

This document has been prepared for the purposes of the

PPP IN INFRASTRUCTURE RESOURCE CENTER FOR CONTRACTS, LAWS AND REGULATIONS (PPIRC) website. It is a sample document FOR REFERENCE PURPOSES ONLY and SHOULD NOT BE used as a "model". The inclusion of any legal materials on the PPIRC website does not mean that they are in any way approved, endorsed or recommended by the World Bank Group or its affiliates. Legal advice should be sought to determine whether a particular legal document is appropriate for any given project, and how the specific terms of the document should be adapted to fit the circumstances of that project

## CONTRACT NO

## CONCESSION CONTRACT FOR:

THE DESIGN, CONSTRUCTION, FINANCE OPERATION AND MAINTENANCE OF HIGHWAY No\* AS A TOLL HIGHWAY, INCLUDING ASSOCIATED FACILITIES AND DEVELOPMENTS .

## VOLUME 1 : BOOK 3D

## ANNEXURE VI: INDEPENDENT ENGINEERS AGREEMENT

## TABLE OF CONTENTS

### CLAUSE ..... PAGE

<b>LIST OF TENDER DOCUMENTS</b> .....	3
1. <b>Definitions</b> .....	5
2. <b>Interpretation</b> .....	7
3. <b>Scope of Services</b> .....	8
4. <b>Duty of Care and Exercise of Authority</b> .....	8
5. <b>Property of the Authority and Concessionaire</b> .....	11
6. <b>Decisions by the Independent Engineer</b> .....	11
7. <b>Provisions of Office Accommodation</b> .....	11
8. <b>Information</b> .....	11
9. <b>Decisions by the Authority and Concessionaire</b> .....	12
10. <b>Access and Assistance</b> .....	12
11. <b>Sub-Consultants</b> .....	12
12. <b>Supply of Personnel</b> .....	13
13. <b>Representatives</b> .....	13
14. <b>Changes in Personnel</b> .....	13
15. <b>Liability between the Parties</b> .....	13
16. <b>Duration of Liability</b> .....	14
17. <b>Maximum Liability and Indemnity</b> .....	14
18. <b>Insurances for Liability and Indemnity</b> .....	15
19. <b>Insurance of the Property of the Concessionaire</b> .....	16
20. <b>Commencement and Completion</b> .....	16
21. <b>Payment for Services Provided before Commencement</b> .....	16
22. <b>Additional Services</b> .....	16

23.	<b>Further Proposals</b> .....	17
24.	<b>Delays</b> .....	17
25.	<b>Force Majeure</b> .....	18
26.	<b>Suspension or Termination</b> .....	19
27.	<b>Exceptional Services</b> .....	21
28.	<b>Rights and Liabilities of Parties</b> .....	21
29.	<b>Payment to the Independent Engineer</b> .....	21
30.	<b>Time for Payment</b> .....	22
31.	<b>Currency of Payment</b> .....	22
32.	<b>Conditions for Payment</b> .....	22
33.	<b>Independent Audit</b> .....	23
35.	<b>Assignment and Sub-Contracts</b> .....	23
36.	<b>Copyright</b> .....	23
37.	<b>Conflict of Interest</b> .....	24
38.	<b>Notices</b> .....	24
39.	<b>Publication</b> .....	24
40.	<b>Resolution of Disputes</b> .....	24
41.	<b>Termination of the Concession Contract</b> .....	26
42.	<b>Miscellaneous Provisions</b> .....	26
43.	<b>Stipulations for the Benefit of the Lenders</b> .....	28
	<b>SCHEDULE 1</b> .....	30
	Conditions of Particular Application .....	30
	<b>SCHEDULE 2</b> .....	33
	Basic Services .....	33
	<b>SCHEDULE 3</b> .....	38
	Remuneration and Payment .....	38
	<b>SCHEDULE 4</b> .....	39
	Provision of Office Accommodation .....	39
	<b>SCHEDULE 5</b> .....	40
	Insurance Requirements .....	40

## LIST OF TENDER DOCUMENTS

VOLUME	BOOK	DESCRIPTION	ANNEXURE
VOLUME 1		<b>INVITATION TO TENDER AND CONTRACTS</b>	
VOLUME 1	BOOK 1	INVITATION TO TENDER	
VOLUME 1	BOOK 2	CONCESSION CONTRACT	
VOLUME 1	BOOK 3 A	SCOPE OF WORKS AND PROGRAMMES	ANNEXURE I
VOLUME 1	BOOK 3 B	ENGINEERING REQUIREMENTS	ANNEXURE II
VOLUME 1	BOOK 3 C	DESCRIPTION OF SITE	ANNEXURE III
VOLUME 1	BOOK 3 D	ENVIRONMENTAL REQUIREMENTS	ANNEXURE IV
VOLUME 1		SOCIO ECONOMIC REQUIREMENTS AND TRAINING	ANNEXURE V
VOLUME 1		INDEPENDENT ENGINEER AGREEMENT	ANNEXURE VI
VOLUME 1	BOOK 3 E	DESIGN AND CONSTRUCTION CONTRACT	ANNEXURE VII
VOLUME 1		OPERATION AND MAINTENANCE CONTRACT	ANNEXURE VIII
VOLUME 1		FORM OF OPERATIONS AND MAINTENANCE BOND	ANNEXURE IX
VOLUME 1		FORM OF FINAL MAINTENANCE BOND	ANNEXURE X
VOLUME 1		FORM OF RESOLUTIVE CONDITIONS BOND	ANNEXURE XI
VOLUME 1		FORM OF OPERATIONS REPORT	ANNEXURE XII
VOLUME 1		FORM OF CONSTRUCTION PROGRESS REPORT	ANNEXURE XIII
VOLUME 1	BOOK 3 F	FINANCIAL BASE CASE	ANNEXURE XIV
VOLUME 1		TOLL STRATEGY AND TOLL TARIFFS	ANNEXURE XV
VOLUME 1		HIGHWAY USAGE FEE	ANNEXURE XVI
VOLUME 1		EQUITY CONTRIBUTION	ANNEXURE XVII
VOLUME 1		INSURANCE REQUIREMENTS	ANNEXURE XVIII
VOLUME 1	BOOK 3 G	CONCESSIONAIRE DOCUMENTS OF ASSOCIATION	ANNEXURE XIX
VOLUME 1		KEY PERSONNEL POSITIONS	ANNEXURE XX
VOLUME 1		SHAREHOLDERS AGREEMENT	ANNEXURE XXI
VOLUME 1		FORM OF ATTORNEYS AFFIRMATION	ANNEXURE XXII
VOLUME 1		ASSOCIATED AGREEMENTS	ANNEXURE XXIII
VOLUME 1		OVERLOADING	ANNEXURE XXIV
VOLUME 1		DEED OF SURETYSHIP	ANNEXURE XXV

<b>VOLUME 2</b>		<b>STANDARD SPECIFICATIONS</b>
VOLUME 2	BOOK 1	STANDARD SPECIFICATIONS FOR OPERATIONS AND MAINTENANCE: GENERAL
VOLUME 2	BOOK 2	STANDARD SPECIFICATIONS FOR OPERATIONS AND MAINTENANCE: ELECTRICAL AND MECHANICAL EQUIPMENT
VOLUME 2	BOOK 3	STANDARD SPECIFICATIONS FOR OPERATIONS AND MAINTENANCE: TOLL SYSTEM AND EMERGENCY COMMUNICATIONS SYSTEM
VOLUME 2	BOOK 4	STANDARD SPECIFICATIONS FOR OPERATIONS AND MAINTENANCE: ELECTRONIC TOLL COLLECTION

<b>VOLUME 3</b>		<b>INFORMATION DOCUMENTS</b>
VOLUME 3	BOOK 1	HIGHWAY INFORMATION
VOLUME 3	BOOK 2	TRAFFIC INFORMATION
VOLUME 3	BOOK 3	DRAWINGS
VOLUME 3	BOOK 4	ENVIRONMENTAL SCOPING REPORT
VOLUME 3	BOOK 5	ADDENDUM TO ENVIRONMENTAL SCOPING REPORT
VOLUME 3	BOOK 6	MACRO ECONOMIC ASSESSMENT REPORT

## ANNEXURE VI

### INDEPENDENT ENGINEERS AGREEMENT

THIS AGREEMENT is made the ● day of ● 200\*

#### Between

- (1) \*\*\*\*\* ROADS AUTHORITY of \*\*\*\*\* (hereinafter called the "Authority");
- (2) ● (hereinafter called the "Concessionaire"); and
- (3) ● (Registration No: ●) of ● (hereinafter called the "Independent Engineer")

#### RECITALS

##### WHEREAS:

- (A) The Authority has entered into an agreement with the Concessionaire (the "Concession Contract") dated on or about the date of this Agreement for the design, construction, rehabilitation, commissioning, financing, operation and maintenance of the Highway, the design, construction, rehabilitation and financing of the Associated Facilities and the undertaking of any Developments (the "Project").
- (B) The Authority and the Concessionaire wish to appoint the Independent Engineer to undertake and perform, in relation to the Project, the Services.
- (C) The Independent Engineer hereby accepts such appointment.

##### NOW THIS AGREEMENT WITNESSETH AS FOLLOWS:

#### DEFINITIONS AND INTERPRETATION

##### 1. Definitions

The following words and expressions shall have the meanings assigned to them except where the context otherwise requires:

"Additional Services" means any substantial extra work to be performed by the Independent Engineer, as the Authority and/or the Concessionaire may reasonably require in respect of the Project or the Administered Contracts, which is not included under Basic Services or Exceptional Services;

"Administered Contracts" means the Concession Contract, the Construction Contracts and, the Operation and Maintenance Contracts in force during the term of

**Comment [ID1]:** [note- careful consideration should be given as to the efficacy of the arrangement. If a three corner dispute arises under this agreement how ill it be managed? Will the dispute resolution procedure under this Agreement override the dispute resolution procedure under the Concession Agreement. Would it be better to have one paymaster and therefore disputes would be between the Independent Engineer and the paymaster and is there then a risk of conflicting decisions if the same issues were addressed under an arbitration pursuant to this Agreement and another under the Concession Contract. Is it possible to join arbitral disputes as suggested in the Arbitration Clause although in that case two arbitrators and an umpire does not really work as there would be three parties. Resolution of these concepts will then affect how this agreement is drafted. ]

this **Agreement** together with any other contracts applicable to the Project agreed by all the Parties in writing to be administered by the Independent Engineer, or any one of them as the context may require;

**"Agreed Compensation"** means additional sums payable to the Independent Engineer in accordance with Clause 30.2;

**"Agreement"** means this Independent Engineer's Agreement;

**"Basic Services"** means those services set out in Schedule 2 hereto;

**"Conditions"** means clauses 1 to 43 inclusive of this Agreement;

**"Construction Documents"** has the meaning ascribed to it in the Construction Contracts;

**"day"** has the meaning ascribed to "Day" in the Concession Contract;

**"Exceptional Services"** means the exceptional services to be performed by the Independent Engineer under Clause 27;

**"Lender's Technical Advisor"** means the person appointed as such under the Loan Agreements;

**"month"** means a period of one month according to the Gregorian calendar commencing with any day of the month;

**"Party"** or **"Parties"** means the parties to this Agreement or any one of them and "third party" means any other person or entity as the context requires;

**"Project"** has the meaning given to it in recital (A) of this Agreement;

**"Services"** means the services to be performed by the Independent Engineer in accordance with this Agreement and comprises Basic Services, the Additional Services and the Exceptional Services.

Words and expressions defined in the Administered Contracts shall have the same meanings and apply mutatis mutandis to this Agreement unless otherwise defined herein. Where there is any inconsistency between a definition in the Concession Contract and any other Administered Contract, the definition in the Concession Contract shall apply.

**Comment [ID2]:** [note- the extent of the involvement of the Independent Engineer in sub-contracts needs to be carefully considered. It is one thing to provide in a sub-contract that certain activities are subject to the scrutiny of the Independent Engineer under the Concession Agreement but it is another to have the Independent Engineer having an active role under the sub-contract].

## 2. Interpretation

Save to the extent that the context or the express provisions of this Agreement otherwise require:

- (a) the index to, and the headings in, this Agreement are for information only and are to be ignored in construing the same;
- (b) references to clauses, schedules and appendices are references to clauses, schedules and appendices to this Agreement;
- (c) the recitals, schedules and appendices to this Agreement are an integral part of this Agreement and reference to this Agreement shall include references thereto;
- (d) references to agreements, documents or instruments include (subject to all relevant approvals) a reference to that agreement, document or instrument as amended, supplemented, substituted, ceded or assigned;
- (e) reference to any statute, statutory instrument or accounting standard (including CPI) or any of their provisions shall be construed as a reference to such statute, statutory instrument or accounting standard as may have been or as may from time to time be amended, replaced or re-enacted;
- (f) words importing the singular shall include the plural and vice versa and words denoting any gender shall include all genders;
- (g) reference to any person shall include the successors and permitted assignees or successors in title of such person irrespective of whether such assignment or succession occurred before or after the date of this Agreement;
- (h) words importing persons shall include firms, partnerships, corporations and any organisation having a legal personality and vice versa;
- (i) references in this Agreement to the Authority, the Concessionaire and the Independent Engineer shall be deemed to include their respective authorised agents and representatives; and
- (j) references to the "Engineer" in any document referred to in this Agreement shall be deemed to refer to the Independent Engineer as the context requires.

## OBLIGATIONS OF THE INDEPENDENT ENGINEER

### 3. Scope of Services

- 3.1 The Independent Engineer shall carry out and complete the Basic Services upon the terms and conditions set out in this Agreement and in accordance with all instructions and directions given to it by the Authority and/or the Concessionaire. The scope of the Basic Services is stated in Schedule 2.
- 3.2 The Independent Engineer shall carry out and complete Additional Services if so instructed by the Authority and/or the Concessionaire;
- 3.3 The Services (including the omission of work and whether or not the omitted work is to be undertaken by another consultant or contractor) may be varied on the instructions of:
- 3.3.1 in the case of Services required to be performed under any Administered Contract to which the Authority is party, the Authority and the Concessionaire jointly; and
- 3.3.2 in the case of Services required to be performed under any Administered Contract not referred to in clause 3.3.1, the Concessionaire, which instructions may only be given with the prior approval of the Authority, such approval not to be unreasonably withheld or delayed.
- 3.4 The Independent Engineer shall be deemed to have full knowledge and understanding of and shall carry out the duties of the Independent Engineer prescribed in the Administered Contracts. In addition, the Independent Engineer shall be deemed to have full knowledge and understanding of all warranties given by the Concessionaire under all the Administered Contracts. The Independent Engineer shall not be relieved from the performance of any of its obligations hereunder or be entitled to any allowance of time or to any additional payment on the grounds that it was not cognisant of any provisions of the Administration Contracts.

### 4. Duty of Care and Exercise of Authority

- 4.1 The Independent Engineer warrants to the Authority and the Concessionaire that in respect of the Services it has exercised and will continue to exercise all reasonable skill, care and diligence to be expected of a properly qualified professional engineer who has held itself out as suitable and competent to perform the Services and who is experienced in providing services similar to the Services in relation to projects of a similar size, scope, nature and complexity to the Project.
- 4.2 Where the Services include the exercise of powers or discretion or the performance of duties authorised or required by the terms of any of the Administered Contracts, the Independent Engineer shall:



- 4.2.1 act in accordance with such Administered Contract and comply with its relevant requirements;
- 4.2.2 when exercising its functions under the Administered Contracts act fairly, honestly, professionally and independently; and
- 4.2.3 in respect of exercising its functions under the Concession Contract on the one hand and the other Administered Contracts on the other on the same facts and circumstances, act consistently between the relevant Contracts and in particular any determination of the Independent Engineer under any Construction Contract or Operation and Maintenance Contract in relation to extensions of time, compensation and/or penalties shall be consistent with any similar determination made by the Independent Engineer under the Concession Contract.

4.3 The Independent Engineer's duties to carry out the functions are as follows:-

- 4.3.1 in respect of any Administered Contract to which the Authority is party, its duties are owed to the Authority, the **Lenders** and the Concessionaire; and
- 4.3.2 in respect of any other Administered Contracts, its duties are owed to the Authority, the Lenders and **Concessionaire**.

The Independent Engineer shall at all times when it is exercising authority or otherwise discharging its professional duties, act fairly, impartially and independently and as a skilled professional, not as an arbitrator.

- 4.4 The Independent Engineer shall at its own cost keep all records including test results available for inspection by the Authority, the Concessionaire and the Lender's Technical Advisor during the period of this Agreement and shall deliver all such records and results to the Authority, with copies to the Concessionaire, on expiration or earlier termination of this Agreement.
- 4.5 The Independent Engineer shall co-operate with and provide all reasonable assistance to any contractors or other consultants or other service providers who are or may be engaged by the Authority, the Concessionaire and/or the Lenders (including, without limitation, the Lender's Technical Advisor and the General **Agent** as defined in the Loan Agreements) in connection with the Project and shall not interfere with or affect the work being performed by such other contractors, consultants or service providers.
- 4.6 The Independent Engineer shall, in the performance of the Services, comply with all applicable law, regulations, codes of practice and relevant national and international standards and shall, at its own cost, ensure that it holds and will continue to hold all such licences and approvals as may be required for the performance of the Services.

**Comment [ID3]:** [note-the lenders will usually have their own technical adviser so Independent Engineer will want to limit its liability to them].

**Comment [ID4]:** [note-under clause 2.2.2 the Independent Engineer has a duty in relation to other Administered Contracts to act fairly but in this provision it is stated to owe no duty to the counterparty to the sub-contract. Sub-contractors may not see this as being wholly consistent].

**Comment [ID5]:** [note-see comment against definition of General Agent in the Concession Contract].

- 4.7 No enquiry, inspection, approval, sanction, comment, consent, decision or instruction at any time given by or on behalf of the Authority or the Concessionaire shall operate to exclude or limit the Independent Engineer's obligation to exercise all the skill, care and diligence required by this clause.
- 4.8 The Independent Engineer shall provide and allocate suitable, properly trained and adequate resources in order to duly and properly perform timeously all its obligations under this Agreement.
- 4.9 The Independent Engineer shall:
- (a) keep the Authority, the Concessionaire and the Lender's Technical Advisor informed on all matters of interest which relate or pertain to the Project; and
  - (b) send to the Authority and the Lender's Technical Advisor a copy of all communications sent by it to, or received by it from, any other party in connection with the Services.
- 4.10 The Independent Engineer shall exercise the Services so as not to delay or disrupt the Project and the Independent Engineer undertakes to perform the Services so that:
- (a) the Concessionaire, acting reasonably diligently in accordance with the instruction of the Independent Engineer, will not be in breach of any of its obligations under the Administered Contract; and
  - (b) the risk of claims for additional payments or extensions of time by sub-contractors against the Concessionaire under any Construction Contract or Operation and Maintenance Contract is minimised.
- 4.11 Except as expressly stated in this Agreement or in the relevant Administered Contract, the Independent Engineer shall have no authority or power:
- 4.11.1 to amend the terms of the relevant Administered Contract;
  - 4.11.2 to relieve the relevant contractor under any such Administered Contract from any of its obligations under the relevant Administered Contract;
  - 4.11.3 to incur any liability to any contractor under any such Administered Contract on behalf of the Concessionaire, whether for additional payment or otherwise;
  - 4.11.4 to grant any contractor under any such Administered Contract an extension of time to perform its obligations thereunder;
  - 4.11.5 in the absence of instruction, to issue any instruction relating to any matter which, in his opinion, is the responsibility under an Administered Contract of a party under such contract.

5. **Property of the Authority and Concessionaire**

Any facilities, whether of a permanent or temporary nature, or consumables supplied by or paid for by the Authority or the Concessionaire for use by the Independent Engineer for the purpose of the Services shall remain the property of the Authority or the Concessionaire as appropriate and where practicable shall be so marked. The Independent Engineer shall upon the expiry of this Agreement or its earlier termination or at the request of the Authority and/or the Concessionaire furnish inventories to the Authority and/or the Concessionaire (as applicable) of such facilities or consumables which have not been consumed in the performance of the Services and shall deliver the same as directed by the Authority and/or the Concessionaire. The preparation of such inventories and their delivery shall not be regarded as an Additional Service.

6. **Decisions by the Independent Engineer**

On all matters properly referred to it for consent, approval, decision or determination in accordance with any Administered Contract, the Independent Engineer shall give its consent, approval, expression of satisfaction or dissatisfaction, decision or determination in writing within the time period referred to in the relevant Administered Contract or if no such period is prescribed, within a reasonable time period which in such latter event, shall be no later than 20 days after being referred to the Independent Engineer. The Independent Engineer shall exercise its rights under this Agreement reasonably and fairly and shall not unreasonably withhold or delay the giving of its consent, approval, expression of satisfaction or dissatisfaction, decision or determination.

**OBLIGATIONS OF THE AUTHORITY AND THE CONCESSIONAIRE**

7. **Provisions of Office Accommodation**

7.1 Subject to clause 5, the Concessionaire shall provide to the Independent Engineer the office accommodation and services specified in Schedule 4 or as otherwise agreed by the Parties at the times specified in that Schedule or as otherwise agreed.

7.2 The Independent Engineer shall comply with the provisions of any lease or other agreement under which the Concessionaire has possession of the items listed in Schedule 4 including obligations to maintain such items or property and shall otherwise be responsible for operating such office facilities including the operating and routine maintenance costs.

8. **Information**

8.1 The Authority and the Concessionaire shall as soon as reasonably practicable after the Independent Engineer's request therefor make available to the Independent Engineer, free of charge, all information and documents in respect of the Project as are requested by the Independent Engineer which are in their possession or control and which are necessary and are reasonably required for the execution of the Services.

**Comment [ID6]:** [note-this may be more than office accommodation-for instance in the case of wide rivers marine and safety equipment may be required].

8.2 Without limitation, the Concessionaire must ensure that the Independent Engineer is provided with all information and documents required under any Construction Contract and any Operation and Maintenance Contract to be provided by the Contractor or O&M Contractor as soon as reasonably practicable and, in any event within the time period required by the relevant Construction Contract or Operation and Maintenance Contract by exercising its rights under those documents.

9. **Decisions by the Authority and Concessionaire**

On all matters properly referred to them in writing by the Independent Engineer, the Authority and Concessionaire shall give their respective decisions in writing and within the time prescribed in the Administered Contracts and, if no time is prescribed, within a reasonable time so as not to delay the performance of the Services.

10. **Access and Assistance**

The Authority and the Concessionaire shall:

- (a) provide to the Independent Engineer and its personnel such reasonable access to the Site as is required for the proper performance of the Services; and
- (b) use reasonable efforts to procure for the Independent Engineer and its personnel such access to other relevant organisations for collection of information by the Independent Engineer to enable the Independent Engineer to perform the Services properly which access the Authority or the Concessionaire only can procure,

subject to the observance of any rules or requirements of the Authority or the Concessionaire as to safety or security on the Site which are applied generally by the Authority, Concessionaire, the Contractors or O&M Contractors.

Such assistance shall not relieve the Independent Engineer from any of its obligations under the Agreement, including its obligation to comply with all applicable requirements of any governmental or other authorities having jurisdiction over this Agreement and/or the Project.

11. **Sub-Consultants**

If any determination which is required to be made by the Independent Engineer (including, amongst others, a determination in terms of clause 6.2.7 of the Concession Contract), involves the evaluation or assessment of any matter outside the Independent Engineer's field of expertise, the Independent Engineer shall appoint a consultant the identity of which shall have the prior approval of the Authority and the Concessionaire. The Independent Engineer shall be responsible for payment to its consultants. No appointment of any consultants shall relieve the Independent Engineer of its liabilities and responsibility under this Agreement and

the Independent Engineer shall remain fully responsible for all Services as if they had been performed by the Independent Engineer.

## PERSONNEL

### 12. Supply of Personnel

Details of the Independent Engineer's personnel shall be submitted to the Authority and the Concessionaire on the date of signature of this Agreement and subsequently within 7 days of any change in personnel. The Independent Engineer warrants that the qualifications and experience of such personnel shall be appropriate for their respective assignments. Such personnel shall be as approved by the Authority and the Concessionaire. Such approval shall not relieve the Independent Engineer of any of its obligations under this Agreement.

**Comment [ID7]:** [note-the issue of change is also dealt with in clause 14 which stipulates that prior approval is required-may be better to tie the two clauses together].

### 13. Representatives

For the administration of this Agreement the Authority, the Concessionaire and the Independent Engineer shall each designate an individual to be its representative. The Parties confirm that their respective representatives have the power and authority to bind the relevant Party (as the case may be) for all purposes in connection with this Agreement. The designated representatives are specified in Schedule 1 and may be changed by written notice to the other Parties.

### 14. Changes in Personnel

14.1 If instructed by the Authority and the Concessionaire in writing to replace any agent, employee or authorised representative, the Independent Engineer shall immediately arrange for replacement of the relevant person with a person of appropriate suitability and competence as approved by the Authority and the Concessionaire. The cost of such replacement shall be borne by the Independent Engineer.

**Comment [ID8]:** Note[-this has to be a joint instruction which makes sense as the Independent Engineer will not wish to become a shuttlecock in a contest between the Authority and the Concessionaire. However the Concession Contract will need to address the issue of dispute as it does not really make sense to refer that type of dispute to arbitration].

14.2 The Independent Engineer shall obtain prior written approval of the Authority and the Concessionaire for any change to any personnel employed by the Independent Engineer in performance of the Services, such approval shall not be unreasonably withheld.

**Comment [ID9]:** [note-may not be practicable in all cases-what if death or serious illness?]

14.3 Any replacement personnel shall have at least the equivalent experience and expertise as the personnel they replace.

## LIABILITY AND INSURANCE

### 15. Liability between the Parties

15.1 Subject to Clause 17.1, the Independent Engineer shall indemnify the Authority and the Concessionaire against any loss, damage or expense incurred to the extent that the same is caused or contributed to by any act, omission or default of or breach of this Agreement by the Independent Engineer or persons for whom it is responsible under this Agreement.

**Comment [ID10]:** [note-in some jurisdictions the concept of indemnity is not understood. Similarly the concept of limiting liability may be an issue. This puts particular emphasis on insurance and the importance of ensuring that the insurance taken out by the Concessionaire extends to the benefit of the Independent Engineer].

15.2 The Authority and the Concessionaire shall be severally liable to the Independent Engineer for breach of their respective obligations to the Independent Engineer pursuant to this Agreement.

16. **Duration of Liability**

Neither the Authority, the Concessionaire nor the Independent Engineer shall be entitled to bring an action against the other for any loss or damage resulting from the other Party's default under this Agreement unless a claim is made against the other Party before the expiry of the period stated in Schedule 1, or such earlier date as may be prescribed by law provided that the period stated in Schedule 1 commences on the date when the claim arose, or if the claim is based on matters which were not capable of discovery at that time, from the date of discovery of the matters entitling the party to make such a claim.

17. **Maximum Liability and Indemnity**

17.1 The maximum liability of one Party to another Party under this Agreement shall, other than in respect of liability arising under Clauses 17.2 and 17.3, be limited to the relevant amount stated in Schedule 1. This limitation is without prejudice to any Agreed Compensation specified under Clause 30.2 or otherwise imposed by this Agreement.

Each Party agrees to waive all claims against each other Party in so far as the aggregate of compensation which would otherwise be payable by such other Party exceeds the relevant maximum amount stated in respect of such Party in Schedule 1.

17.2 The Independent Engineer shall indemnify the Authority and the Concessionaire against all claims, liability, loss, damage and expenses in respect of:

17.2.1 death of persons;

17.2.2 injury to persons;

17.2.3 damage to property; and

17.2.4 liability of any kind in relation to environmental matters,

arising out of or in connection with or by reason of performance or non performance of its obligations hereunder or any breach, default or negligence of the Independent Engineer or persons for whom it is responsible under or pursuant to this Agreement.

17.3 Clauses 15 and 17.1 do not apply to claims arising from gross negligence, fraud, bad faith, deliberate default or reckless misconduct.

**Comment [ID11]:** [ it looks as if this agreement was borrowed from a version which had only two parties and was then amended. The liability as between Authority and Concessionaire should be dealt with under the Concession Contract. It is also slightly inconsistent to have the liability of the Authority or Concessionaire capped if there were claims by third parties against the Independent Engineer for which it was seeking an indemnity. This should be looked at within the total structure of the insurance package.]

18. **Insurances for Liability and Indemnity**

18.1 Without prejudice to its obligations under this Agreement or otherwise at law, the Independent Engineer shall, at its own cost:

18.1.1 effect and maintain professional indemnity insurance from the date of this Agreement until the expiry of 6 years from the completion of the Services in respect of or for an amount not less than the amount stated in Schedule 1 in respect of each and every claim;

18.1.2 effect and maintain insurance against public/third party liability from the date of this Agreement until completion of the Services in respect of or for an amount not less than the amount stated in Schedule 1 in respect of each and every claim;

18.1.3 effect and maintain motor vehicle liability insurance from the date of this Agreement until completion of the services in an amount not less than the amount stated in Schedule 1 in respect of each and every claim;

18.1.4 effect and maintain necessary insurances to ensure that all statutory obligations concerning the Compensation for Occupational Injuries or Diseases Act are complied with; and

18.1.5 effect and maintain employer's common law liability insurance in respect of liability to employees for an amount not less than the amount stated in Schedule 1 in respect of each and every claim,

on terms and with well established insurers of good repute, approved by the Authority and the Concessionaire. The policies effected to comply with the obligations under this Clause shall be non-cancellable save in the event of non payment of premium.

18.2 The Authority or Concessionaire may at their sole discretion require the Independent Engineer to increase the level of cover in respect of the insurances referred to in Clause 18.1 or such other additional insurances. If so requested, the Independent Engineer shall make all reasonable efforts to effect such additional insurance with an insurer and on terms acceptable to the Authority and the Concessionaire. The cost of effecting additional insurance shall be at the expense of the Authority or the Concessionaire which requested such additional insurance or as otherwise agreed.

18.3 The Independent Engineer shall immediately inform the Authority and the Concessionaire if any of the insurances referred to in Clause 18.1 cease to be available or are otherwise not renewed or maintained or for any reason become void or unenforceable.

18.4 The Independent Engineer shall provide the Authority and the Concessionaire with certified copies of such insurance policies and, when required by the Authority or such Concessionaire, produce for inspection documentary evidence to show that

**Comment [ID12]:** [note-this requirement should be looked at in the over-all scope of the services. The Independent Engineer is to be provided with accommodation on Site; the Concessionaire will carry CAR and third part liability insurance and has responsibility for design notwithstanding review by the Independent Engineer and the Authority. It is suggested that the scope of the insurance should be reviewed by the Authority's insurance adviser so as to avoid duplication of cost and risk cover.]

such insurances referred to in Clauses 18.1 and 18.2 are being maintained and the premiums paid promptly.

- 18.5 The Independent Engineer shall ensure that:
- (a) the Authority and the Concessionaire are named on the insurance policies as additional insureds;
  - (b) such policies are for the benefit of the Concessionaire and the Authority;
  - (c) such policies comply with the requirements of Schedule 5.
- 18.6 All insurances to be effected in terms of this Agreement shall be reviewed annually by the Parties and, if necessary, adjusted in order to ensure that terms and sums are commensurate with the related risks.

**19. Insurance of the Property of the Concessionaire**

Unless otherwise approved in writing by the Concessionaire, the Independent Engineer shall insure on terms acceptable to the Concessionaire:

- 19.1 against loss or damage to the property of the Concessionaire supplied or paid for under Clause 7;
- 19.2 against liabilities arising out of the use of such property.

The cost of such insurance shall be at the expense of the Concessionaire.

**Comment [ID13]:** [note-see comment to clause 18.1.1 above].

**COMMENCEMENT, COMPLETION, ADDITIONAL SERVICES AND TERMINATION**

**20. Commencement and Completion**

Notwithstanding the date of signature of this Agreement, the Services shall be commenced and completed at the times or within the periods stated in Schedule 1 subject to any extension in accordance with this Agreement.

**21. Payment for Services Provided before Commencement**

Notwithstanding the commencement of the Services prior to the date of signature of this Agreement, payment for such Services shall be limited to the fee specified in Clause 1 of Schedule 3 and shall be incorporated in the fee payable for year 1 set out in Clause 1 of Schedule 3.

**22. Additional Services**

- 22.1 The Authority and/or the Concessionaire may require the Independent Engineer to undertake Additional Services.



22.2 Unless otherwise agreed between the Authority and the Concessionaire, Additional Services shall be provided at the cost of the Party requesting such Additional Services.

22.3 The fee for any Additional Services shall be agreed by the Party requesting the Additional Services and the Independent Engineer prior to performance of the Additional Services and such fee shall represent a fair and reasonable fee for such Additional Services. If there is a failure to agree on the fee, the fee shall be determined by an independent expert agreed on by the Party requesting the Additional Services and the Independent Engineer. If they cannot agree on the identity of the independent expert he or she shall be appointed by the President for the time being of the Law Society of Gauteng or any successor body thereof.

22.4 The fee for Additional Services shall be paid as a lump sum by the relevant Party stated in Clause 22.2.

### 23. Further Proposals

If requested in writing by the Authority or the Concessionaire, the Independent Engineer shall submit proposals for altering the Services.

### 24. Delays

24.1 If the performance of the Services is materially impeded or delayed by any act of prevention or default of the Authority or the Concessionaire or their contractors or agents as a result of which the extent of the Services or the time that is required for their performance is materially increased:

24.1.1 the Independent Engineer shall give written notice to the Authority and the Concessionaire of the relevant circumstance and probable effects within the 30 (thirty) days of the commencement of such circumstance;

24.1.2 any increase in the extent of the Services shall be regarded as Additional Services only if such notice has been given in strict accordance with Clause 24.1.1 and the Independent Engineer submits its proposed addition to the fee being a fair and reasonable amount for such Additional Services together with all necessary supporting information no later than 30 (thirty) days after the cessation of the relevant circumstance;

24.1.3 the time for completion of the Services shall be extended on a fair and reasonable basis; and

24.1.4 the Party which impeded or delayed the Services, or the Party to which any contractor which delayed or impeded the Services is contracted, shall be liable for cost of such Additional Services.

**Comment [ID14]:** [note-the contract is silent as to who awards time and or money .Also what happens if both Concessionaire and Authority contributed to the delay?]

25. **Force Majeure**

25.1 Force Majeure **Event** means the force majeure events described in the Concession Contract which materially adversely affects the ability of the Independent Engineer to perform its obligations under this Agreement PROVIDED that the Independent Engineer shall not be entitled to treat an event as a Force Majeure Event to the extent that:

**Comment [ID15]:** [note-under clause 18.3 of the Concession Contract the Independent Engineer has a role to play if an Event of Force Majeure impacts upon the Project. The Concession Contract does not address the issue as to what happens if the Independent Engineer cannot perform. The two provisions need to be considered together].

- (a) it would not have occurred but for the breach of the Independent Engineer of this Agreement;
- (b) it could have been prevented through the exercise of proper foresight and diligence; or
- (c) its occurrence could reasonably have been anticipated and/or appropriate anticipatory mitigation measures undertaken.

25.2 The Independent Engineer shall promptly notify the other Parties of the occurrence of a perceived Force Majeure Event and when such an event has ceased. The Parties shall agree whether the perceived Force Majeure Event is to be considered a Force Majeure Event for the purpose of this Clause.

25.3 Subject to Clause 25.4, the Independent Engineer shall be excused from performance of its obligations under this Agreement to the extent that it is unable to perform those obligations as a result of the Force Majeure Event and no Party shall be entitled to claim damages, penalties or other compensation as a result of such failure to perform.

25.4 The Independent Engineer shall, to the maximum extent possible, continue to perform the obligations under this Agreement during the occurrence of any Force Majeure Event and shall notify the other Parties of any proposals, including alternative means of performance, but shall not implement such proposals without the consent of the other Parties.

25.5 If it is agreed under Clause 25.2 that a Force Majeure Event has occurred, the Parties shall promptly consult to agree a mutually satisfactory resolution to the changed circumstances resulting from such Force Majeure Event.

25.6 If a Force Majeure Event (or its consequences) shall continue for 182 or more consecutive days and the Parties have not reached a mutually satisfactory resolution to the changed circumstances, then the Authority together with the Concessionaire shall be entitled to terminate this Agreement upon 28 days' prior written notice.

25.7 The foregoing provisions shall not excuse or release the Independent Engineer from obligations due or performable, or compliance required, under this Agreement prior to the above mentioned failures or delays, in performance not due to the occurrence of the Force Majeure Event or obligations not affected by the Force Majeure Event. The Independent Engineer shall continue its performance under this Agreement when the effects of the Force Majeure Event are removed.

25.8 There shall be no additional cost to the Authority or the Concessionaire as a result of a Force Majeure Event and during continuation of the Force Majeure Event the fee specified in Schedule 3 shall be reduced to reflect the reduction in Services being performed by the Independent Engineer.

**Comment [ID16]:** [note-under the Concession Contract there may be additional work for the Independent Engineer so again this needs to be thought through.]

26. **Suspension or Termination**

26.1 **By Notice of the Authority or Concessionaire**

26.1.1 The Authority with the consent of the Concessionaire or the Concessionaire with the consent of the Authority may suspend all or part of the Services by written notice of at least 28 (twenty eight) days to the Independent Engineer who shall immediately proceed in an orderly manner to take such steps as are necessary to bring to an end, in the shortest time possible, its duties under this Agreement as economically as possible to the Authority and the Concessionaire. Where the Services of the Independent Engineer have been suspended pursuant to this Clause 26.1.1, the Authority and the Concessionaire shall pay any instalments of the payment due to the Independent Engineer commensurate with the Services performed by the Independent Engineer up to the date of suspension less the amount of any payments previously made by the Authority and the Concessionaire to the Independent Engineer under this Agreement and the Authority and the Concessionaire shall not be liable to the Independent Engineer for any loss of profit, loss of contract or other loss and expense arising out of or in connection with such suspension save as expressly provided in this Agreement.

26.1.2 The Independent Engineer shall resume the performance of suspended Services if instructed by the Authority with the consent of the Concessionaire or the Concessionaire with the consent of the Authority. Payment made in accordance with this Clause 26 in the event of any suspension shall rank as payment on account towards payment to which the Independent Engineer is entitled under this Agreement upon resumption of the Services.

26.1.3 If:

- (a) the Services are suspended for a period of 6 months;
- (b) the Independent Engineer is in breach of any of its obligations under this Agreement (including, without limitation the obligation to provide adequate resources or competent staff to carry out its obligations) and, in the case of a breach capable of remedy, fails to remedy the breach within 10 days after receipt of a written notice from the Authority or the Concessionaire giving particulars of the breach and requiring its remedy or, within such longer period as may be specified in such notice; or

- (c) the Independent Engineer is being or has been wound-up or becomes insolvent or enters into liquidation, receivership, judicial management or other composition with creditors or some other analogous event,

then the Authority or the Concessionaire may, with the consent of the other, at any time thereafter and without prejudice to any other rights or remedies, forthwith terminate this Agreement by written notice.

26.1.4 The Authority or the Concessionaire may, with the consent of the other, at any time by written notice to the Independent Engineer of not less than 28 days terminate the Independent Engineer's appointment and this Agreement without prejudice to any other rights or remedies.

## 26.2 By Notice of the Independent Engineer

If:

26.2.1 the Authority or the Concessionaire, as the case may be, fails without reasonable cause to make payment in accordance with Clause 29 within 30 (thirty) days after the due date for payment of an invoice; or

26.2.2 the performance of the Services has been suspended pursuant to Clause 26.1 for a period of 182 (one hundred and eighty two) consecutive days,

the Independent Engineer may by 28 (twenty eight) days' notice in writing terminate this Agreement.

Provided that where the Authority or the Concessionaire is in default under Clause 26.2.1, the other Party shall be entitled to make payment to the Independent Engineer of any amount then due in accordance with Clause 29 and to recover the same from the Party in default as a debt.

## 26.3 Termination of the Concession Contract

26.3.1 Subject to Clause 26.3.2, in the event that the Concession Contract is terminated for any reason, the Authority may forthwith terminate this Agreement by notice in writing.

26.3.2 If this Agreement is terminated in accordance with Clause 26.3.1, prior to the Effective Date, the Independent Engineer shall be paid equally by the Authority and the Concessionaire such part of the fee specified in Clause 1 of Schedule 3 for Services carried out prior to the date of signature of this Agreement as is fairly and properly attributed to the performance of Services properly carried out prior to the date of termination and which remains unpaid.

27. **Exceptional Services**

Upon resumption of the Services or part thereof following a suspension effected in accordance with this Agreement or upon termination of this Agreement, otherwise than pursuant to Clauses 26.1.3 or 26.2.2, any necessary work undertaken by the Independent Engineer with the prior consent of the Authority and the Concessionaire whose consent shall not be unreasonably withheld, which is extra to the Basic Services and Additional Services shall be regarded as Exceptional Services. The performance of Exceptional Services shall, in the case of resumption of the Services or part thereof following a suspension, entitle the Independent Engineer to extra time for its performance and shall, in any event, entitle the Independent Engineer to payment for its performance in accordance with Clause 29.2.

28. **Rights and Liabilities of Parties**

- 28.1 Termination of this Agreement shall not prejudice or affect the accrued rights or obligations of the Parties.
- 28.2 If the Independent Engineer's appointment is terminated for any reason, the Independent Engineer shall, if instructed by the Authority and/or the Concessionaire, take such steps as may be necessary to organise a safe conclusion of the Services.
- 28.3 Following termination of the Independent Engineer's appointment and subject to any set off or deductions of any amount the Authority and/or the Concessionaire may be entitled to make as a result of any breach of this Agreement by the Independent Engineer (which amounts, if any, may be set-off or deducted from any amount otherwise due to the Independent Engineer, whether liquidated or not), the Authority and the Concessionaire shall pay to the Independent Engineer in full and final settlement of any claim which the Independent Engineer may have in consequence thereof any instalments of the payment due to the Independent Engineer commensurate with the Services performed by the Independent Engineer up to the date of termination less the amount of any payments previously made by the Authority and the Concessionaire to the Independent Engineer under this Agreement and the Authority and the Concessionaire shall not be liable to the Independent Engineer for any loss of profit, loss of contract or other loss and expense arising out of or in connection with such termination save as expressly provided in this Agreement.

**PAYMENT**

29. **Payment to the Independent Engineer**

- 29.1 The Authority and the Concessionaire shall pay the Independent Engineer for Basic Services in accordance with these conditions and Schedule 3.
- 29.2 Unless otherwise agreed in writing the Authority and the Concessionaire shall pay, in equal proportions, the Independent Engineer in respect of Exceptional Services:

29.2.1 a fee which represents a fair and reasonable fee for the extra time spent by the Independent Engineer's personnel in the performance of the Exceptional Services; and

29.2.2 the net cost of all other extra expense reasonably and properly incurred by the Independent Engineer as a result of performance of the Exceptional Services.

29.3 The obligations of the Authority and the Concessionaire shall be limited to that portion of the cost of the Services to which each has committed itself in accordance with Schedule 3, to which shall be added the cost of Additional Services carried out pursuant to Clauses 22 and 24 and Exceptional Services carried out pursuant to Clause 27.

### 30. Time for Payment

30.1 Amounts due to the Independent Engineer shall, subject to Clause 32, be paid within the time stated in Schedule 1 after receipt by the Authority and the Concessionaire respectively of an original VAT invoice from the Independent Engineer together with a true copy of the VAT invoice rendered to the other Party.

30.2 If the Authority or the Concessionaire fails, without reasonable cause, to make payment in accordance with Clause 30.1, the Party in default shall be liable to pay the Independent Engineer interest on the sum overdue at the rate defined in Schedule 1 from the due date for payment of the invoice until the date of payment of such invoice ("**Agreed Compensation**"). Such Agreed Compensation shall not affect the rights of the Independent Engineer stated in Clause 26.2.

30.3 The Independent Engineer shall render to the Authority and the Concessionaire on the 28<sup>th</sup> day of each month starting from the second month in which the Services are commenced an original VAT invoice in respect of fees and disbursements payable for the preceding month.

### 31. Currency of Payment

The currency applicable to this Agreement is the [here insert currency].

### 32. Conditions for Payment

32.1 If any item or part of an item in an invoice submitted by the Independent Engineer is contested by the Authority or the Concessionaire, the Party who wishes to make any contest shall give prompt notice to the Independent Engineer (with a copy to the other Party) with reasons and shall not delay payment of the uncontested portion of the invoice.

32.2 The Independent Engineer shall provide the Authority and the Concessionaire with such documents, information or other facilities as the Authority or the Concessionaire may reasonably require for the purpose of verifying the amounts claimed as due for payment.

32.3 The Authority and the Concessionaire shall be entitled to make an appropriate deduction from any payment due to the Independent Engineer in respect of any Services which have not been performed in accordance with this Agreement and in respect of any other deductions or set-off of any amount due by the Independent Engineer, whether liquidated or not.

**33. Independent Audit**

The Independent Engineer shall maintain in the Republic of South Africa and make available during normal working hours for audit and inspection up-to-date records which clearly identify relevant time spent in the performance of the Services, the nature of the activities and the expense.

**GENERAL PROVISIONS**

**34. Languages**

34.1 In Schedule 1 there is stated the ruling language or languages of this Agreement.

**35. Assignment and Sub-Contracts**

35.1 The Independent Engineer shall not without the prior written consent of the Authority and the Concessionaire assign its rights under or any benefits arising out of this Agreement.

35.2 The Authority or Concessionaire shall be entitled with the prior consent of the other to assign its rights under or benefit arising out of this Agreement without the written consent of the Independent Engineer.

35.3 The Independent Engineer shall not without the prior written consent of the Authority and the Concessionaire, unreasonably vary or terminate the appointment of any consultant appointed pursuant to Clause 11.

35.4 The Independent Engineer shall not subcontract all of the Services but may contract part of the Services in accordance with Clause 11.

**36. Copyright**

36.1 The Independent Engineer warrants that it has legal and beneficial ownership of copyright and all other intellectual property and design rights in all works and documents produced or to be provided as part of the Services.

36.2 The Authority and the Concessionaire shall have, and the Independent Engineer shall hereby grant to each of them, a royalty-free, irrevocable, non-exclusive licence to use and re-produce all of the documents, reports or other things which have been or are to be prepared or supplied by the Independent Engineer in the performance of the Services for any purpose whatsoever connected with the Project. Such licence shall carry the right of the Authority and the Concessionaire to grant sub-licences

and shall be otherwise transferable without the consent of the Independent Engineer being required, provided that the said documents, reports or other things to be prepared or supplied by the Independent Engineer may only be used as strictly necessary for the purposes of the Concession Contract and the Associated Agreements (as defined in the Concession Contract). The Independent Engineer shall execute such documents and do such things to give effect to such licences or sub-licences. The provisions of this clause 36.2 shall survive the termination of this Agreement for whatever reason.

36.3 The Independent Engineer warrants that in the performance of the Services the Independent Engineer and its employees have not and will not infringe any third party's intellectual property rights.

37. **Conflict of Interest**

Unless otherwise agreed in writing by the Authority and the Concessionaire, the Independent Engineer and its personnel shall have no interest in nor receive remuneration in connection with the Project except as provided for in this Agreement. The Independent Engineer shall not engage in any activity which might conflict with the interests of the Authority or the Concessionaire in relation to the Project.

38. **Notices**

Notices under this Agreement shall be in writing and will take effect from receipt at the address stated in Schedule 1. Delivery can be by hand or by facsimile against a written confirmation of receipt or by registered letter. The date of receipt of a registered letter shall be deemed to be 10 (ten) days after the date of posting unless proven otherwise by any Party.

**Comment [ID17]:** [ tie in with suggestion as to notices under the Concession Contract].

39. **Publication**

Unless otherwise approved by the Authority in writing, the Independent Engineer, either alone or jointly with others, shall not from the date of this Agreement until two years following the completion of the Services or the earlier termination of this Agreement, publish material relating to the Project and the Services.

**SETTLEMENT OF DISPUTES**

40. **Resolution of Disputes**

40.1 If a dispute of any kind whatsoever arises between the Authority and/or the Concessionaire on the one hand, and the Independent Engineer on the other, in connection with or arising out of this Agreement (not including disputes as to the Services which are to be resolved pursuant to the relevant Administered Contract), then an attempt shall be made by the Parties to settle such dispute amicably and failing settlement within 10 days of a notice initiating attempts at an amicable settlement either Party may send the other Party a written invitation to conciliation under UNCITRAL Conciliation Rules. If the Parties are unable to agree on a



conciliator, either Party may apply to the [ here insert nominating body] appointing a conciliator.

40.2 If the dispute is not resolved by means of the conciliation procedure within 30 (thirty) days after entering such process, or at such earlier time as the Parties may agree, the chief executive officers of the Authority and/or the Concessionaire on the one hand, and the senior partner, principal engineer or chief executive of the Independent Engineer on the other, shall in that respect meet and endeavour to resolve issues between them. The joint and unanimous written decision of such chief executive officers of the Parties shall be binding upon the Parties but if they do not meet or are unable to agree within 60 (sixty) days of the reference to them then the matter may be referred to arbitration pursuant to Clause 40.3.

40.3 Any dispute which cannot be settled amicably pursuant to Clause 40.1 within 90 (ninety) days after receipt by one Party of the other Party's request to do so or such longer period as the Parties may agree or which is not resolved in accordance with Clause 40.2 may be referred by any Party to arbitration under the UNCITRAL Arbitration Rules in force on the date of this Agreement for a decision which shall be final and binding. Such arbitration shall be conducted in [ here insert location]. In the event of such a conflict between the UNCITRAL Arbitration Rules and the terms of this Agreement, the terms of this Agreement shall govern.

40.4 The appointing authority shall be the Secretary General of the ICC International Court of Arbitration. Arbitration shall be conducted in the English language before a panel of three arbitrators. The Authority, the Concessionaire and the Independent Engineer shall each select one arbitrator within 30 (thirty) days after the reference to arbitration and, within such 30 (thirty) day period each Party shall notify the other Parties in writing of the identity of the arbitrator so selected. Should any Party not appoint its arbitrator in this period, any other Party may so notify the appointing authority and request that the appointing authority appoint such arbitrator. The arbitrators as herein above selected shall select in consultation with the Parties the fourth arbitrator who shall act as president of the arbitral panel. If the arbitrators do not agree on the selection of a president of the arbitral panel within 30 (thirty) days from the date of appointment of the last of the three arbitrators, then upon written request of any Party, the president of the arbitral panel shall be selected by the appointing authority. The president of the arbitral panel shall have a casting vote. The arbitral panel shall have the power to make such decisions and all necessary awards as to joining one or more parties as would be available to the High Court of the [ here insert host country].

#### 40.5 Waiver of Immunity

The Authority and the Concessionaire hereby agree not to claim and hereby expressly waive any immunity from suit or arbitral proceedings or from judicial enforcement of awards or judgements relating to matters arising under this Agreement on grounds of sovereignty or otherwise to which they may otherwise be entitled.

**Comment [ID18]:** [note-this does not quite reflect the risk that there could be a difference between the Authority, Concessionaire and Independent Engineer as to who is responsible within a set of circumstances. There are two approaches-one is to redraft the Disputes Resolution Procedures to reflect this although if there was a three way dispute then it would clearly touch and concern an issue under the Concession Contract as between the Concessionaire and the Authority. It would then be an issue as to how such a dispute would be resolved but clearly two arbitrators and an umpire would not work. The alternative would be to have one paymaster and therefore disputes would be between the paymaster and the Independent Engineer and the Agreement would have to be reworked to reflect that.]

**Comment [ID19]:** [ note- see comment against recitals.]

#### 40.6 Performance of Duties during Dispute

The Independent Engineer shall continue to perform his duties, exercise his powers and enjoy his rights pending resolution of any dispute, except for such duties, powers and rights as are the subject of such dispute.

#### 40.7 Jurisdiction

Subject to Clauses 40.1, 40.2, 40.3 and 40.4 the Parties agree that:

- (a) the High Court of [ here insert host country ] shall have non-exclusive jurisdiction over any matter arising out of or in connection with this Agreement; and
- (b) this Agreement shall be governed by construed in accordance with the law of the [ here insert host country].

**Comment [ID20]:** [note-see if invoking jurisdiction of High Court could allow intervention in the decision of the Arbitrators]

#### 40.8 Joinder

Any party shall be entitled to join itself and be heard in any of the Dispute Resolution Procedures under this clause 40 provided that if a party elects to join itself such party may not thereafter withdraw from such proceedings and shall be bound by any determination made in such proceedings.

The party initiating the Dispute Resolution Procedure under this clause shall:

- (a) give notice to all the other Parties of the nature of the dispute and the identity of the immediate parties to the dispute; and
- (b) invite all other parties to join the Dispute Resolution Procedure.

**Comment [ID21]:** [note- refer to earlier comments as to the impact of this particularly note 1].

#### 41. Termination of the Concession Contract

41.1 Upon termination of the Concession Contract the Authority shall assume the rights and obligations of the Concessionaire including but not limited to the right to terminate in terms of Clause 26.1.

41.2 If the Concession Contract is ceded and delegated to a Substituted Entity pursuant to the Concession Contract, this Agreement shall on the same date be ceded and delegated to such Substituted Entity which shall then become the Concessionaire under this Agreement.

#### 42. Miscellaneous Provisions

##### 42.1 Specific Performance

The Independent Engineer shall have no right to seek an order for specific performance by the Authority or the Concessionaire of any of their respective obligations under this Agreement.

#### 42.2 Confidentiality

Save as may be necessary in the performance of its duties under this Agreement or otherwise required by law, the Independent Engineer shall not at any time without the prior written consent of the Authority and the Concessionaire disclose to any person or otherwise make use of any of the documents or this Agreement or any of the Administered Contracts or other confidential information relating to the Project, the completed Project, the Authority or the Concessionaire. This provision shall cease to apply only to the extent that any matter has come into the public domain through no default on the part of the Independent Engineer or any person for whom it is responsible.

#### 42.3 Variations in Writing

All additions, amendments and variations to this Agreement shall be binding only if in writing and signed by duly authorised representatives of each of the Parties.

#### 42.4 Entire Agreement

This Agreement represents the entire agreement between the Parties in relation to the subject matter thereof and supersedes any or all previous agreements or arrangements, whether oral or written, between the Parties in connection with the Project.

#### 42.5 Time and Indulgence

No waiver by any Party of any default by any other Party in the performance of any of this Agreement shall operate or be construed as a waiver of any other or further default whether of a like or different character, or shall be effective unless it is made in writing duly signed by such Party.

Any time or other indulgence allowed by one Party to any other in which to perform its duties and obligations hereunder or to remedy any breach hereof shall not be, and shall not be construed as, a waiver by the Party giving such time or indulgence of any of its rights hereunder.

#### 42.6 Interest

Any Party in default of payment of any amount due hereunder to which Clause 30.2 does not apply shall pay interest on the outstanding payment at a rate of 2 per cent. above the publicly quoted basic rate of interest (expressed as a per centum per annum, compounded monthly in arrears and calculated on a 365 day year) from time to time published by the Reference Bank (as defined in the Concession Contract) as being its prime overdraft rate, as certified by any manager of such bank. Such interest shall be computed on a daily basis from the due date of payment until the relevant amount together with accrued interest is fully paid by the defaulting Party.

42.7 **Severability**

If any one or more of the provisions of this Agreement shall be held wholly or partly invalid, illegal or unenforceable for any reason whatsoever, then those provisions or parts thereof shall be deemed severable from the remaining provisions of this Agreement and shall in no way affect the validity, legality or enforceability of this Agreement. The Parties shall meet as soon as possible and negotiate in good faith a replacement provision that is legally valid and that achieves as nearly as possible the objective of this Agreement and produces an equivalent economic effect.

43. **Stipulations for the Benefit of the Lenders**

The Parties agree that the provisions of this Agreement that refer to the Lenders and the warranty in clause 4.1 comprise stipulations for the benefit of the Lenders and may not be amended without their written consent and that Lenders may at any time accept such stipulations in their favour provided that they accept the obligations imposed upon them in terms of this Agreement.

In Witness whereof the Parties hereto have caused this Agreement to be executed.

Binding signature of the Authority      Binding signature of the Concessionaire

\_\_\_\_\_

Name \_\_\_\_\_ Name \_\_\_\_\_

Title \_\_\_\_\_ Title \_\_\_\_\_

In the presence of      In the presence of

Name \_\_\_\_\_ Name \_\_\_\_\_

Signature \_\_\_\_\_ Signature \_\_\_\_\_

Binding signature of ●      Binding signature of ●

● Ltd      ● Ltd

Name \_\_\_\_\_ Name \_\_\_\_\_

Title \_\_\_\_\_ Title \_\_\_\_\_

In the presence of      In the presence of

Name \_\_\_\_\_ Name \_\_\_\_\_

Signature \_\_\_\_\_ Signature \_\_\_\_\_



extent required, with an invariable interest in the Project against third party claims for bodily injury, death or property damage to third parties

Amount of insurance required: [ ]

18.1.3 Motor Vehicle Liability Insurance This insurance will provide protection for the Concessionaire, the Authority and the Lenders

Amount of insurance required [ ]

18.1.5 Employer's Common Law Liability Insurance This insurance will provide protection for the Concessionaire, the Authority and the Lenders

Amount of insurance required [ ]

20. Commencement: Date of signature of the Concession Contract.

Completion: 5 years from the Effective Date or as otherwise agreed by the Parties.

30.1 Time for Payment: 28 days

30.2 Rate of Agreed Compensation: The prime overdraft rate of the [Reference Bank]

34. Language(s) of the Agreement Ruling Language [ here insert language]

38. Notices:

Authority's address: ●

Authority's Facsimile/telephone number: ●

Concessionaire's address ●

Concessionaire's Facsimile/telephone number: ●

●

**Comment [ID23]:** [note-check jurisdiction as this type of insurance appears in contracts connected with the USA or corporations likely to be sued in the USA and is not necessary in many jurisdictions because neither r the Concessionaire nor the Authority would have any liability to third parties involved in car accidents where the Independent Engineer or its staff were responsible.]

Independent Engineer's address:

Independent Engineer's  
Facsimile/telephone number:

SAMPLE



## SCHEDULE 2

### Basic Services

#### A. Scope of Basic Services

1. The Basic Services shall comprise:
  - 1.1 all the functions which are conferred on the Independent Engineer under or pursuant to the Administered Contracts including, without limitation, the functions referred to in this Schedule 2; and
  - 1.2 all other things or tasks that are reasonably necessary for the Independent Engineer to do to comply with its obligations under this Agreement and the functions conferred on the Independent Engineer under or pursuant to the Administered Contracts.
2. For the avoidance of doubt, nothing in this Schedule 2 is to limit the Independent Engineer's functions, duties, responsibilities and obligations conferred on the Independent Engineer under or pursuant to the Administered Contracts.

#### B. Functions under the Concession Contract

Without limiting the Independent Engineer's functions under the Concession Contract, such functions can be summarised as follows:-

3. *Review of Design Documentation*
  - 3.1 Review of the proposed Administered Contracts for the design and construction of the Construction Works and for Operation and Maintenance of the Highway and make recommendations to the Authority and the Concessionaire for amendments which, in its opinion, should be made to the proposed Administered Contracts to avoid conflicts between those contracts and the Concession Contract.
  - 3.2 Audit the Preliminary Design and any amendments thereto for compliance with all the standards and specifications specified in Annexure II to the Concession Contract applicable to the Preliminary Design and make recommendations to the Authority for approval by the Authority of the Preliminary Design or provide the Authority and the Concessionaire with details of the non-compliance within 21 days of receipt of the Preliminary Design.
  - 3.3 Audit the Detailed Design and any amendments thereto for compliance with all the applicable standards and specifications specified in Annexure II to the Concession Contract applicable to the Detailed Design and notify the Concessionaire and the Authority as to whether the Detailed Design complies with the standards specified in such Annexure II and, if not, provide details of the non-compliance and suggest improvements to the Detailed Design to the Concessionaire and the Authority within 21 days of receipt of such Detailed Design.

**Comment [ID24]:** [note-under Annex II of the Concession Contract the role of the Independent Engineer is heavily proscribed as it is the Authority which actually makes the decisions in relation to approvals of design etc. However in relation to the Concession Contract it was suggested that there could be more certification and checking by the Concessionaire's team which would lighten the role of the Independent Engineer. This is very much conceptual as to whether the Authority and or the Independent Engineer are to have a substantial role and as indicated in relation to the comments on the Concession Contract depends upon who has the greatest exposure if the Concessionaire is in default.]

- 3.4 Determine any extension of time, amount of monetary compensation or relief from penalties to which the Concessionaire is entitled on suspension or variation of any Construction Works by the Authority pursuant to the Concession Contract.
- 3.5 Conduct a general overview of the programme for completion of the Detailed Design insofar as it relates to the obligations of the Authority and inform the Authority of those obligations.
- 3.6 Receive from the designers and Contractors (as relevant) certificates confirming that due care was exercised by them in carrying out the Preliminary Design or Detailed Design (as relevant).
- 3.7 Review the Preliminary Design and Detailed Design documentation and inform the Concessionaire and Authority of all land which is identified as land required for the mining and extraction of materials for the purposes of the Project.
4. *Monitoring of Site Availability, Land Acquisitions and Permits*
- 4.1 Monitor, obtain information from Contractors (as relevant) and report to the Authority and the Concessionaire on the status and progress of land acquisition by the Authority for the purpose of the Project and the permits applied for in relation to the Project.
- 4.2 Monitor and report to the Authority and the Concessionaire and the Contractor on the compliance of the temporary traffic arrangements to be implemented whilst Construction Works are being constructed for compliance with the Authority's Requirements specified in Annexure 1 to the Concession Contract and report to the Authority, Concessionaire and the Contractor on any matter which may obstruct access to the Site and/or commencement of construction of the Construction Works.
- 4.3 Monitor and report to the Authority and the Concessionaire on progress of removal of existing facilities, diversion of existing services and any other work which is necessary to enable construction on the Construction Works to proceed. Advise the Authority, the Concessionaire and the Contractor of action required to avoid any delays to the commencement of any Construction Works.
5. *Review of Construction Programmes*
- 5.1 Audit the Initial Construction Programme and the Additional Construction Works Programme (as and when it is prepared in accordance with the Concession Contract) for compliance with the completion requirements specified in the Authority's Requirements (if any) and the relevant Construction Contract and, if necessary, recommend to the Authority and the Concessionaire any amendments to the programmes which may be necessary to achieve the construction completion requirements.

**Comment [ID25]:** [note-as indicated in respect of the Concession Contract consents and land acquisition depends upon the jurisdiction in which the project is located].

5.2 Monitor the progress of the Construction Works against the Initial Construction Programme and the Additional Construction Works Programme (as relevant) and report to the Authority and the Concessionaire any variance from the relevant programme, promptly give written notice of the variance to the Authority and the Concessionaire.

6. *Control of Construction Quality*

6.1 The Independent Engineer must review the Quality Assurance System and report to the Concessionaire and the Contractor as to whether the Quality Assurance System complies with the requirements of ISO/9002 or any other standard agreed by the Parties to the Concession Contract and, if not provide the Concessionaire and the Contractor with details of the non compliance as soon as reasonably practicable.

6.2 Audit performance of the Concessionaire against the Quality Assurance System by, amongst other things, auditing test results and, where the Independent Engineer considers reasonably appropriate, by a system of verification involving inspections and periodic checking.

6.3 Audit compliance of the completed Construction Works with the Authority's Requirements.

7. *Extensions of Time/Compensation/Relief from Penalties*

Make a determination as to an extension of any date or period, any monetary compensation or any relief from penalties as provided for in the Concession Contract.

8. *Completion Certificates and Requirements*

8.1 Inspect such Highway Section and/or Associated Facility in the time period and as required by the Concession Contract on receipt of a notice under Clause 9.2.1 of the Concession Contract and issue a Taking Over Certificate in respect of any Construction Works as required and in accordance with the Concession Contract or give notice to the Authority and the Concessionaire as required under the Concession Contract.

8.2 Issue a Performance Certificate as required and in accordance with the Concession Contract for a particular package of Construction Works or the Independent Engineer being satisfied that the Contractor has completed all Snagging Items (as that phrase is defined in the Concession Contract).

8.3 Review the as built drawings, other technical and design information and completion records that are required to be provided to the Authority in respect of completed Construction Works and review such drawings, information and records and instruct any necessary clarification of, or modification to such drawings, information and records.

9. *Environmental and Social Requirements*
- 9.1 Audit compliance with the Environmental Requirements under Annexure IV to the Concession Contract in the manner set out in that Annexure.
- 9.2 Audit compliance with the Concessionaire's social obligations under Annexure V to the Concession Contract in the manner set out in that Annexure.
10. *Auditing of Operations and Maintenance*
- 10.1 Conduct periodic audits, at times reasonably determined by the Independent Engineer, of Operations and Routine Maintenance for compliance with the Authority's Requirements (including where necessary verification through site visits).
- 10.2 Audit the Operation and Maintenance Manuals for compliance with Annexure II to the Concession Contract.
- 10.3 Review the periodic condition surveys and proposed remedial actions of the Concessionaire and arrange independent surveys, if necessary, to establish compliance with the performance specifications specified in the Authority's Requirements.
- 10.4 Regularly audit the Traffic Event Loggers (TEL) by comparing the results of the TEL's with the automatic vehicle classifier at each toll plaza and report on the calibration and maintenance of TEL's.
- 10.5 Audit the Operation and Maintenance management systems, the management information systems and procedures for compliance with Annexure II to the Concession Contract.
11. *Financial Control*
- 11.1 Review the proposed Payment Schedules (as defined in the relevant Construction Contract) in conjunction with the Construction Programme and Construction Schedule;
- 11.2 Report on the Contractor's control of progress of Works and risks to completion within the time established in accordance with the relevant Construction Contract.
- 11.3 Receive the Contractor's application for progress payments for Construction Works and certify amounts due for payment under the Construction Contract.
- 11.4 Adjudicate claims for additional payment and extensions of time in terms of the Administered Contracts.
- 11.5 Certify final amounts due under the Construction Contracts.
- 11.6 Review the updated information supplied by the Lenders and the Concessionaire pertaining to the Financial Model and report same to the Authority.

**Comment [ID26]:** [ note-whether the Independent Engineer needs to take such a hands on role depends upon the project].

11.7 Submit bi-monthly status reports covering all aspects of his activities under this Agreement to the Authority and the Concessionaire with a copy to the Lender's Technical Advisor.

**C. Functions under the Construction Contracts and Operation and Maintenance Contracts**

[ ]

SAMPLE

**SCHEDULE 3**  
**Remuneration and Payment**

SAMPLE

**SCHEDULE 4**

**Provision of Office Accommodation**

SAMPLE

## SCHEDULE 5

### Insurance Requirements

Any insurance policy effected by the Independent Engineer as required by the Independent Engineer's Agreement shall:

- (b) contain provisions pursuant to which the insurer agrees that:
- (i) each of the insureds shall for the purposes of the policy be treated as individually and separately insured;
  - (ii) each of the insureds shall be separately insured from any other insured, provided that the total liability of the insurers under each part of the policy concerned shall not (unless the policy specifically permits otherwise) exceed the limit of indemnity stated to be insured by such policy,
  - (iii) the liability of any insurer to any insured under such policy shall not be conditional upon nor affected by any failure in:
    - A. the due observance and fulfilment of the terms and conditions of such policy; or
    - B. the performance of any duties imposed in terms of such policy, by any other insured party under such policy;
  - (iv) the insurer waives all rights of subrogation or action howsoever arising which it may have or acquire arising out of any occurrence in respect of which any claim is admitted under such policy against any of the insured parties;
  - (v) notwithstanding any other provisions of the policy the insurer shall not:
    - A. avoid this insurance, or any valid claim under it;
    - B. claim damages or any other remedy against any insured party, on the grounds that the risk or the claim was not adequately disclosed, or that it was in any way misrepresented, or increased, unless the insurer establishes deliberate fraudulent non-disclosure or misrepresentation in relation thereto. Non-disclosure or misrepresentation by one insured shall not be attributable to any other insured who did not actively participate in such non-disclosure or misrepresentation knowing it to be such;
  - (vi) the policy provides primary cover for the insured parties and no other policy shall be called into contribution;

**Comment [ID27]:** [note-to be reviewed within the context of the over-all insurance programme for the project.]



- (vii) in the event of loss, damage or liability covered by such policy which is also covered either in whole or in part under any other policy or policies of insurance effected by or on behalf of any of the insured parties the insurer will indemnify the insured parties as if such other policy or policies of insurance were not in force; and
  - (viii) it shall waive its rights of recourse (if any) against the insurers who have issued such other policy or policies of insurance;
  - (ix) it shall send copies of all notices of cancellation or any other notices given under or in relation to the policy to the Authority;
- (c) contain only exclusions and other terms and conditions that are a normal feature of such insurances for the property, assets and liabilities to be insured;
- (d) contain a provision that a notice of claim given to the insurer by the Authority or the Concessionaire or any other insured under the policy, shall in the absence of manifest error, be accepted by the insurer as valid notification of a claim in respect of the interests of all insured parties.