

**OPERATIONS SUBCONTRACT**

between

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

and

**EDEN OPERATIONS SUBCONTRACTOR (RF) PROPRIETARY LIMITED**

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## **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 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 Operations Subcontractor, and the Operations Subcontractor has agreed, to undertake the Subcontractor's Project Deliverables and provide the Services 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 **Error! Reference source not found.**;
- 2.1.2 **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;

- 2.1.3 **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;
- 2.1.4 **Agreement** means this Operations Subcontract between the Private Party and the Operations Subcontractor;
- 2.1.5 **Annual Skills Development Commitment** has the meaning set forth in clause 40.1.6;
- 2.1.6 **Alternative Waste Technologies** means the alternative waste technologies to be provided by the Operations Subcontractor on the Project Site as set out in the Subcontractor's Output Specification;
- 2.1.7 **Annexe** means any annex 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 **Error! Reference source not found.**;
- 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 **Change in Control** means any direct change in Control in the Operations Subcontractor;
- 2.1.17 **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;

- 2.1.18 **Companies Act** the Companies Act, 2008;
- 2.1.19 **Compensation Date** means in respect of any termination amount that is payable pursuant to the termination of this Operations Subcontract in circumstances where the PPP Agreement has terminated, a date that falls 10 Business Days after the Private Party receives payment of such termination amount from the Municipality;
- 2.1.20 **Compensation Date Interest Rate** means the rate of interest applicable to the Debt as set out in the Financing Agreements;
- 2.1.21 **Compensation Event** means any breach by the Municipality under the PPP Agreement, save for any breach that constitutes a Municipality Default;
- 2.1.22 **Completion Certificate/s** means the Phase 1 Completion Certificate and the Phase 2 Completion Certificate (as the case may be);
- 2.1.23 **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;
- 2.1.24 **Consents** means all consents, permits, clearances, authorisations, approvals, rulings, exemptions, registrations, filings, decisions, licences, permissions required to be issued by or made with any Responsible Authority in connection with the performance of any of the Subcontractor's Project Deliverables and the Services;
- 2.1.25 **Contract Month** means each calendar month occurring during the Operations Term;
- 2.1.26 **Contract Year** means each municipal financial year starting on the 1st of July and ending on the 30th of June during the Operations Term, or in respect of the first and last years of the Operations Term, the relevant part thereof;
- 2.1.27 **Control** means in relation to any entity, 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) holding the majority of the voting rights on its board of directors (or equivalent body);
- 2.1.28 **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;
- 2.1.29 **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;
- 2.1.30 **D&C Subcontract** means the Design and Construction Subcontract entered into by the Private Party and the D&C Subcontractor on or about the date of this Agreement, together with all its schedules, appendices and annexes;
- 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 **Deductions** means the Penalty Deductions passed through by the Private Party to the Operations Subcontractor in terms of **Error! Reference source not found.** of this Agreement which are attributable to the failure of the Operations Subcontractor to comply with its obligations under this Agreement, as contemplated under **Error! Reference source not found.** of this Agreement;
- 2.1.33 **Default Interest Rate** means the interest rate applicable to the Debt, plus 100 bps (one hundred basis points);
- 2.1.34 **Defects** means any defects, errors, flaws or omissions in the Works or the project deliverables of the D&C Subcontractor under the D&C Subcontract;
- 2.1.35 **Defects Liability Period** means the

- (a) in respect of the Phase 1 Works, the period commencing on the date on which the Completion Certificate is issued for the Phase 1 Works 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 the D&C Subcontract; and
  - (b) in respect of the Phase 2 Works, the period commencing on the date on which the Completion Certificate is issued for the Phase 2 Works and ending on the later of (i) the date falling 12 months after the issue of the Phase 2 Completion Certificate or (ii) such later date as extended in terms of the D&C Subcontract;
- 2.1.36 **Effective Date** means the 1st Business Day following the date on which the Financing Agreements have become unconditional in accordance with their terms;
- 2.1.37 **Employment Equity Act** means the Employment Equity Act, 1998;
- 2.1.38 **Estimate** has the meaning ascribed to it in clause [50.2.3] of the PPP Agreement;
- 2.1.39 **Equity** means the entire issued share capital of the Operations Subcontractor;
- 2.1.40 **Expiry Date** means the 10th anniversary of the Service Commencement Date;
- 2.1.41 **Facilities** means the buildings and other facilities, together with all supporting infrastructure, plant and equipment as required to enable the Private Party and or the Operations Subcontractor to exercise its rights and perform its obligations included in the Subcontractor's Project Deliverables and the Services;
- 2.1.42 **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;
- 2.1.43 **Financing Agreements** has the meaning ascribed to it in the PPP Agreement and also includes the direct financing agreement;
- 2.1.44 **Force Majeure** means any of the following events:
  - (a) war, civil war, armed conflicts or terrorism;
  - (b) nuclear contamination, unless the Operations 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;
- 2.1.45 **George Site** means a site situated at the George Local Municipality which has been provided by the Municipality to the Private Party for the purpose of performing the Project Deliverables and the services under the PPP

Agreement and in turn made available by the Private Party to the Operations Subcontractor to undertake some of the Subcontractor's Project Deliverables;

- 2.1.46 **Good Industry Practice** means applying, in relation to the manner in which the Subcontractor's Project Deliverables and the Services 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;
- 2.1.47 **Hazardous Waste** means any waste that contains organic or inorganic elements or compounds that may, owing to the inherent physical, chemical or toxicological characteristics of that waste, have a detrimental impact on health and the environment and includes hazardous substances, materials or objects within business waste, residue deposits and residue stockpiles as outlined in Schedule 3 of the National Environmental Management: Waste Act 59, 2008;
- 2.1.48 **Hazardous Waste Invoice** means the invoice issued by the Private Party to Hazardous Waste Producers for the services related to the collection, classification, handling and disposal of Hazardous Waste;
- 2.1.49 **Hazardous Waste Charge** means an amount set out in clause 23.2.4;
- 2.1.50 **Hazardous Waste Payment** means the payments received by the Private Party from the Hazardous Waste Producers for the handling and disposal of Hazardous Waste;
- 2.1.51 **Hazardous Waste Report** shall have the meaning ascribed to it in clause 23.2.3;
- 2.1.52 **Hazardous Waste Producer** means the generators and/or the transporters of the Hazardous Waste approved in accordance with the procedure set out in paragraph 41.2 of the Subcontractor's Output Specifications;
- 2.1.53 **IFRS** means the International Financial Reporting Standards;
- 2.1.54 **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;
- 2.1.55 **Intellectual Property** means all intellectual property whatsoever used from time to time in connection with the Subcontractor's Project Deliverables and the Services and the Subcontractor's Project Deliverables, whether capable of registration, registered or not;
- 2.1.56 **Intellectual Property Rights** means rights, titles and interests in any Intellectual Property;
- 2.1.57 **Knysna Site** means a site situated at the Knysna Local Municipality which has been provided by the Municipality to the Private Party for the purpose of performing the Project Deliverables and the services under the PPP Agreement and in turn made available by the Private Party to the Operations Subcontractor to undertake some of the Subcontractor's Project Deliverables;

- 2.1.58 **Landfill Site** means a site within which the Project Site is situated, made available by the Municipality to the Private Party for the conduct of some of the Project Deliverables and in turn made available by the Private Party to the Operations Subcontractor to undertake some of the Services and the Subcontractor's Project Deliverables;
- 2.1.59 **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; and
  - (c) judicial decisions, notifications and all similar directives made pursuant thereto with which the Operations Subcontractor, the Municipality and or the Private Party are bound to comply;
- 2.1.60 **Lenders** means the financiers to the Private Party, from time to time, who are parties to the Financing Agreements;
- 2.1.61 **Licenced Intellectual Property** means all Intellectual Property to be used under licence from any third party;
- 2.1.62 **MFMA** means the Local Government: Municipal Finance Management, 2003;
- 2.1.63 **Minimum Black Equity** has the meaning ascribed thereto in clause 40.1.1;
- 2.1.64 **Mossel Bay Site** means a site situated at the Mossel Bay Local Municipality which has been provided by the Municipality to the Private for the purpose of performing under the PPP Agreement and in turn made available by the Private Party to the Operations Subcontractor to undertake some of the Subcontractor's Project Deliverables;
- 2.1.65 **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;
- 2.1.66 **Municipal Consents** means the Consents to be procured and maintained by the Municipality, listed in Schedule 12: Municipal Consents of the PPP Agreement;
- 2.1.67 **Municipality Default** means any of the following events:
- (a) an expropriation of a part of the Project Assets and/or 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;

2.1.68 **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;

2.1.69 **Occupational Health and Safety Act** means the Occupational Health and Safety Act, 1993;

2.1.70 **Operating 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;

2.1.71 **Operating Monthly Instalment** means the portion of the Unitary Payment that is paid to the Operations Subcontractor, the amount of which is detailed in **Error! Reference source not found.**, as amended from time to time;

2.1.72 **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;

2.1.73 **Operations Subcontractor Consents** means all Consents required in connection with the performance of the Services and the Subcontractor's Project Deliverables (save for the Municipal Consents);

2.1.74 **Operations 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 Operations 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, 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 Operations Subcontractor (in any of these cases, where applicable, whether provisional or final, and whether voluntary or compulsory);

- (c) the Operations Subcontractor ceases to carry on with its business;
- (d) a resolution being passed by the shareholders or the board of directors of the Operations Subcontractor or an order being made for the administration or the winding-up, liquidation or dissolution of the Operations Subcontractor (in any of these cases, where applicable, whether provisional or final and whether voluntary or compulsory);
- (e) the Operations Subcontractor commits a breach of any of its material obligations under this Agreement not covered by sub-paragraphs (a), (b), (c), (d), (g), (h), (i) or (j) or ;
- (f) the Operations Subcontractor abandons the Subcontractor's Project Deliverables and the Services (other than as a consequence of a breach by the Private Party of its obligations under this Agreement);
- (g) the Operations Subcontractor fails to comply with any provision of clause 56 (in respect of assignment and Change in Control) and clause 6.4 (in respect of subcontracting);
- (h) the accumulation of R 500,000.00 or more Deductions in any year;
- (i) the Operations Subcontractor fails to pay any sum or sums (which sums are all outstanding at the same time) due to the Private Party under this Agreement (which sums are not in dispute) which, either singly or in aggregate exceed or exceeds R 100 000 (indexed to CPI) and such failure continues for 20 Business Days from receipt by the Operations Subcontractor of a notice of non-payment from the Private Party;
- (j) any breach of this Agreement has occurred more than once within a rolling 3 month period and:
  - (i) the Private Party has given an initial notice to the Operations Subcontractor describing that breach in reasonable detail and stating that if the 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 Operations Subcontractor;

- 2.1.75 **Operations Subcontractor's Fees** means the aggregate of all Operating Monthly Instalments payable to the Operations Subcontractor in a Financial Year;
- 2.1.76 **Operations Subcontractor's Representative** has the meaning ascribed thereto in clause 64.2;
- 2.1.77 **Operations Term** means the period from the Service Commencement Date and ending on the Expiry Date or the Termination Date, whichever occurs first;

- 2.1.78 **Output Specifications** means the specification set out in Schedule 7: Output Specifications of the PPP Agreement;
- 2.1.79 **Parent Company Guarantee** means the guarantee issued by Interwaste Proprietary Limited in favour of the Operations Subcontractor in the form attached hereto as **Error! Reference source not found.**;
- 2.1.80 **Parties** means the Private Party and the Operations Subcontractor and **Party** shall mean either of them as the context may require;
- 2.1.81 **Penalty Deductions** means the deductions to the Unitary Payments as contemplated in Schedule 1: Payment Mechanisms of the PPP Agreement;
- 2.1.82 **PetroSA** means the Petroleum Oil and Gas Corporation of South Africa SOC Limited;
- 2.1.83 **PetroSA Access Arrangement** means the contractual / legal arrangements to be implemented by PetroSA in granting the owner of the Landfill Site including, the Private Party, Operations Subcontractor and its subcontractors vacant possession and unfettered access to the Landfill Site;
- 2.1.84 **Performance Bond** means the bond in the form set out in **Error! Reference source not found.** provided by a an Acceptable Financial Institution;
- 2.1.85 **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 the PPP Agreement;
- 2.1.86 **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 the PPP Agreement;
- 2.1.87 **Phase 1 Works** means the first phase of the Works and the Project Deliverables during the Works;
- 2.1.88 **Phase 2 Works** means the second phase of the Works and the Project Deliverables during the Works;
- 2.1.89 **PPP Agreement** means the public private partnership agreement between the Private Party and the Municipality attached hereto as **Error! Reference source not found.**, being a public private partnership agreement as contemplated in in Section 120 and the PPP Regulations of the MFMA;
- 2.1.90 **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;
- 2.1.91 **Private Party Default** means any of the following events or circumstances:
- (a) a Municipality Default;
  - (b) any event falling within the definition of **Private Party Default** in the PPP Agreement occurs in respect of the Private Party other than where

the default is caused or contributed to by any fault, failure, action or omission of the Operations 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), other than in circumstances where the Private Party is unable to make payment to the Operations Subcontractor due to a failure by the Municipality to make payment to the Private Party under the PPP Agreement or a fault, failure, action or omission of the Operations 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 the Operations Subcontractor under this Agreement; or
- (e) a breach by the Private Party of its obligations under this Agreement which substantially or materially frustrates or renders it impossible for the Operations Subcontractor to perform its obligations under this Agreement for a continuous period of 3 months;

2.1.92 **Private Party Representative** has the meaning ascribed to such term in clause 64.1 of this Agreement;

2.1.93 **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 Technologies;

2.1.94 **Project Assets** means the equipment listed in **Error! Reference source not found.**;

2.1.95 **Project Deliverables** means the project deliverables to be undertaken by the Private Party in terms of the PPP Agreement;

2.1.96 **Project Insurances** has the meaning set forth in clause [42] of the PPP Agreement;

2.1.97 **Project Site** means the land situated within the Landfill Site, made available by the Municipality to the Private Party for the services and to conduct of some of the Project Deliverables and in turn made available by the Private Party to the Operations Subcontractor for the Services and to undertake some of the Subcontractor's Project Deliverables;

2.1.98 **Project Term** means the period from the Signature Date to the Expiry Date or the Termination Date, whichever occurs first;

2.1.99 **Protected Names** has the meaning ascribed thereto in clause 54.6;

2.1.100 **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 Operations Subcontractor regarding 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 Operations Subcontractor (and consequently the Private Party) to provide the Subcontractor's Project Deliverables and the Services;
- (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;

- 2.1.101 **Relevant Sites** means the Transfer Stations and the Mossel Bay Site;
- 2.1.102 **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;
- 2.1.103 **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;
- 2.1.104 **Scheduled Service Commencement Date** means the date set out in the Works Programme (as defined in the PPP Agreement);
- 2.1.105 **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;
- 2.1.106 **Service Commencement** the actual commencement of the Services, subsequent to the issue of the Availability Certificate;
- 2.1.107 **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;

- 2.1.108 **Shareholders** means the holders of the Equity;
- 2.1.109 **Shareholder Loans** at any date, in relation to any financing (other than the Equity) made available for the Operations Subcontractor by the Shareholders, all principal unpaid at that date;
- 2.1.110 **Signature Date** means the date of signature of this Agreement by the last signing Party;
- 2.1.111 **Small Works** means any change to the Works requested by the Municipality having an individual cost not exceeding R100 000.00 (indexed to CPI) or as otherwise agreed from time to time, except for any request which will (if implemented) increase the likelihood of the Subcontractor's Project Deliverables and the Services not complying with the performance regime or materially and adversely affect the Operation's Subcontractor's ability to perform its obligations under this Agreement;
- 2.1.112 **Small Works Rates** means a schedule of rates for the Small Works;
- 2.1.113 **SMME Shareholder Loans** at any date, in relation to any financing (other than the Equity) made available for the Operations Subcontractor by the Shareholders, all principal unpaid at that date;
- 2.1.114 **South Africa** the Republic of South Africa;
- 2.1.115 **Subcontractor's 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 Operations Subcontractor as a direct result of the termination of this Agreement, but only to the extent that:
- (a) the Losses are incurred in connection with the performance of the Subcontractor's Project Deliverables and the Services by the Operations 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) Subcontractor losses of profits for a period not exceeding 1 year;
    - (iii) any expenditure incurred in anticipation of the performance of the Subcontractor's Project Deliverables and the Services;
    - (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) the Operations Subcontractor and the relevant 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;
- 2.1.116 **Subcontractor's Insurance** has the meaning ascribed thereto in clause 26.4;
- 2.1.117 **Subcontractor's Output Specifications** means the specifications set out in **Error! Reference source not found.** of this Agreement;
- 2.1.118 **Subcontractor's Project Deliverables** means those deliverables set out in **Error! Reference source not found.** of this Agreement;
- 2.1.119 **Termination Date** means any date of early termination of this Agreement in accordance with its terms;
- 2.1.120 **Transfer Station(s)** means the Knysna Site and George Site;
- 2.1.121 **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 Operations 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 Operations 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 Operations 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 Operations 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 Operations 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 Operations 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 Operations 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 Operations 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;

2.1.122 **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;

2.1.123 **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;

2.1.124 **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 33 of this Agreement;

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

2.1.126 **Works** means the design, construction, fitting installation and commissioning works to be undertaken by the D&C Subcontractor, together with all obligations and duties of the D&C Subcontractor as detailed in the D&C Subcontract.

### 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 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 rebating 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 reference 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 reference 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 precede 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

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 or the Termination Date, provided that any accrued rights of either Party shall continue.

#### 5. PROJECT DOCUMENTS

The Private Party has provided the Operations Subcontractor with the PPP Agreement, a copy of which is attached hereto as **Error! Reference source not found..** The Operations 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 Operations Subcontractor

- 6.1.1 Subject to, and in accordance with, the provisions of this Agreement, the Operations Subcontractor shall exercise its rights and perform its obligations to undertake 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 Services and the Subcontractor's Project Deliverables.

- 6.1.2 Without limiting 6.1.1, the Operations Subcontractor shall at its own cost and risk be solely responsible for undertaking the Subcontractor's Project Deliverables, and in so doing shall ensure that 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 the 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; and
- (e) 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 Operations Subcontractor not agent

The Operations 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 Operations 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 Operations Subcontractor subcontracting any part of the Subcontractor's Project Deliverables and the Services to the Approved Subcontractors. In the event that the Operations 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 Operations 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 Operations 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 Operations Subcontractor shall not, engage in any business or activity other than the business or activity included in, or otherwise required to enable the Operations Subcontractor to provide the Subcontractor's Project Deliverables and the Services.
- 7.2 The Operations 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 and the Services. As between the Operations Subcontractor and the Private Party, the Operations 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 Operations Subcontractor shall be deemed to include any of the same by a subcontractor.

- 7.3 The Operations Subcontractor undertakes to perform the Subcontractor's Project Deliverables and the Services in accordance with the provisions of this Agreement so that no act or omission of the Operations Subcontractor will cause or contribute to the Private Party being in breach of its obligations under the PPP Agreement in respect of the Subcontractor's Project Deliverables and the Services.
- 7.4 The Operations Subcontractor shall obtain (at his cost) an unconditional, irrevocable and on demand Performance Bond for the proper performance of the Operations Subcontractor's obligations under this Agreement, for an amount equal to 10% of the Operations Subcontractor's Fees for any rolling 12-Month period as stipulated in **Error! Reference source not found.** (indexed to CPI from the model base date). This guarantee shall be renewed every 12 Months for the amount of the preceding year's fees (indexed to CPI from the model base date) (**Performance Bond**).
- 7.5 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 **Error! Reference source not found.** or in another form approved by the Private Party.
- 7.6 The Operations Subcontractor shall ensure that the Performance Bond and the Parent Company Guarantee are valid and enforceable for the duration of the Operations Term.
- 7.7 The Performance Bond shall guarantee the due performance by the Operations Subcontractor of its obligations under this Agreement to the limit of such Performance Bond, including but not limited to:
- 7.7.1 all the Deductions that are imposed by the Private Party under this Agreement in respect of the actions and omissions of the Operations Subcontractor pursuant to this Agreement;
- 7.7.2 Penalty Deductions that are imposed under the PPP Agreement, for which the Operations Subcontractor is liable in terms of this Agreement and that arise during the Operations Term;
- 7.7.3 all costs that may be incurred in replacing the Operations Subcontractor, and
- 7.7.4 the professional fees that may be incurred in performing the obligations of the Operations Subcontractor under this Agreement upon termination of this Agreement as a result of a breach by the Operations Subcontractor of its obligations in this Agreement.
- 7.8 The Performance Bond shall be issued as follows:
- 7.8.1 as a condition for the payment of Operations Subcontractor's Fees and by not later than 3 months before the date on which the Phase 1 Completion Certificate is proposed to be issued. The Operations Subcontractor shall procure that the Performance Bond shall be issued in favour of the Private



Party by a financial institution on behalf of the Operations Subcontractor and that such Performance Bond shall become effective on the date on which the Phase 1 Completion Certificate is issued; and

7.8.2 the Performance Bond shall be valid and in full force and effect for a period of 12 months; and

7.8.3 shall be replaced in accordance with clause 7.4.

7.9 The Parent Company Guarantee shall be issued as follows:

7.9.1 as a condition for the payment of the Operations Subcontractor's Fees and by no later than 1 month before the date on which the Phase 1 Completion Certificate is proposed to be issued. The Operations Subcontractor shall procure that the Parent Company Guarantee shall be issued in favour of the Private Party and that such Parent Company Guarantee shall become effective on the date on which the Phase 1 Completion Certificate is issued; and

7.9.2 the Parent Company Guarantee shall be valid and in full force and effect for the duration of the Operations Term.

7.10 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 this Agreement and the Private Party shall not be entitled to call an Operations Subcontractor Default, or otherwise terminate this Agreement 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 of its obligations in terms of the D&C Subcontract; or
- (b) any non-compliance by the D&C Subcontractor with the requirements in Schedule 7: Output Specifications of the PPP Agreement and or the D&C Subcontractor's obligation to ensure that the Works comply with all Laws,

provided that the Private Party shall not be liable to Operations Subcontractor pursuant to any breach or non-compliance by the D&C Subcontractor contemplated in this 7.10.

7.11 The Private Party undertakes to provide the Operations Subcontractor with all operations manuals supplied by manufacturers and **as built** drawings, together with any other documentation, relating to the construction and design of the Facilities, as may be reasonably required to enable the Operations Subcontractor to provide the Services and the Subcontractor's Project Deliverables in accordance with the provisions of this Agreement.

7.12 The Operations Subcontractor shall not be responsible for any Deductions arising out of any and all Defects that become known during the Defects Liability Period in respect of each of the Phase 1 Works and the Phase 2 Works.

7.13 If the Operations Subcontractor causes the delay in the issue of the Availability Certificate as a result of any act or omission of the Operations Subcontractor, the Operations Subcontractor shall indemnify the Private Party for any Penalty

Deductions the Private Party is required to pay the Municipality under the PPP 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. OPERATIONS SUBCONTRACTOR WARRANTIES**

The Operations 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 by it 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 any arbitrator that is binding on it as at the Signature Date;
- 9.4 all Operations Subcontractor Consents that are required for the conduct of the Subcontractor's Project Deliverables and the Services are in full force and effect as at the Signature Date, save for any Operations Subcontractor Consents which are not required under the Laws to be obtained by the Signature Date; provided that the Operations Subcontractor warrants that it knows of no reason why any such Operations Subcontractor Consent will not be granted by the time it is required to obtain such Operations 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 Operations 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 Operations 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 operations of the Subcontractor Project Deliverables and the Services; and

9.9 all information disclosed by or on behalf of the Operations 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 Operations Subcontractor to undertake and provide the Subcontractor Project Deliverables and the Services.

## 10. INDEMNITIES

### 10.1 By Operations Subcontractor

Without prejudice to any other rights or remedies available to the Private Party from any other provisions of this Agreement, the Operations 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 Operations 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 Services; or
- (d) other claim, action, charge, cost, demand or expense by a third party relating to the Operation Subcontractor's performance of the Subcontractor's Project Deliverables and the Services; and
- (e) breach by the Operations 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 Operations Subcontractor will not discharge or release the Operations Subcontractor from any third party indemnity as contemplated in this clause.

## 10.2 By the Private Party

The Private Party indemnifies the Operations 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 Operations 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 for the Private Party's right at any time to claim the amount of any direct losses incurred by it as a result of rectifying or mitigating the effects of any Operations Subcontractor Default and any other express right of the Private Party under this Agreement (including any express right to indemnification) , the sole remedy available to the Private Party in respect of any failure in the delivery of the Services and undertaking the Subcontractor's Project Deliverables shall be the operation of the Deductions in accordance with the provisions of this Agreement.
- 12.2 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.
- 12.3 Save in respect of Deductions and 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.
- 12.4 Save in respect of insurance proceeds, the Operations Subcontractor acknowledges and agrees that its annual liability to the Private Party shall be limited to 100% of the Operations Subcontractor's Fees 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 Operations Subcontractor shall provide the Subcontractor's Project Deliverables and Services on the Project Site.
- 14.1.2 The Operations Subcontractor shall ensure that for the duration of the the Subcontractor's Project Deliverables and the Services there is no unauthorised access to the Project Site.
- 14.1.3 The Operations Subcontractor shall throughout the progress of the Subcontractor's Project Deliverables and Services 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 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 Operations Subcontractor shall procure that:
- (a) all the Subcontractor's Project Deliverables and Services carried out at the Project Site by or on behalf of the Operations Subcontractor 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 Operations 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 Operations Subcontractor).

14.1.5 The Operations Subcontractor shall give the Private Party, the Municipality and the Lenders all reasonable access to the Project Site (insofar as such Project Site is under the control of the Operations Subcontract), the Subcontractor's Project Deliverables and the Services so as to enable them to inspect the Services, the Subcontractor's Project Deliverables and the Project Site from time to time and as required under the PPP Agreement and the Financing Agreements, provided that it is given reasonable notice that such access is required and such access is during business hours.

14.1.6 The Operations Subcontractor acknowledges clause [21.3] of the PPP Agreement and therefore acknowledges that the D&C Subcontractor shall only have completed the Phase 1 Works by the Service Commencement Date. The Operations Subcontractor shall fully cooperate with the D&C Subcontractor on the Project Site so as not to interfere, interrupt nor disturb the D&C Subcontractor's undertaking of the Phase 2 Works.

## 14.2 Rights to Project Site

14.2.1 The Private Party shall procure that the Operations Subcontractor, its Approved Subcontractors and any other contractors or agents of the Operations Subcontractor are granted access to the Project Site with effect from the Effective Date for the purposes of monitoring and inspecting the Works in terms of clause 17.

14.2.2 The Private Party shall procure that the Operations Subcontractor, its Approved Subcontractors and any other contractors or agents of the Operations Subcontractor are granted access to the Project Site at least 2 weeks prior to the issue of the Availability Certificate for the purposes of undertaking the Subcontractor's Project Deliverables and the Services in terms of and subject to the provisions of this Agreement and for no other purpose whatsoever. The Operations 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 Operations 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 14.1.6, the Private Party shall ensure that during the Operations Term, there is no interference, interruption or disturbance of the Operations Subcontractor's possession and use of the Project Site.

- 14.2.3 The Private Party shall ensure that for the duration of the Operations Term there is no interference, interruption or disturbance of the Operation Subcontractor's possession and use of the Project Site. For the avoidance of doubt, the Private Party's obligations to the Operations 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.
- 14.2.4 The Operations 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 Subcontractor's Project Deliverables and Services, all in accordance with this Agreement. Subject to clause 14.2.1, the Operations Subcontractor agrees that the Municipality may grant other persons rights in respect of the Project Site.
- 14.2.5 The Operations Subcontractor shall only be entitled to use the Project Site for the purposes of undertaking the Subcontractor's Project Deliverables and Services and shall have no title to, ownership interest in, liens, leasehold rights or any other rights in the Project Site.

#### 14.3 **Rights to Relevant Sites**

- 14.3.1 With effect from the Service Commencement Date, the Private Party undertakes to procure (i) access, (ii) undisturbed use of , *inter alia*, the ablution facilities and utilities (**Agreed Services**) (as applicable in the respective Relevant Sites, and (iii) a right of use of the Agreed Services in such Relevant Sites (as applicable) from the respective parties for and on behalf of the Operations Subcontractor and its Approved Subcontractors and any other contractors or agents of the Operations Subcontractor. Accordingly, the Operations Subcontractor is entitled to enter and use the Agreed Services in the Relevant Site for the purposes of undertaking the Subcontractor's Project Deliverables and Services for the Operations Term. For the avoidance of doubt, the Private Party's obligations to the Operations Subcontractor in respect of the Relevant Sites shall at no times be greater than the obligations of the Municipality to the Private Party in respect of the Relevant Sites.
- 14.3.2 The Operations Subcontractor shall, throughout the conduct of the Project Deliverables and delivery of Services as may be required in the Relevant Sites, as far as reasonably possible, have regard for the safety of persons at the Relevant Site.

#### 14.4 **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 Operations Subcontractor.

### 15. **CONSENTS**

- 15.1 The Private Party shall ensure that the Operations Subcontractor is provided with all the Municipal Consents required by the Operations Subcontractor in connection with the performance of the Services and the Subcontractor's Project Deliverables.
- 15.2 Subject to clause 15.3, the Operations Subcontractor shall be responsible for:

- 15.2.1 obtaining all Operations Subcontractor Consents which may be required in connection with the performance of the Services and the Subcontractor's Project Deliverables,
- 15.2.2 maintaining in full force and effect all such Operations 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 D&C Subcontractor is obligated to obtain, maintain and or implement in terms of the D&C 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 Operations Term, the Operations Subcontractor should keep record of compliance with all Consents, however, the Operations Subcontractor shall incur no liability for the costs in connection with the Municipal Consents and/or Consents obtained by the D&C Subcontractor as contemplated in clause 15.3.
- 15.5 The Private Party shall provide all such assistance to the Operations Subcontractor as may be reasonably necessary for the Operations Subcontractor to obtain all of the 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 Operations Subcontractor to obtain or maintain any such Operations Subcontractor Consents.

## 16. **PROVISION OF THE WORKS**

- 16.1 The D&C Subcontractor shall carry out the Works under the D&C Subcontract in line with its accepted design proposals in order to achieve the required Output Specifications as set out in Schedule 7: Output Specifications of the PPP Agreement.
- 16.2 Without prejudice to its rights under this Agreement, the Operations Subcontractor undertakes not to cause or contribute to causing the Private Party to breach clause [17.1] of the PPP Agreement.

## 17. **COMPLETION CERTIFICATE**

The Operations Subcontractor may be entitled to monitor and inspect the Works and give input in respect of undertaking the Works and may be entitled to sign off the completed Works, provided that it acts reasonably and in a timely manner so as not to cause any delays in the issue of an inspection notice by the D&C Subcontractor to the Private Party or a Completion Certificate, unless such delays would be due to the requirements of clause [21.2] of the PPP Agreement not having been met. The Private Party may consult with the Operations Subcontractor in respect of the requirements of the Completion Certificate and any matters identified by the Operations Subcontractor shall be given due and proper consideration.



## **18. SECURITY**

- 18.1 During the Operations Term only Operations Subcontractor personnel will be allowed to have keys to all gates. The Operations Subcontractor is responsible for opening the gates across the Access Road at the beginning of the work day and locking them at the conclusion of the work day. The security fence just inside the property line encloses the Landfill Site and deters unauthorized access.
- 18.2 All traffic to and from the Project Site will pass through a security area of PetroSA and the Operations Subcontractor must ensure that PetroSA's requirements (as listed in the PetroSA Access Arrangement) are at all times complied with.
- 18.3 All visitors or customers including the Operations Subcontractor's bulk waste transport vehicles must use the Access Road to gain entrance to the Landfill Site. The bulk waste transport vehicles must stop at the weigh station to the vehicles weighed, or to register in a visitor's log which must be maintained by the Operations Subcontractor.
- 18.4 The Operations Subcontractor shall be responsible for the secure storage of his equipment and materials. The Private Party shall not be responsible for any damage to or loss of the Operation Subcontractor's equipment, materials or supplies.

## **19. QUALITY ASSESSMENT PLANS AND SYSTEM**

- 19.1 No later than 30 days prior to the Scheduled Service Commencement Date, the Operations Subcontractor shall develop and deliver to the Private Party an appropriate quality assessment plan to the satisfaction of the Private Party, 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.
- 19.2 No later than 30 days prior to the Scheduled Service Commencement Date, the Operations Subcontractor shall develop and deliver to the Private Party a service quality plan to the satisfaction of the Private Party, 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).
- 19.3 The Operations Subcontractor shall ensure that the Services and the Subcontractor's Project Deliverables are carried out in compliance with the quality assessment plans.
- 19.4 The Operations 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.
- 19.5 Such audits shall be carried out at appropriate intervals, provided that the Private Party shall give the Operations Subcontractor reasonable notice of at least 8 Business Days of when a Municipal Representative proposes to carry out such audits.
- 19.6 The Operations 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

## **20. EQUIPMENT STANDARDS**

The Operations Subcontractor shall ensure that the goods, equipment, consumables and materials used by it or any Approved Subcontractor in connection with the provision of any of the Services and the Subcontractor's Project Deliverables (each as a distinct and separate obligation) are:

- 20.1 maintained in a safe, serviceable and clean condition in accordance with Good Industry Practice;
- 20.2 of the type specified in the service level specifications and/or the method statements (where appropriate) as set out in the Subcontractor's Output Specification; and
- 20.3 in compliance with any relevant rules, regulations, codes of practice and/or South African standards,

and shall, as soon as practical after receiving a reasonable request, in writing, from the Private Party, supply to the Private Party evidence within a reasonable period to demonstrate its compliance with this clause.

## **21. PROJECT ASSETS - GENERAL OBLIGATIONS**

- 21.1 Save as otherwise stated in this Agreement, the Operations Subcontractor shall be liable for all loss and damage to the Project Assets (in whole or in part) howsoever caused.
- 21.2 The Operations Subcontractor shall at its own cost and risk, provide, deliver, manage, maintain, repair, renew and replace (as the case may be) the Project Assets (or part thereof) at such times and in such manner:
  - 21.2.1 as to enable it to meet the Subcontractor's Output Specifications;
  - 21.2.2 as to ensure that it is, at all times, able to provide the Services and the Subcontractor's Project Deliverables;
  - 21.2.3 without limiting clause 21.2 above, as would be required having regard to Good Industry Practice; and
  - 21.2.4 as required by Law.
- 21.3 The Operations Subcontractor shall, upon receipt of a request from the Private Party, supply to the Private Party evidence, as reasonably practicable, to demonstrate its compliance with this clause 21.

## **22. MAINTENANCE**

The Operations Subcontractor shall be responsible for the maintenance of the Project Site and waste cells as per Subcontractor's Output Specifications.

## **23. PAYMENT**

### **23.1 Operations Subcontractor's Payment**

The Operations Subcontractor's Fee shall be the monthly service fee, namely the Operating Monthly Instalment, in respect of the Subcontractor's Project Deliverables and the Services, which is paid monthly in arrears from the Service Commencement

Date and shall be paid in accordance with the principles detailed in **Error! Reference source not found.** to this Agreement.

## 23.2 Hazardous Waste Payment

23.2.1 It is specifically agreed between the Parties that the classification, handling and disposal of Hazardous Waste by the Operations Subcontractor will not form part of the Operating Monthly Instalment for bulk transport services and management and operation of the Project Site as set out in **Error! Reference source not found.** to this Agreement.

23.2.2 The Private Party will invoice the Hazardous Waste Producer directly in accordance with its classification and agreed tariff as set out in Schedule 7: Output Specification of the PPP Agreement.

23.2.3 On the third (3rd) Business Day of each Contract Month the Operations Subcontractor shall deliver to the Private Party in a form acceptable to the Private Party a report which details the amount and class of Hazardous Waste received from each Hazardous Waste Producer for the previous Contract Month (the **Hazardous Waste Report**).

23.2.4 Where the Hazardous Waste Report is undisputed, the Operations Subcontractor shall invoice the Private Party for the costs of the classification, handling and disposal of the Hazardous Waste for the relevant Hazardous Waste Report (**Hazardous Waste Charge**).

23.2.5 Subject to clause 23.2.6, the monthly payment for the Hazardous Waste Charge shall accrue in arrears in respect of each Contract Month during the Operations Terms and shall become due once the Private Party has received the Hazardous Waste Payment in respect of the corresponding Hazardous Waste Invoice issued to a Hazardous Waste Producer.

23.2.6 The Private Party shall pay the Hazardous Waste Charge to the Operations Subcontractor within twenty (20) days of receipt of the payment from a Hazardous Waste Producer.

23.2.7 To the extent that the Private Party, using reasonable efforts, is unable to collect a Hazardous Waste Payment within one (1) financial year of the Hazardous Waste Invoice being issued to a Hazardous Waste Producer, the Municipality, the Private Party and the Operations Subcontractor shall write off the receivables associated with such Hazardous Waste Invoice in accordance with good accounting practices.

## 23.3 Deductions and Set-off

23.3.1 Undisputed Deductions from the Operating Monthly Instalment shall be made as required in terms of **Error! Reference source not found.**

23.3.2 In addition to the Deductions referred to in clause 23.3.1 above, the Private Party may, at its discretion, retain or setoff any undisputed amount owed to it by the Operations Subcontractor under this Agreement (other than the Hazardous Waste Charge) which has, by agreement or determination under this Agreement, become due and payable to the Private Party against any amount due to the Operations Subcontractor under this Agreement, including any termination payment due to the Operations Payment under this Agreement. If no monies are due to the Operations Subcontractor at that time,

then such sums of monies that are due and payable by the Operations Subcontractor to the Private Party shall be paid not more than 20 Business Days after they are agreed or determined, failing which, the Private Party shall be entitled to have recourse to the Performance Bond.

#### 23.4 Invoicing and Payment Arrangements

23.4.1 Reference to Operating Monthly Instalment in this clause shall be a reference to all Operating Monthly Instalments.

23.4.2 The invoicing arrangements with respect to Operating Monthly Instalment and other payments shall be as follows:

- (a) the Operating Monthly Instalment shall accrue in arrears in respect of each Contract Month during the Operations Term and shall be invoiced and paid on or before the payment date stipulated in clause 23.4.7;
- (b) on the 3<sup>rd</sup> Business Day of each Contract Month the Operations Subcontractor shall deliver to the Private Party in a form acceptable to the Private Party a report (the **Operating Monthly Instalment Invoice Report**) which shall set out:
  - (i) the Operating Monthly Instalment (if any) due in respect of the previous payment period;
  - (ii) the aggregate Deductions (if any) due to the Private Party in respect of the previous payment period;
  - (iii) any VAT due and payable in respect of any of the above amounts; and
  - (iv) the calculation of the applicable CPI factor (if any).

23.4.3 The Operating Monthly Instalment Invoice Report delivered pursuant to clause 23.4.2(b) above shall be accompanied by a performance report in a format reasonably acceptable to the Private Party, as agreed to by the Parties prior to the Service Commencement Date, for the relevant payment period, which will:

- (a) be prepared by the Operations Subcontractor; and
- (b) clearly show the basis of calculation of each of the amounts referred to in the Operating Monthly Instalment Invoice Report.

23.4.4 The Operating Monthly Instalment Invoice Report shall be accompanied by invoices from the Operations Subcontractor to the Private Party in respect of any amounts that are due and payable.

23.4.5 If the Operating Monthly Instalment Invoice Report shows a net amount owing by the Operations Subcontractor to the Private Party, then the Private Party shall issue a legally compliant invoice to the Operations Subcontractor in respect of such amount promptly following its receipt of such Operating Monthly Instalment Invoice Report and the Operations Subcontractor shall pay to the Private Party the amount reflected on such invoice no later than the 20 Business Days after the Operations Subcontractor has received such invoice, if such amount is undisputed.

23.4.6 Payment of the undisputed portion of the Operating Monthly Instalment invoice shall be made by the Private Party on or before the Payment Date (as defined below), provided that the Operations Subcontractor submits to the Private Party a revised invoice in respect of such undisputed portion (and a credit note in respect of the disputed portion) within 1 Business Day of notification by the Private Party to the Operations Subcontractor of the dispute in regard to the remaining portion.

23.4.7 The **Payment Date** for any undisputed invoiced amount in an Operating Monthly Instalment Invoice shall be the 5<sup>th</sup> Business Day after the date on which the relevant the Private Party receives payment from the Municipality in respect of the corresponding Unitary Payment Invoice submitted by the Private Party to the Municipality.

## 23.5 **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 Operations Subcontractor.

## 23.6 **Disputes**

23.6.1 If the Private Party disputes all or any part of the Operating Monthly Instalment invoice, this clause will apply in respect of the disputed portion. The Private Party shall give written notification to the Operation Subcontractor within 2 Business Days from the date of receipt of the Operating Monthly Instalment Invoice Reports and invoices referred to in clause 23.4 above of any disputes regarding the Operating Monthly Instalment invoice, which notification shall state the amount of the disputed portion and its reason for disputing such portion.

23.6.2 The Parties shall use all reasonable endeavours to resolve the dispute in question within 3 Business Days of the date of notification by the Private Party to the Operations Subcontractor.

23.6.3 If they fail to resolve the dispute, either Party may refer the dispute for resolution in accordance with the dispute resolution procedure in clause 57 of this Agreement.

23.6.4 Following resolution of the dispute, the Operations Subcontractor shall, to the extent necessary, issue a replacement invoice to the Private Party reflecting the agreed or determined amount due by the Private Party, but excluding any amount already paid. Such amount, if any, shall be paid by the Operations Subcontractor to the Private Party together with interest on such amount calculated in accordance with clause 23.7 forthwith after receipt by it of the replacement invoice.

23.6.5 The provisions of this clause 23.6 shall apply *mutatis mutandis* to any disputed amounts claimed by the Private Party from the Operations Subcontractor.

## 23.7 **Late Payments**

23.7.1 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.

- 23.7.2 In circumstances where Municipality ought to have advanced monies to the Private Party in terms of the PPP Agreement and failed to do so, the Private Party shall exercise its rights against the Municipality to receive such monies.

23.8 **Value-Added Tax**

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

24. **PERFORMANCE REPORT**

A performance report is to be compiled on a monthly basis and delivered by the Operations Subcontractor to the Private Party Representative, which shall be prepared in good faith and in accordance with Good Industry Practice and shall contain at least the following:

- 24.1 a summary of the overall performance of the Services and the Subcontractor's Project Deliverables;
- 24.2 a monthly assessment of the Operation Subcontractor's performance of each material component of the Services and the Subcontractor's Project Deliverables as against its Availability (as defined in the PPP Agreement), standard and performance standards;
- 24.3 details of all relevant monitoring measures undertaken by or on behalf of the Operations Subcontractor in relation to performance of the Services and the Subcontractor's Project Deliverables, including the dates when such measures were undertaken, by whom they were undertaken and the results;
- 24.4 where there have been material deficiencies in the performance of the Services and the Subcontractor's Project Deliverables and, if so, details of the corrected actions taken or to be taken by the Operations Subcontractor to remedy same;
- 24.5 details of any training undertaken by the Operations Subcontractor or its personnel in respect of the Services and the Subcontractor's Project Deliverables and a summary of any employment related issues as relevant to the Services and the Subcontractor's Project Deliverables;
- 24.6 a full record of all incidents relating to health, safety and security relating to the Services and the Subcontractor's Project Deliverables which occurred during the applicable payment period;
- 24.7 a summary of any material changes in the manner of provision of the Services and the Subcontractor's Project Deliverables agreed to between the Parties pursuant to this Agreement or lawful instructions given by a legislator in respect of the provision of the Services and the Subcontractor's Project Deliverables which do not result in or require amendment of this Agreement itself; and
- 24.8 such other information as may be required in terms of **Error! Reference source not found.** or any other additional information the Private Party may reasonably require from time to time.

## **25. REPORTING REQUIREMENTS**

- 25.1 The Operations Subcontractor shall for the duration of the Operations Term:
- 25.1.1 maintain a full record of particulars of the cost of providing the Services and 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 Operations 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 Operations Subcontractor.
- 25.3 The Operations 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 Operations Subcontractor shall maintain or produce, on a monthly basis, the following records or reports in respect of the Project Site, the Services 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 Operations Term;
  - 25.4.2 full records of all material maintenance procedures carried out during the Operations Term;
  - 25.4.3 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;
  - 25.4.4 a schedule of any changes in the Operating Monthly Instalment during the Operations Term, whether as a result of an Operating Monthly Instalment adjustment or by means of a Variation, or as agreed between the Parties, or for any other reason whatsoever; and
  - 25.4.5 organisation charts for the Operations 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. The Operations Subcontractor shall be co-insured under the relevant Project Insurances to the extent that the Operations 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 Operations 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 Operations Subcontractor shall purchase, or procure that its subcontractors or their subcontractors purchase the following insurances (**Subcontractor's Insurances**):
- 26.4.1 Workman's Compensation Insurance;
- 26.4.2 Motor Insurance; and
- 26.4.3 South African Special Risks Insurance Association (SASRIA) only in respect of the Operations Subcontractor's assets used in respect of the Project.
- 26.5 The Operations Subcontractor shall be responsible for maintaining the Subcontractor's Insurance in respect of the Project at its cost throughout the Operations Term, unless agreed otherwise in writing between the Operations Subcontractor and the Private Party.
- 26.6 To the extent that the Operations Subcontractor fails to maintain the Subcontractor'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 Operations Subcontractor, the Operations Subcontractor shall indemnify the Private Party against any costs, damages, or expenses incurred by the Private Party in respect of third party claims arising out of acts and omissions of the Operations 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 Operations Subcontractor; or
- 26.6.2 if such Subcontractor's Insurances were maintained in accordance with the provisions of this clause 26.
- 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 Operations Subcontractor, then the Operations Subcontractor shall be responsible for and bear the cost of any excess or deduction payable in respect of such claim. The Operations 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 Operations Subcontractor or its subcontractors; and
- 26.7.2 claims made by the Private Party as a result of actions or omissions of the Operations 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 Operations Term by the relevant insurer as a



result of any act or omission on the part of the Operations Subcontractor, the Operations Subcontractor shall indemnify 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 Operations 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 Operations Subcontractor, then the Operations Subcontractor shall not be responsible for, or bear any cost of, any re-instatement, Deductions or non-performance as a result thereof (unless the Private Party pays the Operations Subcontractor to undertake such re-instatement or performance), or any claim under clause 10.1 to the extent that the Operations 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 Operations 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 Operations Subcontractor shall provide the Private Party with such assistance that the Private Party can reasonably require the Operations Subcontractor to provide it at the Private Party's reasonable cost.
- 26.11 The Private Party shall provide the Operations Subcontractor with full details of any procedures or obligations with which the Operations Subcontractor is required to comply in respect of the Project Insurances.
- 26.12 The Private Party shall consult with the Operations Subcontractor to obtain any claims of the Operations Subcontractor and the Private Party shall ensure that such claims of the Operations Subcontractor are submitted under the Project Insurances. The Operations 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 of 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 Operations Subcontractor to ascertain whether the Private Party or the Lenders are bringing such a claim. If the Operations 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 Operations Subcontractor has read and understood and shall be bound by the provisions of clause [43] of the PPP Agreement.
- 27.2 The Operations Subcontractor shall co-operate with the Private Party regarding the management of any Uninsurable risk. The Private Party shall consult with the Operations 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 Operations Subcontractor's risk or cost of provision of the Services

and Subcontractor's Project Deliverables without the prior written consent of the Operations 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 Operations 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 Operations Subcontractor, to the extent of the liability to the Operations Subcontractor under this Agreement, an amount equal to the insurance proceeds that would have been payable to the Operations 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 Operations Subcontractor an amount equal to the amount set out in clause 50 and this Operations Contract shall terminate as if for Force Majeure.

## **28. CONSEQUENCES OF RELIEF EVENT**

- 28.1 If a Relief Event has occurred which will:
  - 28.1.1 directly cause a delay in Service Commencement, or
  - 28.1.2 materially adversely affect the ability of the Operations 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 Services, the Subcontractor's Project Deliverables and other provisions under this Agreement.
- 28.2 The Operations Subcontractor has read and understood the provisions of clause [46] of the PPP Agreement and 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 Operations Subcontractor must:
  - 28.2.1 as soon as practicable, and in any event within 3 Business Days after it becomes aware that the Relief Event has caused or is likely to cause delay and or materially adversely affects the ability of the Operations 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 Operations Subcontractor;
  - 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 Operations 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 need for relief from other obligations under this Agreement;
  - (c) the time lost and or relief from the obligations under this Agreement claimed could not reasonably be expected to be mitigated or recovered by the Operations Subcontractor acting in accordance with Good Industry Practice, without incurring material expenditure; and or
  - (d) the Operations 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 Operations 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 or payment 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 44 or its right to claim Deductions, and, subject to clause 28.5 below, shall give such other relief as has been requested by the Operations Subcontractor and agreed between the Private Party and the Municipality.
- 28.4 If the Scheduled Service Commencement Date has been postponed in terms of the PPP Agreement, then the Operations Subcontractor shall not be entitled to receive any payment in respect of the Operating Monthly Instalment.
- 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 arose prior to the happening of the Relief Event and, in the case of Deductions, where 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 Operations Subcontractor shall not be entitled to any relief during the period for which the information is delayed. In this regard it is recorded that the Private Party shall submit all the information required under the PPP Agreement timeously.
- 28.7 The Operations 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 be entitled to 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 Operations Subcontractor as to what the Operations Subcontractor considers a satisfactory solution for dealing with such prolonged Relief Event and, in negotiating with the Municipality, shall attempt to agree to a mutually satisfactory solution with the Municipality. The Private Party undertakes not to agree to any solution with the Municipality unless such solution has been agreed to by the Operations Subcontractor.
- 28.9 Notwithstanding the foregoing provisions of this clause 28, the Operations 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 Operations 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 Operations Subcontractor Default or to make any Deductions in relation to any non-performance of the Operations 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 Operations Subcontractor.

## **29. CONSEQUENCE OF A COMPENSATION EVENT**

- 29.1 If Compensation Event has occurred that has the following direct results:
- 29.1.1 the Service Commencement will not be achieved on or before the Scheduled Service Commencement Date;
- 29.1.2 the Operations 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 Services and/or the Subcontractor's Project Deliverables during the Operations Term; and or
- 29.1.3 the Operations Subcontractor incurs costs or loses revenue,
- then the Parties shall consult with each other and agree 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 Operations 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 Operations Subcontractor must:
- 29.2.1 as soon as practicable, and in any event within 3 Business Days after it becomes aware that the Compensation Event has caused or is likely to cause delay, breach of an obligation under this Agreement and or the Operations

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 and or any estimated change in project costs; 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 Operating Monthly Instalment, time lost, and or relief from the obligations under the Agreement claimed, could not reasonably be expected to be mitigated or recovered by the Operations Subcontractor acting in accordance with the Good Industry Practices,

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 Operations 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

29.3.2 in the case of an additional cost being incurred by the Operations Subcontractor:

(a) on or before the Service Commencement Date; or

(b) as a result of Capital Expenditure being incurred by the Operations Subcontractor at any time;

the Private Party shall compensate the Operations Subcontractor for the actual change in Project costs, Capital Expenditure and loss of revenue reasonably incurred as supported by all relevant substantiating information and documentation within 30 Business Days of its receipt of a written demand by the Operations Subcontractor;

29.3.3 in the case of a payment of compensation of the estimated change in Project costs that does not result in Capital Expenditure being incurred by the Operations Subcontractor but which reflects a change in the costs being incurred by the Operations Subcontractor after the Scheduled Service Commencement Date and in respect of which the Operations Subcontractor shall support any claim under this clause with substantiating information and documentation, the Private Party shall compensate the Operations Subcontractor by an adjustment to the Operating Monthly Instalment; and or

- 29.3.4 the Private Party shall give the Operations 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 Operations 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 Operations Subcontractor.
- 29.5 The Operations Subcontractor shall provide the Private Party with such assistance as the Private Party may reasonably require from the Operations 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 relief in terms of clause [47] of the PPP Agreement, then the Private Party shall not be entitled to call the Performance Bond, any Operations Subcontractor Default or make any Deductions in relation to any non-performance of the Operations Subcontractor caused by such Compensation Event, provided that the Compensation Event was not caused by or contributed to by any act or omission of the Operations 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 any 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 Operations Subcontractor),

the Private Party shall compensate the Operations Subcontractor with the amount which is equal to the amount of the claim that would have been due to the Operations 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 Operations Subcontractor shall only get proportionate relief from its obligations if the Private Party is granted relief in respect of such corresponding 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 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 Operations 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 Operating Subcontractor's obligations under this Agreement, agree what relief the Private Party should seek from the Municipality 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 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 Operations 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 Operations 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 Operations 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 Operations 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 Operations 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 Operations 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 Subject to clause 50, the Operations 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.
- 30.7 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 Services and Subcontractor's Project Deliverables and during the Project Term.

- 30.8 The Operations 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 Operations Subcontractor under this Agreement without the Operations Subcontractor's prior written consent, which consent shall not be unreasonably withheld or denied.
- 30.9 Notwithstanding the foregoing provisions of this clause 30, the Operations 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 Operations Subcontractor's claim and obligations, from the Municipality.
- 30.10 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 Bonds, call any Operations Subcontractor Default or make any Deductions in relation to any non-performance of the Operations 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 Operations Subcontractor.

### 31. UNFORESEEABLE CONDUCT

- 31.1 Should any Unforeseeable Conduct occur which shall adversely and materially affect the general financial and economic position of the Operations Subcontractor, the Operations 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 Operations Subcontractor in the same overall economic position as the Operations Subcontractor would have been in but for such Unforeseeable Conduct (and the Operating Monthly Instalment 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 Services 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 Operations 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 Operations 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 Operations 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 Operations 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 Operations Subcontractor shall have 50 days from the date of receipt of such notice and or 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 Operations 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 Operations 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 a such 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 any resolution of the situation with the Municipality in terms of clause [49.4] of the PPP Agreement which impacts on the Operations Subcontractor unless such resolution has been agreed to by the Operations 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 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 Operations Subcontractor of any determination made in terms of said clause [78] of the PPP Agreement. The Operations Subcontractor undertakes that it shall be bound by any amendments or variations being made to this Agreement arising pursuant to said clause 78 of the PPP Agreement, including if the PPP Agreement shall terminate, then the termination payment payable to the Operations Subcontractor will be equal to the aggregate of the Subcontractor's Costs payable to the Operations Subcontractor, as agreed between the Parties and the Municipality and shall be paid to the Operations Subcontractor on a date that falls 5 Business Days after the Private Party receives such amount from the Municipality 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 in terms of this Agreement.
- 31.6 It is agreed that:
- 31.6.1 if the Operations 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 Operations 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 Operations Subcontractor shall be entitled to claim payment of the Subcontractor's 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 Operations Subcontractor is the Claiming Party, the Operations 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 be obliged to claim the costs of the Operations Subcontractor related to the Subcontractor's Project Deliverables and the Services in respect of any Unforeseeable Conduct, that are notified to it by the Operations Contractor, from the Municipality and the Operations 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 Operations 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 Operations Subcontractor would have been entitled to receive compensation if the Private Party had submitted such claim, then the Private Party shall compensate the Operations Subcontractor with the amount which is equal to the amount of the claim that would have been due to the Operations Subcontractor.

## **32. SMALL WORKS VARIATION**

- 32.1 The Small Works Rates shall be agreed between the Private Party and the Operations Subcontractor at least 25 Business Days prior to the Scheduled Service Commencement Date.
- 32.2 Subsequent to clause 32.1, the Small Works Rates shall be updated by the Operations Subcontractor at least 25 Business Days prior to the start of each year of the Operations Term and such updating shall be undertaken with reference to, and shall reflect, the prevailing market rates, which are to be confirmed by the Private Party in consultation with the Municipality in terms of the PPP Agreement. Should such updated rates be referred to dispute resolution in terms of the PPP Agreement, the rates determined pursuant to such dispute resolution, shall be the applicable rates for the purposes of this clause 32.
- 32.3 The Small Works Rates shall be applied in respect of any request from the Private Party for Small Works to be completed during that year of the Operations Term.
- 32.4 In determining the Small Works Rates, the value of any Small Works shall be calculated on the basis that:
- 32.4.1 the labour element shall be calculated in accordance with rates which are fair and reasonable; and
- 32.4.2 the materials element shall be charged at the cost of the materials to the Operations Subcontractor or to the party carrying out the work (net of all discounts) plus 10%.

- 32.5 The Private Party and the Operations Subcontractor shall agree on the estimate for undertaking the Small Works.
- 32.6 The Private Party shall not agree with the Municipality any reduction in the Small Works Rates submitted by the Operations Subcontractor without the Operations Subcontractor's prior written consent which consent shall not be unreasonable withheld.
- 32.7 The Private Party and the Operations Subcontractor shall agree on the timing for undertaking the Small Works, so as to enable the Private Party to agree that timing with the Municipality, taking into account that the aim of that timing will be to minimise any inconvenience to the Municipality. The Operations Subcontractor shall take all reasonable steps to minimise the duration of any Small Works.
- 32.8 The Private Party shall pay the Operations Subcontractor for Small Works executed within 2 Business Days of the Private Party receiving payment from the Municipality.
- 32.9 Any dispute between the Parties relating to Small Works shall be determined in accordance with clause 57 of this Agreement.

### 33. MUNICIPALITY VARIATIONS

- 33.1 If the Municipality proposes any Variation pursuant to the PPP Agreement, that will or may affect the Services, the Subcontractor's Project Deliverables or the Operations Subcontractor's rights and obligations under this Agreement, the Private Party shall notify the Operations Subcontractor of such Variation within 2 Business Days of the receipt by the Private Party of the Municipality Variation Proposal and the Private Party shall provide the Operations Subcontractor with a copy of such Municipality Variation Proposal.
- 33.2 If the Operations Subcontractor is of the view that the Municipality Variation will affect the Services, the Subcontractor's Project Deliverables or the Operations Subcontractor's rights and obligations under this Agreement, as soon as practicable and in any event within 15 Business Days after having received the Municipality Variation Proposal and, the Operations Subcontractor shall, subject to clause 33.10, deliver its response to the Municipality Variation Proposal (**the Response**) to the Private Party. The Response shall include the opinion of the Operations Subcontractor on:
- 33.2.1 whether relief from compliance with its obligations under this Agreement (in whole or part) is required, including the obligations of the Operations Subcontractor to Subcontractor's Output Specifications during the implementation of the Variation;
  - 33.2.2 any impact on the provision of the Subcontractor's Project Deliverables and the Services;
  - 33.2.3 any impact on the Scheduled Service Commencement Date;
  - 33.2.4 any amendment required to this Agreement as a result of the Variation;
  - 33.2.5 any estimated revised Operating Subcontractor Fees that result directly from the Variation;
  - 33.2.6 any loss of revenue that will result from the Variation;

- 33.2.7 any Capital Expenditure or Operating Expenditure that is required or no longer required as a result of the Variation;
- 33.2.8 any regulatory approvals or Consents which are required; and
- 33.2.9 the proposed method of certification of any Services or Subcontractor's Project Deliverables of the Variations required by the Municipality Variation Proposal.
- 33.3 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 Operations Subcontractor shall:
  - 33.3.1 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;
  - 33.3.2 demonstrate how any Capital Expenditure, Operating Expenditure and any other expenditure to be incurred or avoided is being measured in a cost-effective manner; and
  - 33.3.3 demonstrate that any expenditure that has been avoided, which was anticipated to be incurred to replace or maintain the Project Assets or any other assets 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 33.2 above.
- 33.4 The Private Party shall include the Response in the Estimate that it submits in response to the Municipality Variation Proposal. The Operations Contractor 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 Operations Subcontractor, which consent shall not be unreasonably withheld.
- 33.5 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 000 000.00 (indexed to CPI) during the Operations Term, 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 Subcontractor's Project Deliverables or Services. In each case, the Private Party shall notify the Operations Subcontractor of such requirement and the Operations 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.
- 33.6 The Operations 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 Operations 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.

- 33.7 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.
- 33.8 As soon as practicable after the contents of the Estimate have been agreed or otherwise determined in terms of the PPP Agreement, the Private Party shall:
- 33.8.1 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 Operations Subcontractor; or
- 33.8.2 if the Municipality withdraws the Municipality Variation Proposal, immediately notify the Operations Subcontractor of such withdrawal.
- 33.9 Notwithstanding the other provisions of this clause 33:
- 33.9.1 if, on receipt of the Municipality Variation Proposal pursuant to clause 33.1, the Operations Subcontractor is of the opinion that such Variation is likely to result in an increase in the Project risk or the Operations Subcontractor's financial risk or to generally adversely affect the risk profile of the Operations 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
- 33.9.2 the Private Party shall serve the Operations 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 Operations Subcontractor in terms of this Agreement, and the Operations Subcontractor shall comply with and accept the outcome of the application of said clause 50.2.9(b).
- 33.10 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 Operations Subcontractor and the Municipality Variation Proposal shall be deemed to have been withdrawn.
- 33.11 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:
- 33.11.1 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
- 33.11.2 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 Operations

Subcontractor without the prior consent of the Operations Subcontractor, which consent shall not be unreasonably withheld.

- 33.12 The Private Party shall make payment to the Operations 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 Operating Monthly Instalment will be increased accordingly).
- 33.13 If payment is not made in accordance with clause 33.12 above, the Private Party shall pay interest to the Operations 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.
- 33.14 For the avoidance of doubt, if the Municipality should, in terms clause [50] of the PPP Agreement, vary the nature and or scope of the obligations of the Private Party, which obligations are in respect of the Services and or the Subcontractor's Project Deliverables and are assumed by the Operations Subcontractor in terms of this Agreement, then the nature and or scope of the Operations Subcontractor's obligations to the Private Party will be varied accordingly, provided that the Private Party has complied with the provisions of this clause 33.
- 33.15 The Operations Subcontractor acknowledges that, if applicable, where the Output Specifications in the PPP Agreement are amended, **Error! Reference source not found.** 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 Project Deliverables and the services in the PPP Agreement.

#### 34. OPERATIONS SUBCONTRACTOR AND OTHER VARIATIONS

- 34.1 If the Operations Subcontractor wishes to introduce a Variation, it must serve a notice on the Private Party providing details of such Variation (an **Operations Subcontractor Variation Proposal**).
- 34.2 The Operations Subcontractor Variation Proposal must:
- 34.2.1 set out the proposed Variation in sufficient detail to enable the Private Party to evaluate it in full;
- 34.2.2 specify the Operations Subcontractor's reasons for the Operations Subcontractor Variation Proposal;
- 34.2.3 request the Private Party to consult with the Operations Subcontractor with a view to deciding whether to propose the Operations Subcontractor Variation Proposal to the Municipality and, if so, what consequential changes the Private Party requires as a result;
- 34.2.4 specify all implications of the Operations Subcontractor Variation Proposal on this Agreement, including any reduction in the Operating Subcontractor's costs that may result in a reduction in the Operating Expenditure and any impact on the Scheduled Service Commencement Date (if any);
- 34.2.5 indicate, in particular, whether a Variation to the Operating Monthly Instalment is proposed (and, if so, give a detailed cost estimate of such proposed

- Variation, so as to enable the Private Party to comply with clause [50.3.2] of the PPP Agreement);
- 34.2.6 indicate whether the Operations Subcontractor Variation Proposal shall have any impact on the Operations Contractor's ability to meet obligations under clause 40 (in whole or part) and, if so, provide full details of the impact; and
- 34.2.7 indicate if there are any dates by which a decision by the Municipality is critical.
- 34.3 The Private Party shall evaluate the Operations Subcontractor's Variation Proposal (acting reasonably) taking into account all relevant issues, including, inter alia, whether:
- 34.3.1 a change in the Operations Subcontractor's Fee will occur;
- 34.3.2 the Operations Subcontractor Variation Proposal will affect the performance of the Services and the delivery of the Subcontractor Project Deliverables and/or the quality or successful delivery of the Services and the Subcontractor's Project Deliverables;
- 34.3.3 the Operations Subcontractor Variation Proposal will interfere with the relationship of the Private Party with third parties;
- 34.3.4 the financial strength and capacity of the Operations Subcontractor is sufficient to perform the Variation;
- 34.3.5 the residual value of the Project Assets is reduced;
- 34.3.6 the Operations Subcontractor Variation Proposal materially affects the risks or costs to which the Private Party is exposed; and
- 34.3.7 any amendment shall be required to this Agreement as a result thereof.
- 34.4 To the extent that the Private Party proposes modifications to the Operations Subcontractor Variation Proposal, the Operations Subcontractor may either accept such modifications or withdraw the Operations Subcontractor Variation Proposal.
- 34.5 Once the Operations 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 Operations 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 Operations 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 Operations Subcontractor requests it to do so, failing which, the Operations 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 Project Deliverables or services 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 Operations Subcontractor without the prior consent of the Operations Subcontractor (acting reasonably).

- 34.6 To the extent that the Operations Subcontractor Variation Proposal requires Capital Expenditure, Operating Expenditure or otherwise cause its costs in providing the Services and Subcontractor Project Deliverables to increase or decrease, the Operations Subcontractor shall:
- 34.6.1 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;
  - 34.6.2 demonstrate how Capital Expenditure and Operating Expenditure to be incurred or avoided is being measured in a cost effective manner; and
  - 34.6.3 demonstrate that any expenditure that has been avoided, which was anticipated to be incurred to replace or maintain the Project Assets or any other assets that have been affected by the Operations Subcontractor Variation Proposal concerned has been taken into account in the amount which in its opinion has resulted or is required under clauses 34.2.5 and 34.2.4.
- 34.7 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 34, which obligations are in respect of the Services and/or the Subcontractor's Project Deliverables and to be assumed by the Operations Subcontractor in terms of this Agreement, then the nature and or scope of the Operations 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 34.

## 35. GENERAL "PASS-THROUGH" PRINCIPLE

### 35.1 General

- 35.1.1 The Parties record and acknowledge that the PPP Agreement contain provisions that rely upon this Agreement.
- 35.1.2 Accordingly:
- (a) the Operations 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 Subcontractor's Project Deliverables and the Services which are assumed by the Private Party under the PPP Agreement;
  - (b) the Operations 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 Operations 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 Services and Subcontractor Project Deliverables; and
  - (c) the Operations 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



Operations 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.

## 35.2 **Pass Through Claims**

35.2.1 Subject to the principles set out in this clause 35.2 all entitlements which the Operations 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**).

35.2.2 Where Pass Through Claims arise, the Private Party has certain entitlements under the PPP Agreement. The purpose of this clause 35.2 is to provide the Operations Subcontractor with comparable entitlements in respect of Pass Through Claims and, subject to the provisions of this Agreement, to limit the Operations 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.

35.2.3 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 Operations Subcontractor copies of all relevant documents and other information and allow the Operations Subcontractor (at the Operations 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.

## 35.3 **Proportionate Relief**

35.3.1 The Operations 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 Operations Subcontractor has fulfilled all of its other obligations and is entitled to such relief.

35.3.2 The Operations 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.

## 36. **PERSONNEL**

### 36.1 **Key Personnel**

The Operations 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 Subcontractor's Project Deliverables and the Services (whether by the Operations Subcontractor or its subcontractors) to undertake the Services 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 Operations Subcontractor shall ensure that all Key Personnel Positions are always filled as soon as reasonably possible.

#### **36.2 Removal of Personnel**

The Private Party may require the Operations Subcontractor to remove any employee or other personnel of the Operations Subcontractor or any subcontractor from the Project Site and the Operations 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 Operations 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).

### **37. MONITORING AND INSPECTION**

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

### **38. ENVIRONMENTAL POLICY**

- 38.1 The Operations Subcontractor shall ensure that it has familiarised itself with the hazards associated with the Services and the delivery of 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 Services and the delivery of the Subcontractor's Project Deliverables, and, where possible, replace any hazardous substance that may be used with a non-hazardous or less hazardous substance.
- 38.2 In utilising any hazardous substance, the Operations Subcontractor shall ensure that it complies with the manufacturer's specifications and safety measures at all times.
- 38.3 The Operations Subcontractor shall avoid (insofar as is possible) any contamination of the Project Site in undertaking the Services and the Subcontractor's Project Deliverables, and insofar as any contamination occurs after the Effective Date as a result of the Operations Subcontractor providing and undertaking the Services 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 Operations Subcontractor, the Private Party and or the Municipality ). The provisions of this clause 38 shall only be applicable from the time the Operations Subcontractor becomes active on the Project Site.

### 39. OCCUPATIONAL HEALTH AND SAFETY

- 39.1 During the Operations Term, the Operations 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 Services and the Subcontractor's Project Deliverables and any third parties within the Project Site. In particular (and without limiting the generality of the foregoing), the Operations 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 Operations Subcontractor from time to time.
- 39.2 The Operations Subcontractor shall, during the Operations 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.
- 39.3 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 Operations Subcontractor and its Approved Subcontractors in relation to the performance of the Services and the Subcontractor's Project Deliverables and to this extent the Operations Subcontractor indemnifies the Private Party against any claim which may arise against the Private Party as a result of the Operations Subcontractor's failure to comply therewith.
- 39.4 Without derogating from any of the obligations under this clause 39, both the Operations 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, Approved 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 39.5.
- 39.5 Section 37(2) Undertaking
- 39.5.1 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 39.5. The Private Party and the Municipality shall not be liable for any breaches by the Operations Subcontractor, its agents, its Approved 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 Services and the Subcontractor's Project Deliverables and consequently agrees to provide the Section 37(2) Undertaking.
- 39.5.2 The Operations 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 Services and Subcontractor's Project Deliverables by the Operations Subcontractor and any of its employees, shall be that of the Operations Subcontractor.
- 39.5.3 In accepting such responsibility as set out in clause 39.5.2, the Operations Subcontractor shall indemnify the Private Party and the Municipality against any loss, damage, injury or death, however caused, to the

Operations Subcontractor or to the Approved 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 .

#### 39.6 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.

#### 40. TARGET GROUP REQUIREMENTS OF THE OPERATIONS SUBCONTRACTOR

40.1 The Operations Subcontractor shall ensure that:

40.1.1 for the duration of the Operations 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;

40.1.2 the Black Shareholders shall be entitled to earn a return on their investment in the Subcontractor's Project Deliverables and the Services consistent with their Equity, through their participation in:

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

40.1.3 no less than 30% of the total expenditure forecast by the Operations Subcontractor shall be expended under subcontracts in which Black People and or Black Enterprises will participate;

40.1.4 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 40.1.4(a) are filled by Black Women;

40.1.5 it implements its current employment equity plan, as substituted from time to time in accordance with the Employment Equity Act. The Operations 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;
- 40.1.6 it meets 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 Operations Term; and
- 40.1.7 it expends no less than 1% of the total procurement budget of the Operations Subcontractor in respect of the Project under procurement contracts with SMMEs during the Operations Term.
- 40.2 The Operations Subcontractor shall furnish the Private Party annually within 10 Business Days after the end of each financial year of the Operations Subcontractor a report certified by the Operations Subcontractor's auditors setting forth:
  - 40.2.1 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;
  - 40.2.2 a complete statement of all targets set forth in the skills development plan for that financial year that have been achieved by the Operations Subcontractor in that financial year, together with details of the costs incurred by the Operations Subcontractor in that financial year in respect of such targets;
  - 40.2.3 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 Operations Subcontractor in that financial year, together with the Operations Subcontractor's reasons for not achieving these targets; and
  - 40.2.4 details of the portion (if any) of its Annual Skills Development Commitment for that financial year not applied by the Operations Subcontractor towards the implementation of any of its skills development targets for that financial year, together with the Operations Subcontractor's reasons for not applying the full Annual Skills Development Commitment in that financial year.

#### 41. SUBCONTRACTING

The Operations Subcontractor shall procure that:

- 41.1 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 Operations Subcontractor shall furnish the Private Party with or cause the Private Party to be furnished with:
  - 41.1.1 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
  - 41.1.2 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;
- 41.2 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
- 41.3 each subcontractor shall expend no less than 1% of the total procurement budget of that subcontractor in respect of the Subcontractor's Project Deliverables and the Services under procurement contracts with SMMEs.

## 42. LOCAL EMPLOYMENT

- 42.1 The Operations Subcontractor shall utilise its existing labour for the purposes of carrying out the Subcontractor's Project Deliverables and the Services.
- 42.2 To the extent that the Operations Subcontractor wishes to employ additional labour, the Operations 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.

## 43. TERMINATION FOR PRIVATE PARTY DEFAULT

### 43.1 Procedure

- 43.1.1 On the occurrence of a Private Party Default, or as soon as the Operations Subcontractor within 5 Business Days becomes aware of same, the Operations Subcontractor may serve 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.
- 43.1.2 Upon the occurrence of a Private Party Default arising from a Municipality Default under the PPP Agreement, the Private Party shall consult with the Operations 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 Operations Subcontractor after consultation with the Operations Subcontractor and the Lenders. The Operations 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.
- 43.1.3 On the service of the notice pursuant to clause 43.1.1, the Operations Subcontractor may:

- (a) in the case of the Private Party Default referred to in clause 2.1.91(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 2.1.91(c), if that Private Party Default has not been remedied or rectified within 20 Business Days of the date on which the notice in terms of clause 43.1.1 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.

43.1.4 Regardless of the foregoing, the remedy period granted under clause 43.1.3(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.

43.1.5 The Operations Subcontractor shall not exercise or purport to exercise any rights to terminate this Agreement except as expressly provided for herein. The Operations Subcontractor shall not and shall not be entitled to terminate this Agreement for causes not contained in this Agreement. The rights of the Operations Subcontractor (to terminate or otherwise) under this clause 43 are in addition (and without prejudice) to any other rights which the Operations Subcontractor may have in Law to claim the amount of any direct loss or damages suffered by the Operations Subcontractor on account of any payments default by the Private Party. If the Private Party remedies the breach by paying the Operations Subcontractor compensation or damages of an amount agreed as between the Parties or determined in terms of clause 57, then the Operations Subcontractor shall be precluded from instituting a claim for specific performance against the Private Party.

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 Operations 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 43.1.4, if the Private Party's execution of the remedy is adversely affected by the occurrence of an event of Force Majeure, a Relief Event, 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 or Compensation Event or Unforeseeable Conduct or Variation (as the case may be) which is agreed by the Parties or determined in accordance with clause 57 of this Agreement.

#### 44. TERMINATION FOR OPERATIONS SUBCONTRACTOR DEFAULT

##### 44.1 Notification

The Operations Subcontractor shall notify the Private Party of the occurrence, and details, of any Operations 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 an Operations Subcontractor Default, in either case promptly on the Operations Subcontractor becoming aware of its occurrence.

##### 44.2 Private Party Options

44.2.1 On the occurrence of an Operations Subcontractor Default, the Private Party may:

- (a) in the case of the Operations Subcontractor Default referred to in clauses 2.1.74(a), 2.1.74(b), 2.1.74(c), 2.1.74(d), 2.1.74(f) or 2.1.74(h) 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 Operations Subcontractor Default referred to in clauses 2.1.74(e), 2.1.74(g), 2.1.74(i) and 2.1.74(j) serve notice of default on the Operations Subcontractor requiring the Operations Subcontractor at the Operations Subcontractor's option either:
  - (i) to remedy the Operations 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 Operations Subcontractor Default (**Remedy Programme**). The Remedy Programme shall specify in reasonable detail the manner in, and the latest date by which such Operations Subcontractor Default is proposed to be remedied. The Operations Subcontractor shall only have the option of putting forward a Remedy Programme if it first notifies the Private Party within 3 Business Day of such notice of default that it proposes to do so.

44.2.2 Regardless of the foregoing, the remedy period granted under clause 44.2.1(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 Operations Subcontractor Default has caused (directly or indirectly) the Municipality to exercise its rights under such clause.

44.2.3 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 44 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 Operations Subcontractor. If the Operations 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 57, then the Private Party shall be precluded from instituting a claim for specific performance against the Operations Subcontractor.

#### 44.3 **Remedy Provisions**

44.3.1 Where the Operations Subcontractor puts forward a Remedy Programme in compliance with clause 44.2.1(b)(ii), the Private Party shall have 5 Business Days from receipt of the same within which to notify the Operations 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 Operations 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 Operations 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 57.

44.3.2 If:

- (a) the Operations 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 Operations Subcontractor puts forward a Remedy Programme which has been accepted by the Private Party or has been determined to be reasonable, the Operations 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 Operations 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 Operations Subcontractor with immediate effect; provided that for the purposes of clause 44.3.2, if the Operations 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 Operations 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 or 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 57 of this Agreement.

- 44.3.3 For the avoidance of doubt, this entire clause 44.3 shall be subject to the principle contained in clause 44.2.2.

#### 44.4 **Private Party's Costs**

- 44.4.1 The Operations 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.

- 44.4.2 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 44.4 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 Operations Subcontractor (or to take any action other than termination of this Agreement).

#### 45. **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.

#### 46. **TERMINATION FOR CORRUPT ACTS**

- 46.1 The Operations Subcontractor warrants that in entering into this Agreement it has not committed any Corrupt Act.

- 46.2 If the Operations 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 46.2.1 to 46.2.3 below:

- 46.2.1 if the Corrupt Act is committed by the Operations Subcontractor, any shareholder of the Operations Subcontractor, a director of the Operations Subcontractor or an employee of the Operations Subcontractor acting under the authority or with the knowledge of a director of the Operations Subcontractor, then in any such case, the Private Party may give written notice to the Operations Subcontractor of termination and this Agreement which will terminate immediately;

- 46.2.2 if the Corrupt Act is committed by an employee of the Operations Subcontractor acting of his or her own accord, then the Private Party may give notice to the Operations Subcontractor of termination and this Agreement will terminate, unless within 8 Business Days of its receipt of such notice the Operations Subcontractor procures the termination of that employee's involvement in the Project and (if necessary) procures the performance of that part of the Subcontractor's Project Deliverables and the Services previously performed by that employee to be performed by another person;

- 46.2.3 if the Corrupt Act is committed by any other person not specified in clauses 46.2.1 to 46.2.2 above but involved in the Project as a subcontractor or

supplier to the Operations Subcontractor, then the Private Party may give notice to the Operations Subcontractor of termination and this Agreement will terminate unless within 70 Business Days, the Operations Subcontractor procures the termination of such person's involvement in the Project and (if necessary) procures the performance of the relevant part of the Subcontractor's Project Deliverables and the Services by another person; and

- 46.2.4 any notice of termination under this clause 46 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 46.
- 46.3 Without prejudice to its other rights or remedies under this clause 46, the Private Party shall be entitled to recover from the Operations Subcontractor, the greater of:
- 46.3.1 the amount or value of the gift, consideration or commission which is the subject of the Corrupt Act provided that the Operations Subcontractor, directly or indirectly, is the beneficiary of such gift, consideration or commission ; and
  - 46.3.2 any direct losses sustained by the Private Party and the Municipality in consequence of any breach of this clause by the Operations Subcontractor.
- 46.4 Nothing contained in this clause shall prevent the Operations Subcontractor or any third party from paying any proper commission or bonus to its employees within the agreed terms of their employment.
- 46.5 The Operations Subcontractor shall notify the Private Party of the occurrence (and details) of any Corrupt Act promptly on the Operations Subcontractor becoming aware of its occurrence.
- 46.6 Where the Operations 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.

#### 47. EFFECTS OF TERMINATION

##### 47.1 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.

##### 47.2 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 Operations 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.

#### **47.3 Automatic Termination**

This Agreement shall automatically terminate when the PPP Agreement terminates and the Operations Subcontractor shall be paid in accordance with the Compensation on Termination for Force Majeure in terms of clause 50 of this Agreement, unless such termination of the PPP Agreement is due to an act or omission of the Operations Subcontractor.

#### **47.4 Compliance with clause [62] of the PPP Agreement**

The Operations 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 2.1.91(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.

#### **47.5 Private Party's right to complete the Services**

Where the Private Party has terminated this Agreement, the Private Party may itself provide the Subcontractor's Project Deliverables and the Services or may employ another contractor to provide the Subcontractor's Project Deliverables and the Services and in either such event the following provisions shall apply:

- 47.5.1 within 14 days after termination of this Agreement, the Private Party shall notify the Operations Subcontractor which of the materials and equipment (that is acquired using monies paid by the Private Party), used by the Operations Subcontractor in the undertaking of the Subcontractor's Project Deliverables and the Services including, without limitation, the carrying out of maintenance, the Private Party requires for undertaking the Subcontractor's Project Deliverables and the Services;
- 47.5.2 following receipt of the notice referred to in clause 47.5.1 the materials and equipment (that is acquired using monies paid by the Private Party) specified in such notice shall remain available to the Private Party or such other contractor for the purpose of undertaking the Subcontractor's Project Deliverables and the Services; and
- 47.5.3 the Operations Subcontractor shall promptly remove from the Project Site all materials, equipment and construction plant which is not specified in such notice.

#### **47.6 Transfers of Contracts**

- 47.6.1 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 Subcontractor's Project Deliverables and the Services to the Private Party for transfer to the Municipality, the Operations Subcontractor shall transfer to, and there shall vest in, the Private Party such items of the plant and equipment as shall have been procured by the Operations

Subcontractor for and on behalf of the Private Party, and if the Private Party so elects, all materials on the Project Site shall remain available to the Private Party for the purposes of continuing with the Subcontractor's Project Deliverables and the Services subject to the payment of the Operations Subcontractor's reasonable costs in respect thereof;

- (b) if the Private Party so elects, the Operations Subcontractor shall procure that all rights and obligations of the Operations Subcontractor under its subcontracts (other than any rights which the Operations 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 Operations Subcontractor shall procure that the relevant subcontract automatically terminates when this Agreement terminates; and
- (c) the Operations Subcontractor shall take reasonable steps to procure that the benefit of all guarantees, licences, warranties, documentation, service agreements and other rights relating to the plant, equipment, the Subcontractor's Project Deliverables and/or the Services are ceded to the Private Party, including any reversionary interests and rights relating to the plant, equipment, the Subcontractor's Project Deliverables and/or the Services 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 such guarantees, licenses, warranties, documentation, service agreements and other rights by virtue of the Operating Monthly Instalment and, to the extent termination occurs prior to the Expiry Date, the termination payments made under clauses 48 to 51, to the extent that the Private Party receives proceeds in respect of the Operations Subcontractor's claims from Municipality

#### **47.7 Transfers on Termination or Expiry**

**47.7.1** On termination of this Agreement in circumstances where the PPP Agreement is terminated within 10 Business Days Prior to the Expiry Date, the Operations Subcontractor shall:

- (a) hand over to, and there shall vest in, the Municipality, free from all encumbrances, the Project Assets, which in the case of expiry or termination of the PPP Agreement at the Expiry Date shall be in the state as agreed to by the Parties in the Schedule 16: Handback Schedule of the PPP Agreement, however in the event that the PPP Agreement is terminated prior to the Expiry Date, the Project Assets will be handed over to the Municipality in the condition that they are in at that point in time; or
- (b) transfer to the Municipality, free from any security interest full and unencumbered title in and to all or any part of the books and records required by the Municipality in connection with the Subcontractor's Project Deliverables and the Services;
- (c) deliver to the Municipality, free from any security interest full and unencumbered title in and to all or any part of the Project Assets required by the Municipality in connection with the Project Deliverables;

- (d) deliver to the Municipality any Licensed Intellectual Property and the Municipality shall, to the extent possible, be granted a perpetual non-exclusive, royalty-free licence to use such Licenced Intellectual Property or where same cannot be obtained, the Operations Subcontractor shall procure that the Municipality (or its nominee) is given a licence on terms consistent with those provided to the Operations Subcontractor ;
- (e) deliver to the Municipality (as far as not already delivered to the Municipality) one complete set of:
  - (i) **as built drawings** showing all and any alterations made to the Facilities by the Operations Subcontractor since the Service Commencement Date;
  - (ii) maintenance, operation and training manuals for the Project Assets to the extent that they exist or the Operations Subcontractor has an obligation in terms of this Agreement to acquire or prepare them;
  - (iii) building performance data, including energy, water and waste records; and
  - (iv) the historical operating data and plans of the Facilities and the Project Assets in a format acceptable to the Municipality;
- (f) use all reasonable endeavours to procure that the benefit of all manufacturer's warranties in respect of mechanical and electrical plant and equipment used or made available by the Operations Subcontractor under this Agreement and included in the Project Assets are assigned, or otherwise transferred, to the Municipality;
- (g) ensure that provision is made in all relevant contracts of any description whatsoever to which the Operations Subcontractor is a party to ensure that the Municipality will be in a position to exercise its rights, and the Operations Subcontractor will be in a position to comply with its obligations, under this clause 47.7;
- (h) remove from the Project Site all property used by the Operations Subcontractor in the performance of the Subcontractor's Project Deliverables and the Services not required by the Municipality pursuant to this clause 47.7 and if it has not done so by the Expiry Date or on the date of termination it shall be deemed abandoned and the Municipality may (without being responsible for any loss, damage, costs or expenses) remove and sell any such property and shall hold any proceeds less all costs incurred for the credit of the Private Party;
- (i) deliver to the Municipality:
  - (i) any keys, remote access apparatus and computer access cards to the Facilities that are or should be in the possession or under the control of the Operations Subcontractor or any of its subcontractors; and
  - (ii) without prejudice to clause 53, any copyright licences for any computer programmes (or licences to use the same) within the control of the Operations Subcontractor and necessary for the

operation of the Facilities (but excluding computer programmes which have been developed or acquired by the Operations Subcontractor (or any of its subcontractors) for its own use and not solely for the purposes of provision of any of the Subcontractor's Project Deliverables and the Services at the Facilities or the assignment or transfer of which is otherwise restricted); and

- (iii) vacate the Project Site and shall leave the Project Site, Facilities and Project Assets in a safe, clean and orderly condition;

it being agreed that fair consideration has been paid for such assets, rights and obligations by virtue of the Operating Monthly Instalments and, to the extent termination occurs prior to the Expiry Date, the termination payments made under clauses 48 to 51.

- 47.7.2 If this Agreement terminates in circumstances where the PPP Agreement does not terminate, then the provisions of clause 47.7.1 shall apply, provided that the Private Party shall have all of the rights of the Municipality in terms of clause 47.7.1.

#### 47.8 Transitional Arrangements

- 47.8.1 In the case of any earlier termination, in circumstances where the PPP Agreement is terminated as well, for a period of 12 months (or longer as may be agreed to, in writing, by the Parties) both before and after the Expiry Date or in the case of any earlier termination for the period from the service of notice of termination to 6 months after the Termination Date, the Operations Subcontractor shall have the following obligations, on substantially similar terms and conditions as set out in the PPP Agreement:

- (a) 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 services (which may or may not be the same as, or similar to, the Subcontractor's Project Deliverables or the Services or any of them) following the expiry or earlier termination of this Agreement, the Operations Subcontractor shall co-operate with the Municipality fully in such tender process including (without limitation) by:
  - (i) providing any information relating to the Project which is available to the Operations Subcontractor and which the Municipality may reasonably require to conduct such tender excluding any information which is commercially sensitive to the Operations Subcontractor (and, for the purposes of this sub-clause, **(commercially sensitive)** shall mean information which would if disclosed to a competitor of the Operations Subcontractor or its subcontractors give that competitor a competitive advantage over the Operations Subcontractor or its subcontractors and thereby prejudice the business of the Operations Subcontractor or its subcontractors) but shall exclude any information referred to in the clause dealing with employment matters; and
  - (ii) 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 and the Project Assets subject to the Operations Subcontractor's safety rules and regulations,

provided that the Private Party shall reimburse the Operations Subcontractor any costs and disbursements reasonably incurred by the Operations Subcontractor in complying with the provisions of this clause, to the extent that the Private Party receives such proceeds from the Municipality.

- 47.8.2 If this Agreement terminates in circumstances where the PPP Agreement does not terminate, then the provisions of clause 47.8.1 shall apply, provided that the Private Party shall have all of the rights of the Municipality in terms of clause 47.8.1.

**47.9 Continuing Obligation**

Save as otherwise expressly provided in this Agreement:

- 47.9.1 termination of this Agreement shall be without prejudice to any accrued rights and obligations under this Agreement as at the date of termination; and
- 47.9.2 termination of this Agreement shall not affect the continuing rights and obligations of the Private Party and the Operations Subcontractor under this clause or under any other 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
- 47.9.3 clause 47 in its entirety shall survive termination of this Agreement.

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

- 48.1 Subject to clause 48.2, on termination of this Agreement as a result of a Private Party Default, the Private Party shall:
- 48.1.1 in the case of a Private Party Default contemplated in clause 2.1.91(a) pay the Operations Subcontractor within 10 Business Days of receiving payment from the Municipality and once the monies due to the Lenders have been fully and finally settled by the Private Party, an amount equal to the aggregate of Subcontractor's Costs being the amount claimed in terms of clause 48.2.1 or determined pursuant to the PPP Agreement, less any amount that the Private Party is entitled to set off in terms of this Agreement;
- 48.1.2 in the case of a Private Party Default other than a Private Party Default contemplated in clause 2.1.91(a), be liable to the Operations Subcontractor for the direct losses and damages suffered by the Operations Subcontractor on account of such Private Party Default; and
- 48.1.3 in the case of a Private Party Default other than a Private Party Default contemplated in clause 2.1.91(a) that was caused by a default by the Operations Subcontractor under the Operations Subcontract, have no liability to pay the Operations Subcontractor any termination compensation.
- 48.2 In the case of a Private Party Default in terms of clause 2.1.91(a), resulting in termination of the PPP Agreement and this Agreement, then:
- 48.2.1 if the Operations Subcontractor claims the amounts contemplated in clause 48.1.1 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;

- 48.2.2 subject to compliance by the Private Party with its obligations under this clause 48.2, the Operations Subcontractor shall only be entitled to receive the amounts detailed in clause 48.1, 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;
- 48.2.3 the Operations Subcontractor shall not be entitled to claim specific performance in respect of the payment of the amounts detailed in clause 48.1 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 Operations Subcontractor from claiming specific performance in respect of the balance of the Operations Subcontractor claim contemplated in clause 48.2.4 below;
- 48.2.4 the Private Party shall pursue its claims against the Municipality fully to the extent the Lenders consent thereto. The Operations Subcontractor shall be entitled to payment from the Private Party within 5 Business Days of the Private Party receiving payment from the Municipality; and
- 48.2.5 the Operations Subcontractor shall only be entitled to interest at the rate of the Compensation Date Interest Rate in terms of this clause 48, 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.

**49. COMPENSATION ON TERMINATION FOR OPERATIONS SUBCONTRACTOR DEFAULT**

The Operations Subcontractor shall not be entitled to any compensation or payment of any amount or nature upon the termination of this Agreement for Operations Subcontractor Default other than amounts due and payable by the Private Party to the Operations Subcontractor under this Agreement that arose prior to the Operations Subcontractor Default and that have not been paid.

**50. COMPENSATION ON TERMINATION FOR FORCE MAJEURE**

- 50.1 Subject to clause 50.2 below, on termination of this Agreement under clause 45, the Private Party shall pay to the Operations Subcontractor within 10 Business Days of receiving payment from the Municipality, the Subcontractor's Costs as agreed with the Municipality which shall be paid to the Operations Subcontractor once the monies due to the Lenders and 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.
- 50.2 It is agreed that where the PPP Agreement terminates under clause [60] of the PPP Agreement, resulting in termination of this Agreement, then:
  - 50.2.1 if the Operations Subcontractor claims the amounts contemplated in clause 50.1 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;

- 50.2.2 subject to the Private Party complying with clauses 50.2, the Operations Subcontractor shall only be entitled to receive the amounts detailed in clause 50.1, 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;
- 50.2.3 the Operations Subcontractor shall not be entitled to claim specific performance in respect of the payment of the amounts detailed in clause 50.1 which are payable by the Municipality under the PPP Agreement in circumstances where the Private Party has not received payment from the Municipality;
- 50.2.4 the Private Party shall pursue its claims against the Municipality fully to the extent the Lenders consent thereto. The Operations Subcontractor shall be entitled to payment from the Private Party on the Compensation Date; and
- 50.2.5 the Operations Subcontractor shall only be entitled to interest at the rate of the Compensation Date Interest Rate in terms of this clause 50, 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 Operations Subcontractor, pursuant to this clause 50.2.5, shall be proportional to any corresponding payments of interest made or to be made to the D&C Subcontractor, in terms of the D&C Subcontract, and to the Shareholders of the Private Party.

## 51. **COMPENSATION ON TERMINATION FOR CORRUPT ACTS**

Upon termination of this Agreement in terms of clause 46, the Operations 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 any way detract from any common law claim which the Operations Subcontractor may have against the person or entity who committed the Corrupt Act in question.

## 52. **MUNICIPALITY STEP IN**

- 52.1 If the Municipality exercises any of its rights in terms of clause [69] of the PPP Agreement, the Operations 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 Operations 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.
- 52.2 If pursuant to clause 52.1 the Municipality wishes to take action, the Private Party shall as soon as possible after receiving the Municipalities determination to do so, notify the Operations Subcontractor in writing of:
  - 52.2.1 the action the Municipality wishes to take;
  - 52.2.2 the Municipalities reasons for taking such action;
  - 52.2.3 the date when the Municipality wishes to commence such action;

- 52.2.4 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
- 52.2.5 to the extent practicable, the effect of such action on the Operations Subcontractor
- 52.3 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 52.2 and any ancillary action as the Municipality reasonably believes is necessary (the **Necessary Action**) and the Operations 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.
- 52.4 If the Operations 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 Operations Subcontractor from providing any part of the Subcontractor's Project Deliverables or the Services:
- 52.4.1 the Operations Subcontractor shall be relieved from undertaking the Services and the delivery of the Subcontractor's Project Deliverables to the extent that the Operations 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 Services and Project Deliverables in terms of the PPP Agreement; and
- 52.4.2 in respect of the time period over which such Necessary Action is conducted and provided that the Operations 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 Operations Subcontractor's obligations under this Agreement (such assistance, however, to be (subject to clause 52.5) 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 Operations Subcontractor shall, subject to clause 52.5, be entitled to payment in accordance with clause 23.1. All Incremental Savings realised or that should have been realised by the Operations Subcontractor shall be due and payable by the Operations Subcontractor to the Private Party.
- 52.5 Upon the Necessary Action ceasing, the Operations Subcontractor shall undertake an audit of the Facilities 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 Operations 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.
- 52.6 Within 10 Business Days of the Operations Subcontractor's audit report, as contemplated in clause 52.5, being presented to the Municipality, the Operations Subcontractor shall undertake a reconciliation of all Incremental Costs and or Incremental Savings, and the Operations 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 57:

- 52.6.1 the Private Party shall pay the Operations Subcontractor such monies owing to the Operations Subcontractor as are agreed between the Private Party and the Municipality and upon presentation of a valid tax invoice; or
- 52.6.2 the Private Party shall set-off such monies owed by the Operations Subcontractor.
- 52.7 For the purposes of this clause:
- 52.7.1 **Incremental Costs** shall mean a reasonable cost, other than additional costs referred to in clause 52, incurred by the Operations Subcontractor in meeting the Subcontractor's Output Specifications after the Necessary Action has ceased, where such cost is incurred by the Operations 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 Operations 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 Subcontractor's Project Deliverables or the Services caused the urgent risk that led to the Municipality to exercise the step-in rights under this clause; and
- 52.7.2 **Incremental Saving** shall mean a saving achieved by the Operations Subcontractor as a result of costs not incurred by the Operations Subcontractor during the Necessary Action, less the reasonable costs incurred by the Operations Subcontractor in meeting the Subcontractor's Output Specifications after the Necessary Action. However, where a negligent act or omission by the Operations Subcontractor in performing the Subcontractor's Project Deliverables or the Services caused the urgent risk that led to the Municipality to exercise the step-in rights under this clause, the costs incurred by the Operations Subcontractor in meeting the Subcontractor's Output Specifications after the Necessary Action will not be deducted.
- 52.8 In claiming any Incremental Costs, the Operations Subcontractor shall provide the Private Party with detailed substantiating documentation detailing all fixed costs, variable costs and other costs incurred. The Operations Subcontractor shall mitigate (to the extent required by the common law) the costs of any Incremental Costs incurred.
- 52.9 The Private Party shall only be liable to the Operations Subcontractor for amounts claimed by the Operations Subcontractor pursuant to clause 52.4.2 to the extent that the Private Party is entitled to receive, and receives, a corresponding amount from the Municipality in terms of clause [69.4] of the PPP Agreement. For the avoidance of doubt, the Operations Subcontractor will be precluded from claiming against the Private Party for the costs of providing assistance in terms of clause 52.4.2 unless and until the Private Party receives a corresponding amount from the Municipality in terms of clause [69.4] of the PPP Agreement.
- 52.10 If the Necessary Action is taken as a result of a breach by the Operations Subcontractor of any of its obligations under this Agreement and the Operations 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 Operations Subcontractor from performing any of its obligations:

- 52.10.1 the Operations Subcontractor shall be relieved from undertaking the Subcontractor's Project Deliverables or the Services to the extent that the Operations 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
- 52.10.2 in respect of the period in which the Municipality is taking such Necessary Action, the Operating Monthly Instalment due from the Private Party to the Operations Subcontractor shall equal the amount the Operations Subcontractor would have received if it were performing the obligations affected by the Necessary Action in full over such period, less any, less any Deductions in respect of that breach as calculated in accordance with the payment mechanism in the PPP Agreement, and less an amount equal to the Municipality's costs of taking such Necessary Action,

provided that, if by the expiry of the Step-in Period, the breach still subsists and if it and if it constitutes a Private Party Default in terms of the PPP Agreement, then an Operations Subcontractor Default shall have occurred and then the Private Party must serve a notice in terms of clause 44.2 requiring the Operations Subcontractor to remedy the Operations Subcontractor Default or to put forward a remediation programme.

### **53. INFORMATION AND AUDIT ACCESS**

- 53.1 The Operations Subcontractor shall provide to the Private Party all information, documents, records and the like in the possession of, or available to, the Operations 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.
- 53.2 To this end the Operations 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 Operations Subcontractor has included, or shall include, appropriate provisions to this effect in all agreements it enters into that relate to the Project.
- 53.3 Without limiting the generality of the foregoing, the Operations Subcontractor shall:
- 53.3.1 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 Operations Subcontractor or the Private Party, health and safety, national security, and environmental safety; and
- 53.3.2 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.

### **54. INTELLECTUAL PROPERTY OF THE MUNICIPALITY**

- 54.1 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.

- 54.2 Subject to existing rights and obligations and clause 54.3, the Private Party shall with consent from the Municipality, on prior written application by the Operations Subcontractor to the Private Party, grant a non-exclusive revocable right and license to the Private Party to use the Municipality's trademarks and logos for a period not to exceed the Operations Term.
- 54.3 In order to establish and maintain standards of quality and propriety acceptable to the Municipality, in the event that the Operations Subcontractor desires to use the Municipality's trademarks or logos in any way, the Private Party shall, on behalf of the Operations 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 Operations Subcontractor shall not depart therefrom in any respect without the Municipality's further prior written approval.
- 54.4 If at any time the Municipality revokes its approval for the specified use of any trademark or logo, the Operations 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 Operations Subcontractor as a result of such revocation shall be borne by the Operations Subcontractor if the grounds for the revocation include any ground described in clause 54.5.
- 54.5 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 Operations Subcontractor) if the Operations Subcontractor or any of 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.
- 54.6 The Operations 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 Operations Subcontractor agrees that the sole and exclusive ownership of the Protected Names shall vest in the Municipality.
- 54.7 In circumstances where the Operations 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 the PPP Agreement and with the prior approval of the Municipality. On termination or expiry of the PPP Agreement, the Operations 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.
- 54.8 Within 50 Business Days after the end of the Operations Term and where the Operations Subcontractor has operated a company utilising any of the Protected Names with the permission of the Municipality, the Operations Subcontractor shall either:
- 54.8.1 de-register the company bearing any of the Protected Names; or

54.8.2 change the name to a name not substantially similar to any of the Protected Names.

54.9 The naming of the Operations 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 Operations 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 54.8 shall not be applicable and the intellectual property shall be the sole property of the Operations Subcontractor.

## 55. INTELLECTUAL PROPERTY OF THE PRIVATE PARTY

55.1 The Operations Subcontractor shall, in respect of all Intellectual Property that is owned by it, upon termination or expiry of this Agreement in accordance with its terms, grant to the Municipality a non-exclusive, royalty free licence to use the Operations Subcontractor's Intellectual Property for the Subcontractor's Project Deliverables or the Services or any operational and maintenance services to be provided in the future by or on behalf of the Municipality in relation to the Facilities, or any facilities that succeed them (the **Permitted Purposes**).

55.2 Those licences shall be capable of being freely transferred by the Municipality to third parties at no cost for the Permitted Purposes, but to no other parties without the prior written consent of the Operations Subcontractor.

55.3 In the event that the Operations Subcontractor uses any Intellectual Property owned by any third party, the Operations Subcontractor shall, prior to using any such Intellectual Property, use its reasonable endeavours to the extent practicable to procure the consent of the relevant owner such that the Operations Subcontractor is at all times entitled to grant the Municipality a non-exclusive licence on terms no less favourable than those applicable to the Operations Subcontractor to use the Intellectual Property for the Permitted Purposes, which licences shall be capable of being further transferred by the Municipality to third parties at no cost for the Permitted Purposes.

55.4 The Operations Subcontractor acknowledges and agrees to clause [74.4] of the PPP Agreement which provides that the Private Party indemnifies the Municipality against any liability for costs which the Municipality suffers or incurs as a result of the infringement of any third party rights arising from the use by the Municipality, any responsible authority or any third party whose licence to use any Intellectual Property for the Permitted Purposes, or to whom any rights in respect of the Intellectual Property are assigned for the Permitted Purposes, in accordance with the provisions of that licence or assignment, save to the extent that such liability or costs was occasioned by an intentional act or omission by an indemnified party in question or by its gross negligence. The Operations Subcontractor shall indemnify the Private Party against any liability for costs which the Municipality may claim under clause [74.4] of the PPP Agreement in respect of all the Intellectual Property owned by it.

## 56. ASSIGNMENT & CHANGES IN CONTROL

### 56.1 Assignment

Subject to clauses 6.4, 7 and 47:

- 56.1.1 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;
- 56.1.2 save as expressly permitted hereunder, the Operations 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;
- 56.1.3 save as set out in clause 56.1.4, 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 Operations Subcontractor (such approval not to be unreasonably withheld or delayed);
- 56.1.4 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;
- 56.1.5 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 Operations 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 Operations 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.
- 56.2 **Changes in Control and Black Equity**
- 56.2.1 For the duration of the Operations Term, the Operations Subcontractor shall procure that:
- (a) there is no Change in Control in the Operations 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.

56.2.2 Where a failure by the Operations Subcontractor to comply with its obligations under this clause is not within its own control the Operations 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 Operations to comply with its obligations in terms of this clause after the Rectification Period shall constitute an Operations Subcontractor Default.

56.2.3 Any dispute between the Parties regarding the provisions of this clause shall be determined in accordance with the provisions of clause 57.

### 56.3 **Change in Control in Private Party**

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

56.3.2 To the extent there is a change in Control in the Private Party, the Operations 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.

## 57. **DISPUTE RESOLUTION**

### 57.1 **Referable Disputes**

The provisions of this clause 57 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.

### 57.2 **Internal Referral**

57.2.1 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 Operations 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.

57.2.2 In attempting to resolve the dispute in accordance with the provisions of this clause 57.2, 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.

- 57.2.3 Any dispute which has not been resolved by the representatives contemplated in clause 57.2.1(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.

57.3 **Arbitration**

- 57.4 Where the Parties are unable to resolve the dispute in accordance with clauses 57.2, the dispute shall, at the instance of either Party, be dealt with in accordance with the arbitration process set out below.

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

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

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

- 57.5.3 primarily a technical matter, a suitably qualified person; or

- 57.5.4 any other matter, a suitably qualified person.

- 57.6 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 South 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.

- 57.7 The arbitration shall be held in Johannesburg in accordance with the provisions of the Arbitration Act, 1965.

- 57.8 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.

- 57.9 This clause 57:

- 57.9.1 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

- 57.9.2 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.

- 57.10 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.

**57.11 Performance to Continue**

No reference of any dispute to any resolution process in terms of this clause 57 shall relieve either Party from any liability for the due and punctual performance of its obligations under this Agreement.

**57.12 Associated Agreement Dispute**

57.12.1 An **Associated Agreement Dispute** means any dispute or difference between the Private Party and the Operations Subcontractor which arises out of substantially the same circumstances as any dispute between the Municipality and the Private Party or the D&C 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 D&C Subcontract and in respect of which a notice is given by either of the Operations 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 D&C Subcontractor and the Private Party.

57.12.2 If an Associated Agreement Dispute arises the Operations Subcontractor shall, where relevant, be joined to the dispute under the relevant contract.

57.12.3 In modifying the provisions of this clause 57 to take account of the requirement to resolve an Associated Agreement Dispute together with any dispute between the Private Party and the Operations 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 Operations Subcontractor.

57.12.4 Notwithstanding the provisions of clause 57.12.1 above, the Parties agree that any disputes shall be capable of being referred as an Associated Agreement Dispute. If the Operations Subcontractor serves any notice on the Private Party in terms of clause 57.12.1, 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.

57.12.5 Furthermore, if an Associated Agreement Dispute arises under the D&C Subcontract, the Operations Subcontractor shall, where relevant, be joined to the dispute under the D&C Subcontract. The Parties agree that if an Associated Agreement Dispute arises under this Agreement, the D&C 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 D&C Subcontractor (including litigation), and the provisions of this clause 57 shall be modified accordingly. Where the Operations 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 D&C Subcontractor requiring reference of the relevant dispute for determination in accordance with this clause 57, or within 10 Business Days after receipt by the

Operations Subcontractor of any such notice from the Private Party. In that notice, details of the Associated Agreement Dispute shall be set out.

57.12.6 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 Operations Subcontractor.

57.12.7 Without prejudice to the other modifications so required, the Parties may agree to extend the timetable for the dispute resolution under this clause 57, 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 Operations Subcontractor on the one hand, and the Associated Agreement Dispute on the other, by agreement of the respective Parties to those disputes.

57.12.8 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 Operations Subcontractor.

57.13 **Determinations under PPP Agreement are binding on the Operations 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 Operations Subcontractor participated, or any dispute under the PPP Agreement in respect of which the Operations Subcontractor has not participated due to its own action or omission, that is in respect of or relates to the Services, 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.

57.14 **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.

**58. GOVERNING LAW AND JURISDICTION**

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

58.2 Subject to the provisions of clauses 57, 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.

## **59. AMENDMENTS**

- 59.1 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.
- 59.2 The Private Party shall not, without the prior written consent of the Operations 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 relate to or impact on the Services or the Subcontractor's Project Deliverables.

## **60. PROVISIONS IN FAVOUR OF THE LENDERS AND THE MUNICIPALITY**

- 60.1 The Parties agree that the provisions of this clause 60 and any other provision 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 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.
- 60.2 Without derogating from the generality of the foregoing it is agreed by the Operations Subcontractor that:
- 60.2.1 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;
- 60.2.2 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 at the date of signature thereof, which include, without being limited to, all of the Private Party's rights in, to and under this Agreement and the Performance Bond to the Lenders; and
- 60.2.3 wherever the Private Party and or the Lenders is or are entitled and or obliged under the Security Documents, the PPP Agreement and or the Financing Agreements to cede any rights that it or they may have against the Operations 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).

60.3 The Private Party hereby authorises and instructs the Operations Subcontractor, and the Operations Subcontractor hereby agrees, to make all payments due or which may become due from the Operations 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 Operations Subcontractor by the Lenders, after the enforcement of the cession in *securitatem debiti* detailed in clause 60.2.2.

60.4 The Private Party and Operations Subcontractor hereby agree that where the Private Party has discharged all of its obligations under the Financing Agreements:

60.4.1 the Private Party and the Operations Subcontractor shall no longer be required to involve nor consult with the Lenders; and

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

## 61. **WAIVER**

61.1 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).

61.2 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.

## 62. **ENTIRE AGREEMENT**

62.1 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.

62.2 Each of the Parties acknowledges that:

62.2.1 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

62.2.2 this clause 62 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.

### 63. 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.

### 64. REPRESENTATIVES

#### 64.1 Private Party's Representative

64.1.1 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 Operations Subcontractor to act as the Private Party's duly authorised representative for all purposes connected with this Agreement. The Private Party shall notify the Operations 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.

64.1.2 The Private Party Representative may delegate any of his functions from time to time to a person or persons the identity of whom shall be notified to the Operations Subcontractor and references in this Agreement to the Private Party Representative shall be construed to include such persons.

64.1.3 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.

#### 64.2 Operations Subcontractor's Representative

64.2.1 The Operations Subcontractor shall appoint from the Signature Date until the Expiry Date, an individual (the **Operations Subcontractor's Representative**) whose identity shall be notified to the Private Party to act as the Operations Subcontractor's duly authorised representative for all purposes connected with this Agreement. The Operations Subcontractor shall notify the Private Party in writing forthwith upon the replacement at any time of the Operations Subcontractor's Representative and such replacement shall not be effective until such notice has been given.

64.2.2 Any notice, instruction or information required to be given by or made to the Operations Subcontractor shall only be valid if given by or delivered to the Operations Subcontractor's Representative.

### 65. 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.

### 66. NOTICES AND LEGAL SERVICES

66.1 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:

66.1.1 if to the Operations Subcontractor, at:

Physical 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](mailto:notices@interwaste.co.za) and  
[sallyd@interwaste.co.za](mailto:sallyd@interwaste.co.za).

marked for the attention of the Group Legal Manager

66.1.2 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](mailto:notices@interwaste.co.za)

marked for the attention of the Landfills Director

66.2 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.

66.3 Any notice or other communication given by any Party to the other Party which:

66.3.1 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 7<sup>th</sup> day after the date of posting; or



- 66.3.2 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
- 66.3.3 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
- 66.3.4 is 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.
- 66.4 The previous provisions of this clause 66 shall not invalidate any notice or other communication actually given and received otherwise than as described in those provisions.
- 66.5 The Parties choose their respective physical addresses in clause 66.1 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*.

## 67. PUBLIC RELATIONS AND PUBLICITY

- 67.1 The Operations 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:
- 67.1.1 the Auditor-General under the Public Audit Act; and
- 67.1.2 persons acting in the public interest in accordance with the provisions of the Promotion of Access to Information Act, 2002.
- 67.2 Subject to clause 67.3, 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 67, the approval shall be deemed to be given by the Operations Subcontractor in terms of this clause 67.
- 67.3 To the extent that the Private Party is obliged to disclose or publish information pursuant to clause 67.1, it undertakes to the Operations Subcontractor, if time permits, to consult with the Operations Subcontractor prior to any communication contemplated by this clause 67.2, and if time does not so permit, such consultation shall be dispensed with.

## 68. CONFIDENTIALITY

- 68.1 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 68 shall in any way prevent or limit the Private Party from disclosing the Operations Subcontractor's Confidential Information to the Municipality pursuant to the PPP Agreement.

68.2 Clause 68.1 shall not apply to:

68.2.1 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);

68.2.2 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;

68.2.3 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;

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

68.2.5 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

68.2.6 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.

68.3 The disclosures permitted under clauses 68.2.5 or 68.2.6 of this 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.

## 69. 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.



**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 OPERATIONS SUBCONTRACTOR (RF) PROPRIETARY LIMITED  
("MANDATARY")**

1. Eden Waste has entered into an operations subcontract with the Mandatary in terms of which the Mandatary is required to perform certain Services (as defined therein) for and on behalf of Eden Waste.
2. Notwithstanding the performance of Services 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 Services 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 OPERATIONS SUBCONTRACTOR (RF) PROPRIETARY LIMITED

DRAFT - NOT FOR SIGNATURE

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duly authorised and warranting such authority

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## PAYMENT SCHEDULE

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 **Building Rubble** means waste produced during the construction, alteration, repair or demolition of any structure, and includes rubble, earth, rock and wood displaced during such a construction, alteration, repair or demolition;
- 1.2 **Chipping Services** means the chipping of green waste as described in **Error! Reference source not found.**: Subcontractor's Output Specifications;
- 1.3 **Crushing Services** means the crushing of Building Rubble as is described in **Error! Reference source not found.**: Subcontractor's Output Specifications;
- 1.4 **Invoice Period** means the period of delivering the Service before the invoice is issued for payment; and
- 1.5 **Waste Transportation Services** means the bulk transport services for the transfer of waste from certain Transfer Stations to the Landfill Site.

### 2. OVERVIEW OF THE PAYMENT MECHANISMS

#### 2.1 Introduction

The Payment Mechanism is an important part of the Agreement and provides the contractual basis for the payment of the Operations Subcontractor in exchange for delivering the outputs specified in the Subcontractor's Output Specification as part of the Agreement. The Payment Mechanism is necessarily linked to other parts of the Agreement, such as the Subcontractor's Output Specification which sets the Performance Standards and certain contractual remedies in the Agreement, such as penalties and/ or termination triggers. In other words, the Payment Mechanism should concentrate on measuring and rewarding **outputs**, and not measuring **inputs**, as specified in the Output Specifications.

#### 2.2 Objectives

- 2.2.1 The objective of the Payment Mechanism is to define the total fee payable to the Operations Subcontractor in exchange for delivering the Services. By ensuring that this fee is reduced when Performance Standards are not met, the Payment Mechanism incentivises the Operations Subcontractor to deliver the Service stipulated in the Subcontractor's Output Specification.
- 2.2.2 As a general principle, the reduction in the total fee should be proportionate to the impact on the Private Party of the failure to provide the Service. A further objective of the Payment Mechanism is to share any benefits arising from over performance by the Operations Subcontractor.

### 3. COMPONENTS OF THE PAYMENT MECHANISM

The Operator's Monthly Instalment payable to the Operations Subcontractor for deliverables on this Project includes a fixed and a variable component.

#### 3.1 Fixed component

3.1.1 This is the fixed component of the Operations Subcontractor's Fee in order to ensure the Services are Available for the operation of the:

- (a) Landfill Management;
- (b) Waste Transportation Services;
- (c) Chipping Services; and
- (d) Crushing Services.

3.1.2 The assumed quantities of waste handled in paragraphs 3.1.1(a) to 3.1.1(d) will increase annually by 1.6%.

#### 3.2 Variable component

3.2.1 The purpose of the variable component of cost is to compensate the Operations Subcontractor for general waste actually handled (**N**).

3.2.2 The rate (**R**) for the variable component shall be adjusted for each **Invoice Period** by the Private Party or the Operations Subcontractor depending on whether the weighted average cost of handling the general waste either increases or decreases during the Agreement.

### 4. CALCULATION OF THE OPERATING MONTHLY INSTALMENT

#### 4.1 Landfill Management

The Operating Monthly Instalment will be paid monthly to the Operations Subcontractor and shall be determined and paid in accordance with the following formula:

$$\text{Monthly Payment} = F + NR$$

in which the symbols have the following meaning:

4.1.1 **F** = Fixed component for the Availability of the Project Site which on Service Commencement Date shall be [R 639 000.91 (six hundred and thirty nine thousand Rand and ninety one Cent) per month] [**Note: Figure to be updated at Service Commencement Date – currently as at April 2018**];

4.1.2 **N** shall be the **tons** of general waste handled for the Invoice Period; and

4.1.3 **R** shall be the **rate per ton** for the Invoice Period, which amount is [R 17.58 (seventeen Rand and fifty eight Cent) per ton as at July 2018] [**Note: Figure to be updated at Service Commencement Date – currently as at April 2018**].



#### 4.2 Waste Transportation Services

Monthly payments to the Operations Subcontractor shall be determined and paid in accordance with the following formula:

$$\text{Monthly Payment} = F + NR$$

in which the symbols have the following meaning:

- 4.2.1 **F** = Fixed component for the Availability of the Waste Transportation Services which on Service Commencement Date shall be [R 317 000.00 per month (three hundred and seventeen thousand Rand)] **[Note: Figure to be updated at Service Commencement Date – currently as at April 2018];**
- 4.2.2 **N** shall be the **tons** of general waste handled for the Invoice Period; and
- 4.2.3 **R** shall be the **rate per ton** for the Invoice Period, which amount is [R 48.02 (forty-eight Rand and two Cent) per ton as at July 2018] **[Note: Figure to be updated at Service Commencement Date - – currently as at April 2018].**

#### 4.3 Chipping Services

Monthly payments to the Operations Subcontractor shall be determined and paid in accordance with the following formula:

$$\text{Monthly Payment} = F + NR$$

in which the symbols have the following meaning:

- 4.3.1 **F** = Fixed component for the Availability of the Chipping Services which on Service Commencement Date shall be [R 280 000.00 (two hundred and eight thousand Rand and zero Cent) per month] **[Note: Figure to be updated at Service Commencement Date - – currently as at April 2018];**
- 4.3.2 **N** shall be the **tons** of green waste handled for the Invoice Period; and
- 4.3.3 **R** shall be the **rate per ton** for the Invoice Period, which amount is [R 19.62 (nineteen Rand and sixty two Cent) per ton as at July 2018] **[Note: Figure to be updated at Service Commencement Date - – currently as at April 2018].**

#### 4.4 Crushing Services

Monthly payments to the Operations Subcontractor shall be determined and paid in accordance with the following formula:

$$\text{Monthly Payment} = F + NR$$

in which the symbols have the following meaning:

- 4.4.1 **F** = Fixed component for the Availability of the Crushing Services which on Service Commencement Date shall be [R 195 000.00 per month] (one hundred and ninety five thousand Rand and zero Cent) **[Note: Figure to be updated at Service Commencement Date – currently as at April 2018];**
- 4.4.2 **N** shall be the **tons** of Building Rubble handled for the Invoice Period; and

- 4.4.3 **R** shall be the **rate per ton** for the Invoice Period, which amount is [R 8.40 (eight Rand and forty Cent) per ton as at July 2018] [**Note: Figure to be updated at Service Commencement Date – currently as at April 2018**].

## 5. ADJUSTMENTS AT BASE DATE

- 5.1 The Operations Subcontractor and the Private Party agree that on or about the date on which financial close is reached in terms of the Financing Agreements, the Private Party shall be entitled to adjust the amounts in paragraph 4 in accordance with paragraph 6 in order to take into account, *inter alia*, any fluctuations in inflation, the cost of funding and the foreign exchange rate from the base date of April 2018.
- 5.2 Subsequent to paragraph 5.1 above, the Unitary Payment shall be adjusted in accordance with paragraph 6 below.

## 6. CONTRACT PRICE ADJUSTMENTS

- 6.1 **Fixed Component : Landfill Management, Waste Transportation Services, Chipping Services and Crushing Services:** The fixed component payable to the Operations Sucontractor for the Services in accordance with the Agreement shall, from the first anniversary of the Scheduled Service Commencement Date, be subject to annual adjustments during performance of the Services to reflect changes in the cost for the Services, in accordance with the following formula:

$$F_1 = F_0 + ((F_0 \times E_1 - 1) \times Ex) + (F_0 \times (W_1/W_0 - 1) \times Wx))$$

in which the symbols have the following meaning:

- 6.1.1  $F_0$  = current fixed component;
- 6.1.2  $F_1$  = new fixed component;
- 6.1.3  $Ex$  = CPI linked expenses as a weighted average cost percentage\* of total price;
- 6.1.4  $E_1$  = CPI linked expenses expressed as a base of 100;
- 6.1.5  $E_1$  = CPI linked expenses expressed as the base of 100 plus CPI increase;
- 6.1.6  $Wx$  = Wages as a weighted average cost percentage\* of total price;
- 6.1.7  $W_0$  = Old wages price expressed as base of 100; and
- 6.1.8  $W_1$  = New wages price expressed as the base of 100 plus percentage increase based on the relevant Bargaining Council remuneration for specific year.

**Note:** \* Refer to Weighted Average Price Table for percentages.

- 6.2 **Variable Component : Project Site and Waste Transportation Services, Chipping Services and Crushing Services:** The variable component payable to the Operations Subcontractor for the Services in accordance with the Agreement shall, from the first anniversary of the Scheduled Service Commencement Date, except for the fuel price adjustment that will be subject to monthly adjustments, from the 2<sup>nd</sup> (second) month after the Scheduled Service Commencement Date, be subject to monthly adjustments to reflect changes in the cost for the Services, in accordance with the following formula:

$$R_1 = R_0 + ((R_0 \times F_1/F_0 - 1) \times) + ((R_0 \times E_1/E_0 - 1) \times E_x) + (R_0 \times (W_1/W_0 - 1) \times W_x))$$

in which the symbols have the following meaning:

- 6.2.1  $R_0$  = Current variable component;
- 6.2.2  $R_1$  = New variable component;
- 6.2.3  $F_x$  = Fuel as a weighted average cost percentage\* of total price;
- 6.2.4  $F_0$  = Fuel cost linked expenses expressed as a base of 100;
- 6.2.5  $F_1$  = Fuel cost linked expenses expressed as the base of 100 plus monthly fuel cost increase or decrease;
- 6.2.6  $E_x$  = monthly CPI linked expenses as a weighted average cost percentage\* of total price;
- 6.2.7  $E_0$  = CPI linked expenses expressed as a base of 100;
- 6.2.8  $E_1$  = CPI linked expenses expressed as the base of 100 plus CPI increase;
- 6.2.9  $W_x$  = Wages as a weighted average cost %\* of total price;
- 6.2.10  $W_0$  = Old wages price expressed as base of 100; and
- 6.2.11  $W_1$  = New wages price expressed as the base of 100 plus percentage increase based on the relevant Bargaining Council remuneration for specific year.

**Note:** Fuel will be calculated on a monthly basis with the remainder to be calculated on an annual basis.

**Note:** \* Refer to Weighted Average Price Tables for percentages for variable component

## 7. WEIGHTED AVERAGE PRICE TABLES

### 7.1 Price Increase Mechanism: Garden Route Waste Facility - Landfill Management

Table 1 Price Increase Mechanism: Garden Route Waste Facility - Landfill Management

1b	FIXED COMPONENT OF UNITARY FEE		% of total price (New base date)*
	Capex expenses - USD sensitive	$E_x$	21.6%
	Admin and overhead expenses linked	$E_x$	59.0%
	Wages	$W_x$	19.4%
	<b>Total</b>		<b>100.0%</b>

1b	VARIABLE COMPONENT OF UNITARY FEE		
	Variable expenses linked to CPI	$E_x$	26.6%

	Fuel	$F_x$	73.4%
	Wages	$W_x$	0.0%
	<b>Total</b>		<b>100.0%</b>

## 7.2 Price Increase Mechanism: Transport of Waste George

Table 2 Price Increase Mechanism: Transport of Waste George

<b>2</b>	<b>FIXED COMPONENT OF UNITARY FEE</b>		<b>% of total price (New base date)*</b>
	Capex expenses - USD sensitive	$E_x$	38.1%
	Admin and overhead expenses	$E_x$	50.2%
	Wages	$W_x$	11.7%
	<b>Total</b>		<b>100.0%</b>
<b>2</b>	<b>VARIABLE COMPONENT OF UNITARY FEE</b>		
	Variable expenses	$E_x$	69.5%
	Fuel	$F_x$	30.5%
	Wages	$W_x$	0.0%
	<b>Total</b>		<b>100.0%</b>

## 7.3 Price Increase Mechanism: Transport of Waste Uniondale

Table 3 Price Increase Mechanism: Transport of Waste Uniondale

<b>3</b>	<b>FIXED COMPONENT OF UNITARY FEE</b>		<b>% of total price (New base date)*</b>
	Capex expenses - USD sensitive	$E_x$	0.0%
	Admin and overhead expenses	$E_x$	100.0%
	Wages	$W_x$	0.0%
	<b>Total</b>		<b>100.0%</b>
<b>3</b>	<b>VARIABLE COMPONENT OF UNITARY FEE</b>		
	Variable expenses	$E_x$	0.0%
	Fuel	$F_x$	0.0%
	Wages	$W_x$	0.0%
	<b>Total</b>		<b>0.0%</b>

## 7.4 Price Increase Mechanism: Chipping of Greens

Table 4 Price Increase Mechanism: Chipping of Greens

<b>4</b>	<b>FIXED COMPONENT OF UNITARY FEE</b>		<b>% of total price (New base date)*</b>
	Capex expenses - USD sensitive	E <sub>x</sub>	46.8%
	Admin and overhead expenses	E <sub>x</sub>	40.3%
	Wages	W <sub>x</sub>	12.9%
	<b>Total</b>		<b>100.0%</b>
<b>4</b>	<b>VARIABLE COMPONENT OF UNITARY FEE</b>		
	Variable expenses	E <sub>x</sub>	42.3%
	Fuel	F <sub>x</sub>	57.7%
	Wages	W <sub>x</sub>	0.0%
	<b>Total</b>		<b>0.0%</b>

## 7.5 Price Increase Mechanism: Transfer Stations Crushing

Table 5 Price Increase Mechanism: Transfer Stations Crushing

<b>5</b>	<b>FIXED COMPONENT OF UNITARY FEE</b>		<b>% of total price (New base date)*</b>
	Capex expenses - USD sensitive	E <sub>x</sub>	34.3%
	Admin and overhead expenses	E <sub>x</sub>	46.2%
	Wages	W <sub>x</sub>	19.5%
	<b>Total</b>		<b>100.0%</b>
<b>5</b>	<b>VARIABLE COMPONENT OF UNITARY FEE</b>		
	Variable expenses	E <sub>x</sub>	40.2%
	Fuel	F <sub>x</sub>	59.8%
	Wages	W <sub>x</sub>	0.0%
	<b>Total</b>		<b>100.0%</b>

**Note:** \*Weights to be adjusted to reflect new weighted average rate after each increase event.

## 8. PAYMENT TERMS

- 8.1.1 The Operation Subcontractor shall submit invoices for each month of operation as set out in clause 23.4 of the Agreement.
- 8.1.2 The Operations Subcontractor may only present the first invoice after the Service Commencement Date.
- 8.1.3 Payment of invoices will be in accordance with the provisions of clause 23.4 of the Agreement.

## DEDUCTIONS

8.2 **Performance Deduction**

Should the Operations Subcontractor not deliver the Service on an acceptable level, the Private Party may deduct monies due to the Operations Subcontractor.

This penalty is calculated at R1 000 (one thousand rand) per Calendar Day for each Subcontractor's Output Specification that is not delivered at the performance standard (as set out in the Subcontractor's Output Specification).

The Deduction will be based on an escalating penalty so that subsequent days of non-delivery of the Subcontractor's Output Specification that will lead to progressively higher deductions.

The escalating tariff will be as follows:

Table 9 Penalty for non-compliance with Output Specifications

<b>Days of continuous non-compliance</b>	<b>Penalty</b>	<b>Daily Cap</b>
0 to 10 days per month	R1 000.00 (one thousand rand) per Calendar Day per Subcontractor's Output Specification.	R5000.00 (five thousand rand)
11 to 20 days per month	R1 250.00 (one thousand two hundred and fifty rand) per Calendar Day per Subcontractor's Output Specification.	R6250.00 (six thousand two hundred and fifty rand)
21 days or more per month	R1 500.00 (one thousand five hundred rand) per Calendar Day per Subcontractor's Output Specification.	R7500.00 (seven thousand five hundred rand)

8.3 **Availability Deduction**

The Operations Subcontractor acknowledges that the purpose of the Operating Monthly Instalment is to compensate the Operations Subcontractor for delivery of Operating Monthly Instalment and the Services in terms of this Agreement. In order to ensure that this happens, the Private Party will pay the Operations Subcontractor for its delivery of the

Service and undertaking of the Subcontractor's Project Deliverables at an appropriate service standard.

The Operations Subcontractor acknowledges that if the Private Party does not make the Subcontractor's Project Deliverables and the Services Available, the following penalty regime will apply for non-Availability:

**Table 1 Penalty for non-Availability**

<b>Days non-Availability</b>	<b>Penalty</b>
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 Operations Subcontractor for each Calendar Day that the Subcontractor's Project Deliverables or the Services are un-Available after the Phase 1 Completion Certificate is issued and such non-Availability of the Subcontractor's Project Deliverables or the Services is caused by the conduct of the Operations Subcontractor.

**8.4 Penalty for failing to report or fully disclose all hazardous waste services rendered to Hazardous Waste Producers**

It is specifically recorded that the Private Party has a vested interest in the Hazardous Waste Report. In the event that the Operations Subcontractor fails to disclose all Hazardous Waste disposed of on behalf of the Hazardous Waste Producers, the Operations Subcontractor will be liable to pay a penalty equal to double the Hazardous Waste Charge on all invoices not so disclosed.

## 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, 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 Operations Subcontractor (RF) Proprietary Limited (registration number 2018/549706/07) (**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 "*Operations Subcontract*" dated [●] 2019 (**Contract**), in terms of which the Beneficiary has appointed the Contractor to undertake certain services 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 **Effective Date** means \_\_\_\_\_;
- 3.3 **Expiry Date** has the meaning given in paragraph 7;
- 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 for a period of 12 months from the Effective Date 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 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 it relates to the Contract) 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.
- 9.2 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 3, 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.
- 10.2 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.
- 10.3 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 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]

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Signatory:

Capacity:

Authority:

**APPROVED SUBCONTRACTORS**

1. Inter-Waste Proprietary Limited
2. Mphono Engineering Services CC
3. Bamba Nani Operations Subcontract

## SUBTRACTOR'S OUTPUT SPECIFICATIONS

## INTRODUCTION

## 1. DEFINITIONS

- 1.1 **Building Rubble** means waste produced during the construction, alteration, repair or demolition of any structure, and includes rubble, earth, rock and wood displaced during such a construction, alteration, repair or demolition;
- 1.2 **Chipping Services** means the chipping of green waste as described in this **Error! Reference source not found.**;
- 1.3 **Crushing Services** means the crushing of Building Rubble as is described in this **Error! Reference source not found.**; and
- 1.4 **Waste Transportation Services** means the bulk transport services for the transfer of waste from the certain Transfer Stations to the Landfill Site,

## 2. OBJECTIVES OF THE PROJECT

- 2.1 The Operations 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 Operations Subcontractor is in turn required to provide the Subcontractor's Output Specifications set out herein.
- 2.2 Operations Subcontractor acknowledges that the Project consists of the following main components:
  - 2.2.1 design, construct, operate and maintain the Project Site;
  - 2.2.2 bulk transport of waste from the Transfer Station at the George Site to the Project Site;
  - 2.2.3 provision of a chipper for the Chipping Services and a mobile crusher with screening plant for the processing of Building Rubble monthly at the Relevant Sites;
  - 2.2.4 provision of Alternative Waste Technology.

## LANDFILL OPERATION REQUIREMENTS

## 3. GENERAL

The Scope of Work for this schedule shall be for the operation of the Project Site for a 10 (ten) year period from the expected Scheduled Service Commencement Date or from date of Service Commencement, whichever date occurs last.

#### **4. OPERATING SCHEDULE**

The Project Site shall be operated on a five-day per week basis during the hours of 07:00 to 17:00, Monday through Friday, and Saturdays and public holidays during the hours of 07:00 to 13:00. During peak holiday seasons, the weekend hours may be extended.

Only municipal vehicles from the Hazardous Waste Producers, the Mossel Bay Municipality, the Bitou Municipality or private contractors as may be approved by the Municipality, as well as the Operations Subcontractor's or the Private Party's bulk transport vehicles under this schedule, may enter the Project Site for disposal of waste.

No disposal on the Project Site by private individuals or companies will be allowed except for Hazardous Waste disposal by the Hazardous Waste Producers in line with the Hazardous Waste Acceptance and Billing Procedures under paragraph 41 of this schedule. Private disposal of Municipal Solid waste could be permitted if mutually agreed between the parties.

The Operations Subcontractor shall work as late as necessary to properly cover waste brought into the site on a specific day or by approved users who have been weighed in by 17:00.

The Operations Subcontractor in consultation with the Private Party shall solely make the determination on whether to close the Project Site due to emergencies or inclement weather or any under statutory obligation and shall notify the Municipality accordingly.

In the case of any of the Bitou Municipality and /or Knysna Municipality and/or the Mossel Bay Municipality's bulk transport vehicles suffer a breakdown on the way to the Landfill Site which will mean that the vehicle will arrive at the Project Site after hours, the Operations Subcontractor shall subject to prior notification and good cause, the Operations Subcontractor shall, subject to being in a position to do so, accept the waste (with no obligation to process or cover such waste).

#### **5. ACCEPTABLE WASTES**

The Project Site shall be operated in accordance with the Waste License issued for the Project Site attached hereto or any renewed version of it.

The requirements of the Waste Licence and any applicable regulatory and authoritative requirements must be adhered to.

The Operations Subcontractor shall be responsible for inspecting all loads received at the Project Site to check for all waste other than waste for which the Project Site is licenced in terms of the Waste Management Licence No.12/9/11/L1395/9. If the Operations Subcontractor spots a suspected unacceptable waste received from the Bitou Municipality and/or Knysna Municipality and /or the Mossel Bay Municipality, he shall immediately inform the Private Party's Representative of the action taken or to be taken in respect thereof and the Private Party shall bear the sole risk for such decision. The Operations Subcontractor shall also identify the truck that had carried the waste in question and put all relevant details on record.

#### **6. PROJECT SITE SECURITY**

From the Service Commencement Date, only the Operations Subcontractor's personnel will be allowed to have keys to all gates. The Operations Subcontractor is responsible for opening the gates across the Access Road at the beginning of the work day and locking them at the conclusion of the work day. The security fence just inside the property line encloses the Landfill Site and deters unauthorized access.

All traffic to and from the Project Site will enter through a security area of PetroSA and the Operations Subcontractor must ensure that their requirements (as listed in the PetroSA Access Arrangement) are at all times complied with.

All visitors or customers including the Operations Subcontractor's bulk waste transport vehicles must use the Access Road to gain entrance to the Landfill Site. They are required to stop at the weigh station to have their vehicles weighed, or to register in a visitor's log which must be maintained by the Operations Subcontractor.

The Operations Subcontractor shall be responsible for the secure storage of his equipment and materials. The Private Party shall not be responsible for any damage to or loss of the Operations Subcontractor's equipment, materials or supplies.

## **7. PERSONNEL**

The Operations Subcontractor shall provide a qualified and experienced work force which is capable of operating the Project Site in accordance with these specifications, any conditions of the Waste License and Law. The Operations Subcontractor shall at a minimum provide all his personnel working on Project Site with first aid training and health and safety training as required. The Operations Subcontractor shall provide as a minimum the following operating personnel:

### **7.1 Project Site Supervisor**

This person shall be the Operations Subcontractor's designated on-site representative who shall have full responsibility for the management and operation of the Project Site operation.

The Project Site Supervisor shall be responsible for maintaining all records of the Project Site operation. The Project Site Supervisor shall be the primary point of communication between the Operations Subcontractor, the Private Party and the Municipality. The Project Site Supervisor shall have a minimum of four (4) years of supervisory experience. A Project Site Supervisor must be on site during all operating hours (i.e. five (5) days per week, at least ten (10) hours each day for a total of at least fifty (50) hours per week). The Operations Subcontractor may use one or more persons to act as the Project Site Supervisor provided that they are qualified and meet the approval of the Municipality.

### **7.2 Project Site Assistant Supervisor**

This person shall be the Operations Subcontractor's designated on-site representative who shall be responsible for labour usage for the Project Site operation. The Project Site Assistant Supervisor shall have a minimum of two (2) years of supervisory experience and have all the qualifications required for a Heavy Equipment Operator as described below.

### **7.3 Heavy Equipment Operator(s)**

This person shall be competent in operating equipment similar to that which is specified in this schedule. The Heavy Equipment Operator shall be capable of operating all the equipment the Private Party has on site.

### **7.4 Project Site staff**

These persons shall be responsible for daily litter control and grounds maintenance and spotter duties. The necessary persons shall be qualified to run equipment including tractors, grass cutting apparatus, roadway sweepers, centrifugal pumps and the water

equipment and machinery. The number of Site staff will be as required for the operation of the Project Site. A current list of approved workers on the Project Site must be kept in the Project Site office at all times.

#### **8. FIRST AID TRAINING**

Project Site operating personnel employed by the Operations 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.

#### **9. PROTECTIVE CLOTHING**

Protective clothing and foot gear are to be worn by all Operations Subcontractor personnel when at the working areas of the Project Site, excluding the weigh station 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. Dust masks or suitable breathing equipment must be worn by operating personnel who are exposed to high dust conditions on the Project Site.

#### **10. COMMUNICATION EQUIPMENT**

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

#### **11. EQUIPMENT**

The Operations Subcontractor shall provide the Project Assets and Facilities.

#### **12. EQUIPMENT MAINTENANCE**

The Operations Subcontractor shall be required to maintain all of his Project Assets in good working order by following the recommendations of the equipment's manufacturer regarding maintenance and upkeep. In addition, the Operations Subcontractor shall clean the Project Assets regularly. Primary equipment shall be maintained and backup equipment shall be made available whenever operations are interrupted.

Tracked or cleat wheeled equipment shall not be driven on the paved Access Road. Cleats on the compactor wheels must be kept in a good condition and replaced as per the manufacturer's recommendation. Copies of the manufacturer's recommendations and maintenance schedules are to be made available to the project management team.

#### **13. MAINTENANCE OF PROJECT SITE AREA**

The Operations Subcontractor shall be responsible for maintenance of the Project Site and waste cells as required below, including, but not limited to the following tasks:

- 13.1 Cutting grass on the Project Site;
- 13.2 Reseeding and fertilizing finished slopes of the Project Site where grass may have died;
- 13.3 Watering the lawn on the Project Site as necessary;



- 13.4 Cleaning out storm water pipes;
- 13.5 Reburying waste that may have worked its way to the surface;
- 13.6 Grading the site roads on the Project Site as necessary;
- 13.7 Cleaning debris out of manholes;
- 13.8 Repairing seeps;
- 13.9 Cleaning out leachate collection system as necessary;
- 13.10 Preventing erosion damage on the Project Site as and when required;
- 13.11 Repairing erosion damage to the Project Site as and when required;
- 13.12 Grading the perimeter site roads on the Project Site at least quarterly or as required;
- 13.13 Sweeping and litter picking of the paved Access Road at least once per week;
- 13.14 Maintaining the buildings, fixtures and fittings installed therein; and
- 13.15 Cleaning the surface of weighbridge at least once per week.
- 13.16 All tasks shall be accomplished as part of the bid price for the Contract.

#### **14. TEMPORARY HAUL ROADS**

As part of the services to be provided, the Operations Subcontractor shall be responsible for construction of temporary haul roads necessary for safe and convenient traffic flows between the permanent haul roads and the tipping areas. The Operations Subcontractor also shall be responsible for maintaining all temporary haul roads while they are actively being used.

Temporary haul roads shall be constructed in a manner consistent with Good Industry Practice. The roads shall be crowned to allow for storm water runoff and shall be sufficiently wide to accommodate anticipated traffic. All temporary haul roads shall be maintained to provide safe and convenient access to users of the facility. They shall be kept free of debris, ruts, holes, ponding of water; and shall provide a sound driving surface under usual weather conditions. Construction and maintenance of temporary haul roads shall be inclusive in the price bid for the Subcontractor's Project Deliverables and the Services. Maintenance shall include but not be limited to periodic scarifying, reshaping, addition of materials, and compaction.

#### **15. LITTER CONTROL**

Litter along the roads on the Project Site, and in the vicinity of the weigh station can give the Landfill Site a poor image. Generally such litter indicates poor control, attracts rodents and insects and may be a local nuisance as well as a fire hazard. The Operations Subcontractor's site staff shall inspect the roads on the Project Site, buildings, parking areas, and the area in the vicinity of the working face on a daily basis. When high winds have caused large amounts of litter to be scattered on the Project Site, the Operations Subcontractor shall employ additional personnel on a temporary basis to clean up the litter as soon as possible. The litter collected must be placed on the working face before the application of the daily cover for that operating day.

**16. VECTOR CONTROL**

The Operations Subcontractor shall develop a vector control plan and submit it to the Municipality for approval. Any vector extermination or control project shall be carried out only under the direction of qualified personnel and with adequate safeguards and warning for the local population and Landfill Site users. No shooting will be permitted.

**17. FIRE PREVENTION AND CONTROL**

The Operations Subcontractor shall be responsible for the control and extinguishing of all types of fires which may occur at the Project Site including the immediate reporting of all fires to the Private Party response control office.

To combat fires, each piece of equipment owned/ used by the Operations Subcontractor shall be provided and maintained with a fire extinguisher capable of controlling and extinguishing all classes of small fires. In addition, extinguishers are to be provided and maintained in the offices.

Large Project Site surface fires, shall be isolated or kept from spreading, if possible, using earth from the soil stockpile for daily cover which must be maintained near the working face for such purposes, either to create a fire break by covering solid waste which has not caught fire or by using it to smother the solid waste which is on fire.

The Operations Subcontractor's water truck must be equipped with suitable apparatus to quell or control a fire until the nearest fire department has an opportunity to respond. Immediately after dispatching on-site equipment, operating personnel will summon the nearest fire department for help. The Municipality's response control office shall then be notified of the fire.

**18. SURFACE RUNOFF CONTROL**

One of the primary considerations in Project Site design and operation 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 Operations Subcontractor shall be responsible for constructing and maintaining any swales, berms, culverts, or velocity checks as appropriate, to control surface runoff on and around the Project Site area.

**19. 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 and maintenance 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 Operations Subcontractor shall take whatever measures are necessary to prevent and correct erosion problems on the Project Site.

**20. 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 Operations 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.

**21. TRAFFIC CONTROL**

Traffic control is necessary to maintain an orderly vehicle flow, minimize accidents and avoid delays in unloading time. All incoming traffic shall be directed by signs to the weigh station and weighbridge for weighing. Incoming and outgoing trucks will be controlled at the weigh station by means of traffic signals and gates located adjacent to the weighbridge. The Operations Subcontractor is responsible for spotting and controlling traffic at the working face.

**22. WET WEATHER AREA**

The Operations Subcontractor shall be responsible for maintaining a separate area on the Project Site surface which can be used by customers during wet weather.

**23. SCAVENGING**

Scavenging by the Operations Subcontractor, the Private Party, facility users or outsiders shall not be allowed at any time. The Operations Subcontractor shall be responsible for enforcing this policy. The Municipality and the Private Party will however lend its reasonable support to the Operations Subcontractor in enforcing the said policy and will also facilitate interactions with the South African Police Service should their assistance be required.

**24. DAILY CONSTRUCTION OF LIFTS**

Lifts shall be constructed in one (1) meter thick compacted layers. Solid waste lift heights are not to exceed four (4) meters. The width of each day's cell shall be kept as small as practically possible. In no event shall the width exceed the maximum that can be covered at the end of the work day. As much as practically possible, the top of the lift shall be graded so that ponding of water from rainfall on the Project Site surface is minimised.

**25. DENSITY REQUIREMENT**

The Operations Subcontractor shall run the landfill compactors over the solid waste in enough passes to achieve the maximum in-place density of the solid waste. An optimum in place density of the solid waste deposit of 850 kg/m<sup>3</sup>.

**26. DAILY COVER**

The Operations Subcontractor shall place a minimum of 150 mm of earth (daily cover) over the solid waste at the end of each work day. No solid waste shall remain exposed after the end of an operating day. The Operations Subcontractor is responsible to obtain the cover material. Daily cover excavation, hauling and placement shall be provided by the Operations Subcontractor inclusive in the price for the Subcontractor's Project Deliverables and the Services.

**27. LEACHATE HANDLING**

The Operations Subcontractor shall be responsible for managing the complete leachate collection into a leachate dam. The treatment and removal of the leachate shall remain the responsibility of the Municipality.

## 28. ENVIRONMENTAL MONITORING

All environmental monitoring (including but not limited to groundwater sampling and analysis, gas sampling and analysis and leachate sampling and analysis) and costs associated with such shall be the responsibility of the Operations Subcontractor. All reports must be supplied to the Private Party as soon as available and in line with the requirements as set out in this Agreement and any other regulatory requirements relating to reporting and record keeping.

## 29. 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. Problems created by extremely adverse weather conditions producing, for instance, high leachate flows can be contained within the lined disposal area by allowing leachate to back up within the solid waste deposit, thus utilizing the lined disposal area as a contingency leachate storage facility. This procedure must be specifically approved by the Municipality before implementation.

The response of the Operations Subcontractor's personnel to any serious emergency situation such as, but not limited to, a fire, personal injury, or fuel spill shall be as follows:

- 29.1 Notification of immediate and Project Site Supervisor;
- 29.2 Notification of emergency service (fire department, ambulance) by Project Site Supervisor or his delegated deputy; and
- 29.3 Notification of designated official(s) of the Private Party and the Municipality, and if required the Department of Environmental Affairs and Development Planning by the Project Site Supervisor.

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 Municipality within twenty (20) hours of occurrence.

## 30. ACCIDENT REPORTS

**Accident Reports** are to be prepared by the Operations 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:

- 30.1 To determine responsibility;
- 30.2 To dispose of claims, including workmen's compensation;
- 30.3 For supervision and control of workers;
- 30.4 To identify conditions and practices that cause accidents; and
- 30.5 To fulfil governmental requirements for accident reporting.

The Operations Subcontractor shall keep Accident Report forms available on site for use. A copy of an Accident Report shall be provided to the Private Party by the Operations Subcontractor within twenty (20) hours after the occurrence of an accident.

### **31. OPERATING REPORTS AND RECORDS**

The Operations Subcontractor shall maintain proper records for the Private Party of certain operating data and shall submit this data to the Private Party on a monthly basis in report form.

The monthly report shall be submitted to the Private Party no later than three (3) working days after the end of the month being reported and shall include, but not be limited to, the following information:

- 31.1 Weight, volume and density of the solid waste landfilled during the month.
- 31.2 Cubic meters of cover material used during the month broken out into:
  - 31.2.1 daily cover;
  - 31.2.2 final cover; and
  - 31.2.3 topsoil.
- 31.3 Square meters of areas that were seeded and mulched during the month.
- 31.4 Identification of areas landfilled during the month showing completed lifts and dates of completion. This shall be shown on a plan view on drawings having a scale of 1: 500.
- 31.5 Location and description of repairs made on completed areas during the month.
- 31.6 Leachate quantities collected during the month.
- 31.7 Leachate recycling information for recycling events during the month including:
  - 31.7.1 date of each recycling event;
  - 31.7.2 quantity recirculated during each event;
  - 31.7.3 pumping rate;
  - 31.7.4 identification of the source of the recycled leachate;
  - 31.7.5 identification of the location where leachate was recycled to;
  - 31.7.6 a description of the equipment and method used to recycle the leachate; and
  - 31.7.7 comments or observations about the recycling event.

Monthly and annual reporting will be required and be as set out in clause 19 of this Agreement.

### **32. MONTHLY OPERATIONS MEETING**

On a monthly basis the Operations Subcontractor shall send representatives, including the Project Site Supervisor and Project Manager to the Project Site for an Operations Meeting with the Municipality. The purpose of the meeting shall be to discuss and resolve any problems encountered during the operation of the Project Site and also to inspect the Project Site to insure that the Operations Subcontractor is meeting the requirements of the Contract. These meetings should take place on the third Thursday of every month or such other date as may be agreed

between the Parties with an agenda distributed to all stakeholders one week before the meeting and the minutes of the meeting distributed to all stakeholders a week after the meeting.

### **33. SUMMARY OF KEY PERIODIC OPERATION REQUIREMENTS**

The following is a summary of the most important periodic operating requirements of this schedule:

#### **33.1 Daily Requirements**

- 33.1.1 Placement of a minimum of 150mm of earth (daily cover) over the solid waste at the end of each work day.
- 33.1.2 Picking up litter on the grounds every day.
- 33.1.3 Measuring and recording leachate quantities collected in all leachate tanks.
- 33.1.4 Visually inspect the waste cells for erosion and seeps and all manholes for clogs in the leachate collection system or flow from any leak detection pipe as part of filling out the Daily Inspection Sheet.

#### **33.2 Weekly Requirements**

- 33.2.1 Cutting grass on the Project Site ground around the offices (or as reasonably required).
- 33.2.2 Sweeping and litter picking at the paved Access Road at least once per week.
- 33.2.3 Cleaning the surface of the weighbridge at least once per week.
- 33.2.4 Watering and weeding any flowers and shrubs on an as required basis.
- 33.2.5 Watering grass on the Project Site around the offices.
- 33.2.6 Grading the site road on the Project Site on an as required basis.
- 33.2.7 Cleaning landfill compactor's radiators using an air compressor or high pressure water at least once per week.

#### **33.3 Monthly Requirements**

- 33.3.1 Submission of the Monthly Operating Report described above in these Specification.
- 33.3.2 Attendance at an Operations Meeting to be held on site with the Municipality on a monthly basis.

#### **33.4 Quarterly Requirements**

- 33.4.1 Grading perimeter access roads each quarter.
- 33.4.2 Attendance at the Landfill Monitoring Committee meeting.

### **34. KEY PERFORMANCE INDICATORS**

- 34.1 All Project Assets supplied and ready for use as per program.

- 34.2 Start of service as programmed.
- 34.3 Operation of the Project Site:
  - 34.3.1 Attaining agreed compaction rates as measured once annually.
  - 34.3.2 Covering waste daily, and in the case of the landfill compactor breaking covering by alternative means within 24 (twenty four) hours.
  - 34.3.3 Controlling windblown litter and clearing any stray litter inside the Landfill Site footprint within 48 (forty eight) hours.
  - 34.3.4 Complying with all specified monitoring events with 5 days of dates specified.
  - 34.3.5 Executing audits as specified and submitting reports to the Private Party within 1 week of the specified dates.
  - 34.3.6 Keeping full detailed records of all waste entering the Landfill Site and compiling monthly reports on same.
  - 34.3.7 Keeping the Project Site clear of all scavengers and maintain site security and access control at all times.
  - 34.3.8 Maintaining all Project Assets in a working condition.
  - 34.3.9 Maintaining site landscaping and all site infrastructures in a neat and tidy condition and as specified. Attend to Project Site instructions from the Private Party for corrective action in this regard within 3 working days.
  - 34.3.10 Maintaining Project Site cells and leachate and storm water systems in accordance to design and operating plan parameters. Attend to Project Site instructions from the Municipality for corrective action in this regard within 3 working days.
- 34.4 Monthly reports as described submitted within 3 working days after the end of each month.
- 34.5 Compliance with the conditions of the waste licence granted to the Municipality, as well as any other statutory and regulatory requirements.

## **BULK TRANSPORTATION OF WASTE**

### **35. GENERAL**

The Operations Subcontractor must supply a bulk transport of waste service as part of the contract transporting waste from the Transfer Station at the George Site to the Landfill Site. The local municipalities will operate the Transfer Stations for the time being.

## **CHIPPER AND MOBILE CRUSHER**

### **36. GENERAL**

A suitable chipper for the Chipping Services and a mobile crusher with screening plant must be provided which the Operations Subcontractor must use for the processing of Building Rubble on the Project Site, as well as once monthly at the local municipalities of Mossel Bay, Knysna and George. The local municipalities will make a site available for this function and they will dump Building Rubble for processing at these sites. The processed Building Rubble must remain on

these sites and the local municipalities will use it or sell it. A record must be kept of all activities of this plant.

### **37. KEY PERFORMANCE INDICATORS**

- 37.1 All Building Rubble at the local municipalities of Knysna, Mossel Bay and George processed once per month.
- 37.2 Within 3 days of returning to the Landfill Site, the mobile plant must be functional, washed and clean.
- 37.3 Monthly report on activities of this function submitted to the Private Party within 3 working days after the end of each month.

### **ALTERNATIVE WASTE TREATMENT TECHNOLOGY**

#### **38. ALTERNATIVE WASTE TECHNOLOGY ON PROJECT SITE**

The Operations Subcontractor shall provide Alternative Waste Technologies for the treatment of oil on the Project Site.

#### **39. ALTERNATIVE WASTE TECHNOLOGY ON ALTERNATIVE TECHNOLOGY SITE**

- 39.1 The Municipality shall be responsible for any other, than mentioned under 4.1 above, alternative waste treatment services at the Alternative Technology Site.
- 39.2 The Operations Subcontractor shall allow the Municipality and authorised personnel to access the Alternative Technology Site using roads within the Project Site during the operating hours of the Project Site.
- 39.3 The Municipality shall ensure that it and its authorised personnel adhere to the rules issued by the Operations Subcontractor to the Private Party and ultimately the Municipality from time to time.
- 39.4 To the extent that the Private Party is indemnified by the Municipality under the PPP Agreement, the Private Party shall indemnify the Operations Subcontractor for any claim, harm, damage or loss relating to the activities undertaken by itself or the Municipality or its or the Municipality's authorised personnel on the Alternative Technology Site.

### **HAZARDOUS WASTE**

#### **40. HAZARDOUS WASTE DISPOSAL RESPONSIBILITIES**

- 40.1 The Operations Subcontractor is responsible for:
  - 40.1.1 Compliance with the Minimum Requirements for the Handling, Classification and Disposal of Hazardous Waste;
  - 40.1.2 The maintaining of records as may be prescribed by this Agreement, legislation, regulations and by-laws from time to time;
  - 40.1.3 Monthly reporting of the amount and class of Hazardous Waste collected and disposed of and the amounts invoiced.



#### **41. HAZARDOUS WASTE ACCEPTANCE AND BILLING PROCEDURES**

41.1 A Hazardous Waste Producer that wishes to dispose of Hazardous Waste at the Project Site must:

41.1.1 demonstrate that the Hazardous Waste is generated within the Garden Route District Municipality;

41.1.2 apply for a disposal permit by providing:

- (a) the name of the Hazardous Waste generator;
- (b) the name of the transporter of the Hazardous Waste;
- (c) a licence required for transporting Hazardous Waste;
- (d) an analysis of the Hazardous Waste to be disposed of;
- (e) a material safety data sheet of the Hazardous Waste to be disposed of;
- (f) an indication of the volumes of Hazardous Waste being applied for; and
- (g) an indication of the date of delivery of the Hazardous Waste.

#### **41.2 Approval for the Project Site**

41.2.1 Once the application is received from the Hazardous Waste Producer, the Operations Subcontractor shall review the application and confirm whether the Hazardous Waste can be accepted into the Project Site.

41.2.2 Where the Operations Subcontractor deems that the Hazardous Waste can be accepted into the Project Site, the Operations Subcontractor shall request the Private Party to request approval from the Municipality to accept the Hazardous Waste.

41.2.3 If the Municipality grants the approval, the Private Party shall notify the Operations Subcontractor who shall then notify the Hazardous Waste Producer of the approval and request that the Hazardous Waste Producer book the Hazardous Waste loads on the electronic control authorisation sheet 24 hours prior to the delivery of the Hazardous Waste.

41.2.4 The Private Party shall provide the Hazardous Waste Producer with a quote of the rate per ton that will be charged (exclusive of any treatment which may be required).

#### **41.3 Arrival on the Project Site**

41.3.1 The Hazardous Waste Producer must ensure that the Hazardous Waste is accompanied by a waste manifest document.

41.3.2 The Operations Subcontractor shall take a current sample of the Hazardous Waste and shall check the current sample against the original Hazardous Waste sample received from the Hazardous Waste Producer.

41.3.3 If the current sample and the original sample comply, the Operations Subcontractor shall accept the Hazardous Waste and thereafter weigh and allocate the Hazardous

Waste in accordance with the codes from the South African Waste Information System.

- 41.3.4 Should the Hazardous Waste require treatment before the disposal, the Private Party shall treat the Hazardous Waste with the appropriate chemicals and neutralising agents before the disposal of such Hazardous Waste.
- 41.3.5 Once the Hazardous Waste is in an appropriate standard for disposal, the Operations Subcontractor shall ensure that the Hazardous Waste is transported to the working face for the purposes of disposing the Hazardous Waste.
- 41.3.6 Subsequent to the disposal of the Hazardous Waste, the vehicle which transported the Hazardous Waste shall be weighed out at the weighbridge and provided with a weighbridge slip.
- 41.3.7 The Operations Subcontractor shall then issue a safe disposal certificate to the transporter of the Hazardous Waste which provides evidence that the Hazardous Waste has been appropriately disposed.

#### 41.4 **Billing**

- 41.4.1 The Hazardous Waste Producers shall be responsible for the costs of transporting the Hazardous Waste to the Project Site.
- 41.4.2 The rate per ton quoted and charged to the Hazardous Waste Producer shall take into account the operational costs and the development costs for the disposal per ton of Hazardous Waste in the A-lined facility and such rate will be adjusted annually in accordance with the Contract Price Adjustments agreed upon by the Municipality and the Private Party under Schedule 1: Payment Mechanism of the PPP Agreement.
- 41.4.3 The Hazardous Waste Producer shall be liable for the costs of treating the Hazardous Waste, if such treatment is required.
- 41.4.4 The Private Party shall invoice the Hazardous Waste Producer within thirty (30) days of the date on which the Hazardous Waste Report is delivered.

## PROJECT ASSETS

1. Landfill Site
  - a. Landfill compactor (28 tonne)
  - b. Articulated dump truck (20 tonne)
  - c. Excavator (20 tonne)
  - d. Self-propelled water tanker (10 000 litre)
2. Long Haul Transport
  - a. George truck tractor
  - b. Wasteline conveyor
  - c. Walking floors
3. Chipping and Crushing
  - a. Chipper machine
  - b. Crushing machine
4. Front End Loaders
  - a. George Waste
  - c. Roaming Crusher
  - d. Roaming Chipper



## 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 Operations Subcontractor (RF) Proprietary Limited (Operations Subcontractor) titled Operations Subcontract (Operations Subcontract) for Services to be performed by the Operations 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 Operations Subcontract, the Operations Subcontractor has agreed to procure a guarantee from us in the terms hereof. At the request of the Operations Subcontractor, we have agreed to guarantee the performance of the Operations Subcontractor under the Operations 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 Operations Subcontract.
4. In consideration of the conclusion of the Operations Subcontract by the Private Party, we irrevocably and unconditionally guarantee to you as a co-principal debtor, due performance by the Operations Subcontractor of each and all of its obligations, liabilities, duties and undertakings under and in accordance with the Operations Subcontract save that nothing herein is to be construed as imposing greater obligations on us than are imposed on the Operations Subcontractor in the Operations 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 Operations 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 Operations Subcontract and to any agreement supplemental thereto agreed between you and the Operations Subcontractor and, for the avoidance of doubt, we hereby authorise you and the Operations Subcontractor to make any amendment or variation to the Operations 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 Operations Subcontractor under the Operations Subcontract and remains in full force and effect (notwithstanding any intermediate satisfaction by us, the Operations Subcontractor or any other person) until the said obligations and liabilities of the Operations Subcontractor are carried out, completed and discharged irrevocably and in full in accordance with the Operations 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 Operations Subcontractor and the Operations Subcontractor not performing within the time period permitted under the Operations 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 Operations Subcontractor for the recovery of any sum paid by us in accordance with this Guarantee. Any claim by us against the Operations Subcontractor is to be subordinate to any claims (contingent or otherwise) which you may have against the Operations Subcontractor arising out of or in connection with the Operations Subcontract until the time when these claims are satisfied by the Operations 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 Operations 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)
	)	
	)	
	)	

**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**

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For and on behalf of:

**Eden Waste Management (RF) Proprietary Limited**

Name: \_\_\_\_\_

Office: \_\_\_\_\_

(who warrants his authority)

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For and on behalf of:

**Eden Operations Subcontractor (RF) Proprietary Limited**

Name: \_\_\_\_\_

Office: \_\_\_\_\_

(who warrants his authority)