**Management Agreement**

General and Special Conditions

for a Management Contract

for the Provision of

Water and Wastewater Services

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**GENERAL CONDITIONS**

# CONTRACT AND INTERPRETATION

## ARTICLE 1 - CONTRACT AND INTERPRETATION

### Definitions

Unless the context otherwise requires, the following terms wherever used in this Contract have the following meanings:

“**Adjudicator**” means the person or persons named as such in the SCC;

“**Applicable Law**” means the laws and any other instruments having the force of law in [ ], as they may be issued and in force from time to time including, any decree of the President or government of [ ];

“**Appointing Authority**” is the authority specified in the SCC;

“**Bank**” means the International Bank for Reconstruction and Development (IBRD), the International Development Association (IDA) or the World Bank;

“**Bidder**” is defined in the RFP Documents;

“**Capital Investment Program**” means the capital investment program, if any, of the Utility referred to in SA Section 7.4(2);

“**Contract**” means the agreement entered into between the Utility and the Operator, together with the Contract Documents;

“**Contract Documents**” means the Form of Contract, General Conditions and the Appendices to the General Conditions as set out in GC Section 1.2;

“**Contract Records**” is defined in GC Section 1.8.1(1);

“**Contract Term**” means the term of the Contract, including any renewals approved by the Utility, commencing on the Effective Date and Continuing to, and including, the End Date;

“**Contract Year**” means a continuous period covering a full 365 Days or 366 Days in leap years, the first Contract Year to begin on the Starting Date;

“**Costs**” means all expenditures reasonably incurred, or to be incurred, by the Operator including overhead but excluding profit;

“**Data Room**” means Data Room established by the Utility in the RFP Procurement Process as set out in the RFP Documents;

“**Day**” means a calendar day of the Gregorian Calendar;

“**Defect Liability Period**” means the period of validity of the warranties given by the Operator as set out in GC Section 9.1(2);

“**Effective Date**” is defined in GC Section 2.2.1;

“**Facilities**” means the water and wastewater and related infrastructure as set out in the Facilities Appendix;

“**Force Majeure**” is defined in GC Section 9.6(1);

“**GC**” means the General Conditions;

“**Incentive Compensation**” is defined in the Incentive Compensation Appendix;

“**Including**” means including without limitation and “**includes**” means includes without limitation, unless expressly stated otherwise;

“**Management Staff**” is defined in GC Section 8.3(1);

“**Management Staff Costs**” is defined in GC Section 5.7;

“**Month**” means a calendar month of the Gregorian Calendar;

“**Operations Manager**” is defined in GC Section 8.2(3);

“**Operator**” means the Bidder whose Proposal to perform the Contract has been accepted by the Utility and is named as such in the Form of Contract, and includes the legal successors or permitted assigns of the Operator;

“**Operator’s Fixed Fee**” means the amount specified in Section 2.1 of the Form of Contract, subject to such additions and adjustments thereto or deductions therefrom, as may be made pursuant to the Contract;

“**Operator’s Representative**” is defined in GC Section 8.1.2(1);

“**Parent**” means the parent company of the Operator, if any;

“**Party**” means the Utility or the Operator, as the case may be, and “Parties” means both of them;

 “**Performance Security**” is defined in GC Section 5.3.1(1);

“**PMU**” is defined in GC Section 7.1(1);

“**PMU Director**” is defined in GC Section 7.1(2);

“**Proposal**” means the Operator’s Proposal set out in the Operator’s Proposal Appendix;

“**PSA**” means Performance Standards Appendix;

“**RFP Documents**” means the request for proposals documents issued by the Utility in respect of the process for the selection of an operator to perform the Services;

“**SA**” means Services Appendix;

“**SCC**” means the Special Conditions of Contract;

“**Services**” means the work to be performed by the Operator pursuant to this Contract, as described in the Services Appendix;

“**Shareholder**” means any of the shareholders of the joint venture company if the Operator is a joint venture company;

“**Capital and Operating Investment Fund**” is defined in the Capital and Operating Investment Fund Appendix;

“**Starting Date**” is defined in GC Section 2.2.3 and the SCC;

“**Subcontract**” means any contract, whether written or verbal, entered into by the Operator with a Subcontractor for the performance of any part of the Services;

“**Subcontractor**,” including vendors, means any person to whom execution of any part of the Services is sub-contracted directly or indirectly by the Operator in accordance with the Contract, and includes its legal successors or permitted assigns;

“**Submission Deadline**” means the date for submissions of proposals as stated in or amended by the Request for Proposals;

“**Subsequent Operator**” means the operator that is to assume the provision of the Services, or a variation of the Services, upon termination of the Contract and may include the Utility itself;

“**Taxes**” is defined in GC Section 5.4;

“**Third Party**” means any person or entity other than the Parties;

“**Transition Assistance**” is defined in GC Section 2.2.4; and

“**Utility**” means the [Water Utility];

“**War Risks**” is defined in GC Section 9.7(1).

### Contract Documents

Subject to the Form of Contract provisions, all documents forming part of the Contract, and all parts thereof, are intended to be correlative, complementary and mutually explanatory. The Contract shall be read as a whole. The following appendices which are incorporated by reference into the Contract shall be referred to as follows:

Appendix “1” – Special Conditions of Contract (the “SCC”)

Appendix “2” - Compensation and Payment (the “Compensation and Payment Appendix”)

Appendix “3” – Services (the “Services Appendix”)

Appendix “4” – Performance Standards (the “Performance Standards Appendix”)

Appendix “5” – Description of the Facilities (the “Facilities Appendix”)

Appendix “6” – Description of the Service Area (the “Service Area Appendix”)

Appendix “7” – Operations Staff (the “Operations Staff Appendix”)

Appendix “8” – Incentive Compensation (the “Incentive Compensation Appendix”)

Appendix “9” – Capital and Operating Investment Fund (the “Capital and Operating Investment Fund Appendix”)

Appendix “10” – Securities and Guarantees (the “Securities and Guarantees Appendix”)

Appendix “11” – Operator’s Proposal (the “Operator’s Proposal Appendix”)

### Interpretation

### Language

#### All correspondence and communications to be given, and all other documentation to be prepared and supplied under the Contract shall be written in English, and the Contract shall be construed and interpreted in accordance with that language.

#### If any of the Contract Documents, correspondence or communications are prepared in any language other than English, the English translation of such documents, correspondence or communications shall prevail in matters of interpretation.

### Singular and Plural

The singular shall include the plural and the plural the singular, except where the context otherwise requires.

#### Headings

The headings in the Contract Documents are included for ease of reference, and shall neither constitute a part of the Contract nor affect its interpretation.

#### Persons

Words importing persons or entities shall include firms, corporations and government entities.

#### Incoterms

##### Unless inconsistent with any provision of the Contract, the meaning of any trade term and the rights and obligations of Parties thereunder shall be as prescribed by *Incoterms*.

##### *Incoterms* means international rules for interpreting trade terms published by the International Chamber of Commerce (2000 or latest edition), 38 Cours Albert 1er, 75008 Paris, France.

#### Entire Agreement

The Contract constitutes the entire agreement between the Utility and Operator with respect to the subject matter of the Contract and supersedes all communications, negotiations and agreements, whether written or oral, of the Parties with respect thereto made prior to the date of the Contract.

#### Amendment

##### No amendment or other variation of the Contract shall be effective unless it is in writing, is dated, expressly refers to the Contract, and is signed by a duly authorized representative of each Party hereto.

##### Notwithstanding GC Section 1.3.7(1), if the Utility is obliged, through any agreement or custom with the Bank, to receive a non-objection from the Bank for any proposed amendment or variation, such amendment or variation shall not be effective until a non-objection from the Bank has been received by the Utility.

#### Number of Days

Except as expressly stated to the contrary elsewhere herein, in computing the number of days for the purposes of the Contract all days shall be counted, including Fridays, Saturdays and legal holidays in [ ], provided, however, that if the final day of any period shall fall on a Friday, Saturday, or legal holiday in [ ], then the final day shall be deemed to be the next day which is not a Friday, Saturday or legal holiday in [ ].

#### Independent Contractor

##### The Operator shall be an independent contractor performing the Contract. The Contract does not create any agency, partnership, joint venture or other joint relationship between the Utility and the Operator or its Shareholders.

##### Subject to the provisions of the Contract, the Operator shall be solely responsible for the manner in which the Contract is performed. All employees, agents, representatives or Subcontractors engaged by the Operator in connection with the performance of the Contract shall be under the complete control of the Operator and shall not be deemed to be employees of the Utility, and nothing contained in the Contract, or in any Subcontract awarded by the Operator, shall be construed to create any contractual relationship between the Operator’s employees, representatives or Subcontractors and the Utility.

#### Joint Venture or Consortium

##### If the Operator consists of a joint venture company of more than one person, the Shareholders hereby authorise the representative named in the SCC to act on their behalf in exercising all the Shareholders’ and Operator’s rights and obligations toward the Utility under this Contract, including the receiving of approvals, consents, orders, certificates, instructions and payments from the Utility, amendment of the Contract and in all other matters under the Contract, including the settlement of disputes.

##### If the Operator is a joint venture company of two or more persons, each Shareholder of the joint venture company and each Shareholder’s parent company, shall be jointly and severally bound to the Utility for the fulfilment of the provisions of the Contract by the Operator. Claims against the parent companies or the Shareholders as the case may be shall be subject to any legal defences available to the Operator, and to any limits on the liability of the Operator including those set out in GC Section 9.2.

##### The composition, shareholding, control or constitution of the Operator shall be in accordance with the Operator’s Proposal and shall not be altered without the prior consent of the Utility.

#### Non-Waiver

##### Subject to GC Section 1.3.11(2), no relaxation, forbearance, delay or indulgence by either Party in enforcing any of the terms and conditions of the Contract or the granting of time by either Party to the other shall prejudice, affect or restrict the rights of that Party under the Contract, nor shall any waiver by either Party of any breach of Contract operate as waiver of any subsequent or continuing breach of Contract.

##### To be a valid waiver, any waiver of a Party’s rights, powers or remedies under the Contract shall,

###### be in writing;

###### be dated and signed by the Utility’s or Operator’s Representative, whichever is granting such waiver; and

###### specify the right, power or remedy being waived and the extent to which it is being waived.

#### Severability

If any provision or condition of the Contract is prohibited or rendered invalid or unenforceable, such prohibition, invalidity or unenforceability shall not affect the validity or enforceability of any other provisions and conditions of the Contract.

#### Survival of Obligations

Upon the termination or expiration of the Contract pursuant to the Contract, all rights and obligations of the Parties hereunder shall cease, except those noted in the SCC.

### Notice

##### All notices to be given under the Contract shall be in writing and shall be sent by personal delivery, courier or facsimile to the address for notice of the relevant Party as set out in the SCC and the following provisions apply:

###### Any notice sent by facsimile shall be confirmed by the sender no later than two days after dispatch by a notice sent by courier;

###### Any notice sent by courier shall be deemed to have been delivered 10 days after dispatch. In proving the fact of dispatch, it shall be sufficient to show that the envelope containing such notice was properly addressed, with proper payment for the courier, and conveyed to the courier service for transmission; and

###### Any notice delivered personally or sent by facsimile shall be deemed to have been delivered on the date of dispatch.

##### A Party may change its address for notice pursuant to this Contract by giving the other Party notice of change in accordance with this GC Section1.4.

##### The Operator’s address for the purpose of giving notice pursuant to this GC Section 1.4 shall be in [ ].

##### Notices shall be deemed to include any approvals, consents, instructions, orders, certificates and similar communications to be given under the Contract.

### Governing Law

This Contract, its meaning and interpretation, and the relation between the Parties shall be governed by the Applicable Law.

### Settlement of Disputes[[1]](#footnote-1)

#### Adjudicator

##### If any dispute of any kind whatsoever arises between the Utility and the Operator in connection with or arising out of the Contract including,

###### any question regarding the existence, validity or termination of the Contract; and

###### any matter related to the performance of the Services,

the Parties shall seek to resolve any such dispute or difference by mutual consultation. If the Parties fail to resolve such a dispute or difference by mutual consultation, the dispute shall be referred in writing, by either the Operator or the Utility, to the Adjudicator with a copy to the other Party or Parties.

##### GC Section 1.6.1(1) shall apply,

###### during the execution of the Services and after the completion of the Services; and

###### before and after the termination, abandonment or breach of the Contract.

##### The Adjudicator shall give its decision in writing to both Parties no later than 30 days after the referral of a dispute. If the Adjudicator has rendered its decision within the 30 day time limit, and no notice of intention to commence arbitration has been given by either the Utility or the Operator prior to the expiration of 60 days after the reference of the dispute to the Adjudicator, the Adjudicator’s decision shall become final and binding upon the Utility and the Operator. Any decision that has become final and binding shall be implemented by the Parties forthwith.

##### The Adjudicator shall be paid an hourly fee at the rate specified in the SCC plus reasonable expenditures incurred in the execution of its duties as Adjudicator, and these costs shall be divided equally between the Utility and the Operator.

##### If the Adjudicator resigns or dies, or the Utility and the Operator agree that the Adjudicator is not fulfilling its functions in accordance with the provisions of the Contract, a new Adjudicator shall be jointly appointed by the Utility and the Operator. If the Utility and the Operator cannot agree on a new Adjudicator within 30 days after the resignation, death or removal of the existing Adjudicator, the new Adjudicator shall be appointed at the request of either Party by the Appointing Authority specified in the SCC.

#### Arbitration

##### If either the Utility or the Operator is dissatisfied with the Adjudicator’s decision, or if the Adjudicator fails to give a decision within 30 days after a dispute being referred to it, then either the Utility or the Operator may, within 60 days after such reference, give notice to the other Party, with a copy for information to the Adjudicator, of its intention to commence arbitration, as hereinafter provided, as to the matter in dispute, and no arbitration in respect of this matter may be commenced unless such notice is given.

##### Any dispute in respect of which a notice of intention to commence arbitration has been given, in accordance with GC Section 1.6.2(1), shall be finally settled by arbitration.

##### Arbitration proceedings shall be conducted in accordance with the rules of procedure designated in the SCC.

#### Obligations during Arbitration

Notwithstanding any reference to the Adjudicator or arbitration herein,

###### the Parties shall continue to perform their respective obligations under the Contract unless they otherwise agree; and

###### the Utility shall pay the Operator any monies due the Operator.

### Assignment[[2]](#footnote-2)

##### The Operator shall not assign to any Third Party the Contract, or any part thereof, or any right, benefit, obligation, or interest therein or thereunder without the prior consent of theUtility, which consent may not be unreasonably withheld.

##### The Operator may assign, absolutely or by way of charge, any monies due and payable to it or that may become due and payable to it under the Contract.

##### To be a valid assignment which has been approved by theUtility pursuant to GC Section 1.7(1), the assignment must,

###### be in writing;

###### be dated and signed by the Utility’s Representative; and

###### state the specific details of the assignment.

### Contract Records, Accounting and Auditing

#### Contract Records

##### Except as provided in GC Section 6.1,all data, information, documentation, account, plans, programs, reports, surveys and guidelines of any kind whatsoever (the “Contract Records”) prepared by the Operator in performing the Services shall become and remain the property of theUtility and the Operator shall deliver all Contract Records and a detailed inventory of those Contract Records to theUtility no later than the date of termination or expiration of the Contract, except in respect of such Contract Records that are required to be delivered at an earlier date.

##### The Contract Records shall include,

###### information of any kind whatsoever related to the finances, revenues or expenditures of thewater and wastewater operations in the Utility;

###### all files, documents, plans, drawings, specifications, notes, minutes of meetings and minutes of conversations;

###### all the plans, programs, reports, surveys and guidelines prepared by the Operator in carrying out the Services;

###### the accounts of thewater and wastewater operations at the Facilities; and

###### all manuals, reports, condition surveys, safety records, audit records, inventories, laboratory test results, procurement records, customer information, financial information, financial statements, invoices, accounting records, subcontracts and personnel records,

whether stored in hard copy or electronically and whether stored by the Operator or its Subcontractors.

##### The Operator shall provided theUtility with unrestricted access to the Contract Records during the term of the Contract, including the right to make and retain copies.

##### The Operator may retain a copy of the Contract Records but shall not use them for purposes unrelated to this Contract without the prior approval of theUtility. This GC Section 1.8.1(4) does not in any way relieve the Operator of its obligation of confidentiality pursuant to GC Section 6.2.

##### The Operator acknowledges that theUtility, as owner of the Contract Records, may deal with the Contract Records in any way it determines, including making the Contract Records publicly available and making them available to prospective bidders who may be involved in the process to select a Subsequent Operator.

#### Accounting

The Operator shall keep accurate and systematic accounts in respect of the Services and the Contract in accordance with internationally accepted accounting principles.

#### Auditing the Operator’s Own Accounts and the Contract Records

##### TheUtility may, in its sole discretion, audit,

###### the Operator’s own accounts, financial information, financial statements and technical information at any reasonable time and with 24 hours notice to the Operator; and

###### the Contract Records at any reasonable time and without notice to the Operator,

in respect of any matters related to the Contract.

##### TheUtility may complete the audit or audits itself or may retain an independent auditor, at theUtility’s expense, to complete the audit or audits.

#### Operator’s Audited Accounts

The Operator shall submit, to theUtility, the annual audited accounts of its own finances for each of the Operator’s fiscal years that occur during the Contract Term.

#### Bank Audit

The Bank may, in its sole discretion, inspect or audit the Operator’s accounts, financial information, financial statements and technical information in respect of any matters related to the Contract at any reasonable time and without notice to the Operator and may have the audit carried out by auditors appointed by the Bank.

# SUBJECT MATTER OF THE CONTRACT

## ARTICLE 2 - CONTRACT TERM, TIMING AND COMPLETION

2.1 Scope of Services

Unless otherwise expressly limited in the Contract, the Operator shall carry out all Services and provide Management Staff necessary to manage, operate and maintain the water and wastewater system of the Utility as those Services and the provision of Management Staff is more specifically described in the Contract.

**2.2 Contract Term, Timing and Completion**

#### 2.2.1 Effectiveness of Contract[[3]](#footnote-3)

The Form of Contract shall be signed by the Operator, the Parent and the Shareholders, if the Operator is a joint venture company, prior to its signing by theUtility. The Contract shall come into force and effect on the date the Form of Contract is signed by theUtility (the “Effective Date”), contingent on final approval by the Bank.

2.2.2 Expiration of Contract

This Contract shall terminate on,

###### the third anniversary of the Starting Date or an agreed extension date; or

###### the date of Contract termination pursuant to GC Section 11.2,

(the “End Date”), whichever is applicable.

2.2.3 Commencement of Services

The Operator shall commence the Services on the Starting Date. The Starting Date shall be no later than 30 days after the Effective Date, unless otherwise stated in the SCC, and the Utility shall give the Operator at least seven days prior notice of the Starting Date.

2.2.4 Services After the End Date[[4]](#footnote-4)

The Operator, upon written request by the Utility no later than 60 days prior to the End Date, shall provide assistance to the Utility, at no cost to the Utility, during a transitional period of up to 60 days after the End Date (the “Transition Assistance”). The purpose of the Transition Assistance is to ensure a smooth transition between the Operator and a Subsequent Operator of the Facilities. The Transition Assistance shall be related to only transition services and shall not be the full range of Services as set out in the Services Appendix. The Operator shall provide Transition Assistance at no additional cost to the Utility.

## ARTICLE 3 - OBLIGATIONS OF THE OPERATOR

3.1 Operator’s Responsibilities

##### (1) The Operator shall,

###### perform the Services set out in the Services Appendix;

###### perform the Services in accordance with the Performance Standards Appendix;

###### act, in fulfilling its obligations under the Contract, as the faithful advisors to the Utility; and

###### support and safeguard the Utility’s legitimate interests in dealing with Subcontractors or other Third Parties,

With all due care and diligence in accordance with the Contract.

##### The Operator shall, unless specifically excluded in the Contract, manage all works, Facilities, equipment, materials and supplies to carry out the Services as specified in the Contract.

3.2 Law Governing Services

The Operator shall comply with the Applicable Law and shall ensure that the Management Staff and Subcontractors comply with the Applicable Law. The Operator shall indemnify and hold harmless the Utility from and against any and all liabilities, damages, claims, fines, penalties and expenses of whatever nature arising or resulting from violation of the Applicable Law by the Operator, the Management Staff the Subcontractors and the Subcontractors’ personnel.

**3.3 Conflict of Interest**

#####  (1) The compensation of the Operator pursuant to GC Section 5.1 shall constitute the Operator’s sole compensation in connection with this Contract and, except as provided in GC Section 5.1, the Operator shall not accept for its own benefit any trade commission, discount or similar payment in connection with activities pursuant to this Contract or in the discharge of its obligations hereunder, and the Operator shall use its best efforts to ensure that the Management Staff, Subcontractors, and the Subcontractors’ employees and agents, similarly shall not receive any such additional remuneration.

#####  (2) The Operator, Subcontractors and any entity affiliated with the Operator or the Subcontractors, shall be disqualified, during the Contract Term from providing goods, works or services, other than the Services, with respect to,

###### the goods, works and services purchased from the Capital and Operating Investment Fund; and

###### without the prior approval of the Utility, the Capital Investment Program.

#####  (3) The Operator, Management Staff, Subcontractors and the employees and affiliates of the Subcontractors shall not engage, either directly or indirectly, in any business or professional activities in [ ] which would conflict with the activities assigned to them under this Contract.

##### The Operator and its Shareholders shall not participate in any discussions or work and shall not provide any services or advice to the Utility related to,

###### except with respect to their responsibilities as set out in the Services Appendix, institutional restructuring or reorganisation of the Utility or a utility or department of the Utility;

###### the development or review of bidding documents to retain any Subsequent Operator; or

###### the preparations for the procurement process to retain any Subsequent Operator.

##### Failure of the Operator or the Shareholders to comply with this GC Section 3.3, in addition to constituting a breach of this Contract, may result in the disqualification of the Operator and the Shareholders from bidding in the procurement process to retain any Subsequent Operator.

3.4 Facilities Information and Investigation[[5]](#footnote-5)

#####  (1) The Operator acknowledges that theUtility made available to the Operator, during the RFP procurement process, either directly or by placing the data in the Data Room, all data available to and accessible by the Utility with respect to the Facilities. The Operator shall be responsible for interpreting all available data about the Facilities that is provided to it by theUtility.

##### The Operator shall be deemed to have inspected and examined the Facilities, their surroundings, the Facilities information provided and other available information, and to have satisfied itself before entering into the Contract, as to,

###### the form and nature of the Facilities;

###### the applicable hydrological, hydrogeological and climatic conditions;

###### the extent and nature of the Services and the Facilities, equipment, materials and supplies necessary for the execution and completion of the Services, and the remedying of any defects; and

###### the Operator’s requirements for accommodation, personnel, power, transport, water and other services.

##### The Operator shall be deemed to have obtained all necessary information as to risks, contingencies and all other circumstances that may influence or affect the performance of its obligations under the Contract.

##### To the extent the Operator did not make any of the interpretations, investigations or examinations, or did not satisfy itself, or did not obtain such information as called for in this GC Section 3.4, the Operator represents and warrants that it is willing to assume and does hereby assume responsibility for any and all loss and damage from any cause whatsoever which the Operator’s interpretations, investigations, examinations and obtaining of information may have avoided and agrees to indemnify theUtility from all risk thereof and from conditions arising or developing in the course of performing the Services which may make the performance of the Services more onerous and more expensive to fulfil or perform than was contemplated on the Effective Date. Notwithstanding anything in the Contract to the contrary, the Operator acknowledges and declares that in entering into the Contract it did not and does not rely upon any information or report provided by or on behalf of theUtility or its agents, representatives or employees.

3.5 Access to the Facilities

#####  (1) The Operator shall, during the term of the Contract, provide free and open access to the Facilities for the Utility, and any person representing or invited by the Utility, at the Utility’s request. The Utility shall make its best efforts to provide reasonable notice to the Operator prior to the Utility’s, or its representatives’ or invitees’, access but such notice is not mandatory. The Utility’s representatives and invitees to the Facilities shall observe all safety and health regulations and reasonable instructions of the Operator.

##### The Operator shall give all reasonable access to any other contractors employed by the Utility on or near the Facilities to carry out their work and to regulators under the Applicable Law.

##### If the Operator makes available to other contractors any roads or ways the maintenance for which the Operator is responsible, or provides any other service of whatsoever nature for such other contractors, the Utility shall fully compensate the Operator for any loss or damage caused or occasioned by such other contractors in respect of any such use or service.

3.6 Equipment and Materials Furnished by the Utility

#### 3.6.1 General

#####  (1) The vehicles, equipment, materials and supplies in respect of the water and wastewater systems in the Service Area will remain under the ownership of the Utility.

##### The vehicles, equipment, materials and supplies and any other property whatsoever made available to the Operator by the Utility, or purchased by the Operator with funds provided by the Utility, excluding the Operator’s Fixed Fee and Incentive Compensation, shall be the property of the Utility and shall be marked accordingly.

##### The Utility shall, on the Starting Date, provide all vehicles, equipment, materials and supplies used by the Utility, as of the Starting Date, to the Operator. As of the Starting Date, the vehicles, equipment, materials and supplies shall be in the care and custody of the Operator.

##### The Operator shall, on the End Date, return all vehicles, equipment, materials and supplies made available to the Operator pursuant to GC Section 3.6.1(3) or purchased by the Operator using funds provided by the Utility pursuant to GC Section 3.6.1(2), as of the End Date, to the Utility. The vehicles, equipment and materials returned to the Utility by the Operator pursuant to this GC Section 3.6.1(4) shall be in at least the same condition, normal wear and tear excepted, as they were when made available to or purchased by the Operator.

3.6.2 Vehicles, Equipment, Materials and Supplies Inventory Lists and Handover

#####  (1) No later than the Starting Date, the Utility shall provide to the Operator a list of all vehicles, equipment, materials and supplies to be provided to the Operator on the Starting Date (the “Starting Date Inventory List”).

#####  (2) No later than 30 days after the Starting Date, the Operator shall confirm, in writing, that it has received all items on the Starting Date Inventory List or shall provide a revised Starting Date Inventory List.

#####  (3) No later than 30 days prior to the End Date, or the date of termination, the Operator shall provide to the Utility for their review and approval a list of the vehicles, equipment, materials and supplies to be returned to the Utility on the End Date (the “End Date Inventory List”).

#####  (4) No later than the End Date, the Utility shall confirm, in writing, that they have received all items on the End Date Inventory List.

##### Immediately prior to the End Date, the Operator shall transfer, to the Utility or Subsequent Operator, sufficient consumables to operate the Facilities for at least 90 days after the End Date.

##### The vehicles, equipment, materials and supplies shall be handed over by each Party, pursuant to this GC Section 3.6, at no cost to either Party.

3.6.3 Collection and Handling of Revenues[[6]](#footnote-6)

#####  (1) The Operator shall, in accordance with the Services Appendix, collect Revenues on the Utility’s behalf.

##### The Utility shall open and maintain a deposit account at a banks which has a branch in the Service Area to be used solely for the deposits of all Revenues collected by the Operator on behalf of the Utility. The deposit account shall be in the name of one of the Utility and the choice of the bank shall be in the Utility’s sole discretion.

##### The Operator shall directly deposit all of the collected Revenues of the Customers of the Utility into the account of the Utility, which shall be dedicated accounts for Revenues collected by the Operator. The Operator acknowledges that at all times ownership of the collected Revenues rests with the Utility. The Operator shall deposit all collected Revenues, whether in the form of cash, cheques or other form, to the Utility’s revenue account on the day of receipt. If it is not possible for the Operator to deposit Revenues on the day of receipt, the Revenues shall be deposited by the Operator on the next banking day.

##### At all times, all Revenues collected by the Operator are the property of the Utility. Until such time as the Operator deposits the Revenues into the Utility’s revenue account, the Revenues shall be in the care and custody of the Operator.

##### The Operator shall not deposit nor permit the deposit of the Revenues into any account other than the Utility’s revenue account.

##### The Operator shall be liable for any loss, theft or destruction of the Revenues which occurs prior to the deposit of the Revenues into the Utility’s revenue account. In the event of any loss or theft of Revenues before they are deposited to the Utility’s revenue account, the Operator shall pay the amount of such losses to the Utility forthwith and without recourse to any defense or objection.

##### The Operator shall put in place, prior to the receipt of any of the Revenues, security measures necessary to protect such Revenues from loss, theft or destruction.

ARTICLE 4 – OBLIGATIONS OF THE UTILITY

### 4.1 Utility’s Assistance to the Operator

TheUtility shall use its best efforts to,

###### provide the Operator, Subcontractors and Management Staff with work permits and such other documents as shall be necessary to enable the Operator, Subcontractors or Management Staff to perform the Services;

###### arrange for Management Staff and, if appropriate, their eligible dependants to obtain promptly all necessary entry and exit visas, residence permits, exchange permits and any other documents required for their stay in [ ];

###### facilitate the prompt clearance through customs of any property required for the Services and of the personal effects of the Management Staff and their eligible dependants; and

###### issue to officials, agents and representatives of theUtility all such instructions as may be necessary or appropriate for the prompt and effective implementation of the Services.

4.2 Access to and Possession of the Facilities

The Utility shall be responsible for acquiring and providing legal and physical possession of the Facilities and access thereto and for providing possession and access to all other areas reasonably required for the proper execution of the Contract including all requisite rights of way. The Utility shall provide the Operator, free of charge, full possession of the Facilities during the term of the Contract.

**4.3 Reviews and Approvals of Submissions**

#####  (1) Except as otherwise provided in the Contract, if the Operator submits a plan, report or other documentation to theUtility in writing, and theUtility is required to approve that submission, the Utility shall review and either approve or provide written comment on the Operator’s submission no later than 30 days after the day of submission by the Operator to theUtility.

##### If theUtility fails to approve or refuses to approve the Operator’s submission in accordance with GC Section 4.3(1), the Operator shall notify theUtility in writing that it has not received a response to its submission.

##### If theUtility fails to respond to the Operator’s written notification pursuant to GC Section 4.3(2) within 14 days after the receipt by theUtility of the Operator’s written notification, the Operator’s submission shall be deemed to be approved.

4.4 Operations Staff

The Utility shall, free of charge, for the purpose of carrying out the Services make the Operations Staff available to the Operator in accordance with the Operations Staff Appendix.

4.5 Cost of Operations and Maintenance and Minimum Annual Operations and Maintenance Budgets

##### While the Operator is responsible for the management of day to day operations and maintenance as described in the Services Appendix, the costs and expenses for day to day operations and maintenance, excluding the Management Staff Costs of the Operator, shall be paid by the Utility.

##### Notwithstanding GC Section 4.5(1), the Operator shall play the lead role in the preparation of the Annual Operations and Maintenance Budgets for the Utility’s operations in accordance with SA Section 4.4.

##### The Utility shall not, without the consent of the Operator, decrease the Annual Operations and Maintenance Budgets to an amount, in real terms, that is less than the Utility’s operations and maintenance budget for the Base Year.

C. PAYMENT

## ARTICLE 5 - OPERATOR’S COMPENSATION

5.1 Operator’s Fixed Fee and Incentive Compensation

#### 5.1.1 Operator’s Fixed Fee

##### (1) The Operator’s Fixed Fee shall be as specified in the Form of Contract. The Utility shall pay the Operator’s Fixed Fee in accordance with the Compensation and Payment Appendix for the Services provided by the Management Staff of the Operator. The Operator acknowledges that the Operator’s Fixed Fee is intended to compensate the Operator for the services of the Management Staff.

##### The Operator shall be deemed to have satisfied itself as to the correctness and sufficiency of the Operator’s Fixed Fee, which shall, except as otherwise provided for in the Contract, cover all its obligations under the Contract. The Operator shall make no claim whatsoever for additional costs, expenses or reimbursement for any costs or expenses associated with the Management Staff and acknowledges that the Operator’s Fixed Fee constitutes the only amount payable by the Utility to the Operator for the Management Staff.

5.1.2 Incentive Compensation

#####  (1) The Utility shall pay the Operator Incentive Compensation in accordance with the Incentive Compensation Appendix.

##### (2) The Operator acknowledges that the intent of the Incentive Compensation is to compensate the Operator based on the extent to which it achieves the thresholds for system performance improvements set out in the Incentive Compensation Appendix.

##### (3) The Incentive Compensation for each Contract Year shall be calculated in accordance with the Incentive Compensation Appendix.

5.2 Terms of Payment

##### (1) The Operator’s Fixed Fee and Incentive Compensation shall be paid as specified in the Compensation and Payment Appendix and the Incentive Compensation Appendix. The procedures to be followed in making application for and processing payments shall be those outlined in the same Appendices.

##### (2) In the event that the Utility fails to make any payment by its respective due date or within the period set forth in the Contract, the Utility shall pay to the Operator interest on the amount of such delayed payment at the rate shown in the SCC for the period of delay until payment has been made in full, whether before or after judgment or arbitrage award.

##### (3) The currency or currencies in which payments are made to the Operator under this Contract shall be specified in the Compensation and Payment Appendix and the Incentive Compensation Appendix, subject to the general principle that payments will be made in the currency or currencies in which the Operator’s Fixed Fee has been stated in the Operator’s Proposal.

##### (4) All payments shall be made in the currency or currencies specified in the Compensation and Payment Appendix and the Incentive Compensation Appendix, pursuant to GC Section 5.2(3).

5.3 Performance Security

#####  (1) The Operator and, if applicable, its Parent and Shareholders shall provide a security for the Operator’s proper performance of the Contract to the Utility no later than the date specified in the RFP Documents (the “Performance Security”).

#####  (2) The Performance Security or Performance Securities shall be,

###### in the form of a bank guarantee as set out in the Securities and Guarantees Appendix or in another form only after the Operator has received approval for such form from the Utility;

###### in the amount specified in the SCC;

###### denominated in the currency or currencies of the Contract, or in a freely convertible currency acceptable to the Utility; and

###### in accordance with any other special requirements set out in the SCC.

##### If the Performance Security is a bank guarantee it shall be issued by either,

###### a bank located in [ ];

###### a foreign bank through a correspondent bank located in [ ]; or

###### with the prior written agreement of the Utility, directly by a foreign bank acceptable to the Utility.

##### The Performance Security or Performance Securities shall be valid until 90 days after the End Date, or any extension to the End Date.

##### The Utility shall return the Performance Security or Performance Securities no later than 14 days after its expiration.

##### The cost of complying with this GC Section 5.3.1 shall be borne by the Operator.

5.4 Taxes and Duties

Except as otherwise specifically provided in the Contract, the Operator shall bear and pay all taxes, duties, levies and charges (the “Taxes”) assessed on the Operator, its Subcontractors or their employees by all municipal, state or national government authorities in connection with the Services in and outside of [ ]. The parties acknowledge and agree that the Operator’s Fixed Fee includes all applicable Taxes.

**5.5 Withholding**[[7]](#footnote-7)

Ifthe Operator is in default or breach of its obligations under the Contract, the Utility may, without prejudice to any other rights or remedies it may possess, withhold any payments due to the Operator. The Utility shall pay to the Operator the amounts withheld by the Utility pursuant to this GC Section 5.5, without interest, no later than 15 days after the Operator remedies the default or breach of its obligations that gave rise to the withholding pursuant to this GC Section 5.5.

**5.6 Liquidated Damages**[[8]](#footnote-8)

The Operator shall, without prejudice to any other rights or remedies the Utility may possess, pay liquidated damages to the Utility as set out in the Performance Standards Appendix.

**5.7 Management Staff Costs**

The Operator shall, at its own expense, pay all costs and expenses of, or related to, the Management Staff (the “Management Staff Costs”) including,

###### wages, salaries, benefits, allowances, and severances;

###### the Operator’s home office support;

###### office premises that are supplementary to the office premises provided to the Operator as a result of the implementation of the Initial Transition Plan, and all utility costs, including heating, air conditioning, telephone, fax, electricity and other similar costs related to those office premises;

###### all secretarial and administrative support staff providing assistance and services to the Management Staff;

###### all vehicle, accommodation and transportation costs, whether local or international;

###### travel and relocation of Management Staff and their dependants;

###### communications, photocopying, telephone, faxes, hardware, software and office supplies; and

###### training and development of the Management Staff.

**D. INTELLECTUAL PROPERTY AND CONFIDENTIALITY**

## ARTICLE 6 - INTELLECTUAL PROPERTY[[9]](#footnote-9)

6.1 Intellectual Property and Copyright

##### (1) As between the Parties, the Operator shall retain the copyright and other intellectual property rights in any technical or engineering inventions or innovations made by or on behalf of the Operator in providing the Services and in the Operator’s, Parent’s and Shareholders’ proprietary software, as applicable, that the Operator modified for use in connection with the Services (the “Operator’s Innovations and Software”).

##### (2) The Operator shall be deemed, by signing the Contract, to give the Utility a non-terminable, transferable, non-exclusive, royalty-free licence to copy, use and communicate the Operator’s Innovations and Software and any other software used or purchased by the Operator in the performance of the Services (the “Other Software”), including making and using modifications of them. This licence shall,

###### apply throughout the actual or intended working life, whichever is longer, of the relevant parts of the Facilities;

###### entitle any person in proper possession of the relevant part of the Facilities to copy, use and communicate the Operator’s Innovations and Software and the Other Software for the purposes of managing, operating and maintaining the Facilities;

###### in the case of Operator’s Innovations and Software and the Other Software which are in the form of computer programs and other software, permit their use on any computer at the Facilities and other places as envisaged by the Contract, including replacements of any computers supplied by the Operator; and

###### entitle the Utility to make the Operator’s Innovations and Software and the Other Software available for inspection by a prospective bidder who may be involved in the process to select a Subsequent Operator.

##### As between the Parties, the Utility owns and will continue to own all data with respect to the Services, Facilities and Customers.

6.2 Confidentiality

##### (1) The Operator shall keep confidential and shall not, without the written consent of the Utility, divulge to any Third Party any documents, data or other information arising directly or indirectly from the performance of Services under the Contract, whether such information has been furnished prior to, during or following termination of the Contract.

##### (2) Notwithstanding GC Section 6.2(1), the Operator may furnish to its Subcontractors such documents, data and other information to the extent required for the Subcontractors to perform their work under the Contract, in which event the Operator shall obtain from such Subcontractors an undertaking of confidentiality similar to that imposed on the Operator under GC Section 6.2(1).

##### (3) The Operator shall not use such documents, data and other information received from the Utility for any purpose other than the Services as are required for the performance of the Contract. The Operator shall not publish, permit to be published, or disclose any particulars of the Contract or Facilities in any trade or technical paper or advertising materials without the prior written consent of the Utility.

##### (4) The obligations of the Operator under GC Sections 6.2(1) and 6.2(3), shall not apply to that information which,[[10]](#footnote-10)

###### now or hereafter enters the public domain through no fault of the Operator;

###### can be proven to have been possessed by the Operator at the time of disclosure and which was not previously obtained, directly or indirectly, from the Utility; or

###### otherwise lawfully becomes available to the Operator from a Third Party that has no obligation of confidentiality.

E. EXECUTION OF THE SERVICES

## ARTICLE 7 - CONTRACT ADMINISTRATION AND SUPERVISION

7.1 Utility Administration and Supervision

##### (1) The Utility shall appoint a Project Management Unit (the “PMU”) which shall carry out the duties assigned to it in the Contract. The PMU shall include suitably qualified professionals who are competent to carry out these duties.

##### (2) The Utility shall appoint a PMU Director (the “PMU Director”) who shall be primarily responsible for the activities of the PMU.

##### (3) The PMU shall have no authority to amend the Contract.

##### (4) The PMU may exercise the authority attributable to the PMU as specified in or necessarily to be implied from the Contract. The Utility undertakes not to impose further constraints on the PMU’s authority without prior written notice to the Operator.

##### (5) If the PMU is required to obtain the approval of the Utility before exercising a specified authority, the requirements shall be stated in the SCC. If the PMU exercises a specified authority for which the Utility’s approval is required, then for the purposes of the Contract the Utility shall be deemed to have given approval.

##### (6) Except as otherwise stated in these General Conditions,

###### whenever carrying out duties or exercising authority, specified in or implied by the Contract, the PMU shall be deemed to act for the Utility;

###### the PMU has no authority to relieve either Party of any duties, obligations or responsibilities under the Contract; and

###### any approval, check, certificate, consent, examination, inspection, instruction, notice, proposal, request, test, or similar act by the PMU, including absence of disapproval, shall not relieve the Operator from any responsibility it has under the Contract, including responsibility for errors, omissions, discrepancies and non-compliances.

7.2 Instructions of the PMU

##### (1) The PMU, through the PMU Director, may issue to the Operator, at any time, instructions which may be necessary for the execution of the Services and the remedying of any defects, all in accordance with the Contract. The Operator shall only take instructions from the PMU Director.

##### (2) The Operator shall comply with the instructions given by the PMU Director on any matter related to the Contract. These instructions shall be given in writing.

7.3 Change in the PMU

The Utility may, in its sole discretion, change the members of the PMU. If the Utility intends to change the PMU Director, it shall give the Operator 30 days prior notice of the change.

## ARTICLE 8 - REPRESENTATIVES, STAFF AND SUBCONTRACTING[[11]](#footnote-11)

8.1 Representatives

#### 8.1.1 Utility’s Representative

##### (1) The Utility’s representative (the “Utility’s Representative”) shall be the PMU Director.

##### (2) The Utility shall name its representative no later than 14 days after the Effective Date.

##### (3) The Utility may change its representative from time to time and shall give notice of the change without delay. The Utility shall not change its representative at a time and in such a manner as to impede the progress of the Services.

##### (4) The Utility’s Representative shall represent and act for the Utility at all times during the performance of the Contract. All notices, instructions, orders, certificates, approvals and all other communications under the Contract by the Utility shall be given by the PMU Director except as herein otherwise provided.

##### (5) All notices, instructions, information and other communications given by the Operator to the Utility under the Contract shall be given to the PMU Director except as herein otherwise provided.

8.1.2 Operator’s Representative

##### (1) The Operator shall name its representative (the “Operator’s Representative”) no later than 14 days after the Effective Date and shall request the Utility to approve the proposed Operator’s Representative. If the Utility makes no objection to the proposed Operator’s Representative, the Operator’s Representative shall be deemed to have been approved.

##### (2) If the Utility objects to the proposed Operator’s Representative before the expiration of 14 days after the proposal, the Operator shall propose a replacement no later than 14 days after the Utility’s objection and GC Section 8.1.2(1) and 8.1.2(2) shall apply to the proposed replacement.

##### (3) The Operator’s Representative shall represent and act for the Operator at all times during the performance of the Contract. All notices, instructions, orders, certificates, approvals and all other communications under the Contract by the Operator shall be given by the Operator’s Representative, except as herein otherwise provided.

##### (4) All notices, instructions, information, and other communications given by the Utility to the Operator under the Contract shall be given to the Operator’s Representative as established pursuant to this GC Section 8.1.2.

##### (5) The Operator shall not revoke the appointment of the Operator’s Representative without the Utility’s prior written consent, which shall not be unreasonably withheld. If the Utility consents thereto, the Operator shall appoint some other person as the Operator’s Representative, pursuant to the procedure set out in this GC Section 8.1.2.

##### (6) The Operator’s Representative may, subject to the approval of the Utility, which shall not be unreasonably withheld, at any time delegate to any person any of the powers, functions and authorities vested in him or her. Any such delegation may be revoked at any time. Any such delegation or revocation shall be subject to a prior notice signed by the Operator’s Representative, and shall specify the powers, functions and authorities thereby delegated or revoked. No such delegation or revocation shall take effect unless and until a copy thereof has been delivered to the Utility and the PMU Director.

##### (7) Any act or exercise by any person of powers, functions and authorities so delegated to him or her in accordance with GC Section 8.1.2(6) shall be deemed to be an act or exercise by the Operator’s Representative.

8.2 Operator’s Superintendence

##### (1) Throughout the term of the Contract, the Operator shall provide all necessary superintendence to plan, arrange, direct, manage and inspect the Services.

##### (2) Superintendence shall be given by a sufficient number of persons having adequate knowledge of the language for communications as set out in the SCC and of the operations to be carried out, including the methods and techniques required, the hazards likely to be encountered and methods of preventing accidents, for the satisfactory and safe execution of the Services.

##### (3) Subject to GC Section 8.4, the Operator’s Representative shall appoint a suitable person as operations manager as applicable (the “Operations Manager”) and shall notify the Utility as soon as such appointment is made. The Operations Manager shall supervise all work done at the Facilities by the Operator and shall be present at the Facilities through normal working hours except when on leave, sick or absent in connection with the proper performance of the Contract. Whenever the Operations Manager is absent from the Facilities, a suitable person shall be appointed to act as his or her deputy.

8.3 Management Staff

##### (1) The Operator shall provide and employ at the Facilities for the performance of the Services such managers and personnel, in addition to the Operations Staff, as is necessary for the proper and timely execution of the Contract (the “Management Staff”). The Operator shall ensure that all Management Staff are qualified, appropriately certified, competent and capable of performing the Services and that the Management Staff provides, and is capable of providing, the expertise required by the Management Staff as set out in the Operator’s Proposal Appendix.

##### (2) The Operator shall be responsible for obtaining all necessary permits and visas from the appropriate authorities for the entry of all Management Staff into [ ].

##### (3) The Operator shall at its own expense provide the means of repatriation to all of its and its Subcontractor’s personnel employed on the Contract at the Facilities to their various home countries. It shall also provide suitable temporary maintenance of all such persons from the cessation of their employment on the Contract to the date programmed for their departure. In the event that the Operator defaults in providing such means of transportation and temporary maintenance, the Utility may provide the same to such personnel and recover the cost of doing so from the Operator.

##### (4) The Operator shall at all times during the progress of the Contract use its best endeavours to prevent any unlawful, riotous or disorderly conduct or behaviour by or amongst its employees and the labour of its Subcontractors.

##### (5) The Operator shall, in all dealings with its personnel and the personnel of its Subcontractors currently employed on or connected with the Contract, pay due regard to all recognized festivals, official holidays, religious or other customs and all local laws and regulations pertaining to the employment of personnel.

8.4 Management Staff Changes

#####  (1) The PMU Director may require the Operator to remove and replace any member of the Management Staff who,

###### persists in any misconduct or lack of care;

###### carries out duties incompetently or negligently;

###### fails to comply with any provision of the Contract; or

###### persists in any conduct which gives the Utility reasonable cause to be dissatisfied with him or her.

##### The Operator shall not replace any member of its Management Staff without the approval of the Utility. If the Operator requests a replacement, the replacement person shall be of equal or better qualifications to the person being replaced. Any replacement of Management Staff shall be at no additional cost to the Utility.

##### The Utility may, in its sole discretion, carry out a review, once in each Contract Year, of the Operator’s plan for the involvement of the Management Staff in the provision of the Services. The Operator shall not change any levels of responsibility, time periods that any member of the Management Staff is committed to the Contract or any other matter relating to the nature or duration of the Management Staff’s involvement in the provision of the Services without the prior written consent of the Utility. If the Operator makes any such changes in the involvement of the Management Staff under this Contract, the Operator shall share any savings it may realize as a result of such changes with the Utility.

8.5 Operations Staff

The Operator shall direct the activities of water and wastewater staff employed by the municipalities constituting the Utility as of the Starting Date (the “Operations Staff”) in accordance with the Operations Staff Appendix. [[12]](#footnote-12)

**8.6 Subcontractors**

##### (1) The Operator shall not enter into any contract or contracts that will result in the majority of the Services being performed by a Subcontractor.

##### The Operator shall be responsible for the observance by Subcontractors of the terms and conditions of the Contract and shall ensure that all relevant terms of the Contract are included in the Operator’s contracts with Subcontractors.

##### Subcontracting by the Operator shall not relieve the Operator of any of its obligations under the Contract and the Operator shall be responsible for the acts, omissions and defaults of all Subcontractors, and the Subcontractor’s employees, agents and sub-subcontractors, as fully as if they were acts, omissions or defaults of the Operator or the Management Staff.

F. LIABILITY AND RISK DISTRIBUTION

## ARTICLE 9 - LIABILITY AND RISK DISTRIBUTION

9.1 Defect Liability

#####  (1) The Operator warrants that any construction repair, replacement or rehabilitation related to the Facilities or any part thereof and carried out by the Operator shall be free from defects in the design, engineering, materials and workmanship of the equipment, materials and supplies supplied and of the work executed.

##### (2) The Defect Liability Period shall be 18 months after the date of completion of the specific works to which the warranty applies or 18 months from the End Date, whichever first occurs.

##### (3) If during the Defect Liability Period any defect is found in the design, engineering, materials and workmanship of the equipment, materials and supplies supplied or of the work executed by the Operator, the Operator shall promptly, in consultation and agreement with the Utility regarding appropriate remedying of the defects, and at the Operator’s cost, repair, replace or otherwise make good, as the Operator shall, at its discretion, determine, such defect as well as any damage to the Facilities caused by such defect. The Operator shall not be responsible for the repair, replacement or making good of any defect or of any damage to the Facilities arising out of or resulting from normal wear and tear.

##### (4) The Operator’s obligations under this GC Section 9.1shall not apply to,

###### any designs, specifications or other data designed, supplied or specified by or on behalf of the Utility; or

###### any other materials supplied or any other work, excluding the Services, executed by or on behalf of the Utility, except for the work executed by the Utility under GC Section 9.1(5)(f).

##### (5) Prior to the End Date, the Operator shall manage the process of identifying and remedying defects. After the End Date, the following process shall apply:

###### The Utility shall give the Operator a notice stating the nature of any such defect together with all available evidence thereof, promptly following the discovery thereof. The Utility shall give all reasonable opportunity for the Operator to inspect any such defect.

###### The Utility shall give the Operator all necessary access to the Facilities to enable the Operator to perform its obligations under this GC Section 9.1.

###### The Operator may, with the consent of the Utility, remove from the Facilities any equipment, materials or supplies that are defective if the nature of the defect, or any damage to the Facilities caused by the defect, is such that repairs cannot be expeditiously carried out at the Facilities.

###### If the repair, replacement or making good is of such a character that it may affect the efficiency of the Facilities or any part thereof, the Utility may give to the Operator a notice requiring that tests of the defective part of the Facilities shall be made by the Operator immediately upon completion of such remedial work, whereupon the Operator shall carry out such tests.

###### If such part fails the tests, the Operator shall carry out further repair, replacement or making good, as the case may be, until that part of the Facilities passes such tests. The tests shall be agreed upon by the Utility and the Operator.

###### If the Operator fails to commence the work necessary to remedy such defect or any damage to the Facilities caused by such defect within a reasonable time, which shall in no event be considered to be less than 15 days, the Utility may, following notice to the Operator, proceed to do such work, and the reasonable costs incurred by the Utility in connection therewith shall be paid to the Utility by the Operator or may be deducted by the Utility from any monies due the Operator or claimed under the Performance Security.

###### If the Facilities or any part thereof cannot be used by reason of such defect or making good of such defect, the Defect Liability Period of the Facilities or such part, as the case may be, shall be extended by a period equal to the period during which the Facilities or such part cannot be used by the Utility because of any of the aforesaid reasons.

###### Except as provided in GC Sections 9.1 and 9.4, the Operator shall be under no liability whatsoever and howsoever arising, and whether under the Contract or at law, in respect of defects in the Facilities or any part thereof, the equipment, materials and supplies, design or engineering or work executed that appear after the End Date, except where such defects are the result of the gross negligence, fraud, criminal or willful action of the Operator.

### 9.2 Limitation of Liability[[13]](#footnote-13)

Except in cases of criminal negligence or wilful misconduct,

###### the Operator shall not be liable to the Utility in contract, tort, or otherwise, for any indirect or consequential loss or damage, loss of use, loss of production, or loss of profits of interest costs, provided that this exclusion shall not apply to any obligation of the Operator to pay liquidated damages to the Utility; and

###### the aggregate liability of the Operator to the Utility, whether under the Contract, in tort or otherwise, shall not exceed $3,000,000U.S., provided that this limitation shall not apply to any obligation of the Operator to indemnify the Utility with respect to patent infringement.

9.3 Care of the Facilities

Except as provided in GC Section 9.7, the Operator shall be responsible for the care and custody of the Facilities or any part thereof until the End Date and shall make good at its own cost any loss or damage that may occur to the Facilities from any cause whatsoever during such period. The Operator shall also be responsible for any loss or damage to the Facilities caused by the Operator or its Subcontractors in the course of any work carried out, pursuant to GC Section 9.1.

**9.4 Indemnification**

##### (1) Subject to GC Section 9.4(5), the Operator shall indemnify and hold harmless the Utility and its employees and officers from and against any and all suits, actions or administrative proceedings, claims, demands, losses, damages, costs, and expenses of whatsoever nature, including attorney’s fees and expenses, in respect of the death or injury of any person or loss of or damage to any property, arising in connection with the Operator’s performance of the Services and by reason of the negligence of the Operator or its Subcontractors, or their employees, officers or agents, except any injury, death or property damage caused by the negligence of the Utility, its contractors, employees, officers or agents.

##### (2) If any proceedings are brought or any claim is made against the Utility that might subject the Operator to liability under GC Section 9.4(1), the Utility shall promptly give the Operator a notice thereof and the Operator may at its own expense and in the Utility’s name conduct such proceedings or claim and any negotiations for the settlement of any such proceedings or claim.

##### (3) If the Operator fails to notify the Utility within 30 days of receipt of such notice that it intends to conduct any such proceedings or claim, then the Utility shall be free to conduct the same on its own behalf. Unless the Operator has so failed to notify the Utility within the 30 day period, the Utility shall make no admission that may be prejudicial to the defense of any such proceedings or claim.

##### (4) The Utility shall, at the Operator’s request, provide all available assistance to the Operator in conducting such proceedings or claim, and shall be reimbursed by the Operator for all reasonable expenses incurred in so doing.

##### (5) The Utility shall indemnify and hold harmless the Operator and its employees, officers and Subcontractors from any liability for loss of or damage to property of the Utility that is caused by fire, explosion or any other perils, in excess of the amount recoverable from insurances procured under GC Section 9.6, provided that such fire, explosion or other perils were not caused by any act or omission of the Operator.

##### (6) The Party entitled to the benefit of an indemnity under this GC Section 9.4 shall take all reasonable measures to mitigate any loss or damage which has occurred. If the Party fails to take such measures, the other Party’s liabilities shall be correspondingly reduced.

9.5 Insurance[[14]](#footnote-14)

##### (1) To the extent specified in the SCC, the Operator shall, at its own expense, take out and maintain in effect or cause to be taken out and maintained in effect, during the performance of the Contract, the insurances set forth below in the sums and with the deductibles and other conditions specified in the SCC. The identity of the insurers and the form of the policies shall be subject to the prior approval of the Utility which shall not unreasonably withhold such approval.

###### Cargo Insurance During TransportCovering loss or damage, occurring while in transit from the Operator’s or Subcontractors’ works or stores until arrival at the Facilities, to the equipment, materials and supplies;

###### Installation All Risks InsuranceCovering physical loss or damage to the Facilities occurring prior to the End Date, with an extended maintenance coverage for the Operator’s liability in respect of any loss or damage occurring during the Defect Liability Period while the Operator is at the Facilities for the purpose of performing its obligations during the Defect Liability Period;

###### Third Party Liability InsuranceCovering bodily injury or death suffered by Third Parties, including the Utility’s personnel, and loss of or damage to property occurring in connection with the Services;

###### Professional Liability Insurance Covering loss or damage by reason of professional negligence in the design, construction and operation of the Facilities;

###### Automobile Liability Insurance Covering use of all vehicles used by the Operator or its Subcontractors, whether or not owned by them, in connection with the Services and execution of the Contract;

###### Workers’ Compensation In accordance with the requirements of the Applicable Law;

###### Employer’s Liability In accordance with the requirements of the Applicable Law; and

###### Other InsuranceSuch other insurance as may be set out in the SCC.

##### The Utility shall be named as co-insured under all insurance policies taken out by the Operator pursuant to GC Section 9.5(1), except for the Third Party Liability, Workers’ Compensation and Utility’s Liability Insurances, and the Operator’s Subcontractors shall be named as co-insureds under all insurance policies taken out by the Operator pursuant to GC Section 9.5(1), except for the Cargo Insurance During Transport, Workers’ Compensation and Utility’s Liability Insurances. All insurers’ rights of subrogation against such co-insureds for losses or claims arising out of the performance of the Contract shall be waived under such policies.

##### The Operator shall deliver to theUtility certificates of insurance, or copies of the insurance policies, as evidence that the required policies are in full force and effect. The certificates shall provide that no less than 21 days notice shall be given to theUtility by insurers prior to cancellation or material modification of a policy.

##### The Operator shall ensure that, where applicable, the Subcontractors take out and maintain in effect adequate insurance policies for their employees and vehicles and for work executed by them under the Contract, unless such Subcontractors are covered by the policies taken out by the Operator.

##### If the Operator fails to take out or maintain in effect the insurances referred to in GC Section 9.5(1), theUtility may take out and maintain in effect any such insurances and may from time to time deduct from any amount due the Operator under the Contract any premium that theUtility shall have paid to the insurer, or may otherwise recover such amount as a debt due from the Operator.

##### Unless otherwise provided in the Contract, the Operator shall prepare and conduct all and any claims made under the policies effected by it pursuant to this GC Section 9.5, and all monies payable by any insurers shall be paid to the Operator. TheUtility shall give to the Operator all such reasonable assistance as may be required by the Operator. With respect to insurance claims in which theUtility’s interest is involved, the Operator shall not give any release or make any compromise with the insurer without the prior consent of theUtility.

##### When each insurance premium has been paid, the Operator shall submit a copy of receipts to theUtility and shall notify the Utility’s Representative that it has done so.

##### The Operator shall comply with the conditions stipulated in each of the insurance policies. The Operator shall make no material alteration to the terms of any insurance without the prior approval of theUtility. If an insurer makes, or purports to make, any such alteration, the Operator shall notify theUtility immediately.

##### Nothing in this GC Section 9.5 limits the obligations, liabilities or responsibilities of the Operator, under the other terms of the Contract or otherwise. Any amounts not insured or not recovered from the insurers shall be borne by the Operator.

9.6 Force Majeure

#####  (1) “Force Majeure” shall mean any event,

###### beyond the reasonable control of the Utility or of the Operator, as the case may be; and

###### which is unavoidable notwithstanding the reasonable care of the Party affected.

##### (2) Force Majeure shall include the events listed below in this GC Section 9.6(2) if the conditions set out in GC Section 9.6(1) are satisfied:

###### war, hostilities or warlike operations, whether a state of war be declared or not, invasion, act of foreign enemy and civil war;

###### rebellion, revolution, insurrection, mutiny, usurpation of civil or military government, conspiracy, riot, civil commotion and terrorist acts;

###### confiscation, nationalization, mobilization, commandeering or requisition by or under the order of any government or de jure or de facto authority or ruler or any other act or failure to act of any local state or national government authority;

###### strike, sabotage, lockout, embargo, import restriction, port congestion, lack of usual means of public transportation and communication, industrial dispute, shipwreck, shortage or restriction of power supply, epidemics, quarantine and plague;

###### earthquake, landslide, volcanic activity, fire, flood or inundation, tidal wave, typhoon or cyclone, hurricane, storm, lightning, or other inclement weather condition, nuclear and pressure waves or other natural or physical disaster; and

###### shortage of labor, materials or utilities where caused by circumstances that are themselves Force Majeure.

##### If the Parties are prevented, hindered or delayed from or in performing any of their obligations under the Contract by an event of Force Majeure, then it shall notify the other in writing of the occurrence of such event and the circumstances thereof within 14 days after the occurrence of such event.

##### The Party who has given such notice shall be excused from the performance or punctual performance of its obligations under the Contract for so long as the relevant event of Force Majeure continues and to the extent that such Party’s performance is prevented, hindered or delayed. The End Date shall be extended for a period of time equal to the period of time during which the relevant event of Force Majeure continued.[[15]](#footnote-15)

##### The Party or Parties affected by the event of Force Majeure shall use reasonable efforts to mitigate the effect thereof upon its or their performance of the Contract and to fulfill its or their obligations under the Contract, but without prejudice to either Party’s right to terminate the Contract under GC Sections 9.6(7) and 9.7(6).

##### No delay or nonperformance by either Party hereto caused by the occurrence of any event of Force Majeure shall,

###### constitute a default or breach of the Contract; or

###### subject to GC Sections 9.7(3) and 9.7(5), give rise to any claim for damages or additional Cost occasioned thereby,

if and to the extent that such delay or nonperformance is caused by the occurrence of an event of Force Majeure.

##### If the performance of the Contract is substantially prevented, hindered or delayed for a single period of more than 60 days or an aggregate period of more than 120 days on account of one or more events of Force Majeure during the term of the Contract, the Parties will attempt to develop a mutually satisfactory solution, failing which either Party may terminate the Contract by giving a notice to the other, but without prejudice to either Party’s right to terminate the Contract under GC Section 9.7(6).

##### In the event of termination pursuant to GC Section 9.6(7), the rights and obligations of the Utility and the Operator shall be as specified in GC Sections 11.2.1(1) and 11.2.2(1).

##### Notwithstanding GC Section 9.6(6), Force Majeure shall not apply to any obligation of the Utility to make payments to the Operator herein.

9.7 War Risks

##### (1) “War Risks” shall mean any event specified in GC Section 9.7(2)(a) and (b) and any explosion or impact of any mine, bomb, shell, grenade or other projectile, missile, munitions or explosive of war, occurring or existing in or near [ ].

##### Notwithstanding anything contained in the Contract, the Operator shall have no liability whatsoever for or with respect to,

###### destruction of or damage to the Facilities or any part thereof;

###### destruction of or damage to property of the Utility or any Third Party; or

###### injury or loss of life,

if such destruction, damage, injury or loss of life is caused by any War Risks, and the Utility shall indemnify and hold the Operator harmless from and against any and all claims, liabilities, actions, lawsuits, damages, costs, charges or expenses arising in consequence of or in connection with the same.

##### If the Facilities or any property of the Operator used or intended to be used for the purposes of the Services sustains destruction or damage by reason of any War Risks, the Utility shall pay for,

###### replacing or making good any property or investments of the Operator so destroyed or damaged; and

###### replacing or making good any such destruction or damage to the Facilities or any part thereof,

so far as may be required by the Utility, and as may be necessary for completion of the Services.

##### If the Utility does not require the Operator to replace or make good any such destruction or damage to the Facilities, the Utility shall either request a change in accordance with GC Section 10.1 excluding the performance of the Services in respect of that part of the Facilities thereby destroyed or damaged or, where the loss, destruction or damage affects a substantial part of the Facilities, shall terminate the Contract, pursuant to GC Section 11.2.1.

##### Notwithstanding anything contained in the Contract, the Utility shall pay the Operator for any increased Costs that are in any way attributable to, consequent on, resulting from, or in any way connected with any War Risks, if the Operator notifies the Utility in writing of any such increased cost as soon as practicable.

##### If, during the term of the Contract, any War Risks occur that financially or otherwise materially affect the execution of the Contract by the Operator, the Operator shall use its reasonable efforts to execute the Contract with due and proper consideration given to the safety of its and its Subcontractors’ personnel engaged in the work on the Services. If the execution of the Services becomes impossible or is substantially prevented for a single period of more than 60 days or an aggregate period of more than 120 days on account of any War Risks, the Parties will attempt to develop a mutually satisfactory solution, failing which either Party may terminate the Contract by giving a notice to the other.

##### In the event of termination pursuant to GC Section 9.7(4) or 9.7(6), the rights and obligations of the Utility and the Operator shall be as specified in GC Section 11.2.1.

9.8 Warranties

#### 9.8.1 General

Except for this GC Section 9.8, neither Party has given any warranties or made any representations in respect of the subject matter of this Contract. It is recorded that the Operator has, before entering into this Contract, satisfied itself as to the condition of the Facilities, the income and expenditure of the Utility in providing water and wastewater services, the validity of the establishment of the Utility, and the validity and sufficiency of the licences and permit in terms of which the Services are provided. The Operator, by due diligence audit of the Utility in its function of providing water and wastewater services, has satisfied itself as to all issues to enable it to determine whether to enter into this Contract. The water and wastewater services, the Facilities and the use and operation of the Facilities are accepted by the Operator in the condition in which they are received.

#### Operator’s Warranties

The Operator warrants that,

###### it has the skills and ability to manage, operate and maintain the Facilities and to carry out the Services; and

###### it has the corporate capacity and legal authority to enter into this Contract in [ ] and under the Applicable Law.

9.9 Intellectual Property Indemnity

#### 9.9.1 Indemnity by Operator

The Operator shall, subject to the Operator’s compliance with GC Section 9.9.2, indemnify and hold harmless theUtility and its employees and officers from and against any and all suits, actions or administrative proceedings, claims, demands, losses, damages, costs, and expenses of whatsoever nature, including attorney’s fees and expenses, which theUtility may suffer as a result of any infringement or alleged infringement by the Operator, Subcontractors, or their employees, agents, or representatives, of any patent, utility model, registered design, trademark, copyright or other intellectual property right registered or otherwise existing.

9.9.2 Notice of Claim

##### (1) If any proceedings are brought or any claim is made against theUtility arising out of the matters referred to in GC Section 9.9.1, theUtility shall promptly give the Operator a notice thereof, and the Operator may at its own expense and in theUtility’s name conduct such proceedings or claim and any negotiations for the settlement of any such proceedings or claim.

##### If the Operator fails to notify theUtility no later than 30 days after receipt of such notice that it intends to conduct any such proceedings or claim, then theUtility shall be free to conduct the same on its own behalf. Unless the Operator has so failed to notify theUtility no later than the 30 day period, theUtility shall make no admission that may be prejudicial to the defence of any such proceedings or claim.

##### TheUtility shall, at the Operator’s request, give all available assistance to the Operator in conducting such proceedings or claim, and shall be reimbursed by the Operator for all reasonable expenses incurred in so doing.

#### 9.9.3 Indemnity byUtility

TheUtility shall indemnify and hold harmless the Operator and its employees, officers and Subcontractors from and against any and all suits, actions or administrative proceedings, claims, demands, losses, damages, costs, and expenses of whatsoever nature, including attorney’s fees and expenses, which the Operator may suffer as a result of any infringement or alleged infringement by theUtility of any patent, utility model, registered design, trademark, copyright or other intellectual property right registered or otherwise existing after the End Date.

**G. CHANGE IN CONTRACT ELEMENTS**

## ARTICLE 10 - CHANGE IN CONTRACT ELEMENTS

10.1 Change to the Scope of Services

##### (1) Except as provided in GC Section 10.1(2) and in the Incentive Compensation Appendix, the Operator shall make no claim whatsoever for any adjustment to the Operator’s Fixed Fee or the Incentive Compensation. Without limiting the generality of the foregoing, the Operator shall make no claim whatsoever for any adjustment as a result of,

###### a change in the number or type of Customers in the Service Area;

###### changes to the Facilities or the addition of new Facilities;

###### changes to the quality or quantity of the raw water supply; or

###### disruption to the water system as a result of the Authorities’ capital programs.

##### If, after a date which 30 days is prior to the Submission Deadline in the RFP Documents, in [ ], any law, regulation, ordinance, order or by-law having the force of law is enacted, promulgated, abrogated or changed, which shall be deemed to include any change in interpretation or application by the competent authorities, that subsequently affects the costs and expenses of the Operator or the Operator’s Fixed Fee shall be correspondingly increased or decreased, to the extent that the Operator has thereby been affected in the performance of any of its obligations under the Contract.

#####

##### **ARTICLE 11 - SUSPENSION** **AND TERMINATION**

11.1 Suspension

#### 11.1.1 Suspension by the Utility[[16]](#footnote-16)

##### (1) The Utility may request the PMU Director, by notice to the Operator, to order the Operator to suspend performance of any or all of its obligations under the Contract. Such notice shall specify the obligation of which performance is to be suspended, the effective date of the suspension and the reasons therefor. The Operator shall thereupon suspend performance of such obligation, except those obligations necessary for the care or preservation of the Facilities, until ordered in writing to resume such performance by the PMU Director.

##### (2) If, by virtue of a suspension order given by the PMU Director, other than by reason of the Operator’s default or breach of the Contract, the Operator’s performance of any of its obligations is suspended for an aggregate period of more than 90 days, then at any time thereafter and provided that at that time such performance is still suspended, the Operator may give a notice to the PMU Director requiring that the Utility shall, no later than 30 days after the Utility’s receipt of the notice, order the resumption of such performance or request and subsequently order a change in accordance with GC Section 10.1, excluding the performance of the suspended obligations from the Contract.

##### (3) If the Utility fails to order the resumption of performance in accordance with GC Section 11.1.1(1), the Operator may, by a further notice to the PMU Director, elect to treat the suspension, where it affects a part only of the Services, as a deletion of such part in accordance with GC Section 10.1 or, where it affects the whole of the Services, as termination of the Contract pursuant to GC Section11.2.1.

11.1.2 Suspension by the Operator

##### (1) If, the Utility has,

###### failed to pay the Operator any sum due under the Contract within the period specified in the Contract;

###### failed to approve any invoice or supporting documents without just cause under the Contract; or

###### has committed a substantial breach of the Contract,

The Operator may give a notice to the Utility that requires payment of such sum, with interest thereon as stipulated in GC Section 5.2(2) requires approval of such invoice or supporting documents, or specifies the breach and requires the Utility to remedy the same, as the case may be.

##### (2) If the Utility fails to pay the sums required by the Operator in accordance with GC Section 11.1.2(1) or fails to remedy the breach or take steps to remedy the breach no later than 14 days after receipt of the Operator’s notice, then the Operator may, upon giving 14 days’ notice to the Utility, suspend performance of all or any of its obligations under the Contract.

##### (3) If the Operator is unable to carry out any of its obligations under the Contract for any reason attributable to the Utility, including the Utility’s failure to provide possession of or access to the Facilities, then the Operator may, upon giving 14 days’ notice to the Utility, suspend performance of all or any of its obligations under the Contract, or, in the case of the Services, reduce the Operator’s rate of progress.

##### (4) If the Operator’s performance of its obligations is suspended pursuant to this GC Section11.1.2, then the End Date may, in the discretion of the Utility, be extended and additional Costs incurred by the Operator as a result of such suspension or reduction shall be paid by the Utility to the Operator in addition to the Operator’s Fixed Fee, except in the case of suspension by reason of the Operator’s default or breach of the Contract.

##### (5) During the period of suspension, the Operator shall not remove from the Facilities any assets without the prior written consent of the Utility.

11.2 Termination

#### 11.2.1 Termination for Utility’s Convenience[[17]](#footnote-17)

##### (1) The Utility may at any time terminate the Contract for any reason by giving the Operator a notice of termination that refers to this GC Section 11.2.1(1).

##### (2) Upon receipt of the notice of termination under GC Section 11.2.1(1),

###### the Operator shall, either immediately or upon the date specified in the notice of termination,

cease all further work, except for such work as the Utility may specify in the notice of termination for the sole purpose of protecting that part of the Facilities, or any work required to leave the Facilities in a clean and safe condition;

terminate all Subcontracts; and

repatriate the Management Staff and its Subcontractors’ personnel from the Facilities and leave the whole of the Facilities in a clean and safe condition; and

###### the Operator, subject to the payment specified in GC Section 11.2.2, shall,

deliver to the Utility the Facilities; and

deliver to the Utility all the Contract Records in existence as at the date of termination.

11.2.2 Payment upon Termination by the Utility for Convenience

##### (1) Upon termination of this Contract pursuant to GC Section 11.2.1, theUtility shall make only the following payments to the Operator,

###### any portion of the Operator’s Fixed Fee payable to the Operator for Services satisfactorily performed prior to the date of termination and calculated as set out in GC Section 5.1;

###### the Costs reasonably incurred by the Operator in the repatriation of the Management Staff and its Subcontractors’ personnel;

###### any amounts required to be paid by the Operator to its Subcontractors in connection with the termination of any Subcontracts, including any reasonable cancellation charges;

###### the reasonable Costs incurred by the Operator in protecting the Facilities and leaving them in a clean and safe condition pursuant to GC Section 11.2.1(2)(a)(i); and

###### the reasonable Costs of satisfying all other obligations, commitments and claims that the Operator may in good faith have undertaken with Third Parties in connection with the Contract and that are not covered by this GC Section 11.2.2(1).

##### The Operator acknowledges that the only payments to be made to the Operator on termination by theUtility are set out in this GC Section 11.2.2. The Operator shall not make a claim for lost or foregone profits, revenues, consequential damages or any other costs, damages, expenses or losses of any kind as a result of or in connection with the termination of this Contract.

11.2.3 Termination for Operator’s Default

##### (1) The Utility, without prejudice to any other rights or remedies it may possess, may terminate the Contract forthwith in the following circumstances, by giving a notice of termination and its reasons therefor to the Operator, referring to this GC Section 11.2.3(1):

###### If the Operator becomes bankrupt or insolvent, has a receiving order issued against it, compounds with its creditors, or, if the Operator is a corporation, a resolution is passed or order is made for its winding up, other than a voluntary liquidation for the purposes of amalgamation or reconstruction, a receiver is appointed over any part of its undertaking or assets, or if the Operator takes or suffers any other analogous action in consequence of debt;

###### If the Operator assigns or transfers the Contract or any right or interest therein in violation of the provision of GC Section 1.7; or

###### If the Operator, in the judgment of the Utility, has engaged in corrupt or fraudulent practices in competing for or in executing the Contract. For the purpose of this GC Section 11.2.3(1)(c),“corrupt practice” means the offering, giving, receiving or soliciting of any thing of value to influence the action of a public official in the procurement process or in contract execution; and“fraudulent practice” means a misrepresentation of facts in order to influence a procurement process or the execution of a contract to the detriment of the Utility, and includes collusive practice among Bidders, prior to or after proposal submission, designed to establish proposal prices at artificial non-competitive levels and to deprive the Utility of the benefits of free and open competition.

##### (2) If the Operator,

###### has abandoned or repudiated the Contract;

###### has without valid reason failed to commence the Services promptly or has suspended, other than pursuant to GC Section 11.1.2(1), the progress of Contract performance for more than 30 days after receiving a written instruction from the Utility to proceed;

###### persistently fails to carry out the Services in accordance with the Contract or persistently neglects to carry out its obligations under the Contract without just cause; or

###### refuses or is unable to provide sufficient materials, services or personnel to perform the Services,

Then the Utility may, without prejudice to any other rights it may possess under the Contract, give a notice to the Operator stating the nature of the default and requiring the Operator to remedy the same. If the Operator fails to remedy or to take steps to remedy the same within 14 days after its receipt of such notice, then the Utility may terminate the Contract forthwith by giving a notice of termination to the Operator that refers to this GC Section 11.2.3(2).

##### (3) Upon receipt of the notice of termination under GC Sections 11.2.3(1) or 11.2.3(2) the Operator shall, either immediately or upon such date as is specified in the notice of termination,

###### cease all further work, except for such work as the Utility may specify in the notice of termination for the sole purpose of protecting the Facilities, or any work required to leave the Facilities in a clean and safe condition;

###### terminate all Subcontracts; and

###### deliver to the Utility all Contract Records in existence as of the date of termination.

##### The Utility may enter the Facilities, expel the Operator, and carry out the Services itself or by employing any Third Party.

11.2.4 Payment upon Termination for Operator’s Default

##### (1) If the Contract is terminated pursuant to GC Section 11.2.3, the Operator shall be entitled to be paid,

###### any portion of the Operator’s Fixed Fee payable to the Operator for Services satisfactorily performed prior to the date of termination; and

###### the Costs, if any, incurred by the Operator in protecting the Facilities and in leaving them in a clean and safe condition pursuant to GC Section 11.2.3(3)(a).

##### (2) The Operator acknowledges that the only payments to be made to the Operator on termination by theUtility are set out in this GC Section 11.2.4. The Operator shall not make a claim for lost or foregone profits, revenues, consequential damages or any other costs, damages, expenses or losses of any kind as a result of or in connection with the termination of this Contract.

11.2.5 Termination by Operator

##### (1) If,

 (a) the Utility has:

failed to pay the Operator any sum due under the Contract within the specified period, has failed to approve any invoice or supporting documents without just cause pursuant to the corresponding Compensation and Payment Appendix, or commits a substantial breach of the Contract, the Operator may give a notice to the Utility that requires payment of such sum, with interest thereon as stipulated in GC Section 5.2(2), requires approval of such invoice or supporting documents, or specifies the breach and requires the Utility to remedy the same, as the case may be; and

failed to pay such sum together with such interest, failed to approve such invoice or supporting documents or give its reasons for withholding such approval, failed to remedy the breach or take steps to remedy the breach no later than 14 days after receipt of the Operator’s notice; or

###### the Operator is unable to carry out any of its obligations under the Contract for any reason attributable to the Utility, including the Utility’s failure to provide possession of or access to the Facilities,

Then the Operator may give a notice to the Utility thereof, and if the Utility has failed to pay the outstanding sum, to approve the invoice or supporting documents, to give its reasons for withholding such approval, or to remedy the breach no later than 30 days after receipt of such notice, or if the Operator is still unable to carry out any of its obligations under the Contract for any reason attributable to the Utility no later than 30 days after receipt of the notice, the Operator may, by a further notice to the Utility referring to this GC Section 11.2.5(1), forthwith terminate the Contract.

##### The Operator may terminate the Contract forthwith by giving a notice to the Utility to that effect, referring to this GC Section 11.2.5(2),

###### if the Utility becomes bankrupt or insolvent;

###### has a receiving order issued against it, or compounds with its creditors;

###### being a corporation, if a resolution is passed or order is made for its winding up, other than a voluntary liquidation for the purposes of amalgamation or reconstruction; or

###### a receiver is appointed over any part of its undertaking or assets, or if the Utility takes or suffers any other analogous action in consequence of debt.

##### If the Contract is terminated under GC Section 11.2.5(1) or 11.2.5(2), then,

###### the Operator shall immediately,

cease all further work, except for such work as may be necessary for the purpose of protecting the Facilities or any work required to leave the Facilities in a clean and safe condition; and

terminate all Subcontracts; and

###### the Operator, subject to the payment specified in GC Section 11.2.6, shall

deliver the Facilities to the Utility; and

deliver to the Utility all Contract Records in existence as of the date of termination.

##### Termination by the Operator pursuant to this GC Section 11.2.5is without prejudice to any other rights or remedies of the Operator that may be exercised in lieu of or in addition to rights conferred by GC Section 11.2.5.

11.2.6 Payment upon Termination by Operator

If the Contract is terminated under GC Sections 11.2.5(1) or 11.2.5(2), the Utility shall pay to the Operator all payments specified in GC Section 11.2.2(1), and reasonable compensation for all Costs or damage sustained by the Operator arising out of, in connection with or in consequence of such termination. The Utility shall not be obliged to pay the Operator any amounts related to lost or forgone profits.

11.2.7 Set-Off – Payment upon Termination

In GC Section 11.2, in calculating any monies due from the Utility to the Operator, account shall be taken of,

###### any sum previously paid by the Utility to the Operator under the Contract, including any advance payment paid pursuant to the Compensation and Payment Appendix; and

###### any sum owing by the Operator to the Utility under the Contract, including liquidated damages or withholding monies.

1. it may be useful to have a process of adjudication or expert determination before resorting to arbitration [↑](#footnote-ref-1)
2. assignment provisions must be carefully drafted to limit the circumstances where assignment can be made (particularly if the parties have relied heavily on the identity/ standing of the other parties involved) but to allow assignment of rights to creditors, where appropriate [↑](#footnote-ref-2)
3. it may be appropriate to include some conditions precedent to effectiveness, eg obtaining of relevant licences [↑](#footnote-ref-3)
4. it is useful to include a handover process at termination to ensure a smooth handover [↑](#footnote-ref-4)
5. where the available data is not of sufficient accuracy or quality, it may be appropriate to have an adjustment provision where inaccuracies are found to compensation and performance standards. Alternatively, a benchmarking period could be inserted at the beginning of the contract. [↑](#footnote-ref-5)
6. parties will need to verify that this is permissible under law [↑](#footnote-ref-6)
7. whilst this is a useful tool for the Employer, giving the Employer the right to withhold monies from the Contractor will be a contentious one as the Contractor will be anxious to ensure that this is not used by the Employer arbitrarily. [↑](#footnote-ref-7)
8. care should be taken to ensure that liquidated damages are a reasonable pre-determination of loss [↑](#footnote-ref-8)
9. this is a balanced clause – the employer needs to have a royalty free licence in relation to the intellectual property used by the operator, but it is unlikely to be necessary for the employer to need to have the operator’s intellectual property transferred to it. [↑](#footnote-ref-9)
10. The authority may consider giving it the power under the confidentiality clause to publish the contract/or some of the provisions thereof (whether on a government website, World Bank website or otherwise) in the interests of transparency. [↑](#footnote-ref-10)
11. it is useful to establish who is to be the representative of each party on a day to day basis [↑](#footnote-ref-11)
12. how the operator will direct the staff in practice may be more difficult as the staff are to remain in the employment of the employer and, presumably, all powers of setting wages and discipline will remain with the employer [↑](#footnote-ref-12)
13. in a management contract where the operator is taking on limited risk and being remunerated to reflect this, it may be appropriate to have a modest cap on liability – thought should be given as to whether thus cap should apply to insured risks also and to environmental liability. Local laws should also be reviewed to check if there are any restrictions placed on limiting liability [↑](#footnote-ref-13)
14. care needs to be taken to craft the insurance provisions to the circumstances, and ensure that what is being agreed is obtainable in the relevant market [↑](#footnote-ref-14)
15. the operator continues to be paid (cl. 9.6(9)) and the end date is extended – this is unusual to grant the operator both remedies [↑](#footnote-ref-15)
16. this clause may be useful to include – however, it should be stated whether the operator is to continue to be remunerated during the suspension period and the extent to which performance obligations will continue [↑](#footnote-ref-16)
17. the right to terminate at will gives the authority flexibility – however the operator will be concerned that this could give the employer undue power – and may seek to include compensation for loss of profit [↑](#footnote-ref-17)