter-Paul Ngwenya
Lineta Investments	Julius Nobanda

None of the parties retain time-sheets as their businesses do not bill by the hour. However Cadiz has reconstructed an estimate of the hours spent by their personnel alone on the project. **Annexure 3.1** sets out these details. The project has been divided into 7 stages by Cadiz (based on the significant time allocated to each of these stages) as follows:

- Tender documents
- Briefing sessions
- Consortium discussions
- Tender preparation
- Response to tender queries
- TFR/TE negotiations
- Consortium negotiations

Cadiz (and all the other Endinamix parties) worked on a pure success basis. Furthermore, Cadiz shares one third of its fees with The Beijing Axis (Cadiz' joint venture partner in China who interacted with the CNR team in Beijing and provided translation services and assisted the Chinese understand how to do business in South Africa). Cadiz and TBA (as well as all the other Endinamix parties) not only worked on a success basis but if the CNR consortium was not successful then Cadiz and TBA (and Global Rail) would have been liable for 10% of the expenses related to the BEE consultants (Simanye), the Cadiz and TBA travel and accommodation costs, and legal (ENS). Thus Cadiz and TBA stood to lose a few million Rand if the bid was not successful (labour costs and out-of-pocket expenses). On a pure charge-out basis, the fee for Cadiz (and TBA) alone would have been in the region of R6.8m. As this is a risk-based success fee, the fee for Cadiz (and TBA) would have been in the region of R20.3m (on a 3x basis) and R33.8m (on a 5x basis). If one extrapolates this it can be seen that the

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Initial Fee of R50m did not compensate Endinamix for all the services rendered by their members at the time the Initial Fee was paid. Recall that the project value is R10bn. All the above applies to Global Rail as well except that the Global Rail fee would have been substantially higher given that Global Rail had many more employees on the project (due to the technical requirements of the bid) and Global Rail also provided their offices, secretaries, transport and food for a contingent that swelled up to 35 people at times. Finally it must be borne in mind that all the Endinamix parties were contractually bound to work exclusively on the CNR bid even if the CNR Consortium was not successful in Phase 1 and thus would not have been able to render their services to any other bidders if CNR had not been successful in Phase 1.

The PMA Fee was and is in lieu of contributions made and to be made to the project. The Initial Fee of R50m was to cover the sunk costs and sweat-equity of the Endinamix members. In addition, the Initial Fee is taken into account each and every time a payment is made to Endinamix i.e. the "Endinamix Fee Formula" is the "Endinamix Total Fee minus the Initial Payment" (of R50m). Furthermore as Endinamix was entitled to the Initial Payment (and not Global Rail and Cadiz), the Endinamix fee is calculated with reference to a margin of 5% whereas Global Rail and Cadiz have a margin of 10% (refer to "Total Fee" in the PMA).

Evidence of the work that Cadiz completed can be found in 1497 files (1.87 GB) available for KPMG to review at Cadiz offices (or these can be copied on a flash drive).

In summary however, Cadiz was involved (in line with their responsibilities as per the Consortium Agreement) in the following aspects of Phase 1 and 2 of the tender for the project:

1. Establishing the company (CRRCSARS)
    a. MOI
    b. Shareholders Agreement
    c. Secretarial records
    (all aspects of negotiating and finalising the establishment of the company)

2. Negotiating and finalising the following agreements:
    a. BEE term sheet
    b. Establishment of Bogie Factory
    c. Consortium Agreement
    d. Supply Agreement with TE

3. Financial i.e. the preparation, checking for accuracy of the following models and schedules for the tender:
    a. Contract price

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b. Tender annexure: Local Content
c. Tender annexure: Supplier Development
d. Analysing quotes from suppliers
e. Analysing warranties from suppliers
f. Hedging risks and policies (refer Annexure 3.1 for an example of the work due on this by Endinamix (both English and Mandarin as provided by TBA))
g. Negotiating hedging contracts with Standard Bank and RMB
h. Analysing project cash flows
i. Evaluating currency movements on contract price
j. BEE scorecard analysis
k. Bills of Material (units, price per unit, currency) etc.
l. TCO Model
m. TCO Energy Model
n. Pricing Annexure for tender

Cadiz was obviously just one party involved with the above activities. Global (a massive team), Azon Rail (Babalwa Dludlu in particular), Kopano (Eugene Robson and Riad Khan), Linontando (Tholakele Dlamini, Lindiwe Ngcobo and Nana Sabelo), Makana (Lulamile Xate and Xolani Sithole) and Lineta (Julius Nobanda) spent many days, nights and weekends working through these very complex documents (particularly on the BEE, Local Content and Supplier Development aspects). It must be understood that CNR had never manufactured locomotives for any South African entity and even though they are the largest locomotive manufacturer in the world, very little of this was done for clients outside China. The Endinamix team (which included TBA) therefore provided had to deal with all the technical, financial, taxation and legal aspects of the project.

Rowlen von Gericke ("**RvG**") of Global Rail (who also worked on a pure success basis and provided facilities, meals, accommodation and transport to the CNR delegation) has analysed all his emails sent and received in relation to the project. In total, 3 169 emails were sent and received. 2 962 of these relate to the 232 Diesel Locomotives ("**DLocos**"). Of these 864 were sent by RvG and 2 098 were received from the parties detailed below. In addition, RvG has 648 soft copies of documents related to the project. The emails and documents are obviously too voluminous to print but we invite KPMG to either come inspect these email and documents or let us know how they would like to view these. Obviously all the other members of Endinamix are able to produce the same level of evidence of their participation in the rendering of services in respect of the project during Phases 1 and 2.

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Subject heading	No. of emails
1064 Locomotives	251
599 Electrical Locomotives	207
465 Diesel Locomotives	1 473
232 Electrical Locomotives	1 238
	3 169
Total for 232 Diesel Locomotives	2 962
Emails sent by RvG for 232 DLocos	864
Emails received by RvG for 232 DLocos	2 098
From the Global team	624
Robbie Gonsalves (Cadiz)	283
John Ferraz (ENS)	189
Ouyang Jingping (CNR)	170
Sam Mokorosi (Cadiz)	131
Eugene Nysschen (Global counsel)	123
Transnet	70
Jeff Wang (CNR Dalian)	70
Lulamile Xate (Makana)	48
Meiling Wang (CNR)	44
Babalwa Dludlu (Azon Rail)	23
Ernie Lai King (ENS)	18
Others (Kopano, Linontado, suppliers, BEE consultants etc.)	305
Total for Dlocos	2 962
Tender documents	648

As a further important point it needs to be noted that Endinamix, Global Rail and Cadiz (the "**SA Shareholders**") have to second one person each to the project for a period estimated at 3-4 years. To date this has been done on an ad-hoc basis (Babalwa Dludlu was seconded to the Company for a few months) for the following reasons:

- The Company (who is consulting with their legal advisors and BEE consultants) is not sure whether the secondees should be employed by the SA Shareholders or the Company (there are labour laws and BEE scorecard issues to consider);
- The Company would like Babalwa Dludlu to be seconded by Endinamix but require her to give up all her Azon Rail clients;
- The Company requires that the secondees are Black Women, under the age of 35, speak English and Mandarin and be proficient in the Microsoft suite of products; and

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- The project has been delayed and thus the secondees are only being required now (although they will still be employed on the project for the next 3-4 years or so).

The minutes of the board meeting (which was attached to the email in Annexure 2.6) supports the issues of the secondments as mentioned above (refer **Annexure 3.2**)

Lastly it must be pointed out that the SA Shareholders do not intend to "double dip". As CNR (now CRRC) China controls the Company and the SA Shareholders have no real visibility on where the profits (if any) will be earned in the CRRC group (it could be in Dalian, CRRC and it could be in PRC, Hong Kong or elsewhere), the PMA Fee ensures that the SA Shareholders will be compensated for their services. It is not unheard of for large Chinese SOE's to provide products and services for a loss in order to obtain entry into a market and to create jobs in China. We have little visibility on this. However the SA Shareholders have made it clear (refer 5.2 of the PMA) that should the Company be in a position to declare dividends, the SA Shareholders will only be entitled to dividends to the extent that these exceed the PMA Fees i.e. the dividends will only be received by the SA Shareholders if the margin is in excess of 5% in the case of Endinamix fee and 10% in the case of Global Rail and Cadiz.

We trust that the above evidence provides the rationale and commerciality of the PMA that you requested and that any concerns that you may have had have been adequately addressed. Once again we invite you to come and review Global Rail's and Cadiz' electronic records to obtain an appreciation of the extent of the services that were rendered by Endinamix through their members and advisors in respect of the PMA. Should you have any queries please do not hesitate to contact us.

Yours faithfully

Lulamile Xate

Director

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Rowlen von Gericke

Director

Robbie Gonsalves

Director

ANNEXURE "RG 23"

RG-321
RG-23

Robbie Gonsalves

From: Von Eckardstein, Fred <fred.voneckardstein@kpmg.co.za>
Sent: Friday, 27 October 2017 10:44
To: DLOCO??Jeff Wang; ??(????); daisy; liyongzhikuaiji@163.com; Robbie Gonsalves
Cc: Morris, Neil
Subject: Termination of Services Agreement-CRRC SA Rolling Stock Proprietary Limited

Dear All,

Please find our Termination of Services Agreement attached.

Regards

Fred von Eckardstein
Partner
Sector Head-Construction, Industrial & Automotive Markets

KPMG Inc.
85 Empire Road
Parktown
2193
South Africa

M: +27 (0)83 297 8921
E: fred.voneckardstein@kpmg.co.za

Website
South Africa Blog
LinkedIn
Twitter
Facebook page
YouTube channel

KPMG in South Africa is a B-BBEE Level 2 Empowered Supplier

<<

CRRC Termination.pdf (41.9KB)

ANNEXURE "RG 24"

AFFIDAVIT IN TERMS OF SECTION 34 OF THE PREVENTION AND COMBATTING OF CORRUPT ACTIVITIES ACT 12 OF 2004 (AS AMENDED)

I, the undersigned,

LULAMILE XATE

do hereby make oath and say that:

1. I am an adult businessman of full legal capacity with the following contact particulars:

   1.1. Contact address: 110 Ben Avenue; High Cape 2; Vredehoek; Cape Town

   1.2. Telephone number: 021 510 6912

   1.3. Cellular number: 082 992 0881

   1.4. Email address: Lulamile@xatell.co.za

   1.5. Business/employment address: 14 Dorsetshire Street; Paarden Island

   1.6. Business telephone number: 021 510 6912

   1.7. Business email address: Lulamile@xatell.co.za

2. The facts herein stated are within my personal knowledge and belief unless the contrary is stated or can be implied from the context and are to the best of my knowledge and belief both true and correct.

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-E' HD

3. I am a non-executive director of CRRC SA Rolling Stock (Pty) Ltd (formerly CNR Rolling Stock South Africa (Pty) Ltd) (hereinafter referred to as "CRRC SA").

4. I am also a director of Endinamix (Pty) Ltd (hereinafter referred to as "Endinamix"), which company is a minority shareholder in CRRC SA.

5. I am deposing to this affidavit in my capacity as a director of CRRC SA and Endinamix, such directorship constituting a position of authority as contemplated in section 34 of the Prevention and Combatting of Corrupt Activities Act 12 of 2004 (as amended) (hereinafter referred to as "the Act"), with a view to reporting or causing to report suspicion that other persons have committed various offenses as contemplated in the Act.

6. On 10 October 2017 I became aware of the fact that KPMG, the then auditors of CRRC SA, notified the directors of the board of directors of CRRC SA nominated by CRCC (all of whom are Chinese nationals), namely Wang Gang, Yu Tao, Xhao Gang and Yu Feng, of a reportable irregularity in terms of the Auditing Profession Act 26 of 2005 relating to the relocation of a locomotive factory from Pretoria to Durban on the basis that CRRC SA significantly misrepresented the costs of such relocation to Transnet and furthermore that a so-called Business Development Services Agreement was concluded with a company known as Business Expansion Structured Products (Pty) Ltd with registration number 2009/020420/07 (hereinafter referred to as "BEX") and BEX was consequently paid what appeared to be an exorbitant amount for dubious services rendered.

7. I attach a copy of the document which came to my knowledge, as well as the knowledge of the other South African non-executive directors of CRRC SA, namely Robbie Gonsalves and Rowlen von Gericke hereto marked "X1".

8. The annexures referred to in the letter dated 4 September 2017 by Hogan Lovells Attorneys (forming part of annexures "X1") came to my knowledge and attention on 2 November 2017 and are annexed marked "X2".

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9. The names and contact details of persons we suspect being involved are partially determinable from the annexed documentation of BEX and CRRC SA. In addition we suspect persons either in the employ of, or contracted (or otherwise connected) to Transnet to possibly be involved in transgressions. We do not have more detail in this regard at our disposal.

10. The offence commenced in 2015 and is ongoing.

11. I have no information about the standard of living of the persons possibly involved.

12. The names and contact details of possible witnesses to the alleged offence/s are not known to me.

13. I would prefer acknowledgement of receipt by way of email.

KEMPTON PARK
2017/11/29
16:21

LULAMILE XATE

With the relevant provisions of annexure A of the Rules governing the Administration of an Oath or Affirmation no. R. 1258 of 21 July 1972 (as amended) having been duly complied with, the deponent herein has acknowledged that he understands the contents of this declaration, has no objection to taking the prescribed oath and considers the prescribed oath to be binding on his conscience and that he has uttered the words "So help me, God."

P. Uechtmann.

COMMISSIONER OF OATHS

Full names: Percy Mackenzie

Designation: Lt. Col

Full physical address: 10 Long St
Germiston
SAPS. D.P.C.I.

AFFIDAVIT IN TERMS OF SECTION 34 OF THE PREVENTION AND COMBATTING OF CORRUPT ACTIVITIES ACT 12 OF 2004 (AS AMENDED)

I, the undersigned,

ROBERTO GONSALVES

do hereby make oath and say that:

1. I am an adult businessman of full legal capacity with the following contact particulars:

   1.1. Contact address: 14 Anemone Street, Welgedacht, 7530

   1.2. Telephone number: 021 657 8476

   1.3. Cellular number: 082 452 7275

   1.4. Email address: gonzie@yebo.co.za

   1.5. Business/employment address: 4th Floor The Terraces, 25 Protea Road, Claremont, 7708

   1.6. Business telephone number: 021 657 8476

   1.7. Business email address: Robbie.Gonsalves@cadiz.co.za

2. The facts herein stated are within my personal knowledge and belief unless the contrary is stated or can be implied from the context and are to the best of my knowledge and belief both true and correct.

3. I am a non-executive director of CRRC SA Rolling Stock (Pty) Ltd (formerly CNR Rolling Stock South Africa (Pty) Ltd) (hereinafter referred to as "CRRC SA").

4. I am also a director of Endinamix (Pty) Ltd (hereinafter referred to as "Endinamix"), which company is a minority shareholder in CRRC SA.

5. I am also a director of Cadiz Corporate Solutions (Pty) Ltd (hereinafter referred to as "Cadiz"), which company is also a minority shareholder in CRRC SA.

6. I am deposing to this affidavit in my capacity as a director of CRRC SA, Endinamix and Cadiz, such directorships constituting a position of authority as contemplated in section 34 of the Prevention and Combatting of Corrupt Activities Act 12 of 2004 (as amended) (hereinafter referred to as "the Act"), with a view to reporting or causing to report suspicion that other persons have committed various offenses as contemplated in the Act.

7. I have read the affidavit deposed to Lulamile Xate and confirm the correctness thereof insofar as it pertains to me.

Kempton Park
29 Nov 2017
16h22

ROBERTO GONSALVES

With the relevant provisions of annexure A of the Rules governing the Administration of an Oath or Affirmation no. R. 1258 of 21 July 1972 (as amended) having been duly complied with, the deponent herein has acknowledged that he understands the contents of this declaration, has no objection to taking the prescribed oath and considers the

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prescribed oath to be binding on his conscience and that he has ~~uttered~~ the words "So help me, God."

COMMISSIONER OF OATHS

Full names: Lekey Ueckelmann

Designation: Lt. Col

Full physical address: 10 Long rd.

Jeluntion

SAIS DICI

ANNEXURE "RG 25"

RG-331
RG 25

Robbie Gonsalves

From: Robbie Gonsalves
Sent: Wednesday, 26 September 2018 09:51
To: Nadia Pietersen
Cc: 'Rowlen von Gericke'; Lulamile Xate
Subject: RE: CRRCSARS

Hi Nadia

I will confirm the date and time asap. You need not return my call – I just wanted to check that the email had been received.

We had a board meeting yesterday and were a little surprised when the signed audited AFS's were presented for 2017 as we have not had a board meeting since Dec last year. As far as I can recall even the Dec 2015 were not yet approved. We need to understand how the BEX payment has been treated and how we deal with the RI's. We explained this all to Jeff and his team yesterday.

Regards

From: Nadia Pietersen [mailto:nadia@jtheron.co.za]
Sent: 26 September 2018 09:27 AM
To: Robbie Gonsalves
Cc: 'Rowlen von Gericke'; 'Allen Lee'; Lulamile Xate
Subject: RE: CRRCSARS

Good day Robbie.

Thank you for the mail and the introduction.
It will be great to meet you and discuss a few things.

Next week Wednesday or Thursday will work for me.
What about Wednesday, the 3rd of October 2018, at 10:00 here at my offices?
Our address is 36 Bompas Road, Dunkeld.

Is there something specific you want me to prepare for the meeting?

I also did get a message this morning to give you a call.
Let me know if I should call you back.

If you every struggle to get hold of me on the office line, my cell phone number is 084 453 1816.

Regards
Nadia Pietersen
CA (SA)

J Theron & Pietersen Incorporated
Work No : 011 325 2104
Fax No : 011 341 0180

ANNEXURE "RG 26"

endinamix
Advancing the Rail Industry

27 September 2018

The board of directors
c/o Mr Gang (Jeff) Wang
CRRC SA Rolling Stock (Pty) Ltd ("**CNR**")
3rd Floor
95 Grayston Drive
Sandton

Via e-mail: luckwg@163.com

Dear Sirs

RE: CONCERNS AROUND GOVERNANCE ISSUES AT CRRCSARS

1. At the beginning I would like to state that this letter is written on behalf of all the directors of Endinamix. I also refer to the meeting between the Endinamix board and CNR at your offices on 24 September 2018 at 11H00.
2. By way of background late in 2017 Kopano Ke Matla Investment Company (Pty) Ltd wrote numerous letters to the Chairman of Endinamix in which Kopano requested a meeting between CNR and Endinamix to deal with:
    a. The way CNR was abusing the BEE credentials of Endinamix;
    b. The lack of accountability and openness when it comes to monetary issues;
    c. The exclusion of Endinamix in meetings with Transnet;
    d. The absence of any participation in the supply value chain and management of the manufacturing facility; and
    e. Monies allegedly paid to a Company called BEX.
3. Through our Chairman, which was extremely disappointing and condescending, your response was a plain "NO MEETING WILL TAKE PLACE WITH YOU, HAVE NO RIGHT TO CALL A MEETING WITH CNR".
4. We agreed at the meeting of the 25 September 2018 that we shall put our reservations with you in writing and you shall respond to them with 21 days of receiving them and by responding we do not mean a mere formality but a "substantive" response that shows commitment on your side to resolve the above issues and the following demands:.
    a. CNR make available immediately a list of all supply opportunities, employment and other opportunities in our Joint Venture. Endinamix will identify amongst its shareholders who can add value at what level and such discussions shall immediately start once Endinamix responds to you.
    b. We as Endinamix we regard the payment of R67 181 494 (including VAT) to BEX as a bribe to induce the award of this tender. This is a breach of your fiduciary duties as

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Directors of CNR. We therefore demand that CNR take the following minimum measures to reverse and correct this situation:

i. You report this matter in terms of the Prevention and Combating of Corrupt Activities Act 12 of 2004 (PCCA Act).
ii. You report this matter to the SAPS (HAWKS) as having been the subject of extortion by BEX.
iii. You report the behaviour of BEX in terms of the Financial Intelligence Centre Act 38 of 2001 (FICA).
iv. Any other measures necessary to recover the monies that you paid to BEX.

5. Our position as Endinamix is simply that unless CNR demonstrates a willingness to correct the BEX matter and all the other issues raised above by the Endinamix directors we are not willing to sign and confirm any BEE credentials of the Joint Venture as we will be complicit in the very things we are complaining about and we will demand the resignation of the Endinamix Board Member who sits on your board as that amounts to a conflict of interest.

Yours faithfully

Stephen Nthite
Director

ANNEXURE "RG 27"

RG 27

J THERON
& Pietersen Inc.
CHARTERED ACCOUNTANTS

No. 36 Bompas Road
Dunkeld, 2196
P.O. Box 84699
Greenside
2034

Tel. 011 325 2104
Fax: 011 341 0180
Email: info.jhb@jtheron.co.za
Practice no.: 901229

08 October 2018

The Board
CRRC SA Rolling Stock (Pty) Ltd
95 Grayston Drive
Sandton
South Africa
2196

RE: OFFICIAL RETRACTION OF THE DECEMBER 2015, DECEMBER 2016 AND DECEMBER 2017 AUDITED ANNUAL FINANCIAL STATEMENTS

We, as the Registered Auditors of CRRC SA Rolling Stock (Pty) Ltd (Registration Number 2014/016892/07) would hereby inform the board of our immediate retraction of the audited financial statements for the following year ends:

- For the period ending December 2015
- For the period ending December 2016
- For the period ending December 2017

The above retraction comes as a result of information that came to our attention after the finalisation of the above mentioned audit reports, which could potentially have an effect on the audit opinion issued in these financial statements.

Further to the above, we hereby also notify you that we will need to reopen the December 2015 audit in order to perform further audit procedures on specific line items in the accounting records. We will commence further investigations on the 30th of October 2018.

Should you have any questions, please feel free to contact me.

Regards

Nadia Pietersen
Chartered Accountant (SA)

ANNEXURE "RG 28"

RG 28

Robbie Gonsalves

From: Robbie Gonsalves
Sent: Monday, 15 October 2018 12:42
To: Nadia Pietersen
Subject: RE: RI - Transaction Lacking commercial substance

Dear Nadia

Regarding BEX, we (the directors representing the minority directors ie Lulamile Xate (Endinamix), Rowlen von Gericke (Global) and Robbie Gonsalves (Cadiz)) were dissenting directors when the board voted on the BEX contract ie **we did not support the contract and do not support that the payment made to BEX was a bona-fide payment for services rendered to CRRCSARS**. For this reason we wanted to know how this payment was going to be disclosed in the Dec 2015 AFS's. We have, as yet, not received a response from CRRCSARS on the 27/9 letter.

Regards

From: Nadia Pietersen [mailto:nadia@jtheron.co.za]
Sent: 15 October 2018 12:33 PM
To: Robbie Gonsalves
Subject: RI - Transaction Lacking commercial substance

Hi Robbie.

I hope you had a great weekend.
Just to keep you updated, I read through your response to KPMG regarding the project management fees.
It is all pretty clear, and I understand your reasoning.

Did you prepare a similar document based of the transaction lacking commercial substance, i.e. the BEX transaction?
I did receive the letter addressed to the board dated 27/09/2018.
Have you received any feedback regarding that?

Regards
Nadia Pietersen
CA (SA)

J Theron & Pietersen Incorporated
Work No : 011 325 2104
Fax No : 011 341 0180

ANNEXURE "RG 29"

Independent Auditor's Report

To the shareholder of CRRC SA Rolling Stock (Pty) Ltd

Opinion

We have audited the annual financial statements of CRRC SA Rolling Stock (Pty) Ltd set out on pages 7 to 15, which comprise the statement of financial position as at 31 December 2018, and the statement of comprehensive income, statement of changes in equity and statement of cash flows for the year then ended, and notes to the annual financial statements, including a summary of significant accounting policies.

In our opinion, the annual financial statements present fairly, in all material respects, the financial position of CRRC SA Rolling Stock (Pty) Ltd as at 31 December 2018, and its financial performance and cash flows for the year then ended in accordance with International Financial Reporting Standard for Small and Medium-sized Entities and the requirements of the Companies Act 71 of 2008.

Basis for opinion

We conducted our audit in accordance with International Standards on Auditing. Our responsibilities under those standards are further described in the Auditor's Responsibilities for the Audit of the annual financial statements section of our report. We are independent of the company in accordance with the Independent Regulatory Board for Auditors Code of Professional Conduct for Registered Auditors (IRBA Code) and other independence requirements applicable to performing audits of annual financial statements in South Africa. We have fulfilled our other ethical responsibilities in accordance with the IRBA Code and in accordance with other ethical requirements applicable to performing audits in South Africa. The IRBA Code is consistent with the International Ethics Standards Board for Accountants Code of Ethics for Professional Accountants (Parts A and B). We believe that the audit evidence we have obtained is sufficient and appropriate to provide a basis for our opinion.

Emphasis of matter

We draw attention to the following circumstance.

A reportable irregularity has been submitted to the regulatory board by the predecessor auditor (KPMG Inc) in terms of the defination of a reportable irregularity in section 1 of the Auditing Professions Act of 2005, and the procedures as outlined in section 45. The outcome of the matter is still to be resolved.

Particulars of the reportable irregularity are:

1. According to the information received, the proposal by CNR Rolling Stock South Africa (Pty) Ltd to Transnet SOC Ltd for the "Analysis of cost increase for locomotive delivery and locomotive factory location from Pretoria, Gauten to Durban, Kwazulu Natal in terms of Manufacturing facility relocation for Class 45D Locomotives Supply Project" significantly misrepresented the cost to Transnet. Transnet issued a variation order on 23 July 2015 accepting the proposal.
2. CNR entered into a Business Development Services Agreement with Business Expansion Structured Products (Pty) Ltd (registration no. 2009/020420/07)("BEX") on 25 April 2015 relating to the proposal mentioned in 1. above and made payments to BEX which appear to lack sound commercial substance and purpose.

Our firm has engaged in undertaking further investigation of the matter and have since been limited to perform the duties due to lack of access to requested information.

Our opinion is not modified in respect of this matter.

Other information

The directors are responsible for the other information. The other information comprises the Directors' Report as required by the Companies Act 71 of 2008, which we obtained prior to the date of this report. Other information does not include the annual financial statements and our auditor's report thereon.

Our opinion on the annual financial statements does not cover the other information and we do not express an audit opinion or any form of assurance conclusion thereon.

In connection with our audit of the annual financial statements, our responsibility is to read the other information and, in doing so, consider whether the other information is materially inconsistent with the annual financial statements or our knowledge obtained in the audit, or otherwise appears to be materially misstated. If, based on the work we have performed, we conclude that there is a material misstatement of this other information, we are required to report that fact. We have nothing to report in this regard.