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South African Nuclear Energy Corporation SOC Limited

THE SOUTH AFRICAN NUCLEAR ENERGY
CORPORATION SOC LTD

TERMS AND CONDITIONS OF CONTRACT

June 2017

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TERMS AND CONDITIONS OF CONTRACT

These TERMS AND CONDITIONS OF CONTRACT are applicable to all bids, contracts and orders issued by the South African Nuclear Energy Corporation to service providers for the supply of goods or works or rendering of services

1. DEFINITIONS AND INTERPRETATION

1.1 Clause headings in this *Agreement* are for convenience and reference purposes only and shall not affect the interpretation of the Agreement.

1.2 Where the context requires words implying the singular only shall also include the plural and vice versa and words signifying one gender shall signify all genders.

1.3 In this *Agreement* the following words and expressions shall have the meanings hereby assigned to them except where the context otherwise requires:

1.3.1 **"Agreement"** means these Terms and Conditions of Contract including all attachments and appendices hereto and all documents incorporated by reference therein and, where applicable, special conditions of contract.

1.3.2 **"Bid Documents"** means Bid Specification, Request for Proposal, Request for Quotation documents, or any other document, used by NECSA to solicit the supply of goods or works or services.

1.3.3 **"Fees"** means the contract price(s) as set out in the Pricing Schedule, attached as Annexure "E" in the accompanying SLA, which are payable to the Service Provider under this Agreement for the full and proper performance of the Service Provider's contractual obligations.

1.3.4 **"Order"** means an official written Purchase Order issued for the supply of goods or works or for the rendering of a service. A copy of the Order must be attached in the accompanying SLA as Annexure "C".

1.3.5 **"The South African Nuclear Energy Corporation SOC Ltd"** hereinafter referred to as NECSA

1.3.6 "**NECSA Data**" means information, reports or data and related matter, whether of a confidential or proprietary nature or not, belonging to NECSA or in the possession, or under the control of NECSA provided by NECSA to Service Provider pursuant to the Service Provider providing the Services.

1.3.7 **"Party"** means either NECSA or the Service Provider and **"Parties"** means NECSA and the Service Provider jointly.

1.3.8 **"Project Plan and Schedule of Deliverables"** means a document addressing how and when the Services are to be achieved by showing activities to be performed, the deliverables to be achieved and the milestones/timelines to achieve the deliverables, attached in the accompanying SLA as Annexure "B".

1.3.9 **"Proposal"** means a document, in the form of a business proposal, quotation or other document, setting out the Service Provider's proposed course of action or plan, with proposed solutions to address the Service needs of NECSA and the resources required, in response to the Bid Documents, attached hereto as Annexure "A" (or where Proposal is voluminous, sufficiently referenced in Annexure "A").

1.3.10 **"Service Level Agreement or SLA"** means the special conditions of contract entered into by the Parties to address specific conditions applicable to specific *Services* with the purpose of either amplifying or amending these Terms and Conditions of Contract.

1.3.11 **"Services"** means those functional services ancillary and incidental to the supply of goods, works or rendering of services and other such obligations of the Service Provider covered under this Agreement or any document purporting to engage the professional services of the Service Provider.

1.3.12 **"Service Provider"** means a service provider, consultant or contractor engaged by NECSA to supply goods or works or render services.

1.3.13 **"Service Provider's Intellectual Property/Technology"** means know-how, techniques, concepts, ideas, methods, methodologies, procedures, models, processes, templates; generalised features of the structure, sequence and organisation of software, user interfaces and screen designs; general purpose consulting and software tools, utilities and routines and logic, coherence and methods of operation systems, created or acquired by the Service Provider or where the Service Provider otherwise obtained rights in.

1.4 All terms referred to or defined in the Service Level Agreement shall have the meanings assigned to them therein.

1.5 Any reference to days, months or years shall be a reference to calendar days, months or years as the case may be.

2. APPLICATION

2.1. These Terms and Conditions of Contract are applicable to all bids, contracts and orders issued by NECSA to service providers for the supply of goods or works or rendering of services.

2.2. Where applicable, Service Level Agreements may be provided to address specific Services. Such SLA shall, by reference therein, incorporate these Terms and Conditions of Contract.

2.3. Where there is a conflict between the provisions of such Service Level Agreement and the provisions of these Terms and Conditions of Contract, the Service Level Agreement shall, to the extent of the conflicting provisions, supersede these Terms and Conditions of Contract.

3. AGENCY

This *Agreement* does not constitute either of the *Parties* as the agent of the other for any purposes whatsoever and neither party will be entitled to act on behalf of, or to represent the other unless duly authorised thereto in writing.

4. ASSIGNMENT

Neither *Party* may assign, transfer, subcontract or otherwise part with this *Agreement* or any part thereof or any right or obligation there under, without obtaining the other *Party's* prior written consent thereto.

5. SUBCONTRACTING

In the event of subcontracting any of the work the *Service Provider* shall give preference to Black Empowerment Companies as subcontractors. The *Service Provider* shall notify NECSA in writing of all subcontracts awarded under the *Agreement* if not already specified in the *Bid Documents*. Such notification, in the *Bid Documents* or later, shall not relieve the *Service Provider* from any liability of obligation under the *Agreement*.

6. INDEMNITY AND LIMITATION OF LIABILITY

6.1. The *Service Provider* hereby indemnifies NECSA and undertakes to hold NECSA harmless against all loss or damage, from any cause arising, which the *Service Provider* and/or its employees may sustain as a result of the performance of the *Services* under this *Agreement*.

6.2. The *Service Provider* indemnifies NECSA against all third-party claims of infringement of patent, trademark or industrial design rights arising from use of the goods, works or rendered services or any part thereof by NECSA.

6.3. The *Service Provider* further indemnifies NECSA against any loss, damage, expenses, legal costs, including attorneys and own client costs, which NECSA may incur as a result of the *Service Provider's* breach of any of the warranties and representations as may have been provided.

6.4. Except in cases of criminal, negligence or wilful misconduct, neither *Party* shall be liable to the other, whether in contract, tort or otherwise, for any indirect or consequential loss or damage in any way arising out of or in connection with this *Agreement*.

7. INSURANCE

7.1. The goods supplied under the contract shall be fully insured in a freely convertible currency against loss or damage incidental to manufacture or acquisition, transportation, storage and delivery in the manner specified in the Service Level Agreement.

7.2. Each *Party* hereby accepts its own legal liabilities resulting from its culpable actions and shall ensure that it has sufficient insurance cover to cover its liabilities so arising.

8. FEES AND PAYMENT TERMS

8.1. Subject to the provisions of clause 11 (Penalties), where applicable, NECSA shall pay the *Service Provider Fees* as set out in the Pricing Schedule in the manner specified in the SLA as an Annexure "E" for full and complete performance of the *Services*.

8.2. NECSA shall pay the *Fees* only after the *Services* have been fully performed and completed and the reports/deliverables as per Annexure "B" concerning the performance and completion of such *Services* have been accepted in accordance with the provisions of clause 9 (Reports/Deliverables).

8.3. The *Service Provider* shall submit a monthly statement no later than the last day of the month, along with an original invoice and associated documents, in a format acceptable to NECSA, for the *Fees* due after completion and acceptance of the deliverables.

8.4. If the documents mentioned in 8.3 are correct, payments shall be effected within thirty (30) days after date of statement. All payments will be made by NECSA only through electronic bank transfer into a banking account nominated by the *Service Provider*.

8.5. Where travel, accommodation and disbursement expenses are not included in the *Fees* and NECSA has agreed to reimburse the *Service Provider* for reasonable expenses incurred, the *Service Provider* shall, in accordance with, and subject to, the provisions of 8.3 submit an invoice for payment of such expenses.

8.6. Where deemed necessary, Necsa shall be entitles to a Retention Fee of 10% of the contract value. Such fees will be paid to the Service Provider within three (3) months of receipt of all Goods and/or Services and the issue of a certificate of acceptance.

8.7. Should the Service Provider render services and be entitled to labour costs for installation or erection on a recovery basis, a monthly statement shall be provided to Necsa no later than the last day of the month and Necsa will, if the statement is correct, effect payment within thirty (30) days. Should the monthly statement be in error, Necsa will be entitled to make the adjustment at the next payment or on payment of the retention fees.

9. REPORTS/DELIVERABLES

9.1. Where the carrying out of the *Services* requires reports to be submitted as deliverables, interim and final reports in connection therewith must be furnished to NECSA at its *domicilium*, within the stages set out by the *Parties* and attached as a Schedule in the Service Level Agreement.

9.2. Acceptance of Reports/Deliverables:

9.2.1. NECSA shall have a period of **seven (7) days** (the **"Evaluation Period"**) after furnishing of the Reports/Deliverables, or any part thereof provided in stages in accordance with the agreed to Schedule, to verify that such Reports/Deliverables, or part thereof, conform in all material respects with *NECSA* requirements.

9.2.2. Should there be a non-conformity with NECSA requirements, NECSA must notify the *Service Provider*, in writing, prior to the expiration of the relevant Evaluation Period that such Reports/Deliverables, or part thereof, fail in any material respect to conform with such specifications (a **"Nonconformity"**), the *Service Provider* shall, at its expense, promptly correct such

Nonconformity, whereupon NECSA shall receive an additional **seven (7) day period** ("the **Verification Period**") commencing upon *NECSA's* receipt of the corrected Reports/Deliverables, or part thereof, to verify that the previously reported Nonconformity has been corrected.

9.2.3. NECSA shall provide the *Service Provider* with such assistance as the *Service Provider* may reasonably require to enable the *Service Provider* to verify the existence of, and correct, a reported Nonconformity.

9.2.4. Should NECSA not inform the *Service Provider* of its acceptance of the Report/Deliverables, NECSA agrees that the Reports/Deliverables, or any part thereof, which has been provided to NECSA shall be deemed accepted by NECSA upon the expiration of the Evaluation Period or, in the event that NECSA has notified the *Service Provider* of a Nonconformity as provided above, upon expiration of the relevant Verification Period.

9.2.5. Upon full and final payment to the *Service Provider* of amounts due to the *Service Provider* for fully performed and completed *Services* and accepted Reports/Deliverables, all Reports/Deliverables shall, subject to the provisions of clause 17 (Ownership and Intellectual Property), become the property of NECSA .

10. CONTRACT AMENDMENTS

No variation in or modification of the terms of the contract shall be made except by written amendment signed by the parties concerned.

11. PENALTIES

If the *Service Provider* fails to deliver any or all of the deliverable(s) or to perform the *Services* within the period(s) specified in this *Agreement*, NECSA shall, without prejudice to its other remedies under this *Agreement*, deduct from the *Fees*, as a penalty, a sum calculated in accordance with a formula specified in the Penalty Formula attached hereto as Annexure "D" of the Service Level Agreement, for each day of the delay until actual delivery or performance. NECSA may also consider termination of the contract pursuant to clause 19 (Breach of Agreement).

12. IMPOSSIBILITY OF PERFORMANCE

12.1. In the event of a failure or delay in performance by either *Party* arising from a cause beyond its reasonable control or unforeseeable with reasonable foresight at the time of execution of this *Agreement*, such failure or delay shall not be deemed to be a breach of the *Agreement*.

12.2. If either *P*arty is affected by such failure or delay, it shall give to the other *Party* notice in writing thereof within five (5) days after its existence has manifested. A *Party* shall be entitled to rely on the provisions of clause 12.1 above only if it has given such notice.

12.3. Should either *Party*, after having given the notice in clause 12.2, be unable to rectify its impossibility of performance within fourteen (14) days of the occurrence thereof, the other *Party* may cancel this *Agreement* without any further notice.

13. PROJECT PLAN AND VARIATION

13.1. The *Services* shall be completed in accordance with the stages/phases set out in the Project Plan and Schedule of Deliverables attached hereto in the SLA as Annexure “B”.

13.2. If, however, there arises a need to vary and/or add the *Services* and the Project Plan and Schedule of Deliverables as a result of matters, circumstances and/or necessary additional procedures that were not reasonably foreseen at the onset or if there are delays in obtaining the required documentation and there arises a need to vary and/or extend the delivery time frames, either *Party* will notify the other in writing, as soon as they become aware of this fact and the *Parties* shall agree on the variation of the Project Plan and Schedule of Deliverables and, where applicable, *Fees*.

14. DELAYS IN THE *SERVICE PROVIDER’S* PERFORMANCE

Notwithstanding the provisions of clauses 12 (Impossibility of Performance), 13 (Variation of Project Plan) and 19 (Breach of Agreement), in the event of a delay in the *Service Provider*’s performance beyond the essential delivery time period, NECSA shall, without cancelling the *Agreement*, be entitled to obtain the services of another service provider at the *Service Provider*’*s* expense or to cancel the *Agreement* and procure the services of another service provider as may be required to complete the *Agreement* and without prejudice to *NECSA ’s* other rights.

15. FORCE MAJEURE

Neither *Party* shall be liable, whether direct or consequential, to fulfil its obligations in terms of this *Agreement* if such failure is caused by any circumstance or event beyond the reasonable control of such *Party* which shall without limitation include any act of God, riot, strike action, civil commotion, war, civil war, public disorder, any form of labour disturbances, acts of terrorism, insurrection, rebellion or revolution and/or any other event or activity beyond their reasonable control.

16. CONFIDENTIALITY

16.1. It is envisaged that pursuant to this *Agreement* information, reports or data and related matter, whether of a confidential or proprietary nature or not, belonging to either *Party* may be disclosed or otherwise become available to the other *Party*. Each *Party* agrees to:

16.1.1. Accept such information, reports or data and related matter in confidence and not to copy, disclose, reproduce or make such information, reports or data and related matter available to any third party, unless authorised thereto in writing by the other *Party*, and

16.1.2. Use such information, reports or data and related matter solely in connection with the performance of its obligations in terms of this *Agreement*, and

16.1.3. Restrict the use of such information, reports or data and related matter exclusively to the purpose directed by the other *Party*.

16.1.4. The *Service Provider* undertakes, upon signing hereof, to ensure that all its Employees or agents (as the case may be) who may be privy to any information, reports, data and related matter, process or any other information whatsoever emanating from this process, are well informed and aware of the contents and legal implications of Section 51 of Nuclear Energy Act, 1999 (Act No. 47 of 1999) and have signed confidentiality agreements to hold *NECSA* information in confidence.

16.2. Use of contract documents and information; inspection:

16.2.1. The Service Provider shall not, without NECSA's prior written consent, disclose the contract, or any provision thereof, or any specification, plan, drawing, pattern, sample, or information furnished by or on behalf of NECSA in connection therewith, to any person other than a person

employed by the Service Provider in the performance of the contract. Disclosure to any such employed person shall be made in confidence and shall extend only so far as may be necessary for purposes of such performance.

16.2.2. The Service Provider shall not, without NECSA's prior written consent, make use of any document or information mentioned in the Service Level Agreement except for purposes of performing the contract.

16.2.3. Any document, other than the contract itself shall remain the property of NECSA and shall be returned (all copies) to NECSA on completion of the Service Provider's performance under the contract if so required by NECSA.

16.2.4. NECSA shall permit the Service Provider to inspect NECSA's records relating to the performance of the Service Provider and to have them audited by auditors appointed by NECSA at its own cost, if so required by NECSA.

17. OWNERSHIP AND INTELLECTUAL PROPERTY

17.1. All *NECSA Data* and *Service Provider's Intellectual Property/Technology* and any other intellectual property rights, including but not limited to copyright, in and to the original material supplied by one *Party* to the other *Party* shall vest in the *Party* supplying the material.

17.2. Ownership in all *NECSA Data* belonging to *NECSA,* whether under its control or not, shall continue, to vest in NECSA, and the *Service Provider* shall not obtain any proprietary rights in such data. Any improvements to NECSA *Data* resulting from this *Agreement* shall remain the property of NECSA.

17.3. Where the *Service Provider* utilizes any of its property including the *Service Provider's Intellectual Property/Technology* in connection with the *Services* provided in terms of this *Agreement*, such property shall remain the property of the *Service Provider* and any improvements to the *Service Provider's Intellectual Property/Technology* resulting from this *Agreement* will remain the property of *Service Provider*.

17.4. The *Service Provider* warrants that no aspect of the *Service Provider's Intellectual Property/Technology* utilised by NECSA in terms of this *Agreement* will infringe any patent, design, copyright, trade secret or other proprietary right of any third party

("**third party proprietary rights**"), and the *Service Provider* shall, at its cost, defend NECSA against any claim that the use of the Deliverables infringe any such third party proprietary rights: Provided that NECSA gives prompt notice to the *Service Provider* of such claim, the *Service Provider* controls the defence thereof and *NECSA* does not jeopardise the claim in any way.

17.5. To the extent that there are any components of the *Service Provider's Intellectual Property/Technology* included in the Deliverables, the *Service Provider* grants to NECSA , a royalty-free, perpetual, non-exclusive, non-transferable licence to use such *Service Provider's Intellectual Property/Technology* solely in connection with such Deliverables.

17.6. In the event of *NECSA* requesting the use of any *Service Provider's Intellectual Property/Technology* outside the scope of this *Agreement*, this would be subject to the *Parties* agreeing to a written licence agreement for such use.

18. SETTLEMENT OF DISPUTES

18.1. If any dispute or difference of any kind whatsoever arises between the *Parties* in connection with or arising out of the *Agreement*, the *Parties* shall make every effort to resolve amicably such dispute or difference by mutual consultation. Either *Party* shall in writing notify the other of the dispute, providing the details of the dispute.

18.2. The dispute shall first be referred to the respective project managers of each *Party*, who must use their best endeavours to resolve the dispute within **seven (7) days** of the dispute having been referred to them, or such other time frame agreed between the *Parties*.

18.3. Should the project managers of the *Parties* be unable to resolve the dispute in accordance with the foregoing, the dispute shall be escalated to the respective executive managers/managing directors (or equivalent officers) of the *Parties*, who must use their best endeavours to resolve the dispute within **ten (10) days** of the dispute having been referred to them, or such other time frame agreed between the *Parties*.

18.4. Should it not be possible to settle a dispute by means of mutual consultation, then the *Parties* may exercise their rights afforded to them by law.

19. BREACH OF AGREEMENT

In the event of anyone of the *Parties* ("the Defaulting Party") committing a breach of any of the terms of this *Agreement* and failing to remedy such breach within a period of **seven (7) days** after receipt of a written notice from the other *Party* ("the Aggrieved Party") calling upon the Defaulting Party so to remedy, then the Aggrieved Party shall be entitled, at its sole discretion and without prejudice to any of its other rights in law, either to –

19.1. claim specific performance of the terms and of this *Agreement*; or

19.2. terminate this *Agreement* forthwith and without further notice, to claim and recover damages from the Defaulting Party.

20. TERMINATION FOR INSOLVENCY

Should either *Party* become bankrupt or otherwise insolvent, or commit an act of insolvency or in the event of any of the following circumstances:

20.1. Either *Party* being placed under judicial management whether provisionally or finally;

20.2. A judgment of any competent court being given against either *Party* which judgement is not satisfied within a period of fourteen (14) days from date of knowledge thereof by either *Party*, or no application to be made to a competent court to rescind such judgement within a period prescribed by the rules of the court:

either *Party* shall have the right without prejudice to any other rights or claims which it may have, to cancel and terminate this *Agreement* without notice.

21. NOTICES

The *Parties* choose the addresses set out in *SLA* as their *domicilium citandi et executandi* for all purposes under this *Agreement*, whether in respect of the service or delivery of court process, notices or other documents or all other communications. The *Parties* also choose the persons named in the *SLA* as their project managers and contact persons for the purpose of this *Agreement.* Any notice to be given or to be made for any purpose under this *Agreement* shall be in writing and shall:

21.1. If delivered to the addressee's physical address, be deemed to have been received when so delivered; or

21.2. If sent by registered post to the addressee's postal address, be deemed to have been received seven (7) days after it has been posted; or

21.3. If sent by facsimile, be deemed to have been received on the day on which it was sent; or

21.4. If sent by email, be deemed to have been received on transmission on the day on which a document was emailed.

21.5. Any of the *Parties* shall be entitled to change its respective *domicilium* and any other address, as the case may be, on **fourteen (14) days' notice** to the other, provided such address is within the Republic of South Africa.

22. NON-SOLICITATION OF PERSONNEL

22.1. The *Parties* agree not to make any offer of employment or to employ any member of either *Party's* personnel working on the basis of this *Agreement*, either during the period of this *Agreement* or for a period of six (6) months after completion of the *Services* in terms of this *Agreement*. The *Parties* also agree not to use either *Party's* personnel as consultants, either independently or via a third party for the same period.

22.2. A breach of this condition will render the breaching *Party* liable to pay damages in an amount equal to six (6) month's salary of the relevant member of personnel, provided that such damages shall be calculated in respect of the six (6) month period prior to such member of personnel leaving the employ of non-breaching *Party*. The *Parties* agree that the aforementioned damages are fair, based on the damage the non-breaching *Party* is likely to suffer, and considering the difficulty in calculating the actual damages.

23. RELAXATION

No latitude, extension of time or other indulgence which may be given or allowed by any *Party* to the other *Party* in respect of the performance of any obligation hereunder, and no delay or forbearance in the enforcement of any right of any *Party* arising from this *Agreement*, and no single or partial exercise of any right by any *Party* under this *Agreement*, shall in any circumstances be construed to be an implied consent or election by such *Party* or operate as a waiver or a novation of or otherwise affect any of the *Parties*' rights in terms of or arising from this *Agreement* or stop or preclude any such *Party* from enforcing at any time and without notice, strict and punctual compliance with each and every provision or term hereof.

24. VALIDITY AND SEVERABILITY

24.1. If any provision of this *Agreement* is found or held to be invalid, unlawful, or unenforceable, such terms will be severable from the remaining terms.

24.2. The validity of all the other remaining provisions will not be affected and will continue to be valid and enforceable. If any invalid term is capable of amendment to render it valid, the *Parties* agree to negotiate an amendment to remove the invalidity.

25. VARIATION

No variation of or addition to this *Agreement* will be of any force or effect unless reduced to writing and signed by the *Parties* or their duly authorised representatives.

26. WARRANTIES

26.1. The Service Provider warrants that the goods supplied under the contract are new, unused, of the most recent or current models, and that they incorporate all recent improvements in design and materials unless provided otherwise in the contract. The Service Provider further warrants that all goods supplied under this contract shall have no defect, arising from design, materials, or workmanship (except when the design and/or material is required by NECSA's specifications) or from any act or omission of the Service Provider, that may develop under normal use of the supplied goods in the conditions prevailing in the country of final destination.

26.2. This warranty shall remain valid for twelve (12) months after the goods, or any portion thereof as the case may be, have been delivered to and accepted at the final destination indicated in the contract, or for eighteen (18) months after the date of shipment from the port or place of loading in the source country, whichever period concludes earlier, unless specified otherwise in SLA.

26.3. NECSA shall promptly notify the Service Provider in writing of any claims arising under this warranty.

26.4. Upon receipt of such notice, the Service Provider shall, within the period specified in SLA and with all reasonable speed, repair or replace the defective goods or parts thereof, without costs to NECSA.

26.5. If the Service Provider, having been notified, fails to remedy the defect(s) within the period specified in SLA, NECSA may proceed to take such remedial action as may be necessary, at the Service Provider's risk and expense and without prejudice to

any other rights which NECSA may have against the Service Provider under the contract.

27. APPLICABLE LAW

This *Agreement* shall in all respects be governed by and construed in accordance with the Laws of the Republic of South Africa and all disputes, actions and other matters in connection therewith shall be determined in accordance with such law.

28. GOVERNING LANGUAGE

The contract, all correspondence and other document pertaining to the *Agreement* that is exchanged by the *Parties* shall be written in English.

29. TAXES AND DUTIES

29.1. A foreign Service Provider shall be entirely responsible for all taxes, stamp duties, license fees, and other such levies imposed outside NECSA's country.

29.2. A local Service Provider shall be entirely responsible for all taxes, duties, license fees, etc., incurred until delivery of the contracted goods to NECSA.

29.3. No contract shall be concluded with any bidder whose tax matters are not in order. Prior to the award of a bid the Department must be in possession of a tax clearance certificate, submitted by the bidder. This certificate must be an original issued by the South African Revenue Services.

SIGNED AT _____ ON THIS _____ DAY OF _____ 20_____.

_____

FOR AND ON BEHALF OF THE SERVICE PROVIDER