

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

## ANNEXURE [ ] - OPERATING AGREEMENT

### **TERM SHEET FOR THE OPERATION AND MAINTENANCE AGREEMENT**

entered into between

**[CONCESSIONAIRE];**

and

**[OPERATOR.**

The parties agree as set out below.

#### 1. **INTERPRETATION AND INTRODUCTORY**

The clause headings in this agreement are for the purpose of convenience only and shall not be taken into account in the interpretation of nor modify the terms of this agreement. Unless inconsistent with or a contrary intention clearly appears from the context -

1.1. words importing -

1.1.1. any reference to a gender includes the other genders;

1.1.2. any reference to the singular includes the plural and vice versa;  
and

1.1.3. any reference to natural persons includes legal persons and vice versa;

1.2. the following terms and expressions shall have the meanings assigned to them hereunder and cognate expressions shall have a corresponding meaning -

1.2.1. "**the/this agreement**" means the operation and maintenance agreement as set out herein, together with all appendices hereto;

1.2.2. "**the concession assets**" means the concession assets as defined in terms of the concession contract;

This document has been prepared for the purposes of the **PPP IN INFRASTRUCTURE RESOURCE CENTER FOR CONTRACTS, LAWS AND REGULATIONS (PPPIRC)** website. It is a sample document FOR REFERENCE PURPOSES ONLY and SHOULD NOT BE used as a "model".

The inclusion of any legal materials on the PPPIRC website does not mean that they are in any way approved, endorsed or recommended by the World Bank Group or its affiliates. Legal advice should be sought to determine whether a particular legal document is appropriate for any given project, and how the specific terms of the document should be adapted to fit the circumstances of that project

- 1.2.3. "**the Concessionaire**" means [ ], a priService Tax company with limited liability duly incorporated in [LOCATION] with registration number [ ], herein represented by \_\_\_\_\_ in his capacity as \_\_\_\_\_ of the Concessionaire, he being duly authorised thereto;
- 1.2.4. "**the concession area**" means the concession area to which the concession contract applies from time to time;
- 1.2.5. "**the concession contract**" means the written concession contract between the Concessionaire and [Council] dated [ ], as amended from time to time;
- 1.2.6. "**construction contract**" means a written agreement concluded by the Operator for, on behalf of and in the name of the Concessionaire in terms whereof any of the works existing as at the effective date are expanded, rehabilitated and/or re-commissioned or in terms whereof new elements of the works not in existence as at the effective date are to be constructed and commissioned;
- 1.2.7. "**consumer**" means any end-user within the concession area that is or is to be supplied with water services by the Concessionaire in terms of the concession contract;
- 1.2.8. "**the consumer rules**" means the consumer rules governing the supply of water services to consumers as published by the Concessionaire in terms of the concession contract from time to time;
- 1.2.9. "**contractor**" means any contractor or sub-contractor of the Concessionaire under a construction contract as appointed by the Operator for and on behalf of the Concessionaire in terms of this agreement;
- 1.2.10. "**the developed areas**" means collectively the developed areas within the concession area as at the effective date reflected in the maps annexed hereto marked **Appendix 1** or, if the context is appropriate any one of them;
- 1.2.11. "**Ministry**" means [ ] and/or its successor-in-title;
- 1.2.12. "**the effective date**" means the effective date as defined in terms of the concession contract;
- 1.2.13. "**Council**" means [ ] and its successors-in-title;

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

- 1.2.13. "**expansion areas**" means any area outside the developed areas but within the concession area which, in terms of the concession contract, is to be supplied with water services;
- 1.2.14. "**lender**" means any entity who qualifies as a "lender" under the concession contract;
- 1.2.15. "**new area**" means any geographic area outside the concession area which may in future be incorporated into the concession area;
- 1.2.16. "**the operation and maintenance manuals**" means the written manuals setting out the detailed procedure for the operation and maintenance of the works;
- 1.2.17. "**the Operator**" means [ ];
- 1.2.18. "**the parties**" means all the parties to this agreement;
- 1.2.19. "**regulatory provisions**" means regulatory provisions as defined in the concession contract;
- 1.2.20. "**the stock**" means, collectively, the stocks of chemicals, spare parts, equipment and raw material to be received by the Concessionaire from Council at the effective date in terms of the concession contract;
- 1.2.21. "**substitute entity**" means any person or entity replacing the Concessionaire in terms of [ ] of the concession contract;
- 1.2.22. "**SERVICE TAX**" means value added tax payable in terms of [legislation], as amended;
- 1.2.23. "**water services**" means water services as defined in terms of the concession contract;
- 1.2.25. "**the water services standards**" means the standards pertaining to the quality of water services to be supplied by the Operator to consumers in terms of this agreement, being the standards set out in **Appendix 2** hereto, or such other standards as the parties may from time to time agree upon by executing further appendices and replacing the existing **Appendix 2** therewith, provided that such water services standards shall always be in accordance with

This document has been prepared for the purposes of the **PPP IN INFRASTRUCTURE RESOURCE CENTER FOR CONTRACTS, LAWS AND REGULATIONS (PPIRC)** website. It is a sample document FOR REFERENCE PURPOSES ONLY and SHOULD NOT BE used as a "model".

The inclusion of any legal materials on the PPIRC website does not mean that they are in any way approved, endorsed or recommended by the World Bank Group or its affiliates. Legal advice should be sought to determine whether a particular legal document is appropriate for any given project, and how the specific terms of the document should be adapted to fit the circumstances of that project

the provisions of the Water Services Act and the regulatory provisions;

1.2.6. "**the works**" means the works as defined in terms of the concession contract;

1.3. save as otherwise defined in 1.2, all expressions defined in the concession contract shall bear the meaning in this agreement as is assigned to such expressions in the concession contract;

1.4. if any provision in a definition is a substantive provision conferring rights or imposing obligations on any party, notwithstanding that it is only in the definition clause, effect shall be given to it as if it were a substantive provision in the body of the agreement;

1.5. expressions defined in this clause 1 shall bear the same meaning in any appendices to this agreement which do not otherwise contain their own definitions;

1.6. where any words and/or expressions are defined within the context of any particular clause in this agreement, the words and/or expressions so defined shall bear the meaning assigned to such words and expressions in that clause, notwithstanding that such words and/or expressions have not been defined in this interpretation clause.

## 2. **INTRODUCTION**

2.1. Under terms of [legislation], the Council is obliged to take reasonable measures to provide the infrastructure to ensure the supply of water services to consumers within the concession area.

2.2. Council and the Concessionaire accordingly concluded the concession contract in terms whereof -

2.2.1. the Concessionaire is appointed as an independent private sector water services provider to undertake, on a sole and exclusive basis, for and on behalf of Council the supply of water services within the concession area on the terms and conditions set out in the concession contract and furthermore in accordance with the regulatory provisions; and

2.2.2. the Concessionaire is obliged to sub-contract to and appoint the Operator to operate and maintain the works and to undertake the supply of water services to consumers within the concession area for and on behalf of the Concessionaire on the terms and conditions set out in this agreement.

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

- 2.3. This agreement sets out the basis on and terms and conditions subject to which -
  - 2.3.1. the Concessionaire appoints the Operator as a sub-contractor; and
  - 2.3.2. the Operator will fulfil its duties, as envisaged in 2.2.2.

3. **CONDITIONS PRECEDENT**

- 3.1. This agreement, in its entirety, is subject to the conditions precedent that all the conditions precedent to which the concession contract is subject (save for the requirement of this agreement becoming effective), are timeously fulfilled or waived, as the case may be, and that the concession contract becomes fully binding and unconditional on the parties thereto.
- 3.2. If the conditions precedent set out in 3.1 is not fulfilled timeously and is not waived, then this agreement shall automatically lapse and be of no further force or effect and -
  - 3.2.1. to the extent that this agreement may have been partially implemented, the parties shall be restored to the status quo ante to the extent that same is possible; and
  - 3.2.2. no party shall have any claim against the other arising out of or in connection with this agreement.
- 3.3. The parties undertake to do all things within their power and to take all reasonable steps as expeditiously as possible in order to ensure fulfilment of the conditions precedent set out in 3.1 and to give effect to the provisions of this clause 3.

4. **APPOINTMENT AND GENERAL OBLIGATIONS OF THE OPERATOR**

- 4.1. The Concessionaire hereby appoints the Operator -
  - 4.1.1. to operate and maintain the works; and
  - 4.1.2. to undertake, for and on behalf of the Concessionaire, the supply of water services to all consumers within the concession area,for the duration of and upon the terms and conditions more fully set out in this agreement, which appointment the Operator hereby accepts.

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

4.2. The Operator -

- 4.2.1. shall perform its obligations in terms of this agreement using all the skill, care and diligence to be expected of a properly qualified and competent operator experienced in -
  - 4.2.1.1. operating and maintaining sanitation service works and water services works of a similar size, scope and complexity to the works; and
  - 4.2.1.2. supplying water supply services and sanitation services of a similar size, scope and complexity to the water services;
- 4.2.2. shall, without limiting the generality of 4.2.1, perform its obligations in terms of this agreement in accordance with -
  - 4.2.2.1. the water services standards;
  - 4.2.2.2. the operation and maintenance manuals in the possession of the Operator from time to time;
  - 4.2.2.3. the regulatory provisions; and
  - 4.2.2.4. the consumer rules;
- 4.2.3. shall remain fully aware of the provisions of the concession contract and shall take full account of all the undertakings and warranties on the part of the Concessionaire under and by virtue of the concession contract insofar as same relate to, affect or may affect the performance of this agreement by the Operator. In this regard, the Concessionaire shall, on the signing date, furnish the Operator with a true and correct copy of the concession contract and shall furthermore, from time to time as and when amendments are effected to the concession contract, forthwith furnish the Operator with true and correct copies of all addenda or other similar documents clearly setting out the amendments effected to the concession contract;
- 4.2.4. shall, accordingly and without prejudice to its other obligations under this agreement, perform all obligations relating to the operation and maintenance of the works and the supply of water services imposed on the Concessionaire under the concession contract in accordance with the concession contract (for which purposes all relevant provisions of the concession contract shall



This document has been prepared for the purposes of the **PPP IN INFRASTRUCTURE RESOURCE CENTER FOR CONTRACTS, LAWS AND REGULATIONS (PPPIRC)** website. It is a sample document FOR REFERENCE PURPOSES ONLY and SHOULD NOT BE used as a "model".

The inclusion of any legal materials on the PPPIRC website does not mean that they are in any way approved, endorsed or recommended by the World Bank Group or its affiliates. Legal advice should be sought to determine whether a particular legal document is appropriate for any given project, and how the specific terms of the document should be adapted to fit the circumstances of that project

be deemed to be incorporated herein as between the Concessionaire and the Operator), save where this agreement imposes obligations on the Operator which are more onerous than the obligations of the Concessionaire under the concession contract;

4.2.5. hereby undertakes to the Concessionaire that it will perform its obligations and exercise its rights in terms of this agreement in such manner and at such times so that no act, omission or default of the Operator in relation thereto shall constitute, cause or contribute to any breach by the Concessionaire of any of its obligations under the concession contract;

4.2.6. shall ensure that -

4.2.6.1. in operating and maintaining the works, it will provide services of such a standard so as to result in the works being operated and maintained in a safe manner and free from any unreasonable risk involved in its operation;

4.2.6.2. in supplying the water services for and on behalf of the Concessionaire, it will supply same substantially to the levels of service prescribed in the water services standards;

4.2.7. shall -

4.2.7.1. accept all employees of the Concessionaire seconded to it in terms of this agreement and use such employees to render services hereunder;

4.2.7.2. itself provide all superintendence as may be necessary to supervise the services to be rendered by the employees referred to in 4.2.7.1;

4.2.8. shall maintain and, as new information becomes available, update on an ongoing basis all technical archives and data systems as required in terms of the concession contract in respect of the works and the supply of water services at regular intervals so as to reflect all recent incorporations and/or decommissioning of any asset;

4.2.9. shall develop and implement a maintenance management program for the works to enhance and protect the concession

This document has been prepared for the purposes of the **PPP IN INFRASTRUCTURE RESOURCE CENTER FOR CONTRACTS, LAWS AND REGULATIONS (PPPIRC)** website. It is a sample document FOR REFERENCE PURPOSES ONLY and SHOULD NOT BE used as a "model".

The inclusion of any legal materials on the PPPIRC website does not mean that they are in any way approved, endorsed or recommended by the World Bank Group or its affiliates. Legal advice should be sought to determine whether a particular legal document is appropriate for any given project, and how the specific terms of the document should be adapted to fit the circumstances of that project

assets and related components and equipment within the mechanical, electrical, instrumental and structural areas of the works and shall document the maintenance activities undertaken to ensure the functionality of the works;

4.2.10. shall be responsible for the supply, installation, operation and maintenance of all hardware and software forming part of any geographical information technology system referred to in clause 10.1.6 of the concession contract.

## 5. **DURATION**

5.1. This agreement shall -

5.1.1. notwithstanding the date on which it is signed by the party signing last in time, be deemed to have commenced on the effective date; and

5.1.2. unless earlier terminated in accordance with the provisions hereof, endure until and will automatically terminate at 24:00 on the 30th (thirtieth) anniversary of the effective date.

5.2. Should -

5.2.1. the concession contract be terminated at any time prior to the date envisaged in 5.1.2 and provided that the Concessionaire has ceased to be entitled to its rights and has been released from its obligations under this agreement, Council shall be entitled to require the Operator to continue -

5.2.1.1. to operate and maintain the works; and

5.2.1.2. to undertake the supply of water services within the concession area,

on the terms and conditions set out in this agreement for a maximum period of 90 (ninety days) (or such longer period as Council may agree with the Operator in writing) by delivering a written notice to such effect to the Operator by no later than 60 (sixty) days prior to the date of termination of the concession contract, save where the concession contract has been terminated otherwise than in terms of clause 60 thereof and otherwise than as a result of any eventuality that will make the continuance of this agreement impossible or impractical. Should Council exercise its right in terms of this clause 5.2.1, Council shall bind itself to this agreement and to the Operator in terms of this



This document has been prepared for the purposes of the **PPP IN INFRASTRUCTURE RESOURCE CENTER FOR CONTRACTS, LAWS AND REGULATIONS (PPPIRC)** website. It is a sample document FOR REFERENCE PURPOSES ONLY and SHOULD NOT BE used as a "model".

The inclusion of any legal materials on the PPPIRC website does not mean that they are in any way approved, endorsed or recommended by the World Bank Group or its affiliates. Legal advice should be sought to determine whether a particular legal document is appropriate for any given project, and how the specific terms of the document should be adapted to fit the circumstances of that project

agreement in the place and stead of the Concessionaire with effect from the date on which the concession contract has been terminated;

5.2.2. a substitute entity be appointed at any time prior to the date envisaged in 5.1.2, irrespective of whether or not the concession contract is also terminated but provided that the Operator has consented to the appointment of such substitute entity, then, notwithstanding any provision to the contrary contained in this agreement, this agreement shall not be terminated but all rights and obligations of the Concessionaire under or in terms of this agreement shall be ceded, delegated and assigned to such substitute entity and this agreement shall be assigned and transferred to such substitute entity for a maximum period of 90 (ninety) days (or such longer period as the relevant substitute entity may agree with the Operator in writing) on receipt of a written notice by the Operator, signed by the relevant substitute entity, Council and all the lenders with duly certified documentary evidence stating that -

5.2.2.1. the Concessionaire ceases to be entitled to its rights and is released from its obligations under this agreement;

5.2.2.2. the substitute entity has becomes a party to this agreement, entitled to all the rights and liable to fulfil all the obligations of the Concessionaire hereunder, which shall differ from those referred to in 5.2.2.1 only in respect of the substitution of the substitute entity as the entity who is entitled thereto and liable in respect thereof in place of the Concessionaire,

whereupon the substitute entity shall bind itself to this agreement and to the Operator in terms of this agreement in the place and stead of the Concessionaire with effect from the date on which the substitute entity has been appointed.

5.3. The provisions of 5.2.1 shall constitute an agreement by the Operator and the Concessionaire for the benefit of Council on the basis that Council shall be entitled to the benefits set out therein, which are capable of acceptance and enforcement by Council at any time hereafter and furthermore on the basis that, upon such acceptance and enforcement by Council, Council shall become liable for all obligations set out in this agreement.

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

## 6. **NATURE OF APPOINTMENT**

6.1. The Operator's appointment in terms of this agreement is an exclusive one and, accordingly, for the duration of this agreement the Concessionaire shall not be entitled to appoint any other third party, nor shall the Concessionaire itself be entitled, to perform any of the services to be performed by the Operator in terms of or pursuant to this agreement.

6.2. The Operator is hereby appointed on the basis that the Operator will, as an independent contractor -

6.2.1. operate and maintain the works; and

6.2.2. undertake the supply of water services within the concession area,

for and on behalf of the Concessionaire on the basis more fully set out in this agreement.

6.3. Accordingly, as at the date that this agreement is signed by the party signing last in time and at all times subsequent thereto, both parties are acting as principals and nothing herein contained shall be construed as constituting -

6.3.1. the Operator as an agent or partner of the Concessionaire; or

6.3.2. the Concessionaire as an agent or partner of the Operator,

and each party shall accordingly not be entitled to incur any liability on behalf of or to bind the credit of the other party in any manner save as may be provided for in this agreement and each party hereby indemnifies and holds the other party harmless against any and all claims which may arise by virtue of such firstmentioned party having breached this clause 6.3.

6.4. The Operator shall use its best endeavours to ensure that all material sub-contracts concluded by it with sub-contractors and relating to or associated with the supply of water services or the operation and maintenance of the works subsequent to or that will be implemented with effect from the effective date shall include a clause stipulating expressly the right of the substitute entity appointed (or, if no substitute entity is appointed, the right of Council) to continue with such contracts in force at the time of the termination of this agreement and/or the concession contract to ensure the continuity of the supply of water services.

## 7. **THE CONCESSION AREA**

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

- 7.1. The parties record that -
  - 7.1.1. the territorial scope of the concession area is limited to the concession area as at the effective date, but that in terms of the concession contract same may be extended by agreement between the Concessionaire and Council; and
  - 7.1.2. water supply services are only to be supplied to consumers within the developed areas as at the effective date, but that in terms of the concession contract water supply services may have to be supplied to consumers within the expansion areas and/or new areas by agreement between the Concessionaire and Council.
- 7.2. The Operator shall, accordingly, only be obliged to undertake the supply of water services in terms of this agreement -
  - 7.2.1. within the territorial scope of the concession area as at the effective date, unless and until same has been extended as envisaged in 7.1.1; and
  - 7.2.2. to consumers within the developed areas as at the effective date, unless and until the Concessionaire is required to undertake the supply of water services to consumers in the expansion areas as envisaged in 7.1.2.

## 8. **LEGISLATIVE COMPLIANCE**

- 8.1. The Operator shall -
  - 8.1.1. comply with the regulatory provisions relating to the supply of water services, the concession assets, the environment, employees and/or safety necessary for the protection of persons or property;
  - 8.1.2. comply with the regulatory provisions concerning the building of any works and fire prevention in respect of the works;
  - 8.1.3. obtain and maintain in force all the necessary consents, licences, authorisations and permits required by any competent authority in respect of the concession assets, the operation of the works and to supply the water services within the concession area on terms of the regulatory provisions; and

This document has been prepared for the purposes of the **PPP IN INFRASTRUCTURE RESOURCE CENTER FOR CONTRACTS, LAWS AND REGULATIONS (PPIRC)** website. It is a sample document FOR REFERENCE PURPOSES ONLY and SHOULD NOT BE used as a "model".

The inclusion of any legal materials on the PPIRC website does not mean that they are in any way approved, endorsed or recommended by the World Bank Group or its affiliates. Legal advice should be sought to determine whether a particular legal document is appropriate for any given project, and how the specific terms of the document should be adapted to fit the circumstances of that project

8.1.4. comply with and give all notices required by or under the regulatory provisions relating to its activities in terms of this agreement and the concession contract;

8.1.5. comply with all legislation, laws, policies and the regulatory provisions relating to the conclusion and implementation of this agreement.

8.2. The Concessionaire shall and hereby undertakes to assist, on request, the Operator in its dealings with Council and all competent authorities in implementing this agreement and in the Operator rendering any service under this agreement and shall procure that Council shall do likewise.

9. **FACILITIES, EQUIPMENT AND PLANT**

9.1. The Concessionaire shall -

9.1.1. forthwith upon receipt thereof from Council in terms of the concession contract, furnish the Operator with and place the Operator in possession of -

9.1.1.1. the movable concession assets listed in **Appendix 3**; and

9.1.1.2. the stock;

9.1.2. allow the Operator full and free access to the works as from the effective date or such other date as the Concessionaire obtains such access from Council in terms of the concession contract;

9.1.3. allow the Operator full and free use, occupation, possession and enjoyment of the immovable concession assets listed in **Appendix 4** as from the effective date or such other date as the Concessionaire obtains such use, occupation, possession and enjoyment from Council in terms of the concession contract; and

9.1.4. allow the Operator to enjoy the undisturbed use and possession of and be entitled to the full benefit of all the rights under the contracts referred to in 50.1 of the concession contract as from the effective date,

for the purposes of the performance by the Operator of its obligations in terms of this agreement.

9.2. The Operator shall -

This document has been prepared for the purposes of the **PPP IN INFRASTRUCTURE RESOURCE CENTER FOR CONTRACTS, LAWS AND REGULATIONS (PPPIRC)** website. It is a sample document FOR REFERENCE PURPOSES ONLY and SHOULD NOT BE used as a "model".

The inclusion of any legal materials on the PPPIRC website does not mean that they are in any way approved, endorsed or recommended by the World Bank Group or its affiliates. Legal advice should be sought to determine whether a particular legal document is appropriate for any given project, and how the specific terms of the document should be adapted to fit the circumstances of that project

- 9.2.1. accept delivery and take possession of all the movable concession assets and the stock on the date that same are furnished to the Operator in terms of 9.1.1; and
- 9.2.2. assume full responsibility for the operation and maintenance of the works as from the date referred to in 9.1.2.
- 9.3. As from the effective date, the Operator shall -
  - 9.3.1. from time to time supply all further equipment (but excluding new assets), materials, chemicals, consumables and any other items whatsoever, whether of a temporary or permanent nature, which it may require for the proper performance of its obligations in accordance with this agreement (collectively "**Operator equipment**"); and
  - 9.3.2. be responsible for making application to obtain all necessary licences, permits, consents, authorisations and the like ("**import licences**") from the relevant [country] authorities for the importation of any such equipment, materials, chemicals, consumables and other items which the Operator requires to be imported.
- 9.4. The Concessionaire shall do all such things as may be necessary, or procure the doing of all such things as may be necessary, sign all such documents as may be required and render all other assistance as may be necessary from time to time to allow the Operator to obtain all import licences in a timely fashion and/or otherwise to implement and carry out the terms and conditions of this agreement.
- 9.5. The amount(s) due to the Operator in terms of 15.1 excludes allowances for the payment of any import and re-export duties and taxes and any other similar tax, charge, impost, levy or duty ("**import taxes**") levied on the Operator in connection with the importation of any Operator equipment referred to in 9.3.2 and, in the event that any such import taxes may be or become payable, the Concessionaire shall -
  - 9.5.1. pay the full amount thereof to the relevant authority or other entity concerned within the time allowed for such payment under applicable law so as to allow the relevant equipment, material, chemical, consumable and/or other item to be imported by the Operator and to be cleared for import timely; and

This document has been prepared for the purposes of the **PPP IN INFRASTRUCTURE RESOURCE CENTER FOR CONTRACTS, LAWS AND REGULATIONS (PPIRC)** website. It is a sample document FOR REFERENCE PURPOSES ONLY and SHOULD NOT BE used as a "model".

The inclusion of any legal materials on the PPIRC website does not mean that they are in any way approved, endorsed or recommended by the World Bank Group or its affiliates. Legal advice should be sought to determine whether a particular legal document is appropriate for any given project, and how the specific terms of the document should be adapted to fit the circumstances of that project

9.5.2. deliver to the Operator, forthwith upon having made such payment, an original receipt (or a certified copy thereof) issued by such authority or other entity evidencing the payment to such authority or other entity of all amounts so required to be paid,

and the Concessionaire hereby indemnifies and holds the Operator harmless against all such import taxes and all other costs, expenses, damages and losses incurred and/or suffered by the Operator in that regard.

9.6. Should the Concessionaire fail to comply with its obligations in terms of 9.5, then, without prejudice and in addition to any other right or remedy that the Operator may have in terms of this agreement or at law as a result thereof, the Operator shall be entitled to pay the relevant import taxes to the relevant authority or other entity concerned, in which event the Concessionaire shall forthwith, but in any event by no later than 3 (three) days after having received the Operator's invoice in respect thereof, refund to the Operator the amount so paid.

## 10. **OWNERSHIP OF THE WORKS**

10.1. The Operator -

10.1.1. shall not acquire any title to or ownership interests in or to any of the concession assets or the works; and

10.1.2. hereby acknowledges that -

10.1.2.1. the works and all existing concession assets as at the effective date (including all equipment, accessories, supplies, spare parts and materials forming part thereof) is and shall remain the property of Council; and

10.1.2.2. all assets acquired or constructed after the effective date (including all equipment, accessories, supplies, spare parts and materials forming part thereof) is and shall remain the property of the Concessionaire.

10.2. The Concessionaire shall grant to and/or procure for the Operator, as the case may be, a right of way or other method of access to and egress from all land not owned by the Concessionaire but on which any of the concession assets is situated.



This document has been prepared for the purposes of the **PPP IN INFRASTRUCTURE RESOURCE CENTER FOR CONTRACTS, LAWS AND REGULATIONS (PPPIRC)** website. It is a sample document FOR REFERENCE PURPOSES ONLY and SHOULD NOT BE used as a "model".

The inclusion of any legal materials on the PPPIRC website does not mean that they are in any way approved, endorsed or recommended by the World Bank Group or its affiliates. Legal advice should be sought to determine whether a particular legal document is appropriate for any given project, and how the specific terms of the document should be adapted to fit the circumstances of that project

11. **EQUIPMENT, MATERIALS AND PERSONNEL**

11.1. The Concessionaire shall, furthermore -

11.1.1. employ, on the basis as envisaged in the concession contract, all employees of Council who, prior to the effective date, were associated with or connected to the supply of water services within the concession area and whose names appear on Annexure D1 to the concession contract;

11.1.2. second the employees referred to in 11.1.1 to the Operator on the basis that -

11.1.2.1. all amounts due and payable to such employees shall be paid by the Concessionaire and shall and hereby does indemnify and hold (and continue to hold) the Operator harmless against any and all costs, expenses or damages incurred or suffered by the Operator in that regard and/or as a result of any act or omission of any such employee on a full indemnity basis;

11.1.2.2. the Operator shall be entitled to supervise, control and manage all such employees (including, but not limited to, issuing lawful orders and instructions to and disciplining such employees),

and subject to such further terms and conditions as the Concessionaire and the Operator may from time to time agree upon in writing;

11.1.3. from time to time as and when so requested by the Operator, and on the basis and terms and conditions set out and envisaged in 11.1.2, second such further employees of the Concessionaire as the Operator may require for purposes of this agreement to the Operator;

11.1.4. ensure that all its employees working on the operation and maintenance of the works and the supply of water services within the concession area are properly trained and qualified, competent and experienced to carry out their respective responsibilities;

This document has been prepared for the purposes of the **PPP IN INFRASTRUCTURE RESOURCE CENTER FOR CONTRACTS, LAWS AND REGULATIONS (PPIRC)** website. It is a sample document FOR REFERENCE PURPOSES ONLY and SHOULD NOT BE used as a "model".

The inclusion of any legal materials on the PPIRC website does not mean that they are in any way approved, endorsed or recommended by the World Bank Group or its affiliates. Legal advice should be sought to determine whether a particular legal document is appropriate for any given project, and how the specific terms of the document should be adapted to fit the circumstances of that project

- 11.1.5. timeously procure and acquire all items which may be needed by the Operator to fulfil its obligations under this agreement. The equipment and replacement parts so procured and acquired shall be of suitable size and type and in accordance with the specifications for the works; and
- 11.1.6. from time to time procure and supply such further appropriate replacements for the equipment as and when necessary to enable the Operator to perform its obligations hereunder, it being understood that all cost and expenses relating thereto shall be borne by the Concessionaire.
- 11.2. The Operator shall ensure -
  - 11.2.1. at all times that it has sufficient staff and resources as may be necessary to ensure the proper and timely performance by the Operator of all its obligations in terms of this agreement; and
  - 11.2.2. that all its employees working on the operation and maintenance of the works and the supply of water services within the concession area are properly trained and qualified, competent and experienced to carry out their respective responsibilities.
- 11.3. The Operator shall furthermore adhere to and implement the provisions of clauses 26, 51 and 52 of the concession contract to the extent that those provisions apply to the Operator and will render all necessary assistance to the Concessionaire with its obligations under those provisions.
- 12. **CONSTRUCTION CONTRACTS**
  - 12.1. The Operator shall -
    - 12.1.1. from time to time notify the Concessionaire in writing of all construction work that may be required in respect of the works;
    - 12.1.2. be entitled, for, on behalf of and in the name of the Concessionaire, to prepare and issue requests for proposals and/or tender invitations to such third party/ies as the Operator may deem appropriate relating to any construction work that may be required in respect of the works;
    - 12.1.3. prepare a brief to such third party/ies selected by the Operator regarding the construction work required and request such third party/ies to furnish the Operator with a written proposal or tender in that regard;

This document has been prepared for the purposes of the **PPP IN INFRASTRUCTURE RESOURCE CENTER FOR CONTRACTS, LAWS AND REGULATIONS (PPIRC)** website. It is a sample document FOR REFERENCE PURPOSES ONLY and SHOULD NOT BE used as a "model".

The inclusion of any legal materials on the PPIRC website does not mean that they are in any way approved, endorsed or recommended by the World Bank Group or its affiliates. Legal advice should be sought to determine whether a particular legal document is appropriate for any given project, and how the specific terms of the document should be adapted to fit the circumstances of that project

- 12.1.4. appoint the selected contractor and conclude a construction agreement with such contractor, as agent for and in the name of the Concessionaire, provided that should it wish to appoint any person or entity other than [specific company] for such purposes, it shall do so only after having consulted with the Concessionaire. In this regard, the Concessionaire hereby irrevocably and unconditionally authorises and empowers the Operator to so act in its sole and absolute discretion as the Concessionaire's sole and exclusive representative and agent for, on behalf of and in the name of the Concessionaire and the Concessionaire hereby undertakes not to interfere in that regard; and
  - 12.1.5. act as sole representative and agent of the Concessionaire for all purposes relating to all construction contracts and, in such capacity, shall monitor all construction contracts for and on behalf of the Concessionaire. In this regard, the Concessionaire hereby irrevocably and unconditionally authorises and empowers the Operator to so act as its sole and exclusive representative and agent and to monitor and, if necessary, issue instructions under all construction contracts for, on behalf of and in the name of the Concessionaire and the Concessionaire hereby undertakes not to interfere in that regard; and
  - 12.1.6. generally advise the Concessionaire on any matter in relation to the Operator's duties in terms of this agreement.
  - 12.2. During the currency of any construction contract (including any defects liability period mentioned or referred to therein) the Operator shall allow the relevant contractor access to the works in order that the contractor may carry out and execute, in accordance with the provisions of the relevant construction contract, all work (including remedial work) in terms of the construction contract.
  - 12.3. During the currency of this agreement, the Concessionaire shall not appoint any contractor or conclude any construction or other agreement in relation to the works otherwise than on the basis set out herein.
13. **WATER SERVICES**
- 13.1. In undertaking the water services for and on behalf of the Concessionaire in terms of this agreement the Operator shall, as from the effective date and for the duration of this agreement thereafter, do so in accordance with the provisions of **Appendix 5**.

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

13.2. The Concessionaire shall, as from the effective date and for the duration of this agreement thereafter, adhere to the terms and conditions set out in **Appendix 5** and shall give effect thereto so as to enable the Operator to undertake the water services.

14. **OPERATION AND MAINTENANCE MANUALS**

14.1. Forthwith upon receipt thereof from Council in terms of the concession contract, the Concessionaire shall furnish the Operator with all operation and maintenance manuals relating to the works as at the effective date.

14.2. To the extent that the operation and maintenance manuals referred to in 14.1 are not complete and to the extent that the works are extended or modified during the currency of this agreement, the Operator shall -

14.2.1. carry out detailed studies so as to ascertain the requirements which are to be met to ensure compliance by it of its obligations in terms of this agreement; and

14.2.2. prepare supplementary operation and maintenance manuals, in written form, relating to the fulfilment of its obligations in terms of this agreement.

14.3. The operation and maintenance manuals to be prepared by the Operator in terms of 14.2 shall be furnished to the Concessionaire at the termination or expiration of this agreement.

15. **REMUNERATION AND PAYMENT**

15.1. In consideration for the Operator fulfilling its obligations under this agreement, the Concessionaire shall -

15.1.1. pay to the Operator the amounts; and

15.1.2. reimburse the Operator for the costs, expenses and other outgoings,

set out and/or referred to in **Appendix 6** hereto, calculated in accordance with the provisions of **Appendix 6**.

15.2. The Operator shall furnish the Concessionaire, on or before the last day of each month during the continuance of this agreement (or at such other times or intervals as the Operator may deem fit), with a statement setting out the amounts due and payable by the Concessionaire to the Operator for the period covered by such statement.

This document has been prepared for the purposes of the **PPP IN INFRASTRUCTURE RESOURCE CENTER FOR CONTRACTS, LAWS AND REGULATIONS (PPPIRC)** website. It is a sample document FOR REFERENCE PURPOSES ONLY and SHOULD NOT BE used as a "model".

The inclusion of any legal materials on the PPPIRC website does not mean that they are in any way approved, endorsed or recommended by the World Bank Group or its affiliates. Legal advice should be sought to determine whether a particular legal document is appropriate for any given project, and how the specific terms of the document should be adapted to fit the circumstances of that project

- 15.3. The Concessionaire shall pay the full amount set out in each statement furnished by the Operator to the Concessionaire in terms of 15.2 by no later than 5 (five) days after the date of each such statement.
- 15.4. All payments made by the Concessionaire to the Operator in terms of the provisions of this agreement shall be made in cash, without the cost of transfer of funds, without any deduction or set-off of whatsoever nature and otherwise in accordance with the Operator's written payment instructions from time to time.
- 15.5. Where any payment due to be made by the Concessionaire to the Operator in terms of this agreement falls due on a day which is not a business day (being any calendar day excluding Saturdays, Sundays and public holidays in [COUNTRY]), then such payments shall be made on the last business day preceding such due date.
- 15.6. Should the Concessionaire fail to make full or timeous payment of any amount due in terms of this agreement on the due date therefor, the Operator shall be entitled to charge and receive interest on the amount outstanding, calculated from the due date to the date on which the amount is actually paid in full, at a rate of 2% (two per centum) above the publicly quoted annual prime rate of interest from time to time levied by the Operator's commercial bankers (as certified by any manager of that bank, whose authority and/or appointment and/or qualifications need not be proved), which interest shall be calculated, capitalised and compounded monthly in arrear.
- 15.7. Should the Concessionaire be required by law to effect any payment in terms of this agreement subject to the reduction or withholding of any amount -
  - 15.7.1. the Concessionaire shall forthwith notify the Operator thereof in writing;
  - 15.7.2. the amount payable by the Concessionaire in respect of which such deduction or withholding is required to be made shall be increased to the extent necessary so as to ensure that, after the making of the relevant deduction or withholding (and taking into account any further deduction or withholding on the increased payment), the Operator receives and retains (free from any liability in respect of any such deduction or withholding) a net sum equal to the amount which it would have received and so retained had no such deduction or withholding been made or required to be made; and



This document has been prepared for the purposes of the **PPP IN INFRASTRUCTURE RESOURCE CENTER FOR CONTRACTS, LAWS AND REGULATIONS (PPPIRC)** website. It is a sample document FOR REFERENCE PURPOSES ONLY and SHOULD NOT BE used as a "model".

The inclusion of any legal materials on the PPPIRC website does not mean that they are in any way approved, endorsed or recommended by the World Bank Group or its affiliates. Legal advice should be sought to determine whether a particular legal document is appropriate for any given project, and how the specific terms of the document should be adapted to fit the circumstances of that project

- 15.7.3. the Concessionaire shall pay the full amount so required to be deducted or withheld to the relevant authority or other entity concerned within the time allowed for such payment under applicable law and shall deliver to the Operator, within 10 (ten) days after having made such payment, an original receipt (or a certified copy thereof) issued by such authority or other entity evidencing the payment to such authority or other entity of all amounts so required to be deducted or withheld.
- 15.8. If the Concessionaire disputes the amount reflected as being payable by it in terms of any statement furnished to it by the Operator, the Concessionaire shall deliver a notice in writing to the Operator containing details of such dispute and, within 10 (ten) days of receipt of such notice, the Operator shall furnish the Concessionaire with whatever documents and material may reasonably be required by the Concessionaire to verify the amount reflected as being payable by it in the relevant statement.
- 15.9. Failure of the Concessionaire to collect any amount owing to it by any third party (including, but not limited to, any or all of the consumers and/or any or all of its other customers) for any reason whatsoever will in no whatsoever affect or undermine the Concessionaire's payment obligations to the Operator in terms of this agreement.
- 15.10. If any amount is not paid on due date, then the Operator shall be entitled, without prejudice and in addition to any other right or remedy that it may have in terms of this agreement or at law, to immediately suspend the carrying out of its obligations in terms of this agreement pending payment of the unpaid amount in full.
- 15.11. The Concessionaire shall be responsible for any and all consequences of any suspension referred to in 15.10 and any subsequent resumption of work by the Operator (specifically including, but not limited to any and all costs, expenses, losses and/or damages incurred and/or suffered by the Operator in respect thereof or in relation thereto) and the Concessionaire hereby indemnifies and holds the Operator harmless against same.
- 15.12. All amounts and prices set out or referred to in this agreement are exclusive of value added tax payable in terms of the [legislation], as amended ("**SERVICE TAX**") and any other rates, taxes, duties, charges or imposts which may be or become payable thereon. Accordingly, either party which renders a service or supply to the other party in terms of this agreement shall be entitled to add SERVICE TAX, at the prescribed rate, to the value thereof and, should any SERVICE TAX or other rates, taxes, duties, charges or imposts be or become payable on any amount or price set out in this agreement, such amount or price shall ipso facto be



This document has been prepared for the purposes of the **PPP IN INFRASTRUCTURE RESOURCE CENTER FOR CONTRACTS, LAWS AND REGULATIONS (PPIRC)** website. It is a sample document FOR REFERENCE PURPOSES ONLY and SHOULD NOT BE used as a "model".

The inclusion of any legal materials on the PPIRC website does not mean that they are in any way approved, endorsed or recommended by the World Bank Group or its affiliates. Legal advice should be sought to determine whether a particular legal document is appropriate for any given project, and how the specific terms of the document should be adapted to fit the circumstances of that project

increased with an amount equal to the amount of such SERVICE TAX or such other rate, tax, duty, charge or impost payable in respect thereof.

16. **INSURANCE**

The Concessionaire shall effect and maintain for the duration of this agreement the insurances reflected on the insurance schedule annexed hereto marked **Appendix 7** in accordance with the terms and conditions reflected therein and such additional insurances as may be required from it under the concession contract and shall at all times ensure that the Operator is listed as a co-insured of each such insurance and each insurance policy so effected.

17. **LIABILITY**

17.1. The Operator shall only be liable to the Concessionaire for the fulfilment and discharge of all obligations and requirements for the supply of water services in accordance with this agreement.

17.2. The Operator shall take all reasonable precautions for the protection of life and property on or about or in any way connected with the whole or any part of the works and the supply of water services and shall indemnify and hold the Concessionaire harmless against all losses, claims, demands, proceedings, damages, costs, charges and expenses (including reasonable legal expenses on a full indemnity basis) of whatsoever nature arising out of its actions and/or omissions under this agreement in respect of injury to or death of any person or loss of or damage to any asset or any person or property accruing after the effective date but prior to the termination of this agreement unless such injury, death, loss or damage was caused by any act or omission of Council, the Concessionaire or any of their agents or representatives or other third parties for whom they are responsible in law, to the extent that the Operator is able to recover any such amount from the insurance cover referred to in 16.

17.3. Should it prove impossible as a result of intervention by third parties, to effect extensions of the supply of water services, the Operator shall notify the Concessionaire sufficiently in advance to prepare for adjustments to any of the plans to be implemented by the Concessionaire in terms of the concession contract and the Operator shall be relieved of all or a part of such obligations in regard to levels of service that would have been incumbent upon it pursuant to this agreement.

17.4. As from the effective date the Operator shall be responsible -

17.4.1. to the Concessionaire and third parties for the proper administration and protection of all assets and all risks and obligations, pertaining to the operation, administration,

This document has been prepared for the purposes of the **PPP IN INFRASTRUCTURE RESOURCE CENTER FOR CONTRACTS, LAWS AND REGULATIONS (PPIRC)** website. It is a sample document FOR REFERENCE PURPOSES ONLY and SHOULD NOT BE used as a "model".

The inclusion of any legal materials on the PPIRC website does not mean that they are in any way approved, endorsed or recommended by the World Bank Group or its affiliates. Legal advice should be sought to determine whether a particular legal document is appropriate for any given project, and how the specific terms of the document should be adapted to fit the circumstances of that project

maintenance and construction of the works and the supply or failure to supply water services;

17.4.2. for the payment of any damages, claims and/or losses due to any act or omission of the Operator and shall indemnify and hold the Concessionaire harmless for all losses, damages, penalties, legal fees and costs and expert's fees and costs due to a breach of this undertaking, to the extent that the Operator is able to recover any such amount from the insurance cover referred to in 16.

17.5. The Concessionaire shall give the Operator notice of any claim envisaged in 17.4 that comes to its notice. The Operator shall be obliged to intervene and take over the defence of any such claim and shall assume responsibility in respect of any action or right that is instituted against the Concessionaire in respect of any acts or omissions of the Operator in respect of the supply or failure to supply water services and/or the works that may occur with effect from the effective date (including, but not limited to, the responsibility and sole ability to determine whether to make any admission and/or settle any claim made). The Concessionaire shall co-operate with the Operator in every reasonable way to facilitate the defence by the Operator of any such claim and all negotiations for the settlement or compromise thereof, on the basis that the Operator shall control any litigation and that the Concessionaire shall not settle any such litigation without the Operator's consent. Such co-operation shall, if reasonably necessary, include the right of the Operator to institute proceedings or to counterclaim in the name of the Concessionaire, provided that the Operator shall first furnish to the Concessionaire, and maintain, adequate security for all damages, costs or expenses of whatever nature which may thereby be incurred by the Concessionaire.

17.6. The Concessionaire hereby indemnifies and holds the Operator harmless against all losses, claims, demands, proceedings, damages, costs, charges and expenses (including reasonable legal expenses on a full indemnity basis) of whatsoever nature arising out of the Concessionaire's actions and/or omissions under this agreement and/or the concession contract and those of its agents or representatives or other third parties for whom the Concessionaire is responsible in law. The provisions of this clause 17.6 shall survive termination of this agreement.

## 18. SANCTIONS

18.1. If, as a result of a breach of the provisions of this agreement by the Operator, the Concessionaire becomes liable to pay a penalty to Council in terms of the provisions of [clauses ] of the concession contract, the

This document has been prepared for the purposes of the **PPP IN INFRASTRUCTURE RESOURCE CENTER FOR CONTRACTS, LAWS AND REGULATIONS (PPIRC)** website. It is a sample document FOR REFERENCE PURPOSES ONLY and SHOULD NOT BE used as a "model".

The inclusion of any legal materials on the PPIRC website does not mean that they are in any way approved, endorsed or recommended by the World Bank Group or its affiliates. Legal advice should be sought to determine whether a particular legal document is appropriate for any given project, and how the specific terms of the document should be adapted to fit the circumstances of that project

Operator shall pay to the Concessionaire an amount equal to such penalty on the date that the Concessionaire becomes obliged to pay same to Council.

18.2. The provisions of 18.1 shall not apply where the breach referred to in 18.1 was occasioned by or partly occasioned by any act or omission of the Concessionaire or any of its directors, shareholders, employees, agents, sub-contractors or other third parties for whom it is legally responsible.

19. **LIMITATION OF LIABILITY**

Under no circumstances whatsoever, including as a result of either party's negligence (including gross negligence) acts or omissions or those of either party's servants, agents or contractors or other persons for whom in law it may be liable, and notwithstanding anything to the contrary in this agreement shall -

19.1. the Operator or its servants be liable for any indirect, special or consequential loss or damage of any kind whatsoever or howsoever caused (whether arising under contract, tort or otherwise and whether the loss was actually foreseen or reasonably foreseeable), sustained by the other party, including but not limited to any loss of profits, loss of operation time, interruption or loss of information and/or loss of contracts; and

19.2. the total liability of the Operator exceed an amount equal to the amount actually paid to and received by it from the Concessionaire in terms of 15 during the preceding 12 (twelve) month period less the total of all operating costs incurred by the Operator during such preceding 12 (twelve) month period.

20. **STUDIES, PLANS AND REPORTS**

The Operator shall assist the Concessionaire in preparing the studies, plans and reports to be provided by the Concessionaire to Council pursuant to [clause ] of the concession contract and shall furnish the Concessionaire with all relevant information required by the Concessionaire in relation to its activities in terms of this agreement in that regard.

21. **INSPECTION**

The Operator shall, at all times -

21.1. allow -

21.1.1. the Concessionaire, all employees, representatives and agents of the Concessionaire and any other person authorised by the Concessionaire; and

This document has been prepared for the purposes of the **PPP IN INFRASTRUCTURE RESOURCE CENTER FOR CONTRACTS, LAWS AND REGULATIONS (PPPIRC)** website. It is a sample document FOR REFERENCE PURPOSES ONLY and SHOULD NOT BE used as a "model".

The inclusion of any legal materials on the PPPIRC website does not mean that they are in any way approved, endorsed or recommended by the World Bank Group or its affiliates. Legal advice should be sought to determine whether a particular legal document is appropriate for any given project, and how the specific terms of the document should be adapted to fit the circumstances of that project

21.1.2. the relevant contractor with whom a construction contract has been concluded, all employees, representatives and agents of such contractor and any other person authorised by such contractor; and

21.1.3. any duly authorised representative of Council,

reasonable access to the works and to all workshops and places where work is being prepared or where materials, manufactured articles and machinery are being obtained for the works; and

21.2. afford any necessary facility for and assistance in obtaining the right to such access.

## 22. **CONFIDENTIALITY AND PUBLICITY**

22.1. Having regard to the fact that the parties may from time to time disclose some or all of their confidential information to each other, each party hereby irrevocably agrees and undertakes, in favour of the other party, and in order to protect each party's proprietary interests in and to its confidential information-

22.1.1. not, during the existence of this agreement or at any time thereafter, to use, divulge or disclose, directly or indirectly to any person or entity whatsoever, in any form or manner whatsoever, either directly or indirectly, the confidential information of the other party (or any portion thereof) that may have been disclosed or communicated to or acquired by the recipient;

22.1.2. not, during the existence of this agreement or at any time thereafter, to use, exploit, permit the use of or in any other manner whatsoever apply the confidential information of the other party (or any portion thereof) for its own benefit or for any other purpose whatsoever other than for the purpose for which it was disclosed and otherwise than in accordance with the provisions of this agreement; and

22.1.3. during the existence of this agreement and at all times thereafter, to maintain in secrecy all confidential information of the other party which may have been disclosed or communicated to or acquired by the recipient.

22.2. Notwithstanding the provisions of 22.1, either party shall be entitled to disclose the confidential information of the other party to such of its shareholders, directors, employees, advisors and/or agents ("**associated**

This document has been prepared for the purposes of the **PPP IN INFRASTRUCTURE RESOURCE CENTER FOR CONTRACTS, LAWS AND REGULATIONS (PPIRC)** website. It is a sample document FOR REFERENCE PURPOSES ONLY and SHOULD NOT BE used as a "model".

The inclusion of any legal materials on the PPIRC website does not mean that they are in any way approved, endorsed or recommended by the World Bank Group or its affiliates. Legal advice should be sought to determine whether a particular legal document is appropriate for any given project, and how the specific terms of the document should be adapted to fit the circumstances of that project

**parties**") as may be necessary for the purpose for which that confidential information was disclosed to it or for purposes of operating and executing the concession, provided that the relevant party disclosing same shall take whatever steps are necessary to ensure that such associated parties agree to abide by the terms of this clause 22 and each conclude a separate confidentiality and non-disclosure agreement mutatis mutandis on the terms and conditions set out in this clause 22 in order to prevent the unauthorised disclosure of the confidential information to third parties.

22.3. Each party hereby -

22.3.1. acknowledges that the unauthorised disclosure of the confidential information of the other party (or any portion thereof) to a third party may cause irreparable loss, harm and damage to such other party and accordingly hereby indemnifies and holds the other party harmless against any loss, action, expense, claim, harm or damage, of whatever nature, suffered or sustained by such other party pursuant to a breach by the firstmentioned party or any associated party of the firstmentioned party of the provisions of this agreement; and

22.3.2. undertakes to take all such steps as may be necessary to prevent the confidential information of the other party (or any portion thereof) falling into the hands of unauthorised third parties; and

22.3.3. accepts responsibility for all acts and omissions of its associated parties in relation to the confidential information of the other party.

22.4. Any and all documentation or records relating to the confidential information of either party which comes into the possession of the other party or any one or more of its associated parties during the existence of this agreement or at any time thereafter -

22.4.1. shall be deemed to form part of the confidential information of the firstmentioned party;

22.4.2. shall be deemed to be the property of the firstmentioned party;

22.4.3. shall not be copied, reproduced, published or circulated by the recipient or any associated party of the recipient, save as may be required by the recipient to fulfil its obligations in



This document has been prepared for the purposes of the **PPP IN INFRASTRUCTURE RESOURCE CENTER FOR CONTRACTS, LAWS AND REGULATIONS (PPPIRC)** website. It is a sample document FOR REFERENCE PURPOSES ONLY and SHOULD NOT BE used as a "model".

The inclusion of any legal materials on the PPPIRC website does not mean that they are in any way approved, endorsed or recommended by the World Bank Group or its affiliates. Legal advice should be sought to determine whether a particular legal document is appropriate for any given project, and how the specific terms of the document should be adapted to fit the circumstances of that project

- terms of this agreement mutatis mutandis on the basis set out in 22.2;
- 22.4.4. shall be surrendered to the firstmentioned party on demand on termination of this agreement and neither the recipient nor any of its associated parties shall retain any copies or précis thereof or extracts therefrom, save as may be required by the recipient to fulfil its obligations in terms of this agreement or to conduct its business mutatis mutandis on the basis set out in 22.2.
- 22.5. Any and all information which is acquired by one party pursuant to the implementation of this agreement, in whatever form or from whatsoever source (specifically including, but not limited to, information verbally communicated), shall be deemed to be confidential information and shall be subject to the provisions contained herein.
- 22.6. The above undertakings relating to confidentiality and non-disclosure shall not apply to any information which -
- 22.6.1. is disclosed to Council in accordance with the concession contract or to any other competent authority and/or is disclosed by Council in accordance with the concession contract;
- 22.6.2. is disclosed to a contractor or to any other sub-contractor of the Concessionaire or to any sub-contractor of a contractor;
- 22.6.3. a party can demonstrate is already in the public domain or becomes available to the public otherwise than by its default or the default of any of its associated parties;
- 22.6.4. a party can demonstrate to have been in its possession at the time of its disclosure hereunder without an obligation of confidence, as proved by such party's written records;
- 22.6.5. a party can demonstrate was independently acquired or developed in circumstances that do not amount to a breach of the provisions of this agreement by it or by any of its associated parties, as proved by such party's written records;
- 22.6.6. a party can demonstrate was acquired by it independently from a third party acting in good faith which has not previously obtained the confidential information directly or indirectly under a confidentiality obligation from the other party, as proved by such party's written records;



This document has been prepared for the purposes of the **PPP IN INFRASTRUCTURE RESOURCE CENTER FOR CONTRACTS, LAWS AND REGULATIONS (PPPIRC)** website. It is a sample document FOR REFERENCE PURPOSES ONLY and SHOULD NOT BE used as a "model".

The inclusion of any legal materials on the PPPIRC website does not mean that they are in any way approved, endorsed or recommended by the World Bank Group or its affiliates. Legal advice should be sought to determine whether a particular legal document is appropriate for any given project, and how the specific terms of the document should be adapted to fit the circumstances of that project

- 22.6.7. is disclosed by a party to any competent authority or to satisfy an order of a court of competent jurisdiction or to comply with the provisions of the regulatory provisions or of any law or regulation in force from time to time, provided that in such circumstances the party about to disclose any confidential information of another party shall give the other party sufficient prior written notice of such request so as to enable such other party to take whatever steps it deems necessary to protect its interests in this regard;
- 22.6.8. a party uses or discloses in order to pursue any legal remedy available to it;
- 22.6.9. a party discloses to a person or entity who is negotiating with such party for the acquisition of an interest in such party, provided that the person or entity to whom any disclosure is made shall first have undertaken in writing not to disclose such information to another person or entity and to use it only for the purpose of evaluating its decision; or
- 22.6.10. a party discloses to its shareholders to enable such shareholders to consider the value and prospects of their shareholdings; or
- 22.6.11. a party discloses to the lenders,
- provided that the party about to disclose any confidential information of the other party shall only disclose that portion of the confidential information of the other party which it is legally required to disclose and shall use all reasonable endeavours to protect the confidentiality of such information to the widest extent possible in the circumstances.
- 22.7. In order to protect the confidential information of the parties, each party hereby undertakes -
- 22.7.1. to claim and enforce similar confidentiality undertakings from all its associated parties to whom the confidential information of another party (or any portion thereof) has been disclosed; and
- 22.7.2. to preclude other persons having access to the confidential information of the other parties and shall only allow the aforesaid category of persons to come into contact with such confidential information.

This document has been prepared for the purposes of the **PPP IN INFRASTRUCTURE RESOURCE CENTER FOR CONTRACTS, LAWS AND REGULATIONS (PPIRC)** website. It is a sample document FOR REFERENCE PURPOSES ONLY and SHOULD NOT BE used as a "model".

The inclusion of any legal materials on the PPIRC website does not mean that they are in any way approved, endorsed or recommended by the World Bank Group or its affiliates. Legal advice should be sought to determine whether a particular legal document is appropriate for any given project, and how the specific terms of the document should be adapted to fit the circumstances of that project

22.8. Save as may be required by law or any regulatory authority, no announcement or publicity of content of this agreement or the transactions embodied in this agreement shall be made or issued by or on behalf of any party without the prior written agreement of both parties.

22.9. For purposes of this clause 22, "**confidential information**" of a party means all technical, trade, commercial, financial and management information and secrets of that party, including (but is not limited to) any information in respect of formulae, know-how, statistics, processes, systems, business methods and techniques used by that party in the conduct of its business; any information contained in any business or other model, network and/or architecture design, all information contained in any document prepared by that party in connection with the concession; all computer software, software concepts, specifications and internal control systems of that party; all trade secrets, inventions, technical data, user or consumer data, research and development data, profiles, designs, formulations and all other information belonging to or in the possession of that party and used by it in its business operations; knowledge of details and particulars in regards to that party's suppliers, customers and business associates; that party's methods of conducting business, management, costs and related matters; any other information which relates to the business of that party which is not readily available in the normal course of business to competitors of that party and which may come to the knowledge of the recipient, and all other information, documentation, material or ideas of that party, in whatever form and contained on whatever media, whether subject to or protected by common law or statutory laws relating to copyright, patent, trade mark (registered or unregistered) or otherwise.

23. **DATA OWNERSHIP**

23.1. All -

23.1.1. data and information pertaining to the concession, the works and/or the supply of the water services;

23.1.2. documents prepared by the Operator in the execution of its obligations in terms of this agreement and the entire contents thereof; and

23.1.3. all copyright and other intellectual property rights in, to and in respect of thereof,

shall vest in and remain the exclusive property of the Operator.

This document has been prepared for the purposes of the **PPP IN INFRASTRUCTURE RESOURCE CENTER FOR CONTRACTS, LAWS AND REGULATIONS (PPIRC)** website. It is a sample document FOR REFERENCE PURPOSES ONLY and SHOULD NOT BE used as a "model".

The inclusion of any legal materials on the PPIRC website does not mean that they are in any way approved, endorsed or recommended by the World Bank Group or its affiliates. Legal advice should be sought to determine whether a particular legal document is appropriate for any given project, and how the specific terms of the document should be adapted to fit the circumstances of that project

23.2. On termination of this agreement for whatsoever reason, the Operator will grant to the Concessionaire a royalty free, non-exclusive, non-transferable licence to use all such data, information and documents of which it is the proprietor and which is required by the Concessionaire to continue with the supply of the water services and/or the operation and maintenance of the works in terms of and pursuant to the concession contract.

23.3. The Concessionaire shall furthermore be entitled, on termination of the concession contract, to grant to Council a similar royalty free, non-exclusive, non-transferrable licence to use such portions of such data, information and documents as may be required in terms of clause 68 of the concession contract.

24. **INTELLECTUAL PROPERTY**

24.1. The Concessionaire hereby -

24.1.1. authorises and licenses or (where applicable), will ensure that the relevant third party intellectual property owner will have authorised and licensed and will continue to so authorise and license the Operator to use and to continue to use and/or apply as from the effective date, for the supply of water services and/or the operation and maintenance of the works pursuant to this agreement, any and all intellectual property rights of third parties used and/or applied by Council and/or the Concessionaire in respect of the supply of water services and/or the operation and maintenance of the existing assets as at the effective date; and

24.1.2. indemnifies the Operator and undertakes to keep the Operator fully and effectively indemnified against all claims, demands, costs, expenses and liabilities of whatsoever nature arising out of or in connection with the supply of water services and/or the operation and maintenance of the existing assets by the Operator as from the effective date in respect of any intellectual property rights of third parties referred to in 24.1.1.

24.2. The Operator hereby indemnifies the Concessionaire and undertakes to keep the Concessionaire fully and effectively indemnified against all claims, demands, costs, expenses and liabilities of whatsoever nature arising out of or in connection with the supply of water services and/or the operation and maintenance of the works by the Operator as from the effective date in respect of any intellectual property rights of third parties, but specifically excluding the intellectual property rights referred to in 24.1.1.

This document has been prepared for the purposes of the  
**PPP IN INFRASTRUCTURE RESOURCE CENTER FOR CONTRACTS, LAWS AND REGULATIONS (PPPIRC)**  
website. It is a sample document FOR REFERENCE PURPOSES ONLY and SHOULD NOT BE used as a "model".

The inclusion of any legal materials on the PPPIRC website does not mean that they are in any way approved, endorsed or recommended by the World Bank Group or its affiliates. Legal advice should be sought to determine whether a particular legal document is appropriate for any given project, and how the specific terms of the document should be adapted to fit the circumstances of that project

- 24.3. The indemnities set out in 24.1 and 24.2 shall extend to all costs and expenses (including reasonable legal expenses on a full indemnity basis) incurred by the party who has been indemnified ("**the indemnified party**") as a result of any such claims.
- 24.4. The indemnified party shall give to the indemnitor prompt notice in writing of any claim being made or action threatened or brought against it and shall permit the indemnitor (at the indemnitor's expense) to conduct any litigation which may ensue and all negotiations for a settlement of any claim, giving the indemnitor all reasonable assistance (at the indemnitor's expense) and the indemnified party agrees not to make any admission which might be prejudicial thereto.
- 24.5. The conduct by the indemnitor of any such litigation or negotiations shall be conditional upon its taking over such conduct within a reasonable time after being notified of the claim in question.
- 24.6. If any claim of infringement by a third party of intellectual property rights as aforesaid prevents the Operator from fully conducting its business or any part thereof or receiving the benefit of any of the services performed by it, the Operator shall forthwith, to extent possible, replace or modify same so that it becomes non-infringing or, where possible, obtain a licence to use the relevant third party's intellectual property right concerned against payment of a reasonable licence fee and shall -
- 24.6.1. compensate the Concessionaire for the amount of any direct losses and/or damages sustained or expenses incurred by the Concessionaire during such replacement or modification in circumstances envisaged in 24.2; or
- 24.6.2. be entitled to be compensated by the Concessionaire for the amount expended by it in doing so and the amount of any direct losses and/or damages sustained by it in any other circumstances.
- 24.7. To the extent that it is not possible or practical for the Operator to replace or modify the works and/or its operations or to obtain a licence as envisaged in 24.6, the Concessionaire shall forthwith notify Council and the lenders as envisaged in clause 48.7 of the concession contract and the provisions of the said clause 48.7 will apply mutatis mutandis to this agreement.

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

24.8. Any replacement or modification envisaged in 24.6 will be carried out reasonably promptly so as to minimise any interruption in the Operator's business operations.

25. **TERMINATION BY CONCESSIONAIRE**

25.1. Subject to the remaining provisions of this clause 25, the Concessionaire shall only be entitled to cancel and terminate this agreement on written notice to the Operator if any of the following events should occur -

25.1.1. the Operator breaches a material provision of this agreement and fails to remedy same within 60 (sixty) calendar days after receipt of a written notice from the Concessionaire requiring such breach to be remedied; or

25.1.2. any judgement is granted (which judgement is not subject to appeal or review or, if it is, such appeal or review, as the case may be, is not diligently pursued) for the winding up or judicial management of the Operator, save for any voluntary liquidation for the purposes of reconstruction or amalgamation; or

25.1.3. the members of the Operator adopt a resolution for the voluntary winding up or judicial management of the Operator, save for a voluntary liquidation for the purposes of reconstruction or amalgamation; or

25.1.4. the Operator, for reasons solely attributable to an act or omission of itself, abandons or relinquishes the supply of water services to consumers to such an extent that there is significant widespread danger to the health of the public, which will be presumed to be the case where the Operator fails to supply water services for a continuous period of 5 (five) days or 15 (fifteen) discontinuous days per calendar year; or

25.1.5. the Operator consistently breaches a material provision of the conditions of the supply of water services and consumer rules to the extent that there is significant widespread danger to the health of the public in the concession area and in such a manner as to reasonably justify Council in holding that the Concessionaire's resultant conduct under the concession contract is inconsistent with its intention or ability to carry out the terms and conditions of the concession contract; or



This document has been prepared for the purposes of the **PPP IN INFRASTRUCTURE RESOURCE CENTER FOR CONTRACTS, LAWS AND REGULATIONS (PPPIRC)** website. It is a sample document FOR REFERENCE PURPOSES ONLY and SHOULD NOT BE used as a "model".

The inclusion of any legal materials on the PPPIRC website does not mean that they are in any way approved, endorsed or recommended by the World Bank Group or its affiliates. Legal advice should be sought to determine whether a particular legal document is appropriate for any given project, and how the specific terms of the document should be adapted to fit the circumstances of that project

25.1.6. the Operator wilfully conceals material information which it is obliged to supply to the Concessionaire, where concealment of such information will result in Council to be in breach of its statutory obligations in terms of the regulatory provisions and suffering material damage or loss.

25.2. Prior to the Concessionaire exercising any right to cancel and terminate this agreement, it shall deliver a written notice to Council, each lender and the Operator notifying them of the breach giving rise to such right and requesting the Operator to remedy the breach in question within a period of 60 (sixty) days of the date of receipt of such notice, or such longer period stipulated in the notice if the breach in question cannot reasonably be remedied by the Operator within a 60 (sixty) day period of the date of receipt of such notice, provided that no such notice shall be required where the breach complained of is one contemplated in 25.1.2 or 25.1.4 in circumstances where the Operator fails to supply any water services for a continuous period of 5 (five) days.

25.3. Should -

25.3.1. the Operator fail to remedy the breach in question within the period referred to in the rectification notice referred to in 25.2; or

25.3.2. no notice be required in terms of 25.2,

then the Concessionaire shall be entitled to cancel and terminate this agreement forthwith on written notice to the Operator, Council and each lender.

26. **TERMINATION BY OPERATOR**

Should the Concessionaire breach a material provision of this agreement and should -

26.1. such breach be incapable of being remedied; or

26.2. such breach be capable of being remedied and should the Concessionaire thereafter fail and/or refuse to remedy the breach in question within 60 (sixty) days after receipt if a written notice from the Operator requiring such breach to be remedied,

then, without prejudice to the other rights or remedies of the Operator in terms hereof or at law, the Operator shall be entitled to cancel and terminate this agreement forthwith on written notice to such effect to the Concessionaire, Council and each lender.



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

27. **FORCE MAJEURE**

27.1. Save as may be otherwise specifically provided for in this agreement, no party shall be liable for any failure to fulfil its obligations hereunder where such failure is caused by circumstances or an event beyond the reasonable control of such party which, despite the exercise of diligent efforts, such party was unable to prevent, limit or minimize, including (without limitation) any act of God, drought, war (whether declared or not), military operations, insurrection or civil disorder, riot, strikes (except strikes by or affecting employees of the Concessionaire or the Operator as a result of any unlawful act or omission of the Concessionaire or the Operator, as the case may be, save for any such strike related to a national strike or protest action), civil commotion, invasion, armed conflict, hostile act of foreign enemy, act of terrorism, sabotage, radiation, plague or epidemic, chemical contamination, a continuing emergency situation, fire, lightning, explosion or any other such cause which -

27.1.1. causes material physical damage or destruction to all or a substantial part of the works or other concession assets; or

27.1.2. materially delays the scheduled time of completion of all or any water services to be rendered or works to be executed by the Operator; or

27.1.3. materially interrupts the full and regular supply of water services by the Operator in terms of this agreement,

and which would qualify as an "**event of force majeure**" in terms of the concession contract (each an "**event of force majeure**").

27.2. The party affected by an event of force majeure shall promptly notify the other in writing of the occurrence of an event of force majeure and the estimated extent and duration of such party's inability to perform its obligations as envisaged in 27.1.

27.3. Upon the cessation of circumstances leading to the event of force majeure, the party affected by such event of force majeure shall promptly notify the other of such cessation.

27.4. In the event of any delay caused by an event of force majeure, the term of this agreement as set out in 5.1 shall automatically be extended by a time period equal to the time period with which the contract term of the concession contract has been extended in circumstances where such an event of force majeure also qualifies as "an event of force majeure" in terms of the concession contract.

This document has been prepared for the purposes of the **PPP IN INFRASTRUCTURE RESOURCE CENTER FOR CONTRACTS, LAWS AND REGULATIONS (PPPIRC)** website. It is a sample document FOR REFERENCE PURPOSES ONLY and SHOULD NOT BE used as a "model".

The inclusion of any legal materials on the PPPIRC website does not mean that they are in any way approved, endorsed or recommended by the World Bank Group or its affiliates. Legal advice should be sought to determine whether a particular legal document is appropriate for any given project, and how the specific terms of the document should be adapted to fit the circumstances of that project

- 27.5. To the extent that the consequences of an event of force majeure are covered by the insurance policies referred to in 16, the Operator shall assist the Concessionaire to make the appropriate claims thereunder and the Concessionaire shall, subject to the provisions of the concession contract, apply such insurance proceeds to off-set the impact and effect of the event of force majeure.
- 27.6. If, as a result of an event of force majeure, the performance of a party's obligations under this agreement is only partially affected, such party shall nevertheless remain liable for the performance of those obligations not affected by the event or force majeure.
- 27.7. If an event of force majeure continues for 90 (ninety) or less consecutive days from the date of any notification thereof in terms of 27.2, any and all obligations outstanding shall be fulfilled by the party affected by the event of force majeure as soon as possible after cessation of the event of force majeure, save to the extent that such fulfilment is no longer practically possible or is not required by the other party.
- 27.8. If an event of force majeure continues for more than 90 (ninety) consecutive days from the date of any notification thereof in terms of 27.2 and notice of cessation in terms of 27.3 has not been given and as a result of such event of force majeure, the affected party cannot perform its obligations in whole or in part during that period, the Operator shall be entitled to terminate this agreement by written notice to such effect to the Concessionaire.
28. **EFFECT OF TERMINATION**  
On expiration or termination of this agreement for whatsoever reason -
- 28.1. all amounts due to the Operator under or in terms of this agreement (including, but not limited to, the full demobilisation and other similar costs and expenses of and/or incurred by the Operator in winding down its operations) shall forthwith be payable and the Concessionaire shall forthwith effect payment thereof to the Operator;
- 28.2. the Operator shall, against payment as envisaged in 28.1, deliver or redeliver, as the case may be, to the Concessionaire all concession assets and further equipment, materials, chemicals and consumables in the Operator's possession at such time;
- 28.3. all the records, plans, specifications, engineering documents, operating procedures, utility location plans, record maps, licences, permits and contracts associated with or connected to the works and the supply of

This document has been prepared for the purposes of the **PPP IN INFRASTRUCTURE RESOURCE CENTER FOR CONTRACTS, LAWS AND REGULATIONS (PPIRC)** website. It is a sample document FOR REFERENCE PURPOSES ONLY and SHOULD NOT BE used as a "model".

The inclusion of any legal materials on the PPIRC website does not mean that they are in any way approved, endorsed or recommended by the World Bank Group or its affiliates. Legal advice should be sought to determine whether a particular legal document is appropriate for any given project, and how the specific terms of the document should be adapted to fit the circumstances of that project

water services in the possession of the Operator but belonging to the Concessionaire shall be handed over to the Concessionaire.

SAMPLE

This document has been prepared for the purposes of the  
**PPP IN INFRASTRUCTURE RESOURCE CENTER FOR CONTRACTS, LAWS AND REGULATIONS (PPPIRC)**  
website. It is a sample document FOR REFERENCE PURPOSES ONLY and SHOULD NOT BE used as a "model".

The inclusion of any legal materials on the PPPIRC website does not mean that they are in any way approved, endorsed or recommended by the World Bank Group or its affiliates. Legal advice should be sought to determine whether a particular legal document is appropriate for any given project, and how the specific terms of the document should be adapted to fit the circumstances of that project

29. **ARBITRATION**

29.1. Save in respect of those provisions of this agreement which provide for their own remedies which would be incompatible with arbitration, a dispute which arises -

29.1.1. the interpretation of; or

29.1.2. the carrying into effect of; or

29.1.3. any of the parties' rights and obligations arising from; or

29.1.4. the termination or purported termination of or arising from the termination of; or

29.1.5. the rectification or proposed rectification of,

this agreement, or out of or pursuant to this agreement or which relates in any way to any matter affecting the interests of the parties in terms of this agreement or on any matter which in terms of this agreement requires agreement by the parties (other than where an interdict is sought or urgent relief may be obtained from a court of competent jurisdiction), shall be submitted at the instance of either party to and be decided by arbitration.

29.2. The arbitration shall be in English and be held -

29.2.1. with only the legal and other representatives of the parties to the dispute, the witnesses (both expert and otherwise) to be called during the arbitration hearing, the parties themselves and, if so required by the lenders, the lenders and their legal and other representatives and the arbitrator present thereat and the arbitrator shall be entitled to permit a translator, a stenographer and like officials to attend the arbitration hearing;

29.2.2. in [LOCATION],

and it is the intention that the arbitration shall, where possible, be held and concluded in 21 (twenty one) working days after it has been demanded. The parties shall use their best endeavours to procure the expeditious completion of the arbitration.

This document has been prepared for the purposes of the **PPP IN INFRASTRUCTURE RESOURCE CENTER FOR CONTRACTS, LAWS AND REGULATIONS (PPIRC)** website. It is a sample document FOR REFERENCE PURPOSES ONLY and SHOULD NOT BE used as a "model".

The inclusion of any legal materials on the PPPIRC website does not mean that they are in any way approved, endorsed or recommended by the World Bank Group or its affiliates. Legal advice should be sought to determine whether a particular legal document is appropriate for any given project, and how the specific terms of the document should be adapted to fit the circumstances of that project

- 29.3. The arbitration shall be subject to the arbitration legislation for the time being in force in the [COUNTRY] and the UNCITRAL Rules shall apply to such proceedings.
- 29.4. The arbitrator shall be an impartial advocate or attorney practising in [COUNTRY] of not less than 15 (fifteen) years' standing appointed by the parties or, failing agreement by the parties within 7 (seven) days after the arbitration has been demanded, at the request of either of the parties shall be nominated by the appointing authority which shall be the President for the time being of the Law Society of [COUNTRY]. If that person fails or refuses to make the nomination, either party may approach the [COUNTRY COURTS] to make such an appointment. To the extent necessary, the court is expressly empowered to do so.
- 29.5. The parties shall keep the evidence in the arbitration proceedings and any order made by any arbitrator confidential unless otherwise contemplated herein, save for the purpose of making such order an order of court.
- 29.6. The arbitrator shall be obliged to give his award in writing fully supported by reasons.
- 29.7. The provisions of this clause are severable from the rest of this agreement and shall remain in effect even if this agreement is terminated for any reason.
- 29.8. The arbitrator shall have the power to give default judgment if any party fails to make submissions on due date and/or fails to appear at the arbitration.
- 29.9. Save where otherwise provided in this agreement, no party shall be excused from the performance of its obligations under this agreement pending the outcome of the arbitration.
- 29.10. Notwithstanding anything to the contrary contained in this clause 29 -
  - 29.10.1. the lenders shall be entitled to participate in any arbitration proceeding (and for such purpose shall have full locus standi to do so) and, if the lenders do not participate, the parties shall keep the lenders fully informed of all proceedings;

This document has been prepared for the purposes of the  
**PPP IN INFRASTRUCTURE RESOURCE CENTER FOR CONTRACTS, LAWS AND REGULATIONS (PPIRC)**  
website. It is a sample document FOR REFERENCE PURPOSES ONLY and SHOULD NOT BE used as a "model".

The inclusion of any legal materials on the PPPIRC website does not mean that they are in any way approved, endorsed or recommended by the World Bank Group or its affiliates. Legal advice should be sought to determine whether a particular legal document is appropriate for any given project, and how the specific terms of the document should be adapted to fit the circumstances of that project

29.10.2. the parties shall keep Council fully informed of all proceedings..

### 30. **NOTICES**

30.1.1 All notices and other communications under this Agreement to any party to this Agreement shall be deemed to be duly given or made when given in writing and: -

30.1.1.1 when delivered in the case of personal delivery or post; or

30.1.1.2 when despatched in the case of telex (provided the relevant answer back is received); or

30.1.1.3 when received in the case of facsimile,

in each case to such party addressed to it at the address given below or at such address as such party may after the date of this agreement specify in writing for such purpose to the other parties to this agreement by notice in writing.

the Operatorl:

[            ]  
for the attention of        [    ]  
Fax:            [    ]

Concessionaire

[            ]  
for the attention of        [    ]  
Fax:            [    ]

30.2A written notice includes a notice by facsimile provided that a copy by way of confirmation is also delivered by personal delivery or post.

30.3A notice or other communication received on a non-working day or after business hours in the place of receipt shall be deemed to be served on the next following working day in such place.

### 31. **GENERAL**



This document has been prepared for the purposes of the  
**PPP IN INFRASTRUCTURE RESOURCE CENTER FOR CONTRACTS, LAWS AND REGULATIONS (PPIRC)**  
website. It is a sample document FOR REFERENCE PURPOSES ONLY and SHOULD NOT BE used as a "model".

The inclusion of any legal materials on the PPPIRC website does not mean that they are in any way approved, endorsed or recommended by the World Bank Group or its affiliates. Legal advice should be sought to determine whether a particular legal document is appropriate for any given project, and how the specific terms of the document should be adapted to fit the circumstances of that project

- 31.1. This agreement read with its appendices constitutes the sole record of the agreement between the parties in regard to the subject matter hereof.
  - 31.2. No party shall be bound by any representation, warranty, undertaking, promise or the like not recorded in this agreement.
  - 31.3. No addition to, variation or consensual cancellation of this agreement shall be of any force or effect unless done in writing and signed by or on behalf of all the parties.
  - 31.4. Any indulgence which any party may show to any other in terms of or pursuant to the provisions contained in this agreement shall not constitute a waiver of any of the rights of the party which granted such indulgence.
  - 31.5. This agreement shall be governed by and construed and interpreted in accordance with the laws of [COUNTRY].
32. **COSTS**  
Each party shall bear and pay its own costs of and incidental to the negotiating, drafting, preparing and implementing of this agreement and the transactions set out herein.