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WATER LEASE [001]

Urban Water Supply and Sanitation Project

General Conditions

**GENERAL CONDITIONS
FOR A LEASE CONTRACT
FOR THE PROVISION OF
WATER SUPPLY
AND WASTEWATER SERVICES**

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GENERAL CONDITIONS

A. CONTRACT AND INTERPRETATION

ARTICLE 1 - CONTRACT AND INTERPRETATION

1.1 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, regulations, legal interpretations and any other instruments having the force of law in [country], as they may be issued and in force from time to time;

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

“**Assets**” is defined in the Facilities and Assets Appendix;

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

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

“**Bidding Documents**” means the documents issued by the Water Authority in respect of the process for the selection of an Operator to perform the Services;

“**Capital Investment Program**” means the capital investment program, if any, of the Water Authority referred to in SA Section 6.4;

“**Change**” is defined in GC Section 11.1.1(1);

“**Contract**” means the agreement entered into between the Water Authority and the Operator, as set out in 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 Water Authority, 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;

“**Country of Origin**” means the countries and territories eligible under the rules of the Bank as further elaborated in the SCC;

“**CSCU**” is defined in GC Section 8.1(1);

“**CSCU Director**” is defined in GC Section 8.1(2);

“**Data Room**” means the Data Room established by the Water Authority as set out in the Bidding 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 during which the Operator is responsible for defects, as provided in GC Section 10.1(2);

“**Effective Date**” is defined in GC Section 3.1.1;

“**End Date**” is defined in GC Section 3.1.2;

“**Equipment, Materials and Supplies**” is defined in the Facilities and Assets Appendix;

“**Existing Facilities**” is defined in the Facilities and Assets Appendix;

“**Facilities**” means the water and wastewater infrastructure and associated buildings or similar facilities as set out in the Facilities and Assets Appendix;

“**Force Majeure**” is defined in GC Section 10.6(1);

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

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

“**Intellectual Property Rights**” is defined in GC Section 10.9.1;

“**Management, Operations and Maintenance Costs**” is defined in GC Section 4.6(1);

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

“**New Facilities**” is defined in the Facilities and Assets Appendix;

“**Operations Manager**” is defined in GC Section 9.2(3);

“**Operations Staff**” is defined in GC Section 9.5;

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

“**Operator’s Equipment, Materials and Supplies**” is defined in the Facilities and Assets Appendix;

“**Operator’s Rate**” means the sum 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 Management Personnel**” is defined in GC Section 9.3(1);

“**Operator’s Payment**” means the sum specified in Section 4.1 of the Compensation, Indexation and Adjustment Appendix, subject to such additions and adjustments thereto or deductions therefrom, as may be made pursuant to the Contract;

“**Operator’s Payment Security**” is defined in GC Section 6.3.2(1);

“**Operator’s Representative**” is defined in GC Section 9.1.2(1);

“**Origin**” is defined in GC Section 1.3.13;

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

“**Party**” means any one of the persons that have signed the Contract, as the case may be, and “**Parties**” means both or all of them;

“**Performance Security**” is defined in GC Section 6.3.1(1);

“**Performance Standards**” is defined in the Performance Standards Appendix;

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

“**Repair, Replacement and Rehabilitation**” is defined SA Section 6.3.1;

“**Replacement and Rehabilitation Fund**” is defined in the SA Section 6.3.2;

“**Replacement and Rehabilitation Fund Eligible Expenditures**” is defined in SA Section 6.3.3(5);

“**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 as set out in the Contract;

“**Starting Date**” is defined in GC Section 3.1.4 and the SCC;

“**Subcontract**” means any contract, entered into by the Operator, of its own accord or on behalf of the Water Authority under the Replacement and Rehabilitation Fund, 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 subcontracted directly or indirectly by the Operator, or any person to whom work is contracted under the Replacement and Rehabilitation Fund, in accordance with the Contract, and includes the Subcontractor’s legal successors or permitted assigns;

“**Submission Deadline**” means the date for submissions of Bids as stated in or amended by the Bidding Documents;

“**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 Water Authority;

“**Water Authority**” means the [];

“**Water Authority Equipment, Materials and Supplies**” is defined in the Facilities and Assets Appendix;

“**Taxes**” is defined in GC Section 6.4(1);

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

“**Transition Assistance**” is defined in GC Section 3.1.5;

“**Transition Period**” is defined in GC Section 3.1.3;

“**Transition Period Starting Date**” is defined in GC Section 3.1.3; and

“**War Risks**” is defined in GC Section 10.7(1).

1.2 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” - Operator’s Compensation, Indexation and Adjustment (the “Compensation, Indexation and Adjustment Appendix”)
- Appendix “3” – Description of the Services (the “Services Appendix”)
- Appendix “4” – Performance Standards (the “Performance Standards Appendix”)
- Appendix “5” – Liquidated Damages (the “Liquidated Damages Appendix”)
- Appendix “6” – Description of the Facilities and Assets (the “Facilities and Assets Appendix”)
- Appendix “7” – Description of the Service Area (the “Service Area Appendix”)
- Appendix “8” – Operations Staff (the “Operations Staff Appendix”)
- Appendix “9” – Replacement and Rehabilitation Fund (the “Replacement and Rehabilitation Fund Appendix”)
- Appendix “10” – Securities and Guarantees (the “Securities and Guarantees Appendix”)
- Appendix “11” – Operator’s Bid (the “Operator’s Bid”)

1.3 Interpretation

1.3.1 Language¹

(1) 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.

¹ check laws of country to verify that language of contract can be other than the official language of host country

(2) 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.

1.3.2 Singular and Plural

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

1.3.3 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.

1.3.4 Persons

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

1.3.5 Incoterms

(1) 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*.

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

1.3.6 Entire Agreement²

The Contract constitutes the entire agreement between the Parties 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 to this Contract, made prior to the date of the Contract.

1.3.7 Amendment³

(1) 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.

(2) Notwithstanding GC Section 1.3.7(1), if the Water Authority 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 Water Authority.

1.3.8 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 Thursdays, Fridays and legal holidays in [country], provided, however, that if the final day of any period shall fall on a Thursday,

² an entire agreement clause should remove the possibility of a party trying to rely on representations made prior to contract – creates certainty. Check host legal system to ensure that this is effective.

³ important to have formal way of agreeing amendments so that there is no argument between parties as to whether a variation to the agreement has been agreed

Friday, or legal holiday in [country], then the final day shall be deemed to be the next day which is not a Thursday, Friday or legal holiday in [country].

1.3.9 Independent Contractor⁴

(1) 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 Water Authority and the Operator, its Parent or its Shareholders.

(2) Subject to the provisions of the Contract, the Operator shall be solely responsible for the manner in which the Contract is performed. The Operator's Management Personnel, Operations Staff, and all consultants, 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 Water Authority, 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, consultants, agents, representatives or Subcontractors and the Water Authority.

1.3.10 Joint Venture or Consortium

- (1) If,
- (a) the Operator consists of a joint venture company of more than one person; or
 - (b) the Parent of the Operator is a Party to this Contract,

the Shareholders and Parent hereby authorise the representative named in the SCC to act on their behalf in exercising all the Shareholders', Parent's and Operator's rights and obligations toward the Water Authority under this Contract, including the receiving of approvals, consents, orders, certificates, instructions and payments from the Water Authority, amendment of the Contract and in all other matters under the Contract, including the settlement of disputes.

(2) If the Operator is a joint venture company of two or more persons, each Shareholder of the joint venture company and its Parent, shall be jointly and severally bound to the Water Authority for the fulfilment of the provisions of the Contract by the Operator. Claims against the Parent 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 10.2.

(3) The composition, shareholding, control or constitution of the Operator shall be in accordance with the Operator's Bid and shall not be altered without the consent of the Water Authority.

1.3.11 Non-Waiver⁵

(1) 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.

⁴ important provision in countries where partnerships are recognized – protects parties from being deemed to have formed a partnership – with potential for taking on each other liabilities

⁵ useful provision to ensure that if a party allows the other party in a particular instance to breach the agreement that this is not deemed to be a general waiver of that obligation

- (2) To be a valid waiver, any waiver of a Party's rights, powers or remedies under the Contract shall,
- (a) be in writing;
 - (b) be dated and signed by the Water Authority's or Operator's Representative, whichever is granting such waiver; and
 - (c) specify the right, power or remedy being waived and the extent to which it is being waived.

1.3.12 Severability⁶

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.

1.3.13 Country of Origin

"Origin" means the place where the materials, equipment and other supplies for the Facilities are mined, grown, produced or manufactured, and from which the services are provided.

1.3.14 Survival of Obligations⁷

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.

1.4 **Notices, Approvals, Consents Etc.**⁸

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

- (a) any notice sent by facsimile shall be confirmed by the sender no later than two days after the date of dispatch of the facsimile by a notice sent by courier; and
- (b) any notice delivered personally shall be deemed to have been delivered on the date of dispatch.

(2) 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 Section 1.4.

(3) The Operator's address for the purpose of giving notice pursuant to this GC Section 1.4 shall be in the [country].

⁶ this is an important provision in case any clause is deemed to be unenforceable or invalid – it should ensure that that rest of the agreement remains effective, unless so much of the agreement has been held to be invalid that the agreement becomes a nonsense

⁷ it is important to determine whether any provisions need to survive termination of the agreement – such as clause relating to consequences of termination, any warranties for workmanship, governing law and jurisdiction/ arbitration clauses

⁸ will the parties want to notify each other via email – if so, what is proof of notification?

(4) Notices shall be deemed to include any approvals, consents, instructions, orders, certificates and similar communications to be given under the Contract. If, under the terms of this Contract, the Operator is to seek the approval or consent of the Water Authority, such approval or consent shall be requested by the Operator and granted by the Water Authority prior to the Operator carrying out the action for which consent or approval is sought.

1.5 Governing Law

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

1.6 Settlement of Disputes⁹

1.6.1 Adjudicator

(1) If any dispute of any kind whatsoever arises between the Parties in connection with or arising out of the Contract including,

- (a) any question regarding the existence, validity or termination of the Contract; and
- (b) 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 Water Authority, to the Adjudicator with a copy to the other Party or Parties.

(2) This GC Section 1.6.1 shall apply,

- (a) during the execution of the Services and after the completion of the Services; and
- (b) before and after the termination, abandonment or breach of the Contract.

(3) 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 Water Authority 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 Parties. Any decision that has become final and binding shall be implemented by the Parties forthwith.

(4) 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 Water Authority and the Operator.

(5) If the Adjudicator resigns or dies, or the Water Authority 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 Water Authority and the Operator. If the Water Authority 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.

⁹ this is a useful dispute resolution clause as it has specific time limits for decisions, which allows for certainty. Parties may also consider whether it is appropriate to refer technical issues to an expert. Where there is a regulator or similar body it may be deemed appropriate to refer matters to the regulator – at least in the first instance

1.6.2 Arbitration

(1) If any of the Parties 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 Water Authority 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.

(2) 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.¹⁰

(3) Arbitration proceedings shall be conducted in accordance with the rules of procedure designated in the SCC.

1.6.3 Obligations during Arbitration

Notwithstanding any reference to the Adjudicator or arbitration herein,

- (a) the Parties shall continue to perform their respective obligations under the Contract unless they otherwise agree; and
- (b) both the Water Authority and the Operator shall pay any monies due to one another.

1.7 **Assignment¹¹**

(1) 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 consent of the Water Authority, which consent may not be unreasonably withheld.

(2) 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.

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

- (a) be in writing;
- (b) be dated and signed by the Water Authority's Representative; and
- (c) state the specific details of the assignment.

¹⁰ it is important to make it clear that the arbitration decision will be binding. It needs also to be determined whether the host country recognizes international arbitration and will enforce it – is it a party to the New York Convention (for more on this see Infrastructure and Law website – [])

¹¹ each party must determine whether assignment by the other party is acceptable (and permissible under the law), and if so on what terms. Lenders will also be concerned about this as they will not want to see an Operator transfer its rights to a company with no financial standing.

1.8 Contract Records, Accounting and Auditing

1.8.1 Contract Records

(1) Except as provided in GC Section 7.1, all data, information, documentation, accounts, 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 the Water Authority and the Operator shall deliver all Contract Records and a detailed inventory of those Contract Records to the Water Authority 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.

(2) The Contract Records shall include,

- (a) information of any kind whatsoever related to the finances, revenues or expenditures of the water and wastewater operations that are the subject of this Contract;
- (b) all files, documents, plans, drawings, specifications, notes, minutes of meetings and minutes of conversations;
- (c) all the plans, programs, reports, surveys and guidelines prepared by the Operator in carrying out the Services;
- (d) the accounts of the water and wastewater operations; and
- (e) 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.

(3) The Operator shall provide the Water Authority with unrestricted access to the Contract Records during the term of the Contract, including the right to make and retain copies.

(4) The Operator may retain a copy of the Contract Records but shall not use them for purposes unrelated to this Contract without the approval of the Water Authority. This GC Section 1.8.1(4) does not in any way relieve the Operator of its obligation of confidentiality pursuant to GC Section 7.2.

(5) The Operator acknowledges that the Water Authority, 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.

1.8.2 Accounting

The Operator shall keep accurate and systematic accounts in respect of the Services and the Contract in accordance with [internationally accepted accounting principles]¹².

¹² is the reference to internationally accepted accounting principles sufficiently specific or should the contract provider for local or specific accounting principles? Parties may want to specify frequency of accounts – eg half

1.8.3 Auditing the Operator's Own Accounts and the Contract Records

- (1) The Water Authority may, in its sole discretion, audit,
 - (a) 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
 - (b) the Contract Records at any reasonable time and without notice to the Operator,

in respect of any matters related to the Contract.

(2) The Water Authority may complete the audit or audits itself or may retain an independent auditor, at the Water Authority's expense, to complete the audit or audits.

1.8.4 Operator's Audited Accounts

The Operator shall submit, to the Water Authority, no later than 90 days after the end of the applicable Operator's fiscal year, the annual audited accounts of the Operator's own finances for each of the Operator's fiscal years that occur during the Contract Term.

1.8.5 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.

yearly/ annual – and may also want management accounts to be produced on a more regular basis that are not audited. What is the deadline following the end of an accounting period for furnishing of accounts?

B. SUBJECT MATTER OF THE CONTRACT

ARTICLE 2 - SCOPE OF SERVICES

2.1 Scope of Services

Unless otherwise expressly limited in the Contract, the Operator shall carry out all Services, provide all Equipment, Materials and Supplies and employ all Operations Staff necessary to manage, operate, maintain, repair, replace and rehabilitate the water and wastewater systems of the Water Authority as those Services and the provision of Equipment, Materials and Supplies and Operations Staff are more specifically described in the Contract.

ARTICLE 3 - CONTRACT TERM, TIMING AND COMPLETION

3.1 Contract Term, Timing and Completion

3.1.1 Effectiveness of Contract¹³

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 the Water Authority. The Contract shall come into force and effect on the date the Water Authority receives the Performance Security and the Operator's Payment Security form the Operator (the "Effective Date"), contingent on final approval by the Bank.

3.1.2 Expiration of Contract

Unless the Contract is terminated earlier pursuant to GC Section 12.2, this Contract shall terminate on the twelfth anniversary of the Starting Date (the "End Date").

3.1.3 Transition Period

No later than 30 days after the Effective Date (the "Transition Period Starting Date"), the Operator shall commence those Services identified as the Services to be completed during the period of time commencing on the Transition Period Starting Date and ending on the Starting Date (the "Transition Period").

3.1.4 Commencement of Services

Except with respect to those Services to be carried out during the Transition Period, the Operator shall commence the Services on the Starting Date as specified in the SCC. The Water Authority shall give the Operator at least seven days prior notice of the Starting Date.

3.1.5 Services After the End Date

[TECHNICALLY, AS THE CONTRACT IS TO EXPIRE ON THE END DATE THIS PROVISION WOULD NOT BE ENFORCEABLE AFTER THAT DATE – CARVE OUT SHOULD BE MADE FOR THIS CLAUSE IN CLAUSE 3.1.2]

The Operator, upon written request by the Water Authority no later than 60 days prior to the End Date, shall provide assistance to the Water Authority, at no cost to the Water Authority, during a

¹³ it may be appropriate for certain provisions to be effective on signature, with other provisions coming into force once certain conditions precedent have been met. It may also be appropriate for certain provisions to continue in force following termination of the agreement.

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.

ARTICLE 4 - OBLIGATIONS OF THE OPERATOR

4.1 Operator’s Responsibilities

- (1) The Operator shall,
 - (a) perform the Services set out in the Services Appendix; and
 - (b) perform the Services in accordance with the Performance Standards Appendix,

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

- (2) The Operator shall, unless specifically excluded in the Contract, perform all work, provide all Equipment, Materials and Supplies and employ all Operations Staff to carry out the Services as specified in the Contract.

4.2 Law Governing Services

The Operator shall comply with the Applicable Law and shall ensure that the Operator’s Management Personnel, the Operations Staff, and Subcontractors comply with the Applicable Law. ¹⁴The Operator shall indemnify and hold harmless the Water Authority 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 Operator’s Management Personnel, the Operations Staff, the Subcontractors and the Subcontractors’ employees, consultants, agents, representatives and sub-subcontractors.

4.3 Conflict of Interest

- (1) The compensation of the Operator pursuant to GC Section 6.1 shall constitute the Operator’s sole compensation in connection with this Contract and, except as provided in GC Section 6.1, 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 Operator’s Management Personnel, the Operations Staff, Subcontractors, and the Subcontractors’ employees, consultants, agents, representatives and sub-subcontractors, 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,

- (a) the goods, works and services purchased from the Replacement and Rehabilitation Fund; and
- (b) the Capital Investment Program.

¹⁴ It will need to be considered whether this hold harmless clause is appropriate or even permissible under host country law in relation to liabilities of operator in relation to activities of operation but which were actually not due to the fault of the operator (eg if the water coming into the system was polluted and could not be treated etc)

(3) The Operator, Operator’s Management Personnel, Operations Staff, Subcontractors and their respective employees and affiliates shall not engage, either directly or indirectly, in any business or professional activities which would conflict with the activities assigned to them under this Contract.

(4) The Operator and its Shareholders shall not participate in any discussions or work and shall not provide any services or advice to the Water Authority, other than the Services, related to,

- (a) institutional restructuring or reorganisation of the Water Authority or a utility or department of the Water Authority;
- (b) the development or review of bidding documents to retain any Subsequent Operator; or
- (c) the preparations for the procurement process to retain any Subsequent Operator.

(5) Failure of the Operator or the Shareholders to comply with this GC Section 4.3, 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.

4.4 Facilities Information and Investigation

[THIS PROVISION MAKES THE OPERATOR RESPONSIBLE FOR PERFORMING THE SERVICES AND MEETING THE PERFORMANCE STANDARDS EVEN WHERE DATA SUPPLIED BY THE WATER AUTHORITY – WHETHER RELATING TO ASSET CONDITION, NUMBERS OF CUSTOMERS, ACTUAL REVENUES OR NUMBERS OF WATER AUTHORITY EMPLOYEES IS LATER FOUND TO CONTAIN INACCURACIES – THIS IS A KEY AREA WHERE PROJECTS IN THE PAST HAVE RUN INTO DIFFICULTIES – THE OPERATOR IS ALSO TAKING COLLECTION RISK - IT MIGHT BE MORE APPROPRIATE FOR THERE TO BE (I) AUDITED INFORMATION PROVIDED, (II) AN ADJUSTMENT PROVISION IN THE EVENT THAT DATA IS FOUND TO BE INACCURATE OR (III) A TRANSITIONAL OR DUE DILIGENCE PERIOD IN THE CONTRACT DURING WHICH THE OPERATOR IS ABLE TO REVIEW THE DATA – UNDER STRICT PARAMETERS – AND THEN THE PARTIES OR AN INDEPENDENT EXPERT AGREE PERFORMANCE STANDARDS BASED ON THE REVIEWED DATA]¹⁵

(1) The Operator acknowledges that the Water Authority made available to the Operator, during the bidding process, either directly or by placing the data in the Data Room, all available data on the Existing Facilities and the Water Authority Equipment, Materials and Supplies. The Operator shall be responsible for interpreting all data about the Existing Facilities and the Water Authority Equipment, Materials and Supplies that is provided to it by the Water Authority.

(2) The Operator shall be deemed to have inspected and examined the Existing Facilities and the Water Authority Equipment, Materials and Supplies, their surroundings, information provided regarding the Existing Facilities and the Water Authority Equipment, Materials and Supplies and other available information, and to have satisfied itself before entering into the Contract, as to,

- (a) the form and nature of the Existing Facilities and the Water Authority Equipment, Materials and Supplies;
- (b) the applicable hydrological, hydrogeological and climatic conditions;

¹⁵ for possible wording, go to []

- (c) the extent and nature of the Services and personnel necessary for the execution and completion of the Services, and the remedying of any defects; and
- (d) the Operator’s requirements for accommodation, personnel, power, transport, water and other services.

(3) 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.¹⁶

(4) 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 4.4, 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 the Water Authority 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 the Water Authority or its employees, consultants, agents or representatives.

4.5 Access to the Facilities

(1) The Operator shall, during the term of the Contract, provide to the Water Authority free and open access to the Facilities at the Water Authority’s request. The Water Authority shall make best efforts to provide reasonable notice to the Operator prior to the Water Authority’s access but such notice is not mandatory. The Water Authority’s representative on the Facilities shall observe all safety and health regulations and reasonable instructions of the Operator.

(2) The Operator shall give all reasonable access to any other contractors employed by the Water Authority on or near the Facilities to carry out their work.

(3) If the Operator, pursuant to GC Section 4.5(2), makes available to other contractors any roads or rights of ways the maintenance for which the Operator is responsible, or provides any other service of whatsoever nature for such other contractors, the Water Authority 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.

4.6 Management, Operations and Maintenance Costs

(1) Except as provided in the Replacement and Rehabilitation Fund Appendix and SA Sections 6.3.2 and 7.2.2(2), the Operator shall pay all costs and expenses with respect to the Operator’s Management Personnel, Operations Staff and all costs and expenses related to the performance of the Services (the “Management, Operations and Maintenance Costs”) commencing on the Starting Date.

(2) The Management, Operations and Maintenance Costs to be paid by the Operator shall include all costs and expenses related to,

¹⁶ this is expecting a lot of the Operator although it does have the advantage of certainty. It might be better to state that “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 **as it would be reasonable to expect a Reasonable and Prudent Operator to have obtained**”. In this situation there would need to be an amendment provision to accommodate data or conditions that were not reasonably foreseeable

- (a) the operation and maintenance of the Facilities;
- (b) Equipment, Materials and Supplies;
- (c) except for Replacement and Rehabilitation Fund Eligible Expenditures, all Repair, Replacement, and Rehabilitation;
- (d) wages, salaries, benefits, allowances, bonuses, severances, training and development and any other employment-related costs or expenses for the Operator's Management Personnel and the Operations Staff;
- (e) bulk water;
- (f) administrative costs and expenses incurred in carrying out the Services, including the cost and expenses related to photocopying, telephone, cellular phone, faxes, furniture and translation and interpretation; and
- (g) all computer hardware and software costs and expenses associated with the Services.

4.7 Return of Assets

The Operator shall return the Assets to the Water Authority upon termination or expiration of the Contract as set out in the Facilities and Assets Appendix.

ARTICLE 5 - OBLIGATIONS OF THE WATER AUTHORITY

5.1 Water Authority's Assistance to the Operator

The Water Authority shall use its best efforts to,

- (a) assist the Operator, Subcontractors, Operator's Management Personnel, and Operations Staff with work permits and such other documents as shall be necessary to enable the Operator, Subcontractors, Operator's Management Personnel or Operations Staff to perform the Services;
- (b) assist the Operator's Management Personnel 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 [country];
- (c) facilitate the prompt clearance through customs of any property required for the Services and of the personal effects of the Operator's Management Personnel and their eligible dependants; and
- (d) issue to officials, agents and representatives of the Operator such instructions as may be necessary or appropriate for the prompt and effective implementation of the Services.

5.2 Access to the Facilities¹⁷

The Water Authority 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 Water Authority shall provide the Operator full possession of the Existing Facilities during the term of the Contract and full possession of the Water Authority New Facilities, if applicable, once they are operational and placed under the Operator's care and control.

5.3 Transfer of Water Authority Equipment, Materials and Supplies

The Water Authority shall transfer all Water Authority Equipment, Materials and Supplies prior to the Starting Date in accordance with the Facilities and Assets Appendix.

5.4 Reviews and Approvals of Submissions¹⁸

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

(2) If the Water Authority fails or refuses to approve, consent to or provide written comment on the Operator's submission in accordance with GC Section 5.4(1), the Operator shall notify the Water Authority in writing that it has not received a response to its submission.

(3) If the Water Authority fails to respond to the Operator's written notification pursuant to GC Section 5.4(2) within [14] days after the receipt by the Water Authority of the Operator's written notification, the Operator's submission shall be deemed to be approved.

C. PAYMENT

ARTICLE 6 - OPERATOR'S RATE

6.1 Operator's Rate

(1) The Operator's Rate shall be as specified in the Form of Contract.

(2) The Operator's Rate shall not be subject to any alteration, indexation, or adjustment except in the event of a Change pursuant to GC Article 11 or as set out in GC Section 10.8, GC Articles 13 and 14 and the Compensation, Indexation and Adjustment Appendix.

(3) The Operator shall be deemed to have satisfied itself as to the correctness and sufficiency of the Operator's Rate, which shall, except as otherwise provided for in the Contract, cover all its obligations under the Contract.

¹⁷ this will give the Operator a lot of comfort – host country laws should be checked to ensure that the Water Authority can indeed give such access – the term “full possession” will need to be modified to reflect the appropriate legal interest to be given in the particular host country.

¹⁸ it is useful to have a provision like this for submission of plans and the time line within which they need to be approved – to provide an incentive on the parties to respond promptly

6.2 Terms of Payment

(1) The Operator's Rate¹⁹ shall be paid as specified in the Compensation, Indexation and Adjustment Appendix. The procedures to be followed by the Parties in applying for and processing payments shall be those outlined in the Compensation, Indexation and Adjustment Appendix.

(2) The currency or currencies in which payments are made under this Contract are specified in the Compensation, Indexation and Adjustment Appendix.

6.3 Securities

6.3.1 Performance Security

(1) The Operator shall provide a security for its proper performance of the Contract to the Water Authority no later than the deadline specified in the Bidding Documents (the "Performance Security").

(2) The Performance Security shall be,

- (a) in the form of a bank guarantee as stipulated in the Securities and Guarantees Appendix or in another form approved by the Water Authority;
- (b) in the amount specified in the SCC; and
- (c) denominated in the currency or currencies of the Contract, or in a freely convertible currency acceptable to the Water Authority.

(3) The Performance Security shall be issued by either,

- (a) a bank located in [country] or a foreign bank through a correspondent bank located in [country]; or
- (b) with the prior written agreement of the Water Authority, directly by a foreign bank acceptable to the Water Authority.

(4) The Performance Security shall be valid for an initial period of five years beginning on the Effective Date. The Performance Security shall automatically renew,

- (a) on the fifth anniversary of the Effective Date for a period of validity of five years; and
- (b) on the tenth anniversary of the Effective Date for a period of validity in accordance with GC Section 6.3.1(5).

Each renewal of the Performance Security shall take effect immediately on the expiry of the previous Performance Security.

(5) The second renewal of the Performance Security pursuant to GC Section 6.3.1(4)(b) shall expire no earlier than 180 days after the End Date or upon the expiration of the Defects Liability Period, whichever is later.

¹⁹ the fee is calculated as the total volume billed multiplied by total tariffs billed divided by total tariffs collected

(6) The Water Authority shall return the Performance Security no later than 14 days after its expiration.

(7) The cost of complying with this GC Section 6.3.1 shall be borne by the Operator.

6.3.2 Operator's Payment Security

(1) The Operator shall provide a security for the proper performance of its obligation to pay the Operator's Payment²⁰ as set out in the Compensation, Indexation and Adjustment Appendix (the "Operator's Payment Security") no later than the deadline specified in the Bidding Documents.

(2) The Operator's Payment Security shall be,

(a) in the form of a bank guarantee as stipulated in the Securities and Guarantees Appendix or in another form approved by the Water Authority;

(b) in the amount specified in the SCC; and

(c) denominated in the currency or currencies of the Contract, or in a freely convertible currency acceptable to the Water Authority.

(3) The Operator's Payment Security shall be issued by either,

(a) a bank located in [country] or a foreign bank through a correspondent bank located in [country]; or

(b) with the prior written agreement of the Water Authority, directly by a foreign bank acceptable to the Water Authority.

(4) The Operator's Payment Security shall be valid for an initial period of 5 years beginning on the Effective Date. The Operator's Payment Security shall automatically renew,

(a) on the fifth anniversary of the Effective Date for a period of validity of five years; and

(b) on the tenth anniversary of the Effective Date for a period of validity in accordance with GC Section 6.3.2(5).

Each renewal of the Operator's Payment Security shall take effect immediately on the expiry of the previous Operator's Payment Security.

(5) The second renewal of the Operator's Payment Security pursuant to GC Section 6.3.2(4)(b) shall expire no earlier than 60 days after the End Date.

(6) The Water Authority shall return the Operator's Payment Security no later than 14 days after its expiration.

(7) The cost of complying with this GC Section 6.3.2 shall be borne by the Operator.

²⁰ there is a fixed lease fee – Operator will have to be certain it can even achieve this against revenue collection – plus a variable fee dependent on amounts collected

6.4 Taxes and Duties

(1) 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, consultants, agents and representatives by all municipal, state or national government authorities in the performance of, or in connection with, the Services in and outside of [country].

(2) Notwithstanding GC Section 6.4(1), the Operator shall not be responsible for Taxes imposed by the Applicable Law on any goods, works and services procured by the Operator pursuant to the Replacement and Rehabilitation Fund Appendix. The Parties acknowledge that the amounts set out in the Replacement and Rehabilitation Fund Appendix do not include any costs related to Taxes. The Operator shall pay all Taxes in respect of Replacement and Rehabilitation costs or expenses that are not funded from the Replacement and Rehabilitation Fund.

(3) If any tax exemptions, reductions, allowances or privileges may be available to the Operator in [country], the Water Authority shall use its best endeavors to enable the Operator to benefit from any such tax savings to the maximum allowable extent.

(4) For the purpose of the Contract, it is agreed that the Operator’s Rate specified in the Form of Contract are based on and include the Taxes prevailing in [country] 30 days prior to the Submission Deadline in the Bidding Documents. If any rates of Tax are increased or decreased, a new Tax is introduced, an existing Tax is abolished, or any change in interpretation or application of any Tax occurs in the course of the performance of Contract, which was or will be assessed on the Operator, Subcontractors or their employees in connection with performance of the Contract, an equitable adjustment of the Operator’s Rate shall be made to fully take into account any such change by addition to the Operator’s Rate or deduction therefrom, as the case may be, in accordance with GC Section 10.8.

6.5 Liquidated Damages

The Operator shall pay liquidated damages to the Water Authority in accordance with the Liquidated Damages Appendix.²¹

²¹ it should be specified that for those cases where liquidated damages are to be applied, this will be the Water Authority’s sole remedy – otherwise it is possible that the Water Authority could then sue the Operator separately for breach of contract and/ or that the liquidated damages might be deemed to be ineffective as they may be more than a reasonable pre-estimate of loss

D. INTELLECTUAL PROPERTY AND CONFIDENTIALITY

ARTICLE 7 - INTELLECTUAL PROPERTY²²

7.1 Copyright and Intellectual Property Rights

(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 Water Authority 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,

- (a) apply throughout the actual or intended working life, whichever is longer, of the relevant parts of the Facilities;
- (b) 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;
- (c) 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;
- (d) entitle the Water Authority 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.

(3) The Water Authority shall not, without the Operator's consent, use, copy or communicate the Operator's Innovations and Software or the Other Software to a Third Party for purposes other than those permitted under GC Section 7.1(2).

7.2 Confidentiality²³

(1) The Operator shall keep confidential and shall not, without the written consent of the Water Authority, divulge to any Third Party any documents, data or other information arising directly or

²² this is a well-drafted and balanced provision – often authorities will seek to have ownership of project documents – even bid documents – which may cause the operator difficulties as its livelihood is partly in its expertise and its intellectual property rights. The solution of providing a royalty free license to the water authority to use the intellectual property is the best one – provided that the license is specific to the project and cannot be used in other circumstances

²³ The Government/ Water Authority may be required to make the Agreement or certain terms of the Agreement publicly available - possibly excluding information that is considered commercially sensitive. In the absence of a publication obligation, publication should be encouraged to promote transparency. In such a case, any confidentiality/nondisclosure provisions should have expressly carved out of it those documents/ provisions which are to be published/ accessible to the public.

indirectly from the performance of the Contract, whether such information has been furnished prior to, during or following termination of the Contract.

(2) Notwithstanding GC Section 7.2(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 7.2(1).

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

(4) The obligations of the Operator under GC Sections 7.2(1) and 7.2(3), shall not apply to any information which,

- (a) now or hereafter enters the public domain through no fault of the Operator;
- (b) 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 Water Authority; or
- (c) otherwise lawfully becomes available to the Operator from a Third Party that has no obligation of confidentiality.

SAMPLE

E. EXECUTION OF THE SERVICES

ARTICLE 8 - CONTRACT ADMINISTRATION AND SUPERVISION²⁴

8.1 Water Authority Administration and Supervision

(1) The Water Authority shall appoint a Contract Supervision and Coordination Unit (the “CSCU”) which shall carry out the duties assigned to it in the Contract. The CSCU shall consist of suitably qualified professionals who are competent to carry out these duties.

(2) The Water Authority shall appoint a CSCU Director (the “CSCU Director”) who shall be primarily responsible for the activities of the CSCU.

(3) Except as provided pursuant to GC Section 8.1(5), the CSCU shall have no authority to amend the Contract.

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

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

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

- (a) whenever carrying out duties or exercising authority, specified in or implied by the Contract, the CSCU shall be deemed to act for the Water Authority;
- (b) the CSCU has no authority to relieve either Party of any duties, obligations or responsibilities under the Contract; and
- (c) any approval, check, certificate, consent, examination, inspection, instruction, notice, proposal, request, test, or similar act by the CSCU, 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.

8.2 Instructions of the CSCU

(1) The CSCU, through the CSCU 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 CSCU Director.

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

²⁴ It is important for the contract to run efficiently that people with appropriate qualifications and standing are appointed to this unit. It should also be determined how the Operator can appeal against decisions of the unit – is the unit deemed to be acting as agent of the Water Authority? Subclause 8.1(6) is a bit confusing as it states that the unit is deemed to act for the WA but does not specify how decisions of the WA are to be made or on what basis the Operator can appeal. It would also be assumed that the CSCU is to be monitoring day to day performance and its responsibilities will not overlap with those of the independent assessor and the Review Panel

8.3 Change in the CSCU

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

ARTICLE 9 - REPRESENTATIVES, STAFF AND SUBCONTRACTING

9.1 Representatives

9.1.1 Water Authority's Representative

(1) The Water Authority's representative (the "Water Authority's Representative") shall be the CSCU Director.

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

(3) The Water Authority may change its representative from time to time and shall give notice of the change without delay. The Water Authority shall take all reasonable measures to ensure that if it changes its representative it will not make the change at a time and in such a manner as to impede the progress of the Services.

(4) The Water Authority's Representative shall represent and act for the Water Authority at all times during the performance of the Contract. All notices, instructions, orders, certificates, approvals and all other communications under the Contract by the Water Authority shall be given by the CSCU Director except as otherwise provided in the Contract.

(5) All notices, instructions, information and other communications given by the Operator to the Water Authority under the Contract shall be given to the CSCU Director except as otherwise provided in the Contract.

9.1.2 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 Water Authority to approve the proposed Operator's Representative. If the Water Authority makes no objection to the proposed Operator's Representative, the Operator's Representative shall be deemed to have been approved.

(2) The Operator shall, no later than [180] days prior to the fourth and eight anniversaries of the Starting Date, prepare an updated and revised Staffing Plan for the subsequent four Contract Years, based on the Staffing Plan in the Operator's Bid. The Operator shall submit its updated Staffing Plan to the Water Authority for review and approval.

(3) If the Water Authority 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 Water Authority's objection and GC Section 9.1.2(1) and 9.1.2(2) shall apply to the proposed replacement.

(4) 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 otherwise provided in the Contract.

(5) All notices, instructions, information, and other communications given by the Water Authority to the Operator under the Contract shall be given to the Operator's Representative as established pursuant to this GC Section 9.1.2.

(6) The Operator shall not revoke the appointment of the Operator's Representative without the Water Authority's consent, which shall not be unreasonably withheld. If the Water Authority consents thereto, the Operator shall appoint another person as the Operator's Representative pursuant to the procedure set out in this GC Section 9.1.2.

(7) The Operator's Representative may, subject to the approval of the Water Authority, which shall not be unreasonably withheld, at any time delegate to any person any of the powers, functions and authorities vested in the Operator's Representative. 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 Water Authority and the CSCU Director.

(8) Any act or exercise by any person of powers, functions and authorities so delegated to him or her in accordance with GC Section 9.1.2(6) shall be deemed to be an act or exercise by the Operator's Representative.

9.2 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) The Operator's Representative shall appoint a suitable person as operations manager as applicable (the "Operations Manager"). 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.

9.3 Operator's Management Personnel

(1) The Operator shall provide and employ at the Facilities for the performance of the Contract the Operations Manager and such employees, in addition to the Operations Staff, as are necessary for the proper and timely execution of the Contract (the "Operator's Management Personnel").

(2) The Operator shall, no later than 180 days prior to the fourth and eighth anniversaries of the Starting Date, prepare an updated and revised Staffing Plan for the subsequent four Contract Years, based on the Staffing Plan included in the Operator's Bid. The Operator shall submit its updated Staffing Plan to the Water Authority for review and approval.

(3) The Operator shall be responsible for obtaining all necessary permits and visas from the appropriate authorities for the entry of all Operator's Management Personnel into [country].

(4) The Operator shall at its own expense provide the means of repatriation to the Operator's Management Personnel and to the Subcontractor's employees employed on the Contract 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 Water Authority may provide the same to such employees and recover the cost of doing so from the Operator.

(5) 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 the Operator's Management Personnel, the Operations Staff and the employees of its Subcontractors.

(6) The Operator shall, in all dealings with the Operator's Management Personnel, the Operations Staff and the employees 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 the Applicable Law pertaining to the employment of personnel.

9.4 Replacement of Operator's Management Personnel

(1) The CSCU Director may require the Operator to remove and replace any member of the Operator's Management Personnel or the Operations Staff who,

- (a) persists in any misconduct or lack of care;
- (b) carries out duties incompetently or negligently;
- (c) fails to comply with any provision of the Contract; or
- (d) persists in any conduct which gives the Water Authority reasonable cause to be dissatisfied with him or her.

(2) If the CSCU Director requires a replacement in accordance with GC Section 9.4(1), the replacement member of the Operator's Management Personnel shall be of equal or better quality, and have equal or better qualifications and experience, than the person being replaced, at no additional cost or expense to the Water Authority.

9.5 Operations Staff

In addition to the Operator's Management Personnel, the Operator shall employ all labourers and other staff necessary to carry out the Services (the "Operations Staff") and shall employ the Operations Staff in accordance with the Operations Staff Appendix.

9.6 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.

(2) 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.

(3) 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, representatives and sub-subcontractors, as fully as if they were acts, omissions or defaults of the Operator.

F. LIABILITY AND RISK DISTRIBUTION

ARTICLE 10 - LIABILITY AND RISK DISTRIBUTION

10.1 Defect Liability

(1) The Operator warrants that any Services carried out in respect of the Facilities or any part thereof shall be free from defects in the design, engineering, materials and workmanship of the Operator's Equipment, Materials and Supplies and of the work executed in the performance of the Services.

(2) For Services carried out and Operator's Equipment, Materials and Supplies supplied in the year prior to the End Date, the Defect Liability Period shall be 12 months from the End Date.

(3) If during the Defect Liability Period any defect should be found in the design, engineering, materials and workmanship of the Services carried out and the Operator's Equipment, Materials and Supplies supplied by the Operator in the year prior to the End Date, the Operator shall promptly, in consultation and agreement with the Water Authority regarding appropriate remedying of the defects, and at its 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 Assets arising out of or resulting from normal wear and tear.

(4) The Water Authority 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 Water Authority shall give all reasonable opportunity for the Operator to inspect any such defect.

(5) The Water Authority shall give the Operator all necessary access to the Facilities during the Defect Liability Period to enable the Operator to perform its obligations under this GC Section 10.1.

(6) The Operator may, with the consent of the Water Authority, 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.

(7) 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 Water Authority may give to the Operator a notice requiring that tests of the defective part of the Facilities be made by the Operator immediately upon completion of such remedial work, whereupon the Operator shall carry out such tests.

(8) 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 Parties.

(9) 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 Water Authority may, following notice to the Operator, proceed to do such work, and the reasonable costs incurred by the Water Authority in connection therewith shall be paid to the Water Authority by the Operator or may be deducted by the Water Authority from any monies due the Operator or may be claimed under the Performance Security.

(10) 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 shall be extended by a period equal to the period during which the Facilities or such part cannot be used by the Water Authority because of any of the aforesaid reasons.

(11) Except as provided in GC Sections 10.1 and 10.4, 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 wilful action of the Operator.

10.2 Limitation of Liability²⁵

Except in cases of criminal negligence or wilful misconduct,

- (a) the Operator shall not be liable to the Water Authority 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 Water Authority; and
- (b) the aggregate liability of the Operator to the Water Authority, whether under the Contract, in tort or otherwise, shall not exceed US\$ 190,000,000, provided that this limitation shall not apply to any obligation of the Operator to indemnify the Water Authority with respect to patent infringement.

10.3 Care of the Assets

Except as provided in GC Section 10.7, the Operator shall be responsible for the care and custody of the Assets or any part thereof from 12:01 a.m. on the Starting Date until 11:59 p.m. on the End Date and shall make good at its own cost any loss or damage that may occur to the Assets from any cause whatsoever during such period. The Operator shall also be responsible for any loss or damage to the Assets, caused by the Operator or its Subcontractors in the course of any work carried out, pursuant to GC Section 10.1.

10.4 Indemnification²⁶

(1) Subject to GC Section 10.4(5), the Operator shall indemnify and hold harmless the Water Authority and its employees, consultants, agents, representatives 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, consultants, agents, representatives or officers, except any injury, death or property damage caused by the negligence of the Water Authority, its employees, consultants, agents, representatives or officers.

(2) ²⁷If any proceedings are brought or any claim is made against the Water Authority that might subject the Operator to liability under GC Section 10.4(1), the Water Authority shall promptly give the Operator a notice thereof and the Operator may at its own expense and in the Water Authority's name

²⁵ limitation of liability should be considered carefully by each party – the Authority will be keen to ensure that the Operator is responsible for its actions, however an Operator is likely to be unwilling to take on unlimited liability or to make it do so may be very costly. It is usual practice to exclude liability for consequential and economic loss. The laws of the host country will need to be checked to ensure that the wording is effective in each case.

²⁶ [it may be that insurance proceeds will cover the liabilities indemnified and that provision should be included for deducting amounts recovered through insurance from any amounts claimed]

²⁷ an operator will often want to have the possibility of conducting proceedings of this nature as, amongst other things, its reputation will be at stake

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 Water Authority prior to the expiration of 30 days after receipt of such notice that it intends to conduct any such proceedings or claim, then the Water Authority shall be free to conduct the same on its own behalf. Unless the Operator has so failed to notify the Water Authority within the 30 day period, the Water Authority shall make no admission that may be prejudicial to the defense of any such proceedings or claim.

(4) The Water Authority 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 Water Authority shall indemnify and hold harmless the Operator and its employees, consultants, agents, representatives, officers and Subcontractors from any liability for loss of or damage to property of the Water Authority that is caused by fire, explosion or any other perils, in excess of the amount recoverable from insurances procured under GC Section 10.5, provided that such fire, explosion or other perils were not caused by any act or omission of the Operator or its employees, consultants, agents, representatives, officers or Subcontractors.

(6) The Party entitled to the benefit of an indemnity under this GC Section 10.4 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.

10.5 Insurance²⁸

(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 approval of the Water Authority, which shall not unreasonably withhold such approval.

- (a) Cargo Insurance During Transport
Covering loss or damage to the Operator's Equipment, Materials and Supplies, occurring while in transit from the Operator's or Subcontractors' works or stores until arrival at the Facilities.
- (b) Installation All Risks Insurance
Covering 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.
- (c) Third Party Liability Insurance
Covering bodily injury or death suffered by Third Parties, including the Water Authority's employees, consultants, agents and representatives, and loss of or damage to property occurring in connection with the Services.

²⁸ this is a relatively typical insurance clause. In each contract the parties should consider what sorts of insurance are applicable and available. Also, where the Authority wishes to be named as a co-insured it will need to be determined whether this is available in the relevant insurance market – for more on insurance provisions go to []

- (d) Professional Liability Insurance
Covering loss or damage by reason of professional negligence in the design, construction and operation of the Facilities.
- (e) 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.
- (f) Workers' Compensation
In accordance with the requirements of the Applicable Law;
- (g) Water Authority's Liability
In accordance with the requirements of the Applicable Law; and
- (h) Other Insurance
Such other insurance as may be set out in the SCC.

(2) The Water Authority shall be named as co-insured under all insurance policies taken out by the Operator pursuant to GC Section 10.5(1), except for the Third Party Liability, Workers' Compensation and Water Authority'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 10.5(1), except for the Cargo Insurance During Transport, Workers' Compensation and Water Authority'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.

(3) The Operator shall deliver to the Water Authority 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 the Water Authority by insurers prior to cancellation or material modification of a policy.

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

(5) If the Operator fails to take out or maintain in effect the insurances referred to in GC Section 10.5(1), the Water Authority 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 the Water Authority shall have paid to the insurer, or may otherwise recover such amount as a debt due from the Operator.

(6) 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 10.5, and all monies payable by any insurers shall be paid to the Operator. The Water Authority shall give to the Operator all such reasonable assistance as may be required by the Operator. With respect to insurance claims in which the Water Authority's interest is involved, the Operator shall not give any release or make any compromise with the insurer without the consent of the Water Authority.

(7) When each insurance premium has been paid, the Operator shall submit a copy of receipts to the Water Authority and shall notify the Water Authority's Representative that it has done so.

(8) 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

approval of the Water Authority. If an insurer makes, or purports to make, any such alteration, the Operator shall notify the Water Authority immediately.

(9) Nothing in this GC Section 10.5 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.

10.6 Force Majeure

[FORCE MAJEURE CLAUSES SHOULD BE TAILORMADE TO THE CIRCUMSTANCES OF THE AGREEMENT – THEY ARE NOT A STANDARD FORM PROVISION. FOR GUIDANCE ON WHAT A FORCE MAJEURE CLAUSE SHOULD CONTAIN GO TO []]

- (1) “Force Majeure” shall mean any event,
 - (a) beyond the reasonable control of the Water Authority or of the Operator, as the case may be; and
 - (b) which is unavoidable notwithstanding the reasonable care of the Party affected.
- (2) Force Majeure shall include²⁹ the events listed below in this GC Section 10.6(2) if the conditions set out in GC Section 10.6(1) are satisfied:
 - (a) war, hostilities or warlike operations, whether a state of war be declared or not, invasion, act of foreign enemy and civil war;
 - (b) rebellion, revolution, insurrection, mutiny, usurpation of civil or military government, conspiracy, riot, civil commotion and terrorist acts;
 - (c) 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;
 - (d) 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 supply³⁰, epidemics, quarantine and plague;
 - (e) 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
 - (f) shortage of labor, materials or utilities where caused by circumstances that are themselves Force Majeure.
- (3) to the extent that 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

²⁹ should this list be exhaustive or illustrative? The examples of force majeure although qualified by GC 10.6(1), are broadly drafted (including power shortages, strikes etc). The drafting might give rise to uncertainty – for example in the case of power shortages, could/ should the Operator bring in an auxiliary power unit...

³⁰ shortage or restriction of power supply may be so commonplace in a country that it is not something that should be dealt with in the Force Majeure regime but should be dealt with separately – in particular, it might be that the aggregate 120 days that gives rise to a right to termination might occur within a short period.

writing of the occurrence of such event and the circumstances thereof within 14 days after the occurrence of such event.

(4) 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 [and the Party's performance continued to be prevented, hindered or delayed thereby].³¹

(5) 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 10.6(7) and 10.7(6).

(6) No delay or non-performance by either Party hereto caused by the occurrence of any event of Force Majeure shall,

- (a) constitute a default or breach of the Contract; or
- (b) subject to GC Sections 10.3(2), 10.7(3) and 10.7(5), give rise to any claim for damages or additional Cost occasioned thereby,³²

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

(7) 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 10.7(6).

(8) In the event of termination pursuant to GC Section 10.6(7), the rights and obligations of the Parties shall be as specified in GC Sections 12.2.1(1) and 12.2.2(1).

(9) Notwithstanding GC Section 10.6(6), Force Majeure shall not apply to any obligation of the Water Authority to make payments to the Operator herein.

10.7 War Risks

(1) "War Risks" shall mean any event specified in GC Sections 10.6(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 [country].

³¹ here a remedy has been to allow extension of the contract. If the Operator has certain fixed costs that cannot be avoided during the FM event, it may seek to have these paid at least. In the case of a lease agreement to run a network, such as this, it is less likely that acts of God will prevent at least some of the network from operating – but "political force majeure events" such as war, strike etc are likely to prevent the operator from performing the services. Under the compensation schedule as drafted the Operator will not be able to recover its costs if it has not been supplying water and wastewater services]

³² if the Operator can mitigate by taking action that will result in extra cost, it is unlikely that he would be able to recover this cost. If the cost is considerable, the Operator will only have the alternative of terminating the agreement if the parties cannot agree a compromise.

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

- (a) destruction of or damage to the Existing Facilities or Water Authority Equipment, Materials and Supplies, or any part thereof;
- (b) destruction of or damage to property of the Water Authority or any Third Party; or
- (c) injury or loss of life,

if such destruction, damage, injury or loss of life is caused by any War Risks, and the Water Authority 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.

(3) If the Facilities, Equipment, Materials and Supplies or any other 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 Water Authority shall pay the Operator for,

- (a) replacing or making good any Equipment, Materials or Supplies, or other property of the Operator so destroyed or damaged; and
- (b) replacing or making good any such destruction or damage to the Facilities or any part thereof,

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

(4) If the Water Authority does not require the Operator to replace or make good any such destruction or damage to the Facilities or Water Authority Equipment, Materials and Supplies, the Water Authority shall either (i) request a change in accordance with GC Section 11.1, excluding the performance of the Services in respect of that part of the Facilities and Water Authority Equipment, Materials and Supplies thereby destroyed or damaged or, (ii) where the loss, destruction or damage affects a substantial part of the Facilities and Water Authority Equipment, Materials and Supplies, terminate the Contract, pursuant to GC Section 12.2.1.

(5) Notwithstanding anything contained in the Contract, the Water Authority 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 Water Authority in writing of any such increased Costs as soon as practicable.

(6) 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' employees 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.

(7) In the event of termination pursuant to GC Section 10.7(4) or 10.7(6), the rights and obligations of the Parties shall be as specified in GC Section 12.2.1.

10.8 Change in Laws and Regulations

³³If, after a date which is 30 days prior to the Submission Deadline in the Bidding Documents, in [country], 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, the Operator's Rate 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. Notwithstanding the foregoing, such additional or reduced costs shall not be separately paid or credited if the same has already been accounted for in the Operator's Rate or the Operator's Payment adjustment provisions, where applicable, in accordance with the Compensation, Indexation and Adjustment Appendix.

10.9 Intellectual Property Indemnity

10.9.1 Indemnity by Operator

The Operator shall indemnify and hold harmless the Water Authority and its employees, consultants, agents, representatives 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 the Water Authority may suffer as a result of any infringement or alleged infringement by the Operator, Subcontractors, or their employees, consultants, agents or representatives, of any patent, utility model, registered design, trademark, copyright or other intellectual property right registered or otherwise existing (the "Intellectual Property Rights").

10.9.2 Notice of Claim

(1) If any proceedings are brought or any claim is made against the Water Authority arising out of the matters referred to in GC Section 10.9.1, the Water Authority shall promptly give the Operator a notice thereof, and the Operator may at its own expense and in the Water Authority's name conduct such proceedings or claim and any negotiations for the settlement of any such proceedings or claim.

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

(3) The Water Authority 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.

³³ this is a broadly drafted change of law clause. The Government may seek to have a more limited provision relating to changes of law specific to the Operator or the Services. Also, the Government will want an obligation on the Operator to mitigate the cost of implementing the change of law. It may be appropriate to have a regulator or third party expert determine what the appropriate change would be.

G. CHANGE IN CONTRACT ELEMENTS, SUSPENSION AND TERMINATION

ARTICLE 11 - CHANGE IN CONTRACT ELEMENTS³⁴

11.1 Change to the Services

11.1.1 Introducing a Change

(1) Subject to GC Sections 11.1.2(6) and 11.1.2(11), the Water Authority shall have the right to propose, and subsequently require, that the Operator, from time to time during the performance of the Contract, make any change, modification, addition or deletion to, in or from the Services (hereinafter called “Change”), provided that such Change falls within the general scope of the Services and does not constitute unrelated work and that it is technically practicable, taking into account both the state of advancement of the Services and the technical compatibility of the Change envisaged with the nature of the Services as specified in the Contract.

(2) Notwithstanding GC Section 11.1.1(1), no change made necessary because of any default of the Operator in the performance of its obligations under the Contract shall be deemed to be a Change, and such change shall not result in any adjustment of the Operator’s Rate.

11.1.2 Changes Originating from Water Authority

(1) If the Water Authority proposes a Change pursuant to GC Section 11.1.1, it shall send to the Operator a “Request for Change Proposal,” requiring the Operator to prepare and furnish to the Water Authority as soon as reasonably practicable a “Change Proposal,” which shall include the following:

- (a) brief description of the Change;
- (b) estimated cost of the Change; and
- (c) effect on any other provisions of the Contract.

(2) Prior to preparing and submitting the “Change Proposal,” the Operator shall submit to the Water Authority an “Estimate for Change Proposal,” which shall be an estimate of the cost of preparing and submitting the Change Proposal.

- (3) Upon receipt of the Operator’s Estimate for Change Proposal, the Water Authority shall,
- (a) accept the Operator’s estimate with instructions to the Operator to proceed with the preparation of the Change Proposal;
 - (b) advise the Operator of any part of its Estimate for Change Proposal that is unacceptable and request the Operator to review its estimate; or
 - (c) advise the Operator that the Water Authority does not intend to proceed with the Change.

³⁴ it is useful to have a provision to deal with changes in scope – this provision as drafted is very specific and detailed and would be particularly useful where new build is required or an operator is required to operate additional assets. It is assumed in the agreement that inaccuracies of data supplied by the Authority are for the risk of the Operator– as considered earlier it may be more appropriate to have some sort of risk sharing for inaccuracies as this is an area where projects frequently fall apart.

(4) Upon receipt of the Water Authority's instruction to proceed under GC Section 11.1.2(3)(a), the Operator shall, with proper expedition, proceed with the preparation of the Change Proposal, in accordance with GC Section 11.1.2(1).

(5) The pricing of any Change shall, as far as practicable, be calculated in accordance with the prices included in the Contract. If such prices are inequitable, the Parties thereto shall agree on specific rates for the valuation of the Change.³⁵

(6) If, before or during the preparation of the Change Proposal, it becomes apparent that the aggregate effect of compliance therewith and with all other Change Orders that have already become binding upon the Operator under this GC Section 11.1.2 would be to increase or decrease the Operator's Rate by more than 15 percent, the Operator may give a written notice of objection thereto prior to furnishing the Change Proposal. If the Water Authority accepts the Operator's objection, the Water Authority shall withdraw the proposed Change and shall notify the Operator in writing thereof.

(7) The Operator's failure to object pursuant to GC Section 11.1.2(6) shall neither affect its right to object to any subsequent requested Changes or Change Orders herein, nor affect its right to take into account, when making such subsequent objection, the percentage increase or decrease in the Operator's Rate that any Change not objected to by the Operator represents.

(8) Upon receipt of the Change Proposal, the Parties shall mutually agree upon all matters therein contained. No later than 14 days after such agreement, the Water Authority shall, if it intends to proceed with the Change, issue the Operator with a Change Order.

(9) If the Water Authority is unable to reach a decision within 14 days after agreement with the Operator, it shall notify the Operator with details of when the Operator can expect a decision.

(10) If the Water Authority decides not to proceed with the Change for whatever reason, it shall, no later than the end of the 14 day period set out in GC Section 11.1.2(9), notify the Operator accordingly. Under such circumstances, the Operator shall be entitled to reimbursement of all costs reasonably incurred by it in the preparation of the Change Proposal, provided that these do not exceed the amount given by the Operator in its Estimate for Change Proposal submitted in accordance with GC Section 11.1.2(2).

(11) If the Parties cannot reach agreement on the price for the Change or any other matters identified in the Change Proposal, the Water Authority may nevertheless instruct the Operator to proceed with the Change by issue of a "Pending Agreement Change Order."

(12) Upon receipt of a Pending Agreement Change Order, the Operator shall immediately proceed with effecting the Changes covered by such Order. The Parties shall thereafter attempt to reach agreement on the outstanding issues under the Change Proposal.

(13) If the Parties cannot reach agreement within 60 days after the date of issue of the Pending Agreement Change Order, then the matter may be referred to the Adjudicator in accordance with the provisions of GC Section 1.6.

(14) The Parties acknowledge that the scope of the Services is generally intended to require the Operator to carry out all aspects of the management, operations and maintenance of the water and wastewater system in the Service Area. The Water Authority shall not be required to issue a Change or adjust the Operator's Rate to require the Operator to carry out any new tasks if such new tasks are within the broad scope of the management, operations and maintenance of the water supply and wastewater system in the Service Area.

³⁵ it is not entirely clear what is intended by this provision

ARTICLE 12 - SUSPENSION AND TERMINATION

12.1 Suspension

12.1.1 Suspension by the Water Authority

(1) The Water Authority may request the CSCU 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 Assets, until ordered in writing to resume such performance by the CSCU Director.³⁶

(2) If, by virtue of a suspension order given by the CSCU 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 CSCU Director requiring that the Water Authority shall, no later than 30 days after the Water Authority's receipt of the notice, order the resumption of such performance or request and subsequently order a change in accordance with GC Section 11.1, excluding the performance of the suspended obligations from the Contract.

(3) If the Water Authority fails to order the resumption of performance in accordance with GC Section 12.1.1(2), the Operator may, by a further notice to the CSCU 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 11.1 or, where it affects the whole of the Services, as termination of the Contract pursuant to GC Section 12.2.1.

12.1.2 Suspension by the Operator

(1) If the Water Authority has committed a substantial breach of the Contract, the Operator may give a notice to the Water Authority that specifies the breach and requires the Water Authority to remedy the same, as the case may be.

(2) If the Water Authority fails to remedy the breach or take steps to remedy the breach no later than 14 days after the receipt of the Operator's notice, then the Operator may, upon giving 14 days' notice to the Water Authority, suspend performance of any or all 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 Water Authority, including the Water Authority's failure to provide possession of or access to the Facilities, then the Operator may, upon giving 14 days' notice to the Water Authority, suspend performance of any or all of its obligations under the Contract, or, in the case of the Services, reduce the Operator's rate of progress.

(4) If the Operator suspends the performance of its obligations pursuant to this GC Section 12.1.2, then the End Date may, in the discretion of the Water Authority, be extended and additional Costs incurred by the Operator as a result of such suspension or reduction shall be paid by the Water Authority to the Operator in addition to the Operator's Rate, except in the case of suspension by reason of the Operator's default or breach of the Contract.

³⁶ the Operator will not be entitled to any payment in these circumstances as it will not be able to bill for services to customers and its fees are based on revenues. This is unlikely to be acceptable to Operators.

(5) During the period of suspension, the Operator shall not remove from the Facilities any Equipment, Materials or Supplies or any part of the Facilities, without the consent of the Water Authority.

12.2 Termination

12.2.1 Termination for Water Authority's Convenience³⁷

(1) The Water Authority may at any time terminate the Contract for any reason by giving the Operator a notice of termination that refers to this GC Section 12.2.1(1).

(2) Upon receipt of the notice of termination under GC Section 12.2.1(1),

- (a) the Operator shall, either immediately or upon the date specified in the notice of termination,
 - (i) cease all further work, except for such work as the Water Authority 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;
 - (ii) terminate all Subcontracts; and
 - (iii) except for the Operator's Innovations and Software and Other Software, remove all Operator's Equipment, Materials and Supplies from the Facilities, repatriate the Operator's Management Personnel and its Subcontractors' employees from the Facilities, and leave the whole of the Assets in a clean and safe condition; and
- (b) the Operator, subject to the payment specified in GC Section 12.2.2, shall,
 - (i) deliver the Assets to the Water Authority; and
 - (ii) deliver to the Water Authority all the Contract Records in existence as at the date of termination.

12.2.2 Payment upon Termination by the Water Authority for Convenience

(1) Upon termination of this Contract pursuant to GC Section 12.2.1, the Water Authority shall make the following payments to the Operator,

- (a) the costs reasonably incurred by the Operator in the removal of the Operator's Equipment, Materials and Supplies, except for the Operator's Innovations and Software and Other Software, from the Facilities and in the repatriation of the Operator's Management Personnel and its Subcontractors' employees;
- (b) 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;

³⁷ whilst the Government may be interested in a right of termination for convenience, an operator will be very unwilling to agree to this unless it is given an element of damages for loss of profit – it will also disincentivise an operator from investing resources in implementing the agreement if there is a possibility of termination at will. Therefore, careful consideration needs to be given as to whether this provision is appropriate.

- (c) the reasonable costs incurred by the Operator in protecting the Assets and leaving them in a clean and safe condition pursuant to GC Section 12.2.1(2)(a)(i) and
- (d) the reasonable cost 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 12.2.2(1).

(2) Upon termination of this Contract pursuant to GC Section 12.2.1 the Operator shall, forthwith, pay to the Water Authority any amounts in respect of the Operator's Payment payable to the Water Authority by the Operator as of the date of termination and calculated in accordance with the Compensation, Indexation and Adjustment Appendix. The Water Authority shall not be obliged to make any payments pursuant to GC Section 12.2.2(1) until the payments pursuant to GC Section 12.2.2(2) have been made to the Water Authority by the Operator.

(3) The Operator acknowledges that the only payments to be made to the Operator on termination by the Water Authority in accordance with GC Section 12.2.1 are set out in this GC Section 12.2.2. 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.

12.2.3 Termination for Operator's Default

(1) The Water Authority, 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 12.2.3(1):

- (a) 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;
- (b) 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
- (c) If the Operator, in the judgment of the Water Authority has engaged in corrupt or fraudulent practices in competing for or in executing the Contract. For the purpose of this GC Section 12.2.3(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 Water Authority, and includes collusive practice among Bidders, prior to or after proposal submission, designed to establish bid prices at artificial non-competitive levels and to deprive the Water Authority of the benefits of free and open competition.

- (2) If the Operator,

- (a) has abandoned or repudiated the Contract;
- (b) has without valid reason failed to commence the Services promptly or has suspended, other than pursuant to GC Section 12.1.2(1), the progress of Contract performance for more than 30 days after receiving a written instruction from the Water Authority to proceed;
- (c) 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
- (d) refuses or is unable to provide sufficient materials, services, Operations Staff or Operator's Management Personnel to perform the Services,

then the Water Authority 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 Water Authority may terminate the Contract forthwith by giving a notice of termination to the Operator that refers to this GC Section 12.2.3(2).

(3) Upon receipt of the notice of termination under GC Sections 12.2.3(1) or 12.2.3(2) the Operator shall, either immediately or upon such date as is specified in the notice of termination,

- (a) cease all further work, except for such work as the Water Authority may specify in the notice of termination for the sole purpose of protecting the Assets, or any work required to leave the Assets in a clean and safe condition;
- (b) terminate all Subcontracts; and
- (c) deliver to the Water Authority all Contract Records in existence as of the date of termination.

(4) If the Water Authority has terminated the Contract pursuant to GC Section 12.2.3 then the Water Authority may enter the Facilities, expel the Operator, and carry out the Services itself or by employing any Third Party.

12.2.4 Payment upon Termination for Operator's Default

(1) If the Contract is terminated pursuant to GC Section 12.2.3, the Water Authority shall pay the Operator,

- (a) the fair market value, as agreed by the Water Authority and the Operator and, failing agreement as determined in accordance with GC Section 1.6, of any unused or partially used Operator's Equipment, Materials and Supplies that the Water Authority wishes to acquire from the Operator in accordance with Section 5.2(2) of the Facilities and Assets Appendix; and
- (b) the costs, if any, incurred by the Operator in protecting the Assets and in leaving them in a clean and safe condition pursuant to GC Section 12.2.3(3)(a).

(2) Upon termination of this Contract pursuant to GC Section 12.2.3, the Operator shall, forthwith, pay to the Water Authority any amounts in respect of the Operator's Payment payable to the Water Authority by the Operator as of the date of termination and calculated in accordance with the Compensation, Indexation and Adjustment Appendix. The Water Authority shall not be obliged to make

any payments pursuant to GC Section 12.2.4(1) until the payments pursuant to this GC Section 12.2.4(2) have been made to the Water Authority by the Operator.

12.2.5 Termination by Operator

- (1) If,
 - (a) the Water Authority,
 - (i) has failed to pay the Operator any sum due under the Contract within the specified period or commits a substantial breach of the Contract, the Operator may give a notice (the “Preliminary Notice”) to the Water Authority that requires payment of such sum or that specifies the breach and requires the Water Authority to remedy the same, as the case may be; and
 - (ii) fails to pay the sum or fails to remedy a breach or take steps to remedy a breach in accordance with a notice given under GC Section 12.2.5(1)(a)(i) within 14 days after receipt of the Preliminary Notice; or
 - (b) the Operator is unable to carry out any of its obligations under the Contract for any reason attributable to the Water Authority, including the Water Authority’s failure to provide possession of or access to the Facilities,

then the Operator may give a notice to the Water Authority thereof (the “Final Notice”), and if the Water Authority has failed to pay the outstanding sum or to remedy the breach no later than 30 days after receipt of the Final Notice, or if the Operator is still unable to carry out any of its obligations under the Contract for any reason attributable to the Water Authority no later than 30 days after receipt of the Final Notice, the Operator may, by a further notice to the Water Authority referring to this GC Section 12.2.5(1), forthwith terminate the Contract.

- (2) If the Contract is terminated under GC Section 12.2.5(1), then,
 - (a) the Operator shall immediately,
 - (i) cease all further work, except for such work as may be necessary for the purpose of protecting the Assets or any work required to leave the Assets in a clean and safe condition; and
 - (ii) terminate all Subcontracts; and
 - (b) the Operator, subject to the payment specified in GC Section 12.2.6, shall
 - (i) deliver the Assets to the Water Authority; and
 - (ii) deliver to the Water Authority all Contract Records in existence as of the date of termination.

(3) Termination by the Operator pursuant to this GC Section 12.2.5 is 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 12.2.5.

12.2.6 Payment upon Termination by Operator

If the Contract is terminated under GC Sections 12.2.5(1),

- (a) the Water Authority and the Operator shall make all payments specified in GC Section 12.2.2(1); and
- (b) the Operator shall not make a claim for lost or foregone profits, revenues, consequential damages or losses of any kind as a result of or in connection with the termination of the Contract.

12.2.7 Set-Off – Payment upon Termination

In calculating any monies due from the Water Authority to the Operator, in respect of a termination pursuant to GC Section 12.2, account shall be taken of,

- (a) any sum previously paid by the Water Authority to the Operator under the Contract, including any advance payment paid pursuant to the Compensation, Indexation and Adjustment Appendix; and
- (b) any sum owing by the Operator to the Water Authority under the Contract, including liquidated damages.

SAMPLE

H. PERIODIC AND INTERIM REVIEWS OF THE CONTRACT

ARTICLE 13 - PERIODIC REVIEW

13.1 Four Year Periodic Review

13.1.1 Timing of the Periodic Reviews

(1) The Contract matters listed in GC Section 13.1.1(2) shall be the subject of a detailed and comprehensive periodic review at four year intervals commencing 90 days prior to the fourth and eighth anniversaries of the Starting Date (the “Periodic Review”).

(2) The Periodic Review shall consider the following matters:

- (a) the Operator’s Rate;
- (b) the Adjustment and Indexation Formula; and
- (c) the Performance Standards.

13.1.2 Purpose of the Periodic Reviews

The purpose of the Periodic Review is to consider whether,

- (a) the Operator’s Rate;
- (b) the Adjustment and Indexation Formula; or
- (c) the Performance Standards,

should be adjusted to accommodate the factors set out in the GC Section 13.1.3.

13.1.3 Factors to be Considered during the Periodic Review

(1) In its determination of whether, and to what extent, the Operator’s Rate, Adjustment and Indexation Formula and the Performance Standards ought to be adjusted, the Review Panel constituted in accordance with GC Section 13.2.1 shall consider the following:

- (a) in respect of the Operator’s Rate,
 - (i) excluding costs relating to Services for which the Operator charges Connection Fees as set out in the Services Appendix, operating costs with respect to,
 - (A) electricity;
 - (B) consumables, including chemicals and fuel; and
 - (C) labour costs;
 - (ii) maintenance costs;
 - (iii) Replacement and Rehabilitation costs;
 - (iv) the financial position of the Operator including,

- (A) operating profit; and
- (B) net cash flow;
- (v) the performance of the Operator including,
 - (A) the extent to which poor performance has affected the Operator’s financial position; and
 - (B) the effect of the Operator’s performance on operating, maintenance and Replacement and Rehabilitation costs; and
- (vi) the volume of water produced;
- (b) in respect of the Adjustment and Indexation Formula,
 - (i) the extent to which the existing Adjustment and Indexation Formula is representative of actual cost fluctuations;
 - (ii) the extent to which the existing Adjustment and Indexation Formula is representative of actual foreign and local currency distribution in expenditures; and
 - (iii) the reliability and availability of the local indices used to measure such factors as labour costs and inflation; and
- (c) in respect of the Performance Standards,
 - (i) the effect of the Capital Investment Program on existing Performance Standards;
 - (ii) the effect of investments through the Replacement and Rehabilitation Fund; and
 - (iii) the capacity of the Facilities to meet the existing Performance Standards.

(2) The Operator acknowledges and agrees that the appropriateness, accuracy or inaccuracy of the estimates, of any factor, that were used by the Operator in developing its Bidding Financial Model as required by the Instructions to Bidders in respect of this Contract shall have no impact during the Periodic Review. The Operator further acknowledges and agrees that the appropriateness, accuracy or inaccuracy of any estimates used by the Operator in the preparation of its Bid is entirely at the Operator’s risk and shall not be a factor considered in the Periodic Reviews.³⁸

13.2 Procedure for the Periodic Reviews

13.2.1 The Review Panel

(1) The Periodic Reviews shall be supervised by an independent review panel established by the Operator and Water Authority (the “Review Panel”).

³⁸ here is another provision making it clear that the Operator is at risk for the state of the data that is supplied at the beginning of the contract

(2) The Review Panel shall act in a professional and impartial fashion and shall be assisted by the Independent Assessor appointed pursuant to GC Section 13.2.4 and professional technical staff capable of technical and financial assessment of the information provided to the Review Panel pursuant to GC Section 13.2.3.

- (3) The decisions of the Review Panel
- (a) are final and shall not be subject to the Settlement of Disputes provisions set out in GC Section 1.6;
 - (b) supersede the decision of the Independent Assessor;
 - (c) supersede the outcome of a Settlement of Disputes process under GC Section 1.6, if any, in connection with an Interim Review under GC Article 14 that was decided prior to the applicable Periodic Review; and
 - (d) supersede a pending matter in a Settlement of Dispute process that was commenced prior to the applicable Periodic Review.

13.2.2 Appointment of the Review Panel

- (1) The Review Panel shall consist of three individuals.
- (2) The Operator and the Water Authority shall each nominate an individual to sit as a member of the Review Panel. Each nominee shall,
- (a) be fluent in both English and Arabic; and
 - (b) possess suitable financial, technical and administrative professional experience and qualifications.
- (3) The Appointing Authority will appoint the third member of the Review Panel.
- (4) Each of the Operator and the Water Authority shall pay the costs and expenses of its Review Panel nominee, and the costs and expenses of the third Review Panel member shall be divided equally between the Operator and the Water Authority.

13.2.3 Preparation of Periodic Review Submissions

(1) No later than 180 days prior to the fourth and eighth anniversaries of the Starting Date, the Operator shall prepare a comprehensive and detailed information package setting out a full technical and financial description of the Facilities and Services for the immediately preceding four year period (the “Periodic Review Information Package”).

- (2) The Operator’s Periodic Review Information Package shall include, for the applicable four year period,
- (a) all financial accounts;
 - (b) a report on,
 - (i) revenue and rates of collection;
 - (ii) an analysis of the impact of the Capital Investment Program and the investments under the Replacement and Rehabilitation Fund;

- (iii) billing, consumption and collection statistics;
 - (iv) foreign currency, setting out statistics for foreign currency and local currency and local currency purchases;
 - (v) an analysis of the equity and profitability of the Operator; and
 - (vi) an explanation of the Operator's actual financial performance compared with the Bidding Financial Model included in the Operator's Bid;
 - (vii) an analysis of expenditures from the operating budget to persons affiliated with the Operator;
- (c) the Operator's performance measured against the Performance Standards; and
 - (d) a projection, including assumptions and explanations, for the next four years for all matters set out in GC Sections 13.2.3(2)(a), (b) and (c).

(3) The Operator shall submit the Periodic Review Information Package to the Water Authority and the Independent Assessor no later than 180 days prior to the fourth and eighth anniversaries of the Starting Date.

(4) No later than 90 days prior to the fourth and eighth anniversaries of the Starting Date, the Water Authority and the Operator shall each prepare and submit a Periodic Review report setting out their respective positions on,

- (a) the Operator's Rate;
- (b) the Adjustment and Indexation Formula; and
- (c) the Performance Standards

for the next four year period (the "Periodic Review Report").

(5) The Water Authority and the Operator shall ensure that the Periodic Review Reports include detailed and comprehensive supporting information for each of the Water Authority and Operator's positions and shall address all factors set out in GC Section 13.1.3.

(6) The Operator and the Water Authority shall each submit its Periodic Review Report to the Independent Assessor established pursuant to GC Section 13.2.3 no later than 90 days prior to the fourth and eighth anniversaries of the Starting Date.

13.2.4 The Independent Assessor

(1) The Water Authority and the Operator shall, for each Periodic Review, jointly appoint an independent assessor to review the Periodic Review Reports of the Water Authority and Operator and to provide detailed comments to the Review Panel on the Periodic Review Reports (the "Independent Assessor").

(2) If the Water Authority and the Operator cannot agree on the Independent Assessor prior to the submission date of the Periodic Review Information Package, the Appointing Authority named in the SCC shall appoint an Independent Assessor.

(3) The Independent Assessor shall consult with both the Operator and the Water Authority during its review of the Periodic Review Reports.

(4) The Independent Assessor will submit its review of the Periodic Review Reports to the Review Panel, the Water Authority and the Operator no later than 60 days prior to the fourth and eighth anniversaries of the Starting Date.

ARTICLE 14 - INTERIM REVIEW FOR EXCEPTIONAL CIRCUMSTANCES³⁹

14.1 Timing and Requirements for an Interim Review

(1) At any time after the second anniversary of the Starting Date the Water Authority or the Operator, or both, may request an Interim Review of the,

- (a) Operator's Rate; or
- (b) the Adjustment and Indexation Formula

if the requirements set out in GC Section 14.1(2) have been met (the "Interim Review").

(2) Neither the Operator nor the Water Authority shall be entitled to an Interim Review unless,

- (a) an Exceptional Circumstance as defined in GC Section 14.2 has occurred;
- (b) the Exceptional Circumstance that has occurred
 - (i) arose after the Submission Deadline for Bids; and
 - (ii) arose after the date when the Operator's Rate or Adjustment and Indexation Formula was last determined;
- (c) the Exceptional Circumstance was beyond the control of the Party requesting the Interim Review;
- (d) the Party requesting the Interim Review can demonstrate that the Exceptional Circumstance has, in fact, impacted the Contract or Services in a way that can be reasonably corrected through an adjustment to the Operator's Rate or Adjustment and Indexation Formula; and
- (e) the cost incurred as the result of an Exceptional Circumstance could not have been avoided by reasonable management practices by the Party requesting the Interim Review.

14.2 Definition of Exceptional Circumstance

An Exceptional Circumstance⁴⁰ is,

- (a) any event or series of events that increases the cost of performing the Services by more than [30] percent;
- (b) a decrease of more than [30] percent in the total volume of water billed, as reported in the Operator's billing statistics;

³⁹ an interim is a useful method of resolving exceptional changes in circumstances

⁴⁰ the thresholds for change are very high

- (c) a decrease in the Operator's annual profit in excess of [50] percent of the average profit of the immediately previous two years;
- (d) a significant change or addition to the Facilities that results in a net increase in operating costs in excess of [30] percent;
- (e) a decrease in the Consumer Tariff greater than [15] percent; and
- (f) a permanent or long term change in the raw water quality that increases or decreases the unit cost of water treatment in the Service Area plus or minus [20] percent;

14.3 Procedure for an Interim Review

14.3.1 Requesting an Interim Review

(1) If either the Water Authority or the Operator wishes to request an Interim Review, it shall prepare a request for an Interim Review (the "Interim Review Request") and submit it to an Independent Assessor appointed in accordance with the procedure set out in GC Section 13.2.4 and the other Party.

(2) The Interim Review Request shall set out,

- (a) a detailed description of the Exceptional Circumstance, as defined in GC Section 14.2(1), on which the request for an Interim Review is founded and a demonstration that the definition of Exceptional Circumstance has been met;
- (b) a detailed demonstration that all of the requirements of GC Section 14.1(2) have been met; and
- (c) a brief description of the adjustment to the Operator's Rate or Adjustment and Indexation Formula that is being sought by the Party submitting the Interim Review Request.

(3) The Independent Assessor shall,

- (a) no later than 60 days after the receipt of an Interim Review Request; and
- (b) after consultation with both the Water Authority and the Operator,

submit its findings to the Water Authority and the Operator.

(4) The decisions of the Independent Assessor under GC Section 14.3.1(3) shall be subject to the Settlement of Disputes provisions set out in GC Section 1.6.