



# TERMS AND CONDITIONS

of

**VBKOM Project Managers Proprietary Limited**

Registration number : 2009/012842/07

## 1. DEFINITIONS AND INTERPRETATION

1.1 In these Terms and Conditions, unless otherwise specified or the context clearly indicates the contrary, the following words and expressions shall have the meanings assigned to them below:

- 1.1.1 **“Agreement”** : means these Terms and Conditions, together with the Proposal and the Quotation;
- 1.1.2 **“Business Day”** : means any day excluding a Saturday, Sunday or public holiday in the Republic of South Africa;
- 1.1.3 **“Client”** : means the party that VBKOM will be rendering Services to, as more fully described in the Proposal and/or Quotation;
- 1.1.4 **“Contract Price”** : means where a project fee is agreed between VBKOM and the Client, the total amount of money, expressed in South African Rand, payable by the Client to VBKOM for the Services and/or Final Deliverable, as recorded in the Quotation;
- 1.1.5 **“CPA”** : means the Consumer Protection Act (Act 68 of 2008) as amended, together with all regulations promulgated thereunder from time to time;
- 1.1.6 **“Final Deliverable”** : means the final deliverable(s) to be created by VBKOM through the rendering of the Services, as recorded more fully in the Proposal and/or Quotation;
- 1.1.7 **“Intellectual Property”** : means all present and future intellectual property rights, including but not limited to registered designs, know-how, trade-marks, copyright and all rights having equivalent or similar effect;
- 1.1.8 **“Parties”** : means VBKOM and the Client and any reference to “Party” shall refer to any one of the Parties as the context may indicate;
- 1.1.9 **“Project Initiation Fee”** : means, at the commencement of the rendering of Services by VBKOM to the Client, an upfront fee payable by the Client to VBKOM, determined in proportion to the magnitude of the project and taking into account the necessary preliminary disbursements, which amount is recorded in the Proposal and/or Quotation;
- 1.1.10 **“Proposal”** : means the written proposal furnished by VBKOM to the Client, amongst others setting out detailed particulars of the description of the project, engagement objectives, scope of work to be performed, project execution approach, project timeline and project resources and includes tender submissions, reports or written submissions provided by VBKOM to a Client (or a prospective client) with the view to render Services to the Client;
- 1.1.11 **“Quotation”** : means a written quotation from VBKOM, setting out the fees and costs charged by VBKOM for the rendering of Services and/or the Final Deliverable;
- 1.1.12 **“Services”** : means all the services to be rendered by VBKOM to the Client as more fully described in the Proposal and/or Quotation;
- 1.1.13 **“Service Provider”** : means any third party that is sub-contracted by VBKOM for the rendering of the Services (or any part thereof);
- 1.1.14 **“VBKOM”** : means VBKOM Project Managers Proprietary Limited (Registration number: 2009/012842/07), with further particulars recorded in the Proposal.

## 2. OFFER AND ACCEPTANCE



- 2.1 A Proposal and/or Quotation provided to the Client by VBKOM is an offer by VBKOM to enter into an agreement for the rendering of Services and/or a Final Deliverable as described in the Proposal and/or Quotation. The Client's express acceptance of a Proposal and/or Quotation (in any manner or form, including the Client issuing a purchase order to VBKOM), or the signing of these Terms and Conditions by the Client, or its consent for VBKOM to commence with the rendering of Services in accordance with the Quotation and/or Proposal (even if the Quotation and/or Proposal is not signed by the Client) will constitute acceptance of VBKOM's offer by the Client.
- 2.2 The acceptance by the Client of VBKOM's offer in terms of Clause 2.1 is subject thereto that these Terms and Conditions of VBKOM, together with the Proposal and/or Quotation, will exclusively regulate the relationship between VBKOM and the Client.
- 2.3 Any amendments or variations to the Agreement proposed by the Client (whether recorded in the Client's purchase order or otherwise) are expressly rejected by VBKOM and shall not become part of the Agreement in the absence of VBKOM's express written consent to such other terms. Any amendments and variation to the Agreement shall have no effect unless expressly agreed in writing by the Client and VBKOM.

### 3. COMMENCEMENT

VBKOM shall only commence with the rendering of the Services upon receipt of the Project Initiation Fee as recorded in the Quotation, as well as upon receipt of the duly signed Terms and Conditions ("the Commencement Date"). No latitude, extension of time or other indulgence which may be given or allowed by VBKOM to commence with the rendering of the Services or the Final Deliverable shall under any circumstances be construed to be a waiver of its rights under this clause.

### 4. DUTIES OF VBKOM

- 4.1 VBKOM shall be responsible to –
- 4.1.1 render the Services with such skill, care and diligence as is ordinarily exercised by Service Providers in similar circumstances at the time the Services are rendered; and
- 4.1.2 provide the Client with the Final Deliverable on the estimated delivery date.

### 5. DUTIES OF THE CLIENT

- 5.1 The Client shall be responsible to-
- 5.1.1 promptly make payment of the Project Initiation Fee and the remainder of the Contract Price at such times and intervals as agreed;
- 5.1.2 provide VBKOM with all information, documentation and any other material or input required by VBKOM to perform the Services and deliver the Final Deliverable;
- 5.1.3 within reasonable timelines, attend any meetings required by VBKOM to obtain input from the Client required for the rendering of the Services and/or the Final Deliverables as well as to review and approve the Services and/or Final Deliverable.
- 5.2 Where the Client does not furnish VBKOM with all information and documentation required by VBKOM to render the Services and/or to provide the Final Deliverable, the estimated timelines provided by VBKOM in its Proposal shall automatically be extended in line with the delay in obtaining all information and documentation.

### 6. VBKOM FEES

- 6.1 Fees for Services and/or the Final Deliverable, as recorded in the Proposal and/or Quotation, will be charged in accordance with the guidelines regarding scope of services and tariff of fees for persons registered in terms of the Engineering Profession Act (Act no. 46 of 2000), as published in the Government Gazette from time to time (the ECSA Guidelines).
- 6.2 Fees may be charged on a percentage of contract value, lump sum or time basis, as indicated in the Proposal and/or Quotation.



- 6.3 Fees which are recoverable on a time rate will be invoiced monthly as the rendering of Services and/or Final Deliverable progresses.
- 6.4 Where a Contract Price is agreed, the Client will also be invoiced monthly based on the estimated proportion of Services and/or Final Deliverable completed to date of invoice.
- 6.5 During the period that the Services or Final Deliverable is rendered, VBKOM reserves the right to increase the value of the balance of the Contract Price or the applicable hourly rates, as the case may be, at the beginning of March of each year, which increases shall be communicated to the Client in writing.

## 7. EXPENSES AND COSTS

VBKOM will recover from the Client all expenses actually incurred by VBKOM in rendering the Services, and all other costs incurred on behalf of and with the approval of the Client, plus a mark-up of 10% (Ten Percent), as indicated in the ECSA Guidelines. Where appropriate, VBKOM's invoice will include a charge of 7% (Seven Percent) of professional fees to cover communication and IT expenses (telephones, faxes, e-mail, computing services, etc.).

## 8. PAYMENT TERMS

- 8.1 Except for the Project Initiation Fee, which shall immediately be due and payable on the commencement of the rendering of Services and/or Final Deliverable, all amounts payable by the Client to VBKOM shall be paid within 30 (Thirty) calendar days from the date of invoice.
- 8.2 Within 10 (Ten) calendar days of receipt of an invoice from VBKOM, the Client shall notify VBKOM if it disputes the invoice or any amount therein, together with detailed reasons for the dispute. The Parties undertake to promptly meet to resolve the aforesaid dispute. Unless a dispute notification is received by VBKOM as aforesaid, the Client agrees that-
  - 8.2.1 the invoice is accurate and correct in all respects;
  - 8.2.2 the Services covered in the invoice was properly rendered in accordance with the Agreement; and
  - 8.2.3 payment is due in accordance with the said invoice and the Agreement terms.
- 8.3 In the event of a dispute between VBKOM and the Client about the rendering of Services and/or the Final Deliverable, the Client shall remain liable for the payment of all invoices rendered by VBKOM until the said dispute is fully and finally resolved. The Client shall under no circumstances be entitled to withhold payment of an invoice rendered by VBKOM or to apply any set-off.
- 8.4 VBKOM shall be entitled to suspend all Services and to withhold delivery of the Final Deliverable until all amounts that are due and payable have been paid by the Client.
- 8.5 All payments due to VBKOM shall be made without deduction or set-off, free from banking charges, by means of electronic funds transfer into the nominated banking account of VBKOM as set out in its invoices. Proof of each payment must be forwarded to VBKOM at its e-mail address appearing on its invoice, or such other e-mail address as VBKOM may instruct in writing from time to time.
- 8.6 Where this Agreement has been entered into or authorised by an agent (or a person purporting to act as an agent) on behalf of the Client, the agent and the Client shall be jointly and severally liable for payment of all invoices of VBKOM under the Agreement.
- 8.7 Unless expressly otherwise agreed in writing between VBKOM and the Client, all payments shall be made in South African Rand. Where the Services are rendered in another jurisdiction outside of South Africa, the exchange rate for payment from such a jurisdiction to South African Rand shall be the rate applicable on the date of the invoice of VBKOM and the Client shall bear the risk of any currency fluctuations.



- 8.8 Any outstanding amount that has become due and payable and which remains unpaid shall bear interest at a rate of 2% (Two Percent) per month, calculated from the date that payment became due to the date of full payment, both days inclusive, together with debt collection fees, where applicable.
- 8.9 The Client shall be responsible for payment of all taxes or levies due as a result of a requirement by any governmental organisation, including but not limited to value added tax, importation tax and withholding tax.
- 8.10 VBKOM shall not entertain any request by the Client to render invoices that were made out to the Client, to a third party, unless the Chief Executive Officer of VBKOM in writing approves such request and such third-party signs all documents required by VBKOM to render such third party as the new Client of VBKOM.
- 8.11 The Client shall not be entitled to rely upon any purported change to the banking account particulars of VBKOM unless the Client first telephonically confirms the change of the VBKOM banking account particulars with the Chief Executive Officer of VBKOM and, following such telephonic discussion, the Chief Executive Officer himself furnishes the Client with a written confirmation of change of banking account particulars, together with a certified copy of a board resolution of VBKOM confirming the change. Any payment made by the Client to the incorrect banking account of VBKOM shall be at the sole risk of the Client, who shall remain liable for payment to VBKOM.

## 9. COPYRIGHT

- 9.1 Copyright in all documents, drawings and records whether manually or electronically produced, which form part of the rendering of the Services or the Final Deliverable, including the Proposal, shall vest in VBKOM. None of the documents, drawings or records may be used or applied in any manner, nor may they be reproduced or transmitted in any form or by any means whatsoever for or to any other person, without the prior written consent of VBKOM.
- 9.2 The Client, on acceptance of a Quotation or Proposal from VBKOM, and on condition that the Client pays to VBKOM the full price for the work as agreed, shall be entitled to use for its own benefit and for the specified project only-
- 9.2.1 the results recorded in the Final Deliverable; and
- 9.2.2 the technology described in any report or recommendation delivered to the Client.
- 9.3 Ownership of all rights, including Intellectual Property rights, in and to the Final Deliverable, remains that of VBKOM.
- 9.4 The provisions contained in this Clause 9 shall endure beyond the termination or cancellation of this Agreement without limit in time.

## 10. CONFIDENTIALITY

Should the Client not accept a Proposal or Quotation by VBKOM, all of the documentation and records provided by VBKOM to the Client, together with attachments and any copies, shall be returned to VBKOM within 14 (Fourteen) calendar days of the date of rejection. Should VBKOM not be authorised to proceed with any Services within a reasonable period of time, all of the documentation and records provided by VBKOM to the Client, together with attachments and any copies shall be returned to VBKOM within 14 (Fourteen) calendar days of VBKOM's request.

## 11. DATA PROTECTION

- 11.1 VBKOM will protect the Client's personal information strictly in accordance with the principles of the Electronic Communications and Transactions Act 2002 (as amended) ("the ECT Act") as well as the Protection of Personal Information Act (2013) ("POPI") (to the extent that the said legislation is in force in the Republic of South Africa).
- 11.2 VBKOM is the "data controller" for purpose of the ECT Act as well as the "responsible person" for purposes of POPI.
- 11.3 VBKOM will store the Client's personal information in a secure hosting facility in the Republic of South Africa. VBKOM will store the Client's personal information only for the purpose for which it was collected as well as a record of any third party to whom the personal information was disclosed, the reason for disclosure and the date of the disclosure, for the duration that the Client's information is used and for a period of 1 (one) year thereafter as required by Section 51(5) and (7) of the ECT Act. After



the 1 (one) year period as aforesaid, VBKOM will delete or destroy (as applicable) all the Client's personal information that is stored that has become obsolete (save where such information must be retained for a longer period of time in terms of other applicable legislation).

- 11.4 The Client may request details of personal information that VBKOM holds of the Client by requesting VBKOM in writing to furnish the Client with such information.

## 12. CHANGES TO PROJECT SCOPE

- 12.1 In the event that the Client wishes to change the project scope and Services to be rendered or the Final Deliverable as specified in the Proposal and/or Quotation, the Client shall follow the following process:

- 12.1.1 The Client shall compile and submit a written document to VBKOM, setting out comprehensive particulars of the changes requested;
- 12.1.2 VBKOM shall consider the change request document and furnish the Client with a revised Quotation;
- 12.1.3 If the revised Quotation is accepted by the Client, the Client shall date and sign the revised Quotation, which shall then replace the initial Quotation and form a legally binding Agreement between the Client and VBKOM;
- 12.1.4 In the event that the fees in the revised Quotation exceeds the initial Quotation, the Client shall be liable to make payment of an additional Project Initiation Fee amount as stipulated on the revised Quotation. VBKOM reserves the right to suspend the rendering of any further Services or delivering the Final Deliverable until receipt of payment of the additional Project Initiation Fee amount.

## 13. ADDITIONAL WORK

- 13.1 Additional Services to be performed by VBKOM other than as contemplated in the Proposal and/or Quotation shall be quoted separately from the Proposal and/or Quotation in an addendum thereto.
- 13.2 The Client shall indicate its intention to enter into a legally binding Agreement with VBKOM for additional Services by signing and dating the addendum to the Proposal and/or Quotation.

## 14. ADJUSTMENT OF TIMELINES

- 14.1 Estimated dates for the performance of the Services and delivery of the Final Deliverable are recorded in the Proposal.
- 14.2 Subject to the provisions of Clause 5.2, any adjustment of timelines for the performance of the Services shall only be made by mutual agreement between the Parties, reduced to writing and signed by both Parties. VBKOM shall employ all reasonable measures to ensure that the estimated delivery date of the Services and the Final Deliverable is adhered to.

## 15. EARLY TERMINATION

- 15.1 Should the Client in writing notify VBKOM that it wishes to terminate the Agreement at any stage after the Commencement Date, then without prejudice to any other remedy VBKOM may have, the following shall apply:
- 15.1.1 VBKOM shall be entitled to full payment for the work already completed as well as the reimbursement for any costs and expenses incurred; and
- 15.1.2 VBKOM shall furthermore be entitled to 50% (Fifty Percent) of the outstanding balance of the total fees and cost as recorded in the Proposal and/or Quotation as a "break fee";
- all of which will immediately become due and payable upon termination by the Client as aforesaid.

## 16. SUB-CONTRACTORS

VBKOM shall be entitled to sub-contract, assign or delegate all or any portion of the Services to Service Providers and shall be entitled to procure any Service Provider that VBKOM in its sole discretion, deems appropriate for the performance of the Services and creation of the Final Deliverable.

## 17. GUARANTEES



Save for any warranties of quality automatically accrued in terms of the CPA (if and where applicable), VBKOM disclaims all other warranties, express or implied, including the implied warranties of merchantability and fitness for a particular purpose.

## 18. LIMITATION OF LIABILITY

### 18.1 To the maximum extent permitted by law:

18.1.1 Subject to Clauses 18.1.2 and 18.1.3 below, any liability for loss, damages or costs of VBKOM, its employees, officers and directors arising out of the performance or non-performance of the Services or the Final Deliverable, whether under law of contract, delict or otherwise, shall be limited in aggregate to the cost of rectifying the works the subject of the Services or twice the amount of the fees payable by the Client to VBKOM for such Services, whichever is the lesser.

18.1.2 VBKOM shall not be liable for any damage or consequential costs caused by incomplete or inaccurate information provided by the Client. VBKOM shall not under any condition be liable to the Client in respect to any indirect, consequential or special damages or losses (including loss of profit, loss of business opportunity and payment of liquidated sums or damages under any other agreement).

18.1.3 VBKOM will be deemed discharged from all liability in respect of the Services and the Final Deliverable, whether under the law of contract, delict, or otherwise, on the expiration of one 1 (One) year from the completion of the Services and/or delivery of the Final Deliverable, the date of invoice in respect of the final amount claimed by VBKOM, or the termination of this Agreement, whichever is earliest. The Client shall not be entitled to commence any action or claim whatsoever against VBKOM or any employee, agent or Service Provider of VBKOM in respect of the Services after that date, which rights the Client hereby abandons and waives in total.

## 19. SAFETY

VBKOM shall be responsible only for its activities and that of its employees and nothing shall imply that VBKOM has any responsibility for job site safety which is the responsibility of the Client or its agents or contractors. The Client shall provide in advance any environmental, health, or safety policies or procedures it requires VBKOM to abide by during provision of the Services. If no policies or procedures are provided, VBKOM shall abide by its own policies and procedures in the provision of the Services. At no time shall VBKOM be deemed to be in control of the project site unless by prior written agreement in connection with specific Services. The Client shall provide all assistance listed in the Proposal including but not limited to transportation, accommodation, equipment, emergency services and communication. Should these not be available on arrival at the project, VBKOM reserves the right to suspend all work and recover any costs incurred such as time, travel and accommodation, etc., from the Client.

## 20. DISPUTE RESOLUTION

20.1 Subject to Clause 20.4, if the Parties are unable to resolve any dispute arising out of or in connection with this Agreement by means of joint co-operation or discussion within 1 (One) week after a dispute arises, then the dispute will be finally settled under the Rules of Arbitration of the Arbitration Foundation of South Africa (AFSA) by 1 (One) arbitrator appointed in accordance with the said Rules, which Rules are deemed to be incorporated by reference into this clause.

20.2 Unless otherwise agreed to in writing by the Parties, the arbitration shall be conducted in Pretoria, South Africa and in English.

20.3 The provisions contained in this Clause 20 shall endure beyond the termination or cancellation of this Agreement without limit in time.

20.4 Notwithstanding the provisions of Clause 20.1, VBKOM shall be entitled, at its sole and absolute election, to institute any claim for the payment of the Contract Price or any fees (or any outstanding portion thereof) in a court with competent jurisdiction and the Client shall be bound to such election without the right to refer such a claim to arbitration in accordance with Clause 20.1.

## 21. BREACH



- 21.1 In the event of a breach by any of the Parties ("the Defaulting Party") of its obligations in terms of this Agreement, the other Party ("the Aggrieved Party") may, without prejudice to any rights it may have, deliver to the Defaulting Party a written notice setting out the alleged breach by the Defaulting Party, demanding that the Defaulting Party remedy the breach within a period of 10 (Ten) Business Days.
- 21.2 In the event of the Defaulting Party failing to remedy the breach within the stipulated period of time, then the Aggrieved Party may, at its sole election and notwithstanding any other remedy that the Aggrieved Party may have:
- 21.2.1 enforce the terms and conditions of the Agreement; or
- 21.2.2 cancel this Agreement and claim damages (subject to the restrictions contained in this Agreement).

## 22. DOMICILIUM AND NOTICES

- 22.1 The parties hereby select for all purposes of this Agreement as their respective *domicilia citandi et executandi* their respective addresses recorded in the Quotation or any such other address as the Parties may notify each other of in writing from time to time, for the delivery of all notices and/or processes thereto.
- 22.2 Any notice addressed by any Party to the other Party shall -
- 22.2.1 if delivered by hand at the address of its *domicilium* in terms of this clause, be deemed to have been duly received by the addressee on the date of delivery; or
- 22.2.2 if posted by prepaid registered post to the addressee's *domicilium* in terms of this clause, be deemed to have been received by the addressee on the fifth day following the date of such posting; or
- 22.2.3 if sent by e-mail address, be deemed to have been duly received by the addressee on date of successful transmission thereof.
- 22.3 Notwithstanding anything to the contrary contained or implied in this Agreement, a written notice or communication actually received by one of the parties from another including by way of facsimile transmission shall be adequate written notice or communication to such Party.

## 23. FORCE MAJEURE

- 23.1 Neither of the Parties will be liable for a failure to perform any of its obligations if it proves-
- 23.1.1 that the failure was due to an Impediment beyond its control;
- 23.1.2 that it could not reasonably be expected to have taken the Impediment and its effects upon the Party's ability to perform into account at the time of the conclusion of this Agreement; and
- 23.1.3 that it could not reasonably have avoided or overcome the Impediment or at least its effects.
- 23.2 An "Impediment", includes but is not limited to-
- 23.2.1 war, whether declared or not, civil war, civil violence, riots and revolutions, acts of sabotage;
- 23.2.2 natural disasters such as violent storms, cyclones, earthquakes, tidal waves, floods, destruction by lightning;
- 23.2.3 explosions, fires, destruction of machines, of factories and of any kind of installations;
- 23.2.4 boycotts, strikes and lock-outs of all kinds, go-slows, occupation of factories and premises and work stoppages;
- 23.2.5 acts of authority, whether lawful or unlawful, apart from acts from which the Party seeking relief has assumed the risk by virtue of any other provisions of this Agreement.
- 23.3 For the purposes of this clause "Impediment" does not include lack of authorisations, of licences, of permits or of approvals necessary for the performance of this Agreement.
- 23.4 Relief from liability for non-performance under this clause will start on the date which the Party seeking relief gives Notice of the Impediment and will stop on the date when the Impediment ceases to exist; provided that if the Impediment continues for a period of more than 30 (Thirty) calendar days either of the Parties will be entitled to terminate this Agreement.

## 24. GENERAL



- 24.1 The parties hereby acknowledge that the Agreement concluded between them constitutes the entire Agreement between them and that no other conditions, stipulations, warranties nor representations whatsoever, have been made by any Party or that Party's agent, other than as specifically included herein.
- 24.2 No latitude, extension of time or other indulgence which may be given or allowed by either Party to the other in respect of any payment provided for in this Agreement or the performance of any other obligation shall under any circumstances be construed to be an implied consent by such Party or operate as a waiver or a novation of or otherwise affect any of that Party's rights in terms of or arising from this Agreement, or prevent such Party from enforcing, at any time and without notice, strict and punctual compliance with each and every provision or term hereof.
- 24.3 The parties agree that no variation of, addition to, consensual cancellation or novation of this Agreement in its entirety or of any term or condition thereof shall be of any force or effect, unless such amendment or cancellation is reduced to writing, signed by all the parties or their authorised representatives hereto and attached to the Quotation.
- 24.4 In the event that any of the terms of this Agreement are found to be unreasonable, unjust, unlawful, invalid or unenforceable, those terms will be severable from the remaining terms, which will continue to be valid and enforceable. VBKOM will furthermore be afforded an opportunity to amend any term of this Agreement which is found to be unreasonable, unjust, unlawful, invalid or unenforceable within a period of 30 (Thirty) Business Days to undo the aforementioned effect, after which amendment both Parties shall be bound to the amended terms.

## 25. **GOVERNING LAW**

This Agreement will be construed and governed by South African substantive and procedural law.

SIGNED at.....on this the.....day of..... 2019

### AS WITNESSES:

1. \_\_\_\_\_
2. \_\_\_\_\_

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on behalf of the Client, duly authorised thereto