

3.1.2. "Acceptance Test(s)" / "Acceptance Testing" shall mean the Key Performance Indicators used for the purposes of determining the compliance of the Software with the functional specifications set out in the Licence Agreement;

INSTALLATION SERVICES AGREEMENT

3.1.3. "Agreement" shall mean this written document together with all written appendices, annexures, exhibits or amendments attached to it from time to time;

1. PARTIES

1.1. The Parties to this Agreement are –

Fraxion (Proprietary) Limited

3.1.4. "Business day" shall mean 08h30 to 17h00 on any day other than a Saturday or Sunday or Public Holiday, as defined in the Public Holidays Act 36 of 1994 as amended from time to time;

a company duly incorporated under the laws of South Africa, having its principal place of business at 102 Mariendahl House, Newlands on Main, Corner of Main and Camp Road, Newlands, Cape Town, South Africa with registration number 2000/026408/07.

3.1.5. "Commencement Date" shall mean the date of signature of the purchase order in terms of which the Software licence was purchased;

("Fraxion")

And

3.1.6. "Confidential Information" shall mean:

You

3.1.6.1. any information of whatever nature, which has been or may be obtained by either of the Parties from the other, whether in writing or in electronic form or pursuant to discussions between the Parties, or which can be obtained by examination, testing, visual inspection or analysis, including, without limitation, scientific, business or financial data, source code, know-how, formulae, processes, designs, sketches, photographs, plans, drawings, specifications, sample reports, models, price lists, studies, findings, Documentation, inventions or ideas;

2. INTRODUCTION

Fraxion is the owner of the Software and Documentation and you have obtained a right by way of a Licence to utilise same and whereas you wish to appoint Fraxion to install the Software at your Premises.

NOW THEREFORE the Parties are entering into this Agreement to record the terms and conditions of the Installation Services as follows:

3. DEFINITIONS

3.1. Unless the contrary is clearly indicated, the following words and/or phrases used in this Agreement shall have the following meaning:

3.1.1. "Acceptance" shall mean the Final Acceptance of the Software by you, whether by Notice or in accordance with clause 8.2;

3.1.6.2. analyses, concepts, compilations, studies and other material

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| | prepared by or in possession or control of the recipient which contain or otherwise reflect or are generated in whole or in part from any such information as is specified in this definition; and | | source codes, inventions, trade secrets, Confidential Information and all other rights of a similar character whether registered or capable of registration and all applications and rights to apply for protection of any of the same; |
| 3.1.6.3. | any dispute between the Parties resulting from this Agreement; | 3.1.12. | "Installation Services" shall mean the agreed installation service rendered by Fraxion to you in accordance with clause 8; |
| 3.1.7. | "Copyright" shall mean all rights of copyright whether existing now or in the future in and to the Software Documentation, initial drawings, sketches, flow charts, designs relating thereto; | 3.1.13. | "Key Performance Indicators" shall mean a set of questions provided by Fraxion to you and which you accept are intended to assess successful installation or otherwise of the Software; |
| 3.1.8. | "Documentation" shall mean any deployment and implementation documents and materials relevant to the Software licensed containing amongst other things detailed instructions pertaining to the use of the Software and setting out the operation of the Software; | 3.1.14. | "Licence Agreement" means the licence agreement entered into between the parties in respect of the Software; |
| | | 3.1.15. | "Notice" shall mean a written document; |
| 3.1.9. | "Equipment" shall mean the computer hardware, operating system, supporting software and network infrastructure designated by you from time to time; | 3.1.16. | "Premises" shall mean the venue where Fraxion will be installing the Software for use by you and rendering the Installation Services to you situated at your registered office, or alternative specified address; |
| 3.1.10. | "Final Acceptance" shall mean the Certificate of Acceptance issued by you in respect of the Software as installed by Fraxion on your Equipment, declaring that it has been demonstrated to operate substantially in accordance with the functional specifications set out in the configuration document agreed by the parties; | 3.1.17. | "Program Errors" shall mean defects in the Software which cause it not to operate in conformity with the functional specifications of the Licence Agreement or meet the Key Performance Indicators; |
| | | 3.1.18. | "Project Charter" means a statement of the scope, objectives and participants in a project that provides a preliminary delineation of roles and responsibilities, outlines the project objectives, identifies the main stakeholders, and defines the authority of the project manager, serving as a reference of authority for the future of the project.; |
| 3.1.11. | "Intellectual Property" shall mean all present and future rights in and to the Software and Documentation including but not limited to patents, trademarks and logos (registered and unregistered in any form and/or nature whatsoever whether now used or adopted in the future), service marks, designs, design rights, copyright (including all copyright in any designs and computer programs), together with all related know-how, | 3.1.19. | "Parties" shall mean both Fraxion and you; |

3.1.20. "Software" shall mean
3.1.20.1.1. all application computer programs developed by Fraxion as detailed in the Licence Agreement;

3.1.20.1.2. the current version of the Software licensed to you by Fraxion in terms of this Agreement; and

3.1.20.1.3. the updates of the current version of the Software made available to Customer by Fraxion;

3.2. Where any term is defined within a particular clause other than this clause 3, that term shall bear the meaning ascribed to it in that clause wherever it is used in this Agreement;

4. APPOINTMENT

4.1. You hereby appoints Fraxion, with effect from the Commencement Date to render the Installation Services as set out in the Project Charter and Fraxion hereby accepts this appointment.

5. PAYMENT

5.1. In consideration of all the Installation Services rendered by Fraxion to you, you shall pay to Fraxion the applicable Service Fees and such fees will be payable in accordance with the standard fee schedule, as outlined in the Project Charter and as agreed between the Parties.

5.2. The Service Fee is exclusive of VAT, any other statutory levies, taxes and imposts as may be levied, all travel, transportation and *per diem* costs necessary for travel to Customer's premises at your request, which additional amounts, including disbursements shall, if applicable, be borne by you.

5.3. You shall pay to Fraxion all fees for the Installation Services rendered including the Service Fee within thirty (30) days following receipt of an original invoice by you, in full, without any right of set-off or deduction. All fees, plus VAT, shall be payable in South African Rand (ZAR) to Fraxion. The payment of the fees shall be made by direct transfer into the bank account of Fraxion, which bank details shall be stipulated on the invoice to you.

5.4. Any amount due and owing by you to Fraxion shall carry interest reckoned at the Prime Rate plus 4% from the due date until payment thereof has been received by Fraxion in full. For the purposes of this clause, the Prime Rate shall mean the prime bank overdraft rate as charged by Standard Bank Limited to its corporate customers in respect of overdraft facilities, calculated and compounded monthly in arrear, as certified by any manager of such bank whose appointment and authority shall not be necessary to prove.

6. OBLIGATIONS OF FRAXION

Fraxion shall:-

6.1. implement the Software as described in the Project Charter on your Equipment, and;

6.2. ensure that the Software operates substantially in accordance with the requirements and specifications as set out in the Project Charter and the Licence Agreement.

7. YOUR OBLIGATIONS

You shall procure that you shall:

7.1. provide a suitable operating environment and infrastructure necessary to enable Fraxion to implement the Software in terms of this Agreement;

7.2. provide all hardware, network connections and operating system software and keep the Equipment fully operational and in compliance with Fraxion's specifications;

7.3. ensure at all times during the duration of this Agreement the availability of a project manager and a technical support operations manager, which are

adequately trained, skilled and competent to deal with general administration and financial enterprise resource planning system. In the event that you engage the services of a contractor, you shall ensure that the contractor is adequately trained, skilled and competent to deal with general administration issues as well as issues and queries concerning your financial enterprise resource planning system;

7.4. comply with all the process and associated operational requirements specified by Fraxion;

7.5. give Fraxion or its agents or sub-contractors controlled remote and direct access to your servers to resolve any problems related to the Software; and

7.6. comply with all other requirements as set out in the Fraxion Project Charter

8. INSTALLATION

8.1. DELIVERY AND INSTALLATION

8.1.1. Fraxion will provide the Installation Services in return for payment of the Installation Fees by installing the Software on the Equipment until Final Acceptance in respect thereof has been achieved, in the manner set out in the Project Charter.

8.2. ACCEPTANCE TESTING

8.2.1. The Acceptance Tests ("Tests") of the Software for the purposes of Final Acceptance shall be performed by you in conjunction with Fraxion.

8.2.2. For purposes of the Tests, the Parties shall take all the reasonable steps to reach agreement on a plan prescribing the deliverables ("the Test Plan") which shall be prepared by you and approved by Fraxion in the manner set out in the Project Charter.

9. INTELLECTUAL PROPERTY

9.1. You acknowledge:

9.1.1. that existing and future Intellectual Property Rights inclusive of inventions, Know-How, Copyright and Confidential Information including source code used or embodied in connection with the Software or Software Documentation will at all times vest in Fraxion;

9.1.2. All Intellectual Property developed by Fraxion during the course of this Agreement shall belong to Fraxion and that any enhancements, modifications or improvements made by Fraxion to the Software will be owned by Fraxion;

9.1.3. that the Software was developed and designed by Fraxion and shall acknowledge this in all its dealings by including, inter alia, reference to Fraxion as the developer and the designer in all written documentation and/or verbal communications relating to the Software;

9.1.4. that Fraxion is entitled to sell or transfer in whatsoever manner any and all of the Intellectual Property vested in Fraxion subject to this Agreement and the Licence Agreement and you agree to provide full co-operation where necessary to effect any such transaction.

9.1.5. You shall not at any time in any way question and/or dispute the ownership of Fraxion of any such item and undertakes not to infringe or prejudice any rights of Fraxion in and to the Software or Software Documentation.

10. WARRANTY BY YOU

Customer warrants that:-

10.1. only you will be utilising the Software being implemented in terms of this Agreement on the Equipment; and

10.2. it will utilise the Software only for the purposes set out in the Project Charter.

11. LIMITATION OF LIABILITY

11.1. Fraxion's liability under this Agreement for faulty installation of the Software as well as all and any damages suffered by you in connection therewith, whether direct or indirect, as a result of the malfunctioning of the Software, shall be limited to Fraxion rectifying the malfunction, within a reasonable time and free of charge, provided that Fraxion is notified immediately of the damage or faulty execution of the Software.

11.2. This liability is completely excluded if you attempt to correct or allows third parties to correct or attempt to correct the Software without the prior written approval of Fraxion.

11.3. Notwithstanding anything to the contrary herein contained, Fraxion shall not be liable for any damages or loss whatever or howsoever arising or for any claims for consequential loss or damage which may be sustained by you for any claims made by any other person whatsoever against you, in connection with this Agreement and/or the Software.

11.4. To the extent that a competent court or tribunal finally determines, notwithstanding the limitation contained in this clause, that Fraxion is liable to you for any damages, Fraxion's liability to you for any damages howsoever arising shall be limited to the amounts paid by you under this Agreement during the immediately preceding 12 (twelve) month period.

12. BREACH AND TERMINATION

12.1. Should either of the Parties breach any stipulation contained in the Agreement, and that breach is not due to *force majeure*, then the suffering Party may:

12.1.1. terminate the Agreement; provided that the Party who breached its obligations in terms thereof fails to remedy such breach within seven (7) calendar days after receiving a Notice from the other Party, on expiry of this period; provided further that it confirms this termination, by way of a Notice to the other Party, and claim all damages that it might have suffered as a result of that breach; or

12.1.2. it may claim specific performance of the Agreement from the other Party and all damages that it might have suffered as a result of that breach in the period of six (6) months immediately prior to the moment of the claim arising, reduced by any amounts actually paid by other to the Party in respect of any other claims made by the Party under this Agreement during that same period of six (6) months.

12.2. Either of the Parties may terminate the Agreement at any stage by giving the other two (2) months Notice of its intention to do so.

12.3. Should this Agreement terminate as a result of a breach of any stipulation contained in this agreement, the Licence Agreement shall terminate and you shall cease to use the Software in respect of the Licence granted to it by Fraxion and promptly return to Fraxion all tangible elements of the Software and Documentation or certify the destruction of the same.

12.4. Should the Licence Agreement terminate in accordance with the provisions of that Agreement, this Agreement shall terminate with immediate effect.

13. CONFIDENTIALITY

13.1. The Parties shall hold in confidence all Confidential Information received from each other and not divulge the Confidential Information to any person, including any of its employees, save for employees directly involved in the execution of this Agreement.

13.2. The Parties shall prevent disclosure of the Confidential Information, except as may be required by law.

13.3. Within one (1) month of the termination of this Agreement for whatever reason, the recipient of Confidential Information shall return same, or at the discretion of the owner thereof, destroy such Confidential Information, and shall not retail copies, samples or excerpts thereof.

13.4. It is recorded that the following information will, for the purposes of this Agreement, not be considered to be Confidential Information:

- 13.4.1. Information known to either of the Parties prior to the date that it was received from the other Party; or
- 13.4.2. Information known to the public or generally available to the public prior to the date that it was disclosed by either of the Parties to the other; or
- 13.4.3. Information which becomes known to the public or becomes generally available to the public subsequent to the date that it was disclosed by either of the Parties to the other, through no act or failure to act on the part of the recipient of such information.
- 13.4.4. For the purpose of this clause, the Party who makes the allegation carries the burden of proof thereof.
- 14.4. Where, in terms of this Agreement any communication is required to be in writing, the term "writing" shall include communications by facsimile. Communications by facsimile shall, unless the contrary is proved by the addressee, be deemed to have been received by the addressee one hour after the time of transmission.
- 14.5. Notwithstanding the foregoing, any notice or communication actually received by the executive director, chief operating officer, or senior management of a Party or a natural person that is Party to this Agreement, shall be a valid notice or communication for the purposes of this Agreement.

14. NOTICES AND DOMICILIUM

- 14.1. Each of the Parties chooses domicilium citandi et executandi ("domicilium") for the purposes of the giving of any notice, the payment of any sum, the serving of any process and for any other purposes arising from this Agreement at their respective addresses set forth on the signed Purchase Order in terms of which the Software licence was purchased.
- 14.2. Each of the Parties shall be entitled from time to time, by written notice to the others to vary its domicilium to any other address within the Republic of South Africa which is not a post office box or poste restante.
- 14.3. Any notice given and any payment made by a Party to any of the others ("the addressee") which:
- 14.3.1. is delivered by hand during the normal business hours of the addressee at the addressee's domicilium for the time being shall be presumed, until the contrary is proved by the addressee, to have been received by the addressee at the time of delivery;
- 14.3.2. is posted by prepaid registered post from an address within the Republic of South Africa to the addressee at the addressee's domicilium for the time being shall be presumed, until the

15. FORCE MAJEURE

- 15.1. Neither of the Parties shall be liable for a failure to perform any of its obligations insofar as it proves:
- 15.1.1. that the failure was due to an impediment beyond its control;
- 15.1.2. 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
- 15.1.3. that it could not reasonably have avoided or overcome the impediment or at least its effects.
- 15.2. An impediment, as aforesaid, may result from events such as the following, this enumeration not being exhaustive:
- 15.2.1. war, whether declared or not, civil war, civil violence, riots and revolutions, acts of sabotage;
- 15.2.2. natural disasters such as violent storms, cyclones, earthquakes, tidal floods, destruction by lightning;
- 15.2.3. explosions, fires, destruction of machines, factories and of any kind of installation;

- 15.2.4. boycotts, strikes and lock-outs of all kinds, go-slows, occupation of factories and premises and work stoppages;
- 15.2.5. 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.
- 15.3. For the purposes of this clause "impediment" does not include lack of authorisations, licences, permits or approvals necessary for the performance of this Agreement and to be issued by the appropriate public authority.
- 15.4. Relief from liability for non-performance by reason of the provisions of this clause shall commence on the date upon which the party seeking relief gives Notice of the impediment relied upon and shall terminate on the date upon which such impediment ceases to exist; provided that if such impediment continues for a period of more than sixty (60) days either of the Parties shall be entitled to terminate this Agreement.
- 16. ASSIGNMENT, CESSION AND DELEGATION**
- 16.1. Fraxion shall be entitled to assign, cede, delegate or transfer any rights, obligations, share or interest acquired in terms of this Agreement, in whole or in part, to any third Party with the prior written consent of you, which consent shall not unreasonably be withheld or delayed.
- 16.2. You shall be entitled to assign, cede, delegate or transfer any rights, obligations, share or interest acquired in terms of this Agreement, in whole or in part, to any third Party with the prior written consent of Fraxion, which consent shall not unreasonably be withheld.
- 17. GENERAL**
- 17.1. This document and any annexure(s) thereto contains the entire agreement between the parties in relation to the subject matter hereof.
- 17.2. Fraxion reserves the right to amend this Agreement from time to time. Any new version of the Agreement will be displayed on our website together with the date on which it will become effective, which will never be less than 30 (thirty) days after the date on which it is first published. It is your obligation to visit our web site on a regular basis in order to determine whether any amendments have been made.
- 17.3. The amount due and payable by you to Fraxion in terms of this Agreement between us at any time, shall be determined and proved by a certificate signed by one of Fraxion's directors, whose appointment, qualification and authority need not be proved. Such certificate shall be deemed to be a liquid document for the purpose of obtaining summary judgment, provisional sentence and/or any other judgment against you,
- 17.4. No party shall have any claim or right of action arising from any undertaking, representation or warranty in relation to the subject matter hereof not included in this agreement.
- 17.5. No failure by a party to enforce any provision of this agreement shall constitute a waiver of such provision or affect in any way a party's right to require the performance of such provision at any time in the future, nor shall a waiver of a subsequent breach nullify the effectiveness of the provision itself.
- 17.6. No agreement to vary, add to or cancel this agreement shall be of any force and effect unless reduced to writing and signed by or on behalf of the parties to this agreement.
- 17.7. Insofar as more than one contract is entered into in this agreement, each such contract shall be deemed to be divisible from the other(s) in all respects.
- 17.8. This Agreement shall be governed and construed in accordance with the laws of the Republic of South Africa and the Parties submit to the jurisdiction of the Western Cape High Court. The Parties agree that any costs awarded will be recoverable in accordance with the High Court tariff, determined on an attorney-and-own-client scale.
- 18. ARBITRATION**
- 18.1. The Parties shall first use reasonable endeavours to resolve any disputes that may arise under this Agreement through good faith negotiations. This entails one of the Parties inviting the other in writing to meet, either in person or by means of telephone or video conferencing facilities, and to attempt to resolve the

dispute within 5 (five) Business Days from date of written invitation. In the event that such negotiations do not result in a mutually acceptable resolution within 5 (five) Business Days of the commencement thereof, the dispute shall be handled in accordance with clause 18.2.

- 18.2. Subject to clause 18.1, any dispute or difference arising out of or relating to this Agreement, its termination or cancellation shall be referred to arbitration and finally resolved in accordance with the rules of the Arbitration Foundation of Southern Africa. Such arbitration shall be held in Cape Town, and conducted in the English language before one arbitrator appointed in accordance with the said rules. Any award will be final and not subject to appeal. This agreement to arbitrate shall be enforceable in, and judgement upon any award may be entered in any court of any country having appropriate jurisdiction. A dispute shall be deemed to have arisen when either Party notifies the other Party in writing to that effect. These provisions shall not prevent either Party from approaching any court or other judicial forum in any country having appropriate jurisdiction to obtain timely interim or other relief in cases of urgency.

