

DRAFT - NOT FOR SIGNATURE

DESIGN & CONSTRUCTION SUBCONTRACT

between

EDEN WASTE MANAGEMENT (RF) PROPRIETARY LIMITED

and

EDEN D&C SUBCONTRACTOR (RF) PROPRIETARY LIMITED

WEBBER WENTZEL

in alliance with > **Linklaters**

CONTENTS

Clause	Page
1. Introduction	5
2. Definitions	5
3. Interpretation.....	18
4. Duration	20
5. Transaction Documents.....	20
6. Project Deliverables	20
7. General Obligations.....	22
8. Private Party Warranties.....	24
9. D&C Subcontractor Warranties.....	24
10. Indemnities	25
11. Third Party Claims.....	26
12. Limitation on Liability	27
13. Double Recovery and Mitigation	27
14. Project Site	27
15. Consents.....	29
16. Heritage Objects and Resources	29
17. Provision of the Facilities.....	30
18. Design and construction	31
19. Municipality's and Private Party's Right to Inspect.....	31
20. Works Programme and Dates for Completion	32
21. Completion Certificate	33
22. Quality Assessment Plans and System.....	35
23. Plant and Equipment.....	36
24. Payment.....	36
25. Reporting Requirements.....	39
26. Insurance	40
27. Uninsurable Risks	42
28. Consequences of Relief Event.....	42
29. Consequence of a Compensation Event.....	44
30. Force Majeure.....	47
31. Unforeseeable Conduct.....	48
32. Municipality Variations.....	50
33. D&C Subcontractor and other Variations	54
34. General "Pass-Through" Principle	55
35. Personnel.....	57
36. Monitoring and Inspection	57
37. Environmental Policy.....	57

38.	Occupational Health and Safety	58
39.	Target Group Requirements of the D&C Subcontractor	59
40.	Subcontracting	61
41.	Local Employment.....	61
42.	Termination for Private Party Default	61
43.	Termination for D&C Subcontractor Default	63
44.	Termination for Force Majeure.....	65
45.	Termination for Corrupt Acts.....	65
46.	Effects of Termination	67
47.	Compensation on Termination for Private Party Default.....	70
48.	Compensation on termination for D&C Subcontractor Default.....	71
49.	Compensation on Termination for Force Majeure	72
50.	Compensation on termination for Corrupt Acts.....	72
51.	Municipality Step-In.....	72
52.	Information and Audit Access	75
53.	Intellectual Property of the Municipality.....	75
54.	Assignment & Changes in Control	77
55.	Dispute Resolution	78
56.	Governing Law and Jurisdiction.....	82
57.	Amendments.....	82
58.	Provisions in favour of the Lenders and the Municipality	82
59.	Waiver	83
60.	Entire Agreement	83
61.	Severability	84
62.	Representatives	84
63.	Counterparts	85
64.	Notices and Legal Service.....	85
65.	Public Relations and Publicity.....	86
66.	Confidentiality	87
67.	Costs and Expenses	88
	ANNEXE A SECTION 37(2) UNDERTAKING.....	89
	ANNEXE B MILESTONES	93
	ANNEXE C FORM OF PAYMENT CLAIM CERTIFICATE	94
	ANNEXE D FORM OF TAX INVOICE	95
	ANNEXE E DEDUCTIONS.....	96
	ANNEXE F SUBCONTRACTOR'S OUTPUT SPECIFICATIONS.....	97
	ANNEXE G PPP AGREEMENT	102
	ANNEXE H WORKS PROGRAMME.....	103
	ANNEXE I APPROVED SUBCONTRACTORS.....	104
	ANNEXE J FORM OF PERFORMANCE BOND	105

ANNEXE K FORM OF PARENT COMPANY GUARANTEE	109
ANNEXE L DESIGN PROPOSAL.....	112
ANNEXE M WASTE MANAGEMENT LICENCE.....	113
ANNEXE N ACCEPTABLE FINANCIAL INSTITUTIONS	114

1. INTRODUCTION

- 1.1 The Municipality wishes to procure a new waste disposal facility as well as the bulk transfer of waste from transfer stations to the Project Site and the implementation of alternative waste technologies for the Municipality to be situated on the Municipality's procured and owned land (in Mossel Bay).
- 1.2 Accordingly the Municipality issued the RFP inviting proposals from the private sector for the development, design, finance, maintenance and operation of a new district regional landfill disposal facility on the Project Site.
- 1.3 Pursuant to a competitive tender process, the Private Party was selected as the preferred bidder and its proposal negotiated, pursuant to which the Municipality has requested the Private Party, and the Private Party has agreed to undertake and provide the Project Deliverables on the terms and conditions set out in the PPP Agreement.
- 1.4 The PPP Agreement regulates:
- 1.4.1 the development, design, finance, maintenance and operation of a new district regional landfill disposal facility on the Project Site to initially serve the four local municipalities of Bitou, Knysna, George and Mossel Bay. The Municipality may in future propose a Variation in order to include the other local municipalities within the Garden Route District Municipality;
- 1.4.2 the development and provision of alternative waste treatment technologies to the local municipalities within the Garden Route District Municipality as set out in Schedule 7: Output Specifications of the PPP Agreement or as may be agreed in writing between the Private Party and the Municipality after the Service Commencement Date in accordance with the provisions of the PPP Agreement; and
- 1.4.3 the provision of bulk transport services for the transfer of waste from transfer stations to the Landfill Site and waste management and may include chipping, crushing and alternative waste technologies.
- 1.5 The Private Party wishes to appoint the D&C Subcontractor, and the D&C Subcontractor has agreed, to undertake and provide the Works in respect of the Project on the terms and conditions set out in this Agreement.

2. DEFINITIONS

- 2.1 In this Agreement, unless the context otherwise requires, the following capitalised terms shall have the meanings assigned to them below and cognate expressions shall have corresponding meanings:
- 2.1.1 **Acceptable Financial Institution** means any financial institution listed in Annexe N;
- 2.1.2 **Associated Agreement Dispute** has the meaning set forth in clause 55.12;
- 2.1.3 **Actual Construction Completion Date** means the date on which the construction and commissioning of all the Works is actually completed, being the date on which the Phase 2 Completion Certificate is issued;

- 2.1.4 **Affiliate** means any person that directly or indirectly through any one or more intermediaries Controls, is Controlled by or is under common Control with any person;
- 2.1.5 **Agreement** means this Design & Construction Subcontract between the Private Party and the D&C Subcontractor, together with its schedules, appendices and annexes;
- 2.1.6 **Annual Skills Development Commitment** has the meaning set forth in clause 39.1.6;
- 2.1.7 **Annexe** means any annexe to this Agreement and any **Annexes** means any 2 or more or all of the annexes to this Agreement;
- 2.1.8 **Approved Subcontractors** means the subcontractors listed in Annexe I;
- 2.1.9 **Availability Certificate** means the certificate to be issued by the Private Party pursuant to clause [21.3] of the PPP Agreement certifying that the Services are Available;
- 2.1.10 **Black Enterprise** means an enterprise that is at least 50.1% beneficially owned by Black People and in which Black People have substantial Management Control. Such beneficial ownership may be held directly or through other Black Enterprises;
- 2.1.11 **Black People** means African, Coloured and Indian South African citizens as defined in the Broad Based Black Economic Empowerment Amendment Act, 2013 and Black Person means any such citizen;
- 2.1.12 **Black Shareholder** means any Shareholder that is a Black Person or a Black Enterprise;
- 2.1.13 **Black Women** means female African, Coloured and Indian South African citizens;
- 2.1.14 **Business Day** means any day except a Saturday, Sunday or gazetted national public holiday in the Republic of South Africa;
- 2.1.15 **Capital Expenditure** means any expenditure or obligation and reflected as such in the Financial Model (as defined in the PPP Agreement) and the then current applicable project budget;
- 2.1.16 **Certification Date** means:
- (a) the 25th day of every calendar month; and
 - (b) if the 25th day of a calendar month is not a Business Day, then such date falling on the last Business Day preceding such 25th day;
- 2.1.17 **Change in Control** means any direct change in Control in any of the members of the D&C Subcontractor;
- 2.1.18 **Change in Law** means the introduction, application coming into effect of and/or change in the application after the Signature Date of this Agreement of a Law or any amendment or variation to any Law other than any Law that on or before the Signature Date has been published;

- (a) in a draft bill as part of a government white or green paper which is subsequently enacted in substantially the same form; or
 - (b) in a bill which is subsequently enacted in substantially the same form;
- 2.1.19 **Companies Act** means the Companies Act, 2008;
- 2.1.20 **Compensation Date** means in respect of any termination amount that is payable pursuant to the termination of this Agreement, a date that falls **[10]** Business Days after the Private Party receives payment of such termination amount from the Municipality;
- 2.1.21 **Compensation Date Interest Rate** means the rate of interest applicable to the Debt as set out in the Financing Agreements;
- 2.1.22 **Compensation Event** means any breach by the Municipality including a breach of any of the Municipality's obligations under the PPP Agreement, save for any breach that constitutes a Municipality Default;
- 2.1.23 **Completion Certificate/s** means the Phase 1 Completion Certificate and the Phase 2 Completion Certificate (as the case may be);
- 2.1.24 **Confidential Information** means all information disclosed by one Party to the other Party pursuant to this Agreement, which information is either designated as confidential by the disclosing Party or is confidential by its nature, and all Confidential Information as defined in the PPP Agreement;
- 2.1.25 **Consents** means all consents, permits, clearances, authorisations, approvals, rulings, exemptions, registrations, filings, decisions, licenses, permissions required to be issued by or made with any Responsible Authority in connection with the performance of any of the Works;
- 2.1.26 **Construction Term** means the period commencing on the Effective Date and ending on the Expiry Date or the Termination Date, whichever occurs first;
- 2.1.27 **Contract Month** means each calendar month occurring during the Construction Term;
- 2.1.28 **Control** means in relation to any person, the ability (directly) to direct or cause the direction of the votes attaching to the majority of its issued shares or interests carrying voting rights, or to appoint or remove or cause the appointment or removal of any directors (or equivalent officials) or those of its directors (or equivalent officials) holding the majority of the voting rights on its board of directors (or equivalent body);
- 2.1.29 **Corrupt Act** means:
- (a) offering, giving or agreeing to give to the Municipality or any other organ of state or to any person employed by or on behalf of the Municipality or any other organ of state any gift or consideration of any kind as an inducement or reward:
 - (i) for doing or not doing (or for having done or not having done) any act in relation to the obtaining or performance of the PPP Agreement or any other contract with the Municipality or any other organ of state; or

- (ii) for showing or not showing favour or disfavour to any person in relation to the PPP Agreement or any other contract with the Municipality or any other organ of state;
- (b) entering into the PPP Agreement or any other contract with the Municipality or any other organ of state in connection with which commission has been paid or has been agreed to be paid by the Private Party or on its behalf, or to its knowledge, unless before the relevant contract is entered into particulars of any such commission and of the terms and conditions of any such contract for the payment of such commission have been disclosed in writing to the Municipality;
- (c) committing any offence:
 - (i) under any law from time to time dealing with bribery, corruption or extortion;
 - (ii) under any law creating offences in respect of fraudulent acts; or
 - (iii) at common law, in respect of fraudulent acts in relation to the PPP Agreement or any other contract with the Municipality or any other public body; or
 - (iv) defrauding or attempting to defraud or conspiring to defraud the Municipality or any other public body;

2.1.30 **CPI** means the consumer price index excluding interest on mortgage bonds, for metropolitan and other urban areas (Base 2000=100) published from time to time by Statistics SA in Statistical Release PO141.1 or as determined in terms of the PPP Agreement;

2.1.31 **D&C Subcontractor** means Eden D&C Subcontractor (RF) Proprietary Limited, a private company, with limited liability, duly registered and incorporated in accordance with the company laws of the Republic of South Africa, with registration number 2018/549731/07, the entity appointed by the Private Party to perform the Works pursuant to the PPP Agreement;

2.1.32 **D&C Subcontractor Consents** means all Consents required in connection with the performance of the Works and the Subcontractor's Project Deliverables (save for the Municipal Consents);

2.1.33 **D&C Subcontractor Default** means any of the following events or circumstances:

- (a) any arrangement, composition or compromise with or for the benefit of creditors (including any voluntary arrangement as defined in the Insolvency Act, 1936, or the Companies Act) being entered into by or in relation to the D&C Subcontractor without the prior written consent of the Private Party;
- (b) a liquidator, business rescue practitioner or the like taking possession of or being appointed over, or any winding-up, execution or other process being levied or enforced (and in respect of such execution or other process, not being discharged within 20 Business Days) upon, the whole or any material part of the assets of the D&C Subcontractor (in any of

these cases, where applicable, whether provisional or final, and whether voluntary or compulsory);

- (c) the D&C Subcontractor ceases to carry on with its business;
- (d) a resolution being passed or an order being made for the administration, business rescue, winding-up, liquidation or dissolution of the D&C Subcontractor (in any of these cases, where applicable, whether provisional or final and whether voluntary or compulsory);
- (e) the D&C Subcontractor fails to complete the Works on the Long Stop Date;
- (f) the D&C Subcontractor commits a breach of any of its material obligations under this Agreement not covered by sub-clauses (a), (b), (c), (d), (e), (g), (h), (i), (j) and (k);
- (g) the D&C Subcontractor abandons the Works (other than as a consequence of a breach by the Private Party of its obligations under this Agreement);
- (h) the D&C Subcontractor fails to comply with any provision of clause 54 (in respect of assignment and Change in Control) and clause 6.4 (in respect of subcontracting);
- (i) the accumulation of R 500,000.00 or more Deductions in any year;
- (j) the D&C Subcontractor fails to pay any sum or sums due to the Private Party under this Agreement (which sums are not in dispute) which, either singly or in aggregate, exceed or exceeds R100 000 and such failure continues for 15 Business Days from receipt by the D&C Subcontractor of a notice of non-payment from the Private Party; and
- (k) any breach of any provision of this Agreement has occurred more than once within a rolling 3 month period and:
 - (i) the Private Party has given an initial warning notice to the D&C Subcontractor describing that breach in reasonable detail and stating that if that breach persists or recurs then the Private Party may take further steps to terminate this Agreement; and
 - (ii) that breach persists or recurs after the expiry of period of 45 days after the initial warning notice, and the Private Party has upon that breach so recurring or persisting issued a second and final warning notice, stating that if that breach persists or recurs within the period of 45 days after the final warning notice then the Private Party may terminate this Agreement on 10 days' notice to the D&C Subcontractor;

2.1.34 **D&C Subcontractor's Fee** has the meaning ascribed thereto in clause 24.1.1;

2.1.35 **D&C Subcontractor's Representative** has the meaning ascribed thereto in clause 62.2;

- 2.1.36 **Deductions** means the Penalty Deductions passed through by the Private Party to the D&C Subcontractor in terms of Annexe E of this Agreement which are attributable to the failure of the D&C Subcontractor to comply with its obligations under this Agreement, as contemplated under Annexe E of this Agreement;
- 2.1.37 **Default Interest Rate** means the interest rate applicable to the Debt, plus 100 bps (one hundred basis points);
- 2.1.38 **Defects** means any defects, errors, flaws or omissions in the Works or the Subcontractor's Project Deliverables;
- (a) **Defects Liability Period** means the period commencing on date on which each Completion Certificate is issued (as the case may be) and ending on the later of (i) the date falling 12 months after the issue of the Phase 1 Completion Certificate or (ii) such later date as extended in terms of clause 21.11;
- 2.1.39 **Effective Date** means the first (1st) Business Day following the date on which the Financing Agreements have become unconditional in accordance with their terms;
- 2.1.40 **Employment Equity Act** means the Employment Equity Act, 1998;
- 2.1.41 **Estimate** has the meaning ascribed to it in clause [50.2.3] of the PPP Agreement;
- 2.1.42 **Expiry Date** means the last day of the Defects Liability Period;
- 2.1.43 **Equity** means the entire issued share capital of the D&C Subcontractor;
- 2.1.44 **Facilities** means the buildings and other facilities, together with all supporting infrastructure, as required to enable the Private Party and or the D&C Subcontractor to exercise its rights and perform its obligations included in the Works;
- 2.1.45 **Financing Agreements** means the financing agreements listed in Schedule 17: Financing Agreements of the PPP Agreement and also includes the direct financing agreement;
- 2.1.46 **Financial Year** means the financial year of the Private Party, being 1 January to 31 December, other than in respect of the first year after Signature Date which shall commence on the Effective Date and end on 31 December;
- 2.1.47 **Force Majeure** means any of the following events:
- (a) war, civil war, armed conflicts or terrorism;
- (b) nuclear contamination, unless the D&C Subcontractor and/or any of its subcontractors is the source or cause of this contamination;
- (c) any act of God, earthquake, fire, explosion, flood, cyclone, tempest, riot, insurrection or other civil disorder; and/or
- (d) chemical or biological contamination of the Works and/or Facilities and/or the Project Site from any of the events referred to in this

Agreement, which directly causes any Party to be unable to comply with all or a material part of its obligations under this Agreement;

- 2.1.48 **Good Industry Practice** means applying, in relation to the manner in which the Works are performed, the standards, practices, methods and procedures conforming to applicable law, and exercising that degree of skill, care, diligence, prudence and foresight that would reasonably and ordinarily be expected from a skilled and experienced person engaged in a similar type of undertaking under similar circumstances in the Republic of South Africa;
- 2.1.49 **IFRS** means the International Finance Reporting Standards;
- 2.1.50 **Independent Certifier** means the independent certifier appointed by the Municipality pursuant to the PPP Agreement, who is responsible for issuing the Completion Certificates declaring that the relevant Works have been completed;
- 2.1.51 **Intellectual Property** means all intellectual property whatsoever used from time to time in connection with the Works and the Subcontractor's Project Deliverables, whether capable of registration, registered or not;
- 2.1.52 **Intellectual Property Rights** means rights, titles and interests in any Intellectual Property;
- 2.1.53 **Inspection Notice** means a notice from the D&C Subcontractor to the Private Party stating that the relevant Facilities are ready for inspection by the Independent Certifier;
- 2.1.54 **Landfill Site** has the meaning ascribed thereto in the PPP Agreement;
- 2.1.55 **Law** means:
- (a) the common law;
 - (b) all applicable statutes, statutory instruments, by-laws, regulations, ordinances, orders, rules and other secondary provincial or local legislation, treaties, directives and codes of practice having force of law in South Africa or the province or locality within which the Project is conducted;
 - (c) judicial decisions, notifications and all similar directives made pursuant thereto with which the D&C Subcontractor, the Municipality and or the Private Party are bound to comply;
- 2.1.56 **Lenders** means the financiers to the Private Party, from time to time, who are parties to the Financing Agreements;
- 2.1.57 **Long Stop Date** means the last Business Day of the [fourteenth] Contract Month calculated from the Effective Date as extended in accordance with this Agreement, or such other date as may be agreed to, in writing, by the Municipality and the Private Party, being the date by which the Services must have commenced, failing which the Private Party shall be entitled to terminate this Agreement;
- 2.1.58 **LTA** means the lender's technical advisor appointed by the Lenders pursuant to the Financing Agreements;

- 2.1.59 **MFMA** means Local Government: Municipal Finance Management, 2003;
- 2.1.60 **Milestones** means the milestones for the Construction Term listed in Annexe B;
- 2.1.61 **Minimum Black Equity** has the meaning ascribed thereto in clause 39.1.1;
- 2.1.62 **Municipal Consents** means the Consents to be procured and maintained by the Municipality, listed in Schedule 12: Municipal Consents of the PPP Agreement;
- 2.1.63 **Municipality** means the Garden Route District Municipality (formerly Eden District Municipality), duly established in terms of Section 12 and 14 of the Local Government: Municipal Structures Act 117 of 1998, by Establishment Notice No. PN499/2000, dated 22 September 2000, with its principal place of business situated at 54 York Street, George, Western Cape, South Africa;
- 2.1.64 **Municipality Default** means any of the following events:
- (a) an expropriation of a part of the shares (or shareholder loans) of the Private Party by the Municipality or other Responsible Authority;
 - (b) a failure by the Municipality to make payment of any amount or amounts that are due and payable by the Municipality under the PPP Agreement (which amounts are not in dispute) which, either singly or in aggregate exceeds the sum of R100 000.00 (one Hundred Thousand Rand) (index linked) and such failure continues for twenty (20) Business Days from receipt by the Municipality of a notice of non-payment from the Private Party;
 - (c) a breach by the Municipality of its obligations under the PPP Agreement which substantially or materially frustrates or renders it impossible for the Private Party to perform its obligations under the PPP Agreement for a continuous period of 3 months;
 - (d) a Corrupt Act in relation to the Project committed by an officer or employee of the Municipality; and
 - (e) a breach by the Municipality of its obligations in terms of clause [75] of the PPP Agreement;
- 2.1.65 **Municipality Representative** means the party(ies) appointed as such by the Municipality in terms of the PPP Agreement, which appointment shall exclude any person that may have represented a bidder for the Project;
- 2.1.66 **Municipality Variation Proposal** means a notice served by the Municipality to the Private Party for a Variation in terms of clause [50.2.2] of the PPP Agreement;
- 2.1.67 **Notice of Drawstop** means a notice by the Lenders to the Private Party providing that, *inter alia*, the Lenders suspend any disbursements or utilisations under the Financing Agreements;
- 2.1.68 **Occupational Health and Safety Act** means the Occupational Health and Safety Act, 1993;

- 2.1.69 **Operations Subcontractor** means Eden Operations Subcontractor (RF) Proprietary Limited, a private company, with limited liability, duly registered and incorporated in accordance with the company laws of the Republic of South Africa, with registration number 2018/549706/07, the entity appointed by the Private Party to deliver the Services pursuant to the PPP Agreement;
- 2.1.70 **Operations Subcontract** means the operations subcontract entered into by the Private Party and the Operations Subcontractor on or about the date of this Agreement, together with all its schedules, appendices and annexes;
- 2.1.71 **Output Specifications** means the specifications set out in Schedule 7:Output Specification of the PPP Agreement;
- 2.1.72 **Parent Company Guarantee** means the guarantee issued by Interwaste Proprietary Limited in favour of the D&C Subcontractor in the form attached hereto as Annexe K;
- 2.1.73 **Parties** means the Private Party and each member of the D&C Subcontractor and **Party** shall mean any of them as the context may require;
- 2.1.74 **Performance Bond** means the bond in the form set out in Annexe J provided by an Acceptable Financial Institution;
- 2.1.75 **Penalty Deductions** means the deductions to the Unitary Payments as contemplated in Schedule 1: Payment Mechanisms of the PPP Agreement;
- 2.1.76 **Phase 1 Completion Certificate** means the certificate to be issued by the Independent Certifier, declaring that the Phase 1 Works have been completed in accordance with this Agreement;
- 2.1.77 **Phase 2 Completion Certificate** means the certificate to be issued by the Independent Certifier, declaring that the Phase 2 Works have been completed in accordance with this Agreement;
- 2.1.78 **Phase 1 Works** means the first phase of the Works and the Subcontractor's Project Deliverables as detailed in the Works Programme;
- 2.1.79 **Phase 2 Works** means the second phase of the Works and the Subcontractor's Project Deliverables as detailed in the Works Programme;
- 2.1.80 **PPP Agreement** means the public private partnership agreement between the Private Party and the Municipality attached hereto as Annexe G, being a public private partnership agreement as contemplated in Section 120 and the PPP Regulations of the MFMA, together with the schedules to that agreement;
- 2.1.81 **Private Party** means Eden Waste Management (RF) Proprietary Limited, a private company, with limited liability, duly registered and incorporated in accordance with the company laws of the Republic of South Africa, with registration number 2014/092464/07, a special purpose vehicle incorporated for the purposes of entering into the PPP Agreement with the Municipality and for undertaking of the Project;
- 2.1.82 **Private Party Default** means any one of the following events:
- (a) a Municipality Default;

- (b) any event falling within subclauses [1.13.1] to [1.113.5] of the definition of **Private Party Default** in the PPP Agreement occurs in respect of the Private Party other than where a default under subclause 1.113.5 is caused or contributed to by any fault, failure, action or omission of the D&C Subcontractor;
- (c) a failure by the Private Party to make payment of any amount or amounts that are due and payable by the Private Party under this Agreement (which amounts are not in dispute) where:
 - (i) the D&C Subcontractor is not in breach of its obligations under this Agreement and the Private Party has been provided with funds from equity and debt advances to pay the D&C Subcontractor;
 - (ii) the D&C Subcontractor is not in breach of its obligations under this Agreement but the Lenders have failed to make the requisite debt advances to pay the D&C Subcontractor to the Private Party, in breach of the Lenders' obligations under the Financing Agreements; or
 - (iii) a Notice of Drawstop has been issued in terms of the Financing Agreements and the issue of such Notice of Drawstop is not due to any act or omission of the D&C Subcontractor;
- (d) the Municipality terminates the PPP Agreement pursuant to a Private Party Default under the PPP Agreement which was not caused or contributed to by any fault, failure, action or omission of the D&C Subcontractor under this Agreement; and
- (e) a breach by the Private Party of its obligations, which is not caused by a Municipality Default, under this Agreement which substantially or materially frustrates or renders it impossible for the D&C Subcontractor to perform its obligations under this Agreement for a continuous period of 30 days following receipt by the Private Party of a notice from the D&C Subcontractor setting out the nature of the default and the frustration caused as a result thereof;

- 2.1.83 **Private Party Representative** has the meaning ascribed thereto in clause 62.1.1;
- 2.1.84 **Project** means the provision by the Private Party of the Project Deliverables to the Municipality including inter alia the development, design, finance, maintenance and operation of a new district regional landfill / waste disposal facility as well as the bulk transfer of waste from certain transfer stations to the Project Site and the implementation of alternative waste technology;
- 2.1.85 **Project Deliverables** means the project deliverables undertaken by the Private Party which are set out in the Output Specifications;
- 2.1.86 **Project Insurances** has the meaning set forth in clause [42] of the PPP Agreement;
- 2.1.87 **Project Site** means the land made available by the Municipality to the Private Party for the conduct of the Project Deliverables and in turn made available by the Private Party to the D&C Subcontractor to undertake the Subcontractor's Project Deliverables;

- 2.1.88 **Protected Names** has the meaning ascribed thereto in clause 53.6;
- 2.1.89 **Relief Event** means:
- (a) any fire, explosion, tempest, flood, ionising radiation (to the extent it does not constitute an event of Force Majeure), earthquakes, riots, civil commotion and community unrest or pressure waves caused by devices travelling at supersonic speed;
 - (b) (without limiting the obligations of the Private Party or D&C Subcontractor regarding the design and construction specifications and the Subcontractor's Output Specifications) any failure by the Municipality, any Responsible Authority, utility provider or other like body which affects the ability of the D&C Subcontractor (and consequently the Private Party) to carry out the Works;
 - (c) any accidental loss or damage to the Works and/or Facilities;
 - (d) any off-site failure or shortage of power, water, fuel or transport;
 - (e) any blockade or embargo which does not constitute an event of Force Majeure;
 - (f) the discovery of any heritage objects or resources;
 - (g) any delay in obtaining any consent/Consent or such Consent is renewed on onerous terms;
 - (h) any official or unofficial strike, lock-out, go-slow or other such labour disputes generally affecting the Project;
 - (i) adverse weather conditions which fall outside the five-year average for the Project Site; or
 - (j) the outbreak of any plague or epidemic at the Facilities;
- 2.1.90 **Responsible Authority** means any ministry, any minister, any organ of state, any official in the public administration or any other governmental or regulatory department, commission, municipality, entity, service utility, board, agency, instrumentality or authority (in each case, whether national, provincial or municipal) or any court, each having jurisdiction over the matter in question, but excluding for all purposes the Municipality;
- 2.1.91 **RFP** means the request for proposals issued by the Municipality and dated 11 March 2015, Municipality inviting proposals from the private sector to undertake the development, design, financing, maintenance and operation of a new district regional landfill/waste disposal facility near Mossel Bay;
- 2.1.92 **Scheduled Service Commencement Date** means the date stipulated in the Works Programme as the day after the date on which the Availability Certificate is scheduled to be issued and the Services are due to commence;
- 2.1.93 **Section 37(2) Undertaking** means the written undertaking to be given by the D&C Subcontractor to the Private Party in terms of which the D&C Subcontractor accepts liability for health and safety matters under the

Occupational Health and Safety Act, in relation to the performance of the Works in the form attached hereto as Annexe A;

- 2.1.94 **Service Commencement** means the actual commencement of the Services, subsequent to the issue of the Availability Certificate;
- 2.1.95 **Service Commencement Date** means the date of Service Commencement as stated in the Availability Certificate issued by the Private Party in accordance with clause [21] of the PPP Agreement;
- 2.1.96 **Services** mean the operational services (excluding the Works) to be provided by or on behalf of the Private Party for the Municipality as set forth in the Output Specifications and as may be subsequently amended in accordance with the PPP Agreement;
- 2.1.97 **Shareholders** means the holders of the Equity;
- 2.1.98 **Shareholder Loans** at any date, in relation to any financing (other than the Equity) made available for the D&C Subcontractor by the Shareholders, all principal unpaid at that date;
- 2.1.99 **Signature Date** means the date of signature of this Agreement by the last signing Party;
- 2.1.100 **SMME** means an exempted micro enterprise or a qualifying small enterprise as defined in the Codes of Good Practice on Broad-Based Black Economic Empowerment issued in terms of the Broad-Based Black Economic Empowerment Act, 2013;
- 2.1.101 **South Africa** means the Republic of South Africa;
- 2.1.102 **Subcontractor Costs** means all damages, losses, liabilities, costs, and expenses (including legal costs and expenses) (**Losses**) that have been or will be reasonably and properly incurred by the D&C Subcontractor as a direct result of the termination of the PPP Agreement, but only to the extent that:
- (a) the Losses are incurred in connection with the completion of the Works by the D&C Subcontractor, including, without limitation:
 - (i) the cost of any materials or goods ordered or subcontracts placed that cannot be cancelled without such Losses being incurred;
 - (ii) the D&C Subcontractor's loss of profits for a period not exceeding 1 year;
 - (iii) any expenditure incurred in anticipation of the completion of the Works;
 - (iv) the cost of demobilisation including the cost of any relocation of equipment used in connection with the Project;
 - (v) retrenchment payments; and
 - (b) the Losses that are incurred under arrangements and or agreements that have been entered into for the purposes of the Project and are

consistent with terms that have been entered into in the ordinary course of business and on reasonable commercial terms; and

- (c) each of the D&C Subcontractor and its subcontractor:
 - (i) has used reasonable endeavours to mitigate its Losses to the extent required by the common law; and
 - (ii) has notified the Private Party of the amount of such costs, Losses, damages and expenditure within 20 Business Days of the Termination Date;

2.1.103 **Subcontractor's Insurances** has the meaning ascribed thereto in clause 26.4;

2.1.104 **Subcontractor's Output Specifications** means the specifications set out in Annexe F of this Agreement;

2.1.105 **Subcontractor's Project Deliverables** means those deliverables set out in Annexe F;

2.1.106 **Termination Date** means any date of early termination of this Agreement in accordance with its terms;

2.1.107 **Unforeseeable Conduct** shall occur if, after the Signature Date, the Municipality or any Responsible Authority takes any action (including any Change in Law) or fails to carry out its obligations as prescribed by law; and

- (a) the principal effect of which is directly borne by:
 - (i) the Project and not other similar PPP's;
 - (ii) the Private Party (and consequently the D&C Subcontractor) and not other persons; or
 - (iii) parties undertaking PPP's or similar PPP's and not other persons; and
- (b) in respect of which the Private Party (and consequently the D&C Subcontractor) is not entitled to any other relief pursuant to any other provision of the PPP Agreement or this Agreement (as the case may be);
- (c) which was not foreseen by the Private Party or the D&C Subcontractor (as the case may be) on or before the Signature Date or if foreseen, its direct consequences on the Project were not foreseen or the consequences were judged to be so small that they were not taken into consideration; and
- (d) which could not reasonably be foreseen by any person in the position of the Private Party or the D&C Subcontractor (as the case may be) on or before the Signature Date as being likely to occur, or, if it could reasonably have been foreseen, its direct consequences could not reasonably have been foreseen by any person in the position of the Private Party or the D&C Subcontractor (as the case may be) on or before the Signature Date, provided that the following shall not constitute unforeseeable conduct;

- (i) where any act or omission of the Municipality is in direct response to any act or omission of the Private Party or the D&C Subcontractor (as the case may be) which is illegal, other than an act or omission rendered illegal by virtue of such conduct of the Municipality or in violation of agreements to which the Private Party or the D&C Subcontractor (as the case may be) is a party;
- (ii) an increase in taxes of general application which does not discriminate against the Private Party or the D&C Subcontractor (as the case may be) and other parties undertaking projects similar to the Project; and
- (iii) such conduct by the Municipality is required as a result of an event of Force Majeure and is reasonably proportionate thereto;

2.1.108 **Uninsurable** means in relation to a risk means either that:-

- (a) insurance is no longer available from reputable insurers in the South African insurance market; or
- (b) even if insurance is available from reputable insurers in the South African insurance market, the insurance premium payable for insuring that risk had increased to such a level or the terms on which it is available are so onerous or the scope of the insurance cover is so reduced that the risk is generally no longer being insured against in the South African insurance market;

2.1.109 **Unitary Payments** means the charges payable to the Private Party in connection with the performance of its obligations included in the Project Deliverables as calculated in accordance with clause [31] of the PPP Agreement and Schedule 1: Payment Mechanism of the PPP Agreement;

2.1.110 **Variations** means any variations to the Project Deliverables in accordance with clause [50] of the PPP Agreement which result in a variation in terms of clause 32 of this Agreement;

2.1.111 **VAT** means any value-added tax or any similar tax which is imposed in place of or in addition to such tax;

2.1.112 **Works** means the design, construction, fitting installation and commissioning works to be undertaken by the D&C Subcontractor as detailed in the Works Programme, together with all obligations and duties of the D&C Subcontractor as detailed in this Agreement, as may be amended in accordance with this Agreement; and

2.1.113 **Works Programme** means the programme included as Annexe H, as may be subsequently amended in accordance with this Agreement.

3. INTERPRETATION

This Agreement shall be interpreted according to the following provisions, unless the context requires otherwise:

3.1 references to the provisions of any Law shall include such provisions as amended, re-enacted or consolidated from time to time in so far as such amendment, re-

enactment or consolidation applies or is capable of applying to any transaction entered into under this Agreement;

- 3.2 references to **indexed to CPI** in relation to any amount of money shall mean that such amount has been expressed in the month and year in which the Signature Date occurs prices and shall be escalated annually as at the Signature Date and each anniversary thereof with reference to the then most recent publication of the CPI, subject to adjustments for any rebasing or recalculation thereof in accordance with the formula contained in Schedule 2: Financial Model of the PPP Agreement;
- 3.3 references to **Parties** shall include the Parties' respective successors-in-title and, if permitted in this Agreement, their respective cessionaries and assignees;
- 3.4 references to a **person** shall include an individual, firm, company, corporation, juristic person, Responsible Authority, and any trust, organisation, association or partnership, whether or not having separate legal personality;
- 3.5 references to any **Responsible Authority** or any public or professional organisation shall include a reference to any of its successors or any organisation or entity, which takes over its functions or responsibilities;
- 3.6 references to **clauses, sub-clauses** and **Annexes** are references to the clauses, sub-clauses and annexes of and to this Agreement and references to Schedules are references to the schedules attached to the PPP Agreement;
- 3.7 the headings of clauses and sub-clauses are included for convenience only and shall not affect the interpretation of this Agreement;
- 3.8 references to **month** are references to a calendar month, unless otherwise specified;
- 3.9 the Annexes to this Agreement are an integral part of this Agreement and references to this Agreement shall include the Annexes;
- 3.10 the Parties acknowledge that each of them has had the opportunity to take legal advice concerning this Agreement, and agree that no provision or word used in this Agreement shall be interpreted to the disadvantage of either Party because that Party was responsible for or participated in the preparation or drafting of this Agreement or any part of it;
- 3.11 words importing the singular number shall include the plural and vice versa, and words importing either gender or the neuter shall include both genders and the neuter;
- 3.12 references to **this Agreement** shall include this Agreement as amended, varied, novated or substituted in writing from time to time;
- 3.13 any references to any statute, enactment, order, regulation or similar instrument shall be construed as a reference to the statute, enactment, order, regulation, or instrument as amended, re-enacted or replaced from time to time;
- 3.14 references to any other agreement or document shall include (subject to all approvals required to be given pursuant to this Agreement for any amendment or variation to or novation or substitution of such agreement or document) a reference to that agreement or document as amended, varied, novated or substituted from time to time;

- 3.15 general words preceded or followed by words such as **other** or **including** or **particularly** shall not be given a restrictive meaning because they are preceded or followed by particular examples intended to fall within the meaning of the general words;
- 3.16 where any number of days is prescribed in this Agreement, same shall be reckoned inclusively of the first and exclusively of the last day unless the last day falls on a day that is not a Business Day, in which case the last day shall be the immediately following Business Day;
- 3.17 any substantive provision, conferring rights or imposing obligations on a Party and appearing in any of the definitions in clause 2 or elsewhere in the Agreement, shall be given effect to as if it were a substantive provision in the body of the Agreement; and
- 3.18 terms defined in the PPP Agreement or the Financing Agreements shall, unless defined in this Agreement, have the same meaning in this Agreement as the meaning ascribed to them in the PPP Agreement or the Financing Agreements (as the case may be).

4. **DURATION**

Without derogating from the continuing obligations of the D&C Subcontractor in respect of Defects and for specified obligations in this Agreement (including, without limitation, clause 46), this Agreement and the rights and obligations of the Parties under this Agreement shall take effect on the Effective Date and terminate on the earlier of the Expiry Date, the Termination Date, termination pursuant to clause 46.3 or the early termination of this Agreement in accordance with its terms, provided that any accrued rights of either Party shall continue.

5. **TRANSACTION DOCUMENTS**

The Private Party has provided the D&C Subcontractor with the PPP Agreement, a copy of which is attached hereto as Annexe G. The D&C Subcontractor expressly acknowledges that it has reviewed the terms of the PPP Agreement and the Private Party's obligations in terms of clause [4] of the PPP Agreement and shall not do anything that will or would cause the Private Party to breach its obligations in that clause.

6. **PROJECT DELIVERABLES**

6.1 **D&C Subcontractor**

6.1.1 Subject to, and in accordance with, the provisions of this Agreement, the D&C Subcontractor shall exercise its rights and perform its obligations to undertake the Works and the Subcontractor's Project Deliverables at its own cost and risk without recourse to the Private Party, save as otherwise expressly provided for in this Agreement, so as to enable the Private Party to fulfil its obligations in terms of the PPP Agreement, and in particular clause [5] of the PPP Agreement, in respect of the Works and the Subcontractor's Project Deliverables.

6.1.2 Without limiting clause 6.1.1, the D&C Subcontractor shall at its own cost and risk be solely responsible for undertaking the Works and the Subcontractor's Project Deliverables, and in so doing shall ensure that the Works and the Subcontractor's Project Deliverables are performed:

- (a) in accordance with Good Industry Practice;
- (b) in a manner that is not likely to cause death, injury to health or damage to property or the environment;
- (c) in a manner that is consistent with the Private Party or Municipality discharging its statutory functions and duties that are directly impacted on by this Project;
- (d) in compliance with the applicable Laws and Consents and all applicable standards detailed in this Agreement;
- (e) to achieve the design and construction specifications in accordance with Annexe L; and
- (f) to meet the Subcontractor's Output Specifications.

6.2 **Co-operation**

Each Party shall co-operate with the other in the exercise and performance of their respective rights and obligations under this Agreement and so as to enable the Private Party to fulfil its obligations in terms of the PPP Agreement.

6.3 **D&C Subcontractor not agent**

The D&C Subcontractor agrees that it is an independent contractor performing this Agreement. This Agreement does not create any agency, partnership, joint venture or other joint relationship between the Parties. The D&C Subcontractor shall not contract with any person or otherwise incur liabilities in the name of the Private Party.

6.4 **Appointment of Subcontractors**

The Private Party hereby consents to the D&C Subcontractor subcontracting any part of the Works to the Approved Subcontractors. In the event that the D&C Subcontractor wishes to appoint additional subcontractors or replace the Approved Subcontractors, such subcontractors shall comply with the following criteria:

- 6.4.1 have the appropriate technical and financial ability to perform the obligations of the original subcontractor under the relevant subcontract;
- 6.4.2 employ persons having appropriate qualifications, experience and technical competence;
- 6.4.3 have sufficient resources available to them (including committed financial resources and contracts) to perform the obligations of the original subcontractor under the relevant subcontract (as applicable); and
- 6.4.4 have the necessary legal power and authority to become a party to the relevant subcontract, its directors not having any criminal convictions, it not having any outstanding tax liabilities (save for any such liability which is the subject of a bona fide dispute),

and the D&C Subcontractor shall ensure that Private Party provides its prior written consent in terms hereof, provided that such prior written consent shall not be unreasonably withheld or delayed and shall in any event be provided within 5

Business Days of the request by the D&C Subcontractor, failing which it shall be deemed to be approved and that the terms and conditions upon which any such subcontractor is appointed are substantially the same as the subcontracts concluded with the Approved Subcontractor and provide the Private Party with a copy of the duly executed agreement with any such proposed subcontractor and/or Approved Subcontractor.

7. GENERAL OBLIGATIONS

- 7.1 The D&C Subcontractor shall not engage in any business or activity other than the business or activity included in, or otherwise required to enable the D&C Subcontractor to provide, the Subcontractor's Project Deliverables and the Works.
- 7.2 The D&C Subcontractor shall not be relieved of any obligation, responsibility or liability under this Agreement by the appointment of any Approved Subcontractor or subcontractor to carry out any part of the Subcontractor's Project Deliverables. As between the D&C Subcontractor and the Private Party, the D&C Subcontractor shall be responsible for the payment, performance, acts, defaults, omissions, breaches and negligence of all Approved Subcontractors or subcontractors. All references in this Agreement to any performance, payment, act, default, omission, breach or negligence of the D&C Subcontractor shall be deemed to include any of the same by a subcontractor.
- 7.3 If the Service Commencement Date is later than the Scheduled Service Commencement Date (as extended in terms of this Agreement), as a result of the Phase 1 Completion Certificate being issued on a day that is later than the day scheduled for the issuing of the Phase 1 Completion Certificate in Annexe H (as amended following any relief granted pursuant to the occurrence of a Relief Event, Compensation Event, Force Majeure event, Variation (if given) or Unforeseeable Conduct) as a result of any act or omission of the D&C Subcontractor, the D&C Subcontractor shall pay liquidated damages to the Private Party. The D&C Subcontractor's liability for such damages shall be limited to the amounts that the Private Party is required to pay under Annexe E.
- 7.4 The Private Party has provided the D&C Subcontractor with a draft of the Operations Subcontract. The D&C Subcontractor expressly acknowledges that it has reviewed the terms of the Operations Subcontract and the D&C Subcontractor:
- 7.4.1 acknowledges that the Operations Subcontract provides that the Operations Subcontractor shall not be responsible for, and shall not incur any liability arising from, any non-compliance with any obligations of the Operations Subcontractor under the Operations Subcontract, and the Private Party shall not be entitled to call an Operations Subcontractor default, or otherwise terminate the Operations Subcontract or claim damages pursuant to any Operations Subcontractor default to the extent that such non-compliance results from, or arises out of:
- (a) any breach by the D&C Subcontractor with its obligations in terms of this Agreement;
 - (b) any non-compliance by the D&C Subcontractor with the requirements in the Subcontractor's Output Specifications and/or the D&C Subcontractor's obligation to ensure that the Works comply with all Laws and the provisions of this Agreement; or

(c) any design error; and

7.4.2 accordingly, indemnifies the Private Party against:

- (a) all losses, liabilities, damages, costs, expenditure or the like, arising out of any of the events listed in clauses 7.4.1(a), 7.4.1(b) and 7.4.1(c); and
- (b) any costs, expenditure, losses, damages or liability arising out of the Operations Subcontractor's non-compliance with its obligations under the Operations Subcontract where such non-compliance arises out of any of the events listed in clauses 7.4.1(a), 7.4.1(b) and 7.4.1(c),

provided that the D&C Subcontractor shall not be liable to the Private Party in terms of this clause 7.4 for any losses, liabilities, damages, costs, expenditure or the like caused by the Operations Subcontractor or that arises as a result of the Operations Subcontractor's failure to comply with its maintenance obligations to the extent that such losses, liabilities, damages, costs, expenditure or the like is caused by or arises from such failure of the Operations Subcontractor.

7.4.3 The D&C Subcontractor shall obtain (at his cost) an unconditional, irrevocable and on-demand Performance Bond for the proper performance of the D&C Subcontractor's obligations under this Agreement, in the amount equal to 10% of the D&C Subcontractor's Fee. This Performance Bond shall reduce to 5% of the D&C Subcontractor's Fee on the date of issue of the Phase 2 Completion Certificate and lapse at the end of the Construction Term.

7.4.4 On or about the Signature Date, the D&C Subcontractor shall deliver the Parent Company Guarantee and the Performance Bond to the Private Party. The Performance Bond shall be issued by a financial institution acceptable to the Private Party (in consultation with the Lender), and shall be in the form provided in Annexe J or in another form approved by the Private Party.

7.4.5 The D&C Subcontractor shall ensure that the Parent Company Guarantee and the Performance Bond are valid and enforceable for the duration of the Construction Term. If the terms of the Performance Bond specify an expiry date which falls before the end of the Construction Term, at least 28 days before such expiry date the D&C Subcontractor shall extend the validity of the Performance Bond until the end of the Construction Term, failing which, the Private Party shall be entitled to call the Performance Bond and hold the cash received as security.

7.4.6 The Performance Bond shall guarantee the due performance by the D&C Subcontractor of its obligations under this Agreement to the limit of such Performance Bond, including but not limited to:

- (a) all the Deductions that are imposed by the Private Party under this Agreement in respect of the actions and omissions of the D&C Subcontractor pursuant to this Agreement;
- (b) all costs and damages in respect of Defects in the Works and that become known during the Defects Liability Period;
- (c) all Penalty Deductions imposed by the Municipality on the Private Party as a result of any Defects that become known during the Defects Liability Period;

- (d) all costs that may be incurred in replacing the D&C Subcontractor; and
- (e) the professional fees that may be incurred in performing the obligations of the D&C Subcontractor under this Agreement upon termination of this Agreement as a result of a breach by the D&C Subcontractor of its obligations in this Agreement.

8. PRIVATE PARTY WARRANTIES

The Private Party warrants on the Signature Date that:

- 8.1 it has taken all necessary actions to authorise its execution of this Agreement;
- 8.2 it is a limited liability company, duly incorporated and validly existing under the Laws and has taken all necessary actions to authorise its execution of and to fulfil its obligations under this Agreement;
- 8.3 this Agreement has been duly executed by it on proper authority and is in full force and effect as at the Signature Date; and
- 8.4 the execution and performance of this Agreement does not and will not contravene any provision of its memorandum of incorporation as at the Signature Date, or any order or other direction of any arbitrator that is binding on it as at the Signature Date.

9. D&C SUBCONTRACTOR WARRANTIES

The D&C Subcontractor warrants on the Signature Date that:

- 9.1 it is a limited liability company, duly incorporated and validly existing under the Laws and has taken all necessary actions to authorise its execution of and to fulfil its obligations under this Agreement;
- 9.2 this Agreement has been duly executed on proper authority and is in full force and effect as at the Signature Date;
- 9.3 the execution and performance of this Agreement does not and will not contravene any provision of its memorandum of incorporation as at the Signature Date, or any order or other direction of or arbitrator that is binding on it as at the Signature Date;
- 9.4 all D&C Subcontractor Consents that are required for the conduct of the Subcontractor's Project Deliverables and the Works are in full force and effect as at the Signature Date, save for any such D&C Subcontractor Consents which are not required under the Laws to be obtained by the Signature Date; provided that it warrants that it knows of no reason why any such D&C Subcontractor Consent will not be granted by the time it is required to obtain such D&C Subcontractor Consent;
- 9.5 no litigation, arbitration, investigation or administrative proceeding is in progress as at the Signature Date or, to its knowledge as at the Signature Date, threatened against it, which is likely to have a material adverse effect on the ability of the D&C Subcontractor to perform its obligations under this Agreement;
- 9.6 it is not subject to any obligation or non-compliance which is likely to have a material adverse effect on the D&C Subcontractor's ability to perform its obligations under this Agreement;

- 9.7 no proceedings or any other steps have been taken or, to its knowledge of, threatened for the winding-up or liquidation (whether voluntary or involuntary, provisional or final), business rescue or deregistration of itself, or for the appointment of a liquidator, business rescue practitioner or similar officer over it or over any assets;
- 9.8 it has not carried out any trading or business activities since its incorporation or incurred any liabilities other than in connection with the Subcontractor Project Deliverables and the Works; and
- 9.9 all information disclosed by or on behalf of the D&C Subcontractor to the Private Party at any time up to the Effective Date is true, complete and accurate in all material respects and it is not aware of any material facts or circumstances not disclosed to the Private Party which would, if disclosed, be likely to have an adverse effect on the Private Party's decision to appoint the D&C Subcontractor to undertake and provide the Subcontractor Project Deliverables and the Works.

10. INDEMNITIES

10.1 By D&C Subcontractor

Without prejudice to any other rights or remedies available to the Private Party from any other provisions of this Agreement, the D&C Subcontractor indemnifies and shall keep the Private Party indemnified at all times against all direct losses (the term **direct losses** includes any claims brought by the Municipality against the Private Party in terms of the PPP Agreement) sustained by the Private Party in consequence of:

- 10.1.1 any:
- (a) loss of or damage to property relating to the Project;
 - (b) any breach of the D&C Subcontractor's statutory duties arising under the Laws;
 - (c) claim for or in respect of the death or personal injury of any individual as a result of the performance of the Subcontractor's Project Deliverables and the Works;
 - (d) other claim, action, charge, cost, demand or expense by a third party relating to the D&C Subcontractor's performance of the Subcontractor's Project Deliverables and the Works; and
 - (e) any breach by the D&C Subcontractor of any warranties given by it in this Agreement,

(including, without limitation, any reasonable legal fees or reasonable costs),

save to the extent caused by the negligence or wilful acts or omissions or misconduct of the Municipality or the Private Party or by a breach by the Private Party of an express provision of this Agreement.

- 10.1.2 It is specifically recorded that the incurrence or discharge of any Deduction by the D&C Subcontractor will not discharge or release the D&C Subcontractor from any third party indemnity as contemplated in this clause.

10.2 **By the Private Party**

The Private Party indemnifies the D&C Subcontractor in respect of the actions or omissions of the Municipality, to the extent that the Municipality indemnifies the Private Party in respect of such acts and omissions in respect of the Subcontractor's Project Deliverables in terms of the PPP Agreement.

11. **THIRD PARTY CLAIMS**

11.1 Nothing in this clause shall prevent or restrict the right of the Private Party or the D&C Subcontractor to seek any interdict or similar relief, any decree or specific performance or any other discretionary remedies of court.

11.2 In the event of either Party incurring a third party claim (**third party claim**) for which the other Party has indemnified it then such Party (**Indemnified Party**) shall notify the other Party (**Indemnifying Party**) thereof within a period of 5 Business Days of that Indemnified Party becoming aware of such claim.

11.3 The Indemnified Party will provide the Indemnifying Party with all reasonable co-operation and assistance in relation to the third party claim.

11.4 Subject to the terms of any Project Insurances, the Indemnifying Party shall be entitled to dispute any such third party claim, at its own cost and risk, in the name of the Indemnified Party, subject to the Indemnifying Party:

11.4.1 exercising due care in defending a third party claim so as not to bring the name of the Indemnified Party into disrepute;

11.4.2 keeping the Indemnified Party fully informed of the conduct of such third party claim; and

11.4.3 obtaining the written approval of the Indemnified Party (which shall not be unreasonably withheld or delayed) prior to settling any third party claim.

11.5 Should the Indemnifying Party fail to exercise its right in terms of this clause 11 to dispute any third party claim in the name of the Indemnified Party, the Indemnifying Party shall notify the Indemnified Party within a reasonable period of its decision to pay and/or settle any such third party claim, pursuant to which the Indemnified Party shall have an election, on written notice to the Indemnifying Party to take over any third party claim against its release of the Indemnifying Party from liability under the indemnity in respect of such claim.

11.6 Where the Indemnified Party fails to provide the Indemnifying Party with written notice of its decision to take over a third party claim within 15 Business Days of the receipt of the notice by the Indemnifying Party referred to in clause 11.5, the Indemnified Party shall be deemed to have repudiated any right under clause 11.5 to take over the third party claim and the Indemnifying Party shall be required to pay and/or settle such third party claim in a manner that does not result in any breach of its obligations under this Agreement.

11.7 In the event that the Indemnified Party has received an indemnifying amount from the Indemnifying Party and subsequently recovers (in a separate action) a sum arising from the third party claim to which the indemnifying amount relates, to the extent that the aggregate sum recovered by the Indemnified Party exceeds the indemnified amount of the loss sustained by the Indemnified Party (the **excess**), the

Indemnified Party shall make payment to the Indemnifying Party of the excess up until an amount equal to the indemnifying amount.

12. LIMITATION ON LIABILITY

- 12.1 Save as otherwise provided for by the provisions of this Agreement, neither Party shall be liable in delict to the other Party in respect of any act or omission relating to or in connection with this Agreement.
- 12.2 Save in respect of Deductions or insurance proceeds, neither Party shall be liable to the other for any damages or any indemnity to the extent that the damages or the amount claimed under the indemnity is for or arises out of loss of profit, loss of use, loss of production, loss of business or loss of business opportunity or is a claim for special damages or consequential loss suffered or allegedly suffered by any person.
- 12.3 The Private Party agrees that, notwithstanding clause 12.1, where the calculation or determination of any compensation on termination or compensation or other amount to be paid to the D&C Subcontractor under this Agreement includes any amount that the D&C Subcontractor would otherwise be prevented from claiming by virtue of clause 12.1 (including, but not limited to, Subcontractor losses of profits), such amounts shall nevertheless be included in such calculation or determination.
- 12.4 The D&C Subcontractor acknowledges and agrees that its liability to the Private Party shall be limited to 100% of the D&C Subcontractor's Fee as amended or adjusted.

13. DOUBLE RECOVERY AND MITIGATION

- 13.1 Neither Party to this Agreement shall be entitled to recover (whether pursuant to an indemnity or otherwise) any loss to the extent that it has already been compensated for that loss, whether by way of insurance payments or otherwise or is entitled to be compensated for that loss by way of Project Insurance.
- 13.2 In particular, each Party shall be under an obligation to mitigate the consequences of any conduct in respect of which it is entitled to compensation under this Agreement (whether by way of indemnity or otherwise).

14. PROJECT SITE

14.1 General Obligations in respect of Project Site

- 14.1.1 The D&C Subcontractor shall undertake the Works and the Subcontractor's Project Deliverables on the Project Site.
- 14.1.2 The D&C Subcontractor shall ensure that for the duration of the Works there is no unauthorised access to the Project Site.
- 14.1.3 The D&C Subcontractor shall, throughout the progress of the Works, have regard for the safety of all persons at the Project Site (whether lawfully or not) to the extent required by Law, and shall keep the Project Site, the Works and the Facilities in an orderly state as appropriate in accordance with Good Industry Practice to avoid danger to such persons.
- 14.1.4 The D&C Subcontractor shall procure that:

- (a) all Subcontractor's Project Deliverables carried out at the Project Site by or on behalf of the D&C Subcontractor whether before, during the completion of the Works shall be carried out in a manner that does not breach any conditions of the title deeds of the Project Site (a copy of which has been provided to the D&C Subcontractor);
- (b) there shall be no conduct which gives rise to a right on the part of any person to obtain title to the Project Site or any part of it save in accordance with the terms of the PPP Agreement, the Financing Agreements and this Agreement; and
- (c) it complies with the zoning conditions imposed by the Mossel Bay Local Authority on the Project Site (copies of which has been provided to the D&C Subcontractor).

14.1.5 The D&C Subcontractor acknowledges clause [21.3] of the PPP Agreement and agrees that it shall give the Operations Subcontractor all reasonable access to the Project Site at least 2 weeks prior to the issue of the Availability Certificate by the Private Party to the Municipality so as to enable the Operations Subcontractor to perform the Services and comply with its obligations under the Operations Subcontract. The D&C Subcontractor shall fully cooperate with the Operations Subcontractor when undertaking the Works on the Project Site so as not to interfere, interrupt nor disturb the Operations Subcontractor's performance of the Services.

14.2 **Rights to Project Site**

14.2.1 The Private Party shall procure that the D&C Subcontractor, its Approved Subcontractors and any other contractors or agents of the D&C Subcontractor are granted possession of and access to the Project Site with effect from the Effective Date for the purposes of undertaking the Works and the Subcontractor's Project deliverables in terms of and subject to the provisions of this Agreement and for no other purpose whatsoever. The D&C Subcontractor shall have no title to, ownership interest in, liens, leasehold rights or any other rights in the Project Site. For the avoidance of doubt, the Private Party's obligations to the D&C Subcontractor in respect of the Project Site shall at no times be greater than the obligations of the Municipality to the Private Party in respect of the Project Site. Subject to clauses 14.1.5, the Private Party shall ensure that up until the date of issue of the Phase 2 Completion Certificate there is no interference, interruption or disturbance of the D&C Subcontractor's possession and use of the Project Site.

14.2.2 The D&C Subcontractor has no and will have no rights with respect to the airspace above, or subsoil rights below the Project Site, except the right to use such land for the sole purpose of undertaking the Works and the Subcontractor's Project Deliverables during the Construction Term, all in accordance with this Agreement. Subject to clause 14.2.1, the D&C Subcontractor agrees that the Municipality may grant other persons rights in respect of the Project Site.

14.2.3 The D&C Subcontractor shall only be entitled to use the Project Site for the purposes of undertaking the Works and the Subcontractor's Project Deliverables and shall have no ownership interest in or any other property rights in the Project Site.

14.3 **Project Site Conditions**

The Municipality has conducted studies or caused studies to be conducted on their behalf at the Project Site, the results of which have been made available to the Private Party and the D&C Subcontractor.

15. **CONSENTS**

15.1 The Private Party shall ensure that the D&C Subcontractor is provided with all the Municipal Consents required by the D&C Subcontractor in connection with the performance of the Works and the Subcontractor's Project Deliverables.

15.2 Subject to clause 15.3, the D&C Subcontractor shall be responsible for:

15.2.1 obtaining all D&C Subcontractor Consents which may be required in connection with the performance of the Works and the Subcontractor's Project Deliverables;

15.2.2 maintaining in full force and effect all such D&C Subcontractor Consents; and

15.2.3 implementing all the Consents (including the applicable Municipal Consents) in accordance with their respective terms within the period of its validity.

15.3 The exception to clause 15.2 is:

15.3.1 any Consents which the Operations Subcontractor is obligated to obtain, maintain and or implement in terms of the Operations Subcontract; and

15.3.2 any Municipal Consents which the Municipality is obligated to obtain, maintain and or implement in terms of the PPP Agreement.

15.4 During the Construction Term the D&C Subcontractor should keep record of compliance with all Consents, however, the D&C Subcontractor shall incur no liability for the costs in connection with the Municipal Consents and/or Consents obtained by the Municipality and Operations Subcontractor as contemplated in clause 15.3.

15.5 The Private Party shall provide all such assistance to the D&C Subcontractor as may be reasonably necessary for the D&C Subcontractor to obtain all of the D&C Subcontractor Consents referred to in clause 15.2, provided, however, that the Private Party shall incur no liability for the costs of obtaining or maintaining, or any delay, failure or inability of the D&C Subcontractor to obtain or maintain any such D&C Subcontractor Consents.

16. **HERITAGE OBJECTS AND RESOURCES**

16.1 **Discovery**

Upon the discovery of any heritage object or resource (as defined in the National Heritage Resources Act, 1999 or any corresponding provincial legislation) during the course of the Works and Subcontractor's Project Deliverables, the D&C Subcontractor shall:

16.1.1 promptly notify the Private Party of such discovery;

- 16.1.2 take all necessary steps not to disturb the heritage object or resource, including ceasing any Works or Subcontractor's Project Deliverables to the extent that the carrying out of such Works or Subcontractor's Project Deliverables might reasonably endanger the heritage object or resource or prevent or impede its excavation or preservation; and
- 16.1.3 take all necessary steps to preserve the heritage object or resource in the same position and condition in which it was discovered.
- 16.2 **Action**
- 16.2.1 The Private Party shall promptly, and in any event within 10 Business Days of the notice in clause 16.1.1, (provided that it has received instructions from the Municipality in terms of clause [16.2.1] of the PPP Agreement) issue an instruction to the D&C Subcontractor specifying what action the Private Party requires the D&C Subcontractor to take in relation to such discovery or delay, which action will be the action that the Municipality requires the Private Party to take in terms of clause [16.2.1] of the PPP Agreement.
- 16.2.2 If so directed by the Private Party or a Responsible Authority, D&C Subcontractor shall allow representatives of the Municipality or the Responsible Authority to enter onto the Project Site for the purposes of removal or disposal of such discovery; provided that such entry shall be subject to the Municipality or Responsible Authority complying with all relevant safety and security procedures which shall include any relevant health and safety and or security plans for the construction of the Facilities and any reasonable directions regarding the safety and or security of the Project Site that may be issued by or on behalf of the D&C Subcontractor.
- 16.2.3 Any instruction from the Private Party (which will be based on instructions given by the Municipality in terms of the PPP Agreement) in connection with the discovery which includes the requirement for the D&C Subcontractor to carry out works (being any work of alteration, addition, demolition or extension or variation in the Works) which are not works that would be necessary for the purpose of compliance with any Law or any Consents or the performance of the Works, then such works shall be deemed to be a Municipality Variation and the provisions of clause 32 shall apply.

17. PROVISION OF THE FACILITIES

- 17.1 The D&C Subcontractor shall design, construct and provide the Facilities to meet the specifications for the Facilities as set out in Annexe F and Annexe L.
- 17.2 The D&C Subcontractor shall allow the Independent Certifier to inspect and monitor the progress of the Works upon the Project Site as frequently as he wishes subject to his adherence to the Project Site rules established for safety and security. The Independent Certifier shall have no authority to approve or accept the D&C Subcontractor's performance of its obligations under this Agreement as being discharged except as provided in clause [21] of the PPP Agreement and clause 21 of this Agreement. Nothing done by the Independent Certifier in accordance with this clause 17.2 shall in any respect relieve or absolve the D&C Subcontractor from its responsibility for the design or construction of the Works under or in connection with this Agreement.

- 17.3 The D&C Subcontractor undertakes to fulfil its obligations in terms of this Agreement so that the Independent Certifier is in a position to issue the Phase 1 Completion Certificate on or by the Scheduled Service Commencement Date and the Phase 2 Completion Certificate on or by the scheduled construction completion date as specified in the Works Programme, which dates may be amended pursuant to clauses 28, 29, 30, 31, 32 or 33.
- 17.4 In addition, the D&C Subcontractor agrees and undertakes that, as part of the undertaking of the Works and the Subcontractor's Project Deliverables, the procurement and provision of the Facility, the Operations Subcontractor will be allowed to monitor and inspect the Works and to give input into the construction process to the extent required by the Operations Subcontractor, acting reasonably, to enable it to fulfil its obligations in respect of the Services. Furthermore, the D&C Subcontractor undertakes that neither it nor its professional team shall request the Independent Certifier to issue the Completion Certificates without detailed consultation with the Operations Subcontractor prior to making such request and that any matters identified by the Operations Subcontractor shall be given due and proper consideration by the D&C Subcontractor and shall be addressed by the D&C Subcontractor prior to making such requests to the Independent Certifier.

18. DESIGN AND CONSTRUCTION

- 18.1.1 The D&C Subcontractor shall carry out the Works in line with its accepted design proposals as set out in Annexe L.
- 18.1.2 It is expressly agreed between the Parties that the D&C Subcontractor remains solely responsible for the design and assumes and carries all risk in insuring that it meets the Subcontractor's Output Specifications.
- 18.1.3 The D&C Subcontractor shall comply with the Waste Management Licence (as set out in Annexe M) issued in terms of Section 49(1)(a) of the National Environmental Management: Waste Act, 2008 by the Department of Environmental Affairs and the authority granted by the Western Cape Government as appears in Schedule 6: Project Site of the PPP Agreement and all other legislative, regulatory and authoritative conditions, including but not limited to those listed in the Subcontractor's Output Specifications.

19. MUNICIPALITY'S AND PRIVATE PARTY'S RIGHT TO INSPECT

- 19.1 The D&C Subcontractor acknowledges the obligations of the Private Party to the Municipality in terms of clause [18] of the PPP Agreement and agrees that:
- 19.1.1 subject to complying with all relevant safety procedures, which shall include any relevant health and safety plans for the construction of the Facilities, the D&C Subcontractor's site rules for the Project Site from time to time and any reasonable directions with regard to site safety that may be issued by or on behalf of the D&C Subcontractor, the Municipality Representative and/or the Private Party Representative shall have access at all reasonable times to the Project Site to view the carrying out of the Works on reasonable prior notice appropriate to the circumstances; and
- 19.1.2 the Municipality Representative and/or the Private Party Representative shall be entitled to visit any site or workshop where materials are being manufactured, prepared or stored for use in the Works for the purposes of general inspection and of attending any test or investigation being carried out

in respect of the Works, provided that the Municipality Representative and/or the Private Party Representative observes all reasonable security, access, health and safety and environmental policies prescribed by the D&C Subcontractor. In the event that the Municipality Representative and/or the Private Party Representative fails to comply with the aforementioned requirements the Private Party shall be entitled to preclude such Municipality Representative and/or the Private Party Representative from exercising the rights of access to the Project Site granted to them under this Agreement.

20. WORKS PROGRAMME AND DATES FOR COMPLETION

20.1 Dates of Completion

Subject to the provisions of this Agreement and the PPP Agreement, the D&C Subcontractor shall:

- 20.1.1 complete the Phase 1 Works by the Scheduled Service Commencement Date as set out in the Works Programme, unless the D&C Subcontractor is otherwise granted an extension in accordance with clauses 28, 29, 30, 31, 32 or 33 of this Agreement or such other date as may be agreed to, in writing, by the Parties; and
- 20.1.2 complete the Phase 2 Works by the scheduled construction completion date as set out in the Works Programme, unless the Private Party is otherwise granted an extension in accordance with clauses 28, 29, 30, 31, 32 or 33 of this Agreement or such other date as may be agreed to, in writing, by the Parties.

20.2 Report on Delay

- 20.2.1 If the D&C Subcontractor becomes aware of any circumstances which might lead to a significant delay in progress and/or completion of the Works, which delay requires a revision of the Works Programme, the D&C Subcontractor shall forthwith give written notice to the Private Party of the relevant circumstances.
- 20.2.2 Such notice shall:
 - (a) identify the cause or causes of the delay;
 - (b) indicate whether and to what extent the delay is caused by a Relief Event or Compensation Event;
 - (c) provide details of the nature of the event causing or likely to cause a delay and its duration; and
 - (d) identify clearly, by reference to a revised Works Programme, whether the Scheduled Service Commencement Date is to be affected and the extent of such affect.
- 20.2.3 The D&C Subcontractor shall afford the Private Party such access to the Project Site and documentation of the D&C Subcontractor as the Private Party may reasonably consider necessary and appropriate for the purpose of establishing the accuracy of the delay notice.

- 20.2.4 If it appears to the Private Party at any time that the actual progress of the Works as a whole has significantly fallen behind the schedule of the Works Programme, then the Private Party shall be entitled to require the D&C Subcontractor to submit to the Private Party a report identifying the reasons for the delay and at the election of the Private Party to:
- (a) produce and submit to the Private Party a revised Works Programme showing the manner and the periods in which the Works will be carried out to ensure achievement of the Scheduled Service Commencement Date; and/or
 - (b) produce and submit to the Private Party a revised Works Programme showing the steps which are to be taken to eliminate or reduce the delay and the effect of any such delay on the achievement of the Scheduled Service Commencement Date.
- 20.2.5 Should the Service Commencement Date be delayed beyond the Scheduled Service Commencement Date owing to the D&C Subcontractor's failure to timeously comply with the time periods agreed upon (dates of completion) the Private Party shall be indemnified by the D&C Subcontractor for all reasonable costs and expenses which the Private Party may be liable to the Municipality for under clause [19.3.5] of the PPP Agreement as a consequence of such delay.
- 20.2.6 The D&C Subcontractor shall notify the Private Party if at any time the actual progress of the Works is significantly ahead of the Works Programme so that the D&C Subcontractor anticipates that the Actual Construction Completion Date will be earlier than the scheduled construction completion date.
- 20.2.7 The Private Party shall be entitled to reasonably require the D&C Subcontractor to produce and submit a revised Works Programme.

21. COMPLETION CERTIFICATE

- 21.1 When the D&C Subcontractor is satisfied that the relevant Works have been completed and at least 10 Business Days before the dates detailed in clause 20.1 or the date on which all the Works are completed, the D&C Subcontractor shall issue an Inspection Notice to the Private Party stating that the Works are ready for inspection.
- 21.2 Within 2 Business Days of receipt of the Inspection Notice from the D&C Subcontractor:
- 21.2.1 for the Phase 1 Works, the Private Party shall forward the Inspection Notice to the Independent Certifier and the Operations Subcontractor, requesting the Independent Certifier to commence and to complete an inspection of the Phase 1 Works; and
 - 21.2.2 for the Phase 2 Works, the Private Party shall forward the Inspection Notice to the Independent Certifier and the Operations Subcontractor, requesting the Independent Certifier to commence and to complete an inspection of the Phase 2 Works.
- 21.3 If the Independent Certifier is of the opinion that a Phase 1 Completion Certificate or Phase 2 Completion Certificate (as the case may be), may be issued, the Private Party will request the Independent Certifier to issue the Phase 1 Completion

Certificate or the Phase 2 Completion Certificate, as the case may be. These Phase 1 Completion Certificates or Phase 2 Completion Certificates (as the case may be) shall be evidence that the D&C Subcontractor has completed the Phase 1 Works or Phase 2 Works (as the case may be).

- 21.4 If the Independent Certifier is of the opinion that a Phase 1 Completion Certificate or Phase 2 Completion Certificate (as the case may be) may not be issued, the Private Party will request the Independent Certifier to give the Private Party (with a copy simultaneously to the D&C Subcontractor) a written notice (**Independent Certifier's Notice**) specifying all the matters which, in the opinion of the Independent Certifier, must be satisfied before a Phase 1 Completion Certificate or Phase 2 Completion Certificate (as the case may be) can be issued.
- 21.5 If such Independent Certifier's Notice is given by the Independent Certifier, the D&C Subcontractor shall not be entitled to receive the Phase 1 Completion Certificate or Phase 2 Completion Certificate (as the case may be) until, in the opinion of the Independent Certifier the D&C Subcontractor has attended to all of the matters specified in the Independent Certifier's Notice.
- 21.6 The D&C Subcontractor shall notify the Private Party, who will notify the Independent Certifier, once it considers, that it has satisfied the matters specified in the Independent Certifier's Notice. The Private Party will request the Independent Certifier to conduct an inspection of the Phase 1 Works or Phase 2 Works (as the case may be) and:
- 21.6.1 if all items listed in the Independent Certifier's Notice have been attended to his satisfaction, notify the Private Party and the Municipality and issue the Phase 1 Completion Certificate or Phase 2 Completion Certificate (as the case may be) to the Private Party; and
- 21.6.2 if the Independent Certifier is not satisfied that the outstanding matters specified in the Independent Certifier's Notice have been rectified, issue a further Independent Certifier's Notice to that effect to the Private Party, and such further Independent Certifier's Notice shall set out details of such outstanding matters. The provisions of clause 21.5 and this clause 21.6.2 shall apply, *mutatis mutandis*, until all the matters specified as outstanding in the further Independent Certifier's Notice have been rectified to the satisfaction of the Independent Certifier and the Phase 1 Completion Certificate or Phase 2 Completion Certificate (as the case may be) is issued to the Private Party.
- 21.7 The Private Party will provide the D&C Subcontractor with a copy of the further Independent Certifier's Notice and or a Phase 1 Completion Certificate or Phase 2 Completion Certificate (as the case may be) after receipt by the Private Party.
- 21.8 The D&C Subcontractor acknowledges and agrees that the Independent Certifier shall only issue a Phase 1 Completion Certificate or Phase 2 Completion Certificate (as the case may be), when in the Independent Certifier's opinion:
- 21.8.1 all of the relevant Phase 1 Works or Phase 2 Works (as the case may be) have been completed in accordance with the Output Specifications except for any minor outstanding work which will not substantially affect the use or safe operation of the Works in accordance with its intended purpose; and
- 21.8.2 the Facilities are in such condition that the Services could be provided.

- 21.9 Upon receipt of a Completion Certificate from the Independent Certifier the risks in the Phase 1 Works or the Phase 2 Works (as the case may be) shall transfer to the Private Party and the D&C Subcontractor shall deliver to the Private Party all such documentation as may be reasonably required by the Private Party, including the design and construction data in respect of the Phase 1 Works or the Phase 2 Works (as the case may be) within 15 Business Days of the issue of the relevant Completion Certificate.
- 21.10 Notwithstanding the issuing of a Completion Certificate, the D&C Subcontractor shall remedy any Defects in the Works which may arise until the earlier of the Expiry Date and the Termination Date, provided that any delictual liability that the D&C Subcontractor may have in respect of such Defects shall not be affected by the lapsing of such contractual obligations and shall continue to exist despite any expiry of said contractual liability.
- 21.11 The Private Party shall be entitled to an extension of the Defects Liability Period if and to the extent that the Works cannot be used for the purposes for which they are intended by reason of Defect or damage and the Defects Liability Period shall be extended until the date on which the Private Party confirms that all the Defects have been remedied subject to such Defects Liability Period not enduring beyond 15 months after the issue of the Phase 2 Completion Certificate.
- 21.12 Should the D&C Subcontractor fail to remedy any Defects, the Private Party shall be entitled to employ other contractors to rectify the Defects and to charge and recover the costs of doing so, to and from the D&C Subcontractor.
- 21.13 Should the D&C Subcontractor fail to complete the Phase 1 Works by the Scheduled Service Commencement Date or the Phase 2 Works by the scheduled construction date stipulated in the Works Programme (as the case may be), the D&C Subcontractor shall be liable to pay Deductions as stipulated in Annexe E.

22. QUALITY ASSESSMENT PLANS AND SYSTEM

- 22.1 The D&C Subcontractor shall develop an appropriate quality assessment plan, the standard of which shall be consistent with the principles of ISO 9000 or any equivalent standard which is generally recognised as having replaced it.
- 22.2 There shall be:
- 22.2.1 a design quality plan; and
- 22.2.2 a construction quality plan;
- which shall be consistent with any standard set in terms of any applicable environmental legislation and any relevant rules, regulations, codes of practice as set out by the South African Bureau of Standards (SABS).
- 22.3 The D&C Subcontractor shall ensure that the Works and the Subcontractor's Project Deliverables are carried out in compliance with the design quality plan, the construction quality plan and the quality assessment plans, including compliance by its subcontractors.
- 22.4 The D&C Subcontractor acknowledges that the Municipality's Representative will be entitled to carry out audits as against the requirements set out in the Subcontractor's Output Specifications and the Consents.

- 22.5 Such audits shall be carried out at appropriate intervals, provided that the Private Party shall give the D&C Subcontractor reasonable notice of at least 8 Business Days of when a Municipal Representative proposes to carry out such audits. Such audits shall not in any way delay the D&C Subcontractor from proceeding with the Works.
- 22.6 The D&C Subcontractor shall cooperate with the Municipality's Representative, including providing it with all the information and documentation which it may reasonably require in connection with its right to audit.

23. PLANT AND EQUIPMENT

- 23.1.1 The D&C Subcontractor must ensure that all its plant and equipment used in performing the Works and the Subcontractor's Project Deliverables are maintained in a safe and working order and in compliance with Law.
- 23.1.2 If the Private Party's Representative considers that any D&C Subcontractor's plant and equipment is unsafe for use in performing the Works or the Subcontractor's Project Deliverables, or not in working order, or not in compliance with the Law, the Private Party's Representative may direct the D&C Subcontractor to:
- (a) cease using that plant and equipment until it has been brought into a safe and working order and into compliance with the Law; or
 - (b) replace that plant and equipment with plant and equipment which is in a safe and working order and in compliance with the Law.
- 23.1.3 If the D&C Subcontractor fails to comply with a direction to cease using that plant and equipment, the Private Party may perform the obligation, or have the obligation performed on the D&C Subcontractor's behalf and the costs and expenses incurred by the Private Party are recoverable from the D&C Subcontractor as a debt due to the Private Party.

24. PAYMENT

24.1 D&C Subcontractor Payment

- 24.1.1 The fee paid to the D&C Subcontractor for the Works will be the fixed fee of:
- (a) R80,070,095.36, for the Phase 1 Works; and
 - (b) R64,997,173.54, for the Phase 2 Works,
- (D&C Subcontractor's Fee),**
- which fee excludes VAT and shall not increase for any reason unless it is expressly agreed by the Parties in terms of clause 29, 31, 32 or 33 that the D&C Subcontractor Fee will increase for a specified amount. The fee will be paid as detailed in this clause 24.1.
- 24.1.2 Annexe B contains the measurable parts of the Works and the amounts contained therein take into account the materials which are to be used in respect of the Works (**Milestones**).

- 24.1.3 Each payment in respect of a Milestone shall become due within the specified month within which such a Milestone is achieved (subject to clause 24.1.11) and provided the D&C Subcontractor provides the Private Party with documentary evidence of the Milestone having been achieved, which documentary evidence is required to be to the reasonable satisfaction of the Private Party.
- 24.1.4 On the Certification Date, the Private Party, the Independent Certifier, the LTA (if applicable) and the D&C Subcontractor shall inspect the Works to ascertain the value of the Works completed since the Effective Date and the value of the Works completed since the previous Certification Date in the previous calendar month.
- 24.1.5 The Independent Certifier and LTA (if applicable) shall confirm the achievement of each Milestone and certify the value of the Works completed within 3 Business Days of each Certification Date (the **Valuation Date**). The D&C Subcontractor shall be entitled to be paid for the Milestones achieved in accordance with this clause 24.1.
- 24.1.6 The D&C Subcontractor shall, within 2 Business Days of the Valuation Date in the relevant calendar month, issue and deliver its written payment claim certificate to the Private Party and the Independent Certifier, which certificate shall be in the form contained in Annexe C to this Agreement and shall specify the value of the Works that the D&C Subcontractor thinks have been completed since the Effective Date, the value of the Works that the D&C Subcontractor thinks have been achieved since the last Certification Date and any claim for additional payments to which the D&C Subcontractor is entitled in terms of this Agreement (**Payment Claim Certificate**).
- 24.1.7 The Private Party shall procure that the Independent Certifier issues, within 3 Business Days of the delivery of a Payment Claim Certificate by the D&C Subcontractor, to the Private Party and the D&C Subcontractor, its written confirmation of all or part of the contents of the Payment Claim Certificate and or its written notice of dispute in respect of all or part of the contents of the Payment Claim Certificate. If the Independent Certifier confirms all or part of the contents of the Payment Claim Certificate, then the D&C Subcontractor shall issue a tax invoice to the Private Party in respect of the entire or the undisputed (as the case may be) amount due for payment in terms of that Payment Claim Certificate, which tax invoice shall comply with the form of tax invoice attached hereto as Annexe D (**Tax Invoice**). If the Independent Certifier disputes all or part of the contents of a Payment Claim Certificate, that dispute shall be resolved as a dispute with the Private Party in accordance with clause 55.
- 24.1.8 Regardless of the value of the Works actually completed by the D&C Subcontractor and certified as completed by the Independent Certifier, the D&C Subcontractor shall not be entitled to be paid an amount greater than the amount specified in the column entitled (**Cumulative Total**) in Annexe B against that Certification Date. The D&C Subcontractor shall be entitled, in respect of a calendar month, to be paid the lesser of the amount detailed in the Tax Invoice issued in respect of that calendar month and the difference between the Cumulative Total for that calendar month and the Cumulative Total paid in the previous calendar month.

24.1.9 The Private Party shall pay the D&C Subcontractor the amount specified in a Tax Invoice within 15 Business Days of the date on which the Private Party received the Payment Claim Certificate, in respect of which that Tax Invoice was issued, provided that the D&C Subcontractor had issued that Tax Invoice within 5 Business Days of the issue of the confirmation detailed in clause 24.1.7. If the Private Party does not pay a Tax Invoice within 20 Business Days of the date on which the Private Party received the Payment Claim Certificate, then interest at the Default Interest Rate shall accrue on the amount of such Tax Invoice, and shall be payable by the Private Party, from the 16th Business Day after the date on which the Private Party received the Payment Claim Certificate.

24.1.10 If the Lenders have issued a Notice of Drawstop to the Private Party in terms of any Financing Agreement and the issue of such notice is due to an act or omission of the D&C Subcontractor, the D&C Subcontractor shall not be entitled to payment until that notice has been cancelled or lifted by the Lenders and the D&C Subcontractor shall not be entitled to suspend its performance of the Works whilst the Private Party is unable to pay it due to the issue of that Notice of Drawstop.

24.1.11 Annexe B and Annexe H shall be amended to reflect any relief granted to the D&C Subcontractor due to any Relief Event, Compensation Event, for a Force Majeure event, Variations (if relevant) or Unforeseeable Conduct, and the dates on which the Milestones are to be paid shall be amended to reflect any such relief.

24.2 **Set-off**

24.2.1 The Private Party shall be entitled to set-off against the D&C Subcontractor's Fee:

- (a) any Deductions imposed by the Private Party that are as a result of Defects that become known during the relevant Defects Liability Period;
- (b) any costs borne by the Private Party on behalf of the D&C Subcontractor in terms of this Agreement; and
- (c) indemnity claims of the Private Party against the D&C Subcontractor.

24.2.2 In addition to clause 24.2.1, whenever any sum of money is agreed or determined to be due and payable by the D&C Subcontractor to the Private Party, such sum may, at the Private Party's discretion, be deducted from or applied to reduce the amount then due to the D&C Subcontractor. If no monies are due to the D&C Subcontractor at that time, then such sums of monies that are due and payable by the D&C Subcontractor to the Private Party shall be paid not more than 5 Business Days after they are agreed or determined, failing which, the Private Party shall be entitled to have recourse to the Performance Bond.

24.3 **Value-Added Tax**

Any invoice under this Agreement shall comply with the requirements of the Value-Added Tax Act, 1991.

24.4 **Manner of Payment**

All payments under this Agreement shall be made in RSA Rands, quoting the invoice/statement number against which payment is made. Payment will be made by electronic funds transfer into the bank account designated in writing for this purpose by the D&C Subcontractor.

24.5 **Late Payments**

24.5.1 Each Party shall be entitled, without prejudice to any other right or remedy, to receive interest on any payment not duly made pursuant to the terms of this Agreement on the due date, calculated from day to day at a rate per annum equal to the Default Interest Rate from the day after the date on which payment was due up to and including the date of payment.

24.5.2 In circumstances where Lenders ought to have advanced monies to the Private Party in terms of the Financing Agreements and failed to do so, the Private Party shall exercise its rights against the Lenders to receive such monies.

25. **REPORTING REQUIREMENTS**

25.1 The D&C Subcontractor shall for the duration of the Construction Term:

25.1.1 maintain a full record of particulars of the cost of providing the Subcontractor's Project Deliverables; and

25.1.2 when reasonably requested by the Private Party, furnish, within a reasonable period, a summary of any of the aforementioned costs in such format and detail as the Private Party may reasonably require.

25.2 The D&C Subcontractor shall prepare the financial statements in accordance with IFRS and these financial statements will reflect a true and fair view of the results of its operations for the period in question and the state of its affairs as at the date at which the financial statements are compiled and shall disclose or reserve against all the liabilities, actual or contingent of the D&C Subcontractor.

25.3 The D&C Subcontractor shall keep books of accounts in accordance with IFRS and have same available for inspection by the Private Party upon reasonable notice and shall allow the Private Party to arrange for an audit to be conducted from time to time as may be required by the Private Party in its discretion and as may be required under the Public Audit Act, 2004.

25.4 The D&C Subcontractor shall maintain or produce, on a monthly basis, the following records or reports in respect of the Project Site, the Works and all the Subcontractor's Project Deliverables:

25.4.1 a full record of all incidents relating to health, safety and security which occur during the Construction Term;

25.4.2 full records of all relevant training and instruction by it and its subcontractors of their personnel, together the certificates and record of qualifications pertaining thereto;

25.4.3 a schedule of any changes in the monthly D&C Subcontractor's Fee during the Construction Term, whether as a result of a D&C Subcontractor's Fee

adjustment or by means of a Variation, or as agreed between the Parties, or for any other reason whatsoever; and

25.4.4 organisation charts for the D&C Subcontractor and its personnel.

25.5 The abovementioned reports shall be available for inspection by the Private Party upon reasonable notice.

26. INSURANCE

26.1 The Private Party shall at its cost take out and shall thereafter maintain and keep in full force and effect the Project Insurances. Each of the Project Insurances required from the Effective Date up until the date of issue of the Phase 2 Completion Certificate, will be taken out by the Private Party and become fully effective on the Effective Date. The D&C Subcontractor, its consultants (in respect of the Professional Indemnity insurance policy) and its subcontractors (in respect of the Construction All Risk and Professional Indemnity insurance policies) shall be co-insured under the relevant Project Insurances to the extent that the D&C Subcontractor has an insurable interest for the purposes of those insurances and such insurances shall contain a provision waiving the insurers' subrogation rights against the D&C Subcontractor, its employees and agents.

26.2 The payment of the insurance premiums due and payable under the policy applying to any Project Insurance shall be the responsibility of the Private Party.

26.3 No Party to this Agreement shall take any action or fail to take any action, or (in so far as is reasonably within its power) permit anything to occur in relation to it, which would entitle any insurer to refuse to pay any claim under the policy applying to any Project Insurance.

26.4 The D&C Subcontractor shall purchase, or procure that its subcontractors or their subcontractors purchase, the following insurances (**Subcontractor's Insurances**) to the reasonable satisfaction of the Private Party:

26.4.1 Workman's Compensation Insurance;

26.4.2 Construction and Plant Equipment Insurance;

26.4.3 Motor Insurance; and

26.4.4 South African Special Risks Insurance Association (SASRIA) only in respect of the D&C Subcontractor's assets used in respect of the Project.

26.5 The D&C Subcontractor shall be responsible for maintaining the Subcontractor's Insurances in respect of the Project at its cost throughout the Construction Term, unless agreed otherwise in writing between the D&C Subcontractor and the Private Party.

26.6 To the extent that the D&C Subcontractor fails to maintain the Contractor's Insurances, or to the extent that any Subcontractor's Insurances lapse or any third party claim is repudiated due to any act or omission on the part of the D&C Subcontractor, the D&C Subcontractor shall indemnify the Private Party against any costs, damages, or expenses in respect of third party claims arising out of acts and omissions of the D&C Subcontractor in respect of which third party claim compensation or indemnification would have been payable under such Subcontractor's Insurances:

- 26.6.1 but for the act or omission on the part of the D&C Subcontractor; or
- 26.6.2 if such Subcontractor's Insurances were maintained in accordance with the provisions of this clause 25.
- 26.7 If a claim is made under any of the Subcontractor's Insurances, or any of the Project Insurances as a result of any act or omission of the D&C Subcontractor, then the D&C Subcontractor shall be responsible for and bear the cost of any excess or deduction payable in respect of such claim. The D&C Subcontractor shall compensate the Private Party for any increases in insurance premium, deductibles and excesses in respect of the Project Insurances that arise from:
- 26.7.1 the claims record of the D&C Subcontractor or its subcontractors; and
- 26.7.2 claims made by the Private Party as a result of actions or omissions of the D&C Subcontractor,
- to the extent that the numbers and or quantum of claims is, or are, greater than would reasonably be expected.
- 26.8 If any claim made under any of the Project Insurances held by the Private Party is repudiated at any time during the Construction Term by the relevant insurer as a result of any act or omission on the part of the D&C Subcontractor, the D&C Subcontractor indemnifies the Private Party against any costs, damages, or expenses incurred by or claims made against the Private Party in respect of which the Private Party would have been compensated or indemnified under such insurances but for the act or omission on the part of the D&C Subcontractor. Subject to clause 26.7, if any claim made under any of the Project Insurances held by the Private Party is repudiated by the relevant insurer, and such repudiation is not as a result of or contributed to by any act or omission by the D&C Subcontractor, then the D&C Subcontractor shall not be responsible for or bear any cost of, any re-instatement as a result thereof (unless the Private Party pays the D&C Subcontractor to undertake such re-instatement) or any claim, under clause 10.1 to the extent that the D&C Subcontractor would have been compensated or indemnified and is not compensated or indemnified by the Project Insurances as a result of such repudiation.
- 26.9 The D&C Subcontractor acknowledges and agrees to the provisions of clause [42] of the PPP Agreement.
- 26.10 Should the circumstances envisaged by clause [45] of the PPP Agreement occur and the Private Party be required to undertake any Reinstatement Works (as defined in clause [45.3.1] of the PPP Agreement), the D&C Subcontractor shall provide the Private Party with such assistance that the Private Party can reasonably require the D&C Subcontractor to provide it at the Private Party's reasonable cost.
- 26.11 The Private Party shall provide the D&C Subcontractor with full details of any procedures or obligations with which the D&C Subcontractor is required to comply in respect of the Project Insurances.
- 26.12 The Private Party shall consult with the D&C Subcontractor to obtain any claims of the D&C Subcontractor and the Private Party shall ensure that such claims of the D&C Subcontractor are submitted under the Project Insurances. The D&C Subcontractor shall not be entitled to bring or enforce any claim under the Project Insurances in its own name and on its own behalf without the prior written

approval of the Private Party and the Lenders where either the Private Party or the Lenders are bringing a claim in respect of the same cause of action under the Project Insurances, the onus being on the D&C Subcontractor to ascertain whether the Private Party or the Lenders are bringing such a claim. If the D&C Subcontractor is permitted to bring or enforce such a claim, it shall give both the Private Party and the Lenders prior written notice of the fact that it is bringing such a claim and full details of the grounds of such claim and the amount of such claim.

27. UNINSURABLE RISKS

27.1 The D&C Subcontractor has read and understood and shall be bound by the provisions of clause [43] of the PPP Agreement.

27.2 The D&C Subcontractor shall co-operate with the Private Party regarding the management of any Uninsurable risk. The Private Party shall consult with the D&C Subcontractor in determining how to manage any Uninsurable risk including the financial consequences. The Private Party shall not agree any issues contemplated in clause [43.2] of the PPP Agreement with the Municipality which impacts on the D&C Subcontractor's risk or cost of provision of the Works and Subcontractor's Project Deliverables without the prior written consent of the D&C Subcontractor, which consent shall not be unreasonably withheld. The Parties agree that if the requirements of clauses [43.1] and [43.2] of the PPP Agreement are met and the PPP Agreement is not terminated:

27.2.1 this Agreement shall continue in force and effect; and

27.2.2 on the occurrence of any risk which is Uninsurable which affects the D&C Subcontractor (but only if that risk has continued to be Uninsurable), the Private Party shall:

(a) in the circumstances contemplated in clause [43.4.3(a)] of the PPP Agreement, and once the Private Party receives payment from the Municipality, pay to the D&C Subcontractor, to the extent of the liability to the D&C Subcontractor under this Agreement, an amount equal to the insurance proceeds that would have been payable to the D&C Subcontractor had the risk continued to be insurable, within 5 Business Days of receipt of the relevant monies from the Municipality, in which event this Agreement shall continue; or

(b) in the circumstances contemplated in clause [43.4.3(b)] of the PPP Agreement and once the Private Party receives payment from the Municipality, pay the D&C Subcontractor an amount equal to the amount set out in clause 49 and this Agreement shall terminate as if for Force Majeure.

28. CONSEQUENCES OF RELIEF EVENT

28.1 If a Relief Event has occurred which:

28.1.1 will directly cause a delay in Service Commencement, or

28.1.2 materially adversely affects the ability of the D&C Subcontractor to perform any of its obligations under this Agreement,

then the Parties shall consult with each other on what relief the Private Party shall seek in terms of clause [46] of the PPP Agreement in relation to the obligations and

duties contained thereunder insofar as it relates to the Works and other provisions under this Agreement.

28.2 The D&C Subcontractor has read and understood the provisions of clause [46] of the PPP Agreement and understands and agrees that the Private Party must comply with the provisions of that clause 46 in order to obtain relief in respect of a Relief Event. Accordingly, to obtain relief, the D&C Subcontractor must:

28.2.1 as soon as practicable, and in any event within 3 Business Days after it became aware that the Relief Event has caused or is likely to cause delay and or materially adversely affects the ability of the D&C Subcontractor to perform any of its obligations, give to the Private Party a notice of its claim for relief from its obligations under this Agreement, including full details of the nature of the Relief Event, the date of occurrence, its likely duration and its likely impact to the extent that such information is available to the D&C Subcontractor, provided further that the D&C Subcontractor shall give the Private Party any additional information in relation to the Relief Event as and when such information becomes available;

28.2.2 within 15 Business Days of receipt by the Private Party of the notice referred to in clause 28.2.1 above, give full details of the relief claimed; and

28.2.3 demonstrate to the reasonable satisfaction of the Private Party that:

- (a) the D&C Subcontractor and or its subcontractors could not have avoided such occurrence or consequences by steps which they might reasonably be expected to have taken, without incurring material expenditure;
- (b) the Relief Event was the primary cause of the delay to the Scheduled Service Commencement Date or the need for relief from the obligations under this Agreement;
- (c) the time lost and or relief from the obligations under this Agreement claimed (including any customary builders holidays occurring within such period) could not reasonably be expected to be mitigated or recovered by the D&C Subcontractor acting in accordance with Good Industry Practice, without incurring material expenditure; and or
- (d) the D&C Subcontractor is using reasonable endeavours to perform its obligations under this Agreement,

so as to enable the Private Party to fulfil the requirements of clause [46] of the PPP Agreement and its obligations under the Financing Agreements.

28.3 In the event that the D&C Subcontractor has complied with its obligations under clause 28.2 above, the Private Party shall be obliged to apply for relief in terms of clause [46] of the PPP Agreement and to the extent that the Private Party obtains corresponding relief under the PPP Agreement from the Municipality:

28.3.1 the Scheduled Service Commencement Date shall be postponed by such time as shall be reasonable for such a Relief Event, taking into account the likely effect of the delay; and or

28.3.2 the Private Party shall not be entitled to exercise its rights to terminate this Agreement under clause 43 or its right to claim Deductions, and, subject to clause 28.5 below, shall give such other relief as has been requested by the

D&C Subcontractor and agreed between the Private Party and the Municipality.

- 28.4 The D&C Subcontractor shall only be entitled to payment during the period that the Relief Event continues to the extent that it achieves Milestones and is entitled to payment in terms of clause 24.
- 28.5 Nothing in clause 28.3 above shall affect any entitlement of the Private Party to make Deductions or any other deductions as are permitted under this Agreement during the period in which the Relief Event is subsisting, where the right to make such Deductions or other deductions do arise prior to the happening of the Relief Event and, in the case of Deductions, that corresponding Penalty Deductions are made by the Municipality under the PPP Agreement.
- 28.6 In the event that information required by clause 28.2 above is provided after the dates referred to in that clause, then the D&C Subcontractor shall not be entitled to any relief during the period for which the information is delayed. The Private Party shall submit all the information required under the PPP Agreement timeously, once it has received such information from the D&C Subcontractor.
- 28.7 The D&C Subcontractor shall notify the Private Party if at any time it receives or becomes aware of any further information relating to the Relief Event, giving details of that information to the extent that such information is new or renders information previously submitted materially inaccurate or misleading. The Private Party shall give this information to the Municipality in terms of the PPP Agreement.
- 28.8 If the provisions of clause [46.7] of the PPP Agreement are applicable, the Private Party shall consult with the D&C Subcontractor as to what the D&C Subcontractor considers a satisfactory solution for dealing with such prolonged Relief Event and, in negotiating with the Municipality, shall give due and proper consideration to the D&C Subcontractor's opinion.
- 28.9 Notwithstanding the foregoing provisions of this clause 28, the D&C Subcontractor shall only be entitled to relief pursuant to a Relief Event from the Private Party to the extent that the Private Party receives relief pursuant to that Relief Event in respect of the D&C Subcontractor's obligations, from the Municipality, provided that the Private Party has complied with the provisions of this clause 28.
- 28.10 If the Private Party fails to comply with the provisions of this clause 28 and as a result thereof the Private Party is not entitled to any relief in terms of clause [46] of the PPP Agreement, then the Private Party shall not be entitled to call the Performance Bond or any D&C Subcontractor Default or to make any Deductions in relation to any non-performance of the D&C Subcontractor caused by such Relief Event, provided that the Relief Event was not caused by or contributed to by any act or omission of the D&C Subcontractor.

29. CONSEQUENCE OF A COMPENSATION EVENT

- 29.1 If Compensation Event has occurred that has the following direct results:
- 29.1.1 the D&C Subcontractor will be unable to achieve Service Commencement on or before the Scheduled Service Commencement Date;
- 29.1.2 the D&C Subcontractor is unable to comply with its obligations under this Agreement or the Private Party is unable to comply with its obligations under the PPP Agreement in respect of the Works and or the Subcontractor's Project

Deliverables or during the period from the Effective Date to the date of issue of the Phase 2 Completion Certificate ; and/or

29.1.3 the D&C Subcontractor incurs costs or loses revenue,

then the Parties shall consult with each other on the compensation the Private Party shall seek in terms of clause [47] of the PPP Agreement so that both Parties are placed in the same economic and financial position that they would each have been if the Compensation Event had not occurred.

29.2 The D&C Subcontractor has read and understood the provisions of clause [47] of the PPP Agreement and that the Private Party must comply with the provisions of said clause [47] in order to obtain relief in respect of a Compensation Event. Accordingly, to obtain relief and or claim compensation the D&C Subcontractor must:

29.2.1 as soon as practicable, and in any event within 3 Business Days after it became aware that the Compensation Event has caused or is likely to cause delay, breach of an obligation under this Agreement and or the D&C Subcontractor to incur costs, give to the Private Party a notice of its claim for an extension of time to the Scheduled Service Commencement Date, payment of compensation and or relief from its obligations under this Agreement;

29.2.2 within 15 Business Days of receipt by the Private Party of the notice referred to in clause 29.2.1 above, give full details of the Compensation Event and the extension of time (including any customary builders holidays occurring within such period and that the D&C Subcontractor could not reasonably be expected to mitigate or recover such time without incurring material expenditure) and or any estimated change in project costs or lost revenue claimed; and

29.2.3 demonstrate to the reasonable satisfaction of the Private Party that:

(a) the Compensation Event was the direct cause of the estimated change in Project costs and or any delay in the achievement of the Scheduled Service Commencement Date; and

(b) the estimated change in the D&C Subcontractor's Fee, time lost, and or relief from the obligations under the Agreement claimed, could not reasonably be expected to be mitigated or recovered by the D&C Subcontractor acting in accordance with Good Industry Practice,

so as to enable the Private Party to fulfil the requirements of clause [47.2] of the PPP Agreement.

29.3 In the event that the D&C Subcontractor has complied with its obligations under clause 29.2 above, the Private Party shall be obliged to apply for relief in terms of clause [47] of the PPP Agreement, and to the extent that the Private Party obtains corresponding relief and or compensation under the PPP Agreement from the Municipality:

29.3.1 the Scheduled Service Commencement Date shall be postponed by such time as shall be reasonable for such a Compensation Event, taking into account the likely effect of the delay; and/or

29.3.2 in the case of any costs being incurred by the D&C Subcontractor:

- (a) at any time from the Effective Date up until the date of issue of the Phase 2 Completion Certificate; and/or
- (b) additional capital expenditure being incurred by the D&C Subcontractor at any time; and

the Private Party shall compensate the D&C Subcontractor for the actual change in Project costs, additional capital expenditure incurred by the D&C Subcontractor within 20 Business Days of its receipt of monies from the Municipality paid for the purposes of settling any such monies claimed (and the D&C Subcontractor's Fee will be increased accordingly), provided that the D&C Subcontractor has provided it with all relevant substantiating information and documentation in respect of all such claims of the D&C Subcontractor, and or

29.3.3 the Private Party shall give the D&C Subcontractor such relief from its obligations and such extensions of time under this Agreement, as is reasonable for such a Compensation Event and which corresponds to the relief and extension of time granted to the Private Party in terms of the PPP Agreement by the Municipality.

29.4 In the event that information is provided after the dates referred to in clause 29.2 above, then the D&C Subcontractor shall not be entitled to any extension of time, compensation, or relief from its obligations under this Agreement in respect of the period for which the information is delayed. The Private Party shall submit all the information required under the PPP Agreement timeously, once it has received such information from the D&C Subcontractor.

29.5 The D&C Subcontractor shall provide the Private Party with such assistance as the Private Party may reasonably require from the D&C Subcontractor in order to enable the Private Party to fulfill its obligations in terms of the PPP Agreement.

29.6 If the Private Party fails to comply with the provisions of this clause 29 and as a result thereof the Private Party is not entitled to any compensation in terms of clause [47] of the PPP Agreement, then the Private Party shall not be entitled to call the Performance Bond, any D&C Subcontractor Default or make any Deductions in relation to any non-performance of the D&C Subcontractor caused by such Compensation Event, provided that the Compensation Event was not caused or contributed to by any act or omission of the D&C Subcontractor.

29.7 If:

29.7.1 the Private Party fails to submit a claim as contemplated in this clause 29; or

29.7.2 the Private Party is not entitled to claim any compensation (or compensation is reduced) as a result of the fact that the Compensation Event arose (directly or indirectly) as a result of any negligence, wilful conduct or default of the Private Party (that was not caused or contributed to by any act or omission of the D&C Subcontractor),

the Private Party shall compensate the D&C Subcontractor with the amount which is equal to the amount of the claim that would have been due to the D&C Subcontractor but for the events listed in clauses 29.7.1 and 29.7.2

30. FORCE MAJEURE

- 30.1 Subject to the other provisions of this clause 30, the Party claiming relief shall be relieved from liability under this Agreement to the extent that by reason of the Force Majeure event it is not able to perform all, or a material part of its obligations under this Agreement, provided that:
- 30.1.1 subject to the compliance by the Private Party with its obligations set out in this clause 30, the D&C Subcontractor shall only get proportionate relief from its obligations if the Private Party is granted relief in respect of the same obligations in the PPP Agreement;
- 30.1.2 the Private Party shall only get relief from its obligations that correspond to the obligations of the Municipality under the PPP Agreement, if the Municipality is granted the corresponding relief in respect of the same obligations in the PPP Agreement; and
- 30.1.3 the Private Party shall be granted relief from those of its obligations under this Agreement that are also an obligation of the Private Party under the PPP Agreement and that are not to be fulfilled and undertaken by the D&C Subcontractor in terms of this Agreement, if the Private Party is granted the same relief from those obligations under the PPP Agreement.
- 30.2 If either Party is of the opinion that a Force Majeure event has occurred, they shall consult together and, in respect of the relief that is to be sought in respect of the D&C Subcontractor's obligations under this Agreement, agree what relief the Private Party should seek under clause [48] of the PPP Agreement.
- 30.3 Where a Party is (or claims to be) affected by an event of Force Majeure:
- 30.3.1 it shall take all reasonable steps to mitigate to the extent required by the common law the consequences of such an event upon the performance of its obligations under this Agreement, resume performance of its obligations affected by the event of Force Majeure as soon as practicable; and
- 30.3.2 it shall not be relieved from liability under this Agreement to the extent that it is not able to perform, or has not in fact performed, its obligations under this Agreement due to its failure to comply with its obligations under clause 30.3.1.
- 30.4 The D&C Subcontractor shall provide the Private Party with all notices and information that the Private Party requires to comply with clauses [48.3], [48.4] and [48.6] of the PPP Agreement, provided that the time periods within which the D&C Subcontractor shall provide the Private Party with notices and information shall be 3 and 10 Business Days for the purposes of clauses [48.3] and [48.4] of the PPP Agreement respectively. The Private Party shall provide the D&C Subcontractor with copies of all notices and information provided to it by the Municipality in terms of clauses [48.3], [48.4] and [48.6] of the PPP Agreement within 3 Business Days of the receipt of that information from the Municipality. If the Private Party is seeking relief from an obligation that does not correspond to an obligation of the Municipality in the PPP Agreement, it shall provide the D&C Subcontractor with copies of all notices and information that it provides to the Municipality simultaneously with it delivering the notices and information on the Municipality. The Private Party shall serve all notices that it receives from the D&C Subcontractor claiming the occurrence of a Force Majeure event, on the Municipality in compliance with the provisions of the PPP Agreement.

- 30.5 If the relief has been claimed by the Municipality in terms of the PPP Agreement, the Private Party shall notify the D&C Subcontractor of any notice it receives from the Municipality in terms of clause [48.5] of the PPP Agreement as soon as possible after receiving such notification.
- 30.6 If the Scheduled Service Commencement Date has been postponed in terms of clause [48.8] of the PPP Agreement, then the Long Stop Date shall be extended by the same period. The D&C Subcontractor shall only be entitled to payment during the period that the Force Majeure event endures to the extent that it achieves Milestones and is entitled to payment in terms of clause 24.
- 30.7 Subject to clause 49, the D&C Subcontractor's sole right to payment or otherwise in relation to the occurrence of an event of Force Majeure shall be as provided in this clause 30.
- 30.8 The Parties agree to any modifications to this Agreement which may be equitable having regard to the nature of an event or events of Force Majeure, whilst ensuring that any such amendments to this Agreement shall be substantially the same as any amendments to the PPP Agreement so as to ensure that the provisions of this Agreement remain substantially the same as the provisions of the PPP Agreement in respect of the Works and the Subcontractor's Project Deliverables and during the Construction Term.
- 30.9 The D&C Subcontractor acknowledges the provisions of clause [48.10] of the PPP Agreement. The Private Party undertakes not to agree any amendments to the PPP Agreement which will impact on the rights and obligations of the D&C Subcontractor under this Agreement without the D&C Subcontractor's prior written consent, which consent shall not be unreasonably withheld or denied.
- 30.10 Notwithstanding the foregoing provisions of this clause 30, the D&C Subcontractor shall only be entitled to relief pursuant to an event of Force Majeure from the Private Party to the extent that the Private Party receives relief pursuant to that event of Force Majeure in respect of the D&C Subcontractor's claim and obligations, from the Municipality.
- 30.11 If the Private Party fails to comply with the provisions of this clause 30 and as a result thereof the Private Party is not entitled to any relief in terms of clause [48] of the PPP Agreement, then the Private Party shall not be entitled to call the Performance Bond, any D&C Subcontractor Default or make any Deductions in relation to any non-performance of the D&C Subcontractor caused by such event of Force Majeure, provided that the event of Force Majeure was not caused by or contributed to by any act or omission of the D&C Subcontractor.

31. UNFORESEEABLE CONDUCT

- 31.1 Should any Unforeseeable Conduct occur which shall adversely affect the general economic position of the D&C Subcontractor, the D&C Subcontractor shall be entitled, subject to the provisions of this clause 31, to such compensation and or relief from the Private Party as shall place the D&C Subcontractor in the same overall economic position as the D&C Subcontractor would have been in but for such Unforeseeable Conduct (and the D&C Subcontractor's Fee will be increased accordingly), provided that, subject to compliance by the Private Party with its obligations under this clause 31, such compensation and or relief shall not exceed the compensation and or relief that is granted or provided to the Private Party by the

Municipality pursuant to that Unforeseeable Conduct in respect of the Works and or the Subcontractor's Project Deliverables.

- 31.2 Should the Municipality claim, in terms of the PPP Agreement that any Unforeseeable Conduct has occurred which materially beneficially affects the general economic position of the Private Party, the D&C Subcontractor shall pay the value of any benefit it may have received as a result of the Unforeseeable Conduct to the Private Party so as to enable the Private Party to pay such benefit to the Municipality in terms of the PPP Agreement, which payment shall ensure that the D&C Subcontractor remain in the same overall economic position it would have been in had the materially beneficial Unforeseeable Conduct not occurred.
- 31.3 The Party claiming the occurrence of the Unforeseeable Conduct (**Claiming Party**) shall give written notice to the other Party (**Receiving Party**) containing reasonably detailed particulars of such conduct and its likely economic consequences to the Claiming Party. If the D&C Subcontractor is the Claiming Party, the Private Party shall be obliged to give a corresponding notice in terms of clause [49.3] of the PPP Agreement to the Municipality.
- 31.4 If the Private Party or the D&C Subcontractor is the Claiming Party, then the following shall be applicable:
- 31.4.1 in the case where the Private Party is the Claiming Party, the D&C Subcontractor shall have 50 days from the date of receipt of such notice to effect a remedy for the Unforeseeable Conduct which restores the general economic position of the Private Party to that which it would have been in if such Unforeseeable Conduct had not occurred; and
- 31.4.2 in the case where the D&C Subcontractor is the Claiming Party, subject to and in accordance with clause [49] of the PPP Agreement, the Private Party shall have 70 days from the date of receipt of such notice to effect a remedy for the Unforeseeable Conduct which restores the general economic position of the D&C Subcontractor to that which it would have been in if such Unforeseeable Conduct had not occurred.
- 31.5 If the Receiving Party does not effect such a remedy within such period, the Parties shall co-operate fully with each other in such situation so as to accommodate the consultation process in clause [49.4] of the PPP Agreement, with the intention of enabling the Private Party to reach a mutually satisfactory resolution of the situation with the Municipality in terms of the PPP Agreement. The Private Party agrees that it shall not agree to any resolution of the situation with the Municipality in terms of clause [49.4] of the PPP Agreement which impacts on the D&C Subcontractor unless such resolution has been agreed to by the D&C Subcontractor, acting reasonably. In the event that a mutually satisfactory resolution has not been reached with the Municipality in terms of the PPP Agreement within the 10 Business Days consultation period detailed in clause [49.4] of the PPP Agreement, the matter shall be dealt with in accordance with clause [49.4] of the PPP Agreement, for a determination to be made in terms of clause [78] of the PPP Agreement. The Parties acknowledge and agree that the Private Party shall inform the D&C Subcontractor of any determination made in terms of said clause [78]. The D&C Subcontractor undertakes that it shall be bound by any amendments or variations arising pursuant to said clause [78] of the PPP Agreement, including if the PPP Agreement shall terminate, then the termination payment payable to the D&C Subcontractor will be as equal to the aggregate of the Subcontractors Costs payable to the D&C Subcontractor, as agreed with the Municipality or determined in

terms of any Associated Agreement Dispute and shall be paid to the D&C Subcontractor on a date that falls 5 Business Days after the Private Party receives such amount from the Municipality once all monies due to the Lenders by the Private Party have been fully and finally settled, less any amounts that the Private Party is entitled to set-off in terms of this Agreement.

- 31.6 It is agreed that:
- 31.6.1 if the D&C Subcontractor claims the amounts contemplated in clause 31.5 from the Private Party, the Private Party shall be obliged to claim a corresponding amount from the Municipality in accordance with the provisions of the PPP Agreement;
- 31.6.2 subject to compliance by the Private Party with its obligations under this Agreement and subject to the provisions of clause 31.9 below, the D&C Subcontractor shall only be entitled to receive payments of the amounts detailed in clause 31.5, which are payable by the Municipality under the PPP Agreement, from the Private Party if the Private Party receives payment from the Municipality under the PPP Agreement.
- 31.7 Should the PPP Agreement be terminated in accordance with clause [49.4] of the PPP Agreement, the D&C Subcontractor shall be entitled to claim payment of the Subcontractors Costs if the Municipality has made a corresponding payment to the Private Party and once the Private Party's obligations to the Lenders are fully and finally settled. The Private Party shall pursue its claims against the Municipality fully to the extent the Lenders permit it to do so.
- 31.8 Insofar as the D&C Subcontractor is the Claiming Party, the D&C Subcontractor shall use all reasonable endeavours to minimise and mitigate the effects of any Unforeseeable Conduct to the extent required by common law.
- 31.9 In addition to clause 31.5, the Private Party will claim the costs of the D&C Subcontractor related to the Works in respect of any Unforeseeable Conduct, that are notified to it by the D&C Subcontractor, from Municipality and the D&C Subcontractor shall, subject to clause 31.10, only be entitled to claim relief and proceeds from the Private Party to the extent that the Private Party, in respect of any Unforeseeable Conduct, receives relief and proceeds in respect of the D&C Subcontractor's claim and obligations, from the Municipality.
- 31.10 If the Private Party fails to submit a claim as contemplated in this clause 31 under the PPP Agreement and the D&C Subcontractor would have been entitled to receive compensation if the Private Party had submitted such claim, then the Private Party shall compensate the D&C Subcontractor with the amount which is equal to the amount of the claim that would have been due to the D&C Subcontractor.

32. MUNICIPALITY VARIATIONS

- 32.1 If the Municipality proposes any Variation pursuant to the PPP Agreement, that will or may affect the Works or the D&C Subcontractor's rights and obligations under this Agreement, the Private Party shall notify the D&C Subcontractor of such Variation with 2 Business Days of the receipt by the Private Party of the Municipality Variation Proposal and the Private Party shall provide the D&C Subcontractor with a copy of such Municipality Variation Proposal.

- 32.2 As soon as practicable and in any event within 15 Business Days after having received or delivered the Municipality Variation Proposal, the D&C Subcontractor shall, subject to clause 32.9, deliver its response to the Municipality Variation Proposal (**the Response**) to the Private Party. The Response shall include the opinion of the D&C Subcontractor on:
- 32.2.1 whether relief from compliance with its obligations under this Agreement (in whole or part) is required, including the obligations of the D&C Subcontractor to achieve the date scheduled for the issue of the Completion Certificate and meet the specifications for the Facilities and Subcontractor's Output Specifications during the implementation of the Variation;
 - 32.2.2 any impact on the provision of the Subcontractor's Project Deliverables and the Works;
 - 32.2.3 any impact on the Scheduled Service Commencement Date;
 - 32.2.4 any amendment required to this Agreement as a result of the Variation;
 - 32.2.5 any estimated revised D&C Subcontractor's Fees that result directly from the Variation;
 - 32.2.6 any loss of revenue that will result from the Variation;
 - 32.2.7 any Capital Expenditure that is required or no longer required as a result of the Variation;
 - 32.2.8 any regulatory approvals or Consents which are required; and
 - 32.2.9 the proposed method of certification of any Works of the Variations required by the Municipality Variation Proposal.
- 32.3 As soon as practicable, and no later than 5 Business Days after the Private Party receives the Response, the Parties shall discuss the issues set out in the Response. The D&C Subcontractor shall:
- 32.3.1 provide evidence that it has used reasonable endeavours (including (where practicable) the use of competitive quotes) to oblige the subcontractors to minimise any increase in costs and maximise any reduction in costs;
 - 32.3.2 demonstrate how any Capital Expenditure to be incurred or avoided is being measured in a cost-effective manner; and
 - 32.3.3 demonstrate that any Capital Expenditure that has been avoided, which was anticipated to be incurred to meet the specifications for the Facilities that have been affected by the Municipality Variation Proposal concerned, has been taken into account in the amount which in its opinion has resulted or is required under clauses 32.2 above.
- 32.4 The Private Party shall include the Response in the Estimate that it submits in response to the Municipality Variation Proposal. The D&C Subcontractor shall supply the Private Party with all information and documents that the Private Party may require for the purposes of discussing the Estimate with the Municipality. The Private Party shall not amend the Estimate in a manner which will result in an

amendment of the Response without the prior written consent of the D&C Subcontractor, which consent shall not be unreasonably withheld.

- 32.5 The Parties record that, in such discussions, the Municipality may modify the Municipality Variation Proposal, and (if the estimated Capital Expenditure in respect of the Variation is expected to exceed an amount equal to R1 000 000 (indexed to CPI) during the period from the Effective Date until the date of issue of the Phase 2 Completion Certificate, and provided that it is practicable for the Private Party to do so) the Municipality may require the Private Party to seek and evaluate competitive quotes for the relevant Works. In each case, the Private Party shall notify the D&C Subcontractor of such requirement and the D&C Subcontractor shall, as soon as practicable, and in any event not more than 10 Business Days after receipt of such modification, notify the Private Party of any consequential changes to the Response. If any modification is made to the Response, the Private Party shall modify its Estimate to reflect such modification.
- 32.6 The D&C Subcontractor shall comply with Good Industry Practice with the objective of ensuring that it obtains best value for money (taking into account all relevant circumstances including, in particular, the requirement that the D&C Subcontractor should not be worse off as a result of the implementation of the Variation) when procuring any work, supplies, materials or equipment required in relation to the Variation.
- 32.7 The Parties record that if the Private Party and the Municipality cannot agree on the contents of the Estimate, then the Municipality Variation Proposal shall be withdrawn, (save that a Private Party Variation may not be withdrawn) or referred for resolution in terms of clause [50.2.7] of the PPP Agreement, in accordance with clause [78] of the PPP Agreement. The Parties shall use their reasonable endeavours to ensure that such dispute is an Associated Agreement Dispute.
- 32.8 As soon as practicable after the contents of the Estimate have been agreed or otherwise determined pursuant to the PPP Agreement, the Private Party shall:
- 32.8.1 if the Municipality confirms the Estimate in terms of clause [50.2.8] of the PPP Agreement, confirm the Response (as modified) in writing to the D&C Subcontractor; or
- 32.8.2 if the Municipality withdraws the Municipality Variation Proposal, immediately notify the D&C Subcontractor of such withdrawal.
- 32.9 Notwithstanding the other provisions of this clause 32:
- 32.9.1 if, on receipt of the Municipality Variation Proposal pursuant to clause 32.1, the D&C Subcontractor is of the opinion that such Variation is likely to result in an increase in the Project risk or the D&C Subcontractor's financial risk or to generally adversely affect the risk profile of the D&C Subcontractor, it shall, as soon as practical and in any event within 5 Business Days after having received the Municipality Variation Proposal, serve a notice on the Private Party stating its opinion and the reasons therefor; and
- 32.9.2 the Private Party shall promptly serve the D&C Subcontractor's notice on the Municipality, whereafter the provisions of clause [50.2.9(b)] of the PPP Agreement and the outcome of applying such clause shall be applicable to the Private Party in terms of the PPP Agreement and thereafter, and to the extent applicable, such outcome shall be applicable to the D&C Subcontractor in

terms of this Agreement, and the D&C Subcontractor shall comply with and accept the outcome of the application of said clause 50.2.9(b).

- 32.10 If the Municipality does not confirm the Estimate (as modified) in terms of clause [50.2.10] of the PPP Agreement, then the Private Party shall inform the D&C Subcontractor and the Municipality Variation Proposal shall be deemed to have been withdrawn.
- 32.11 The Parties record and agree that the Municipality and Private Party shall agree, in terms of clause [50.2.16(a)] of the PPP Agreement:
- 32.11.1 a payment schedule in respect of the payment of such sum reflecting the amount and timing of the costs to be incurred by the Private Party in carrying out the Variation to the extent such costs shall be borne by the Municipality; and
- 32.11.2 where payment for part of the Variation reflects the carrying out of, or specific progress towards, an element within the Variation, an objective means of providing evidence confirming that the part of the Variation corresponding to each occasion when payment is due under the payment schedule appears to have been duly carried out, shall be agreed and provided for as part of the payment schedule,
- except that the Private Party shall not agree anything with the Municipality pursuant to clause [50.2.16(a)] of the PPP Agreement which impacts on the D&C Subcontractor without the prior consent of the D&C Subcontractor, which consent shall not be unreasonably withheld.
- 32.12 The Private Party shall make payment to the D&C Subcontractor within 35 days of receipt by the Private Party of invoices presented in accordance with the agreed payment schedule (as the case may be, varied by agreement from time to time) accompanied by the relevant evidence (where applicable) that the relevant part of the Variation has been carried out (and the D&C Subcontractor's Fee will be increased accordingly).
- 32.13 If payment is not made in accordance with clause 32.12 above, the Private Party shall pay interest to the D&C Subcontractor on the amount unpaid from the date 35 days after receipt of the relevant invoice until date of payment (both days inclusive), at the Default Interest Rate.
- 32.14 For the avoidance of doubt, if the Municipality should, in terms clause [50.2] of the PPP Agreement, vary the nature and or scope of the obligations of the Private Party, which obligations are in respect of the Works and or the Subcontractor's Project Deliverables and are to be assumed by the D&C Subcontractor in terms of this Agreement, then the nature and or scope of the D&C Subcontractor's obligations to the Private Party will be varied accordingly, provided that the Private Party has complied with all the provisions of this clause 32.
- 32.15 The D&C Subcontractor acknowledges that, if applicable, where the Output Specifications in the PPP Agreement are amended, Annexe F of this Agreement will be amended accordingly to ensure that at all times the Subcontractor's Output Specifications are aligned with the Output Specifications relating to the Works and the Facilities in the PPP Agreement.

33. D&C SUBCONTRACTOR AND OTHER VARIATIONS

- 33.1 If the D&C Subcontractor wishes to introduce a Variation, it must serve a notice on the Private Party providing details of such Variation (a **D&C Subcontractor Variation Proposal**).
- 33.2 The D&C Subcontractor Variation Proposal must:
- 33.2.1 set out the proposed Variation in sufficient detail to enable the Private Party to evaluate it in full;
 - 33.2.2 specify the D&C Subcontractor's reasons for the D&C Subcontractor Variation Proposal;
 - 33.2.3 request the Private Party to consult with the D&C Subcontractor with a view to deciding whether to propose the D&C Subcontractor Variation Proposal to the Municipality and, if so, what consequential changes the Private Party requires as a result;
 - 33.2.4 specify all implications of the D&C Subcontractor Variation Proposal on this Agreement, including any reduction of the D&C Subcontractor's costs that may result in a reduction in the capital expenditure and any impact on the Scheduled Service Commencement Date (if any);
 - 33.2.5 indicate whether the D&C Subcontractor Variation Proposal shall have any impact on the D&C Subcontractor's ability to meet obligations under clause 39 (in whole or part) and if so full details of the impact;
 - 33.2.6 indicate if there are any dates by which a decision by the Municipality is critical.
- 33.3 The Private Party shall evaluate the D&C Subcontractor's Variation Proposal taking into account all relevant issues, including, *inter alia*, whether:
- 33.3.1 a change in the D&C Subcontractor's Fee will occur;
 - 33.3.2 the D&C Subcontractor Variation Proposal will affect the performance of the Works and the delivery of the Subcontractor Project Deliverables and/or the quality or successful delivery of the Services;
 - 33.3.3 the D&C Subcontractor Variation Proposal will interfere with the relationship of the Private Party with third parties;
 - 33.3.4 the financial strength and capacity of the D&C Subcontractor is sufficient to perform the Variation;
 - 33.3.5 the residual value of the project assets is reduced;
 - 33.3.6 the D&C Subcontractor Variation Proposal materially affects the risks or costs to which the Private Party is exposed; and
 - 33.3.7 any amendment shall be required to this Agreement as a result thereof.
- 33.4 To the extent that the Private Party proposes modifications to the D&C Subcontractor Variation Proposal, the D&C Subcontractor may either accept such modifications or withdraw the D&C Subcontractor Variation Proposal.

- 33.5 Once the D&C Subcontractor Variation Proposal has been agreed between the Parties, the Private Party shall then submit it to the Municipality in terms of the PPP Agreement. Such agreed D&C Subcontractor Variation Proposal shall become a Private Party Variation Proposal made in terms of clause [50.3] of the PPP Agreement if the Municipality agrees that such variation may be undertaken pursuant to said clause 50.3. The Private Party shall use its reasonable endeavours to ensure that the D&C Subcontractor is involved in any discussion held between the Private Party and the Municipality in respect thereof. The Private Party shall withdraw that proposal if the D&C Subcontractor requests it to do so, failing which, the D&C Subcontractor shall comply with whatever decision is reached in respect of that proposal in terms of the PPP Agreement, including any decision as to any sharing in any reduction in the cost of the Works that may be reached in terms of clause [50.3.8] of the PPP Agreement. The Private Party shall not agree any change to or other aspect of the Private Party Variation Proposal under the PPP Agreement that impacts on the D&C Subcontractor without the prior consent of the D&C Subcontractor (acting reasonably).
- 33.6 To the extent that the D&C Subcontractor Variation Proposal requires Capital Expenditure or otherwise cause its costs in providing the Works and Subcontractor Project Deliverables to increase or decrease, the D&C Subcontractor shall:
- 33.6.1 provide evidence that it has used reasonable endeavours (including (where applicable) the use of competitive quotes) to oblige the subcontractors to minimise any increase in costs and maximise any reduction in costs;
- 33.6.2 demonstrate how Capital Expenditure to be incurred or avoided is being measured in a cost effective manner; and
- 33.6.3 demonstrate that any expenditure that has been avoided, which was anticipated to be incurred to replace or maintain assets that have been affected by the D&C Subcontractor Variation Proposal concerned has been taken into account in the amount which in its opinion has resulted or is required under clauses 33.2.4 and 33.2.5.
- 33.7 For the avoidance of doubt, if the nature and or scope of the obligations of the Private Party under the PPP Agreement are varied pursuant to this clause 33, which obligations are in respect of the Operator's Project Deliverables and to be assumed by the D&C Subcontractor in terms of this Agreement, then the nature and or scope of the D&C Subcontractor's obligations to the Private Party in terms of this Agreement will be varied accordingly, provided that the Private Party has fully complied with the provisions of this clause 33.
- 33.8 The D&C Subcontractor shall only be entitled to an extension of the scheduled construction completion date for the issue of the Phase 2 Completion Certificate under this Agreement if the scheduled construction completion date for issue of the Phase 2 Completion Certificate pursuant to the PPP Agreement is moved to a later date, which corresponds to the extension of such date.

34. **GENERAL "PASS-THROUGH" PRINCIPLE**

34.1 **General**

- 34.1.1 The Parties record and acknowledge that the PPP Agreement contain provisions that rely upon this Agreement.

34.1.2

Accordingly:

- (a) the D&C Subcontractor expressly acknowledges that it has reviewed the terms of the PPP Agreement, and subject to any specific limitations to be agreed in this Agreement, assumes those risks relevant to the Works which are assumed by the Private Party under the PPP Agreement;
- (b) the D&C Subcontractor will carry out its obligations under this Agreement, in such manner as to allow the Private Party to comply with its obligations under the PPP Agreement, and the D&C Subcontractor will not do anything or omit to do anything which prevents or interfere with the Private Party's performance of its corresponding obligations under the PPP Agreement relating to the Works and Subcontractor Project Deliverables; and
- (c) the D&C Subcontractor must, unless specifically agreed otherwise in this Agreement:
 - (i) perform its obligations in such a manner as to allow the Private Party to fulfil its obligations under the PPP Agreement for which the D&C Subcontractor is responsible under this Agreement; and
 - (ii) provide to the Private Party all documents and other things reasonably required for the Private Party to fulfil its obligations under the PPP Agreement so that all such documentation and the like conforms with the requirements of the PPP Agreement.

34.2 **Pass Through Claims**

34.2.1 Subject to the principles set out in this clause 34.2 all entitlements which the D&C Subcontractor has against the Private Party under this Agreement where the Private Party has corresponding entitlements against the Municipality under the PPP Agreement will be pass through claims, including, but not limited to, in relation to Force Majeure, Unforeseeable Conduct, Relief Events, Compensation Events (**Pass Through Claims**).

34.2.2 Where Pass Through Claims arise, the Private Party has certain entitlements under the PPP Agreement. The purpose of this clause 34.2 is to provide the D&C Subcontractor with comparable entitlements in respect of Pass Through Claims and, subject to the provisions of this Agreement, to limit the D&C Subcontractor's rights against the Private Party in respect of Pass Through Claims by reference to the Private Party's entitlements under the PPP Agreement.

34.2.3 In respect of all Pass Through Claims the Private Party must, in a timely manner and subject to its obligations under the PPP Agreement, give the D&C Subcontractor copies of all relevant documents and other information and allow the D&C Subcontractor (at the D&C Subcontractor's cost) an opportunity to attend relevant meetings and expert hearings and make submissions to the Private Party, where permitted by the PPP Agreement.

34.3 **Proportionate Relief**

34.3.1 The D&C Subcontractor shall be eligible for relief and/or compensation for any Pass Through Claim to the proportionate extent that the Private Party obtains relief and/or compensation for any such event under the PPP Agreement,

provided that the D&C Subcontractor has fulfilled all of its other obligations and is entitled to such relief.

- 34.3.2 The D&C Subcontractor must take all actions, prepare all notices, and provide all other information as required under the PPP Agreement in sufficient time for the Private Party to be able to review, discuss and, where applicable, update such notices before the Private Party engages with the Municipality, in relation to such event under the PPP Agreement.

35. PERSONNEL

35.1 Key Personnel

The D&C Subcontractor shall at all times ensure that sufficient suitable and appropriately qualified and experienced personnel are employed in the key personnel positions relating to the Works (whether by the D&C Subcontractor or its subcontractors) to undertake the Works and delivery of the Subcontractor's Project Deliverables and that such key personnel shall be located in and be citizens of the Republic of South Africa. Without limiting the generality of the foregoing, the D&C Subcontractor shall ensure that all key personnel positions are always filled as soon as reasonably possible.

35.2 Removal of Personnel

The Private Party may require the D&C Subcontractor to remove any employee or other personnel of the D&C Subcontractor or any subcontractor from the Project Site and the D&C Subcontractor shall do so, (provided such removal is permitted under Law) including if the Municipality requests the Private Party to remove such employee or personnel in terms of clause [52.2] of the PPP Agreement and the D&C Subcontractor shall as soon as reasonably possible replace such employee or personnel with suitable appropriately qualified and experienced replacements (provided such replacement is permitted under Law).

36. MONITORING AND INSPECTION

The D&C Subcontractor shall on reasonable notice from the Private Party grant reasonable access to the Facilities to any person that the Private Party advises the D&C Subcontractor requires access to monitor the D&C Subcontractor's and or the Private Party's (in terms of the PPP Agreement) performance of the Works and the Subcontractor's Project Deliverables, provided that such person complies with all Laws and procedures of the D&C Subcontractor in respect of the Facilities and does not interfere with the D&C Subcontractor's performance of the Works and the Subcontractor's Project Deliverables.

37. ENVIRONMENTAL POLICY

- 37.1 The D&C Subcontractor shall ensure that it has familiarised itself with the hazards associated with the Works and the Subcontractor's Project Deliverables being carried out at the Project Site and that minimum use is made of any hazardous substance (being any natural or artificial substance, whether in solid, gaseous or liquid form capable of causing harm to any human or any other living organism supported by the environment (including air, water, land, surface land and sub-surface land) or capable of damaging the environment or public health or posing a threat to public safety including any contamination and all substances for which in each case liability or responsibility is imposed under applicable environment law) in

undertaking the Works and the Subcontractor's Project Deliverables, and, where possible, replace any hazardous substance that may be used with a non-hazardous or less hazardous substance.

37.2 In utilising any hazardous substance, the D&C Subcontractor shall ensure that manufacturer's specifications and safety measures are at all times complied with.

37.3 The D&C Subcontractor shall avoid (insofar as is possible) any contamination of the Project Site in undertaking the Works and the Subcontractor's Project Deliverables, and, insofar as any contamination occurs after the Effective Date as a result of the D&C Subcontractor providing and undertaking the Works and the Subcontractor's Project Deliverables, shall remove same and avoid any ongoing contamination, and at its own cost comply with any Law and or Consent, order, notice or direction of any regulatory body in respect thereof (whether same is made against the D&C Subcontractor, the Private Party and or the Municipality).

38. OCCUPATIONAL HEALTH AND SAFETY

38.1 During the Construction Term, the D&C Subcontractor shall be responsible for the observance by itself and its subcontractors of all applicable health and safety precautions necessary, whether required by Law or Good Industry Practice, for the protection of itself and its subcontractors involved in providing the Works and or the Subcontractor's Project Deliverables and any third parties within the Project Site. In particular (and without limiting the generality of the foregoing), the D&C Subcontractor shall ensure that such persons are aware of, and at all times comply with, the Municipality's health and safety policy and requirements notified to the D&C Subcontractor from time to time.

38.2 The D&C Subcontractor shall, during the Construction Term, maintain proof of compliance with the Occupational Health and Safety Act and produce the same to the Private Party and the Municipality within 20 hours of a request for same.

38.3 The Private Party shall not be liable in respect of a breach of any of the provisions under the Occupational Health and Safety Act by the D&C Subcontractor and its subcontractors in relation to the performance of the Works and the Subcontractor's Project Deliverables and to this extent the D&C Subcontractor indemnifies the Private Party against any claim which may arise against the Private Party as a result of the D&C Subcontractor's failure to comply therewith.

38.4 Without derogating from any of the obligations under this clause 38, both the D&C Subcontractor and the Private Party shall each be responsible for the health and safety precautions and requirements in respect of each of its own employees, subcontractors and or agents, as provided for in the Occupational Health and Safety Act and the regulations promulgated thereunder save to the extent that the liability in respect of a breach of a particular provision under the Occupational Health and Safety Act is regulated under this Agreement in terms of clause 38.5.

38.5 Section 37(2) Undertaking

38.5.1 The Parties record that, in terms of the PPP Agreement, the Municipality shall not be liable in respect of any breach of the Occupational Health & Safety Act by the Private Party, its agents or its subcontractors, and accordingly, the Private Party requires this indemnity detailed in this clause 38.5. The Private Party and the Municipality shall not be liable for any breaches by the D&C Subcontractor, its agents, its subcontractors and any of their employees of any

of the provisions under the Occupational Health and Safety Act in relation to the performance of the Works and the Subcontractor's Project Deliverables and consequently agrees to provide the Section 37(2) Undertaking.

38.5.2 The D&C Subcontractor acknowledges that the Section 37(2) Undertaking constitutes an agreement in terms of Section 37(2) of the Occupational Health and Safety Act, in terms of which, all responsibility for health and safety matters in relation to the performance of the Works and Subcontractor's Project Deliverables by the D&C Subcontractor and any of its employees, shall be that of the D&C Subcontractor.

38.5.3 In accepting such responsibility as set out in clause 38.5.2, the D&C Subcontractor shall indemnify the Private Party and the Municipality against any loss, damage, injury or death, however caused, to the D&C Subcontractor or to the subcontractors or any of their employees and shall hold the Private Party and the Municipality harmless against all and any claims, losses, damages, liability, costs and expenses of whatsoever nature, which the Private Party may, at any time sustain or incur arising out of the aforementioned circumstances; provided that such loss, damage, injury or death is not caused by the willful action or omission or gross negligence of the Private Party or the Municipality.

38.6 **Construction Regulations**

Each Party acknowledges and agrees to comply with its obligations under the Construction Regulations, 2014 issued in terms of the Occupational Health & Safety Act.

39. **TARGET GROUP REQUIREMENTS OF THE D&C SUBCONTRACTOR**

39.1 The D&C Subcontractor shall ensure that:

39.1.1 for the Construction Term, no less than 25% of the voting Equity from time to time shall be directly and beneficially owned by Black People and/or Black Enterprises (the **Minimum Black Equity**) and such Equity shall rank *pari passu* with the voting Equity held by the Shareholders who are not Black People or Black Enterprises;

39.1.2 the Black Shareholders shall be entitled to earn a return on their investment in the Works consistent with their Equity, through their participation in:

- (a) the dividends and other distributions declared by the D&C Subcontractor from time to time in respect of the Equity; and
- (b) the payments made to the Shareholders in respect of the Shareholder Loans;

39.1.3 no less than 30% of the total expenditure forecast by the D&C Subcontractor shall be expended under subcontracts in which Black People and or Black Enterprises will participate:

39.1.4 no less than:

- (a) 30% of each of its senior management and executive appointments shall be filled by Black Persons; and

- (b) 50% of the minimum number of appointments specified in clause 39.1.4(a) are filled by Black Women;
- 39.1.5 it implements its current employment equity plan, as substituted from time to time in accordance with the Employment Equity Act. The D&C Subcontractor shall furnish the Private Party with:
 - (a) each successive employment equity plan submitted by it in terms of that act within 4 Business Days following the date of submission of that plan; and
 - (b) a copy of each report submitted by it to the Department of Labour (or its successor) pursuant to Section 21 of that act within 4 Business Days following the date of submission of that report;
- 39.1.6 the D&C Subcontractor shall meet the annual skills development targets set forth in clause [55.6] of the PPP Agreement and shall apply no less than an amount equal to 6% of its annual payroll expenditure in any financial year towards the costs of implementing its skills development targets (**Annual Skills Development Commitment**) for that financial year during the Construction Term; and
- 39.1.7 it shall expend no less than 1% of the total procurement budget of the D&C Subcontractor in respect of the Project under procurement contracts with SMMEs during the Construction Term.
- 39.2 The D&C Subcontractor shall furnish the Private Party annually within 10 Business Days after the end of each financial year of the D&C Subcontractor a report certified by the D&C Subcontractor's auditors setting forth:
 - 39.2.1 in relation to each Shareholder:
 - (a) the Equity ownership of that Shareholder and details of all changes whatsoever in such ownership in that financial year (including, without limitation, changes effected through any acquisition or disposal of issued shares, or through any subscription for new shares);
 - (b) the Shareholder Loans of that Shareholder and details of all changes in the amount of such Shareholder Loans in that financial year (including, without limitation, changes effected through repayments);
 - (c) the voting rights attaching to all classes of Equity owned by that Shareholder in that financial year; and
 - (d) details of all dividends and other distributions declared to and received by that Shareholder in respect of its Equity, as well as all payments made to that Shareholder in respect of any Shareholder Loans, in that financial year;
 - 39.2.2 a complete statement of all targets set forth in the skills development plan for that financial year that have been achieved by the D&C Subcontractor in that financial year, together with details of the costs incurred by the D&C Subcontractor in that financial year in respect of such targets;
 - 39.2.3 a complete statement of all targets (if any) set forth in the skills development plan for that financial year that have not been achieved by the D&C

Subcontractor in that financial year, together with the D&C Subcontractor's reasons for not achieving these targets; and

- 39.2.4 details of the portion (if any) of its Annual Skills Development Commitment for that financial year not applied by the D&C Subcontractor towards the implementation of any of its skills development targets for that financial year, together with the D&C Subcontractor's reasons for not applying the full Annual Skills Development Commitment in that financial year.

40. **SUBCONTRACTING**

The D&C Subcontractor shall procure that:

- 40.1 each of its subcontractors implements that subcontractor's current employment equity plan, as substituted from time to time in accordance with the Employment Equity Act. The D&C Subcontractor shall furnish the Private Party with or cause the Private Party to be furnished with:
- 40.1.1 each successive employment equity plan submitted by that subcontractor in terms of the Employment Equity Act within 3 Business Days following the date of submission of that plan; and
- 40.1.2 a copy of each report submitted by that subcontractor to the Department of Labour (or its successor) pursuant to Section 21 of the Employment Equity Act within 3 Business Days following the date of submission of that report;
- 40.2 each subcontractor shall apply no less than an amount equal to 6% of that subcontractor's annual payroll expenditure in any financial year towards the costs of implementing its skills development targets for that financial year; and
- 40.3 each subcontractor shall expend no less than 1% of the total procurement budget of that subcontractor in respect of the Works under procurement contracts with SMMEs.

41. **LOCAL EMPLOYMENT**

- 41.1 The D&C Subcontractor shall utilise its existing labour for the purposes of carrying out the Works.
- 41.2 To the extent that the D&C Subcontractor wishes to employ additional labour, the D&C Subcontractor undertakes to employ labour within the municipal boundaries of Garden Route District Municipality unless a special skill or experience is required which is not readily available within the municipal boundaries of Garden Route District Municipality or South Africa.

42. **TERMINATION FOR PRIVATE PARTY DEFAULT**

42.1 **Procedure**

- 42.1.1 On the occurrence of a Private Party Default, or as soon as the D&C Subcontractor within 5 Business Days becomes aware of same, the D&C Subcontractor may service notice on the Private Party of the occurrence (and specifying details) of such Private Party Default and shall, simultaneously with the service of such notice, deliver a copy thereof to the Lenders.

42.1.2 Upon the occurrence of a Private Party Default arising from a Municipality Default under the PPP Agreement, the Private Party shall consult with the D&C Subcontractor, as well as with the Lenders as to the course of action to be followed by the Private Party in terms of the PPP Agreement. Such course of action shall be advised by the Private Party to the D&C Subcontractor after consultation with the D&C Subcontractor and the Lenders. The D&C Subcontractor shall not be entitled to terminate this Agreement for a Private Party Default that is a Municipality Default unless the PPP Agreement is terminated for the Municipality Default.

42.1.3 On the service of the notice pursuant to clause 42.1.1, the D&C Subcontractor may:

(a) in the case of the Private Party Default referred to in clause 2.1.82(b), terminate this Agreement in its entirety by notice in writing having immediate effect;

(b) in the case of the Private Party Default referred to in clause 2.1.82(c), if that Private Party Default has not been remedied or rectified within:

(i) 10 Business Days, where the Lenders have issued a Notice of Drawstop in terms of any Financing Agreement and the provisions of clause 24.1.10 are not applicable; and

(ii) 20 Business Days, in all other Private Party Defaults falling within clause 2.1.82(c), where the provisions of clause 24.1.10 are not applicable,

of the date on which the notice in terms of clause 42.1.1 is served, terminate this Agreement in its entirety by notice in writing having immediate effect; and

(c) while the same is subsisting, in the case of any other Private Party Default serve notice of default on the Private Party requiring the Private Party to remedy the Private Party Default referred to in such notice of default (if the same is continuing) within 30 Business Days of such notice of default.

42.1.4 Regardless of the foregoing, the remedy period granted under clause 42.1.3(c) shall be the same as the remedy period that may be granted to the Private Party in terms of clause [59] of the PPP Agreement, if the Private Party Default has caused (directly or indirectly) the Municipality to exercise its rights under such clause.

42.1.5 The D&C Subcontractor shall not exercise or purport to exercise any rights to terminate this Agreement except as expressly provided for herein. The D&C Subcontractor shall not and shall not be entitled to terminate this Agreement for causes not contained in this Agreement. The rights of the D&C Subcontractor (to terminate or otherwise) under this clause 42 are in addition (and without prejudice) to any other rights which the D&C Subcontractor may have in Law to claim the amount of any direct loss or damages suffered by the D&C Subcontractor on account of any payment default by the Private Party. If the Private Party remedies the breach by paying the D&C Subcontractor compensation or damages of an amount agreed as between the Parties or determined in terms of clause 55, then the D&C Subcontractor shall be

precluded from instituting a claim for specific performance against the Private Party.

- 42.1.6 If the Private Party Default notified in a notice of default is not remedied before the expiry of the period referred to in the notice then the D&C Subcontractor may, terminate this Agreement in its entirety by written notice to the Private Party with immediate effect; provided that for the purposes of clause 42.1.4, if the Private Party's execution of the remedy is adversely affected by the occurrence of an event of Force Majeure, a Relief Event, a Compensation Event, Unforeseeable Conduct or Variation, then, subject to the Private Party complying with the mitigation and other requirements in this Agreement concerning Force Majeure, Relief Events, Compensation Events, Unforeseeable Conduct or Variation, (as the case may be), the time for execution of the remedy or any relevant element of it shall be deemed to be extended by a period equal to the delay caused by the Force Majeure event or Relief Event, Compensation Event, Unforeseeable Conduct or Variation (as the case may be) which is agreed by the Parties or determined in accordance with clause 55 of this Agreement.

43. TERMINATION FOR D&C SUBCONTRACTOR DEFAULT

43.1 Notification

The D&C Subcontractor shall notify the Private Party of the occurrence, and details, of any D&C Subcontractor Default of which it is aware and of any event or circumstance which it is aware is likely, with the passage of time or otherwise, to constitute or give rise to a D&C Subcontractor Default, in either case promptly on the D&C Subcontractor becoming aware of its occurrence.

43.2 Private Party's Options

- 43.2.1 On the occurrence of a D&C Subcontractor Default, the Private Party may:
- (a) in the case of the D&C Subcontractor Default referred to in clauses 2.1.33(a), 2.1.33(b), 2.1.33(c), 2.1.33(d), 2.1.33(e), 2.1.33(g), or 2.1.33(i), terminate this Agreement in its entirety by notice in writing having immediate effect;
 - (b) and while the same is subsisting, in the case of any other D&C Subcontractor Default referred to in clauses 2.1.33(f), 2.1.33(h) 2.1.33(j) or 2.1.33(k) serve notice of default on the D&C Subcontractor requiring the D&C Subcontractor at the D&C Subcontractor's option either:
 - (i) to remedy the D&C Subcontractor Default referred to in such notice of default (if the same is continuing) within 15 Business Days of such notice of default; or
 - (ii) to put forward, within 10 Business Days of such notice of default being delivered, a reasonable programme for remedying the D&C Subcontractor Default (**Remedy Programme**). The Remedy Programme shall specify in reasonable detail the manner in, and the latest date by, which such D&C Subcontractor Default is proposed to be remedied. The D&C Subcontractor shall only have the option of putting forward a Remedy Programme if it first notifies

the Private Party within 3 Business Days of such notice of default that it proposes to do so.

43.2.2 Regardless of the foregoing, the remedy period granted under this clause 43.2.1(b)(ii) shall not exceed the remedy period that may be granted to the Private Party in terms of clause [59] of the PPP Agreement, if the D&C Subcontractor Default has caused (directly or indirectly) the Municipality to exercise its rights under such clause.

43.2.3 The Private Party shall not exercise or purport to exercise any rights to terminate this Agreement except as expressly provided for herein. The Private Party shall not and shall not be entitled to terminate this Agreement for causes not contained in this Agreement. The rights of the Private Party (to terminate or otherwise) under this clause 43 are in addition (and without prejudice) to any other rights which the Private Party may have in Law to claim the amount of any direct loss or damages suffered by the Private Party on account of any payment default by the D&C Subcontractor. If the D&C Subcontractor remedies the breach by paying the Private Party compensation or damages of an amount agreed as between the Parties or determined in terms of clause 55, then the Private Party shall be precluded from instituting a claim for specific performance against the D&C Subcontractor.

43.3 **Remedy Provisions**

43.3.1 Where the D&C Subcontractor puts forward a Remedy Programme in compliance with clause 43.2.1(b)(ii), the Private Party shall have 5 Business Days from receipt of the same within which to notify the D&C Subcontractor that it does not accept the Remedy Programme, giving reasons for its decision and acting reasonably, failing which the Private Party shall be deemed to have accepted the Remedy Programme. The Private Party shall act reasonably in rejecting the Remedy Programme. The Private Party shall not reject the Remedy Programme if the Municipality accepts such Remedy Programme (or any programme based thereon) in terms of the PPP Agreement where the Private Party has provided such Remedy Programme to the Municipality in terms of the PPP Agreement. Where the Private Party notifies the D&C Subcontractor that it does not accept the Remedy Programme, the Parties shall endeavour within the following 5 Business Days to meet to discuss any necessary amendments to the Remedy Programme put forward. In the absence of agreement the question of whether the Remedy Programme (as the same may have been amended by agreement) will remedy the D&C Subcontractor Default in a reasonable manner and within a reasonable time period (and, if not, what would be a reasonable programme) may be referred by either Party for resolution in accordance with clause 55, unless such dispute is joined to any similar dispute under the PPP Agreement as an Associated Agreement Dispute.

43.3.2 If:

- (a) the D&C Subcontractor Default notified in a notice of default is not remedied before the expiry of the period referred to in the notice; or
- (b) where the D&C Subcontractor puts forward a Remedy Programme which has been accepted by the Private Party or has been determined to be reasonable, the D&C Subcontractor fails to achieve any element of the

Remedy Programme or to complete the Remedy Programme by the specified end date for the Remedy Programme (as the case may be); or

- (c) any Remedy Programme put forward by the D&C Subcontractor is rejected by the Private Party as not being reasonable, and the relevant dispute resolution procedure does not find against that rejection,

then the Private Party may terminate this Agreement in its entirety by written notice to the D&C Subcontractor with immediate effect; provided that for the purposes of clause 43.3.2, if the D&C Subcontractor's execution of the Remedy Programme is adversely affected by the occurrence of an event of Force Majeure, a Relief Event, Unforeseeable Conduct, Variation or a Compensation Event, then, subject to the D&C Subcontractor complying with the mitigation and other requirements in this Agreement concerning Force Majeure, Relief Events, Unforeseeable Conduct, Variation or Compensation Events (as the case may be), the time for execution of the Remedy Programme or any relevant element of it shall be deemed to be extended by a period equal to the delay caused by the Force Majeure event, Relief Event, Unforeseeable Conduct, Variation or Compensation Event (as the case may be) which is agreed by the Parties or determined in accordance with clause 55 of this Agreement.

- 43.3.3 For the avoidance of doubt, this entire clause 43.3 shall be subject to the principle contained in clause 43.2.2.

43.4 **Private Party's Costs**

- 43.4.1 The D&C Subcontractor shall reimburse the Private Party with all reasonable costs incurred by the Private Party in exercising any of its rights in terms of this clause. The Private Party shall take reasonable steps to mitigate such costs.

- 43.4.2 The Private Party shall not exercise, or purport to exercise, any right to terminate this Agreement except as expressly set out in this Agreement. The rights of the Private Party (to terminate or otherwise) under this clause 43.4 are in addition (and without prejudice) to any other rights which the Private Party may have in Law to claim the amount of any direct loss or damages suffered by the Private Party on account of the acts or omissions of the D&C Subcontractor (or to take any action other than termination of this Agreement).

44. **TERMINATION FOR FORCE MAJEURE**

This Agreement shall terminate with immediate effect upon the termination of the PPP Agreement in terms of clause [60] of the PPP Agreement.

45. **TERMINATION FOR CORRUPT ACTS**

- 45.1 D&C Subcontractor warrants that in entering into this Agreement it has not committed any Corrupt Act.

- 45.2 If the D&C Subcontractor or any Affiliate of it (or anyone employed by or acting on behalf of any of them, including its subcontractors) commits any Corrupt Act, then the Private Party shall be entitled to act in accordance with clauses 45.2.1 to 45.2.3 below:

- 45.2.1 if the Corrupt Act is committed by the D&C Subcontractor, any shareholder of the D&C Subcontractor, a director of any shareholder of the D&C

Subcontractor or an employee of the D&C Subcontractor acting under the authority or with the knowledge of a director of the D&C Subcontractor, then in any such case, the Private Party may give written notice to the D&C Subcontractor of termination and this Agreement which will terminate immediately;

- 45.2.2 if the Corrupt Act is committed by an employee of the D&C Subcontractor acting of his or her own accord, then the Private Party may give notice to the D&C Subcontractor of termination and this Agreement will terminate, unless within 8 Business Days of its receipt of such notice the D&C Subcontractor procures the termination of that employee's involvement in the Project and (if necessary) procures the performance of that part of the Works previously performed by that employee to be performed by another person;
- 45.2.3 if the Corrupt Act is committed by any other person not specified in clauses 45.2.1 to 45.2.2 above but involved in the Project as a subcontractor or supplier to the D&C Subcontractor, then the Private Party may give notice to the D&C Subcontractor of termination and this Agreement will terminate unless within 70 Business Days, the D&C Subcontractor procures the termination of such person's involvement in the Project and (if necessary) procures the performance of the relevant part of the Services by another person; and
- 45.2.4 any notice of termination under this clause 45 shall specify:
- (a) the nature of the Corrupt Act;
 - (b) the identity of the party or parties who the Private Party believes has committed the Corrupt Act; and
 - (c) the date on which this Agreement will terminate in accordance with the applicable provisions of this clause 45.
- 45.3 Without prejudice to its other rights or remedies under this clause 45, the Private Party shall be entitled to recover from the D&C Subcontractor, the greater of:
- 45.3.1 the amount or value of the gift, consideration or commission which is the subject of the Corrupt Act, provided that the D&C Subcontractor, directly or indirectly, is the beneficiary of such gift, consideration or commission; and
- 45.3.2 any direct losses sustained by the Private Party and the Municipality in consequence of any breach of this clause by the D&C Subcontractor.
- 45.4 Nothing contained in this clause shall prevent the D&C Subcontractor or any third party from paying any proper commission or bonus to its employees within the agreed terms of their employment.
- 45.5 The D&C Subcontractor shall notify the Private Party of the occurrence (and details) of any Corrupt Act promptly on the D&C Subcontractor becoming aware of its occurrence.
- 45.6 Where the D&C Subcontractor is required to replace any of the subcontractors pursuant to this clause, the provisions of clause 6.4 shall apply and be construed accordingly.

46. EFFECTS OF TERMINATION

46.1 Continued Effect – No Waiver

Notwithstanding any breach of this Agreement by either Party, and without prejudice to any other rights which the other Party may have in relation to it, the other Party may elect to continue to treat this Agreement as being in full force and effect and to enforce its rights under this Agreement. The failure of either Party to exercise any right under this Agreement, including any right to terminate this Agreement and any right to claim damages, shall not be deemed a waiver of such right for any continuing or subsequent breach.

46.2 Continued Performance

Subject to any exercise by the Private Party of its rights to perform, or to procure a third party to perform, the obligations of the D&C Subcontractor, the Parties shall continue to perform their obligations under this Agreement, notwithstanding the giving of any notice of default or notice of termination, until the termination of the Agreement in accordance with its terms becomes effective.

46.3 Automatic Termination

This Agreement shall automatically terminate when the PPP Agreement terminates and the D&C Subcontractor shall be paid in accordance with the Compensation on Termination for Force Majeure in terms of clause 49 of this Agreement, unless such termination of the PPP Agreement is due to an act or omission of the D&C Subcontractor.

46.4 Compliance with clause [62] of the PPP Agreement

The D&C Subcontractor has read and acknowledges the obligations of the Private Party under clause [62.4] of the PPP Agreement and agrees that, save in the case where this Agreement is terminated for a Private Party Default falling in clause 2.1.82(a), the Private Party may transfer its rights and obligations under this Agreement to the Municipality as contemplated in clause [62.4] of the PPP Agreement.

46.5 Private Party's right to complete the Works

Where the Private Party has terminated this Agreement, the Private Party may itself complete the Works or may employ another contractor to complete the Works and in either such event the following provisions shall apply:

46.5.1 within 14 days after termination of this Agreement, the Private Party shall notify the D&C Subcontractor which of the materials, equipment or construction plant, on or adjacent to the Project Site, used by the D&C Subcontractor in the construction of the Works including, without limitation, the carrying out of maintenance, the Private Party requires for completing the Works;

46.5.2 following receipt of the notice referred to in clause 46.5.1 the materials and equipment and (subject to payment of a reasonable hire charge therefor) construction plant specified in such notice shall remain available to the Private Party or such other contractor for the purpose of completing the Works; and

46.5.3 the D&C Subcontractor shall promptly remove from the Project Site all materials, equipment and construction plant, which is not specified in such notice.

46.6 **Transfers of Contracts**

46.6.1 On termination of this Agreement in accordance with its terms for any reason, in circumstances where the PPP Agreement has been terminated:

- (a) if such termination occurs prior to the Service Commencement Date, insofar as any transfer shall be necessary fully and effectively to transfer the Works and/or Facilities or any part thereof to the Private Party for transfer to the Municipality, the D&C Subcontractor shall transfer to, and there shall vest in, the Private Party such part of the Works and/or the Facilities as shall have been constructed by the D&C Subcontractor for and on behalf of the Private Party, and if the Private Party so elects:
 - (i) all materials on the Project Site or required for the purposes of completing the Works and/or the Facilities shall remain available to the Private Party for the purposes of completing the Works subject to the payment of the D&C Subcontractor's reasonable costs in respect thereof; and
 - (ii) all construction plant shall remain available to the Private Party for the purposes of completing the Works and/or the Facilities, subject to payment of the D&C Subcontractor's reasonable costs in connection therewith;
- (b) if the Private Party so elects, the D&C Subcontractor shall procure that all rights and obligations of the D&C Subcontractor under its subcontracts (other than any rights which the D&C Subcontractor has to payment of any amounts under its subcontracts) or any one of them are or is ceded and delegated to the Private Party or any third party nominated by it. Where the Private Party does not so elect, or any subcontractor whose consent is required refuses to consent thereto, the D&C Subcontractor shall procure that the relevant subcontract automatically terminated when this Agreement terminates; and
- (c) the D&C Subcontractor shall take reasonable steps to procure that the benefit of all guarantees, licences, warranties, documentation, service agreements and other rights relating to the Works and/or the Facilities are ceded to the Private Party, including any reversionary interests and rights relating to the Works and/or the Facilities or to the extent some may not be ceded, is transferred in a manner agreed between the Parties at that time.

it being agreed that fair consideration has been paid for guarantees, licences, warranties, documentation, service agreements and other rights by virtue of the D&C Subcontractor's Fee and, to the extent termination occurs prior to the Expiry Date, the termination payments made under clauses 47 to 49, to the extent that the Private Party receives proceeds in respect of the D&C Subcontractor's claims from Municipality.

46.7 Transfers on Termination or Expiry

46.7.1 On termination of this Agreement in circumstances where the PPP Agreement is terminated:

- (a) the D&C Subcontractor shall, within 5 Business Days of notification from the Private Party:
 - (i) insofar as any transfer of the Works and/or the Facilities to the Municipality shall be necessary, transfer such part of the Works and/or the Facilities as shall have been constructed, and there shall vest in, the Municipality;
 - (ii) if applicable, provide any licensed Intellectual Property to the Private Party and the Private Party and the Municipality shall, to the extent possible, be granted a perpetual non-exclusive, royalty-free licence to use such licenced Intellectual Property;
 - (iii) remove from the Project Site all property not forming part of the Facilities and if it has not done so within 5 Business Days or such reasonable period taking into consideration the nature of property to be removed after any notice from the Private Party requiring it to do so;
 - (iv) deliver to the Private Party for any keys, remote access apparatuses and computer access cards to the Facilities (if any); and
- (b) if the Municipality so elects:
 - (i) the Facilities shall remain available to the Municipality for the purposes of completing the Works;
 - (ii) the construction plant purchased for the Project shall remain available to the Municipality for the purposes of completing the Works, subject to payment of the D&C Subcontractor's reasonable costs;
 - (iii) the D&C Subcontracts shall be assigned to the Municipality or any third party nominated by it; provided that where termination occurs under clause [58] of the PPP Agreement, the consent of the D&C Subcontractor shall be required. Where the Municipality does not so elect, or the D&C Subcontractor refuses that consent, this Agreement shall automatically terminate when the PPP Agreement terminates.

46.7.2 If this Agreement terminates in circumstances where the PPP Agreement does not terminate, then the provisions of clause 46.7.1 shall apply, provided that the Private Party shall have all the rights of the Municipality in terms of clause 46.7.1.

46.8 Transitional Arrangements

46.8.1 In the case of any earlier termination, in circumstances where the PPP Agreement is terminated as well, for the period from the service of notice of termination to 6 months after the Termination Date, the D&C Subcontractor

shall (if the Municipality wishes to conduct a tender process in terms of clause [62.6.2] of the PPP Agreement, with a view to entering into an agreement for the provision of works (which may or may not be the same as, or similar to, the Works or any of them) following the expiry or earlier termination of this Agreement) co-operate with the Municipality fully in such tender process to the extent that such agreement to be entered into by the Municipality will relate to the Works, including (without limitation) by:

- (a) providing any information relating to the Project which is available to the D&C Subcontractor and which the Municipality may reasonably require to conduct such tender excluding any information which is commercially sensitive to the D&C Subcontractor (and, for the purposes of this sub-clause, (**commercially sensitive**) shall mean information which would, if disclosed to a competitor of the D&C Subcontractor or its subcontractor(s), give that competitor a competitive advantage over the D&C Subcontractor or its subcontractor(s) and thereby prejudice the business of the D&C Subcontractor or its subcontractor(s)) but shall exclude any information referred to in the clause dealing with employment matters; and
- (b) assisting the Municipality by providing all (or any) participants in such tender process with access on reasonable notice and at reasonable times to the Project Site subject to the D&C Subcontractor's safety rules and regulations, provided that the Private Party shall reimburse the D&C Subcontractor any costs and disbursements reasonably incurred by the D&C Subcontractor in complying with the provisions of this clause, to the extent that the Private Party receives such proceeds from the Municipality.

46.8.2 If this Agreement terminates in circumstances where the PPP Agreement does not terminate, then the provisions of clause 46.8.1 shall apply, provided that the Private Party shall have all of the rights of the Municipality in terms of clause 46.8.1.

46.9 **Continuing Obligations**

Save as otherwise expressly provided in this Agreement:

46.9.1 termination of this Agreement shall be without prejudice to any accrued rights and obligations under this Agreement as at the date of termination; and

46.9.2 termination of this Agreement shall not affect the continuing rights and obligations of the Private Party and the D&C Subcontractor under any provision of this Agreement which is expressed to survive termination or which is required to give effect to such termination or the consequences of such termination; and

46.9.3 clause 46 in its entirety shall survive termination of this Agreement.

47. **COMPENSATION ON TERMINATION FOR PRIVATE PARTY DEFAULT**

47.1 Subject to clause 47.2, on termination of this Agreement as a result of a Private Party Default, the Private Party shall:

47.1.1 in the case of a Private Party Default contemplated in clause 2.1.82(a), pay the D&C Subcontractor within 10 Business Days of receiving payment from the

Municipality, an amount equal to the aggregate of Subcontractor Costs, being the amount claimed in terms of clause 47.2.1, or determined pursuant to the PPP Agreement, less any amount that the Private Party is entitled to set off in terms of this Agreement;

- 47.1.2 in the case of a Private Party Default other than a Private Party Default contemplated in clause 2.1.82(a), be liable to the D&C Subcontractor for the direct losses and damages suffered by the D&C Subcontractor on account of such Private Party Default; and
- 47.1.3 in the case of a Private Party Default other than a Private Party Default contemplated in clause 2.1.82(a) that was caused by a default by the Operations Subcontractor under the Operations Subcontract, have no liability to pay the D&C Subcontractor any termination compensation.
- 47.2 In the case of a Private Party Default in terms of clause 2.1.82(a), resulting in termination of the PPP Agreement and this Agreement, then:
 - 47.2.1 if the D&C Subcontractor claims the amounts contemplated in clause 47.1.1 from the Private Party, provided such claim is timeous and the Private Party is able to bring the claim in terms of the PPP Agreement the Private Party shall be obliged to claim a corresponding amount from the Municipality in accordance with the provisions of the PPP Agreement;
 - 47.2.2 if the Private Party has complied with its obligations under this clause 47.2, the D&C Subcontractor's claim under this clause 47.2 shall be limited to the amounts detailed in clause 47.1, which are payable by the Municipality under the PPP Agreement, from the Private Party if the Private Party receives payment under the PPP Agreement from the Municipality;
 - 47.2.3 the D&C Subcontractor shall not be entitled to claim specific performance in respect of the payment of the amounts detailed in clause 47.1 which are payable by the Municipality under the PPP Agreement in circumstances where the Private Party has not received payment from the Municipality. Nothing in this clause shall however preclude the D&C Subcontractor from claiming specific performance in respect of the balance of the D&C Subcontractor claim contemplated in clause 47.2.4 below;
 - 47.2.4 the Private Party shall pursue its claims against the Municipality fully to the extent the Lenders consent thereto. The D&C Subcontractor shall be entitled to payment from the Private Party within 5 Business Days of the Private Party receiving payment from the Municipality; and
 - 47.2.5 the D&C Subcontractor shall only be entitled to interest at the rate of the Compensation Date Interest Rate in terms of this clause 47, with effect from the Compensation Date until the date that such amount is paid in full, after the Private Party has paid, to its Lenders such amounts as may be due and payable to its Lenders.

48. COMPENSATION ON TERMINATION FOR D&C SUBCONTRACTOR DEFAULT

The D&C Subcontractor shall not be entitled to any compensation or payment of any amount or nature upon the termination of this Agreement for D&C Subcontractor Default.

49. COMPENSATION ON TERMINATION FOR FORCE MAJEURE

- 49.1 Subject to clause 49.2 below, on termination of this Agreement under clause 44, the Private Party shall pay to the D&C Subcontractor within 10 Business Days of receiving payment from the Municipality, the Subcontractor Costs which shall be paid to the D&C Subcontractor once the monies due to the Lenders by the Private Party have been fully and finally settled, less any amounts that the Private Party is entitled to set-off under this Agreement.
- 49.2 It is agreed that where the PPP Agreement terminates under clause [60] of the PPP Agreement, resulting in termination of this Agreement, then:
- 49.2.1 if the D&C Subcontractor claims the amounts contemplated in clause 49.1 from the Private Party, the Private Party shall be obliged to claim a corresponding amount from the Municipality in accordance with the provisions of the PPP Agreement, provided such claim is timeous and the Private Party is able to bring the claim in terms of the PPP Agreement;
- 49.2.2 if the Private Party has complied with its obligations under this clause 49.2, then the D&C Subcontractor's claim under this clause 49.2 shall be limited to the amounts detailed in clause 49.1, which are payable by the Municipality under the PPP Agreement, from the Private Party if the Private Party receives payment under the PPP Agreement from the Municipality;
- 49.2.3 the D&C Subcontractor shall not be entitled to claim specific performance in respect of the payment of the amounts detailed in clause 49.1 which are payable by the Municipality under the PPP Agreement in circumstances where the Private Party has not received payment from the Municipality;
- 49.2.4 the Private Party shall pursue its claims against the Municipality fully to the extent the Lenders consent thereto. The D&C Subcontractor shall be entitled to payment from the Private Party on the Compensation Date; and
- 49.2.5 the D&C Subcontractor shall only be entitled to interest at the rate of the Compensation Date Interest Rate in terms of this clause 49, with effect from the Compensation Date until the date that such amount is paid in full, after the Private Party has paid, to its Lenders, such amounts as may be due and payable to its Lenders. Any payments made to the D&C Subcontractor, pursuant to this clause 49.2.5, shall be proportional to any corresponding payments of interest made or to be made to the Operations Subcontractor, in terms of the Operations Subcontract, and to the Shareholders of the Private Party.

50. COMPENSATION ON TERMINATION FOR CORRUPT ACTS

Upon termination of this Agreement in terms of clause 45, the D&C Subcontractor shall not be entitled to any compensation or payment of any nature or amount, other than amounts due and payable under this Agreement that have not been paid, provided that this shall not in a way detract from any common law claim which the D&C Subcontractor may have against the person or entity who committed the Corrupt Act in question.

51. MUNICIPALITY STEP-IN

- 51.1 If the Municipality exercises any of its rights in terms of clause [69] of the PPP Agreement, the D&C Subcontractor shall comply with any and all instructions that may be given to it by the Private Party as a result of the Private Party receiving

instructions from the Municipality in terms of clauses [69.2] and [69.3] of the PPP Agreement. The Private Party shall give to the D&C Subcontractor all information and documents that it may receive from the Municipality in terms of said clauses [69.2] and [69.3] of the PPP Agreement.

- 51.2 If pursuant to clause 51.1 the Municipality wishes to take action, the Private Party shall as soon as possible after receiving the Municipality's determination to do so, notify the D&C Subcontractor in writing of:
- 51.2.1 the action the Municipality wishes to take;
 - 51.2.2 the Municipality's reasons for taking such action;
 - 51.2.3 the date when the Municipality wishes to commence such action;
 - 51.2.4 the time period (the **Step-in Period**) which the Municipality reasonably believes will be necessary for such action and which must be a fixed period; and
 - 51.2.5 to the extent practicable, the effect of such action on the D&C Subcontractor.
- 51.3 Following the service of such notice, the Parties record that, in terms of the PPP Agreement, the Municipality shall take such action as notified under clause 51.2 and any ancillary action as the Municipality reasonably believes is necessary (the **Necessary Action**) and the D&C Subcontractor shall give all reasonable assistance to the Private Party to enable it to give reasonable assistance to the Municipality in the conduct of such Necessary Action.
- 51.4 If the D&C Subcontractor is not in breach of any of its obligations under this Agreement in respect of which the Necessary Action is proposed to be taken, then for so long as and to the extent that the Necessary Action is taken and this prevents the D&C Subcontractor from providing any part of the Works:
- 51.4.1 the D&C Subcontractor shall be relieved from undertaking the Subcontractor's Project Deliverables to the extent that the D&C Subcontractor is unable to do so as a direct consequence of the Necessary Action, to the extent that the Private Party receives such relief from undertaking the corresponding Project Deliverables in terms of the PPP Agreement; and
 - 51.4.2 in respect of the time period over which such Necessary Action is conducted and provided that the D&C Subcontractor enables the Private Party to provide the Municipality with such reasonable assistance as the Municipality may need in the conduct of such Necessary Action to the extent that such assistance falls within the scope of the D&C Subcontractor's obligations under this Agreement (such assistance, however, to be (subject to clause 51.5) at the expense of the Private Party, to the extent of any incremental costs), with the result that the Private Party is paid Incremental Costs by the Municipality, then the D&C Subcontractor shall, subject to clause 51.5, be entitled to payment in accordance with clause 24.1. All Incremental Savings realised or that should have been realised by the D&C Subcontractor shall be due and payable by the D&C Subcontractor to the Private Party;
- 51.5 Upon the Necessary Action ceasing, the D&C Subcontractor shall undertake an audit of the Works in order to determine what remedial maintenance or work is required to be undertaken as a direct result of any act or omission by the Municipality whilst it stepped-in. The D&C Subcontractor shall provide the Private

Party, which shall provide to the Municipality, with the detailed audit report within 30 Business Days of the Necessary Action.

- 51.6 Within 10 Business Days of the D&C Subcontractor's audit report, as contemplated in clause 51.5, being presented to the Municipality, the D&C Subcontractor shall undertake a reconciliation of all Incremental Costs and or Incremental Savings, and the D&C Subcontractor shall provide the Private Party with the reconciliation and all substantiating documentation within such 10 Business Days. Upon the reconciliation being agreed or determined pursuant to clause 55:
- 51.6.1 the Private Party shall pay the D&C Subcontractor such monies owing to the D&C Subcontractor as are agreed between the Private Party and the Municipality and upon presentation of a valid tax invoice; or
- 51.6.2 the Private Party shall set-off such monies owed by the D&C Subcontractor.
- 51.7 For the purposes of this clause:
- 51.7.1 **Incremental Costs** shall mean a reasonable cost, other than additional costs referred to in clause 51, incurred by the D&C Subcontractor in meeting the Subcontractor's Output Specifications after the Necessary Action has ceased, where such cost is incurred by the D&C Subcontractor as a result of any act or omission by the Municipality having stepped-in under this clause provided that no Incremental Cost shall be payable in respect of costs incurred after the Necessary Action where the D&C Subcontractor failed to meet the Subcontractor's Output Specifications prior to the Step-in Period commencing in respect of such item or where a negligent act or omission by the Operation Subcontractor in performing the Services caused the urgent risk that led to the Municipality to exercise the step-in rights under this clause ; and
- 51.7.2 **Incremental Saving** shall mean a saving achieved by the D&C Subcontractor as a result of costs not incurred by the D&C Subcontractor during the Necessary Action, less the reasonable costs incurred by the D&C Subcontractor in meeting the Subcontractor's Output Specifications after the Necessary Action. However, where a negligent act or omission by the D&C Subcontractor in performing the Works caused the urgent risk that led to the Municipality to exercise the step-in rights under this clause, the costs incurred by the D&C Subcontractor in meeting the Subcontractor's Output Specifications after the Necessary Action will not be deducted.
- 51.8 In claiming any Incremental Costs, the D&C Subcontractor shall provide the Private Party with detailed substantiating documentation detailing all fixed costs, variable costs and other costs incurred. The D&C Subcontractor shall mitigate (to the extent required by the common law) the costs of any Incremental Costs incurred.
- 51.9 The Private Party shall only be liable to the D&C Subcontractor for amounts claimed by the D&C Subcontractor pursuant to clause 51.4.2 to the extent that the Private Party is entitled to receive, and receives, a corresponding amount from the Municipality in terms of clause [69.6] of the PPP Agreement. For the avoidance of doubt, the D&C Subcontractor will be precluded from claiming against the Private Party for the costs of providing assistance in terms of clause 51.4.2 unless and until the Private Party receives a corresponding amount from the Municipality in terms of clause [69.6] of the PPP Agreement.

51.10 If the Necessary Action is taken as a direct result of a breach by the D&C Subcontractor of any of its obligations under this Agreement and the D&C Subcontractor has failed to remedy such breach within the required time periods as contemplated in this Agreement, then for so long as and to the extent that such Necessary Action is taken and this prevents the D&C Subcontractor from performing any of its obligations:

51.10.1 the D&C Subcontractor shall be relieved from undertaking the Works to the extent that the D&C Subcontractor is unable to do so as a direct consequence of the Necessary Action, provided that such relief shall be the same as the relief that the Private Party receives under the PPP Agreement; and

51.10.2 the D&C Subcontractor shall only be entitled to payment during the period that the Necessary Action is being taken to the extent that it achieves Milestones and is entitled to payment in terms of clause 24,

provided that, if by the expiry of the Step-in Period, the breach still subsists and if it constitutes a Private Party Default in terms of the PPP Agreement, then a D&C Subcontractor Default shall have occurred and then the Private Party must serve a notice in terms of clause 43.2 requiring the D&C Subcontractor to remedy the D&C Subcontractor Default or to put forward a remediation programme.

52. INFORMATION AND AUDIT ACCESS

52.1 The D&C Subcontractor shall provide to the Private Party all information, documents, records and the like in the possession of, or available to, the D&C Subcontractor as may reasonably be requested by the Municipality for the purpose of complying with any of its statutory reporting obligations including its reporting obligations under the MFMA and the Auditor-General Act, 1995.

52.2 To this end the D&C Subcontractor shall use all reasonable endeavours to ensure that all such information in the possession of any counter-party to any agreement, which relates to the Project, shall be available to the Private Party and the D&C Subcontractor has included, or shall include, appropriate provisions to this effect in all agreements it enters into that relate to the Project.

52.3 Without limiting the generality of the foregoing, the D&C Subcontractor shall:

52.3.1 provide and shall procure that its subcontractors shall provide all such information as the Private Party may reasonably require from time to time in terms of the PPP Agreement to enable the Private Party to provide reports and returns as required by the Municipality or any other Responsible Authority, including reports and returns regarding the physical condition of any building occupied by the Municipality, health and safety, national security, and environmental safety; and

52.3.2 note and facilitate the Municipality's compliance with the Promotion of Access to Information Act, 2000 in the event that the Municipality is required to provide information to any person pursuant to that Act.

53. INTELLECTUAL PROPERTY OF THE MUNICIPALITY

53.1 All Intellectual Property Rights whatsoever, whether capable of registration or not, regarding the Municipality's name, trademarks, logos, image and all other intellectual property matters relating to the Municipality, including its name, trademarks, logos and or image shall remain the sole property of the Municipality.

- 53.2 Subject to existing rights and obligations and clause 53.3, the Private Party shall with consent from the Municipality, on prior written application by the D&C Subcontractor to the Private Party, grant a non-exclusive revocable right and license to the D&C Subcontractor to use the Municipality's trademarks and logos for the period up until the date of issue of the Phase 2 Completion Certificate.
- 53.3 In order to establish and maintain standards of quality and propriety acceptable to the Municipality, in the event that the D&C Subcontractor desires to use the Municipality's trademarks or logos in any way, the Private Party shall, on behalf of the D&C Subcontractor, first submit the concept or a sample of the proposed use to the Private Party who shall submit to the Municipality for approval, which shall be in its sole and absolute discretion. If the Municipality approves the concept or sample, the D&C Subcontractor shall not depart therefrom in any respect without the Municipality's further prior written approval.
- 53.4 If at any time the Municipality revokes its approval for the specified use of any trademark or logo, the D&C Subcontractor shall forthwith discontinue all use of such trademark or logo and shall remove from public sale or distribution any previously approved product in respect of which the Municipality has revoked its approval. The costs incurred by the D&C Subcontractor as a result of such revocation shall be borne by the D&C Subcontractor if the grounds for the revocation include any ground described in clause 53.5.
- 53.5 The Municipality may revoke its approval immediately upon 10 Business Days written notice to the Private Party (who will forthwith deliver such notice to the D&C Subcontractor) if the D&C Subcontractor or any of its or its officers, directors or employees commits any crime or otherwise engages in conduct which violates any Law, or engages in any conduct that offends against public morals and decency and, in the Municipality's reasonable opinion, materially prejudices the reputation and public goodwill of the Municipality.
- 53.6 The D&C Subcontractor acknowledges that the name(s) of the Municipality (the **Protected Names**) are associated with and peculiar to the Municipality and are the intellectual property of the Municipality. Consequently, the D&C Subcontractor agrees that the sole and exclusive ownership of the Protected Names shall vest in the Municipality.
- 53.7 In circumstances where the D&C Subcontractor utilises any of the Protected Names, either on its own or in combination or association with any other name, it does so only in terms of this Agreement and with the prior approval of the Municipality. On termination or expiry of this Agreement, the D&C Subcontractor shall not be entitled to operate or conduct any business using any of the Protected Names either on its own or in combination or association with any other name.
- 53.8 Within 50 Business Days after the issue of the Phase 2 Completion Certificate and where the D&C Subcontractor has operated a company utilising any of the Protected Names with the permission of the Municipality, the D&C Subcontractor shall either:
- 53.8.1 de-register the company bearing any of the Protected Names; or
- 53.8.2 change the name to a name not substantially similar to any of the Protected Names.
- 53.9 The naming of the D&C Subcontractor's business operation shall be undertaken in consultation with the Private Party and subject to the Private Party's approval. In

circumstances where the name chosen by the D&C Subcontractor and approved by the Private Party is not part of the Municipality's Intellectual Property Rights, then the rights of the Municipality contemplated in clause 53.8 shall not be applicable and the intellectual property shall be the sole property of the D&C Subcontractor.

54. ASSIGNMENT & CHANGES IN CONTROL

54.1 Assignment

Subject to clauses 6.4, 7 and 46:

- 54.1.1 this Agreement shall be binding on, and shall endure to the benefit of, the Parties and their respective successors-in-title and permitted transferees and assigns;
- 54.1.2 save as expressly permitted hereunder, the D&C Subcontractor shall not, without the prior written approval of the Private Party, assign, cede, delegate, transfer or otherwise dispose of any right or obligation under this Agreement to any other person;
- 54.1.3 save as set out in clause 54.1.4, the Private Party shall not assign, cede, delegate, transfer or otherwise dispose of any right or obligation under this Agreement to any other person, save with the prior written approval of the D&C Subcontractor (such approval not to be unreasonably withheld or delayed);
- 54.1.4 the Private Party shall be entitled to assign, cede, delegate, transfer or otherwise dispose of its rights and obligations under this Agreement to any person to which its rights and obligations under the PPP Agreement are assigned, ceded, delegated, transferred or otherwise disposed of under and pursuant to any of the Financing Agreements, including but not limited to, the Security Documents;
- 54.1.5 upon the transfer of the Private Party's rights, liabilities and obligations under this Agreement to any person to which the Private Party's rights, liabilities and obligations under the PPP Agreement are transferred becoming effective:
- (a) the Private Party, shall be released from any past, present and future obligations under or in connection with this Agreement (the **Discharged Rights and Obligations**);
 - (b) the person to whom the Private Party's rights, liabilities and obligations are so transferred and the D&C Subcontractor will acquire rights and obligations against each other which are the same as the Discharged Rights and Obligations, save only insofar as they are exercisable by or against such person instead of the Private Party; and
 - (c) the D&C Subcontractor shall enter into such documentation as is reasonably necessary to give effect to such transfer including any documentation necessary to ensure that the Lenders, after such transfer has become effective, continue to have the benefit of such rights as they have under this Agreement.

54.2 **Changes in Control and Black Equity**

54.2.1 For the duration of the Construction Term, the D&C Subcontractor shall procure that:

- (a) there is no Change in Control in the D&C Subcontractor;
- (b) subject to the Lenders' rights in respect of any security held by them (or any agent acting on their behalf, or any security company, trust or other entity holding any security in respect of the debt for the benefit of the Lenders) there is no sale, assignment, cession, transfer, exchange, renunciation or other disposal (at any time) of the whole or any part of the Equity and/or the Shareholder Loans of any Black Shareholder other than to another Black Shareholder, Black Person or Black Enterprise;
- (c) there is no dilution in the aggregate Equity holdings of the Black Shareholders below the Minimum Black Equity; and
- (d) there is no Change in Control (at any time) in any Shareholder that is a Black Enterprise, which will result in that Shareholder no longer being a Black Enterprise.

without the prior written approval of the Private Party, which consent shall not be unreasonably withheld.

54.2.2 Where a failure by the D&C Subcontractor to comply with its obligations under this clause is not within its own control the D&C Subcontractor shall be entitled to rectify the failure within a period of 4 months from the date on which the failure to comply with the provisions of this clause came to its attention (the **Rectification Period**). A continued failure by the D&C Subcontractor to comply with its obligations in terms of this clause after the Rectification Period shall constitute a D&C Subcontractor Default.

54.2.3 Any dispute between the Parties regarding the provisions of this clause shall be determined in accordance with the provisions of clause 55.

54.3 **Change in Control in Private Party**

54.3.1 For the duration of the Construction Term, the Private Party shall procure that there is no change in Control in the Private Party.

54.3.2 To the extent there is a change in Control in the Private Party, the D&C Subcontractor agrees that it shall enter into a direct agreement with the Private Party and the Lenders substantially in the form of the direct agreement annexed to the PPP Agreement.

55. **DISPUTE RESOLUTION**

55.1 **Referable Disputes**

The provisions of this clause 55 shall, save where expressly provided otherwise, apply to any dispute arising in relation to or in connection with any aspect of this Agreement between the Parties.

55.2 Internal Referral

55.2.1 If a dispute arises in relation to any aspect of this Agreement, the Parties shall attempt in good faith to come to an agreement in relation to the disputed matter, in accordance with the following informal process:

(a) all disputes shall first be referred to a meeting of the Private Party's Representative and the D&C Subcontractor's Representative who have sufficient authority for resolution; and

(b) if the Parties have been unable to resolve the dispute within 5 Business Days of referral to the Parties' representatives, either Party may refer the dispute for a decision by Chief Executive Officers or equivalent officers of both Parties.

55.2.2 In attempting to resolve the dispute in accordance with the provisions of this clause 55.2, the Parties shall (and shall procure that their employees and representatives shall) use reasonable endeavours to resolve such dispute without delay by negotiations or any other informal procedure which the relevant representatives may adopt. Those attempts shall be conducted in good faith in an effort to resolve the dispute without necessity for formal proceedings.

55.2.3 Any dispute which has not been resolved by the representatives contemplated in clause 55.2.1(b) within 5 Business Days of the dispute being referred to them (or any longer period agreed between the Parties) shall be treated as a dispute in respect of which informal resolution has failed.

55.3 Arbitration

55.4 Where the Parties are unable to resolve the dispute in accordance with clauses 55.2, the dispute shall, at the instance of either Party, be dealt with in accordance with the arbitration process set out below.

55.5 There shall be a single arbitrator who shall be, if the question in issue is:

55.5.1 primarily an accounting matter, an independent chartered accountant of not less than 15 years' standing;

55.5.2 primarily a legal matter, a practising attorney or advocate of not less than 15 years' standing;

55.5.3 primarily a technical matter, a suitably qualified person; or

55.5.4 any other matter, a suitably qualified person.

55.6 The appointment of the arbitrator shall be agreed upon between the Parties, but failing agreement between them within a period of 10 Business Days after the arbitration has been demanded, either Party shall be entitled to request the chairman for the time being of the Arbitration Foundation of Southern Africa (**AFSA**) to make the appointment and, in making his appointment, to have regard to the nature of the dispute. Should the Parties be unable to agree on the nature of the dispute, it shall be deemed to be a legal dispute matter and the arbitrator shall be a person with the qualification set out in clause 55.5.2 above.

- 55.7 The arbitration shall be held in Johannesburg in accordance with the provisions of the Arbitration Act, 1965.
- 55.8 The decision of the arbitrator shall, in the absence of manifest error, be final and binding on the Parties, and may be made an order of any Court of competent jurisdiction.
- 55.9 This clause 55:
- 55.9.1 is severable from the rest of this Agreement and shall, notwithstanding the termination, cancellation, invalidity or alleged invalidity of this Agreement or any part of it for any reason, remain in full force and effect; and
- 55.9.2 constitutes an irrevocable consent by the Parties to any proceedings in terms hereof and no Party shall be entitled to withdraw therefrom or to claim in any such proceedings that it is not bound by this clause.
- 55.10 The provisions of this clause shall not preclude any Party from access to a competent division of the High Court of South Africa for urgent and/or interim relief pending the outcome of an arbitration in terms hereof or in respect of arbitration proceedings in terms hereof.
- 55.11 **Performance to Continue**
- No reference of any dispute to any resolution process in terms of this clause 55 shall relieve either Party from any liability for the due and punctual performance of its obligations under this Agreement.
- 55.12 **Associated Agreement Dispute**
- 55.12.1 An **Associated Agreement Dispute** means any dispute or difference between the Private Party and the D&C Subcontractor which arises out of substantially the same circumstances as any dispute between the Municipality and the Private Party or the Operations Subcontractor and the Private Party, or which raises issues which are substantially the same as issues raised in a dispute under the PPP Agreement or Operations Subcontract and in respect of which a notice is given by either of the D&C Subcontractor or the Private Party requiring reference of that associated dispute in the same proceedings as the relevant dispute between the Municipality and the Private Party or the Operations Subcontractor and the Private Party.
- 55.12.2 If an Associated Agreement Dispute arises the D&C Subcontractor shall, where relevant, be joined to the dispute under the relevant contract.
- 55.12.3 In modifying the provisions of this clause 55 to take account of the requirement to resolve an Associated Agreement Dispute together with any dispute between the Private Party and the D&C Subcontractor (and without limiting the modifications so required), references to **Parties** shall be construed as including a reference to any party or prospective party to the Associated Agreement Dispute other than the Private Party and the D&C Subcontractor.
- 55.12.4 Notwithstanding the provisions of clause 55.12.1 above, the Parties agree that any disputes shall be capable of being referred as an Associated Agreement Dispute. If the D&C Subcontractor serves any notice on the Private Party in terms of clause 55.12.1, the Private Party shall serve notice on the Municipality in terms of the PPP Agreement and the Private Party shall take

such steps and give such notices as may be required in terms of the PPP Agreement to enable the Associated Agreement Dispute to be resolved in terms of the dispute resolution provisions contained in the PPP Agreement.

55.12.5 Furthermore, if an Associated Agreement Dispute arises under the Operations Subcontract, the D&C Subcontractor shall, where relevant, be joined to the dispute under the Operations Subcontract. The Parties agree that if an Associated Agreement Dispute arises under this Agreement, the Operations Subcontractor shall be joined to the dispute under this Agreement. An Associated Agreement Dispute under this Agreement shall be decided in the same proceedings as any dispute between the Private Party and the Operations Subcontractor (including litigation), and the provisions of this clause 55 shall be modified accordingly. Where the D&C Subcontractor wishes the Associated Agreement Dispute to be so decided, they shall give notice of that requirement to the Private Party together with any notice by the Operations Subcontractor requiring reference of the relevant dispute for determination in accordance with this clause 55, or within 10 Business Days after receipt by the D&C Subcontractor of any such notice from the Private Party. In that notice, details of the Associated Agreement Dispute shall be set out.

55.12.6 The Parties acknowledge and agree that these provisions take account of the requirement to resolve an Associated Agreement Dispute together with any dispute between the Private Party and the D&C Subcontractor, references to **Parties** shall be construed as including a reference to any party or prospective party to the Associated Agreement Dispute other than the Private Party and the D&C Subcontractor.

55.12.7 Without prejudice to the other modifications so required, the Parties may agree to extend the timetable for the dispute resolution under this clause 55, provided that:

- (a) the period within which the relevant Parties are to endeavour to agree to or, as the case may be, the selection of the arbitrator shall be 10 Business Days calculated from the date of the notice of intention to refer the Associated Agreement Dispute to resolution in this process; and
- (b) the periods within which the dispute must be successfully concluded or, as the case may be, determined may be separately extended in respect of the dispute between the Private Party and the D&C Subcontractor on the one hand, and the Associated Agreement Dispute on the other, by agreement of the respective Parties to those disputes.

55.12.8 The arbitrator shall have the same powers in relation to determining the Associated Agreement Dispute as it has in relation to the dispute between the Private Party and the D&C Subcontractor.

55.13 **Determinations under PPP Agreement are binding on the D&C Subcontractor**

The Parties agree that any determination that is handed down in terms of clause [77] or [78] of the PPP Agreement in respect of which the D&C Subcontractor participated, or any dispute under the PPP Agreement in respect of which the D&C Subcontractor has not participated due to its own action or omission, that is in respect of or relates to the Works, Subcontractor's Project Deliverables or any other

provisions of this Agreement, shall be final and binding on the Parties for the purposes of the Project and this Agreement.

55.14 **Suspension of Prescription**

The Parties agree that, for the purposes of the Prescription Act, 1969 as amended from time to time, time shall cease to run in respect of any dispute on the date of service of the relevant notice referring that dispute for dispute resolution.

56. **GOVERNING LAW AND JURISDICTION**

56.1 This Agreement shall be governed by and construed in accordance with the laws of the Republic of South Africa.

56.2 Subject to the provisions of clauses 55, each Party agrees that the High Court of South Africa shall have exclusive jurisdiction to hear and decide any application, action, suit, proceeding or dispute in connection with this Agreement, and irrevocably submits to the jurisdiction of the High Court of South Africa.

57. **AMENDMENTS**

57.1 No provision of this Agreement (including, without limitation, the provisions of this clause) may be amended, substituted or otherwise varied, and no provision may be added to or incorporated in this Agreement, except (in any such case) by an agreement in writing signed by the duly authorised representatives of the Parties or where amended by a dispute determination or as otherwise provided in this Agreement.

57.2 The Private Party shall not, without the prior written consent of the D&C Subcontractor, which consent shall not be unreasonably withheld, agree to any new agreement, policy or other documentation detailed in the PPP Agreement or its Schedules, to the extent that the new agreement, policy or other documentation detailed in the PPP Agreement or its Schedules relates to or impacts on the Works or the Subcontractor's Project Deliverables.

58. **PROVISIONS IN FAVOUR OF THE LENDERS AND THE MUNICIPALITY**

58.1 The Parties agree that the provisions of this clause 58 and any other provisions of this Agreement that refer to the Municipality and or the Lenders comprise stipulations for the benefit of the Municipality, and or the Lenders (as the context requires) that shall not be amended without the consent of the Lenders, and or the Municipality (as applicable). The Municipality and the Lenders may at any time accept such stipulations in their favour provided they accept any corresponding obligations imposed upon them in the terms of this Agreement.

58.2 Without derogating from the generality of the foregoing it is agreed by the D&C Subcontractor that:

58.2.1 it will comply with its obligations under this Agreement to ensure that it does not cause an Event of Default (as defined in the Financing Agreements) or Potential Event of Default (as defined in the Financing Agreements) in terms of the Financing Agreements;

58.2.2 it acknowledges that it has received notice of and consents to the cession *in securitatem debiti* by the Private Party (pursuant to the Security Documents) of all of the Private Party's incorporeal movable rights of every kind and every

nature whatsoever which arise from any cause whatsoever and whether they exist now or come into existence in the future, and are due and payable now or in the future, and whether actual or contingent, and whether or not they were within the contemplation of the parties to the Security Documents (as defined in the Financing Agreements) at the date of signature thereof, which includes, without being limited to, all of the Private Party's rights in, to and under this Agreement and the Performance Bond and the Project Insurances to the Lenders; and

58.2.3 wherever the Private Party and or the Lenders is or are entitled and or obliged under the Security Documents and or the Financing Agreements to cede any rights that it or they may have against the D&C Subcontractor, then the Private Party and/or the Lenders, as the case may be, shall be entitled to cede the rights in question to any one or more Lenders and or any other person or persons, even if the result of the cession would be to split the rights of any claims arising under them (for the avoidance of doubt, a cession shall include, without limitation, any transfer of rights).

58.3 The Private Party hereby authorises and instructs the D&C Subcontractor, and the D&C Subcontractor hereby agrees, to make all payments due or which may become due from the D&C Subcontractor to the Private Party under or arising from or in respect of this Agreement to the credit of the account so notified to the D&C Subcontractor by the Lenders, after the enforcement of the cession *in securitatem debiti* detailed in clause 58.2.2.

58.4 The Private Party and D&C Subcontractor hereby agree that where the Private Party has discharged all of its obligations under the Financing Agreements:

58.4.1 the Private Party and the D&C Subcontractor shall no longer be required to involve nor consult with the Lenders; and

58.4.2 any provision of this Agreement which has been drafted for the benefit of the Lenders shall no longer apply.

59. **WAIVER**

59.1 Any relaxation, indulgence or delay (together **Indulgence**) by either Party in exercising, or any failure by either Party to exercise, any right under this Agreement shall not be construed as a waiver of that right and shall not affect the ability of that Party subsequently to exercise that right or to pursue any remedy, nor shall any Indulgence constitute a waiver of any other right (whether against that Party or any other person).

59.2 The waiver of any right under this Agreement shall be binding on the waiving Party only to the extent that the waiver has been reduced to writing and signed by the duly authorised representative(s) of the waiving Party.

60. **ENTIRE AGREEMENT**

60.1 Except where expressly provided otherwise in this Agreement, this Agreement constitutes the entire agreement between the Parties in connection with its subject matter and supersedes all prior representations, communications, negotiations and understandings concerning the subject matter of this Agreement.

60.2 Each of the Parties acknowledges that:

- 60.2.1 it does not enter into this Agreement on the basis of and does not rely, and has not relied, upon any statement or representation (whether negligent or innocent) or warranty or other provision (in any case whether oral, written, express or implied) made or agreed to by any person (whether a Party to this Agreement or not) except those expressly contained in or referred to in this Agreement, and the only remedy available in respect of any misrepresentation or untrue statement made to it shall be a remedy available under this Agreement; and
- 60.2.2 this clause 60 shall not apply to any statement, representation or warranty made fraudulently, or to any provision of this Agreement which was induced by fraud, for which the remedies available shall be all those available under the Law governing this Agreement.

61. SEVERABILITY

Whenever possible, each provision of this Agreement shall be interpreted in a manner which makes it effective and valid under Law, but if any provision of this Agreement is held to be illegal, invalid or unenforceable under Law, that illegality, invalidity or unenforceability shall not affect the other provisions of this Agreement, all of which shall remain in full force.

62. REPRESENTATIVES

62.1 Private Party's Representative

- 62.1.1 The Private Party shall appoint, from the Signature Date until the Expiry Date, an individual (the **Private Party Representative**) whose identity shall be notified to the D&C Subcontractor, to act as the Private Party's duly authorised representative for all purposes connected with this Agreement. The Private Party shall notify the D&C Subcontractor in writing forthwith upon the replacement at any time of the Private Party Representative and such replacement shall not be effective until notice has been given.
- 62.1.2 The Private Party Representative may delegate any of his functions from time to time to a person or persons the identity of who shall be notified to the D&C Subcontractor and references in this Agreement to the Private Party Representative shall be construed to include such persons.
- 62.1.3 Any notice, instruction or information required to be given by or made to the Private Party shall only be valid if given by or delivered to the Private Party Representative.

62.2 D&C Subcontractor's Representative

- 62.2.1 The D&C Subcontractor shall appoint from the Signature Date until the Expiry Date, an individual (the **D&C Subcontractor's Representative**) whose identity shall be notified to the Private Party, to act as the D&C Subcontractor's duly authorised representative for all purposes connected with this Agreement. The D&C Subcontractor shall notify the Private Party in writing forthwith upon the replacement at any time of the D&C Subcontractor's Representative and such replacement shall not be effective until such notice has been given.
- 62.2.2 Any notice, instruction or information required to be given by or made to the D&C Subcontractor shall only be valid if given by or delivered to the D&C Subcontractor's Representative.

63. COUNTERPARTS

This Agreement may be executed in any number of identical counterparts, all of which when taken together shall constitute one agreement. Any single counterpart or a set of counterparts taken together which, in either case, are executed by the Parties shall constitute a full original of this Agreement for all purposes.

64. NOTICES AND LEGAL SERVICE

64.1 All notices and any other communications whatsoever (including, without limitation, any approval, consent, demand, query or request) by either Party in terms of this Agreement or relating to it shall be given in writing and sent by registered post, or delivered by hand, or transmitted by facsimile or electronic mail to the recipient Party at its relevant address set out below:

64.1.1 if to the D&C Subcontractor, at:

Address:	2 Brammer Road Germiston South Gauteng 1400
Postal address:	P O Box 382 Germiston 1400
Facsimile number:	N/A
Electronic mail address:	notices@interwaste.co.za and sallyd@interwaste.co.za

marked for the attention of the Group Legal Manager;

64.1.2 if to the Private Party, at:

Address:	2 Brammer Road Germiston South Gauteng 1400
Postal address:	P O Box 382 Germiston 1400
Facsimile number:	N/A
Electronic mail address:	notices@interwaste.co.za

marked for the attention of the Landfills Director.

- 64.2 Either Party may, by written notice to the other Party, change any of the addresses at which or the designated person for whose attention those notices or other communications are to be given.
- 64.3 Any notice or other communication given by any Party to the other Party which:
- 64.3.1 is sent by registered post to the addressee at its specified address shall be rebuttably presumed to have been received by the addressee on the 7th day after the date of posting; or
 - 64.3.2 is delivered by hand to the addressee during the normal business hours of the addressee at its specified address shall be rebuttably presumed to have been received by the addressee at the time of delivery; or
 - 64.3.3 is transmitted by facsimile to the addressee during the normal business hours of the addressee at its specified facsimile number shall be rebuttably presumed to have been received by the addressee on the date of transmission as indicated on the sender's facsimile transmission report; or
 - 64.3.4 it transmitted by electronic mail to the addressee during the normal business hours of the addressee at its specified electronic mail address shall be rebuttably presumed to have been received by the addressee on the date of transmission as reflected on the sender's electronic mail records.
- 64.4 The previous provisions of this clause 64 shall not invalidate any notice or other communication actually given and received otherwise than as described in those provisions.
- 64.5 The Parties choose their respective physical addresses in clause 64.1 as their respective *domicilia citandi et executandi* at which all documents relating to any legal proceedings to which they are a party may be served. If that address is changed to another address which is not a physical address in the Republic of South Africa, then the original address shall remain the *domicilium citandi et executandi* of the relevant Party until it nominates a new physical address within the Republic of South Africa in writing to be its new *domicilium citandi et executandi*.

65. PUBLIC RELATIONS AND PUBLICITY

- 65.1 The D&C Subcontractor acknowledges that certain information pertaining to the Project is required to be disclosed in accordance with the statutory reporting obligation of the Municipality to publish information about the performance of the Private Party and or any other information as it may be required to publish from time to time in response to enquiries from:
- 65.1.1 the Auditor-General under the Public Audit Act; and
 - 65.1.2 persons acting in the public interest in accordance with the provisions of the Promotion of Access to Information Act, 2002.
- 65.2 Subject to clause 65.3, neither Party shall communicate with representatives of the press, television, radio or other communications media on any matter concerning the Agreement without the prior approval of the other Party, such consent not to be unreasonably withheld; save that to the extent that Confidential Information is to be disclosed in accordance with this clause 65, the approval shall be deemed to be given by the D&C Subcontractor in terms of this clause 65.

65.3 To the extent that the Private Party is obliged to disclose or publish information pursuant to clause 65.1, it undertakes to the D&C Subcontractor, if time permits, to consult with the D&C Subcontractor prior to any communication contemplated by this clause 65.2, and if time does not so permit, such consultation shall be dispensed with.

66. CONFIDENTIALITY

66.1 Each Party shall keep all Confidential Information of the other Party confidential while this Agreement remains in force and for a period of 7 years after the Project terminates for any reason. Each Party shall also use reasonable endeavours to prevent its employees, agents and subcontractor from making any disclosure to any person of any Confidential Information of the other Party while this Agreement remains in force and for a period of 7 years after the Project terminates for any reason. Nothing in this clause 66 shall in any way prevent or limit the Private Party from disclosing the D&C Subcontractor's Confidential Information to the Municipality pursuant to the PPP Agreement.

66.2 Clause 66.1 shall not apply to:

66.2.1 any disclosure of information that is reasonably required by shareholders, officers, directors, employees, consultants and professional advisers who have a need to know (and then only to the extent that each such person has a need to know);

66.2.2 any matter which a Party can reasonably demonstrate is already generally available and in the public domain otherwise than as a result of a breach of this clause;

66.2.3 any disclosure which is required by any applicable law (including any order of a Court of competent jurisdiction), or the rules of any stock exchange or governmental or regulatory authority having the force of law, in arbitration and the Party required to make the disclosure has taken all reasonable steps to oppose or prevent the disclosure and has consulted with the other Party prior to making such disclosure;

66.2.4 any disclosure of information that is already lawfully in the possession of the receiving Party prior its disclosure by the disclosing Party;

66.2.5 any provision of information to the advisors of the receiving Party, or to any funders or potential funders, but in the latter case, only to the extent reasonably necessary to enable a decision to be taken on whether that potential funder will become a funder; or

66.2.6 any disclosure by the Parties to the Municipality of information relating to the design, construction, operation and maintenance of the Project and any other information that may be reasonably required for the purpose of retendering of the PPP Agreement in accordance with clause [65] of the PPP Agreement, save for the Intellectual Property owned by the other Party.

66.3 The disclosures permitted under clauses 66.2.5 or 66.2.6 of the definition of Confidential Information in the PPP Agreement may only be made subject to obtaining appropriate confidentiality undertakings consistent with the provisions of clause [87] of the PPP Agreement from the intended recipients.

67. COSTS AND EXPENSES

Each Party shall be responsible for paying its own costs and expenses incurred in connection with the negotiation, preparation and execution of this Agreement.

SECTION 37(2) UNDERTAKING

ANNEXE A

**AGREEMENT IN TERMS OF SECTION 37(2) OF THE OCCUPATIONAL HEALTH
AND SAFETY ACT, 85 OF 1993 ("OHSA") ENTERED INTO BY AND BETWEEN**

**EDEN WASTE MANAGEMENT (RF) PROPRIETARY LIMITED
("EDEN WASTE")**

and

**EDEN D&C SUBCONTRACTOR (RF) PROPRIETARY LIMITED
("MANDATARY")**

1. Eden Waste has entered into a design and construction subcontract with the Mandatary in terms of which the Mandatary is required to perform certain Works (as defined therein) for and on behalf of Eden Waste.
2. Notwithstanding the performance of Works by the Mandatary for and on behalf of Eden Waste, neither Eden Waste nor the Mandatary intends that the provisions of section 37(1) of the OHSA should apply to the relationship between them. Accordingly, Eden Waste and the Mandatary have agreed to the arrangements and procedures contained in this agreement to ensure compliance by the Mandatary with the relevant provisions of the OHSA.
3. This agreement is intended to comply with and constitutes the agreement contemplated in Section 37(2) of the OHSA. Eden Waste and the Mandatary acknowledge and agree that they are separate employers, as contemplated in the OHSA and accordingly, must each ensure compliance with the provisions of the OHSA in respect of the work performed by their respective employees.
4. In pursuance of proper compliance with its obligations as an employer, the Mandatary agrees that it shall:
 - 4.1 ensure that all hazards associated with any Works to be performed are identified, risk assessed and that control measures to mitigate that risk are implemented;
 - 4.2 prepare, implement and maintain appropriate safety instructions and procedures;
 - 4.3 ensure that all employees are trained as contemplated in section 13 of the OHSA;
 - 4.4 ensure that all necessary statutory appointments are made and that all required supervision is in place and effective;
 - 4.5 ensure that all required reporting is done timeously and in accordance with any applicable specifications and/or guidelines;
 - 4.6 provide and maintain a safe working environment which does not expose employees to harm to their health or safety; and
 - 4.7 implement and maintain a safety management and reporting system that guides compliance with the OHSA and which includes assessments of compliance with all aspects of the OHSA at regular intervals.

Signed at

on

2019

Witness

**for EDEN WASTE MANAGEMENT (RF)
PROPRIETARY LIMITED**

DRAFT - NOT FOR SIGNATURE

.....

duly authorised and warranting such
authority

Signed at

on

2019

Witness

**for EDEN D&C SUBCONTRACTOR (RF)
PROPRIETARY LIMITED**

DRAFT - NOT FOR SIGNATURE

.....

.....
duly authorised and warranting such
authority

.....

MILESTONES

* DESCRIPTION	CUMULATIVE TOTAL	PHASE 1	GENERAL WASTE DISPOSAL CELL 1	HAZARDOUS WASTE DISPOSAL CELL	LEACHATE CONTAINMENT DAM	ACCESS ROAD	BUILDINGS AND INFRASTRUCTURE	FENCING	STORM WATER	GENERAL WASTE DISPOSAL CELL 2 - PHASE 2
MILESTONES FOR MONTH 1	13,998,721	13,998,721	1,787,926	477,766	201,327	1,534,309	1,703,495	8,293,897	-	-
% COMPLETED FOR THE MONTH	9.65%	17.48%	5.10%	5.09%	1.91%	21.88%	21.04%	93.04%	0.00%	0.00%
MILESTONES FOR MONTH 2	21,591,979	21,591,979	7,549,215	1,753,421	1,523,554	3,305,333	2,463,421	4,997,036	-	-
% COMPLETED FOR THE MONTH	14.88%	26.97%	21.52%	18.69%	14.49%	47.14%	30.42%	56.06%	0.00%	0.00%
MILESTONES FOR MONTH 3	15,558,721	15,558,721	7,939,083	2,857,332	736,809	2,115,862	1,909,635	-	-	-
% COMPLETED FOR THE MONTH	10.73%	19.43%	22.63%	30.45%	7.01%	30.18%	23.58%	0.00%	0.00%	0.00%
MILESTONES FOR MONTH 4	10,958,331	10,164,756	4,748,617	2,310,927	1,898,822	773,101	433,289	-	-	793,575
% COMPLETED FOR THE MONTH	7.55%	12.69%	13.54%	24.63%	18.06%	11.03%	5.35%	0.00%	0.00%	1.22%
MILESTONES FOR MONTH 5	18,371,892	13,443,064	6,138,808	1,562,871	4,759,178	-	982,207	-	-	4,928,828
% COMPLETED FOR THE MONTH	12.66%	16.79%	17.50%	16.66%	45.26%	0.00%	12.13%	0.00%	0.00%	7.58%
MILESTONES FOR MONTH 6	15,297,286	6,295,547	4,621,909	51,852	679,502	-	942,285	-	-	9,001,739
% COMPLETED FOR THE MONTH	10.54%	7.86%	13.18%	0.55%	6.46%	0.00%	11.64%	0.00%	0.00%	13.85%
MILESTONES FOR MONTH 7	16,318,385	1,439,512	1,088,220	-	-	-	226,904	-	124,388	14,878,873
% COMPLETED FOR THE MONTH	11.25%	1.80%	3.10%	0.00%	0.00%	0.00%	2.80%	0.00%	11.59%	22.89%
MILESTONES FOR MONTH 8	13,108,870	213,414	71,505	-	-	-	-	-	141,909	12,895,455
% COMPLETED FOR THE MONTH	9.04%	0.27%	0.20%	0.00%	0.00%	0.00%	0.00%	0.00%	13.22%	19.84%
MILESTONES FOR MONTH 9	9,294,989	156,725	-	-	-	-	-	-	156,725	9,138,264
% COMPLETED FOR THE MONTH	6.41%	0.20%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	14.60%	14.06%
MILESTONES FOR MONTH 10	7,554,719	439,838	-	-	-	-	-	-	439,838	7,114,881
% COMPLETED FOR THE MONTH	5.21%	0.55%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	40.98%	10.95%
MILESTONES FOR MONTH 11	3,014,187	293,697	-	-	-	-	-	-	293,697	2,720,490
% COMPLETED FOR THE MONTH	2.08%	0.37%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	27.36%	4.19%
TOTAL MILESTONES	145,068,079	80,070,905	35,076,562	9,382,970	10,515,495	7,011,408	8,096,892	8,914,215	1,073,365	64,997,174

* For the purposes of payment in respect of the achievement of a Milestone, the D&C Subcontractor shall be deemed to have achieved the relevant Milestone if, on the Valuation Date, the D&C Subcontract shall have completed at least 95% of the Works associated with the achievement of such Milestone.

FORM OF PAYMENT CLAIM CERTIFICATE

Payment Claim Certificate

Eden D&C Subcontractor (RF) Proprietary Limited

Claim No : _____

Date : ____/____/____

Estimated Final Fee

Fixed D&C Subcontractor's Fee	R
Approved additional fee / Deductions	R
VAT (14%)	R
Total	R

Valuation

Value of the Works since Effective Date	R
Value of the Works since last Certification Date	R
Claim for additional fee	R
Deductions	R
Net Amount	R
Plus VAT (14%)	R
Amount Payable as per Tax Invoice	R

Certificate Date : ____/____/____

Signed : _____

FORM OF TAX INVOICE



EDEN WASTE MANAGEMENT CONSTRUCTION SUBCONTRACTOR (PTY) LTD

PRO FORMA INVOICE

EDEN WASTE MANAGEMENT
CONSTRUCTION
SUBCONTRACTOR (PTY) LTD
P.O. Box 382
Industries East
Germiston South
1400

CO NO:
VAT NO:

CONTRACT NO:

CONTRACT NAME:

Public Private Partnership for development, design, finance, maintenance and operation of a new District Regional Landfill Site, including Alternative Waste Treatment Technology and the Provision of Bulk Transport Services

CERTIFICATE:

1

MONTH ENDING:

September 2019

VALUE OF WORK DONE CIVILS			R	-
ADD : C P I			R	-
ADD: PREVIOUS ESCALATION			R	-
Sub total (1)			R	-
LESS : 1st RETENTION	Previous Retention	10% R	-	-
	Current Retention	10% R	-	-
LESS : 2nd RETENTION			R	-
Sub total (2)			R	-
ADD : M O S PREV.		100% R	-	-
ADD : M O S CURRENT.		100% R	-	-
Sub total (3)			R	-
LESS : PENALTIES			R	-
Sub total (4)			R	-
LESS: PREVIOUS PAYMENTS EXCLUDING VAT			R	-
Sub total (6)			R	-
ADD: CURRENT ESCALATION			R	-
Sub total (7)			R	-
ADD: 15% VAT			R	-

AMOUNT DUE THIS CERTIFICATE

R -

	PRINT NAME	SIGNATURE	DATE
CONTRACTOR	_____	_____	_____
CONSULTANT	_____	_____	_____
CLIENT / LTA	_____	_____	_____

DEDUCTIONS

1. Availability Deduction

The D&C Subcontractor acknowledges that the purpose of the Unitary Payment is to compensate the Private Party for delivery of the Service in terms of the PPP Agreement. It is important to note that sufficient risk transfer happens from the Municipality to the Private Party. In order to ensure that this happens, the Municipality will pay the Private Party for its delivery of the Service at an appropriate service standard.

The D&C Subcontractor acknowledges that if the Private Party does not make the Services Available, the following penalty regime will apply for non-Availability:

Table 1 Penalty for non-Availability

Days non-Availability	Penalty
0 to 3 days	R1 000 per Calendar Day.
4 to 6 days	R1 250 per Calendar Day.
7 days or more	R1 500 per Calendar Day.

Therefore, a similar penalty regime will apply to the D&C Subcontractor for each Calendar Day that the Services are un-Available after the Phase 1 Completion Certificate is issued and such non-Availability of Services is caused by the conduct of the D&C Subcontractor.

2. Penalty for delay of completion

In the event that the D&C Subcontractor fails to complete:

- 2.1 the Phase 1 Works by the scheduled construction completion date for the Phase 1 Works, the D&C Subcontractor shall pay R5 000.00 (five thousand rand) per day for each day the construction of the Project Site is delayed; and
- 2.2 the Phase 2 Works by the scheduled construction completion date for the Phase 2 Works, the D&C Subcontractor shall pay R2 500.00 (two thousand five hundred rand) per day for each day the construction of the Project Site is delayed.

SUBCONTRACTOR'S OUTPUT SPECIFICATIONS

In this schedule, all capitalised terms that are used but not defined, unless the context otherwise requires, have the same meaning as set out in the Agreement.

1. DEFINITIONS

- 1.1 **Access Road** means a road to be built from the existing road belonging to PetroSA (which connects the N2 to the existing landfill site and the Gouriqua Power Station as) to the entrance of the Project Site;
- 1.2 **Alternative Technology Site** means a site within the Landfill Site allocated to the Municipality and indicated as such in Schedule 6: Project Site of the PPP Agreement where the Municipality will appoint third party operators to provide alternative waste management technology; and
- 1.3 **PetroSA** means the Petroleum Oil and Gas Corporation of South Africa SOC Limited.

2. OBJECTIVES OF THE PROJECT

The D&C Subcontractor acknowledges that the Private Party is required under the PPP Agreement to design, construct, manage and operate the Project Site, and provide bulk transport services that meet or exceed the technical minimum requirements of the Output Specification listed under Schedule 7: Output Specifications of the PPP Agreement and the D&C Subcontractor is in turn required to provide the Subcontractor's Output Specifications set out herein.

3. GENERAL

During the various phases of design, construction and operation of the Project Site, the D&C Subcontractor is required to comply with all Laws and Consents.

4. DESIGN

The design of the Project Site facilities must comply with the relevant legislative, regulatory and authoritative requirements in the establishment of the Project Site and all designs are to be approved by the Private Party and ultimately the Municipality prior to the commencement of construction.

In general terms, the design must include at least the following:

- 4.1 Access Road with a minimum width of six (6) metre and with an asphalt surface up to at least the weighbridge.
- 4.2 Weighbridge with a minimum capacity of 60 tonnes and minimum length of 24 m, as well as security infrastructure at the entrance gate. Weighbridge to be linked to a relevant computer with software to process the information.
- 4.3 Onsite gravel roads including a road allowing the Private Party and the Municipality to access the Alternative Technology Site.
- 4.4 Storm water infrastructure consisting of berms, pipelines, channels and energy dissipation structures.

- 4.5 General Waste cell with a life that provides in excess of 300,000 cubic meters of airspace after the initial 10 year operational period (assuming that 9,350 cubic meters of material per month with a 1.6% increase per year).
- 4.6 Hazardous Waste cell with a life that that provides in excess of 43,000 cubic metres of airspace after the initial 10 year operational period (assuming that 5,05 cubic meters of hazardous material per month). To the extent that hazardous waste in excess of the aforementioned amount is received by the Private Party at the Project Site then the airspace will reduce proportionately.
- 4.7 Stockpiles of excavated cover material during construction.
- 4.8 Leachate collection and management system as required by the relevant legislation (which shall not include the treatment and disposal of the leachate).
- 4.9 Contaminated storm water dam, as required by the relevant legislation.
- 4.10 Offices and other on-site buildings. The buildings must be constructed in standard brick and mortar construction, concrete floors with suitable floor covering, plastered and painted walls, ceilings, glazed windows and Chromadek or similar corrugated iron roofing. Buildings to be designed with appropriate electrical reticulation, plugs and light fittings, air conditioners (2) in office and meeting room. Ablution facilities with hot water provision and a septic tank to be provided as well, both for office staff and Project Site staff. Adequate area lighting to be provided at entrance gate and weighbridge. The maintenance shed to have a concrete floor with a steel superstructure roofed and clad on at least three sides with Chromadek or similar steel sheeting. All steel used in the construction at the Project Site buildings should be treated for rust, bearing in mind the proximity of the Project Site to the coast.
- 4.11 The buildings on the Project Site must have the following minimum dimensions or as long as the total minimum dimensions is met
- 4.11.1 Guard House and Weighbridge Office – 24 m²;
- 4.11.2 Office and ablution facilities – 60 m², plus;
- 4.11.3 Meeting room (including chairs and tables) – 15 m²;
- 4.11.4 Laboratory for on-site testing as specified by the “Minimum Requirements for Waste Disposal By Landfill (Department of Water Affairs and Forestry, 1998) – 32 m²;
- 4.11.5 Lecture room (including chairs, tables and a projector) – 96 m²;
- 4.11.6 Carport for at least three (3) vehicles;
- 4.11.7 Vehicle Maintenance and Storage Shed – 120 m²;
- 4.11.8 Project Site ClearVu or concrete palisade fence;
- 4.11.9 A "jackal" fence around the Landfill Site;
- 4.11.10 Signboards;
- 4.11.11 Drilling and equipping for monitoring boreholes;

- 4.11.12 Detailed design drawings (as approved by the Municipality) before construction may commence; and
- 4.11.13 The design of the Project Site must accommodate all the Services.

5. CONSTRUCTION

Construction must be supervised, and all completed components signed off by an independent certifier, appointed in terms of the PPP Agreement.

All construction activities must comply with any relevant Laws and Consents. Specific attention should be given to ongoing construction health and safety requirements.

Dust suppression must be applied so that no unreasonable nuisance is caused to users of adjoining properties, both during the construction period as well as for the full operations period.

Monthly progress meetings must be held with the Municipality during the construction stage and the outcomes of all Quality Assurance (QA) testing and reports must be submitted to the Municipality at these meetings.

The construction will be undertaken in two phases.

5.1 Phase 1 Works

The D&C Subcontractor shall undertake the following construction for the Phase 1 Works:

- 5.1.1 Construction of leachate dam;
- 5.1.2 Construction of A-lined facility;
- 5.1.3 Construction of B-lined facility;
- 5.1.4 Construction of the Access Road; and
- 5.1.5 Building of all infrastructure:
- (a) Guardhouse;
 - (b) Weighbridge office;
 - (c) Meeting room;
 - (d) Laboratory;
 - (e) Lecture room
 - (f) Carport for three (3) vehicles;
 - (g) Vehicle storage and maintenance shed;
 - (h) Palisade fencing around the Project Site;
 - (i) Jackal fence around the Landfill Site; and
 - (j) Drilling of two monitoring boreholes.

5.2 **Phase 2 Works**

The D&C Subcontractor shall undertake the construction of cell 2 and cell 3 for the Phase 2 Works.

6. **FIRST AID TRAINING**

Project Site operating personnel employed by the D&C Subcontractor shall be required to attend first aid training classes offered by the South African Red Cross or other recognized agency. First Aid kits are to be located and maintained in the weigh station, the maintenance building, and on all pieces of operating equipment.

Telephone numbers of nearby ambulance services and the hospital in Mossel Bay shall be prominently displayed, along with police and fire numbers, at each working station.

7. **PROTECTIVE CLOTHING**

Protective clothing and foot gear are to be worn by all D&C Subcontractor personnel when at the working areas of the Project Site in accordance with applicable Laws. The working areas include, but are not limited to, the working face, stockpile areas, manholes, sampling pits, pump stations, leachate storage dam, gas vents, maintenance building, and areas under construction.

8. **COMMUNICATION EQUIPMENT**

Suitable communications equipment is to be provided by the D&C Subcontractor to all its staff on site.

9. **SURFACE RUNOFF CONTROL**

One of the primary considerations in Project Site design is the routing of up gradient rainfall runoff and snow melt around and off the fill areas and leachate collection facilities. Providing for such surface water control helps to diminish, if not eliminate, problems associated with the infiltration of this water into the solid waste or the inflow of such water into sumps or manholes. The D&C Subcontractor shall be responsible for constructing any swales, berms, culverts, or velocity checks as appropriate, to control surface runoff on and around the Project Site area.

10. **EROSION CONTROL**

Erosion of the protective cover material on Project Site cells is to be repaired as soon as possible to maintain the required depth of cover. The establishment of a good stand of grass on the finished slopes is important in maintaining erosion control. It may be necessary to use silt fences, straw bales, ditches or berms in addition to help prevent erosion. The D&C Subcontractor shall take whatever measures are necessary to prevent and correct erosion problems on the Project Site.

11. **DUST CONTROL**

Dust may be a problem during extremely dry periods and presents health hazards to personnel through inhalation of the dust particles, safety hazards by obscuring vision, and maintenance problems to vehicles and equipment. It can give the Landfill Site a poor image with respect to standard of operation. Therefore, the D&C Subcontractor shall, over gravel and unpaved roads, use water and/or moisture absorbing chemicals such as calcium chloride to control dust. The use of moisture absorbing chemicals first must be cleared with

appropriate authorities. Other paved areas adjacent to the weigh station and weighbridges shall be cleaned by hand, if necessary.

12. **EMERGENCY ACTION PLAN**

The proper design, construction and operation of the Project Site should not result in any event detrimental to the environment under normal or certain abnormal conditions.

The response of the D&C Subcontractor's personnel to any serious emergency situation such as, but not limited to, a fire, personal injury, or fuel spill shall be to notify the Private Party.

This notification procedure augmented with names of responsible personnel shall be posted in the office and Gatehouse. It shall be followed with written accounts of each incidence submitted to the Private Party within 10 hours of occurrence.

13. **ACCIDENT REPORTS**

Accident Reports are to be prepared by the D&C Subcontractor for each significant mishap which occurs involving injury to operating personnel or visitors (personal injury requiring medical attention) and/or damage to equipment and Facilities. Maintenance of accident records is a necessary part of the safety program for several reasons:

- 13.1 To determine responsibility;
- 13.2 To dispose of claims, including workmen's compensation;
- 13.3 For supervision and control of workers;
- 13.4 To identify conditions and practices that cause accidents; and
- 13.5 To fulfil governmental requirements for accident reporting.

The D&C Subcontractor shall keep Accident Report forms available on site for use. A copy of an Accident Report shall be provided to the Private Party within 10 hours after the occurrence of an accident.

14. **KEY PERFORMANCE INDICATORS**

- 14.1 Landfill planning and design executed as specified, and approved for construction by Department of Environmental Affairs, Department of Water Affairs. Mossel Bay Municipality and the Municipality within the agreed project program.
- 14.2 Landfill and its associated infrastructure constructed and signed off within the programmed time frame.
- 14.3 Start of service as programmed.
- 14.4 Compliance with the conditions of the waste licence granted to the Municipality, as well as any other statutory and regulatory requirements.

WORKS PROGRAMME

ANNEXE H

APPROVED SUBCONTRACTORS

1. Inter-Waste Proprietary Limited
2. Mekan Engineering Services CC

**ANNEXE J
FORM OF PERFORMANCE BOND**

[To be placed on letterhead of the issuing bank]

1. THIS GUARANTEE IS MADE ON [INSERT DATE]

We, the undersigned, being duly authorised to sign and incur obligations in the name of and for and on behalf of [insert name of the issuing bank], whose registered office is situated at [insert address of the issuing bank] (the **Bank**), are irrevocably and unconditionally bound to Eden Waste Management (RF) Proprietary Limited (registration number: 2014/092464/07),, whose registered office is situated at 2 Brammer Road, Germiston South, Gauteng, 1400 (together with its successors, novatees and assigns of this guarantee, the **Beneficiary**), in respect of the Guarantee Amount, as set out below, for payment of which amount the Bank binds itself in accordance with the provisions of this guarantee.

2. RECITALS

- 2.1 The Beneficiary and Eden D&C Subcontractor (RF) Proprietary Limited (registration number: 2018/549731/07) (**Contractor**), whose registered office is situated at 2 Brammer Road, Germiston South, Gauteng, 1400 (together with its successors, novatees and assigns of the Contract) entered into an agreement entitled "*D&C Subcontract*" dated [●] 2019 (**Contract**"), in terms of which the Beneficiary has appointed the Contractor to undertake certain works upon and subject to the terms and conditions contained in the Contract.
- 2.2 The Contractor has agreed, under the Contract, to procure for the benefit of the Beneficiary a bank guarantee in the form of this guarantee.
- 2.3 The Bank has agreed, at the request of the Contractor, to enter into this guarantee for the benefit of the Beneficiary (the **Guarantee**).

3. DEFINITIONS

In this Guarantee the following words and expressions shall have the following meanings:

- 3.1 **Business Day** means a day on which banks are open for business in the Republic of South Africa excluding a Saturday, Sunday or public holiday;
- 3.2 **Expiry Date** has the meaning given in paragraph 7;
- 3.3 **Phase 2 Completion Certificate** means the certificate issued under Clause 21 of the Contract;
- 3.4 **Guarantee Amount** means R[●] ([amount in words]);
- 3.5 **Signature Date** means the date on which the authorised representative of the Bank signs this Guarantee; and
- 3.6 **Third Party** has the meaning given in paragraph 11.2.

4. **GUARANTEE**

4.1 The Bank hereby irrevocably and unconditionally undertakes to pay on demand (being within 24 hours) on any Business Day on which it receives a written demand from the Beneficiary in accordance with this paragraph 4, an amount equal to the lesser of:

4.1.1 the amount specified in such demand; and

4.1.2 the Guarantee Amount.

4.2 The obligations of the Bank under this Guarantee are primary and not by way of surety.

5. **PROCEDURE FOR MAKING A CLAIM**

5.1 The Bank's obligation to make payments under this Guarantee shall arise on receipt of a demand made in accordance with paragraphs 4, 5 and 6 below.

5.2 The Beneficiary may make one or more demands under this Guarantee. The demand shall state that the Contractor has defaulted in its obligations under the Contract.

5.3 The Bank shall not be required or permitted to make any other investigation or enquiry as to whether the Contractor has defaulted in its obligations under the Contract. The Bank shall be obliged to make payment under this Guarantee without any proof in relation to any alleged breach, default, or other circumstances under which this Guarantee is called and without reference to the principal.

5.4 Each demand shall:

5.4.1 be signed by a director or authorised signatory of the Beneficiary;

5.4.2 be delivered to the Bank on a Business Day and during normal banking hours at the Bank's offices at [insert address of the issuing bank] (or such other office of the Bank as the Bank may from time to time notify the Beneficiary); and

5.4.3 specify the bank account into which payment of the demand shall be made.

5.5 A demand delivered by hand shall be effective from the date when it is delivered to the Bank.

5.6 All payments to be made by the Bank under this Guarantee shall be made to the account specified in the relevant demand.

6. **GUARANTEED AMOUNT**

The maximum aggregate liability of the Bank under this Guarantee shall not exceed the Guarantee Amount.

7. **EXPIRY**

This Guarantee is irrevocable and shall remain valid and enforceable until the date [●] months after the Phase 2 Completion Certificate is issued in accordance with the Contract (the **Expiry Date**), when this Guarantee shall expire and be of no further force and effect whether returned to us or not. The expiry of this Guarantee shall not affect or discharge the liability of the Bank to make payment of any written demand from the Beneficiary delivered to the Bank on or before the Expiry Date.

8. NO INDULGENCE

The Bank shall not in any way be released or discharged from any liability under this Guarantee by any invalidity, illegality or unenforceability of the Contract nor by any alteration, amendment or variation in the terms of the Contract nor by any allowance of time by the Beneficiary under the Contract nor by any forbearance or forgiveness or indulgence in respect of any matter or thing concerning the Contract nor by the business rescue, insolvency, bankruptcy, winding up or reorganisation of the Contractor or the Beneficiary nor by any dispute or disagreement whatsoever between the Beneficiary and the Contractor under or in relation to the Contract, nor by any other act, omission, matter or thing (whether similar to the foregoing or otherwise) whereby the obligations of the Bank under this Guarantee might (but for this provision), under any applicable law or otherwise, be discharged or affected.

9. CESSION AND ASSIGNMENT

9.1.1 The Beneficiary shall be entitled to assign, cede or delegate, novate or transfer its rights and/or obligations under this Guarantee to the Development Bank of Southern Africa (as lender to the project to which the Contract relates) without the prior written consent of the Bank and such cession, assignment or transfer shall not release the Bank from the liability under this Guarantee. In this regard, the Bank irrevocably and unconditionally consents to any such cession, assignment, transfer and/or granting of any security interest and, to the extent necessary, to any splitting of claims that may arise therefrom.

9.1.2 The Bank shall not be entitled to assign, cede or delegate its rights and/or obligations under this Guarantee without the prior written consent of the Beneficiary.

10. NOTICES

10.1 Any notices or communications to be made by the Bank or the Beneficiary to the other under or in connection with this Guarantee (other than demands, which are to be made under paragraphs 4, 5 and 6 above) shall be in writing and made to the other at the following applicable address:

10.1.1 in the case of the Bank: [●]

10.1.2 in the case of the Beneficiary: 2 Brammer Road, Germiston South, Gauteng, 1400

10.1.3 Subject to paragraph 10.3:

10.2.1 any notice sent by courier shall be deemed (in the absence of evidence to the contrary) to have been served at the time of actual receipt by the addressee;

10.2.2 any notice delivered personally shall be deemed to have been served on the date of delivery.

10.2 If notice (including any demand) is delivered by courier or personally after 17h00 on a day or on a day that is not a Business Day, the notice will be deemed to have been received on the next Business Day.

11. MISCELLANEOUS

- 11.1 All payments under this Guarantee shall be made in South African Rands and shall be free of any set-off, withholding or deduction of any kind whatsoever.
- 11.2 Nothing in this Guarantee shall, or is intended to, create rights and or benefits in favour of any person who is not a party to this Guarantee (a **Third Party**) other than the Beneficiary or as contemplated in paragraph 9.1.1 above, and no term or provision of this Guarantee shall be, or is intended by the Bank or the Beneficiary to be, enforceable by any Third Party, other than the Beneficiary.
- 11.3 Any waiver by the Beneficiary of the terms of this Guarantee or any consent or approval given by the Beneficiary shall only be effective if given in writing and then only for the purpose and upon the terms and conditions, if any, on which it is given.
- 11.4 If at any time one or more provisions of this Guarantee is or becomes illegal, invalid or otherwise unenforceable in any respect, such provision or provisions will be ineffective to the extent only of such illegality, invalidity or unenforceability and such illegality, invalidity or unenforceability will not invalidate the other provisions of this Guarantee.
- 11.5 This Guarantee is binding on the successors of the Bank.
- 11.6 This Guarantee shall be governed by and construed in accordance with the laws of the Republic of South Africa.
- 11.7 The Bank and the Beneficiary irrevocably agree that the High Courts of the Republic of South Africa shall have the non-exclusive jurisdiction to hear and determine any suit, action or proceeding and to settle any dispute which may arise under or in connection with this Guarantee and for such purposes irrevocably submit to the non-exclusive jurisdiction of such courts.
- 11.8 The Contractor shall be liable for the cost of procuring and maintaining this Guarantee, and for the costs of the Beneficiary in enforcing this Guarantee, and the Beneficiary shall have no liability to the Bank in respect of such costs.

SIGNED at on 2019

For: [insert name of the Bank]

Signatory:

Capacity:

Authority:

FORM OF PARENT COMPANY GUARANTEE

Date: **[insert]**

To: Eden Waste Management (RF) Proprietary Limited

2 Brammer Road

Germiston South

Gauteng

1400

Email address: notices@interwaste.co.za

Attention: Landfills Director

Parent Company Guarantee**Garden Route District Municipality Landfill Site PPP Project**

1. Eden Waste Management (RF) Proprietary Limited (**Private Party**) has entered into a contract dated **[insert date]** with Eden D&C Subcontractor (RF) Proprietary Limited (**D&C Subcontractor**) titled design and construction subcontract (**D&C Subcontract**) for Works to be performed by the D&C Subcontractor in order for the Private Party to provide certain Project Deliverables to the Municipality which include, inter alia, the development, design, finance, maintenance and operation of a new district regional landfill / waste disposal facility as well as the bulk transfer of waste and the implementation of alternative waste technology.
2. Pursuant to the terms of the D&C Subcontract, the D&C Subcontractor has agreed to procure a guarantee from us in the terms hereof. At the request of the D&C Subcontractor, we have agreed to guarantee the performance of the D&C Subcontractor under the D&C Subcontract on the terms and conditions set out in this parent company guarantee (**Guarantee**).
3. In this Guarantee, all capitalised terms that are used but not defined, unless the context otherwise requires, have the same meaning as set out in the D&C Subcontract.
4. In consideration of the conclusion of the D&C Subcontract by the Private Party, we irrevocably and unconditionally guarantee to you as a co-principal debtor, due performance by the D&C Subcontractor of each and all of its obligations, liabilities, duties and undertakings under and in accordance with the D&C Subcontract save that nothing herein is to be construed as imposing greater obligations on us than are imposed on the D&C Subcontractor in the D&C Subcontract.
5. Our obligations under this Guarantee are to remain in full force and effect and are not to be affected or discharged in any way by any forbearance or waiver of any right of action or remedy you may have against the D&C Subcontractor or negligence by you in enforcing any right of action or remedy.
6. This Guarantee extends to any variation of or amendment to the D&C Subcontract and to any agreement supplemental thereto agreed between you and the D&C Subcontractor and, for

the avoidance of doubt, we hereby authorise you and the D&C Subcontractor to make any amendment or variation to the D&C Subcontract and enter into any supplemental agreement.

7. This Guarantee is a continuing guarantee and accordingly covers all of the obligations and liabilities of the D&C Subcontractor under the D&C Subcontract and remains in full force and effect (notwithstanding any intermediate satisfaction by us, the D&C Subcontractor or any other person) until the said obligations and liabilities of the D&C Subcontractor are carried out, completed and discharged irrevocably and in full in accordance with the D&C Subcontract.
8. This Guarantee is without prejudice to and shall be in addition to any other security which you may at any time hold.
9. This Guarantee may only be enforced after: (i) first having made a claim for performance against the D&C Subcontractor and the D&C Subcontractor not performing within the time period permitted under the D&C Subcontract, and (ii) thereafter seeking recourse to the Performance Bond.
10. We agree not to make any claim or threaten to make any claim on any ground whatsoever whether by proceedings or otherwise against the D&C Subcontractor for the recovery of any sum paid by us in accordance with this Guarantee. Any claim by us against the D&C Subcontractor is to be subordinate to any claims (contingent or otherwise) which you may have against the D&C Subcontractor arising out of or in connection with the D&C Subcontract until the time when these claims are satisfied by the D&C Subcontractor or us as the case may be. To that extent we agree not to claim or have the benefit of any security which you hold or may hold for any monies or liabilities due or incurred by the D&C Subcontractor in respect of any payment by us hereunder. We undertake to hold that sum in trust for you for so long as any sum is payable (contingently or otherwise) under this Guarantee.
11. The Private Party shall be entitled to assign, cede, delegate, transfer or otherwise dispose of its rights and obligations under this Guarantee to any person to which its rights and obligations under the PPP Agreement are assigned, ceded, delegated, transferred or otherwise disposed of under and pursuant to any of the Financing Agreements, including but not limited to, the Security Documents.
12. Any notice required by this Guarantee is deemed to be duly given when delivered (in the case of personal delivery) or 1 (one) week after being despatched by prepaid registered post or as otherwise advised by and between the parties hereto.
13. This Guarantee is governed by and construed in accordance with the laws of South Africa. Any dispute arising out of or in connection with this Guarantee will be settled by way of arbitration in accordance with the Rules of the Arbitration Foundation of Southern Africa, which shall not preclude either party seeking urgent or interdictory relief in any court of competent jurisdiction.

IN WITNESS of which we have duly executed this Guarantee on the date stated above.

[Interwaste Proprietary Limited])
)
)
)

.....))
Signature of authorised person	Signature of authorised person
))
))
))
.....))
Office held	Office held
))
))
))
.....))
Name of authorised person	Name of authorised person
(block letters)	(block letters)
))
))
))

WASTE MANAGEMENT LICENCE

ANNEXE M

ACCEPTABLE FINANCIAL INSTITUTIONS

1. Absa Bank Limited
2. FirstRand Bank Limited
3. The Standard Bank of South Africa Limited
4. Nedbank Limited
5. Santam Limited
6. Lombard Insurance Company Limited
7. Hollard's Insurance Company.

SIGNATURE PAGE

For and on behalf of:

Eden Waste Management (RF) Proprietary Limited

Name: _____

Office: _____

(who warrants his authority)

For and on behalf of:

Eden D&C Subcontractor (RF) Proprietary Limited

Name: _____

Office: _____

(who warrants his authority)