

# Terms and Conditions

Concluded by and between NCC

and

the Subscriber as indicated in the Service Application Form and/or Quotation.

## 1 INTERPRETATION

1.1 In this agreement, unless the context otherwise indicates:

1.1.1 “**NCC**” means Network & Computing Consultants (PTY) LTD, South Africa,

Reg No: 2003/012491/07.

1.1.2 “**Commencement Date**” means the date detailed as such in the Service Application Form, notwithstanding the Signature Date;

1.1.3 “**Data Message**” means a data message as defined in section 1 of the ECT Act, including but not limited to an e-mail message and a web site or web page available on the Internet;

1.1.4 “**ECT Act**” means the Electronic Communications and Transactions Act 25 of 2002 available from: <http://www.polity.org.za/pdf/ElectronicCommunications.pdf> ;

1.1.5 “**NCC Representative**” shall be a person as nominated from time to time by NCC;

1.1.6 “**Malicious Computer Code**” means software and technology applications developed to disrupt electronic communications or destroy data, including but not limited to computer viruses, Trojan Horses and worms;

1.1.7 “**RIC Act**” means the Regulation of Interception of Communications and Provision of Communication Related Information Act 70 of 2002 available from <http://www.gov.za/acts/2002/a70-02>

1.1.8 “**Service**” means the services described in the Service Application Form or applicable quotation;

1.1.9 “**Signature Date**” means the date when the last party signing this agreement does so;

1.1.10 “**Spam**” means unsolicited e-mail communications addressed to the Subscriber or Sub-Users and determined to be unsolicited according to agreed principles and processes, regardless of the fact that the communication in question does not amount to an unsolicited communication;

1.1.11 “**Subscriber**”, “**you**” or “**your**” means you the customer to whom services are provided, the person or business detailed as such in the Service Application Form and/or quotation;

1.1.12 “**Subscriber Communication(s)**” means:

- i. Data messages created or sent by the Subscriber and/or Sub-Users;
- ii. e-mail messages addressed to the Subscriber and/or any Sub-User User (including hyperlinks in and attachments to such messages);
- iii. e-mail messages created and sent by the Subscriber and/or any Sub-User (including hyperlinks in and attachments to such messages);
- iv. internet web sites or web pages downloaded by the Subscriber and/or Sub-Users;

- v. internet postings made by the Subscriber and/or Sub-Users to any internet web site, chat room or message board;
  - vi. software downloaded by the Subscriber and/or Sub-Users from any internet or extranet environment; and
  - vii. any and all “archived communication-related information” and/or “communication-related information” as defined in the RIC Act.
- 1.1.13 “Subscriber Representative”** means the person so indicated by the Subscriber on the Service Application Form or such other person as may be nominated from time to time by the Subscriber; and
- 1.1.14 “Sub-User(s)” or “Users”** means any person who has access to the Service through the Subscriber, including but not limited to employees, friends and/or family members of the Subscriber;
- 1.1.15 “Contract Term”** means where you have committed to a minimum term (typically a multiple of years) the “Contract Term” is the period stated in the applicable quotation. At the end of the Contract Term, your Service will continue on a Month-to-Month basis;
- 1.1.16 “Month-to-Month”** means the Services specified in the applicable quotation as “Month-to-Month”. Such Service(s) may then be cancelled by providing NCC with a Cancellation Request in writing 30 days prior to the date of the service you wish to cancel;
- 1.1.17 “Quotation”** means the written quotation (either in electronic or paper form) provided to you by NCC for signature, which describes the Services, Fees and Contract Term you are purchasing, and that is signed by the Subscriber, either manually or electronically;
- 1.1.18 “Service Application Form”** means the written quotation (either in electronic or paper form) provided to you by NCC for signature, which describes the Services, you are purchasing, and that is signed by the Subscriber, either manually or electronically;
- 1.1.19 “AUP”** means acceptable use policy;
- 1.1.20 “Confidential Information”** means all non-public information disclosed by either you or NCC to the other that the recipient should reasonably understand and be aware to be confidential. NCC’s Confidential Information includes unpublished pricing information and terms of service, audit reports, compliance and certification reports, security reports, product development plans, data centre designs, server configuration designs and other proprietary information or technology;
- 1.1.21 “Fees”** means the monthly fees for Services as specified in your accepted quotation and invoices;
- 1.1.22 “Website”** means the NCC website, currently located at [www.ncc.co.za](http://www.ncc.co.za);
- 1.1.23** Words importing the singular shall include the plural and vice versa, words importing the masculine gender shall include the neuter gender and vice versa and words importing persons shall include partnerships and bodies corporate.

## **2 APPOINTMENT OF NCC**

The Subscriber hereby appoints NCC to provide the Service to the Subscriber and Sub-Users and NCC hereby accepts such appointment, subject to the terms and conditions detailed herein, and available at <http://www.ncc.co.za>.

### **3 RELATIONSHIP BETWEEN THE PARTIES**

**Nothing in this agreement shall constitute an employer / employee relationship or an agency or a partnership in any shape or form between the parties nor authorise either of the parties to incur any liability on behalf of the other of them, save to the extent expressly provided for herein or as agreed and reduced to writing during the course of this agreement.**

### **4 COMMENCEMENT DATE AND PERIOD**

This Service shall:

- 4.1.1** commence on the day that the service is activated for use of the Subscriber and/or the activation date requested by the Subscriber;
- 4.1.2** continue if indicated for the minimum committed period stated by the "Contract Term" in the applicable quotation;
- 4.1.3** at the end of the Contract Term, your Service will continue on a Month-to-Month basis. In such case, the Subscriber is not required to re-sign the agreement each month as the applicable original agreement for signature on commencement of Services remains in effect and binding until a termination request, subject always to the provisions of this agreement, is received by NCC; and
- 4.1.4** subject to NCC's and the Subscriber's right to terminate this agreement with written notice, the period of which is provided for under the applicable clause, and subject always to the provisions of this agreement.

### **5 PAYMENT TERMS**

**5.1** Your Fees are Due:

- 5.1.1** in consideration for the Service to be rendered by NCC to the Subscriber in terms of this agreement, the Subscriber shall pay NCC the fees as set out in the Quotation;
- 5.1.2** all Fees charged under this Agreement and/or applicable Quotation are due and payable by you on the due date of the invoices generated by NCC, unless otherwise specified in Additional Terms and Conditions, or where otherwise agreed to in writing by the Parties;
- 5.1.3** non-recurring Fees (such as initial set-up, paid-for support requests or any other non-recurring service) will be billed on or around the date incurred, or on or around the first billing cycle that follows the date incurred, at NCC's option and are payable by you when due;
- 5.1.4** you must report any overcharges or billing disputes to NCC within 30 days of the time you receive your invoice. You agree that charges that are not disputed within 30 days of the date they are charged are conclusively deemed accurate;
- 5.1.5** it is your responsibility to notify NCC if you have not received your monthly invoices and statement by the 5<sup>th</sup> of each month;
- 5.1.6** the applicable Quotation state if Fees include or exclude VAT;
- 5.1.7** credit for services must be applied for in writing and is at the sole discretion of the Directors. Credit applied for may not be more than the monthly fee for that specific service.

**5.2 Additional Terms Affecting Payments by Debit Order:**

**5.2.1** If you pay by Debit Order, then NCC will charge your bank account 30 days after invoice (as applicable) to pay for any charges that may apply to your account. See 5.1.3 for any disputes in billing;

**5.2.2** you agree that you will notify NCC of any changes to bank account or any other information NCC may reasonably require in order to process your payments in a timely manner.

**5.3 Other Fees:** You are responsible for paying NCC the following additional fees:

**5.3.1** NCC will have the option to charge overdue amounts with interest at 1.5% per month;

**5.3.2** you will be responsible for any costs NCC incurs in enforcing collection of any fees payable by you under this Agreement, including reasonable legal fees, court costs or collection agency fees;

**5.3.3** any costs NCC incurs due to insufficient funds or other charges incurred in connection with payment processing of your account.

**5.4 Suspension:** NCC may suspend Services, upon notice to you, where the Fees for such Services are overdue.

**5.5 Price Reviews:** NCC might at their own discretion annually review Fees. NCC may at any time increase the Fees, due to a significant change of financial exposures or costs, and will give sixty (60) days' notice of any such increase in Fees. Subscriber is entitled to terminate the Services for which the Fee change is unacceptable.

**5.6 Additional Services and/or Equipment:** Equipment quoted on in applicable Quotation will be configured and delivered to you in a working condition. Should you require any further modifications, configurations and/or installation of software or hardware not included in the Quotation, an additional fee of R 605.00 ex. vat per hour will be charged.

**6 TERMINATING YOUR SERVICES**

**6.1 Termination:** This Agreement and all Services, or a single Service provided to you by NCC, may be terminated in one of the following ways:

**6.1.1** by NCC for any reason by providing you with notice at least 30 days prior to the date we intend to terminate this Agreement, the Services, or a Service;

**6.1.2** by NCC immediately if you fail to pay any fees for Services later than 10 (ten) days after they are due, or if NCC determines that you have used fraudulent information to order or pay for your Services;

**6.1.3** by either you or NCC, if the other Party commits a material breach or fails to perform any obligations under this Agreement, and has not remedied the breach within 30 days after receipt of a notice from the non-breaching Party identifying the breach or failure; or

**6.1.4** as otherwise provided in this Agreement, including as set forth in the AUP.

## **7 EARLY TERMINATION FEES**

- 7.1 Standard Services:** If you terminate this Agreement or a Service before the end of its Contract Term by providing a Cancellation Request to NCC, then you will be liable for the early cancellation fees of the specific Service(s) as calculated at cancellation date.
- 7.2 Non-standard Services:** If you terminate a Service provided by NCC using non-standard services or hardware procured specifically for Subscriber then you will be liable to pay to NCC an early termination fee equal to 100% of the total Fees payable for the Terminated Services for the remainder of your Contract Term. For the avoidance of doubt, all Services shall be deemed to be Standard Services unless clearly indicated otherwise by NCC.

## **8 THE SERVICES**

- 8.1.1** NCC shall in pursuance of its appointment in terms hereof:
- 8.1.2** provide the Service as detailed in the Service Application Form to the Subscriber and/or Sub-Users;
- 8.1.3** exercise the utmost good faith towards the Subscriber both in carrying out its duties hereunder and also in all its dealings with the Subscriber;
- 8.1.4** exercise all reasonable skill, care and diligence in the discharge of its obligations in terms of this agreement; and
- 8.1.5** provide the Service in a competent, professional and timely manner with reasonable skill and care.
- 8.1.6** Subject to the provisions of the RIC Act the Subscriber:
- 8.1.7** authorises NCC to monitor the Subscriber's use of the Service and Subscriber Communications in order to provide statistical information to the Subscriber;
- 8.1.8** authorises NCC to employ the necessary technology to intercept and delete Subscriber Communications that amount to Spam;
- 8.1.9** authorises NCC to scan and monitor Subscriber Communications for illegal or unaccepted words, terms and graphics, as indicated by the Subscriber, and to block and/or delete such Subscriber Communications;
- 8.1.10** authorises NCC to employ the necessary technology to scan and monitor all Subscriber Communications for any form of Malicious Computer Code and to block and/or delete such Subscriber Communications;
- 8.1.11** authorises NCC to intercept, copy, and forward all Subscriber Communications of Sub-Users identified by the Subscriber to the Subscriber Representative, if so required by the Subscriber, and only to monitor compliance with acceptable use policies or to identify illegal use of the Service; and
- 8.1.12** shall not employ or allow Sub-Users to employ illegal software and encryption technology that prevents the interception or decryption of Subscriber Communications.
- 8.1.13** The Subscriber warrants that:
- 8.1.14** it has obtained the necessary authority and consent to authorise the actions detailed in clause 8.1.6 on behalf of Sub-Users;
- 8.1.15** it indemnifies and holds NCC harmless against any loss, liability or damage resulting from a breach of the authority and undertaking given in clause 8.1.6;

- 8.1.16 it has an acceptable use policy in place that governs the use of the Service by the Subscriber and Sub-Users and prohibits the use of the Service for illegal, unauthorised, immoral or unwanted purposes; and all Sub-Users are aware of the Subscriber's acceptable use policy;
- 8.1.17 the Subscriber indemnifies and holds NCC harmless against loss, liability or damages of whatsoever nature incurred by NCC or third parties related to:
- 8.1.18 the use of the Service by the Subscriber or Sub-Users;
- 8.1.19 the interception of Subscriber Communications; or
- 8.1.20 the content of Subscriber Communications.
- 8.1.21 NCC shall not be liable, in any manner whatsoever, for damage, loss or liability incurred by the Subscriber or Sub-Users related to the use of the Service or the installation of any technology provided by NCC;
- 8.1.22 although NCC shall employ all reasonable attempts to provide the Service free of errors or interruptions, it does not make any warranties or representations that the Service will be uninterrupted, error free or that enough bandwidth will be available to the Subscriber at any specific time; and
- 8.1.23 in the event of NCC being unable to provide any of the Services referred to in the mutually signed Service Level Agreement, NCC shall notify the Subscriber Representative immediately and take all reasonable steps to remedy the defect.

## 9 CONSIDERATION

- 9.1 **Hardware and Software:** NCC makes every effort to adopt a 'best in class' strategy with regards to the products it uses to provide the Services. However, NCC does not manufacture the hardware, and in most cases does not develop the software components, that are used to provide the Services. NCC does not make any representations or warranties regarding either fitness for any particular purpose, nor any standard or quality, unless this forms part of the manufacturers' or developers' specifications for such products. This Section does not affect your rights under the Service Level Agreement.
- 9.2 **Hardware and Software Risk:** All risk in and to all goods sold by NCC to the customer shall pass to the customer on delivery thereof. Ownership in all goods sold and delivered shall remain vested in NCC until the full purchase price has been paid.
- 9.2.1 **Hardware warranty:** NCC does not supply stand-by components unless specifically agreed upon prior to commencement of Services. NCC will not be liable to you, a User or any other third party for any temporary delay, outage or interruption of a Service.
- 9.3 **Liability for Defects:** NCC is dependent on manufacturers and developers of the 3rd Party Products for updates and patches, including security patches, and will have no liability to you, your Users or any third party with respect to security and/or functionality vulnerabilities inherent in the applicable products.
- 9.4 **License Terms:** You agree to observe the terms of any license or applicable end user subscriber agreement for 3rd Party Products. NCC will not have any liability to you or any other party resulting from your violation of any license agreements or end user subscriber agreements that govern such Branded Products and that you will be solely responsible for any additional software or products that you install or use in connection with the Services. It is the

Subscriber's responsibility to ensure that end-user subscriber agreements are renewed in a timely manner. NCC is not responsible for observing the contract period of such agreements.

- 9.5 IP Addresses:** You agree that you will use any Internet protocol ("IP") numbers and addresses assigned to you by NCC in accordance with all reasonable regulations and policies established by NCC, and in accordance with any applicable international standards with respect to the use of IP numbers and addresses. NCC will maintain and control ownership of all IP numbers and addresses that it may assign to you. The allocation of your IP Addresses is determined by a third party IP allocation authority, not NCC. Where NCC requires, or, if the applicable third party IP allocation authority requires us to, NCC may change or remove any and all IP addresses that we have assigned to you. To the extent possible, we will give you reasonable prior notice of any such change. Where you have been granted the right by NCC to configure your own servers, you may not attempt to change or modify your allocated IP addresses without prior notice to NCC.
- 9.6 Security:** The online security of your server and user access control (including the safety of all passwords and ensuring that the technical contacts specified for your services are up-to-date) is your responsibility, although NCC offers additional Services that you may select to help you keep your servers and data secure. If your server is responsible for or involved in an attack or unauthorized access to another server or system, you will notify NCC immediately and NCC will have the right to respond as it determines appropriate including the right to identify, isolate and block the source of the attack.
- 9.7 Customer Data:** NCC is not aware of and does not monitor the type, nature or value of your data either passing over our network or being stored in our hardware, nor can we audit, view or manipulate your data in the ordinary course of business. The following provisions explain how we operate and your responsibilities:
- 9.7.1 Data Retention/Server Reclaim:** NCC will remove and permanently delete any data stored on its systems or servers following the termination of any Services in accordance with its internal procedures. You will not have access to the systems or hardware following termination of a Service; therefore it is your responsibility to retain a copy of the data prior to termination. Where you request a copy of such data prior to termination, and where NCC's systems permit recovery of such data, NCC will use reasonable efforts to provide you with a copy of your data, subject to your payment of any reasonable fees quoted by NCC in association with your request.
- 9.7.2 Backups:** The backing up of data will be the sole responsibility of the client. The supplier will not be responsible for any loss of data. It is you the Customer's responsibility to ensure that you have sufficient data retention and versioning backups. You the Customer are responsible for the integrity and content of such backups.
- 9.7.3 Data losses:** Our services are designed to minimize and/or mitigate the risk of data losses, to the extent possible. **You are responsible for selecting services appropriate to your needs.** NCC provides a Quotation that includes a list of suggested services and components. Failure to select any service(s) or component(s) is done entirely at the Subscriber's own risk.

- 9.8 Interruption of Service:** NCC does not guarantee that (i) access to any Service will be uninterrupted or completely error-free; (ii) that defects can or will be corrected; or (iii) that any Service will be completely secure. You agree that:
- 9.8.1** except as expressly provided in the Service Level Agreement, NCC will not be liable to you, a User or any other third party for any temporary delay, outage or interruption of a Service; and
- 9.8.2** NCC is not liable for any delay or failure to perform its obligations under this Agreement where the delay or failure results from an act of God or other cause beyond NCC's reasonable control.
- 9.9 Customer Requirements:** You acknowledge and agree that it is your responsibility to ensure that the Services are appropriate and suitable for your requirements. Where NCC provides advice in reference to your Service requirements or the configuration of any equipment used in connection with your Service, such advice is provided in a good faith basis using reasonable skill and care. Professional services are subject to separate agreement between the Parties.
- 9.10 Patches:** You are responsible to implement and install appropriate and updated patching policies to secure your Services.
- 9.11 End of Life Support:** NCC may identify your Service or a product component of your Service as "End of Life" and request that the EOL Product be replaced by an NCC supported service or component and that you migrate your Services to such NCC supported service or component. NCC has no obligation to continue to make an EOL Product available after the End of Life date identified by NCC.
- 9.11.1** NCC's Service Level Agreements and performance guarantees will not apply to the EOL Product or any aspect of your Service that is adversely affected by the EOL Product.

## **10 CONFIDENTIALITY UNDERTAKINGS BY NCC**

NCC shall not use or disclose, in any manner whatsoever, any information concerning the Subscriber, Sub-Users or Subscriber Communications unless so agreed between the parties or obliged to do so through due legal process in terms of relevant legislation.

## **11 INTELLECTUAL PROPERTY RIGHTS**

NCC hereby licenses the Subscriber to install and use software provided by NCC for the purposes of this agreement and the use of the Services and reserves all other rights.

## **12 FAILURE TO PERFORM**

Should either party fail to fulfil its obligations in terms of this agreement as a result of:

- 12.1.1** inability to secure labour, materials or supplies despite having taken reasonable steps to procure same;
- 12.1.2** any act of God, war, strike, lockout or other labour dispute, fire, terrorism, urban terror, flood, Malicious Code Infection, denial of service attack, power failure, telecommunications infrastructure damage or failure or legislation; or
- 12.1.3** any other cause beyond the reasonable control of the party concerned,

then notwithstanding anything to the contrary contained or implied in this agreement, the other party shall not be entitled to terminate this agreement prematurely, nor shall it have any claim for damages in whatsoever nature against the party concerned.

### **13 NO ASSIGNMENT**

The Subscriber shall be not entitled in any manner whatsoever to:

- 13.1.1 cede its rights;
- 13.1.2 delegate its obligations; and/or
- 13.1.3 assign its rights and obligations,

under this agreement without the prior written consent of NCC.

### **14 EARLY TERMINATION**

Should:

- 14.1.1 either party commit any breach of their obligations and/or undertakings in terms of this appointment and/or any other term and/or condition of this appointment, and fail to remedy such breach within a period of 7 (seven) days after receipt of written notice requiring it to do so;
- 14.1.2 either party repeatedly breach any of the terms and/or conditions hereof in such a manner as to justify the innocent party in holding that the other party's conduct is inconsistent with the intention or ability of such other party to carry out the provisions of this agreement; or
- 14.1.3 either party become liquidated or insolvent or be in the process of liquidation or insolvency,

then in all or any of such events, the other (innocent party) shall be entitled, without prejudice to any other claims that it may have, to prematurely terminate the appointment under this agreement, and claim damages where appropriate.

### **15 ARBITRATION**

Subject to urgent and interim relief, all disputes in terms of this agreement, the interpretation hereof or the use of and provision of the Service, shall be referred to confidential arbitration in terms of the Expedited Rules of the Arbitration Foundation of South Africa (AFSA) and such arbitration shall be conducted in English in Bloemfontein. The AFSA Expedited Rules may be downloaded from: [http://www.arbitration.co.za/Pages/docs/expedited\\_rules.pdf](http://www.arbitration.co.za/Pages/docs/expedited_rules.pdf) .

### **16 NOTICES AND DOMICILIA**

The Subscriber chooses its *domicilium citandi et executandi* ("domicilium") for the purposes of the giving of any notice, the serving of any process and for any other purpose, the addressed provided in the Service Application Form.

### **17 GENERAL**

- 17.1.1 No Data Message sent by the Subscriber to NCC shall amend this agreement or the rights and duties of the parties hereto in any manner, unless such a data message is reduced to paper and signed by the parties;
- 17.1.2 Data Messages sent by the Subscriber to NCC shall be deemed to be received by NCC only when NCC responds thereto, and for the purposes of this clause an auto-response shall not be deemed as a response by NCC;
- 17.1.3 legal notices and/or disclaimers linked or accessible from or attached to a data messages (as defined above) sent by NCC to the Subscriber shall be deemed

part of this Agreement and shall override and replace any such notices and disclaimers linked or accessible from any data messages sent by the Subscriber;

- 17.1.4** no alteration, cancellation, variation of, or addition hereto shall be of any force or effect unless reduced to writing and signed by all parties to this agreement or their duly authorised representatives;
- 17.1.5** this document contains the entire agreement between the parties and no party shall be bound by any undertakings, representations, warranties, promises or the like not recorded herein;
- 17.1.6** No indulgence, leniency or extension of time which any party (the Grantor) may grant or show to any other party, shall in any way prejudice the Grantor or preclude the Grantor from exercising any of its rights in the future; and
- 17.1.7** The law of South Africa and the jurisdiction of the South African courts shall govern this agreement.

**18. COSTS**

Each party shall be responsible for its own legal costs incurred in connection with the negotiation and preparation of this agreement and attendances incidental thereto.

SIGNED at .....on the ..... day of .....2018

Witnesses:

1 .....

2 .....

*(Signature of Witnesses)*

.....

*(obo Subscriber, who warrants his/her authority to sign)*

SIGNED at .....on the ..... day of .....2018

Witnesses:

1 .....

2 .....

*(Signature of Witnesses)*

.....

*(obo ISP)*

*Parties must initial every page of this agreement and, if necessary, at all changes made in ink*