

**PUBLIC PRIVATE PARTNERSHIP AGREEMENT FOR THE
SUPPLY OF WASTE SERVICES**

entered into by and between

**THE KWADUKUZA LOCAL MUNICIPALITY
("KDM")**

**Represented by N J MDAKANE
(duly authorised)**

and

**DOLPHIN COAST WASTE MANAGEMENT (PTY) LTD
("the Supplier")**

**represented by MANDLENKOSI LUCKY MAYISE
(duly authorised)**

DATE: 29/10/2020

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PART A

INTRODUCTION

WHEREAS, the KwaDukuza Local Municipality issued a tender for the Establishment of a Public Private Partnership, under Tender Number MN 82/2017, for General Waste Collection Services within its area of jurisdiction;

AND WHEREAS, the Dolphin Coast Waste Management (Pty) Ltd, having tendered for the bid, was the successful bidder in relation to the Tender (Tender Number MN82/2017), for the provisions of the services.

NOW THEREFORE, the parties conclude this Public Private Partnerships Agreement to record the rights and obligations of the parties as per the Tender documents and embody the terms and conditions to govern the relationship between the parties.

1. DEFINITIONS

1.1. In this PPP Agreement, unless inconsistent with or otherwise indicated by the context, the following words or phrases shall have the meaning ascribed to them as:-

“Active Equity” – means, in relation to any Black Equity (and may be issued Shares in the Share Capital of any Sub-contractor held by black people and/or black enterprises) that such Black Equity is (or Shares are) held by black people and/or black enterprises who will participate directly in the day-to-day management and operations of the Project on the terms described in paragraphs PS3 and PSC3.3 of the Tender document;

“Annual BEE Report” – has the meaning as referred to in Clause 38;

“Annual Skills Development Commitment” – has the meaning as referred to in clause 39;

“Black Enterprise” – means an enterprise that is at least 50, 1% (Fifty comma One per cent) 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 Enterprise;

“Black Equity” – means the voting equity held by black Shareholders from time to time;

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“Black Shareholder” – means any Shareholder that is a black person or a black enterprise;

“Black Women” – means female African, Coloured and Indian South African Citizens;

“Business Day” – means any day except a Saturday, Sunday or public holiday in the Republic of South Africa;

“Calendar month” – shall mean 1 (One) of the 12 (Twelve) months of the year from the 1st to the last day of such month;

“Capital Expenditure” – means any expenditure treated as capital expenditure under GAAP;

“Commercial Waste” – means refuse similar in composition to domestic refuse and generated in Restaurants, Offices, Banks, retail Shops, Supermarkets, Hotels, Kitchen, Cafes, Garages and Filling Stations, and other Businesses, but excludes special refuse;

“Commercial Unit” – means the monthly charge relative to the volumes of waste being remove and disposed of, from each commercial or industrial entity per month. The frequency of commercial refuse removal collections may vary, relative to the type of wastes and volumes, from 3 (Three) to 7 (Seven) days per week. The number of Units per commercial enterprise is relative to the number of standard black refuse bags collected per month divided by the number of collections rendered per month based on a 4 (Four) week monthly cycle;

“Compensation Events” - means any breach by the Municipality including a breach of any of the Municipality's obligations under this PPP Agreement in respect of the Relevant Sites, and any failure of the Municipality to procure and renew the Municipal Consents, save for any breach that constitutes a Municipality Default;

“Consents” – means all consents, permits, clearances, authorisations, approvals, rulings, exemptions, registrations, filings, decisions, licences, required to be issued by

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or made with any Responsible Authority in connection with the performance of any of the Project Deliverables;

“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:
 - (a1) for doing or not doing (or for having done or not having done) any act in relation to the obtaining or performance of this PPP Agreement or any other contract with the Municipality or any other organ of state; or
 - (a2) for showing or not showing favour or disfavour to any person in relation to this PPP Agreement or any other contract with the Municipality or any other organ of state;
- (b) entering into this 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 Supplier 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:
 - (c1) under any law from time to time dealing with bribery, corruption or extortion;
 - (c2) under any law creating offences in respect of fraudulent acts; or
 - (c3) at common law, in respect of fraudulent acts in relation to this PPP Agreement or any other contract with the Municipality or any other public body; or
- (d) defrauding or attempting to defraud or conspiring to defraud the Municipality or any other public body;
- (e) Any other interpretation given to it by a court of law or any legislation.

“CPIX” – means the consumer price index as published from time to time by the relevant institution, 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; provided that if:

- (a) such index ceases to be published; or
- (b) KDM and the Supplier agree (or, failing agreement, if it is determined by the Steering Committee) that due to a change in circumstances such index is no longer representative, then from the date when the index was last published, the

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Parties shall use such other index as agreed between them or, failing agreement, as Steering Committee as being a fair and reasonable replacement index;

“Day” – shall mean a calendar day;

“Domestic Refuse” – means general household waste produced on any residential premises, and includes kitchen waste, paper, packing materials, smaller household items, broken crockery, glass, ashes, cinders, food refuse, rags, bones, floor sweeping and animal droppings;

“Domestic Unit” – means the monthly charge for the removal and disposal on a twice weekly basis, from each dwelling, of 2 (Two) standard refuse bags of domestic type waste;

“Effective Date” – means, notwithstanding the date of signature hereof the 1st November 2020;

“Equity” – means the entire issued share capital of the Supplier;

“Expiry Date” - the date on which this PPP Agreement will end due to a natural efflux of time; or in terms of this agreement.

“Facilities” – means the immovable property, the buildings and other facilities [together with all supporting infrastructure, plant and equipment] as required to enable the Supplier to exercise its rights and perform its obligations included in the Project Deliverables;

“Financial Model” – means the cash flow projections of the supplier as developed by the supplier, the financial base case for the Project as reflected in the computer model attached to this PPP Agreement on disk as Schedule 1, which model incorporates the forecast cash flow statements of the Supplier including all expenditure, revenues, taxation and financing of the Project Deliverables together with the income statements and balance sheets for the Supplier over the Project Term, and details of all assumptions, calculations and methodology used in the compilation thereof, as amended from time to time in accordance with the Financing Agreements;

“Force Majeure” - means any of the following events:

- (a) war, civil war, armed conflicts or terrorism; nuclear contamination, unless the Supplier and/ or any Sub-Contractor is the source or cause of this contamination;
- (b) any act of God, earthquake, fire, explosion, flood, cyclone, tempest, riot, insurrection or other civil disorder; and/ or
- (c) chemical or biological contamination of the Works and/ or Facilities and/ or the Project Site from any of the events referred to in this PPP Agreement, which directly causes any party to be unable to comply with all or a material part of its obligations under this PPP Agreement;
- (d) any event beyond the control of the parties which prevents either party from performing its obligations in terms of this PPP agreement.

“GAAP” – means the generally accepted accounting practice in the Republic of South Africa as approved from time to time by the South African Accounting Standards Board, South African Institute of Chartered Accountants, South African Institute of Professional Accountants or their successors in title.

“Garden Refuse” – means grass cuttings, weeds, hedge trimmings, plants and small tree branches;

“Good Industry Practice” – means applying, in relation to the manner in which the services are rendered, 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;

“Government Subsidised Housing” – means house built for, occupied by, qualifying beneficiaries who meets the national housing subsidy scheme criteria.

“IFRS” - means the International Financial Reporting Standards

“Industrial Waste” – means:-

- a) usual waste received from light, medium and heavy industry; and
- b) material arising from use in packing, receiving, dispatch and shipping in any type of industry and includes, paper, cardboard, wood, plastic, rags and metals; or

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- c) refuse peculiar to any industrial activity, and includes all raw materials used in and residues resulting from the process of such industry, but excludes special refuse;

“Intellectual Property” – means all intellectual property whatsoever used from time to time in connection with the Works and/or the Services whether capable of registration, registered or not;

“KDM” – means the KwaDukuza Local Municipality, a Municipality as define in Section 1 of the Municipal Systems Act 32 of 2000;

“Licensed Intellectual Property” – means all Intellectual Property to be used under licence from any third party;

“Management Control” – means, in relation to any enterprise, the ability to direct or cause the direction for the Business and management policies or practices of that enterprise;

“Minimum Black Equity” – has the meaning set forth in paragraph 6.2 of the Tender document;

“Month” – shall mean a month calculated from a particular day in 1 (One) month to the day before the day numerically corresponding to it in the following month;

“Operating Expenditure” – means any expenditure treated as operating expenditure under GAAP;

“Operations Subcontract” – means the contract between the supplier and the Operations Subcontractor in respect of the Services;

“Operations Subcontractor” – means the person appointed by the supplier to perform the Services;

“Parties” – means the parties to this agreement being KDM and Supplier;

“Penalty Deductions” – means the Performance Deductions;

“Performance Deductions” - has the meaning as set forth in Schedule 8;

“PPP Agreement” – means this public private partnership agreement between the Parties, as concluded in terms of the Provisions of the Municipal Finance Management Act 56 of 2003, as amended, and regulations thereto;

“Project” – means the project carried out in satisfaction of this PPP Agreement;

“Project Assets” – Means the immovable property and improvements thereon of the transfer station as and when acquired by KDM.

“Project Deliverables” - means the supply of the services in terms of this PPP agreement,

“Project Documents” – means the tender documents and submissions, any Shareholders Agreement, the Subcontracts agreements and all other contracts described in Clause 4 relating to the performance of the Project Deliverables, executed by the parties thereto with this PPP Agreement or otherwise,

“Project Insurances” - has the meaning set forth in Clause 31(Insurance);

“Project Officer” – means the official designated by the [accounting officer/accounting authority] of the Institution KDM on notice to the Supplier as the project officer for the Project. The Institution may replace the project officer from time to time on prior written notice to the Supplier;

“Project Site” – means the service area;

“Project Term”- means the period from the effective date to the expiry Date;

“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, institution, 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 Institution;

“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 Supplier regarding the design and construction specifications and the Output Specifications) any failure by the Municipality, any Responsible Authority, utility provider or other like body which affects the ability of the Supplier to carry out the Works or provide 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; or
- (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, unless any of the events listed above arises as a result of any negligence, wilful conduct or default of the Supplier or any subcontractor;

“Services” – means the operational services to be provided by or on behalf of the Supplier for KDM as set forth in Schedules 3, 4 and 5 as may be subsequently amended in accordance with this PPP Agreement;

“Service Area” – means the area where the services shall be performed, and which area as set out in schedule 5 and is defined as follows:-

- (a) in the north –
 - (a1) from N2 Highway going East – along the southern edge of Road P492 terminating at the Indian Ocean where the Hlimbitwa River flows into the Indian Ocean.
 - (a2) Going West from the N2 Highway along the Southern edge of Road P492 to the R102/P492 intersection.

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- (a3) Then from where the R102 and the Mnyundwini River meet, West along the Southern Bank of the Mnyundwini River and thereafter along the Southern Bank of the Ngoye River to the Western Boundary of KDM and
- (b) in the south – from the northern boundary of the Ethekezi Municipality; and
- (c) in the east – along the Indian Ocean Coastline within the area described in (a) and (b) above; and
- (d) in the west – to the western boundary of the KwaDukuza Municipality within the area described in (a) and (b) above.

“Shareholders” – means the holders of the Equity;

“Signature Date”- means the date of signature of this PPP Agreement by the last signing Party;

“SMME” or “Small, Medium or Micro Enterprise” – means any Business, trade or undertaking or other enterprise which is directly owned and managed by one or more natural persons and which has less than 50 (Fifty) full time employees; an annual turnover less than R10 000 000, 00 (Ten Million Rand), indexed to CPIX; and gross asset value (fixed property included) of less than R1 000 000, 00 (One Million Rand) indexed to CPIX;

“Special Refuse” – means any refuse requiring a special handling treatment and/or disposal procedure, and includes logs, Abattoir waste, minerals, oils, sludge’s, sand, stone, excavated soils, builders rubble, hazardous or radioactive waste and medical waste, and any other matter so deemed by the Municipality from time to time;

“Subcontracts” – means the any contracts between the Supplier and Subcontractor;

“Subcontractor Costs” – means any payments due to the sub-contractor by the supplier for the services already rendered by the sub-contractor to the satisfaction of KDM in terms of this PPP agreement.

“Subcontractors” – means all parties contracted by the Supplier in fulfilment of its obligations in terms of this agreement.

“Supplier” – means Dolphin Coast Waste Management (Pty) Limited, Registration No.2005/013939/07, a duly registered Company together with its Liquidators, Trustees, successors-in-title, nominees and assigns;

“Supplier Default” - means any of the following events or circumstances:

- (a) any business rescue proceedings, arrangement, composition or compromise with or for the benefit of creditors (as contemplated in the Insolvency Act, 1936 or the Companies Act, 2008) being entered into by or in relation to the Supplier, without the prior written consent of KDM;
- (b) a liquidator, business rescue practitioner or the like taking possession of or being appointed over, or any winding-up, business rescue, execution or other process being levied or enforced (and not being discharged or set aside within 20 (twenty) Business Days taking such possession nor such appointment) upon, the whole or any material part of the assets of the Supplier used to provide the Project Deliverables, or placing the Supplier under supervision for the purposes of commencing business rescue proceedings (in any of these cases, where applicable, whether provisional or final, and whether voluntary or compulsory);
- (c) the Supplier ceases to carry on business;
- (d) a resolution being passed or an order being made for the administration, winding-up, placing under business rescue, liquidation or dissolution of the Supplier not set aside within 20 (twenty) Business Days of such being passed or such order being made (in any of these cases, where applicable, whether provisional or final and whether voluntary or compulsory);
- (e) the Supplier commits a breach of any of its material obligations under this PPP Agreement; and fails to remedy such breach after due written notice to do so in terms of this agreement.
- (f) the Supplier abandons the Services at any time (other than as a consequence of a breach by KDM of its obligations under this PPP Agreement);
- (g) the Supplier is in default of its obligations as contemplated in Schedule 5 (BBBEE Shareholding and Subcontracting) at any stage during the operation of the Agreement;
- (h) the Supplier fails to obtain and maintain any Insurances as required in terms of Clause 31.2 (Insurances);
- (i) KDM has given an initial written warning notice to the Supplier describing that breach in reasonable detail and stating that if that breach persists for or recurs within a further period of 30 (thirty) Business Days after the initial warning notice, then KDM may take further steps to terminate this PPP Agreement;

“Small Works” - means any change to the Works requested by the Municipality having an individual cost not exceeding R100 000.00 (One Hundred Thousand Rand) (indexed to CPIX) or as otherwise agreed from time to time, except for any request which will (if implemented) increase the likelihood of the Services not complying with the performance regime or materially and adversely affect the Supplier's ability to perform its obligations under this PPP Agreement;

“Tender/Tender documents” – means the Tender and documents put out by KDM under Tender Number MN82/2017, and in respect of which the Supplier is the successful bidder;

“Termination Date” – means any date of early termination of this PPP Agreement in accordance with its terms;

“Unitary Payments”- means the charges payable to the Supplier in connection with the performance of its obligations included in the Project Deliverables as calculated in accordance with Clause 24;

“Variations” – means any variations to the Project Deliverables in accordance with Clause 36;

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

“VAT ACT” - means the Value Added Tax Act, 1991

“Year” – shall mean a year calculated from a particular day in 1 (One) year to the day before the day numerically corresponding to it in the following year.

2. INTERPRETATION

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

2.1.1. Headings of Clauses shall be deemed to have been included for purposes of convenience only and shall not affect the interpretation of the Agreement.

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- 2.1.2. Unless inconsistent with the context, words relating to any gender shall include the other genders, words relating to the singular shall include the plural and vice versa and words relating to natural persons shall include associations of persons having corporate status by statute or common law.
- 2.2. This agreement shall be governed by and construed according to the Laws of South Africa.
- 2.3. 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 PPP Agreement.
- 2.4. This agreement may be signed by the parties in any number of counterparts, each of which shall be deemed to be an original, but all of which shall together constitute one and the same agreement.
- 2.5. The Parties acknowledge that each of them has had the opportunity to take legal advice concerning this PPP Agreement, and agree that no provision or word used in this PPP 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 PPP Agreement or any part of it.
- 2.6. Where an expression has been defined and such definition contains a provision conferring a right or imposing an obligation on any party, then notwithstanding that it is contained only in a definition, effect must be given to that provision as if it were a substantive provision contained in the body of this agreement.
- 2.7. Words or expression defined in any particular Clause in the body of this agreement must bear the meaning so assigned to it throughout this agreement unless the context indicates otherwise.
- 2.8. The *eiusdem generis* rule does not apply so that whenever specific words of a particular class are used in conjunction with general words then the specific words shall not limit the scope of the general words. If any provision is followed by the word "including" and specific examples, such examples must not be construed so as to limit the general ambit of the provision concerned.

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- 2.9. A reference to any Legislation (including Statutes, Ordinances, Regulations and By-laws) must be construed as a reference to that Legislation as at the date of signature of this agreement and as may be amended or re-enacted or substituted from time to time.
- 2.10. 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
- 2.11. A reference to any statutory body or Court or to any association for the purposes appointing an expert or Arbitrator must be construed as a reference to that statutory body or Court or association as at the date of signature and any successor.
- 2.12. A reference to any legal principle, doctrine or process under South African Law includes a reference to the equivalent or analogous principle, doctrine or process in any other jurisdiction in which the provisions of this agreement may apply or to the Laws of which a party may be or become subject.
- 2.13. The expiration or termination of this agreement does not affect such of its provisions which of necessity must continue to apply after such expiration or termination.
- 2.14. Any reference to an amount in this agreement means that amount is exclusive of VAT unless specified otherwise.
- 2.15. References to "indexed to [CPIX]" in relation to any amount of money shall mean that such amount has been expressed in [month and year in which the Signature Date occurs] prices and shall be escalated annually as at the Signature Date and each anniversary thereof with reference to the then most recent publication of the [CPIX], subject to adjustments for any rebasing or recalculation thereof in accordance with the formula contained in Schedule 9.
- 2.16. The Schedules to this PPP Agreement are an integral part of this PPP Agreement and references to this PPP Agreement shall include the Schedules

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- 2.17. The various documents forming part of this agreement are to be taken as mutually explanatory. In the event of any conflict or inconsistency, the provisions contained in the main body of the agreement will prevail.
- 2.18. References to "Clauses", "sub-Clauses" and "Schedules" are references to the clauses, sub-clauses and schedules of this PPP Agreement.
- 2.19. References to "this PPP Agreement" shall include this PPP Agreement as amended, varied, novated or substituted in writing from time to time.
- 2.20. References to any other contract or document shall include (subject to all approvals required to be given pursuant to this PPP Agreement for any amendment or variation to or novation or substitution of such contract or document) a reference to that contract or document as amended, varied, novated or substituted from time to time.
- 2.21. General words preceded or followed by words such as "other" or "including" or "particularly" shall not be given a restrictive meaning because they are preceded or followed by particular examples intended to fall within the meaning of the general words.
- 2.22. In the calculation of a number of days where performance or delivery is required, the calculation shall exclude the first day and include the last day.

PART B: PROJECT GOVERNING STRUCTURE, PROJECT DOCUMENTS AND DELIVERABLES

3. PROJECT GOVERNING STRUCTURE

3.1. Steering Committee

KDM, and Supplier shall, within 30 (thirty) days of the Commencement Date, establish and maintain throughout the Project Term a joint Steering committee (the "**Steering Committee**"), consisting of at least 1 (one) representatives of KDM (one of whom shall be appointed chairperson) and at least 1 (one) representatives of Supplier, and Representatives from the KZN Provincial Treasury and National Treasury, which shall have the functions described below. A quorum of the Steering Committee shall consist of at least 1 (one) representative of each of KDM and Supplier.

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3.2. **Functions**

The functions of the Steering Committee shall be:

- 3.2.1. to provide a means for the joint review of issues relating to all day to day aspects of the performance of this PPP Agreement;
- 3.2.2. to provide a forum for joint strategic discussion, considering actual and anticipated changes in the market and business of KDM and/or the Project, and possible variations of this PPP Agreement to reflect those changes or for the more efficient performance of this PPP Agreement;
- 3.2.3. to provide a means of agreeing Variation Proposals and payments of the Service Payment and deductions (if any) therefrom in accordance with this PPP Agreement; and
- 3.2.4. in certain circumstances, pursuant to the Dispute Resolution Procedure, to provide a means of resolving disputes or disagreements between the Parties amicably.
- 3.2.5. to review the terms of this PPP agreement and give input on variations or additions thereto in order to make the agreement practical and workable especially with regard to the resolute condition contained in this PPP agreement..

3.3. **Recommendations**

The role of the Steering Committee is to make recommendations to the Parties, which they may accept or reject at their complete discretion. Neither the Steering Committee itself, nor its members acting in that capacity, shall have any authority to vary any of the provisions of this PPP Agreement or to make any decision, which is binding on the Parties. No Party shall rely on any act or omission of the Steering Committee, or any member of the Liaison Committee acting in that capacity, so as to give rise to any waiver in respect of any right, benefit or obligation of any Party.

3.4. **Representatives**

The relevant Parties shall appoint and remove their representatives on the Steering Committee by written notice delivered to the other at any time. A representative on the Steering Committee may appoint and remove an alternate (who may be another representative of that Party) in the same manner. If a representative is unavailable (and the other Party's representatives may rely on the alternate's statement that the representative is unavailable) his/her alternate shall have the same rights and powers as the representative.

3.5. Procedures and Practices

- 3.5.1. Subject to the provisions of this Agreement, the members of the Steering Committee may adopt such procedures and practices for the conduct of the activities of the Steering Committee as they consider appropriate from time to time and:
- 3.5.1.1. may invite to any meeting of the Steering Committee such other persons as its members may agree (in accordance with Clause 3.5.1); and
- 3.5.1.2. receive a review report from any person agreed by its members.
- 3.5.2. Recommendations, agreements and other decisions of the Steering Committee must have the affirmative vote of the majority of those voting on the matter, which must include not less than 1 (one) representative of KDM and not less than 1 (one) representative of Supplier.
- 3.5.3. The Steering Committee shall meet monthly for the first three months of this agreement and thereafter from time to time as necessary.
- 3.5.4. Any member of the Steering Committee may request a meeting of the Steering Committee at any time.
- 3.5.5. Meetings of the Steering Committee shall be convened on not less than 10 (ten) Business Days' notice (identifying the agenda items to be discussed at the meeting) provided that in emergencies a meeting may be called at any time on such notice as may be reasonable in the circumstances.
- 3.5.6. Where the Steering Committee decides it is appropriate, meetings may also be held by telephone or another form of telecommunication, by which each participant can hear and speak to all other participants at the same time.
- 3.5.7. Minutes of all recommendations (including those made by telephone or other form of telecommunication) and meetings of the Steering Committee shall be kept by Supplier and copies circulated promptly to the Parties, normally within 15 (fifteen) Business Days of the making of the recommendation or the holding of the meeting. A full set of minutes shall be open to inspection by any Party at any time, upon request.

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4. PROJECT DOCUMENTS

- 4.1. The supplier must comply with the provisions of the project documents and, may only:
- 4.1.1. terminate, or make any amendment to any project document; or
 - 4.1.2. in any respect, depart from its obligations or waive any rights under any project document;
with the prior written agreement of KDM.
- 4.2. The Supplier and KDM shall procure that any Project Document not executed simultaneously with this PPP Agreement is executed in due course.
- 4.3. Without limiting the restrictions on amendments to the Project Documents in Clause (4.1) above, the Supplier shall furnish KDM with a true and complete copy (including all schedules) of any amendment to any Project Document or of any Project Document not executed by the effective Date, within 90 Days of the date of the Supplier's execution of such amendment or Project Document.

5. SCHEDULES

- 5.1. This PPP Agreement must be interpreted as being inclusive of the following Project Documents as Schedules to the Agreement:
- (a) The Financial Model (**Schedule 1**)
 - (b) BBBEE Score Card (6.2 of Tender Document) (**Schedule 2**)
 - (c) Project Site Map (**Schedule 3**)
 - (d) List of KDM's Assets (**Schedule 4**)
 - (e) Performance Monitoring Plan (**Schedule 5**)
 - (f) Payment Mechanisms (Price Schedule) (**Schedule 6**)
 - (g) Consents relating to the Project (**Schedule 7**)
 - (h) List of Project Insurances (**Schedule 8**)
 - (i) Incorporation Details of the Supplier (**Schedule 9**)
 - (j) Procedure Hand back (**Schedule 10**)
 - (k) Penalty Regimes (**Schedule 11**)
 - (l) Proforma Service Request (**Schedule 12**)
 - (m) Change Control Procedure: (**Schedule 13**)
 - (n) BBBEE Shareholding Structure and Contracting: (**Schedule 14**)
 - (o) BBBEE Empowerment (**Schedule 15**)
 - (p) Risk Register (**Schedule 16**)
 - (q) Risk Management Plan (**Schedule 17**)
 - (r) Contract Management Plan (**Schedule 18**)
 - (s) KDM Council Resolution C859 (**Schedule 19**)

- (t) Memorandum of Agreement between KDM and Dolphin Coast Landfill Management (Pty) Limited dated 14 November 2006. **(Schedule 20)**
- (u) Exit Strategy Document **(Schedule 21)**
- (v) Monitoring System **(Schedule 22)**
- (w) Tender documents and submissions **(Schedule 23)**
- (x) Street Sweeping Services **(Schedule 24)**

5.2. In relation to any Project Documents being Schedules to this PPP Agreement not being concluded at the Date of Signature, then the Parties agree to the finalisation of these within 90 days of the effective date.

5.3. In the production of the schedules, the Parties undertake to be bound by the Tender Documents, the negotiations concluded between the Parties as well as guided by the PPP Manual and Standardised Provisions issued by National Treasury.

6. PROJECT DELIVERABLES

6.1. Subject to, and in accordance with, the provisions of this PPP Agreement, the Supplier shall exercise its rights and perform its obligations included in the Project Deliverables at its own cost and risk without recourse to KDM save as otherwise expressly provided for in this PPP Agreement.

6.2. Any Services performed by the Supplier outside of the bid documentation, unless authorised by KDM, shall be performed at the Supplier's own risk and sole cost and expenses.

6.3. Without limiting Clauses 6.1 and 6.2, the Supplier shall at its own cost and risk be solely responsible for procuring that the Project Deliverables are performed:

- (a) in accordance with Good Industry Practice;
- (b) all applicable Standards;
- (c) all applicable Service Levels;
- (d) in a manner that is not likely to cause death, injury to health or damage to property or the environment;
- (e) in a manner that is consistent with KDM discharging its statutory functions and duties;
- (f) in compliance with all applicable law and the Consents
- (g) all reasonable Directions;
- (h) all relevant KDM Policies; and

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- 6.4. Each Party shall co-operate with the other in the exercise and performance of their respective rights and obligations under this PPP Agreement.
- 6.5. The Supplier shall, from the Effective Date, and on an ongoing and continuous basis throughout the Term allocate and/or procure all necessary, appropriate or required resources; and perform such other incidental and/or related services, functions and responsibilities, as may be required in order for it to fully perform the service in accordance with this PPP Agreement.

PART C: GENERAL OBLIGATIONS

7. SCOPE OF SERVICES

- 7.1. The Supplier shall render the following refuse and collection services to KDM within the service area: -

7.1.1. delivery of refuse bags: -

7.1.1.1 each residential Unit in formal developments will receive a minimum supply of 26 (Twenty six) standard black refuse bags to cover a period of 3 (three) months.

7.1.1.2. to each non-residential user (institutional, industrial and commercial enterprises) of a specified number (to be specified by KDM) of refuse bags, which number shall be based on usage/volumes of waste produced by these users for collection;

7.1.1.3 to each informal house within an informal development of 1 (One) refuse bag per week;

7.1.2 collection of:-

7.1.2.1 2 (Two) refuse bags per residential unit in formal developments which are placed in bags or other containers on the street verge 2 (two) days per week;

7.1.2.2 all waste from the non-residential users in accordance with Schedules as determined by KDM;

7.1.2.3 refuse from bins at community areas such as Schools Shopping Centres, Taxi Ranks, etc., once per week or as per the Schedule supplied by KDM;

7.1.2.4. 1 (One) refuse bag or equivalent containers placed outside the informal houses in informal developments once per week, unless instructed to by KDM to increase the number of refuse bags.

- 7.1.3. Litter picking of the open areas surrounding the informal houses, road reserves and designated street reserves;
- 7.1.4 removal of piles of refuse and rubble in road reserves and open spaces (illegal dumping) as instructed by KDM in writing;
- 7.1.5 street sweeping as referred to below;
- 7.1.6. the delivery of refuse collected to the Transfer Station specified at Shakas Head. It is further recorded that for the duration of this Agreement and as per the conditions as specified in KDM Council Resolution C859 dated 20th November 2002, KDM's rights to buy back the property shall remain entrenched;
- 7.1.7. the transportation and disposal of all refuse collected as described above at the KwaDukuza landfill site (Dolphin Coast Landfill site) or an alternative licenced landfill as reasonably specified by KDM;
- 7.2. it is recorded that in terms of a Memorandum of Agreement between KDM and Dolphin Coast Landfill Management (Pty) Limited signed on the 14th November 2006 KDM has the right of disposal at the site mentioned in Clause 4.1.7 above for a period of 100 (One Hundred) years from date of signature of such Agreement or for the period the site is utilised as a landfill site, whichever is the shorter period.
- 7.3. All refuse collection and disposal shall be completed during normal working hours (i.e. 06h30 to 17h00 7 (seven) days a week. All statutory holidays shall be considered normal working days. No services shall be undertaken outside of normal working hours unless by prior approval of, or on the instruction of KDM.
- 7.4. **Obligations of the Supplier in respect of the transfer station**
- 7.4.1. It is herein recorded that upon expiry of this PPP agreement , the transfer station at Shaka's Head, Portion 153 (of 15) of the Farm Compensation number 868 shall be transferred by the supplier at no cost to KDM, together with all improvements thereon.
- 74.2. it is herein recorded that the Supplier has waived their rights in terms of EXCO resolution C859 of 20 November 2002 and the agreement entered into between the Supplier and KDM wherein KDM will buy back the transfer station at a fixed cost.

8. STREET SWEEPING

- 8.1. The Supplier shall be responsible for street sweeping and refuse removal pursuant thereto as per the attached schedule/map.
- 8.2. The Supplier shall be paid the fixed monthly costs as set out in the Tender, and the operating costs per linear meter as per the Schedule to be provided by KDM and agreed to by the parties.
- 8.3. It is envisaged that this function shall be sub-contracted as per Clause 40.
- 8.4. This service shall be performed at the agreed locations and the frequency shall be in accordance with (schedule 24), accepted by the supplier and approved by the accounting officer or his designated official/ or authorised representative

9. SERVICE PROVISION

- 9.1. The Supplier shall render the services in terms of the successful bid documentation specification, Tender documentation and this PPP agreement.

10. PERFORMANCE

- 10.1. The Supplier shall at all times during the Term perform all of its obligations under this Agreement strictly in accordance with best industry practice and the terms and conditions of this PPP agreement.

11. WARRANTIES

- 11.1 The Parties hereby warrant, represent and undertake that:
- 11.1.1. this Agreement shall, when executed, constitute valid and binding obligations on the Parties;
- 11.1.2. this Agreement is executed by a duly Authorised Signatory of the Supplier and KDM;
- 11.1.3. the parties are not aware of anything which might or shall adversely affect its ability to perform its obligations under this Agreement;
- 11.1.4. they shall ensure that all information supplied to the other party is true, accurate and complete in all respects.
- 11.2. The Supplier hereby warrants, represents and undertakes that:
- 11.2.1. it shall render the Services in accordance with the Service Levels and otherwise as is required by this Agreement;
- 11.2.2. it possesses the requisite level of skill, expertise and experience in rendering services of a similar scope, complexity, size and sophistication as the Services;

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- 11.2.3. it shall at all times render the Services in accordance with Best Industry Practice;
- 11.2.4. it shall only ever assign appropriately experienced, qualified and trained Supplier Personnel to perform the Services;
- 11.2.5. all Supplier Personnel shall at all times perform the Services with all due skill, care and diligence;
- 11.2.6. it has obtained and shall maintain in force all Consents, if any, required by it to enter into this Agreement and to render the Services;
- 11.2.7. it is not aware of any circumstances which may result in the Supplier commencing Business Rescue proceedings;
- 11.2.8. it shall notify KDM in writing, immediately upon the occurrence of any of the following events:
 - 11.2.8.1. when the board of the Supplier becomes aware that it is Financially Distressed; or
 - 11.2.8.2. when the board of the Supplier contemplates, considers, discusses or agrees to any Business Rescue of the Supplier or proposes to do any of these things; or
 - 11.2.8.3. when the Supplier becomes aware of any person proposing to take, or taking, any steps to apply to court or actually applying to court for the Business rescue of the Supplier;
 - 11.2.8.4. the performance of its obligations under this Agreement shall fully comply with Applicable Laws;
 - 11.2.8.5. the Services shall not infringe the Intellectual Property rights of any Third Party;
 - 11.2.8.6. it shall at all times perform its obligations in a manner that does not breach, nor cause KDM to breach, KDM Policies; and
- 11.3. The Parties acknowledge and agree that the written notice referred to in clause 11.2.8. above shall set out the full details of the Financial Distress or the actual or proposed activity or event, as the case may be.

12. LIMITATION OF LIABILITY

- 12.1. Nothing in this Agreement shall exclude or limit either Party's liability in relation to:
 - 12.1.1. death or personal injury caused by negligence or wilful or reckless misconduct of that Party;
 - 12.1.2. any fraud or fraudulent misrepresentation of that Party or any other criminal act which leads to such Party suffering a Loss;

- 12.1.3. any liability which cannot be excluded by law by that Party; and/or
- 12.1.4. clause 13 (Indemnity), clause 59 (Intellectual Property Rights) and clause 63 (Confidentiality).
- 12.2. The Parties shall not be liable to each other for any indirect or consequential loss or damage, including loss of profit, revenue, anticipated savings, business transactions or goodwill or other contracts whether arising from negligence or breach of contract.
- 13. INDEMNITY**
- 13.1. The Supplier shall fully indemnify and hold KDM harmless from and against any and all Losses and Claims, of whatsoever nature, which KDM may suffer, incur or sustain arising out of or in connection with the Supplier rendering the Services to KDM.
- 14. CONDUCT OF PROCEEDINGS**
- 14.1. Where a situation arises or an event occurs which gives rise to the right by a Party to claim an indemnity under this Agreement, the claiming Party shall deliver to the indemnifying Party notice of such Claim as soon as is reasonably practicable upon its receipt of notice thereof.
- 14.2. Unless agreed otherwise between the Parties, the indemnifying Party shall, at its cost and expense, conduct all negotiations and proceedings (including the right to appoint legal counsel of its choice) and the indemnified Party shall provide such assistance as may be reasonably required by the indemnifying Party.
- 14.3. Notwithstanding sub-clause 14.2, either party may at its cost and expense, appoint its own legal counsel where it deems it necessary in its sole and absolute discretion.
- 14.4. Neither Party shall make any admission on behalf of the other Party which is reasonably likely to be prejudicial to the defence of such proceedings without the prior consent of the other Party.
- 14.5. Neither Party shall compromise or settle such proceedings without the prior consent of the other Party.
- 14.6. The indemnifying Party shall conduct all negotiations and proceedings in relation to this clause (Conduct of Proceedings) diligently and endeavour not to adversely affect the indemnified Party's reputation or goodwill in any respect whatsoever.

PART D: PROJECT SITE

15. KWADUKUZA MUNICIPALITY PROPERTY

- 15.1. The Supplier acknowledges and agrees that any property of KDM that is provided to the Supplier, in order to facilitate the rendering of the Services, shall remain the absolute property of KDM and shall at any reasonable time be available for inspection by a KDM representative.
- 15.2. Any such property owned by KDM in the possession of the Supplier on completion of this Agreement shall, at the Supplier's cost and expense, be promptly returned to KDM forthwith.
- 15.3. The Supplier shall ensure that KDM's property is kept in a safe and secure environment at all times.
- 15.4. The Supplier shall be responsible at all times for any and all Losses to KDM property in its possession, and if required the Supplier shall furnish such security for the payment of any such Losses as KDM may require.
- 15.5. The Supplier shall be responsible at all times for any and all Losses suffered by and/or incurred by KDM as a result of the Supplier's breach of this clause 15 (KDM Property).
- 15.6. The Supplier shall be responsible for the security, maintenance; repairs and replacement of all property used by the supplier in connection with the provision of the service and KDM shall be under no liability in respect thereof.¹

16. PROJECT SITE COMPLIANCE

16.1. Environmental Risks

- 16.1.1. The Supplier shall take all reasonable steps to protect the Environment (within the Service Area) and to limit damage and nuisance to people and property resulting from pollution, noise and other results of its operations within the Service Area.
- 16.1.2. The Supplier shall ensure that emissions, surface discharges and effluent from the Supplier's activities shall not contravene the standards prescribed under applicable Environmental Laws.

¹ This clause has been inserted to include additional obligations for the Private Party in relation to the Project Site.

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16.2. Heritage Resources

Discovery

- 16.2.1. Upon the discovery of any heritage object or resource (as defined in the National Heritage Resources Act, 1999 or any corresponding provincial legislation) during the course of the services, the Supplier shall:
- 16.2.1.1. promptly notify KDM of such discovery;
 - 16.2.1.2. take all necessary steps not to disturb the heritage object or resource, including cease any Works to the extent that the carrying out of such Works might reasonably endanger the heritage object or resource or prevent or impede its excavation or preservation; and
 - 16.2.1.3. take all necessary steps to preserve the heritage object or resource in the same position and condition in which it was discovered.

Action

- 16.2.2. KDM shall promptly and in any event within 15 (Fifteen) Business Days of the notice in section 16.6.2.1.1 issue an instruction to the Supplier specifying what action KDM requires the Supplier to take in relation to such discovery.
- 16.2.3. The Supplier shall promptly and diligently comply with any instruction so issued (save to the extent that such instruction constitutes a proposal by KDM for a deemed KDM Variation as provided in clause 16.2.5. below, in which case the variation procedure provided for in clause 36.1.5 (KDM Variations) shall apply) at its own cost.
- 16.2.4. If so directed by KDM or Responsible Authority, the Supplier shall allow representatives of the KDM or Responsible Authority to enter onto the Project Site for the purposes of removal or disposal of such discovery; provided that such entry shall be subject to KDM or Responsible Authority complying with all relevant safety procedures which shall include any relevant health and safety plans for the construction of the Facilities and any reasonable directions regarding the safety of the Project Site that may be issued by or on behalf of the Supplier.
- 16.2.5. If the discovery is a relief event and any instruction from KDM in connection with the discovery includes the requirement for the supplier to carry out works which are not works that would be necessary for the purpose of compliance with applicable law or any consents, then such works shall be deemed to be a variation and the provisions of clause 36.1.5 (KDM Variations) shall apply.
- 16.2.6. If the discovery is not a relief event and any instruction from KDM in connection with the discovery includes the requirements for the Supplier to carry out works, then such works shall be deemed to be a variation and the provisions of clause 36.1.22 (Supplier Variations) shall apply.

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17. SERVICE LOCATION ACCESS

- 17.1. Unless otherwise directed, the Supplier shall render the Services at the Service Location(s) set out in the relevant Service Request.
- 17.2. For the purpose of sub-clause 17.1 above, KDM will provide access to the Service Locations subject strictly to the provisions of this clause (Service Location Access).
- 17.3. KDM will provide such access to Service Locations as is reasonably necessary for the Supplier to perform the Services.

18. GOVERNMENT SUBSIDISED HOUSING

- 18.1. The parties shall work together to ensure that there is a cost-effective method developed going forward for refuse collection from Government subsidised housing in all future such areas where applicable.

PART E: DURATION AND SERVICE COMMENCEMENT

19. DURATION

- 19.1. This PPP Agreement and the rights and obligations of the parties under this PPP Agreement shall take effect on the effective date.
- 19.2. The service period shall commence on the Effective Date and shall continue, subject to Clause 47 below, for a period of 10 (Ten) years.

20. QUALITY ASSURANCE

- 20.1. The Supplier shall maintain throughout the Project Term a quality assurance system, as may be relevant to the Services provided under this Agreement.
- 20.2. Upon reasonable request of KDM, the Supplier shall provide evidence of its compliance with this clause (Quality Assurance).
- 20.3. Notwithstanding the provisions of this clause (Quality Assurance), the Supplier shall, for the Project Term, maintain all other relevant technical certifications as are required by Best Industry Practice for it to provide the Services.
- 20.4. The Supplier acknowledges and agrees that compliance with the requirements of this clause (Quality Assurance) shall not relieve the Supplier of any of its duties, obligations or responsibilities under this Agreement.

PART F: SERVICES

21. SERVICE LEVELS AND SERVICE CREDITS

- 21.1. The Supplier shall, during the Term, do all such things as are necessary to ensure that the Services are provided so as to meet or exceed the relevant Service Standards.
- 21.2. If the Supplier fails to achieve a Service Level then the Supplier shall owe KDM Service Credits, in accordance with a reasonable Service Request agreed by the parties.
- 21.3. In the event Service Credits accrue under this Agreement, the Supplier shall ensure that the relevant Invoice provided to KDM reflects a Deduction in the amount of Fees commensurate with such accrued Service Credits.
- 21.4. In the event a Service Level is not met, notwithstanding any other provision in this Agreement, the Supplier shall:
 - 21.4.1. arrange all such additional equipment, resources and/or materials as are reasonably necessary for the Services to meet the Service Level; and
 - 21.4.2. take all necessary remedial action to correct such a failure to meet the relevant Service Level.
- 21.5. The Supplier acknowledges and agrees that any actions required under clause 21.4 shall be entirely at its own cost and expense.
- 21.6. The Supplier acknowledges and agrees that its payment of any Service Credits under this Agreement shall not relieve it of its obligations whatsoever to meet or exceed the Service Levels in accordance with this Agreement.
- 21.7. The Supplier acknowledges and agrees that KDM's rights in this clause (Service Levels and Service Credits) shall be without prejudice to any other rights and/or remedies KDM may have under this Agreement, Applicable Laws or otherwise.
- 21.8. The Parties acknowledge and agree that the payment of, or provision of, the Service Credits is not a penalty and the amounts of the Service Credits do not exceed what is a genuine pre-estimate of the minimum Loss likely to be suffered by KDM in respect of a failure by the Supplier to meet the Service Levels.
- 21.9. Any amounts paid as Service Credits will be deducted from any final amount awarded by a court of law (or appropriate dispute resolution forum) in relation to the relevant breach.
- 21.10. KDM shall be entitled, in its reasonable discretion, and provided notice has been given in terms of Clause 47, and the Supplier agrees thereto, to treat any Service Credit entitlement as a Deduction.

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22. PERFORMANCE MONITORING

22.1. Monitoring by the Supplier

- 22.1.1. The Supplier undertakes to monitor its performance of the Services and/or to procure that its performance of the Services is monitored.
- 22.1.2. The Supplier shall in respect of each of the component parts of the Services develop and maintain a detailed written performance monitoring mechanism and procedure in a format and with a content acceptable to KDM, which performance monitoring mechanism and procedure shall be based on mechanisms and monitoring frequencies to be approved by KDM.
- 22.1.3. The performance monitoring mechanisms and procedures referred to above shall be implemented by the Supplier with effect from the Service Effective Date.

22.2. Monitoring by KDM

- 22.2.1. KDM may, at its own expense, carry out such monitoring and/or auditing of the Services and of the Suppliers performance monitoring mechanisms and procedures and quality assurance procedures as it may from time to time require.
- 22.2.2. KDM may, in its absolute discretion, jointly monitor any of the aspects of the Services with the Supplier.
- 22.2.3. KDM shall, in addition, at its own expense, be entitled to undertake an annual review of the Supplier operating and management procedures relating to the Project Deliverables.
- 22.2.4. The Parties Agree to develop a Performance Monitoring Plan (Schedule 5) as part of the Contract Management Plan as attached in Schedule 23

22.3. Monitoring System

- 22.3.1. The Supplier shall within a period of 6 months following the effective date establish and operate a facility to which performance failures in relation to any aspect of the Project Operations can be reported by any of KDM or Suppliers personnel at the Project Site. That Monitoring System shall also be operated so as to enable the Parties to monitor and assess responses and response times in relation to any reported Service.

PART H: PAYMENTS AND FINANCIAL MATTERS

23. PROJECT BUDGET

KDM must:

- 23.1. ensure that its expenditure commitment under this PPP Agreement is appropriated in its annual budget for each financial year for the duration of the Project; and
- 23.2. ensure that it complies with all relevant legislation, including the Municipal Financial Management Act and the Regulations thereto, the Municipal Systems Act and any relevant by-laws established in terms thereof and any other relevant Law.

24. MONTHLY UNITARY PAYMENT

- 24.1. It is specifically agreed that the Supplier shall not be entitled to receive any monthly Unitary Payment until the Service Effective Date.
- 24.2. The monthly Unitary Payment shall be paid to the extent that the Services are Available from the Service Commencement Date and will be made in accordance with this clause and as per the decision of the bid adjudication committee and pricing schedule annexed hereto marked as Schedule 1.
- 24.3. The monthly unitary payment shall be fixed and firm from the Effective Date until KDM Financial Year end and shall thereafter, at the beginning of every KDM Financial Year, escalate in accordance with the escalation rate agreed by the Parties, being CPIX plus 2% (Two per cent).
- 24.4. The monthly unitary payment shall accrue in arrears in respect of each payment period during the service period and shall be invoiced and paid on or before the payment date.
- 24.5. Settlement discount, if any, agreed upon by the Parties in writing shall be deducted from the unitary payment.
- 24.6. KDM may deduct any amounts owed by the Supplier to KDM from the unitary payment, provided such amounts are not in dispute.
- 24.7. The Supplier shall co-operate with KDM and both parties shall be bound to carry out quarterly "house counts" to determine the increase/decrease, in residential numbers of Units serviced by the Supplier. These numbers shall be agreed between the parties and the required adjustments shall become effective immediately upon such agreement being reached, or any dispute being resolved in terms of clause 44 below.
- 24.8. KDM shall also be obliged to advise the Supplier of each and every new/additional user which shall be determined/effective at the time of KDM passing the building plans and /or providing an electrical connection to such property/ development.

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- 24.9. In the event that KDM fails to advise the Supplier of any new user/s then the Supplier shall on determining the additional user be able to advise KDM and charge KDM effective from the date as per Clause 24.9 above at the charge rate applicable to such service.

25. PENALTY DEDUCTIONS

- 25.1. Undisputed Penalty Deductions from the monthly Unitary Payment shall be made as required in terms of Schedule 6: Payment Mechanism.
- 25.2. In addition to the Penalty Deductions referred to in clause 25.1 above, whenever any sum of money is agreed or determined in terms of this PPP Agreement to be due and payable by the Supplier to KDM, such sum may, at the reasonable discretion of KDM, be deducted from or applied to reduce the amount then due or which at any time afterwards may become due by KDM to the Supplier, provided that:
- 25.2.1. KDM has given the Supplier five (5) Business Days' notice of its intention to apply such a deduction; and
- 25.2.2. upon the termination of this PPP Agreement, any deductions then deductible shall be made from any termination payment due to the Supplier under clause (48) (Consequences of Termination), clause (50) (Termination for Supplier Default) and clause (49) (Termination for Force Majeure), provided that such deductions under the relevant clauses have not already been made.

26. INVOICING AND PAYMENT ARRANGEMENTS

- 26.1. The Supplier shall do all things necessary so as to provide KDM with an Invoice:-
- 26.1.1. within 30 (thirty) days after the end of each calendar month;
- 26.1.2. which accurately sets out the applicable unitary payment due for the relevant period;
- 26.1.3. shall fully disclose and with sufficient details and particularity all the services, activities as well as costs incurred and that have been rendered against the agreed costs schedules as part of the agreed project schedule; and
- 26.1.4. such payment invoice shall be signed off by the senior representative of the Supplier to confirm all the activities, material, labour and hours ("bill of quantities"), which reflects any appropriate Deductions from the unitary payment pursuant to clause 26.

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- 26.2. The Supplier acknowledges and agrees that a failure by the Supplier to meet its obligations under sub-clause 26.1.1 above shall cause KDM significant internal accounting and budgetary problems.
- 26.3. In the event that the Supplier fails to provide KDM with an Invoice in accordance with sub-clause 26.1.1, the Supplier hereby acknowledges and agrees that:
- 26.3.1. KDM shall not be liable or obligated to pay the Supplier, at any time, any sums whatsoever in relation to such Invoice until such Invoice has been rectified;
- 26.3.2. the Supplier shall be liable to reimburse KDM for any reasonable costs incurred by KDM in relation to such Invoice, including but not limited to internal administrative costs.
- 26.4. All original Invoices must be forwarded to KDM to the address stated below:
Address:
KwaDukuza Municipality
Chief Albert Luthuli Street,
KwaDukuza, 4450
Attention: Mr Siyabonga Khanyile
Email: siyabongak@kwadukuza.gov.za
- 26.5. Subject to the satisfactory performance of the Services, payment of Invoices will be effected no later than 30 (thirty) days following receipt of a correct, valid and original tax Invoice together with all supporting documentation.
- 26.6. Invoices should be raised and submitted in the month in which the Services were rendered.
- 26.7. All payments are provisional and are subject to audit by KDM. The Supplier shall preserve its records for such period as the South Africa Revenue Services may require or 5 (five) years from date of payment of the Fees, whichever is the longer.

27. MANNER OF PAYMENT

- 27.1. All payments under this PPP 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 Supplier's bank account furnished to KDM in writing.
- 27.2. The Supplier shall ensure that KDM, at all times, has the correct bank account details in order to affect the electronic funds transfer.

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- 27.3. KDM's total liability towards the Supplier for the Services performed shall be deemed to have been met when the electronic funds transfer has been completed, in accordance with the Invoice.

28. DISPUTE OF PAYMENTS

- 28.1. Should KDM dispute any amount appearing on an Invoice submitted to KDM, pursuant to this Agreement and/or the Service Request, KDM shall, within 10 (ten) days of receipt of the Affected Invoice, notify the Supplier, in writing, of such dispute, specifying the affected Invoice, specific amount in dispute; and alleged reasons or grounds for dispute.
- 28.2. If the Parties are unable to resolve such dispute within 30 (thirty) days, it shall be referred to the Financial manager of the Supplier and the financial manager of KDM or their Authorised Representatives for determination.
- 28.3. If the representatives appointed are unable to resolve the dispute within 10 (ten) days, such dispute shall be referred for resolution in accordance with Dispute Resolution of this Agreement.
- 28.4. In the event that the Supplier requires payment of the undisputed amount contained in the Affected Invoice, it shall issue a credit note for the full value of the Affected Invoice and issue a new invoice reflecting the undisputed amount. The disputed portion of the Affected Invoice shall then be dealt with as specified above.

29. VAT

- 29.1. The Supplier shall ensure that the Invoice complies with the provisions of the VAT Act 89 of 1991, failing which KDM shall not make any payment in respect thereof until such time as it receives an Invoice which complies with the provisions of the VAT Act.
- 29.2. The Supplier acknowledges that, in accordance with section 20(4) of the VAT Act, it is mandatory for the Supplier to print KDM's VAT Registration Number on each and every Invoice that the Supplier issues to KDM.

30. REPORTING REQUIREMENTS

- 30.1. The Supplier shall for the duration of the Project Term:
- 30.1.1. maintain (which shall include the back-up, storage and safe custody of) a full record of particulars of the costs of providing the Scope of Services. Such records shall further include details of any commitments made by the Supplier for future expenditure and details of any funds held by the Supplier;

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- 30.1.2. when requested by KDM, furnish a summary of any of the aforementioned costs in such form and detail as KDM may reasonably require;
- 30.1.3. afford such facilities as KDM may reasonably require for its representatives to examine the records maintained under this Clause 30 (Reporting Requirements);
- 30.2. deliver to KDM:
 - 30.2.1. as soon as they become available (and in any event within 90 (Ninety) days of the end of each Financial Year), copies of its financial statements for that period which shall contain an income statement and a balance sheet and a cash flow statement audited and certified by a firm of independent auditors;
 - 30.2.2. as soon as they become available (and in any event within 60 (Sixty) days of the end of each of its financial half years and Financial Year end), copies of its unaudited financial statements for that half year or year (as the case may be) which shall contain an income statement, a balance sheet and a cash flow statement;
 - 30.2.3. prepare the financial statements referred to in this Clause 30 (Reporting Requirements) on the basis consistently applied in accordance with IFRS and those financial statements shall give 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 to which the financial statements are made up and shall disclose or reserve against all the liabilities (actual or contingent) of the Supplier; and
- 30.3. The Supplier shall keep books of account in accordance with IFRS, and have same available for inspection by KDM upon reasonable notice, shall present a report of the same to KDM as and when requested and shall allow KDM to arrange for an audit to be conducted from time to time as may be required by KDM in its discretion and as may be required under any Law.
- 30.4. KDM's rights of access to the books of account shall include the appointment of cost auditors for verification of cost expenditure, or for the purpose of Clause 62 (Change).
- 30.5. The Supplier shall maintain (which shall include the back-up, storage and safe custody of) and/or produce the following records or reports in respect of the Service Area and all the Services:
 - 30.5.1. a full record of all incidents relating to health, safety and security which occur during the Contract Term;
 - 30.5.2. full records of all maintenance procedures carried out during the Contract Term;

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- 30.5.3. full records of all relevant training and instruction by a Subcontractor of its personnel, together with the certificates and record of qualifications pertaining thereto;
 - 30.5.4. a schedule of any changes in the Unitary Payment during the Project Term, whether as a result of being index linked or for any other reason;
 - 30.5.5. organisational charts of the Supplier and Subcontractor personnel; and
 - 30.5.6. a health and hygiene report to be completed every 6 (six) months,
- 30.6. The Supplier shall:
- 30.6.1. have the items listed above available for inspection by KDM upon reasonable notice;
 - 30.6.2. present a report of the same to KDM as and when reasonably requested; and
 - 30.6.3. in respect of the items listed at Clauses 30.1.1 (Reporting Requirements), 30.1.2 (Reporting Requirements) and 30.1.3 (Reporting Requirements), provide KDM, within 5 (five) Business Days of any amendment thereto, with an updated version of that item, reflecting the latest amendments.
 - 30.6.4. The Supplier shall maintain (which shall include the back-up, storage and safe custody of) such records for a period of at least 5 (Five) years after the Expiry Date and make the same available for inspection by KDM as KDM may reasonably require.
- 30.7. Upon the expiry or termination of the PPP Agreement, and if KDM wishes to enter into another agreement for the operation and management of the equipment and facilities needed to undertake the Services, without prejudice to the identity of any new private party, the Supplier shall comply with all reasonable requests of KDM to provide information relating to the Supplier's costs of operating the Services.
- 30.8. The Supplier shall, within 10 (Ten) Business Days of the event occurring, report in writing to KDM details of the following events:
- 30.8.1. any encumbrance, lien or attachment imposed on any of the Supplier's property and any seizure thereof which encumbrance, lien, attachment or seizure materially affects, impedes or obstructs (whether directly or indirectly) the ability of the Supplier to provide the Services;
 - 30.8.2. any transaction in respect of the Equity of the Supplier of which the Supplier is aware;
 - 30.8.3. any default under any Financing Agreement, the circumstances thereof and possible results as viewed by the Supplier; and

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- 30.8.4. the circumstances surrounding any matter which might influence the validity of this PPP Agreement, or any matter that constitutes or might contribute to a Supplier Default, and impact thereof on the Services.
- 30.9. KDM and its employees and agents shall treat any information and/or records provided by the Supplier in terms of this Clause 30, with the utmost confidentiality, and shall not disclose the same to any third parties, other than Agents of KDM who perform the Services in terms of this Clause.

PART I: INSURANCE

31. INSURANCE

- 31.1. The Supplier shall take out and shall thereafter maintain the insurances listed in Schedule 11: Project Insurances and any other insurances in respect of the Project as may be required by law for the periods set out in the aforementioned schedule (the Project Insurances). Each of the Project Insurances listed in Schedule 11: Project Insurances must be taken out and become fully effective by no later than the Effective Date. Each of the Project Insurances (if any) not listed in Schedule 11: Project Insurances, but required by law must be taken out and become fully effective not later than the earliest date as required by the applicable law.
- 31.2. 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.
- 31.3. No Party to this PPP 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.

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- 31.4. The Supplier undertakes that each Project Insurance shall, to the extent allowed by the insurer;
- 31.4.1. without limiting the provisions of clause 31.4.6 below, name the Supplier as the insured;
 - 31.4.2. provide for non-vitiation protection in respect of any claim made by the Municipality as co-insured insofar as and to the extent available. If non-vitiation protection is unavailable when any such insurance policy is first placed, then the Supplier shall procure that the insurance broker investigates whether any non-vitiation protection subsequently becomes available prior to each renewal of the policy and provides written confirmation promptly upon the renewal thereof as to the unavailability thereof to the Municipality. If any non-vitiation protection subsequently becomes available, then the Municipality shall be entitled to require the Supplier to procure such protection and the costs thereof shall be borne by the Private Party;
 - 31.4.3. contain a clause waiving the insurers' subrogation rights against the Municipality, its employees and agents, save in the event that the claim arises out of a negligent act or omission on the part of the Municipality, its employees and agents;
 - 31.4.4. provide for thirty (30) days' prior written notice of its cancellation, non-renewal or amendment to be given to the Municipality;
 - 31.4.5. contain a clause recording that such Project Insurance is a primary insurance and shall not be brought into contribution by any other insurances; and
 - 31.4.6. provide for payment of any proceeds under any of the material damage insurances included in the Project Insurances to be made by the insurers.
- 31.5. The Supplier shall procure that each of the Project Insurances shall note the Municipality's interest.
- 31.6. The Municipality undertakes to comply with the terms of the Project Insurances, as applicable.
- 31.7. The Municipality shall indemnify and hold harmless the Supplier from and against any and all suits, actions, administrative proceedings, claims, fines, losses, demands, costs, charges and expenses of whatsoever nature to the extent arising out of or resulting from any vitiating acts in respect of the Project Insurances.
- 31.8. Any liability for uninsured loss or damage (including any deductibles), shall be borne by the Party responsible for such loss and damage.
- 31.9. The Supplier shall furnish the Municipality, on request, with:

- 31.9.1. true and complete copies of the policies of all the Project Insurances (together with any other information reasonably requested by the Municipality relating to such policies) and the Municipality shall be entitled to inspect them during ordinary business hours; and
- 31.9.2. satisfactory evidence that the premiums due and payable under any such policies have been paid and that the Project Insurances are in full force and effect in accordance with the requirements of this clause.
- 31.10. The Supplier shall, as and when required pursuant to the terms of the relevant policy, renew each Project Insurance for so long as any risk covered thereby exists and shall furnish the Municipality with true and complete copies of each certificate of renewal for such Project Insurance as soon as possible but in any event no less than at least ten (10) days before the relevant renewal date.
- 31.11. If the Supplier breaches clause 31.1 or 31.2 above in relation to any Project Insurance, the Municipality may pay any premiums required to keep such Project Insurance in force and effect, or itself procure such Project Insurance and may recover all premiums or other costs incurred by it in doing so from the Supplier on written demand.
- 31.12. The Supplier shall notify the Municipality within five(5) days after submitting any claim in excess of R75 000.00 (seventy five thousand Rand) (indexed to CPIX) under any of the insurance policies referred to in this clause, accompanied by full details of the event giving rise to the claim.
- 31.13. Neither the failure to comply, nor full compliance with the insurance provisions of this PPP Agreement shall limit or relieve the Supplier of its liabilities and obligations under this PPP Agreement.
- 31.14. the Supplier shall apply any proceeds of any policy of the Project Insurance:
- 31.14.1. in the case of third party legal liability or employer's liability insurance, in satisfaction of the claim, demand, proceeding or liability in respect of which the proceeds are payable; and
- 31.14.2. in the case of any other Project Insurance, so as to ensure the performance by the Supplier of its obligations under this PPP Agreement.
- 31.15. The Supplier shall bear the risk of any shortfall in the proceeds of any Project Insurance.
- 31.16. To the extent that the Municipality receives any proceeds of any Project Insurance, then the Municipality shall pay such proceeds to the Supplier and shall not be entitled to deduct such proceeds from any Termination Amount.

31.17. Insofar as any proceeds of any Project Insurance are paid to the Municipality, as co-insured, the Municipality shall pay such proceeds to the Supplier which shall utilise such proceeds to reinstate, repair or replace the Facilities or any Project Asset, the benefit received under such Project Insurance shall not be deducted from a Termination Amount.

31.18. Uninsurable Risk

31.18.1. if Insurance is no longer available from a reputable insurer if a risk usually covered by the Project Insurances in Schedule 11: Project Insurances, becomes Uninsurable. The Supplier shall notify the Municipality within thirty (30) days of the risk becoming uninsurable.

31.18.2. If both Parties agree, or it is determined in accordance with clause 46 (Fast-track Dispute Resolution), that:

31.18.2.1. the risk is Uninsurable;

31.18.2.2. the risk being Uninsurable is not caused by the actions or omissions of the Supplier or a Subcontractor; then the Parties shall meet to discuss the means by which the risk should be managed.

31.18.3. The Supplier shall bear the onus of proving the circumstances in clause 31.14.1 and its sub-clauses.

31.18.4. If the requirements of clauses 31.14.1 and 31.14.2. are met:

31.18.4.1. this PPP Agreement shall continue in force and effect;

31.18.4.2. the Unitary Payment shall be reduced by an amount equal to the premium previously payable in respect of the Uninsurable risk in accordance with the Base Case Financial Model; and

31.18.4.3. on the occurrence of the risk (but only if that risk has continued to be Uninsurable) the Municipality shall, at the Municipality's option, either pay:

31.18.4.3.1. to the Supplier an amount equal to the insurance proceeds that would have been payable had the risk continued to be insurable, in which event this PPP Agreement will continue;
or

31.18.4.3.2. an amount equal to the amount set out in clause 49 (Compensation on Termination for Force Majeure) and this PPP Agreement will terminate as if for Force Majeure.

- 31.18.5. Where a risk which was previously Uninsurable ceases to be Uninsurable, the Supplier shall procure and maintain insurance in respect of that risk and the Unitary Payment shall be increased by an amount equal to the premium payable in respect of the previously Uninsurable risk. If the risk that would usually be covered by the Project Insurances becomes Uninsurable and is also a Relief Event, then the provisions of this clause 13.14 (Uninsurable Risks) together with the provisions of clause 32 (Consequences of a Relief Event) shall apply in the event that such risk occurs, Neither the failure to comply, nor full compliance with the insurance provisions of this PPP Agreement shall limit or relieve the Supplier of its liabilities and obligations under this PPP Agreement.
- 31.18.6. The Supplier shall apply any proceeds of any policy of the Project Insurance:
- 31.18.6.1. in the case of third party legal liability or employer's liability insurance, in satisfaction of the claim, demand, proceeding or liability in respect of which the proceeds are payable; and
- 31.18.6.2. in the case of any other Project Insurance, so as to ensure the performance by the Supplier of its obligations under this PPP Agreement.
- 31.18.7. The Supplier shall bear the risk of any shortfall in the proceeds of any Project Insurance.
- 31.18.8. To the extent that the Municipality receives any proceeds of any Project Insurance, then the Municipality shall pay such proceeds to the Supplier and shall not be entitled to deduct such proceeds from any Termination Amount.
- 31.18.9. Insofar as any proceeds of any Project Insurance are paid to KDM as co-insured, KDM shall pay such proceeds to the Supplier which shall utilise such proceeds to reinstate, repair or replace the Facilities or any Project Asset, the benefit received under such Project Insurance shall not be deducted from a Termination Amount.

PART J: RELIEF EVENTS, COMPENSATION EVENTS AND FORCE MAJEURE

32. CONSEQUENCES OF A RELIEF EVENT

A Relief Event means any event as set out under clause 1 (definition section)

- 32.1. If and to the extent that a Relief Event:
- 32.1.1. Directly causes a delay in Service Commencement; and/ or
- 32.1.2. Materially adversely affects the ability of the Supplier to perform any of its obligations under this PPP Agreement, then the Supplier shall be entitled to apply for relief from any rights of KDM arising under clause 47 (Breach) or in respect of Deductions and shall, in the case of clause 32.1.2, continue to receive the Unitary Payment.

- 32.2. To obtain relief, the Supplier must:
- 32.2.1. as soon as practicable, and in any event within ten (10) Business Days after it became aware that the Relief Event has caused or is likely to cause delay and/or materially adversely affect the ability of the Supplier to perform its other obligations, give to KDM a notice of its claim for relief from its obligations under this PPP Agreement, including full details of the nature of the Relief Event, the date of occurrence and its likely duration;
 - 32.2.2. within twenty (20) Business Days of receipt by KDM of the notice referred to in clause 32.2.1 above, give full details of the relief claimed; and
 - 32.2.3. demonstrate to the reasonable satisfaction of KDM that:
 - 32.2.4. the Supplier and 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;
 - 32.2.5. the Relief Event was the primary cause of the delay to the Scheduled Service Commencement Date or the need for relief from other obligations under this PPP Agreement;
 - 32.2.6. the time lost and/or relief from the obligations under this PPP Agreement claimed could not reasonably be expected to be mitigated or recovered by the Supplier acting in accordance with Good Industry Practice, without incurring material expenditure; and
 - 32.2.7. the Supplier is using reasonable endeavours to perform its obligations under this PPP Agreement.
- 32.3. In the event that the Supplier has complied with its obligations under clause 32.2 above, then:
- 32.3.1. 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 delay; and/or
 - 32.3.2. KDM shall not be entitled to exercise its rights to terminate this PPP Agreement under clause 47 (Breach) and, subject to clause 32.4 below, shall give such other relief as has been requested by the Supplier and agreed between the Parties or decided pursuant to clause 46 (Fast-track Dispute Resolution).
- 32.4. Nothing in clause 32.3 above shall affect any entitlement to make Penalty Deductions or any deductions made in accordance with PART H: PAYMENTS AND FINANCIAL MATTERS during the period in which the Relief Event is subsisting where the right to make deductions arose prior to the happening of the Relief Event.

- 32.5. In the event that information required by clause 32.2 above is provided after the dates referred to in that clause, then the Supplier shall not be entitled to any relief during the period for which the information is delayed.
- 32.6. The Supplier shall notify KDM 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.
- 32.7. In the event of a Relief Event as defined in clause 1 (definition section) that continues for a period in excess of one hundred and eighty (180) days, the Parties shall meet in order to find a mutually satisfactory solution for dealing with such prolonged Relief Event.
- 32.8. If the Parties cannot agree on the extent of the relief required, or KDM disagrees that a Relief Event has occurred or that the Supplier is entitled to any extension of the Scheduled Service Commencement Date and/or relief from other obligations under this PPP Agreement, the Parties shall resolve the matter in accordance with clause 46 (Fast-track Dispute Resolution).

33. CONSEQUENCES OF A COMPENSATION EVENT

A Compensation Event means any event as set out under clause 1 (definition section)

- 33.1. If, as a direct result of the occurrence of a Compensation Event:
- 33.1.1. the Supplier is unable to achieve Service Commencement on or before the Scheduled Service Commencement Date;
 - 33.1.2. the Supplier is unable to comply with its obligations under this PPP Agreement; and/or
 - 33.1.3. the Supplier incurs costs or loses revenue,
- then the Supplier is entitled to apply for relief from its obligations and/or claim compensation under this PPP Agreement.
- 33.2. To obtain relief and/or claim compensation the Supplier must:
- 33.2.1. as soon as practicable, and in any event within ten (10) Business Days after it became aware that the Compensation Event has caused or is likely to cause delay, breach of an obligation under this PPP Agreement and/or the Supplier to incur costs or lose revenue, give to KDM a notice of its claim for an extension of time for Service Commencement, payment of compensation and/or relief from its obligations under this PPP Agreement;
 - 33.2.2. within twenty (20) Business Days of receipt by KDM of the notice referred to in clause 33.2.1 above, give full details of the Compensation Event and

- the extension of time and/or any estimated change in Project costs claimed;
and
- 33.2.3. demonstrate to the reasonable satisfaction of KDM that:
- 33.2.4. the Compensation Event was the primary cause of the estimated change in Project costs and/or any delay in the achievement of the Scheduled Service Commencement Date; and
- 33.2.5. the estimated change in Project costs, time or revenue lost, and/or relief from the obligations under the PPP Agreement claimed, could not reasonably be expected to be mitigated or recovered by the Supplier acting in accordance with Good Industry Practice.
- 33.3. In the event that the Supplier has complied with its obligations under clause 33.2 above, then:
- 33.3.1. 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 delay; and
- 33.3.2. in the case of an additional cost being incurred by the Supplier or the Supplier losing any revenue;
- 33.3.3. on or before the Service Commencement Date; or
- 33.3.4. as a result of Capital Expenditure being incurred by the Supplier at any time,
- 33.3.5. KDM shall compensate the Supplier for the actual estimated change in Project costs, loss of revenue, Capital Expenditure incurred, within thirty (30) Business Days of its receipt of a written demand by the Supplier supported by all relevant information;
- 33.3.6. in the case of a payment of compensation for the estimated change in Project costs that does not result in Capital Expenditure being incurred by the Supplier but which reflects a change in the costs being incurred by the Supplier after the Service Commencement Date, KDM shall compensate the Supplier in accordance with clause 33.6 below by an adjustment to the Unitary Payment; and /or
- 33.3.7. KDM shall give the Supplier such relief from its obligations under this PPP Agreement, as is reasonable for such a Compensation Event.
- 33.4. In the event that information is provided after the dates referred to in clause 33.2 above, then the Supplier shall not be entitled to any extension of time, compensation, or relief from its obligations under this PPP Agreement in respect of the period for which the information is delayed.

- 33.5. If the Parties cannot agree on the extent of any compensation, delay incurred, or relief from the Supplier's obligations under this PPP Agreement, or KDM disagrees that a Compensation Event has occurred (or as to its consequences), or that the Supplier is entitled to any relief under this clause, the Parties shall resolve the matter in accordance with clause 46 (Fast-track Dispute Resolution).
- 33.6. Any payment of compensation referred to in Section 33.3.6 above shall be calculated so as to ensure that the Supplier is not placed in a better or worse position following the occurrence of a Compensation Event).

34. FORCE MAJEURE

Force Majeure means any event as set out in clause 1 (definition section)

- 34.1. Subject to clauses 34.2.1 and 34.2.2, the Party claiming relief shall be relieved from liability under this PPP 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 PPP Agreement.
- 34.2. Where a Party is (or claims to be) affected by an event of Force Majeure:
- 34.2.1. it shall take all reasonable steps to mitigate the consequences of such an event upon the performance of its obligations under this PPP Agreement, resume performance of its obligations affected by the event of Force Majeure as soon as practicable and use all reasonable endeavours to remedy its failure to perform; and
- 34.2.2. it shall be relieved from liability under this PPP Agreement to the extent that it is not able to perform, or has not in fact performed, its obligations under this PPP Agreement due to its failure to comply with its obligations under sub-clause 34.2.1.
- 34.3. The Party claiming relief shall serve written notice on the other Party within ten (10) Business Days of it becoming aware of the relevant event of Force Majeure. Such initial notice shall give sufficient details to identify the particular event claimed to be an event of Force Majeure.
- 34.4. A subsequent written notice shall be served by the Party claiming relief on the other Party within a further twenty (20) Business Days which shall contain such relevant information relating to the failure to perform (or delay in performing) as is available, including (without limitation) the effect of the event of Force Majeure on the ability of the Party to perform, the action being taken in accordance with clause 34.2.1, the date of the occurrence of the event of Force Majeure and an estimate of the period of time required to overcome it (and/or its effects) including taking into account any customary builder holidays occurring during such period (if applicable).

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- 34.5. The Party claiming relief shall notify the other as soon as the consequences of the event of Force Majeure have ceased and when performance of its affected obligations can be resumed.
- 34.6. If, following the issue of any notice referred to in clause 34.4, the Party claiming relief receives or becomes aware of any further information relating to the event of Force Majeure (and/or any failure to perform), it shall submit such further information to the other Party as soon as reasonably possible.
- 34.7. During the continuance of any event of Force Majeure which occurs on or after the Service Commencement Date the Unitary Payment payable in respect of such period shall be reduced to an amount equivalent to (a) the Unitary Payments payable in respect of those Services that are Available to the Municipality during such period after taking account of the effects of such event of Force Majeure and no Deduction shall be effected to the extent any rights to make such Deductions arises from facts or circumstances covered by an event of Force Majeure plus (b) so much of the Unitary Payment as is required to be paid so as to prevent the Default Cover Ratios (as defined in the Financing Agreement) from being breached.
- 34.8. If an event of Force Majeure occurs before the Service Commencement Date and as a result thereof the Supplier is unable to achieve Service Commencement on or before the Scheduled Service Effective Date and the Supplier has complied with its obligation under this clause,
- 34.8.1. the relevant Scheduled Service Commencement Date shall be postponed by such time as shall be reasonable for such event of Force Majeure, taking into account the likely effect of delay; and
- 34.8.2. the Supplier shall not be entitled to receive any payment in respect of the Unitary Payment in respect of the Services not being performed during the occurrence of the event of Force Majeure.
- 34.9. The Supplier'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.
- 34.10. The Parties shall endeavour to agree any modifications to this PPP Agreement which may be equitable having regard to the nature of an event or events of Force Majeure. Clause 46 (Fast-track Dispute Resolution) shall not apply to a failure of KDM and the Supplier to reach agreement pursuant to this sub-clause.

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PART K: UNFORESEEABLE DISCRIMINATORY GOVERNMENT CONDUCT AND VARIATIONS

35. UNFORESEEABLE CONDUCT

- 35.1. Should any Unforeseeable Conduct occur which materially and adversely affects the general financial and economic position of the Supplier, the Supplier shall be entitled to such compensation and/or relief from KDM as shall place the Supplier in the same overall financial and economic position as the Supplier would have been in but for such unforeseeable Conduct.
- 35.2. Should any Unforeseeable Conduct occur which materially beneficially affects the general economic position of the Supplier, the Supplier shall pay the value of such benefit, upon that benefit becoming available to the Supplier in the form of cash revenues, to KDM so that the Supplier remains in the same overall economic position it would have been in had the materially beneficial Unforeseeable Conduct not occurred.
- 35.3. The Party claiming the occurrence of the Unforeseeable Conduct (**Claiming Party**) shall give written notice to the other Party (**Receiving Party**) containing reasonable particulars of such conduct and its likely economic consequences to the Supplier.
- 35.4. The Receiving Party shall have sixty (60) 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 Supplier to that which it would have been in if such Unforeseeable Conduct had not occurred. If the Receiving Party does not affect such a remedy within such period, the Parties shall consult within ten (10) Business Days after the expiration of such period with a view to reaching a mutually satisfactory resolution of the situation. In the event that a mutually satisfactory resolution has not been reached within such ten (10) Business Day consultation period, the matter shall be dealt with in accordance with clause 44 (Dispute Resolution) for a determination to be made in respect of:
- 35.4.1. an appropriate extension of time as may be fair and reasonable under the circumstances and/or
- 35.4.2. any monetary relief as may be fair and reasonable under the circumstances; and/or
- 35.4.3. termination of the PPP Agreement where any other remedy under this clause shall not be sufficient to place the Supplier in the same position as it would have been, had the Unforeseeable Conduct not taken place in which event the Termination Date shall be the date specified in the determination in terms of clause 46 (Fast-track Dispute Resolution), or

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failing such specification, the earliest date specified by either Party on written notice to the other Party, and the compensation payable to the Supplier for termination in such circumstances shall be equal to the amount the Supplier would have received had the PPP Agreement been terminated for a Force Majeure as calculated under clause 49 (*Compensation on Termination for Force Majeure*).

- 35.5. In so far as the Supplier is the Claiming Party, it shall use all reasonable endeavours to minimise and mitigate the effects of any Unforeseeable Conduct.

36. **VARIATION**

Small Works Variations

- 36.1. At least twenty (20) days prior to each subsequent PPP Agreement year, the Supplier shall propose a schedule of rates to be agreed with KDM (the **Small Works Rates**), such agreed rates to be applied in respect of any request from KDM for Small Works to be completed during that PPP Agreement year. The value of any Small Works shall be calculated on the basis that:
- 36.1.1. the labour element shall be calculated in accordance with rates which are fair and reasonable; and
 - 36.1.2. the materials element shall be charged at the cost of the materials to the Supplier or to the party carrying out the work (net of all discounts) plus 10%.
 - 36.1.3. The Supplier and KDM shall agree the timing of any Small Works, so as to minimise any inconvenience to KDM. The Supplier shall take all reasonable steps to minimise the duration of any Small Works.
 - 36.1.4. Any dispute between the Parties relating to Small Works shall be determined by Independent Expert in accordance with clause 46 (Fast-track Dispute Resolution).

KDM Variations

- 36.1.5. KDM has the right to propose Variations to the Project Deliverables, in accordance with this clause. KDM shall not propose a Variation which:
- 36.1.5.1. requires the Services to be performed in a way that infringes any Law or is inconsistent with Good Industry Practice;
 - 36.1.5.2. would cause any Consent to be revoked (or be unobtainable);
 - 36.1.5.3. would, if implemented, result in a change in the nature of the Project; or

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- 36.1.5.4. would materially and adversely affect the Works or Services in a way that is not compensated for.
- 36.1.5.5. and any dispute or uncertainty as to whether any proposed Variation will have any such effect may be referred by either Party for resolution by the independent expert in accordance with clause 46 (Fast-track Dispute Resolution).
- 36.1.5.6. If KDM requires a Variation to the Project Deliverables, it must serve a notice on the Supplier detailing the requested Variation (a **KDM Variation Proposal**).
- 36.1.6. KDM Variation Proposal shall set out the Variation required in sufficient detail as to enable the Supplier to calculate and provide the estimated revised Project costs, Unitary Payment and where necessary a revised Service Commencement Date and any other relevant dates that may require revision as a result of such Variation, in accordance with clause 36.1.7 below (the **Estimate**).
- 36.1.7. As soon as practicable and in any event within thirty (30) Business Days after having received KDM Variation Proposal, the Supplier shall, subject to clause 36.1.12 deliver the Estimate to KDM. The Estimate shall include the opinion of the Supplier on:
 - 36.1.7.1. whether relief from compliance with its obligations is required, including the obligations of the Supplier to achieve the Scheduled Service Commencement Date and meet the performance regime during the implementation of the Variation;
 - 36.1.7.2. any impact on the Scheduled Service Commencement Date;
 - 36.1.7.3. any impact on the provision of the Services;
 - 36.1.7.4. any amendment required to this PPP Agreement and/or any Project Document as a result of the Variation;
 - 36.1.7.5. any estimated revised Project costs and Unitary Payment that result directly from the Variation;
 - 36.1.7.6. any loss of revenue that will result directly from the Variation;
 - 36.1.7.7. any Capital Expenditure or Operating Expenditure that is required or no longer required as a result of the Variation;
 - 36.1.7.8. any regulatory approvals or Consents which are required;
 - 36.1.7.9. the proposed method of certification of any Works or operational aspects of the Variations required by KDM Variation Proposal; and

- 36.1.8. Subject to clause 36.1.27, as soon as practicable after KDM receives the Estimate, the Parties shall discuss and agree the issues set out in the Estimate. The Supplier shall:
- 36.1.8.1. provide evidence that it has used reasonable endeavours (including (where practicable) the use of competitive quotes) to oblige its Subcontractors to minimise any increase in costs and maximise any reduction in costs;
 - 36.1.8.2. demonstrate how any Capital Expenditure to be incurred or avoided is being measured in a cost-effective manner; and
 - 36.1.8.3. demonstrate that any expenditure that has been avoided, which was anticipated to be incurred to replace or maintain assets that have been affected by KDM Variation concerned, has been taken into account in the amount which in its opinion has resulted or is required under Clauses 36.1.7 and/or 36.1.7.5 above. In such discussions KDM may modify KDM Variation Proposal and (if the estimated increase in Capital Expenditure in respect of the Variation is expected to exceed R1 000 000.00 (one million Rand) (indexed to CPIX) and it is practicable for the Supplier to do so), KDM may require the Supplier to seek and evaluate competitive tenders for the relevant capital works. In each case the Supplier shall, as soon as practicable, and in any event not more than ten (10) Business Days after receipt of such modification, notify KDM of any consequential changes to the Estimate.
- 36.1.9. The Supplier 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 Supplier 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.
- 36.1.10. If the Parties cannot agree on the contents of the Estimate, then the dispute will be determined in accordance with clause 46 (Fast-track Dispute Resolution) provided that any matter referred for resolution to fast-track dispute resolution shall be referred on the basis that the Independent Expert in making its determination shall not place the Supplier in a better or worse position than prior to such KDM Variation.

- 36.1.11. As soon as practicable after the contents of the Estimate have been agreed or otherwise determined pursuant to clause 46 (Fast-track Dispute Resolution), KDM shall:
- 36.1.11.1. confirm the Estimate (as modified) in writing; or
 - 36.1.11.2. withdraw KDM Variation Proposal.
- 36.1.12. Notwithstanding the other provisions contained under **KDM Variations** above:
- 36.1.12.1. if, on receipt of KDM Variation Proposal pursuant to clause 36.1.5, the Supplier is of the opinion that such Variation is likely to result in an increase in the Project risk or its financial risk or to generally adversely affect the risk profile of the Supplier, it shall, as soon as practical and in any event within ten (10) Business Days after having received the Municipality Variation Proposal, serve a notice on the Municipality stating its opinion and the reasons therefor; and
 - 36.1.12.2. the Parties shall meet as soon as practical and in any event within ten (10) Business Days of receipt of such notice. If the Parties agree that such Variation is likely to increase the Project risk or the Supplier's financial risk or to generally adversely affect the risk profile of the Supplier, KDM Variation Proposal shall be withdrawn. If the Parties are unable to agree on the likely effects of KDM Variation Proposal, either Party may refer the matter to an Independent Expert pursuant to clause 46 (Fast-track Dispute Resolution). If it is determined by the Independent Expert that the Municipality Variation Proposal will increase the Project risk, financial risk or generally adversely affect the risk profile of the Supplier, KDM Variation Proposal shall be deemed to have been withdrawn.
- 36.1.13. If KDM does not confirm the Estimate (as modified) in writing within twenty (20) Business Days of the contents of the Estimate having been agreed in accordance with clause 36.1.8 or determined pursuant to clause 36.1.10, then KDM Variation Proposal shall be deemed to have been withdrawn.
- 36.1.14. In the event that the Estimate (as modified) involves estimated Capital Expenditure then the Supplier shall use its reasonable endeavours to obtain funding for the whole of the estimated Capital Expenditure, on terms reasonably satisfactory to it and KDM.

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- 36.1.15. KDM may, at any time following the date on which the Estimate is confirmed, agree to meet all or, to the extent the Supplier has obtained funding for only part of the Capital Expenditure, the remaining part of the Capital Expenditure.
- 36.1.16. In the event that the Estimate has been confirmed by KDM, then the Unitary Payment shall be adjusted in accordance with the Estimate.
- 36.1.17. At the same time that the Supplier gives the Estimate, it shall also provide KDM with a proposal as to whether the Financial Model should change, and if so, how. If KDM accepts the proposal, the Financial Model shall be adjusted as proposed and concomitantly therewith the Unitary Payment shall be adjusted as contemplated in the revised Financial Model. If KDM rejects such proposal and the Parties are unable to agree the required changes to the Financial Model within 20 (twenty) Business Days of KDM's rejection of the Supplier's proposal, KDM Variation Proposal shall be withdrawn.
- 36.1.18. KDM and Supplier shall agree:
- 36.1.18.1. a payment schedule in respect of the payment of such sum reflecting the amount and timing of the costs to be incurred by the Supplier in carrying out the Variation to the extent borne by KDM; and
 - 36.1.18.2. 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, (such payment schedule and evidence to be determined by an Independent Expert in accordance with clause 46 (Fast-track Dispute Resolution) in the event of KDM and Supplier failing to agree as to its terms);
 - 36.1.18.3. KDM shall make payment to the Supplier within thirty (30) days of receipt by KDM of invoices/statements 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

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- 36.1.18.4. if payment is not made in accordance with sub-clause 36.1.20.3, KDM shall pay interest to the Supplier on the amount unpaid from the date thirty (30) days after receipt of the relevant invoice/statement until paid, at the Default Interest Rate.
- 36.1.19. Notwithstanding any provision to the contrary, it is recorded that any KDM Variation Proposal or Estimate resulting in a material increase to the monthly Unitary Payment will require authorisation by the Council of KDM in compliance with the provisions of the MFMA and MSA. The Supplier shall not carry out KDM Variation until such authorisation is granted.

Supplier Variations

- 36.1.20. If the Supplier wishes to introduce a Variation, it must serve a notice on KDM providing details of such Variation (a **Supplier Variation Proposal**).
- 36.1.21. The Supplier Variation Proposal must:
- 36.1.21.1. set out the proposed Variation in sufficient detail to enable the Municipality to evaluate it in full;
 - 36.1.21.2. specify the Supplier's reasons for the Supplier Variation Proposal;
 - 36.1.21.3. request KDM to consult with the Supplier with a view to deciding whether to agree to the Supplier Variation Proposal and, if so, what consequential changes KDM requires as a result;
 - 36.1.21.4. specify all implications of the Supplier Variation Proposal on this PPP Agreement and any of its terms;
 - 36.1.21.5. indicate, in particular, whether a Variation to the Unitary Payments is proposed (and, if so, give a detailed cost estimate of such proposed Variation); and
 - 36.1.21.6. indicate if there are any dates by which a decision by KDM is critical.
- 36.1.22. KDM shall evaluate the Supplier's Variation Proposal taking into account all relevant issues, including whether:
- 36.1.22.1. a change in the Unitary Payments will occur;
 - 36.1.22.2. the Variation will affect the quality or successful delivery of the Services;

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- 36.1.22.3. the Variation will interfere with the relationship of the Municipality with third parties;
- 36.1.22.4. the financial strength of the Supplier is sufficient to perform the Variation;
- 36.1.22.5. the residual value of the Project Assets is reduced; and
- 36.1.22.6. the Variation materially affects the risks or costs to which KDM is exposed;
- 36.1.22.7. if an amendment to this PPP Agreement and any Project Document is required as a result thereof;
- 36.1.23. As soon as practicable after receiving the Supplier Variation Proposal, the Parties shall meet and discuss the matters referred to in it. During their discussions KDM may propose modifications or accept or reject the Supplier Variation Proposal.
- 36.1.24. Subject to clause 36.1.29, if KDM accepts the Supplier Variation Proposal (with or without modification), the Supplier shall begin to implement the relevant changes arising from the Variation within twenty (20) Business Days (or such longer period as the Parties agree) of KDM's acceptance. Within this period, the Parties shall consult and agree the remaining details as soon as practicable and shall enter into any documents to amend this PPP Agreement or any relevant Project Document, which are necessary to give effect to the Variation.
- 36.1.25. If KDM rejects the Supplier Variation Proposal, it shall not be obliged to give its reasons for such a rejection.
- 36.1.26. Unless KDM's acceptance specifically agrees to an increase in the Unitary Payments, the Supplier shall be deemed to have withdrawn the Supplier Variation Proposal and the Supplier shall be under no obligation to proceed with the Variation, unless the Supplier indicates, within 20 (twenty) Business Days of it being notified by KDM that the Supplier is prepared to carry out the Variation without an increase in the Unitary Payments.
- 36.1.27. If the Supplier Variation Proposal causes or will cause the Supplier's costs or those of a Subcontractor to decrease, there shall be a decrease in the Unitary Payments in a manner that ensures an equitable sharing in any cost saving by the Supplier and/or the Subcontractors.
- 36.1.28. Notwithstanding any provision to the contrary, it is recorded that any Supplier Variation Proposal or Estimate resulting in a material increase to the monthly Unitary Payment will require authorisation by the Council of

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KDM in compliance with the provisions of the MFMA and MSA. The Supplier will not commence with the Supplier Variation until such authorisation has been granted.

- 36.2. The provisions of the Electronic Communications and Transactions Act, No. 25 of 2002 are expressly excluded from this variation clause.

PART L: EMPLOYEMENT

37. SUPPLIER PERSONNEL

- 37.1. The Supplier shall at all times ensure that sufficient suitable and appropriately qualified and experienced personnel will be employed (whether by the Supplier or its Subcontractors) to undertake the Project Deliverables and that such personnel shall be located in the Republic of South Africa. Without limiting the generality of the foregoing, the Supplier shall ensure that all key personnel positions are always filled as soon as reasonably possible.
- 37.2. KDM may require the Supplier to remove any employee or other personnel of the Supplier or any Subcontractor from the Project Site and the Supplier shall do so (provided such removal is permitted under applicable law) if in the reasonable opinion of KDM such employee or personnel engages in any conduct which might reasonably result in a breach of any provision of this PPP Agreement or threaten public health, safety or security, and the Supplier shall as soon as reasonably possible replace such employee or personnel with suitable appropriately qualified and experienced replacements (provided such replacement is permitted under applicable law).
- 37.3. The Supplier shall designate a Contact Person who shall devote sufficient business time overseeing and ensuring the proper performance of the Services.
- 37.4. The Supplier's Contact Person:
- 37.4.1. shall be the primary contact for KDM in dealing with the Supplier in respect of the Services;
 - 37.4.2. shall have overall responsibility for managing and coordinating the delivery of the Services;
 - 37.4.3. shall meet regularly with KDM's Contact Person, and make presentations to the and
 - 37.4.4. shall have the power and authority to make decisions with respect to actions to be taken by the Supplier in the ordinary course of day-to-day management of the Services in accordance with this Agreement.

- 37.5. For the purposes of sub-clause 37.4.2 above, such Contact Person may designate in writing a reasonable number of additional employees of the Supplier to be points of contact for KDM with respect to particular matters of expertise relating to the Services.
- 37.6. KDM shall designate in writing a Contact Person who shall be authorised to act as KDM's primary contact for the Supplier in dealing with KDM in relation to the Services and who shall have the power and authority to make decisions with respect to actions to be taken by KDM in the ordinary course of day-to-day management of the Services.
- 37.7. For the purposes of sub-clause 37.6 above, such Contact Person may designate in writing a reasonable number of additional KDM employees to be points of contact for the Supplier with respect to particular matters of expertise relating to the Services.

PART M: BLACK ECONOMIC EMPOWERMENT

38. BLACK EQUITY IN THE SUPPLIER

38.1. The Supplier shall ensure that: -

- 38.1.1. for a period of 10 (Ten) years, no less than 51% (Fifty One per cent) 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;
- 38.1.2. for a period of 10 (Ten) years, not less than 51% (Fifty-One per cent) of the Black Equity shall be held as Active Equity on the terms set out in paragraph 6.2 of the Tender document;
- 38.1.3. the Black Shareholders shall be entitled to earn a return on their investment in the Project consistent with the returns forecast in the Financial Model through their participation in the dividends and other distribution declared by the Supplier from time to time in respect of the Equity; and
- 38.1.4. the payment made to the Shareholders in respect of the Shareholder Loans.

38.2. The Supplier shall furnish KDM annually within 90 (Ninety) Business Days after the end of each Financial year of the Supplier, a report certified by the Supplier's Auditors ("Annual BEE Report") setting forth, in relation to each Shareholder:

- 38.2.1. 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);

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- 38.2.2. the voting rights attaching to all classes of Equity owned by that Shareholder in that financial year.

39. SUPPLIER'S MANAGEMENT AND EMPLOYMENT EQUITY

- 39.1. The Supplier shall reasonably ensure that: -

39.1.1. the Supplier shall comply with the Employment Equity Act, 1998 and implement its current employment equity plan, as substituted from time to time in accordance with that Act;

- 39.1.2. the Supplier shall furnish KDM with:

39.1.2.1. any employment equity plan submitted by the Supplier in accordance with that Act within 90 (Ninety) days following the date of submission of that plan; and

39.1.2.2. a Supplier shall implement its skills development plan and, shall apply no less than amount (the "Annual Skills Development Commitment") equal to 10 percentage of its annual payroll expenditure in any financial year towards the costs of implementing its skills development targets for that financial year;

39.1.2.3. The Supplier shall include in its Annual BEE Report for each financial year:

39.1.2.4. a complete statement of all targets set forth in the skills development plan for that financial year that have been achieved by the Supplier in that financial year, together with details of the costs incurred by the Supplier in that financial year in respect of such targets;

39.1.2.5. 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 Supplier in that financial year, together with the Supplier's reasons for not achieving these targets; and

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

40. SUBCONTRACTING

- 40.1. It is a mandatory requirement of this contract that the Supplier will subcontract waste collection services in informal areas (areas without heavy vehicle access), to Community Based Contracts, within 90 days of the effective date.
- 40.2. Any subcontractors appointed by way of Community Based Contracts must ensure that the aims of such contracts, include, amongst other, to:
 - 40.2.1. Encourage and promote the involvement of members of the community in the care and upliftment of their living environment;
 - 40.2.2. Enhance the quality of life of members of the community, and in so doing, provide employment opportunities and contribute towards poverty alleviation;
 - 40.2.3. Create and sustain commercially viable, profit making and job creating refuse removal enterprises.
- 40.3. The scope of works for Community Based Contracts appointed as subcontractors must, amongst others, be to:
 - 40.3.1. Establish refuse collection points;
 - 40.3.2. Collect full refuse bags and transport to a suitable bulk collection point (if skips are to be used), or to the Transfer Station;
 - 40.3.3. Collect and remove litter from public areas; and
 - 40.3.4. Remove illegal dumps and animal carcasses, as instructed.
- 40.4. The Supplier must ensure that:
 - 40.4.1. no less than 35% (Thirty five percent) of the total Capital Expenditure forecast in the Financial Model to be incurred by the Supplier shall be expended under Subcontracts in which Black People and /or Black Enterprises will participate in the manner described in paragraph 6.2 of the Tender document;
 - 40.4.2. no less than 35% (Thirty five percent) of the total Operating Expenditure forecast in the Financial Model to be incurred by the Supplier be expended under Subcontracts in which Black People and /or Black Enterprises will participate in the manner described Schedule 2;
 - 40.4.3. not less than 51% (Fifty-One per cent) of each subcontractor, the senior management and executive appointments, shall be filled by Black Persons and, that the percentage proportion of Black People in such appointments shall increase by no less than 10% (Ten per cent) every period thereafter until the end of the Term of this Contract; and
 - 40.4.4. the minimum number of positions of 15% (Fifteen per cent) of the total number of black people, are to, if reasonably possible to be filled by Black Women;

- 40.4.5. each Subcontractor shall endeavour to implement that Subcontractor's current employment equity plan, as substituted from time to time in accordance with the Employment Equity Act, 1998;
- 40.4.6. the Supplier must furnish KDM with or cause KDM to be furnished with:
 - 40.4.6.1. each successive employment equity plan submitted by that subcontractor in terms of that Act within 90 (Ninety) days following the date of submission of that plan; and
 - 40.4.6.2. a copy of each report submitted by that Subcontractor to the Department of Labour (or its successor) pursuant to Section 21 of that Act within 90 (Ninety) days following the date of submission of that report;
 - 40.4.6.3. each Subcontractor shall meet the annual skills development targets to be set forth in a Schedule hereto and shall apply no less than an amount equal to 15% (Fifteen per cent) of that Subcontractor's annual payroll expenditure in any financial year toward the cost of implementing its skills development targets for that financial year; and
 - 40.4.6.4. each Subcontractor shall expend no less than 30% (Thirty per cent) of the total procurement budget of that Subcontractor in respect of the Project under procurement contracts with SMMEs.
- 40.5. In addition to the above, the Supplier shall furnish KDM, through the Steering Committee of the Project, on a quarterly basis, with a report detailing its spend on Subcontractors and its compliance with the provisions of this PPP Agreement in relation to empowerment and its BBBEE mandates.

41. BBBEE LEGISLATION

- 41.1. The Supplier shall assist KDM to comply with the procurement provisions contained in the Codes of Good Practice on Broad Based Black Economic Empowerment and/or any code issued in terms of section 9(1) of the Broad Based Black Economic Empowerment Act, 2003 ("BEE") (collectively "BBBEE Legislation").
- 41.2. Without limiting the Supplier's obligations in terms of this clause (BBBEE Legislation), the Supplier shall:
 - 41.2.1. for the Project Term retain and/or improve its BBBEE Rating;
 - 41.2.2. provide KDM with annual updates on its status in respect of BEE compliance requirements and confirmation that it has maintained/improved its BEE Rating;

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- 41.2.3. advise KDM if its BEE Rating changes materially from the BEE Rating as at the Effective Date within a period of 2 (Two) weeks from the date on which the event giving rise to the material change in the BEE Rating occurs; and
- 41.2.4. in the event of an adverse change to its BEE Rating, the Supplier shall advise KDM within a period of 1 (one) month from the date on which the event giving rise to the adverse change in the BEE Rating occurs, what steps have and/or will be taken by the Supplier to restore the original BEE Rating.
- 41.3. The Supplier acknowledges and warrants that it has read and is fully conversant with and shall strictly comply (where applicable to it) with, the BBBEE Legislation.
- 41.4. The Supplier acknowledges and agrees that any act that constitutes a breach of its obligations in this clause (BBBEE Legislation) shall be deemed a material breach of this Agreement.

42. BUSINESS ENTERPRISE DEVELOPMENT & EMPOWERMENT

- 42.1. The parties shall reasonably endeavour to ensure, through the provision of the services that there is Business Enterprise Development and Empowerment, as envisaged in Clause 39 and 40 above.

43. CO-OPERATION WITH OTHER VENDORS

- 43.1. The Supplier shall, where reasonably requested by KDM, co-operate with any other competent and legitimate Vendors in connection with the Services.
- 43.2. The Supplier's obligation under this clause shall apply on an ongoing and continuing basis throughout the Term and shall include:
 - 43.2.1. providing such co-operation as KDM may reasonably require it to provide in connection with the Services;
 - 43.2.2. providing such reasonable information within a reasonable period as any other Vendor may reasonably require (where it is reasonable to do so) in connection with the Services but only where there is a confidentiality agreement in place between the Supplier and that Other Vendor;
 - 43.2.3. where requested by KDM, entering into a confidentiality agreement with relevant Other Vendors on terms similar to those contained in this Agreement; and
 - 43.2.4. any other requirements relating to the provision of the Services, as may be notified to the Supplier by KDM from time to time.

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- 43.3. The Supplier acknowledges and agrees that the performance of its obligations under this clause (Co-operation with other vendors) shall:
- 43.3.1. not entitle it to any additional fees, payments or compensation whatsoever; and
 - 43.3.2. be performed within a reasonable time frame directed by KDM and in any event as soon as reasonably practicable.
 - 43.3.3. Should the recommended vendor propose fees that are not market related the parties shall refer the matter to the project steering committee to recommend whether a variation is necessary.

PART N: TERMINATION

44. DISPUTE RESOLUTION

- 44.1. The provisions of this clause 44 (Dispute Resolution) shall, save where expressly provided otherwise, apply to any dispute arising in relation to or in connection with any aspect of this PPP Agreement between the Parties.
- 44.2. If a dispute arises in relation to any aspect of this PPP 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:
- 44.2.1. all disputes shall first be referred to a meeting of the Supplier's representative and KDM's Representative who have sufficient authority for resolution; and
 - 44.2.2. if the Parties have been unable to resolve the dispute within fourteen (14) days of referral to the Parties' representatives, either Party may refer the dispute for a decision by the Municipal Manager of KDM and the Chief Executive Officer or equivalent officer of the Supplier.
- 44.3. In attempting to resolve the dispute in accordance with the provisions of this clause 44.2, 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.
- 44.4. Any dispute which has not been resolved by the representatives contemplated in clause 44.2 within five (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.

45. LITIGATION/ARBITRATION

- 45.1. Subject to clause 28 (dispute of payment) regarding invoice disputes, if a dispute of any nature arises between the Parties, including in regard to the interpretation of, the effect of, the Parties' respective rights or obligations hereunder, a breach of or the termination of this Agreement and having already complied with the provisions of clause 44 above; and;
- 45.2. The representatives of the Parties be unable to resolve a dispute in accordance with the foregoing, such dispute will be submitted to and decided by arbitration in terms of this clause, and failing arbitration a court of competent jurisdiction or, upon agreement between the Parties, by arbitration in terms of this clause 45 (Litigation/Arbitration).
- 45.3. The arbitrator(s) shall be appointed by the Parties within 10 (ten) days of agreement on arbitration, and failing agreement on the choice of arbitrator, shall be nominated by the Chairman for the time being of the Durban Bar Council. If replacement of the arbitrator becomes necessary, this shall be affected in the same manner as set out in this clause 45 (Litigation/Arbitration).
- 45.4. The arbitration shall be held within the jurisdiction of KDM.
- 45.5. The arbitration shall be held in accordance with the Arbitration Act 42 of 1965 of the Republic of South Africa and any statutory modification or re-enactment thereof.
- 45.6. The arbitrator shall be entitled to:
- 45.6.1. determine and settle the formalities and procedures, which shall be in an informal and summary manner, that is, it shall not be necessary to observe or carry out either the usual formalities or procedure or the strict rules of evidence;
 - 45.6.2. investigate or cause to be investigated any matter, fact or thing which he considers necessary or desirable in connection with any matter referred to him for decision;
 - 45.6.3. decide the matters submitted to him according to what he considers just and equitable in all the circumstances, having regard to the purpose of this Agreement; and
 - 45.6.4. make such award, including an award for specific performance, an interdict, damages or a penalty or the costs of arbitration or otherwise as he in his discretion may deem fit and appropriate. The Parties shall comply fully and promptly with any award without delay.
- 45.7. The arbitration shall be held as quickly as possible after it is demanded, with a view to it being completed within 30 (thirty) days after it has been so demanded.

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- 45.8. This clause (Dispute Resolution) is severable from the rest of the Agreement and shall therefore remain in effect even if this Agreement is terminated.
- 45.9. This clause (Dispute Resolution) shall not preclude any Party from obtaining interim relief on an urgent basis from a court of competent jurisdiction pending the decision of the arbitrator.
- 45.10. The Parties hereby consent to the jurisdiction of the High Court of the Republic of South Africa in respect of the proceedings in this clause (Dispute Resolution), where applicable, and the above Court shall have jurisdiction to enforce any award made by an arbitrator under this clause (Dispute Resolution), where applicable.
- 45.11. An award made by an arbitrator pursuant to the provisions of this clause (Dispute Resolution), shall be final and binding on the Parties.

46. FAST-TRACK DISPUTE RESOLUTION

- 46.1. Disputes expressly referred for determination pursuant to this clause 46 (Fast-track Dispute Resolution) shall be determined by the relevant Independent Expert as defined.
- 46.2. Within fifteen (15) Business Days after a dispute has been referred by either Party to the appropriate Independent Expert, the Independent Expert shall require the Parties to submit in writing their respective arguments. The Independent Expert shall, in his/her absolute discretion, consider whether a hearing is necessary in order to resolve the dispute.
- 46.3. It shall be entirely within the power and competence of the Independent Expert to decide upon any matters related to the proper preparation of the dispute for hearing and in that regard the Independent Expert shall direct the Parties accordingly.
- 46.4. The Independent Expert shall set the date for the hearing, choose the venue (which must be a venue in KwaZulu-Natal) for the hearing and determine all matters regarding any aspect of the hearing. Moreover, the Independent Expert can decide whether at the hearing the Parties are to give oral evidence or confine themselves to presenting their cases in writing or by some other appropriate procedure. In this regard, the Independent Expert must be guided by considerations of fairness, the cost-effective resolution of the dispute, and the need to resolve the dispute quickly.
- 46.5. The Independent Expert shall provide both Parties with his/her written decision on the dispute, within twenty (20) Business Days of the referral (or such other period as the Parties may agree after the referral). The Independent Expert shall give his/her reasons for the award, if requested by either Party.
- 46.6. The Independent Expert's costs of any referral shall be borne as the Independent Expert shall specify or, if not specified, equally by the Parties. Each Party shall bear

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- its own costs arising out of the referral, including its legal costs and the costs and expenses of any witnesses.
- 46.7. The Independent Expert shall act impartially and may take the initiative in ascertaining the facts and the law.
- 46.8. Should the need arise for either Party to seek interim or temporary relief before the adjudication is finalised, that Party may apply to the Independent Expert to grant such interlocutory order or give the required temporary relief and the Independent Expert shall have the same power to do so as if the matter were one heard by a Judge in the High Court of South Africa, save that if by law such power or order cannot be exercised or given by an Independent Expert then, and then only, should the Parties refer such matter to such High Court.
- 46.9. The proceedings shall be confidential and all information, data or documentation disclosed or delivered by either Party to the Independent Expert in consequence of or in connection with his/her appointment as Independent Expert shall be treated as confidential. Neither the Parties nor the Independent Expert shall, save as permitted by clause 62 (Confidentiality) of this PPP Agreement, disclose to any person any such information, data or documentation unless the Parties otherwise agree in writing, and all such information, data or documentation shall remain the property of the Party disclosing or delivering the same and all copies shall be returned to such Party on completion of the Independent Expert's work.
- 46.10. The Independent Expert is not liable for anything done or omitted in the discharge or purported discharge of his/her functions as Independent Expert, unless the act or omission is grossly negligent or in bad faith. Any employee or agent of the Independent Expert is similarly protected from liability.
- 46.11. Should any Party fail to co-operate with the Independent Expert with the result that in the view of the Independent Expert such default or omission prejudices the adjudication process, then the Independent Expert can either:
- 46.11.1. give that Party written notice that unless it remedies the default or omission within a given time, it will forfeit the right to continue to participate in the adjudication; or
- 46.11.2. warn the Party in writing that its default or omission may make it liable to a punitive order of costs irrespective of whether it succeeds in the adjudication or not and such punitive award of costs may include an order of attorney and client costs or attorney and own client costs as those expressions are understood in the Uniform Rules of Court.
- 46.12. The Independent Expert shall be deemed not to be an arbitrator but shall render his/her decision as an expert and the provisions of the Arbitration Act, 1965 and any other law

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relating to arbitration shall not apply to the Independent Expert or his/her determination or the procedure by which he/she reaches his/her determination. The Independent Expert's decision shall be final and binding on the Parties

47. BREACH

47.1 The Supplier shall be deemed to have breached this Contract in the event that it commits a Supplier Default as contemplated in Clause 1 in the Definition section (Supplier Default).

47.2 In the event of either party (the defaulting party) breaching any other terms of this Agreement and failing to remedy such breach within 14 (Fourteen) days of the other party (the aggrieved party) giving written notice to remedy such breach, the aggrieved party shall be entitled to, and without prejudice to its rights to damages or other rights in Law be entitled to:-

47.2.1 sue for specific performance; or

47.2.2 cancel this Agreement.

47.3 Subject to Clause 47.2 above either party shall be entitled to give notice to terminate this Agreement with immediate effect, such termination to be effective upon deemed receipt of such notice, if the other party:-

47.3.1 commits a material breach (including a series of minor breaches which together are considered material) of any of the terms of this Agreement and (if such a breach is remediable) fails to remedy that breach within 14 (Fourteen) days of that party being notified in writing of the breach;

47.3.2 takes steps to place itself, or is placed under administration or in liquidation, whether voluntary or compulsory and whether provisionally or finally;

47.3.3 takes steps to de-register itself or is de-registered;

47.3.4 ceases or threatens to cease to carry on Business;

47.3.5 commits an act which would be an act of insolvency as defined by the Insolvency Act of 1936 as amended from time to time if committed by a natural person;

47.3.6 fails to satisfy a Judgment in excess of R1 000 000,00 (One Million Rand) entered against itself within 21 (Twenty One) days after it becomes aware of the Judgment, except if it provides evidence on an ongoing basis to the reasonable satisfaction of the other party that steps have been initiated within the 21 (Twenty One) days to appeal, review or rescind a Judgment and to procure suspension of execution of the Judgment and that such steps are being expeditiously pursued; the period of 21 (Twenty One)

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days shall run from the date on which the Judgment becomes final, or the date on which the attempt to procure the suspension of the execution fails; or;

47.3.7 is subject to a Force Majeure Event giving rise to a right to terminate this Agreement in accordance with Clause 34.

47.2. Notwithstanding any other provision of this Agreement, KDM may give notice to the Supplier to terminate this Agreement with immediate effect, such termination to be effective upon deemed receipt of such notice:

47.2.1. if a material Consent required by the Supplier is finally revoked for whatever reason;

47.2.2. if there is a change in Control of the Supplier without the prior written consent of KDM, which consent shall not unreasonably be withheld;

47.2.3. if the Supplier's conduct gives rise to a right to terminate under clauses 50, 51 and/or 52 below;

47.2.4. if the Supplier is Financially Distressed;

47.2.5. if any Person applies to Court for the Business Rescue of the Supplier;

47.2.6. if any of the Services (or any part thereof) provided or omitted to be provided by the Supplier hereunder renders KDM in breach of any Applicable Law.

48. CONSEQUENCES OF TERMINATION

48.2. In case of termination, KDM shall pay to the Supplier any amount owed in respect of the Services that have been properly executed, delivered and accepted in accordance with this Agreement, less any Deductions permitted under this Agreement.

48.3. In the event that this Agreement has been terminated by KDM under clause 47, KDM may in its sole and absolute discretion:

48.3.1. engage other resources (including any Third Party) to perform services similar to the Services provided under this Agreement; and

48.3.2. retain and apply any balance of monies due to the Supplier as may be necessary to pay for the cost and expense of completing the Supplier's obligations under this Agreement.

48.4. For the purposes of sub-clause 48.2 above the Supplier shall pay any increased costs and expenses reasonably incurred by KDM in completing the Supplier's obligations under this Agreement and KDM may treat the same as a Deduction.

48.5. The Parties acknowledge and agree that where a Party exercises a right to terminate this Agreement, that Party shall use reasonable endeavours to mitigate any Losses it suffers as a result of exercising its right to terminate.

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- 48.6. On termination of this Agreement:
- 48.6.1. the Supplier shall promptly return to KDM and permanently delete from all computer and/or electronic media all Confidential Information (including all copies thereof) belonging to KDM and shall provide to KDM a certificate signed by the Supplier's Authorised Representative confirming that the Supplier has not retained any Confidential Information belonging to KDM;
 - 48.6.2. the Supplier shall promptly return all KDM property; and
 - 48.6.3. any rights of the Parties that arose or accrued prior to termination of this Agreement shall survive and continue in full force and effect, in addition to the provisions of clauses 12 (Limitation of Liability), 13 (Indemnity), 48 (Consequences of Termination), 60 (Exit Strategy), 59 (Intellectual Property Rights), 63 (Confidentiality), 44 (Dispute Resolution), 67 (Non-Solicitation), 73 (Severability), 74 (No Waiver), 75 (Entire Agreement) and 83 (Governing Law), but all other rights and obligations of the Parties shall cease immediately.
- 48.7. Termination of this Agreement shall not relieve a Party of obligations imposed upon such Party by statute or regulation or by this Agreement prior to its termination.
- 48.8. The exercise of any termination right set out in clause (Termination) by a Party shall be without prejudice to the Party's other rights and remedies under this Agreement.
- 48.9. In the event of termination of this Agreement for any reason whatsoever all Service Request(s) shall automatically terminate.
- 48.10. In the event of termination of this agreement, KDM reserves the right to assume the contractual rights of the supplier in relation to the Supplier's sub-contractors and any other third parties .

49. TERMINATION FOR FORCE MAJEURE

- 49.2. If, in the circumstances referred to in clause 1 (Force Majeure) the Parties have failed to reach agreement on any modification to this PPP Agreement pursuant to that clause within one hundred and eighty days (180) days of the date on which the Party affected serves notice on the other Party in accordance with that clause, either Party may at any time afterwards terminate this PPP Agreement by written notice to the other Party having immediate effect, provided always that the effects of the relevant events of Force Majeure continue to prevent either Party from performing any material obligation under this PPP Agreement. In such an event the Termination Date shall be the date upon which the earliest of the notices terminating the PPP Agreement is received by the other Party.

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50. TERMINATION FOR SUPPLIER DEFAULT

Notification

- 50.2. The Supplier shall notify KDM of the occurrence, and details, of any Supplier Default and of any event or circumstance which is likely, with the passage of time or otherwise, to constitute or give rise to a Supplier Default, in either case promptly on the Supplier becoming aware of its occurrence.

Municipality's Options

- 50.3. On the occurrence of a Supplier Default, or within a reasonable time after KDM becomes aware of the same, KDM may:

50.3.1. in the case of the Supplier Default referred to in clause 1 a – e (definition section terminate this PPP Agreement in its entirety by notice in writing having immediate effect;

50.3.2. and while the same is subsisting, in the case of any other Supplier Default serve notice of default on the Supplier requiring the Supplier at the Supplier's option either:

50.3.2.1. to remedy the Supplier Default referred to in such notice of default (if the same is continuing) within twenty (20) Business Days of such notice of default; or

50.3.2.2. to put forward within twenty (20) Business Days of such notice of default a reasonable programme for remedying the Supplier Default. The programme shall specify in reasonable detail the manner in, and the latest date by, which such Supplier Default is proposed to be remedied. The Supplier shall only have the option of putting forward a programme in accordance with this clause if it first notifies KDM within five (5) Business Days of such notice of default that it proposes to do so.

Remedy Provisions

- 50.4. Where the Supplier puts forward a programme in accordance with clause 0, KDM shall have ten (10) Business Days from receipt of the same within which to notify the Supplier that it does not accept the programme, failing which the Municipality shall be deemed to have accepted the programme. KDM shall act reasonably in rejecting the programme. Where KDM notifies the Supplier that it does not accept the programme, the Parties shall endeavour within the following five (5) Business Days to agree any necessary amendments to the programme put forward. In the absence of agreement within five (5) Business Days, the question of whether the programme (as the same may have been amended by agreement) will remedy the Supplier 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 46 (Fast-track Dispute Resolution).

50.5. If:

50.4.1 the Supplier Default notified in a notice of default is not remedied before the expiry of the period referred to in the notice; or


50.4.2. where the Supplier puts forward a programme which has been accepted by KDM or has been determined to be reasonable, the Supplier fails to achieve any element of the programme or to complete the programme by the specified end date for the programme (as the case may be); or

50.4.2.1. any programme put forward by the Supplier is rejected by KDM as not being reasonable, and the dispute resolution procedure does not find against that rejection, then KDM may, terminate this PPP Agreement in its entirety by written notice to the Supplier with immediate effect; provided that for the purposes of clause 0 if the Supplier's execution of the programme is adversely affected by the occurrence of an event of Force Majeure or a Relief Event then, subject to the Supplier complying with the mitigation and other requirements in this PPP Agreement concerning Force Majeure or Relief Events (as the case may be), the time for execution of the 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 (as the case may be) which is agreed by the Parties or determined in accordance with clause 46 (Fast-track Dispute Resolution).

Municipality's Costs

50.5. The Supplier shall reimburse the Municipality with all costs incurred by the Municipality in exercising any of its rights in terms of this clause. The Municipality should take reasonable steps to mitigate such costs.

50.6. The Municipality shall not exercise, or purport to exercise, any right to terminate this PPP Agreement except as expressly set out in this PPP Agreement. The rights of the Municipality (to terminate or otherwise) under this clause are in addition (and without prejudice) to any other right which the Municipality may have in law to claim the amount of any direct loss or damages suffered by the Municipality on account of the acts or omissions of the Supplier (or to take any action other than termination of this PPP Agreement).

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51. CONDUCT OF THE SUPPLIER

51.1. If, at any time during the Term, KDM, in its reasonable discretion determines that the Supplier has, in respect of this Agreement:

51.1.1. acted dishonestly and/or in bad faith; and/or

51.1.2. has made any intentional or negligent misrepresentation to KDM, whether in any negotiations preceding the conclusion of or in the execution of the Agreement between the Parties, then KDM shall be entitled, by written notice to the Supplier and notwithstanding termination clause, to forthwith terminate this Agreement and/or any Service Request, either in whole or part.

51.1.3. Upon such termination KDM shall be entitled, in addition to all other remedies available to it, to recover from the Supplier all damages it has suffered by virtue of such conduct by the Supplier.

51.1.4. If, at the time of such termination, KDM is indebted to the Supplier for any amounts whatsoever, KDM shall be entitled to withhold payment in respect thereof for a period of 90 (ninety) days from the date of termination in order to investigate the Supplier's conduct and if any damages are suffered by KDM due to such conduct.

51.1.5. No payment by KDM to the Supplier after the lapse of the period referred to in sub-clause 35.3 above shall preclude KDM, thereafter, from recovering from the Supplier any such damages as KDM may have suffered.

52. CORRUPTION

52.1. If, at any time during the Term, KDM has a reasonable suspicion that the Supplier has, in respect of this Agreement (or any other Agreement), directly or indirectly given or agreed to give or offered to give any gratification to another Person whether for the benefit of that Person or any other Person in order to improperly influence any Person to:

52.1.1. award a tender for provision of services to any public or private Person, including KDM;

52.1.2. in the absence of a tender process, promote the procurement of a contract with any public or private Person, including KDM;

- 52.1.3. withdraw a tender awarded to another public or private Person, including KDM;
- 52.1.4. fix the price, consideration or other monies stipulated or otherwise provided for in any such contract; then KDM shall be entitled, by written notice to the Supplier, to forthwith terminate this Agreement.
- 52.2. Upon such termination KDM shall be entitled, in addition to all other remedies available to it, to recover from the Supplier damages it has suffered by virtue of such conduct by the Supplier.
- 52.3. If, at the time of such termination, KDM is indebted to the Supplier for any amounts whatsoever, KDM shall be entitled to withhold payment in respect thereof for a period of 120 (one hundred and twenty) days from the date of termination in order to investigate the Supplier's conduct and if any damages are suffered by KDM due to such conduct.
- 52.4. No payment by KDM to the Supplier after the lapse of the period referred to in clause 17.3 shall preclude KDM, thereafter, from recovering from the Supplier any such damages as KDM may have suffer.

53. CANVASSING AND INDUCING KDM EMPLOYEES

- 53.1. Either party shall not under any circumstances offer, promise or make any gift, payment, loan, reward, inducement, benefit or other advantage, which may be construed as being made to solicit any favour, to any of KDM's employees.
- 53.2. Such an act will constitute a material breach of this Agreement and KDM shall be entitled, after notice, to terminate this Agreement, without prejudice to any rights.

54. SPECIFIC PERFORMANCE

- 54.1. The parties acknowledge and agree that as a result of any breach of this Agreement by the other party, the aggrieved may suffer Losses in respect of which monetary remedies would not be a sufficient remedy for such a breach, and the aggrieved party, or its Affiliates, are entitled to interim or interlocutory relief to prevent a breach of, or to compel specific performance of this Agreement.

55. HANDBACK

55.1. continued performance

- 55.1.1. Subject to any exercise by KDM of its rights to perform, or to procure a third party to perform, the obligations of the Supplier, the Parties shall continue to perform their obligations under this PPP Agreement, notwithstanding the giving of any notice of default or notice of termination, until the termination of the PPP Agreement becomes effective in accordance with the provisions of this clause.

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55.2. Transfers to KDM of Assets, Contracts, etc. on Termination Only

On termination of this PPP Agreement in accordance with its terms for any reason:

55.2.1. if that occurs prior to the Service Commencement Date, in so far as any transfer of the Project Assets to KDM shall be necessary, the Supplier shall transfer such part of the Works and/or the Facilities as shall have been constructed, and/or Project Assets, to, and there shall vest in, KDM. If KDM so elects:

55.2.1.1. the Facilities shall remain available to KDM for the purposes of completing the Works; and

55.2.1.2. the construction plant purchased for the Project shall remain available to KDM for the purposes of completing the Works, subject to payment of the Supplier's reasonable costs, provided that all the Facilities forms part of the Project Assets and /or the Supplier shall have been paid for such Facilities if it does not form part of the Project Assets;

55.3. Transfers to KDM on Termination or Expiry

55.3.1. On termination of this PPP Agreement for any reason in accordance with its terms or within ten (10) Business Days prior to the Expiry Date, the Supplier shall:

55.3.1.1. hand over to, and there shall vest in, KDM, free from all encumbrances, the Project Assets, which in the case of expiry or termination of this PPP Agreement at the Expiry Date shall be in the state as agreed to by the Parties in the Schedule 10: Procedure Hand back Schedule, however in the event that the PPP Agreement is terminated prior to the Expiry Date, the Project Assets will be handed over to KDM in the condition that they are in at that point in time; or

55.3.1.2. procure that any Subcontractor shall (as the case may be), transfer to KDM, free from any security interest full and unencumbered title in and to all or any part of the Project Assets required by KDM in connection with the Project Deliverables;

55.3.1.3. procure that any Licensed Intellectual Property shall be provided to KDM and KDM shall, to the extent possible, be granted a perpetual non-exclusive, royalty-free licence to use such Licenced Intellectual Property;

- 55.3.2. deliver to KDM (as far as not already delivered to KDM) one complete set of:
- 55.3.2.1. maintenance, operation and training manuals for the Facilities to the extent that they exist or the Supplier has an obligation in terms of this PPP Agreement to acquire or prepare them;
 - 55.3.2.2. 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 Supplier under this PPP Agreement and included in the Project Assets are assigned, or otherwise transferred, to KDM;
 - 55.3.2.3. ensure that provision is made in all relevant contracts of any description whatsoever to which the Supplier or any Subcontractor is a party to ensure that KDM will be in a position to exercise its rights, and the Supplier will be in a position to comply with its obligations, under this clause 54.3 ;
 - 55.3.2.4. remove from the Project Site all property not forming part of the Facilities and Project Assets as required by KDM pursuant to clause 54.2 (Transfer to Municipality of Assets, Contracts, etc.) and if it has not done so within ten (10) Business Days or such reasonable period taking into consideration the nature of property to be removed after any notice from KDM requiring it to do so KDM may (without being responsible for any loss, damage, costs or expenses) remove and sell any such property not forming part of the Facilities and Project Assets and shall hold any proceeds less all costs incurred for the credit of the Supplier and/or its Subcontractors provided that where this PPP Agreement is terminated without any period of notice to the Supplier, the Supplier shall have a period of 10 (ten) Business Days or such additional reasonable period after the Termination Date to remove such property;
- 55.3.3. deliver to KDM:
- 55.3.3.1. any keys, remote access apparatus and computer access cards to the Facilities; and
 - 55.3.3.2. without prejudice to clause 58 (Intellectual Property of KDM), any copyright licences for any computer programmes (or licences to use the same) necessary for the operation of the Facilities (but excluding computer programmes which have been developed or acquired by the Supplier for its own use and not solely for the purposes of provision of any of the Services at the Facilities or the assignment or transfer of which is otherwise restricted); and the parties will negotiate a cost thereof, subject to clause 59 (Intellectual Property Rights).

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55.4. Transitional Arrangements

55.4.1. For a period of twelve (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 twelve (12) months after the termination date (or a period of one (1) month in the event that the Supplier is required to hand over the Facilities to a third party), the Supplier shall have the following obligations, on substantially similar terms and conditions as set out in this PPP Agreement:

55.4.1.1. the Supplier shall co-operate fully with KDM and any successor providing services to KDM in the nature of any of the Services or any part of the Services in order to achieve a smooth transfer of the manner in which KDM obtains services in the nature of the Services and to avoid or mitigate in so far as reasonably practicable any inconvenience or any risk to the health and safety of the employees of KDM and members of the public, provided KDM pays for the reasonable costs and expenses incurred by the Supplier for the delivery of the transitional services should such transitional services be required after the Expiry Date, the Supplier however shall not provide transitional services if such are required by a third party for a period greater than the period referred to in clause 54.4 above;

55.4.1.2. if the Municipality wishes to conduct a tender process with a view to entering into a contract for the provision of services (which may or may not be the same as, or similar to, the Services or any of them) following the expiry or earlier termination of this PPP Agreement, the Supplier shall co-operate with the Municipality fully in such tender process including (without limitation) by:

55.4.1.2.1. providing any information which the Municipality may reasonably require to conduct such tender excluding any information which is commercially sensitive to the Supplier (and, for the purposes of this sub-clause, commercially sensitive shall mean information which would if disclosed to a competitor of the Supplier or Subcontractor give that competitor a competitive advantage over the Supplier or Subcontractor and thereby prejudice the business of the Supplier or Subcontractor but shall exclude any information referred to in the clause dealing with employment matters; and

55.4.1.2.2. 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 Private Party's safety rules and regulations.

55.5. Continuing Obligations

55.5.1. Save as otherwise expressly provided in this PPP Agreement:

55.5.1.1. termination of this PPP Agreement shall be without prejudice to any accrued rights and obligations under this PPP Agreement as at the date of termination; and termination of this PPP Agreement shall not affect the continuing rights and obligations of the Supplier and KDM under this clause or any other provision of this PPP Agreement which is expressed to survive termination or which is required to give effect to such termination or the consequences of such termination.

PART O: STEP IN

56. KDM STEP-IN

56.1. If KDM reasonably believes that it needs to take any action in connection with the Services because a serious and urgent risk arises to the health or safety and security of persons or property, or to the Environment, and/or to the discharge of a statutory duty, then KDM shall be entitled to take action in accordance with the following provisions.

56.2. If paragraph 40.1 applies and KDM wishes to take action, KDM shall notify the Supplier in writing of the following:

- 56.2.1. the action it wishes to take;
- 56.2.2. its reasons for taking such action;
- 56.2.3. the date when it wishes to commence such action;
- 56.2.4. the time period (the Step-in Period) which it reasonably believes will be necessary for such action and which must be a fixed period; and
- 56.2.5. to the extent practicable, the effect of such action on the Supplier and its obligations to provide the Services during the Step-in Period.

- 56.3. Following the service of such notice, KDM shall take such action as notified under 39.2 above and any ancillary action as it reasonably believes is necessary (the Necessary Action) and the Supplier shall give all reasonable assistance to KDM in the conduct of such Necessary Action.
- 56.4. If the Supplier is not in breach of any of its obligations under this PPP 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 Supplier from providing any part of the Services:
- 56.4.1. the Supplier shall be relieved from undertaking the Services to the extent that the Supplier is unable to do so as a direct consequence of the Necessary Action; and
- 56.4.2. in respect of the time period over which such Necessary Action is conducted and provided that the Supplier provides KDM with such reasonable assistance as KDM may need in the conduct of such Necessary Action (such assistance, however, to be at the expense of KDM to the extent of any incremental costs), the Unitary Payment due from the KDM to the Supplier shall equal the amount the Supplier would have received if it was satisfying all its obligations affected by the Necessary Action in full over such period.
- 56.5. If the Necessary Action is taken as a result of a breach by the Supplier of any of its obligations under this PPP Agreement, then for so long as and to the extent that such Necessary Action is taken and this prevents the Supplier from performing any of its obligations:
- 56.5.1. the Supplier shall be relieved from such obligations; and
- 56.5.2. in respect of the period in which KDM is taking such Necessary Action, the Unitary Payment due from KDM to the Supplier shall equal the amount the Supplier would have received if it were performing the obligations affected by the Necessary Action in full over such period, less any Deductions in respect of that breach as calculated in accordance with the Payment Mechanism, and less an amount equal to KDM's costs of taking such Necessary Action.
- 56.5.3. If by the expiry of the Step-in Period, the breach still subsists despite a notice to Supplier in terms of Clause 33 above, and it constitutes a Supplier Default, KDM must serve a notice in terms of Clause 41 (KDM Options) requiring the Supplier to remedy the Supplier's Default or to put forward a Remedy Programme as contemplated in Clause 41 (KDM Options)²

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57. KDM OPTIONS

- 57.1. On the occurrence of a Supplier Default in circumstances contemplated in Clause 40.1 above, or within a reasonable time after KDM becomes aware of same, and subject to KDM having given notice in terms of Clause 33 above, KDM may:
- 57.1.1. terminate this PPP Agreement in its entirety by notice in writing having immediate effect; and
 - 57.1.2. while the same is subsisting, in the case of any other Supplier Default, serve a breach notice on the Supplier requiring the Supplier at the Supplier's option either:
 - 57.1.3. to remedy the Supplier Default referred to in such notice of default (if the same is continuing) within 20 (twenty) Business Days of such notice of default being delivered; or
 - 57.1.4. to put forward, within 20 (twenty) Business Days of such notice of default being delivered, a reasonable programme for remedying the Supplier Default (Remedy Programme). The Remedy Programme shall specify in reasonable detail the manner in, and the latest date by, which such Supplier Default is proposed to be remedied. The Supplier shall only have the option of putting forward a Remedy Programme if it first notifies KDM within 5 (five) Business Days of receipt of the notice of default that it proposes to do so.³

PART P: INFORMATION AND AUDIT ACCESS

58. INFORMATION AND AUDIT ACCESS

- 58.1. The Supplier shall provide to KDM all information, documents, records and the like in the possession of, or available to, the Supplier as may reasonably be requested by KDM for the purpose of complying with any of its statutory reporting obligations including its reporting obligations under the Municipal Finance Management Act and the Public Audit Act, 2004.
- 58.2. To this end the Supplier shall use all reasonable endeavours to ensure that all such information in the possession of any counter-party to any Project Document shall be available to KDM and the Supplier has included, or shall include, appropriate provisions to this effect in all Project Documents.

² This clause has been inserted to allow for the possibility of KDM taking over some or all of the Private Party's obligations for a specific period during subsistence of the PPP Agreement, should the need arise.

³ This clause has been inserted to set-out options available to KDM in the event of Private Party Default.

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- 58.3. Without limiting the generality of the foregoing, the Supplier shall:
- 58.3.1. provide and shall procure that its Subcontractors shall provide all such information as the Supplier may reasonably require from time to time to enable KDM to provide reports and returns as required by any Responsible Authority, including reports and returns regarding the physical condition of any building occupied by the Supplier or its Subcontractors in terms of this PPP Agreement, health and safety, national security, and environmental safety; and
 - 58.3.2. note and facilitate KDM's compliance with the Promotion of Access to Information Act, 2000 in the event that KDM is required to provide information to any person pursuant to that Act.

PART R: INTELLECTUAL PROPERTY

59. INTELLECTUAL PROPERTY RIGHTS

- 59.1. Ownership of all Intellectual Property supplied to the Supplier by KDM and/or its Affiliates to facilitate the rendering of the Services shall remain vested in KDM, its Affiliates and/or their Third-Party licensors.
- 59.2. If and to the extent the receipt of the Services by KDM and/or its Affiliates requires the Supplier (or its licensors) to grant KDM and/or its Affiliates a licence and/or such other rights to any Intellectual Property then the Supplier is hereby deemed to have granted (or procured the granting of) such licences and/or other rights as may reasonably be required for the Term.
- 59.3. All reports, manuals, financial statements, budgets, indices, research papers, letters or other similar documents (the nature of which is not limited by the specific reference to the foregoing items) which are created, compiled or devised or brought into being by the Supplier or come into the Supplier's possession during the course and scope of its engagement by KDM and all copies thereof will be the sole property of KDM and, upon the termination date or earlier if required by KDM, such documents and all copies shall be returned to KDM.
- 59.4. KDM shall exclusively own all Intellectual Property produced, created, compiled, devised or brought into being by the Supplier during the course and scope of the Supplier rendering the Services to KDM.

- 59.5. KDM may make application at its own expense for the registration of the Intellectual Property, referred to in clauses 42.4 and 42.5, in the Republic of South Africa and/or in any other country. The Supplier shall support KDM in relation to such application as requested by KDM.
- 59.6. Should the Supplier fail to sign any cession, assignment or other required documents provided for in this clause (Intellectual Property Rights) and fail to hand them to KDM or its representative within 7 (seven) days after being called upon in writing to do so, then the Supplier irrevocably and in *rem suam* appoints any KDM nominated by KDM with the power of substitution, as the agent of the Supplier, to sign any cession, assignment or other required documents on the Supplier's behalf.
- 59.7. The Supplier undertakes that it shall not at any time or in any place use the Intellectual Property contemplated by sub-clause 42.4 above which exists as at the date of termination of this Agreement for its benefit and/or for the benefit of any Third Party.
- 59.8. If within a period of 2 (two) years after the termination of this Agreement for any reason, the Supplier, in respect of any Intellectual Property referred to in sub-clause 32.4 above:
- 59.8.1. applies anywhere in the world for the registration of a patent, copyright or similar legal protection; or
 - 59.8.2. assists any person in any way to make such an application,
 - 59.8.3. the Supplier shall disclose this fact to KDM, together with details of the Intellectual Property so covered.
- 59.9. Notwithstanding any other provision of this Agreement, the Supplier shall fully indemnify and hold KDM and its Affiliates harmless from any and all Claims and Losses arising out of or in connection with any of the following:
- 59.9.1. any infringement (actual or alleged) of any Third Party's Intellectual Property rights in connection with or arising out of this Agreement;
 - 59.9.2. as a result of KDM's use or possession of any Documentation or software supplied by the Supplier in the manner contemplated by this Agreement; or
 - 59.9.3. any default (actual or alleged) by the Supplier under any licenses for any Third-Party Intellectual Property rights.

59.10. Without prejudice to sub-clause 42.10 above, if at any time a Claim is made that any Documentation and/or software supplied by the Supplier breaches a Third Party's Intellectual Property rights, the Supplier shall, at its own expense and at KDM's sole option:

59.10.1. procure for KDM the right to continue using the relevant Documentation and/or software;

59.10.2. replace or modify the Documentation and/or software such that they become non-infringing without substantially affecting the functionality of the same;

59.10.3. take such action as the Supplier shall reasonably deem appropriate to avoid or settle any such infringement or alleged infringement; or

59.10.4. refund all fees to KDM.

PART S: EXIT

60. EXIT STRATEGY

60.1. The Supplier shall provide such assistance as KDM may reasonably require in the event the Agreement is terminated, for a period of 60 (Sixty) days after the notice of termination is received, provided KDM is not in breach of this Agreement and the Agreement is terminated due to its breach.

60.2. For the purposes of sub-clause 44.1, the Supplier acknowledges and agrees that such assistance may include:

60.2.1. providing any and all Documentation that KDM or any Third Party nominated by KDM would reasonably require;

60.2.2. promptly assigning the benefit of, or where requested novate, to KDM or any Third Party nominated by KDM any and all Agreements entered into by the Supplier exclusively for KDM in connection with the delivery of the Services..

60.3. Either party shall have the option, no less than 6 (Six) months prior to the expiry of this Contract, to enter into negotiations to extend the Contract period.

60.4. Two (2) years prior to the expiry of this Contract, KDM should prepare an exit strategy that will be based on the provisions related to the termination and expiry in the contract.

- 60.5. The exit strategy should demonstrate KDM's capacity to bring the project to an end in an efficient manner and should include:
- 60.5.1. An analysis of the options for continuing the service after termination/expiry and a recommendation regarding the preferred option;
 - 60.5.2. Plans for organising a post implementation review of the project, which should assess key deliverables, value for money, quality and project innovation – and should be carried out within 6 (Six) months of the expiry/termination date;
 - 60.5.3. The steps that will be taken to integrate the lessons of the project into the day-to-day work of KDM;
 - 60.5.4. An implementation plan based on the hand back procedures set out in the contract;
 - 60.5.5. Details of the municipal officials who will be responsible for managing the exit strategy;
 - 60.5.6. Plans to deal with the implications of any employee transfers from the Supplier to KDM;
 - 60.5.7. An estimate of the resources that KDM will allocate to managing the exit strategy;

PART T: MISCELLANEOUS

61. ASSIGNMENT

- 61.1. This PPP Agreement and any Project Document to which both KDM and the Supplier are parties shall be binding on, and shall be to the benefit of, them and their respective successors-in-title and permitted transferees and assigns.
- 61.2. Save as expressly permitted hereunder the Supplier shall not, without the prior written approval of KDM, assign, cede, delegate, transfer or otherwise dispose of any right or obligation under this PPP Agreement or any Project Document to which it is a party to any other person.
- 61.3. KDM shall not assign, cede, delegate, transfer or otherwise dispose of any right or obligation under this PPP Agreement or Project Document to which it and the Supplier are parties to any other person, save with the prior written approval of the Supplier (such approval not to be unreasonably withheld or delayed) or to give effect to any mandatory requirement of any applicable law.

Handwritten initials:
Z.M. NTJ

62. CHANGE

- 62.1. For the duration of the Project Term, the Supplier shall procure that there is no Change in Control in the Supplier (or in any company of which the Supplier is a subsidiary) without the prior written approval of KDM.
- 62.2. The Supplier shall procure that for the duration of this PPP agreement
- 62.2.1. there is no dilution in the aggregate Equity holdings of the Black Shareholders below the Minimum Black Equity ; and
- 62.2.2. 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.
- 62.3. For the purpose of Clause 62.2 (Changes in Control and Black Equity), the term "subsidiary" shall have the meaning as defined in the Companies Act, 2008.
- 62.4. Either Party may request a Change to the Services and the Services Levels in accordance with the procedure set out in Schedule 13 (Change Control Procedure). The Parties acknowledge and agree that this Agreement may not be Varied other than in accordance with this Agreement.

63. CONFIDENTIALITY

- 63.1. Each Party shall keep the other Party's Confidential Information confidential.
- 63.2. Each Party shall use the other Party's Confidential Information solely in accordance with its performance of its obligations under this Agreement.
- 63.3. Each Party acknowledges and agrees that it shall not disclose Confidential Information provided to it by the other Party to any Person other than its employees, KDMs or advisers who need to know the Confidential Information for the purposes of this Agreement ("Permitted Recipient") and shall procure that each Permitted Recipient is made aware of and complies with its obligations of confidentiality under this Agreement as if that Permitted Recipient was a Party.
- 63.4. This clause (Confidentiality) does not apply to Confidential Information which:
- 63.4.1. is in or comes into the public domain other than by breach of this Agreement or of any obligation of confidence owed under this Agreement;
- 63.4.2. the receiving Party can prove it knew of prior to its disclosure by the disclosing Party;
- 63.4.3. was subsequently disclosed to the receiving Party lawfully by a Third Party who did not acquire the information under an obligation of confidentiality; or
- 63.4.4. is independently developed by or for the receiving Party at any time by Persons who have had no access to or knowledge of the said information.

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- 63.5. Notwithstanding the foregoing, each Party shall be entitled to make any disclosure required by any Applicable Laws or by any order of a court or tribunal of competent jurisdiction.
- 63.6. Each Party shall ensure that its Personnel understand the nature of the obligations set out in this clause (Confidentiality) and shall procure the observance of the same by its Personnel.

64. DATA PROTECTION

- 64.1. The Parties specifically record that all Data provided by KDM to the Supplier, or to which the Supplier may be exposed, shall constitute Confidential Information and where applicable, Intellectual Property belonging to KDM.
- 64.2. The Supplier hereby warrants, represents and undertakes in favour of KDM that it shall at all times strictly comply with all Applicable Laws and with all the provisions and requirements of any KDM data protection policies and procedures which may be in force from time to time.
- 64.3. The Supplier hereby warrants, represents and undertakes that it shall not, at any time, copy, compile, collect, collate, process, mine, store, transfer, alter, delete, interfere with or in any other manner use Data for any purpose other than with the express prior written consent of KDM, and to the extent necessary to provide the Services to KDM.
- 64.4. The Supplier further warrants, represents and undertakes that it shall ensure that all its systems and operations which it uses to provide the Services, including all systems on which Data is copied, compiled, collated, processed, transmitted, stored, collected, mined, altered or deleted or otherwise used as part of providing the Services, shall at all times be of a minimum standard required by all Applicable Laws and be of a standard no less than the standards which are in compliance with the Best Industry Practice for the protection, control and use of Data.

65. GOVERNANCE

- 65.1. The Parties shall, during the Project Term, comply with the principles and processes as detailed in the relevant Service Request audit.
- 65.2. Subject to this clause 64.1, KDM may audit the Supplier's compliance with this Agreement including audits of:
- 65.2.1. the Unitary Payment, the Supplier's premises; and
 - 65.2.2. the Supplier's systems and the physical and information technology security policies and practises in place.

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- 65.3. Any audit exercised under clause 64.2 shall be carried out with reasonable prior notice and in a reasonable way so as to cause as little disruption as is reasonably possible to the performance of the Services and the Supplier's business.
- 65.4. The Supplier shall, at no cost and expense to KDM, provide all assistance reasonably requested by KDM in relation to any audit, including providing access to the Supplier's Personnel, records and premises.
- 65.5. The Supplier acknowledges and agrees that KDM may engage Third Party advisers to undertake any audit contemplated by this clause (Audit).
- 65.6. KDM may allow any regulator and any Persons appointed by such regulator to participate in any audit and to receive the results of that audit.
- 65.7. Notwithstanding the provisions of this clause (Audit), KDM shall be entitled, on an ad hoc basis, to inspect the premises from which the Supplier renders the Services and to examine the security, access control and environmental conditions maintained at the said premises. Such inspection may include a review of the Supplier's security policies and controls.

66. AFFILIATE AGREEMENT

- 66.1. Should any KDM Affiliate wish to avail itself of the rights and obligations of KDM as set forth in this Agreement:
- 66.1.1. such KDM Affiliate will execute an Affiliate Agreement, in substantially the form as set out in Schedule 15, to this Agreement pursuant to which a severable and independent Agreement will arise between the Supplier, and such KDM Affiliate on the terms of this Agreement, as read with and amended by the specific terms set out in the Affiliate Agreement; and
- 66.1.2. the Affiliate Agreement will set out the specific products and/or services to be provided by the Supplier, to KDM Affiliate, as well as any specific terms or amendments which may be applicable to such relationship.
- 66.2. Each such Affiliate Agreement will constitute a separate and divisible relationship between the relevant parties thereto with the effect that should:
- 66.2.1. any Affiliate Agreement be terminated for whatsoever reason, whether due to a breach thereof by either party or otherwise, such termination will not affect the continuation or enforceability of any other Affiliate Agreement or this Agreement; and

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- 66.2.2. this Agreement be terminated for whatsoever reason, such termination will not affect the continuation or enforceability of any Affiliate Agreement and, to the extent necessary to give effect to such Affiliate Agreement, the terms and conditions of this Agreement will endure as between the parties to such Affiliate Agreement.
- 66.3. Neither KDM nor any other Affiliates will, under any circumstances whatsoever, whether as surety, guarantor or otherwise, be liable for any obligations agreed to or liability incurred by the relevant KDM Affiliate in terms of such Affiliate Agreement.
- 66.4. All limits of liability and indemnification will apply in respect of each of the Affiliate Agreement(s) and this Agreement, and will not be aggregated across all such agreements.
- 66.5. An Affiliate Agreement is capable of termination, cession, amendment and extension independently of this Agreement and any other Affiliate Agreement.
- 66.6. No subsequent alteration or amendment of this Agreement by KDM and/or the Supplier will have any effect on any Affiliate Agreement, unless expressly provided to the contrary and countersigned by each party to an Affiliate Agreement.
- 66.7. When pricing new business for KDM and/or its Affiliates, the Supplier shall take the volume of business it provides to KDM and/or its Affiliates into consideration.
- 66.8. The Parties acknowledge and agree that any amount to be paid under clause 46.2 shall be payable within 30 (thirty) days of commencement of such member of staff's appointment by the Recruiting Party.
- 66.9. Nothing in this clause (Non-Solicitation) shall prevent either Party from hiring or contracting with any person who applies for a job or contract as a response to a generally advertised invitation by the relevant Party.
- 67. RESOLUTIVE CONDITION**
- 67.1 It is acknowledged that this PPP Agreement is a living document and there are Schedules that need to be finalised in the light of certain recommendations and suggestions of KZN Treasury. Notwithstanding the above mentioned, this PPP Agreement shall commence on the Effective Date, subject to sub-clause 67.2 below.
- 67.2 This entire Agreement is subject to the Resolutive Condition that, within a period of 90 (Ninety) days of the Effective Date (or such additional period as the parties may agree to in writing), both parties give to the other written confirmation that they are each satisfied that this PPP Agreement has been substantially completed in all material respects.

68. IMPLEMENTATION AND GOOD FAITH

- 68.1. The Parties undertake to do all such things, perform all such acts and take all steps to procure the doing of all such things and the performance of all such acts, as may be necessary or incidental to give or be conducive to give effect to the terms, conditions and import of this Agreement.
- 68.2. The Parties shall at all times during the continuance of this Agreement observe the principles of good faith towards one another in the performance of their obligations in terms of this Agreement.
- 68.3. The parties acknowledge that this is a living document and further negotiation needs to be conducted in good faith to finalise outstanding issues, for instance, but not limited to, the street sweeping requirements.

69. PUBLICITY AND PRESS RELEASES

- 69.1. Neither Party shall, and each Party shall ensure that none of its Sub-Contractors shall, advertise, release any statement to the press or otherwise make any public statement of any nature about the appointment of the Supplier or the terms or subject matter of this Agreement (save insofar as may be required by Applicable Laws) without the prior approval in writing of the other Party.
- 69.2. Any material relating to this Agreement (including any Intellectual Property rights pertaining to either Party such as trademarks, brand names and logos) which is intended for publication in any form by the other Party must first be submitted in draft form to the other Party for approval.

70. SUB-CONTRACTS

- 70.1. The Supplier shall not, without the prior written consent of KDM, enter into any subcontract with any other service provider for the performance of this Agreement or any part thereof, save as provided for in this Agreement.
- 70.2. Notwithstanding KDM's consent to sub-contracting any portion of this Agreement, the Supplier shall not be relieved from any of its obligations hereunder by entering into any sub-contract for the performance of this Agreement or any part thereof.
- 70.3. KDM shall not be required to interact with any Sub-Contractors at any time during the Term and shall only interact with the Supplier.

71. CESSION AND ASSIGNMENT

- 71.1. Neither Party shall be entitled to cede, assign, transfer or make over any of their rights or obligations in terms of this Agreement without obtaining the prior written consent of the other Party, which shall not be unreasonably withheld, conditioned or delayed
- 53.2 Any cession or assignment agreed to by a Party will not relieve the other Party of any obligations with respect to any covenant, condition, or obligation required to be performed by that Party under this Agreement.

72. REPUTATION

- 72.1. The Supplier shall not do anything, or engage in any activity, which is likely to adversely affect, or damage, KDM's good name and/or reputation and shall procure that its KDMs and employees involved in the implementation of this Agreement, do not do any such thing or engage in any such activities.

73. SEVERABILITY

- 73.1. The invalidity, illegality or unenforceability of any of the provisions of this Agreement shall not affect the validity, legality and enforceability of the remaining provisions of this Agreement.

74. NO WAIVER

- 74.1. The failure of either Party to insist upon the strict performance of any provision of this Agreement or to exercise any right, power or remedy consequent upon a breach hereof shall not constitute a waiver by such Party to require strict and punctual compliance with each and every provision of this Agreement.

75. ENTIRE AGREEMENT

- 75.1. This document embodies the entire agreement between the Parties hereto in relation to the subject matter hereof.

76. NOTICES AND DOMICILIUM

- 76.1. The parties choose as their domicilia citandi et executandi for all purposes under this Agreement, whether in respect of Court processes, notices or other documents or communication of whatsoever nature (including the exercise of any option), the following addresses:-

KDM:

Physical: 14 Chief Albert Luthuli Street
KwaDukuza
4450

Postal: P.O Box 72
KwaDukuza
4450

Telephone: 032 4375 015

E-mail: municipalm@kwadukuza.gov.za/ lindon@kwadukuza.gov.za

SUPPLIER:

Physical: 21 Hawk Road
Imbonini Park
Shaka's Head

Postal: P.O Box 1576
Ballito 4420

Telephone: 032 9400 400

E-mail: mandla@dcwm.co.za

- 76.2. Any notice or communication required or permitted to be given in terms of this Agreement shall be valid and effective only if in writing, but it shall be competent to give notice by e-mail.
- 76.3. Any party may by notice to any other party change the physical address chosen as its domicilium *citandi et executandi* vis-à-vis that party to another physical address in the Republic of South Africa or its telefax number, provided that the change shall become effective vis-à-vis that addressee on the 7th business day from the deemed receipt of the notice by the addressee.

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76.4. Any notice to a party:-

- 76.4.1. sent by prepaid registered post (by airmail if appropriate) in a correctly addressed envelope to it at its *domicilium citandi et executandi* shall be deemed to have been received by the 7th business day after posting (unless the contrary is proved);
- 76.4.2. delivered by hand to a responsible person during ordinary business hours at its *domicilium citandi et executandi* shall be deemed to have been received on the day of delivery; and
- 76.4.3. sent by e-mail to its chosen e-mail address shall be deemed to have been received on the date of dispatch (unless the contrary is proved).
- 76.4.4. Notwithstanding anything to the contrary herein contained a written notice or communication actually received by a party shall be an adequate written notice or communication to it notwithstanding that it was not sent to or delivered at its chosen *domicilium citandi et executandi*.

77. **COUNTERPARTS**

- 77.1. This Agreement may be signed in counterparts and the copies signed in counterpart shall constitute the Agreement. This shall include faxed copies of this document.

78. **NATURE OF RELATIONSHIP**

- 78.1. This Agreement does not create a partnership, joint venture or agency between the Parties. Under no circumstances whatsoever shall either Party be liable for the debts of the other Party, howsoever incurred.

79. **RIGHTS OF THIRD PARTIES**

- 79.1. Unless otherwise expressly stated herein this Agreement does not create any rights which are enforceable by any Person who is not a Party to this Agreement. The Supplier acknowledges and agrees that this Agreement is made for the benefit of KDM and its Affiliates.

80. **FURTHER ASSURANCE**

- 80.1. The Supplier shall do or procure the doing of all such further acts, and execute or procure the valid execution of all such documents, as may from time to time be necessary in KDM's reasonable opinion to give full effect to this Agreement.

81. COSTS & EXPENSES

81.1. Each Party shall pay its own costs and expenses in connection with negotiating, drafting, preparing and implementing this Agreement.

82. GOVERNING LANGUAGE

82.1. Any notice given under this Agreement shall be in English. All other documents provided under this Agreement shall be in English.

83. GOVERNING LAW

83.1. The laws of the Republic of South Africa shall govern the validity, interpretation and performance of this Agreement and the courts of the Republic of South Africa shall have sole jurisdiction.

SIGNED AT KWADUKUZA ON THE 29th DAY OF OCTOBER 2020

WITNESSES:

1. Couede

2. [Signature]

[Signature]
for and on behalf of
KWADUKUZA LOCAL
MUNICIPALITY

SIGNED AT KWADUKUZA ON THE 29th DAY OF OCTOBER 2020

WITNESSES:

1. Couede

2. [Signature]

[Signature]
for and on behalf of
SUPPLIER