CONCESSION AGREEMENT
FOR WATER AND SANITATION SERVICES

[DATE ]

BETWEEN

[COUNCIL]

AND

[CONCESSIONAIRE]
THIS AGREEMENT is made on the [DATE]

BETWEEN

(1) [ ] (the "Council" which expression shall include successors and permitted assigns); and

(2) [ ] (registered number [ ]) whose registered office is at [ ] (the "Concessionaire" which expression shall include successors and permitted assigns).

WHEREAS:

The Council is responsible for water and wastewater services in [location].

The Council issued an RPF to select a Concessionaire to provide the water and wastewater services under a Concession in the Concession Area.

The Concessionaire submitted an offer in relation to the Concession and was selected by the Council.

The Parties will to record their agreement regarding the matters described above and do so in this Concession Agreement.

THE PARTIES AGREE AS FOLLOWS -

1. INTERPRETATION

The headings of the clauses in this Contract are for the purpose of convenience and reference only and shall not be used in the interpretation of nor modify nor amplify the terms of this Contract nor any clause hereof. Unless a contrary intention clearly appears -

1.1. words importing –

1.1.1. any one gender include the other two genders;

1.1.2. the singular include the plural and vice versa; and

1.1.3. natural persons include created entities (whether incorporated or unincorporated) and the state and vice versa;

1.2. the following terms shall have the meanings assigned to them hereunder and cognate expressions shall have corresponding meanings, namely -
1.2.1. "Affiliated Company" means in relation to a company a company which is for the time being a holding company of that company or a subsidiary of that company or a subsidiary of any holding company of which that company is a subsidiary or a company in which that company holds not less than 30% (thirty per centum) of the issued shared capital directly or indirectly;

1.2.2. "Basic Sanitation" means the minimum standard of Sanitation Services necessary for the safe and hygienic and adequate collection, removal, disposal or purification of domestic water-waste and sewage from households, including informal households as may be prescribed in terms of Regulatory Provisions;

1.2.3. "Basic Water Supply" means the minimum standard of Water Supply Services necessary for the reliable Supply of [25l (twenty five litres)] of water per capita per day (or such other quantity of water that may be prescribed in terms of Regulatory Provisions) to domestic households, including informal households, to support life and personal hygiene of such a quality as may be prescribed in terms of Regulatory Provisions;

1.2.4. "Bulk Water Supply Agreement" means the Bulk Water Supply Agreement to be concluded between the Council and Ministry of Environment containing terms in accordance with the applicable principles and assumptions reflected in the bulk Supply agreement framework schedule annexed hereto marked Annexure [ ];

1.2.5. “Charges” means the Charges agreed to between the Council and the Concessionaire in terms of this Contract in respect of the Supply of Water Services, as modified in terms hereof from time to time;

1.2.6. “Charge Schedule” means the Charge Schedule reflecting the Charges applicable in terms of the Contract from time to time, the first such Charge Schedule being annexed hereto marked [ ];

1.2.7. "Competent Authority" means collectively –

1.2.7.1. any Government, provincial or local government, any agency, authority, body or standard setting institution or other person or entity having jurisdiction under any law or Regulatory Provision or organ of state which supplies Potable Water or water intended to be converted to Potable Water and/or their successors in title or assigns; or

1.2.7.2. any person or entity appointed by any person or entity referred to in 1.2.7.1; or

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1 Appropriate where there is a bulk supply agreement(s) relevant to the supply of Water Services

- 3 –
1.2.7.3. any court of competent jurisdiction;

or, if the context is appropriate any one of them;

1.2.8. "Concession Assets" means collectively the Existing Assets and the New Assets subsequent to the Council making them available to the Concessionaire in terms of this Contract or, if the context is appropriate any one of them;

1.2.9. "Concession Area" means the area within the municipal boundaries of the Council including all Developed Areas, Expansion Areas and any New Areas which may be included therein from time to time in accordance with 8.2 or, if the context is appropriate any one of them. A map reflecting the Concession Area as at the Effective Date is annexed hereto marked [ ];

1.2.10. "Concession Fee" means the annual fee to be paid by the Concessionaire to the Council pursuant to the Concession Fee and Payment Schedule annexed hereto marked Annexure [ ];

1.2.11. "Concessionaire" means [ ];

1.2.12. "Concession" means the Concession for the construction, financing, design, upgrading, expansion, rehabilitation, operation, maintenance and management of the Supply of Water Services and the Works within the Concession Area as set out in this Contract;

1.2.13. "Consumer Installation" means collectively a pipeline, fitting or apparatus connected to a Service Connection Point and used by a Consumer to gain access to the Supply of Water Services (including any septic tank or other loose standing system used for such purposes but not connected to the Works) or, if the context is appropriate any one of them;

1.2.14. "Consumer Rules" means the Consumer Rules published by the Concessionaire from time to time, governing the Supply of Water Services;

1.2.15. "Consumer" means any end user within the Concession Area that is supplied with Water Services by the Concessionaire;

1.2.16. "Contract Term" means the period referred to in 9.3;

1.2.17. "Contract" means this agreement including the annexures and schedules annexed hereto;

1.2.18. "Control of the Concessionaire" means –
1.2.18.1. the beneficial ownership of the majority of the ordinary voting shares in the issued share capital of the Concessionaire; or

1.2.18.2. the beneficial ownership of the shares in the issued share capital of the Concessionaire entitling the beneficial owner thereof to exercise less than the majority of the votes attaching to all the issued shares of the Concessionaire, but where such voting power is sufficiently dominant relative to the spread of the shareholdings that it does constitute de facto Control of the Concessionaire; or

1.2.18.3. the right, through shareholding or otherwise, to control the composition of the board of directors of the Concessionaire and, without prejudice to the generality of the foregoing, the composition of such board shall be deemed to be so controlled if the person or entity holding the right may by the exercise of some power, directly or indirectly, appoint or remove the majority of the directors;

1.2.18.4. the right to control the management of the Concessionaire; or

1.2.18.5. the ability to exercise a material influence over the financial and business policies of the Concessionaire;

1.2.19. "Council" means [ ];

1.2.20. "2CPI" means the weighted average of the Consumer Price Index in respect of all areas and for all items as published by [    ] from the time to time, provided that if –

1.2.20.1. such index should cease to be published, or

1.2.20.2. the basis of the calculation of such index has changed and pursuant to such change one Party has notified the other that it is not satisfied therewith, or

1.2.20.3. the Parties agree that, due to a change in circumstances, the index is no longer representative of the general inflationary changes in [country], or (in circumstances where the Parties are unable to reach such agreement) where such fact is confirmed in writing by an independent actuary in [country] (who shall act as expert and not as arbitrator) appointed for such purpose by [relevant actuarial body], whose determination shall be final and binding upon the Parties.

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2 Weighted inflation index is often considered more appropriate than general index in these cases – can also modify an existing index to take certain other factors into account/ remove certain elements that are considered distorting factors if this is deemed appropriate
then, in any such circumstances, the Parties will use such official information or index as may be available and acceptable to them, or failing such availability or acceptance, an index determined in writing as fair and reasonable by a majority decision of a panel of 3 (three) independent actuaries in country] (who shall act as experts and not as arbitrators) appointed for such purpose by the President for the time being of [relevant actuarial body], whose determination shall be binding upon the Parties. Any determination made by the majority of such panel as to the date from which any revised index shall take effect and liability for the cost of determination of the index by the panel shall be binding upon the Parties;

1.2.21. "Developed Area" means collectively the Developed Areas within the Concession Area as at the Effective Date reflected in the maps annexed hereto marked Annexure [B1] or, if the context is appropriate any one of them;

1.2.22. "Ministry" means [ ] and/or its successor in title;

1.2.23. "Effective Financial Statements" means the audited financial statements of the Council in respect of the Supply of Water Services as at and for the 12 (twelve) month period ending on the Effective Date;

1.2.24. "Effective Date" means the later of –

1.2.24.1. 10h00 of the first day of the third calendar month following the month in which this Contract is signed by the Party signing last in time; or

1.2.24.2. 10h00 of the first day of the calendar month following the month in which the conditions precedent are fulfilled or waived in terms of 4,

or 10h00 of such other date as may be agreed between the Parties and the Lenders in writing;

1.2.25. "Equity" means the paid up share capital contributions and loan contributions of the Concessionaire’s shareholders to the Concessionaire;

1.2.26. "Emergency Situations" means collectively inter alia fires, floods, water pollution, droughts, operational emergencies and any other situations the magnitude of which may create danger to the health or safety of Consumers or affect the Supply of the Water Services as envisaged in this Contract and/or any other event which would qualify as such under the Bulk Water Supply Agreement or Regulatory Provisions or, if the context is appropriate any one of them;
1.2.27. "Event of Force Majeure" means an Event of Force Majeure as contemplated in 73,

1.2.28. "Existing Assets" means collectively the movable and immovable assets that constitute the Works owned by the Council associated with or connected to the Supply of Water Services within the Concession Area as at the Effective Date or, if the context is appropriate any one of them. The Existing Assets as at the signature date are reflected in the asset schedules annexed hereto marked [ ];

1.2.29. "Expansion Areas" means any area outside the Developed Areas but within the Concession Area, which by agreement between the Parties as envisaged in 8.2 is approved for the expansion of the Supply of Water Services pursuant to a Five Year Plan;

1.2.30. "Financial Base Case" means the financial/bankers base case model of the Concessionaire in respect of the Concession (as prepared by [ ] a copy of which will on the signature date be lodged with and will be retained in trust for the duration of the Contract Term by the Concessionaire’s auditors;

1.2.31. "Financial Closing" means the execution of –

1.2.31.1. the Financing Agreements and the fulfilment or waiver, as the case may be, of the suspensive conditions precedent to which the Financing Agreements may be subject following legal, financial and technical due diligence to the satisfaction of the Lenders and any necessary amendments to the Contract required by the Lenders; and

1.2.31.2. Equity subscription agreements representing binding commitments for the subscription of Equity in the Concessionaire by its shareholders in each case in a form satisfactory to the Concessionaire and the Lenders;

1.2.32. "Financing Agreement" means any agreement and/or document entered into by or on behalf of a Lender and the Concessionaire in connection with the financing or as the case may be the re-financing of the Concessionaire's obligations under the Contract (including but not limited to the provision of security in relation thereto);

1.2.33. "Five Year Plan" means the Five Year Plan to be delivered by the Concessionaire to the Council pursuant to clause 2 of the reporting schedule annexed hereto marked Annexure [J];

1.2.34. "Government" means the central government of [country];
1.2.35. "holding company" means a holding company as defined in [companies legislation];

1.2.36. "Industrial Effluent" means Sewage Effluent resulting from the Industrial Use of water within the Concession Area;

1.2.37. "Industrial Use" means the use of water for mining, manufacturing, generating electricity, land-based transport, construction or any other purpose not connected to the domestic use of water;

1.2.38. "Intellectual Property" means all patents, trademarks, registered designs, know-how, trade secrets, names, brands, logos, licence and distributorship agreements and copyright associated with or connected to the Works or the Supply of the Water Services as well as the underlying inventions relating to any patents in respect of the operation and maintenance of the Works;

1.2.39. "Lease Agreements" means collectively –

1.2.39.1. the Lease Agreement as amended from time to time in terms whereof the Concessionaire will lease from the Council all the Existing Assets of a movable nature as from the Effective Date annexed hereto marked Annexure B6; and

1.2.39.2. the Lease Agreement as amended from time to time in terms whereof the Concessionaire will lease from the Council all the Existing Assets of a immovable nature as from the Effective Date annexed hereto marked Annexure [B7],

or, if the context is appropriate, any one of them;

1.2.40. "Lender" means any entity who has undertaken to provide debt financing facilities to the Concessionaire in respect of the Concession as envisaged in the Financial Base Case (specifically excluding any provider of Equity, lease or other financing) and who has entered into a Financing Agreement with the Concessionaire or who becomes a Party to a Financing Agreement (whether by assignment, novation or otherwise) for such purpose, to the extent that the repayment obligations under which Financing Agreement have not been discharged;

1.2.41. "Liabilities" means any liability, whether actual or contingent, including without limitation to the generality of the foregoing, any claims or Liabilities as a result of any breach of Contract or any delict committed, and any liability arising from or associated with the Supply of Water Services and the Works;
1.2.42. "Material Adverse Governmental Action" means any action or omission of a Competent Authority after the signing date hereof of whatsoever nature, the effect of which is to discriminate against or has an adverse effect on the rights, interests and/or obligations of the Concessionaire and/or water service providers in general, and/or results in any actual or prospective adverse change in the Concessionaire's costs (including, but not limited to, income or other tax) or revenues or general economic position, including but not limited to –

1.2.42.1. the introduction, application or change of any law, regulation, by-law, ordinance, policy directive, licence, decree, order or other similar provision having the force of law; or

1.2.42.2. the failure to discharge any legally binding duty or obligation or to enforce any statutory right by any Competent Authority; and/or

1.2.42.3. any decision or judgement of a court of competent jurisdiction,

provided that there shall not be deemed to be a Material Adverse Governmental Action to the extent that such act or omission is of general application to all proprietary limited companies in [country];

1.2.43. "Minister" means [        ] and/or his successor in title responsible for Water Services;

1.2.44. "New Area" means any geographic area situated outside the Concession Area which may in the future be incorporated into it;

1.2.45. "New Assets" means collectively the movable and immovable assets acquired or constructed by the Concessionaire during the Contract Term both within and outside of the Concession Area pertaining to the Supply of Water Services or, if the context is appropriate any one of them;

1.2.46. "Operating Agreement" means the operating and maintenance agreement concluded between the Concessionaire and the Operator in accordance with the term sheet annexed hereto marked Annexure [    ], including any amendments thereto as approved by the Council and the Lenders from time to time;

1.2.47. "Operator" means [    ], a company duly incorporated in [    ] with registration number [    ];

1.2.48. "Operator Group " means the Operator, [    ] and [any subsidiaries of the Operator from time to time];

1.2.49. "Parties" means collectively the Council and the Concessionaire;
1.2.50. "Pension Fund Contributions" means collectively the employer and the employee contributions payable in terms of the rules of the pension funds referred to in 24, and in terms of agreements with employees from time to time or, if the context is appropriate any one of them;\(^3\)

1.2.51. "Performance Guarantee" means the Performance Guarantee to be rendered by the Concessionaire pursuant to 26;

1.2.52. "Potable Water" means water conforming to the quality parameters prescribed in the quality specification annexed hereto marked Annexure [B4] as amended from time to time;

1.2.53. "Prevention and Emergency Plan" means the plan to be submitted in accordance with the provisions of the reporting schedule annexed hereto marked Annexure [J];

1.2.54. "Prime Rate" means the publicly quoted Prime Rate of interest of [bank] calculated on a 365 (three hundred and sixty five) day factor irrespective as to whether or not the year is a leap year;

1.2.55. "Raw Water" means water from surface or underground sources that has not been treated and/or purified into Potable Water;

1.2.56. "Regulatory Provisions" means collectively the provisions of any prevailing governing legislation, by-laws, ordinance or any regulation or notice issued pursuant to such legislation, policy directive or notice issued by a Competent Authority in respect of the Supply of Water Services, the Works and/or the activities of the Concessionaire from time to time, which apply to the Concession, the Concessionaire and this Contract or, if the context is appropriate any one of them;

1.2.57. "RFP" means the Request For Proposal issued by the Council dated [   ] including all amendments and/or clarifications issued thereto;

1.2.58. "Right of Way" means a right of passage over or under and of access and egress to any immovable property or part thereof;

1.2.59. "Sanitation Service" means collectively the metering, the collection of Tariffs, collection, removal, disposal, purification or treatment of human excreta, domestic waste-water, waste and Sewage Effluent resulting from the use of water for domestic purposes and Industrial Effluent emanating from within the Concession Area;

1.2.60. "Sanitation Services Works" means all Concession Assets built, installed or used to provide Sanitation Services within the Concession

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\(^3\) Relevant where there is a pension plan in place
Area, consisting of *inter alia* any treatment works, conveyance pipe, pumphouse, access road, pumping installation, electricity transmission line, pipeline meter, fitting or apparatus, or, if the context is appropriate any one of them;

1.2.61. "Sanitation Service Connection Point" means the point at which a Consumer Installation is connected to the Sanitation Services Works being –

1.2.61.1. where the sewer pipeline is situated within a property owned or occupied by a Consumer, at the inspection eye closest to the sewer pipeline or at a point [1.5 (one comma five) meters] from the nearest sewer pipeline whichever is closest; or

1.2.61.2. where the sewer pipeline is situated outside a property owned or occupied by a Consumer, at the property boundary.

1.2.62. "Service Connection Point" means collectively a Sanitation Service Connection Point and a water Supply Service Connection Point or, if the context is appropriate any one of them;

1.2.63. "Service Standards" means collectively the standards pertaining to the quality of Water Services to be supplied pursuant to the Contract and the Regulatory Provisions or if the context is appropriate any one of them;

1.2.64. "Sewage Effluent" means any domestic discharge or Industrial Effluent acceptable according to the Regulatory Provisions and the Consumer Rules or other requirements of the Concessionaire determined in terms of 35 that is received by the Sanitation Services Works;

1.2.65. "Stock" means collectively the stocks of chemicals, spare parts, equipment and raw materials held by the Council at the Effective Date including any damaged or unsaleable Stock or, if the context is appropriate any one of them;

1.2.66. "Subcontractor" means any person or entity who has Contracted with the Concessionaire for the performance of any obligations of the Concessionaire hereunder;

1.2.67. "Subcontract" means the Contract between the Concessionaire and any relevant Sub-contractor providing for the performance by the Subcontractor of some or all of the obligations of the Concessionaire in terms of the Contract;

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4 Important to indicate where concessionaire's responsibility begins and ends
1.2.68. "subsidiary" means a subsidiary company as defined in [companies legislation];

1.2.69. "Substitute Entity" means any person or entity selected by the Council or the Lenders to replace the Concessionaire and who has entered into the requisite agreements, in accordance with the provisions of 62;

1.2.70. "Supply" means the provision, conveyance and distribution of Water Services;

1.2.71. "Tariff" means collectively the Water Tariff, the Sanitation Tariff and all other Tariffs and prices approved and promulgated by the Council reflected in the Tariff Schedule applicable from time to time or if the context is appropriate any one of them;

1.2.72. “Tariff Schedule" means the Tariff schedule promulgated by the Council and published from time to time setting out the governing principles, prices, and Tariffs payable by Consumers in respect of the Supply of Water Services in force at any given time;

1.2.73. "Tender" means the offer submitted by or on behalf of the Concessionaire to the Council pursuant to the RFP;

1.2.74. "Transferring Employees" means collectively the employees of the Council associated with or connected to the Supply of Water Services within the Concession Area as at the Effective Date whose names appear on the final personnel schedule contemplated in clause 21.3;

1.2.75. ["Service Tax" means service tax charged pursuant to [relevant tax legislation]];

1.2.76. ["VIP" means a ventilated improved pit latrine;]

1.2.77. "Waste Water Treatment" means the treatment of Sewage Effluent in order that the effluent after treatment conforms to Regulatory Provisions and the specifications reflected in the quality specification annexed hereto marked Annexe [ ];

1.2.78. "Water Supply Services" means collectively the abstraction, conveyance, treatment, distribution, metering and collection of Tariff in respect of Potable Water or Raw Water intended to be converted to Potable Water or, if the context is appropriate any one of them;

1.2.79. "Water Supply Services Connection Point" means the point at which a Consumer Installation is connected to the Water Services works,
being at the property boundary of the property owned or occupied by a Consumer;

1.2.80. "Water Source" means a source of Raw Water for subsequent use as Potable Water or other approved uses;

1.2.81. "Water Supply Services Works" means all movable and immovable Concession Assets built, installed or used to supply Water Supply Services within the Concession Area consisting of \textit{inter alia} any reservoir, dam, water treatment works, well, pumphouse, borehole, access road, pumping installation, electricity transmission line, pipeline, pipeline meter, fitting or apparatus, or if the context is appropriate any one of them;

1.2.82. "Water Services" means collectively, Water Supply Services, (including Basic Water Supply), Sanitation Services (including Basic Sanitation) or, if the context is appropriate any one of them;

1.2.83. "[currency] and the symbol [ ] means the currency of [country];

1.2.84. "Works" means collectively the Water Supply Services Works and Sanitation Services Works or, if the context is appropriate any one of them.

1.3. any reference to an enactment is to that enactment as at the date of signature hereof and as amended or re-enacted from time to time;

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 Contract;

1.5. when any number of days is prescribed in this Contract, same shall be reckoned exclusively of the first and inclusively of the last day unless the last day falls on a Saturday, Sunday or public holiday in [country], in which case the last day shall be the next succeeding day which is not a Saturday, Sunday or public holiday in [country];

1.6. where figures are referred to in numerals and in words, if there is any conflict between the two, the words shall prevail;

1.7. expressions defined in this Contract shall bear the same meanings in schedules or annexures to this Contract which do not themselves contain their own definitions;

1.8. in the event of any conflict or ambiguity between the expressions and/or provisions of the Contract and any annexures or schedule thereto, the Contract shall govern;
1.9. the use of any expression in this Contract covering a process available under [country] law such as a winding-up (without limitation *eiusdem generis*) shall, if any of the Parties to this Contract is subject to the law of any other jurisdiction, be construed as including any equivalent or analogous proceedings under the law of such defined jurisdiction;

1.10. where any term is defined within the context of any particular clause in this Contract, the term so defined, unless it is clear from the clause in question that the term so defined has limited application to the relevant clause, shall bear the meaning ascribed to it for all purposes in terms of this Contract, notwithstanding that that term has not been defined in this interpretation clause;

1.11. the expiration or termination of this Contract shall not affect such of the provisions of this Contract as expressly provide that they will operate after any such expiration or termination or which of necessity must continue to have effect after such expiration or termination, notwithstanding that the clauses themselves do not expressly provide for this;

1.12. unless expressly provided as being in the sole discretion of a Party, where approval, acceptance, consent or action by a Party is required under this Contract, such approval, acceptance, consent or action shall be in writing and shall not be unreasonably delayed or withheld;

1.13. all references to annexures and schedules are references to the annexures and schedules annexed to this Contract.
2. **NOVATION OF EXISTING AGREEMENTS AND CANCELLATION OF EXISTING AGREEMENTS**

2.1. This Contract shall be deemed to substitute –

2.1.1. the Tender;

2.1.2. the RFP; and

2.1.3. any other prior agreements (whether written or oral) between the Parties pertaining to the Supply of Water Services or relating to the Concession.

3. **CONDITIONS PRECEDENT**

3.1. This Contract, save for the provisions of this clause 3 and clauses [9.2, 10.2 11.12, 67, 74, 75, 76, 77, 78 and 79] which shall be of immediate force and effect, is subject to the fulfilment of the following conditions precedent, namely:

3.1.1. the submission by the Concessionaire to and the approval by the Council of the Concessionaire’s memorandum and articles of association and shareholders' agreement;

3.1.2. the Operating Agreement is concluded and becomes unconditional due to the fulfilment of any conditions precedent contained therein (save for the requirement of this Contract becoming effective and unconditional);

3.1.3. [the conclusion of the Lease Agreements between the Council and the Concessionaire;

3.1.4. [the Bulk Water Supply Agreement is concluded and becomes unconditional due to the fulfilment of any conditions precedent contained therein (save for the requirement of this Contract becoming effective and unconditional) and all of the Council's rights, obligations, title and interest in and to the Bulk Water Supply Agreement are ceded, assigned and transferred to the Concessionaire;]

3.1.5. the submission by the Concessionaire to the Council and the Lenders of the required Performance Guarantees as envisaged in 26;

3.1.6. the submission by the Concessionaire to the Council of the necessary proof that the required insurance policies referred to in the

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6 Conditions precedent will vary from project to project and so this list should be regarded as illustrative only. Included in the conditions should be any certificates, permissions, confirmation of financing that are deemed appropriate to enable the substantive obligations of the agreement to commence.
insurance schedule annexed hereto marked **Annexure [ ]** have been
effected in accordance with 27;

3.1.7. [Financial Closing be obtained;] 7

3.1.8. payment by the Concessionaire to the Council of the Contract
implementation fee of [ ];

3.1.9. [that all requirements and formalities of all Regulatory Provisions be
complied with by the Parties;]

3.1.10. [the Council issuing to the Consumers the necessary invoice in
respect of the Supply of Water Services as envisaged in 13.12;] 8

3.1.11. the Concessionaire obtaining all the requisite permits, licences,
consents and authorisations required by it to fulfil its obligations under
this Contract and to conduct the business as a Water Services provider;

3.1.12. that all of the Council's rights, obligations, title and interest in and to
the Contracts between the Council and various third Parties, which
Contracts are reflected in the Contract schedule annexed hereto marked
**Annexure [H1]** are 9 [ceded], [novated], assigned, delegated and
transferred to the Concessionaire and that, to the extent required, the
consent of all other Parties to such Contracts be obtained;

3.1.13. that the Council furnishes the Concessionaire with certified copies
of the resolutions adopted by the Council to grant the Concession to the
Concessionaire and to authorise the conclusion of this Contract and in
terms whereof the Council official who signs and executes this Contract
for and on behalf of the Council is specifically authorised and
empowered to do so; and

3.1.14. that the Concessionaire furnishes the Council and the Lenders with a
certified copy of the resolution adopted by the board of directors of the
Concessionaire to accept the Concession granted to it in terms of this
Contract and to authorise the conclusion of this Contract and in terms
whereof the relevant representative of the Concessionaire who signs and
executes this Contract for and on behalf of the Concessionaire is
specifically authorised and empowered to do so.

3.1.15. [10] the promulgation and enactment by the Council of the necessary
by-laws to permit the implementation of the Contract and the Tariffs and

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7 Relevant where there is substantial new investment required
8 Relevant where there is to be a change from invoices being issued in council's name to the
name of the concessionaire
9 relevant terminology depends on the legal system
10 where legislation is required in order for the contract to be entered into
the Concessionaire confirms in writing that it is satisfied that such by-
laws permit the implementation of the Contract and the Tariffs.]

3.1.16. [that the legal advisor of the Council, furnishes the Council with a
written opinion as to the legal, valid and binding nature of this Contract,
the enforceability of the Council’s obligations hereunder and the
Council’s authority to conclude, implement and perform in terms of this
Contract.]

3.1.17. [that the legal advisor of the Concessionaire, furnishes the
Concessionaire with a written opinion as to the legal, valid and binding
nature of this Contract, the enforceability of the Concessionaire’s
obligations hereunder and the Concessionaire’s authority to conclude,
implement and perform in terms of this Contract.]

3.2. The conditions precedent may only be waived by written agreement of both
Parties and the Lenders.

3.3. Forthwith after the signature of this Contract, the Parties shall use their best
endeavours to procure the fulfilment of the conditions precedent.

3.4. Subject to 3.5, unless all of the conditions precedent are fulfilled by no later
than [120 (one hundred and twenty)] days after the date on which this
Contract has been signed by the Party signing last in time or such later date as
may be agreed between the Parties, the provisions of this clause 3 and clauses
[67, 74, 76, 77, 78 and 79] shall continue to be of force and effect, but the
remainder of this Contract shall never become effective and no Party shall
have any enforceable rights and/or obligations pursuant to the Contract.

3.5. [Should the conditions precedent not timeously be fulfilled and provided that
such non-fulfilment is not the result of any fault or negligent act or omission
of the Concessionaire, then the Concessionaire shall be entitled, without
prejudice to its other rights or remedies, to extend the date by which the
conditions precedent are to be fulfilled for a further period not exceeding 2
(two) months by delivering written notice to such effect to the Council and
the Lenders at least 5 (five) days prior to the effluxion of the [120 (one
hundred and twenty)] days referred to in 3.4.]  

3.6. The Parties agree to use their respective best endeavours to achieve the
fulfilment of the above conditions precedent and to keep one another
informed from time to time on request as to the progress being made in the
fulfilment thereof. It is further acknowledged that following the signing of
this Contract, it may be necessary for the Parties, before the Effective Date, to
agree in good faith to make any appropriate amendments to the annexures to

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11 sensible to have a cut off date
12 This provision is usually only granted where there is concern that there is a risk of conditions
precedent outside the concessionaire’s control not being satisfied within the time allocated

- 17 -
and provisions of the Contract to reflect matters still under review or which arise after such date of execution including (without limitation) the requirements associated with the financing and the development of the business of the Concessionaire. The Parties undertake, upon the reasonable request of the other, to meet at mutually convenient times, dates and venues and to negotiate with one another in good faith with a view to reaching such agreement in writing.

3.7. It is recorded that for the period as from the signature date hereof up to the day prior to the Effective Date, the Concessionaire shall commence preparation for the take over of the Supply of Water Services and the Existing Assets and the Council shall procure access for the Concessionaire to the Existing Assets and ensure the availability of its personnel and of such other information in respect of the Supply of Water Services and the Existing Assets that may be required by the Concessionaire for such purposes. It is further recorded that the Concessionaire will during such period and in consultation with the Council, prepare an interim emergency plan in respect of the Supply of Water Services and the Works to be implemented as from the Effective Date pending the preparation and implementation of the emergency plan as provided for in the reporting schedule annexed hereto marked Annexure [ ]. The Council shall furthermore consult with the Concessionaire in respect of all management and other decisions affecting the Supply of Water Services and the Existing Assets during such period and shall not during such period make any capital or other commitments in respect of the Existing Assets and/or the Supply of Water Services without prior consultation with the Concessionaire.
4. CORPORATE STRUCTURE

4.1. The Concessionaire is incorporated in [country] as a single purpose private company in accordance with the [legislation] with the sole purpose of undertaking the activities referred to in 6 hereof.

4.2. [The memorandum, articles of association and shareholders agreement as approved by the Council shall not be amended or modified during the Contract Term except as agreed by the Council and the Lenders.]

4.3. The Concessionaire's head office and main place of business shall for the Contract Term be [within the Concession Area].

5. OBJECT

14 The object and main business of the Concessionaire shall be restricted to the supply of Water Services pursuant to the provisions of this Concession Agreement.

6. SHAREHOLDING

6.1. The initial members constituting the Concessionaire and their respective shareholding is set out in the shareholder schedule annexed hereto marked Annexure [A1].

6.2. Notwithstanding anything to the contrary contained in this Contract -

6.2.1. the Operator shall for the [duration][first [ ] years] of the Contract Term retain direct beneficial ownership of at least [ ]% ([ ] per centum) of the total issued share capital of the Concessionaire; and

6.2.2. [no shares in the share capital of the Concessionaire may be transferred to any person or entity that will have the effect that the entity or person controlling the Concessionaire immediately before such transfer loses such control, save for any such transfer or change in control-

6.2.2.1. that is effected with the prior written approval of the Council

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13 The number of limitations on changes of corporate structure and location of Concessionaire deemed appropriate for each project will vary depending on, amongst other things, level of investment to be made by Concessionaire, importance of identity of key investor(s), whether commercial lending is involved. Where there is a construction company as part of the consortium it will wish to be able to exit from the Concessionaire soon after the end of construction, whereas it is more usual to require the operator investor to remain for a longer period.

14 Where lenders are involved then they may wish to see the activities of the Concessionaire restricted to those of providing the services under the Concession agreement, to ensure that the Concessionaire is not carrying out more risky or unrelated business.

15 See footnote 11

16 experience of initial operator may be deemed to be important and so common to see requirement for it to remain within the concessionaire consortium for a period.
and the Lenders; or

6.2.2.2. that occurs from one entity to another entity within the [Operator Group].]

7. RESTRICTIONS IN THE ARTICLES OF ASSOCIATION OF THE CONCESSIONAIRE

17 The Concessionaire shall not have the power to perform any of the following acts without the prior written approval of the Council and the Lenders -

7.1. the cessation or alteration of its object and business;

7.2. the merger with another entity or the entering into of a partnership, joint venture or any other association with any entity;

7.3. the acquisition or incorporation of any subsidiaries and/or associate companies by the Concessionaire;

7.4. the alienation of shares held by the Concessionaire in any subsidiary or associate which it has acquired with the consent of the Council and the Lenders;

7.5. the cancellation and/or amendment of any insurance policies set out in the insurance schedule the effect of which may be prejudicial to the interests of the Council and/or the Lenders (it being recorded, for the avoidance of doubt, that the Council's approval shall not be required in respect of any other insurance policy);

7.6. the conclusion of any other agreement associated with or connected to the provision of Water Services or the undertaking of any activities as a water service provider as defined in [relevant legislation] outside the Concession Area, except as envisaged in this Contract;

7.7. [the registration of any transfer of shares in the Concessionaire by the Concessionaire which would cause the Operator to be in breach of its undertaking to retain direct beneficial ownership of at least [ ]% ([ ] per centum) of the total issued share capital of the Concessionaire;]

7.8. the encumbrance of or grant of any security interest in respect of any Concession asset save for any such right granted to and in favour of the Lenders in respect of any New Assets.

8. APPOINTMENT OF CONCESSIONAIRE

17 It may be deemed important to restrict the activities of the Concessionaire and to ensure that its share capital is not altered etc. Here are a number of possible restrictions which might be included.
8.1. **Appointment**

8.1.1. The Council hereby appoints the Concessionaire as a private sector water service provider to [solely and exclusively]\(^{18}\) operate and execute the Concession within the Concession Area with effect from the Effective Date and the Concessionaire hereby accepts the appointment on the terms and conditions of this Contract. Subject to the other provisions of this Contract (including without limitation 60 and 70) the appointment is personal to the Concessionaire and may not be alienated, [novated], ceded or assigned.

8.1.2. The Concessionaire will with effect from the Effective Date and on the terms and conditions of the Contract be responsible for the Supply of Water Services in the Concession Area in the manner set out herein.

8.1.3. The Concessionaire shall Subcontract certain of its rights and obligations under this Contract to the Operator in terms of and subject to the provisions of the Operating Agreement and shall be entitled to Subcontract further rights and obligations to third Parties as may be necessary in accordance with 50.

8.2. **Concession Area**

8.2.1. \(^{19}\)The territorial scope of the Concession is limited to the Concession Area as at the Effective Date but may be extended to include any modification to or extensions of the Concession Area that may in the future be included by Regulatory Provision on the basis set out in 8.2.2.

8.2.2. As from the Effective Date, the Concessionaire shall Supply Water Services to the Developed Areas as provided for in this Contract. The Supply of Water Services to New Areas and Expansion Areas will be undertaken solely and exclusively by the Concessionaire subject to the provisions of this Contract provided that\(^{20}\) -

8.2.2.1. the Supply of Water Services to New Areas and Expansion Areas already incorporated into and provided for in any current Five Year Plan at any relevant time, shall be supplied at the levels of service and as from the dates stated therein (or such other dates as

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\(^{18}\) Parties need to consider whether exclusivity is necessary/ desirable. Whilst it is likely that lenders and the concessionaire will require certainty and so seek exclusivity, as they will be concerned that the authority could proceed to award a concession in the same area to another party, it may be appropriate to maintain some flexibility re service provision particularly to parts of the service area which have not yet got a formal connection and will be dependent on alternatives such as tanks or bottled water. In such case it may only be appropriate to allow for exclusivity once a formal connection has been created – see 8.2.2 onwards for sample wording.

\(^{19}\) Important to specify scope of concession area clearly

\(^{20}\) where it is possible to identify new areas before contract signature it is good practice to try and establish as much of the detail before contract signature so that it is not left for future discussion.
the Concessionaire and the Council may agree upon in writing) and in accordance with the Charges in force at such date;

8.2.2.2.  \(^{21}\) the Supply of Water Services to New Areas and/or Expansion Areas not already incorporated into and provided for in the current Five Year Plan at any relevant time will be undertaken solely and exclusively by the Concessionaire subject to any pre-existing rights of Supply of Water Services in the area concerned as at the date of and as specifically set out in the Council’s notice in terms of 8.2.2.2.1 and subject to the provisions of this Contract on the following basis-

8.2.2.2.1.  the Council will, as soon as it becomes aware of the likelihood that Water Services will have to be supplied to a New Area, or an expansion area notify the Concessionaire of that fact in writing, stipulating in such notice at least -

8.2.2.2.1.1.  the New Area and/or expansion area concerned, giving full and adequate details regarding the nature, topography, zoning and situation of the land;

8.2.2.2.1.2.  the Council’s proposals regarding the Water Services required, the service level to which such Water Services are to be supplied and the date by which the Water Services must be supplied. Provided that consideration shall at all times be given to the Supply of a Basic Water Supply Service in the absence of any other feasible level of Water Supply Service;

8.2.2.2.1.3.  any pre-existing right of Supply in any new or expansion area concerned;

8.2.2.2.2.  within 30 (thirty) days of receipt of the Council’s notice in terms of 8.2.2.2.1 or such other period that may be agreed, the Parties shall meet at the Council’s offices at a mutually convenient date and time to negotiate, in good faith, with a view to reaching agreement in writing in respect of the Supply of Water Services to the New Area and/or expansion area concerned, having regard to -

8.2.2.2.2.1.  the statutory and social responsibilities of the Council to provide Water Services within the Concession Area;

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\(^{21}\) See footnote 18

\(^{22}\) In some poorer or informal areas where individual connections to properties may not be feasible or affordable, it may be appropriate to allow a level and specification of service which is lower than elsewhere and so it is important to maintain flexibility
8.2.2.2.2. the ability of the Concessionaire to Supply Water Services to the New Area and/or expansion area concerned within the current Five Year Plan in force;

8.2.2.2.3. the possibility of the Concessionaire undertaking the Supply of Water Services to the entire area concerned on a sole and exclusive basis;

8.2.2.2.4. the achievement of the premise and the basis of the Financial Base Case and the continued ability of the Concessionaire to discharge its obligations under this Contract;

8.2.2.2.5. the Concessionaire's continued ability to fulfil its obligations under all Financing Agreements;

8.2.2.2.6. all available funding options, including but not limited to the need for any appropriate adjustment in the Charges and/or Tariff then in force, the possibility of the Council obtaining additional funding or of the Council registering a special project with the Government in order to request grant funding or other available subsidies to finance the Supply of Water Services to such New Area and/or expansion area;

8.2.2.2.7. the proposed level of service to which the required Water Services can be feasibly supplied taking into consideration the ability and willingness of the Consumers to pay for such Water Services;

8.2.2.2.8. the appropriate billing arrangements and possible use of on-site payment arrangements, and the cost thereof;

8.2.2.2.9. the availability of resources including, but not limited to, the adequate availability of Raw Water and the equitable allocation of Potable Water to all Consumers.

8.2.2.3. In the event that -

8.2.2.3.1. the Parties reach agreement, in writing, as envisaged in 8.2.2.2, the Supply of Water Services to the New Area and/or the expansion area concerned will be undertaken by the Concessionaire in terms of this Contract as amended by the agreement concluded in terms of 8.2.2.2;

8.2.2.3.2. the Parties are unable to reach agreement as
envisioned in 8.2.2.2 the Concessionaire's obligation to Supply Water Services to the New Area or the expansion area concerned shall be deferred and not enforced by the Council until such time as the Parties have reached agreement in respect thereof as envisaged in 8.2.2.2, provided that the Parties shall in consultation with one another determine the method as to how and the terms and conditions on which the supply of a Basic Water Supply can be made available to the Consumers in the area concerned.

8.2.2.3.3. Should a group of Consumers within the Concession Area but outside the Developed Areas require a Basic Water Supply only and should the Government fail to provide the necessary funding to supply such Consumers therewith, the Parties shall meet at the Council’s offices at a mutually convenient date and time, to negotiate in good faith, with a view to reaching agreement in writing on how a Basic Water Supply can be provided to such Consumers and the provisions of 8.2.2 and 8.2.3 shall apply mutatis mutandis thereto.

8.3. Contract Term

8.3.1. The term of the Contract will, unless terminated earlier in accordance with the provisions hereof, be for a period of 30 (thirty) years calculated with effect from the Effective Date and terminating at 24h00 (twenty four hundred hours) on the 30th anniversary date of the Effective Date subject to any extensions that be agreed pursuant to 8.3.2.

8.3.2. Subject to compliance with the Regulatory Provisions, the Contract Term may be extended by such further periods as may be agreed between the Parties and the Lenders subject to the terms hereof provided agreement is reached in respect of such extended period in writing at least 12 (twelve) months prior to the expiration date of any existing period.

8.4. Exclusivity

23 As from the Effective Date the Concessionaire will subject to 8.2.2.2, 30.6 and 30.8 be granted the sole and exclusive right to Supply Water Services within the Concession Area for the Contract Term to the exclusion of the

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23 The Concessionaire will be anxious to have exclusivity of supply to ensure that it has the full customer range (including large industrial customers who are likely to be more reliable payers). However, consideration needs to be given to the reality of the existing circumstances (eg large consumers may already have their own arrangements which are separate from the municipal supply) and to whether in poorer areas it is more appropriate to allow alternative suppliers (such as tankers) at least until a formal connection is created.
Council and other third Parties.

8.5. Fee

8.5.1. The annual Concession Fee payable by the Concessionaire to the Council for the appointment will be calculated and payable in accordance with the provisions of the Concession Fee and payment provision schedule annexed hereto marked Annexure [B2].

8.5.2. Interest shall accrue on any amounts due and payable which are not paid on the due date at the Prime Rate from the due date to the date preceding the date of actual payment in full.

8.5.3. [Save as may be provided for in this Contract, the Concessionaire shall not be entitled to withhold, deduct or set off any amount due and payable by the Council to the Concessionaire from the Concession Fee during the first 10 (ten) years of the Contract.]24

8.5.4. The Concession Fee payable by the Concessionaire to the Council in terms hereof shall be deposited into and retained by the Council in a dedicated water services regulatory and monitoring fund established by the Council for this purpose and all monies in such fund shall be dedicated to and used exclusively by the Council for the fulfilment of its monitoring and regulatory functions in respect of the Supply of Water Services as set out in this Contract and pursuant to the Regulatory Provisions.

9. DUTIES AND RESPONSIBILITIES OF THE CONCESSIONAIRE

9.1. Scope of Services

9.1.1. The Concessionaire will, with effect from the Effective Date be responsible, at its own cost, risk benefit, profit and/or loss for -

9.1.1.1. the Supply of Water Services to Consumers within the Concession Area in accordance with this Contract, its Consumer Rules, the levels and conditions of service set out in the performance and service levels annexed and marked Annexure [B3] hereto and the Regulatory Provisions;

9.1.1.2. subject to 10, and excluding any part of the Existing Assets not delivered on the Effective Date, the control, operation and maintenance of the Works in accordance with this Contract;

24 Provisions regarding either parties right to set off amount due against other amounts will be a point for negotiation. Where lenders are involved and there is substantial investment by Concessionaire there will probably be requirements for restrictions on Council's right of set off.
9.1.1.3. the collection of all revenue associated with the Supply of Water Services in the Concession Area;

9.1.1.4. the design, construction, installation, commissioning and management of all work in relation to the Works within the Concession Area, including the making of such investment, as is set out in the current portion of the Five Year Plan applicable from time to time;

9.1.1.5. the archival of data pursuant to the provisions of the quality specification annexed hereto marked Annexeure [B4] in respect of the Works and the Supply of Water Services to Consumers at regular intervals to reflect all particulars in respect of all Consumers and recent incorporations and/or decommissioning of any Works;

9.1.1.6. the Supply, installation, operation and maintenance of all hardware and software forming part of any geographical information technology system in respect of the Works that is b compatible with the system presently used by the Council’s monitoring office. Should the Concessionaire wish to install an alternative system then the Concessionaire shall be responsible for the costs and installation and all costs associated with or connected to the replacement modification and upgrading of the Council’s hardware and software of the Council’s monitoring office to ensure that the Council is a position to fully discharge its monitoring functions and obligations set out in this Contract.

9.2. Concession Assets

The Concessionaire will at its own risk benefit, profit and/or loss have the right to possess, use, operate, manage, maintain, rehabilitate, redesign, return, improve and expand the Concession Assets during the Contract Term.

9.3. Maintenance

9.3.1. Any maintenance, rehabilitation, design and construction activities undertaken by or on behalf of the Concessionaire connected to or associated with the Concession Assets and/or the Works shall conform to the Regulatory Provisions and the quality specification annexed hereto marked Annexure [B4].

9.3.2. The Concessionaire shall undertake all the necessary renewals and/or corrective maintenance of any meters, pumps, valves, hydrants, connections and other constituent elements of the Works.

9.3.3. The Concessionaire shall, as an integral part of the service improvement and expansion plans which it implements, renew and/or rehabilitate the Works to ensure the Supply of Water Services as required.
under the Contract.

9.3.4. The Concessionaire shall develop and implement a maintenance management programme for the Works to enhance and protect the Concession 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.

9.4. **Legislative Compliance**

9.4.1. The Concessionaire shall -

9.4.1.1. comply with the Regulatory Provisions relating to the Supply of Water Services, the Concession Assets, the environment, employees and/or health and safety necessary for the protection of persons or property;

9.4.1.2. comply with the Regulatory Provisions concerning the building of any Works and fire prevention in respect of the Works;

9.4.1.3. 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 in terms of the Regulatory Provisions;

9.4.1.4. comply with and give all notices required by or under the Regulatory Provisions relating to its activities in terms of this Contract;

9.4.1.5. pay any fees or Charges required to be paid under the Regulatory Provisions and shall pay any fees or Charges pertaining to the provision of utility services in respect of the Works;

9.4.1.6. comply with all legislation, laws, policies and the Regulatory Provisions relating to the conclusion and implementation of the Operating Agreement and any Financing Agreements during the Contract Term.

9.4.2. Should the Council after the signature date hereof enact, modify or amend any Regulatory Provision the effect of which is to discriminate against or has an adverse effect on the rights interests and/or obligations of the Concessionaire or results in any actual or prospective change in the Concessionaire’s costs or revenues or general economic position or which does not correspond with or which is contrary to the provisions of this Contract, such action shall be deemed to constitute a Material Adverse Governmental Action.
9.5. **Assistance by the Council**

The Council shall assist and do all things in its power to assist, on request and without delay the Concessionaire, both in its dealings with competent authorities and otherwise in implementing the Contract including the obtaining of permits, licences, authorisations, consents and approvals to undertake the operation and maintenance of the Works and the Supply of Water Services provided that the Council shall not incur any liability of whatsoever nature or howsoever called nor be liable for any costs due to the failure of the Concessionaire to obtain any such permits, licences and approvals or to obtain such permits, licences and approvals timeously save where the granting of such permits, licences and approvals are within the power of the Council and are unreasonably withheld.25

10. **IMPLEMENTATION PROCEDURE**

10.1. It is recorded that an efficient and orderly transfer and assumption of rights and responsibilities in respect of the Supply of Water Services and the Works on the Effective Date is imperative and the Parties undertake to cooperate to achieve such objective.

10.2. Accordingly, the Concessionaire and the Council shall, simultaneously with the execution of this Contract, sign and execute the Lease Agreements in terms whereof the Concessionaire will lease from the Council all the Existing Assets as from the Effective Date.

10.3. On the Effective Date, the Concessionaire shall at its risk, cost, benefit and profit furthermore take over from the Council and be fully responsible for:

10.3.1. the Works in accordance with the take-over procedure annexed hereto as Annexure [B5];

10.3.2. the Transferring Employees on the basis described in clauses 21 to 26 of this Contract;

10.3.3. the Council's right, title, interest and obligations in and to the agreements reflected in the Contract schedule annexed hereto marked Annexure [H1] in accordance with the provisions of 48;

10.3.4. all documents and technical records of the Council pertaining to the Supply of Water Services and the Existing Assets in accordance with the take-over procedure annexed hereto marked Annexure [B5]; and

10.3.5. all consumables and Stock associated with or connected to the Supply

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25 There may be some licenses, consents or approvals which are specified as Council Consents to be obtained by the Council
of Water Services in accordance to the provisions of 16 hereof.

10.4. At 10h00 (ten hundred) hours on the Effective Date, a meeting between representatives of the Parties will be held at the offices of the Council. At that meeting the Concessionaire and the Council will sign the handover certificate annexed hereto marked Annexure [B8] recording the take-over by the Concessionaire of the Supply of Water Services and the Existing Assets as envisaged in 10.3.

11. **FINANCIAL PROVISIONS**

11.1. The Council shall be responsible and liable for the discharge of all payments (including both capital and accrued interest) and other financing obligations associated with or connected to the Existing Assets and shall indemnify and hold the Concessionaire harmless in respect of any breach thereof.

11.2. The Concessionaire undertakes, subject to the other provisions hereof, to make payment of the rentals due and payable to the Council pursuant to the Lease Agreements on the due date in accordance with the Lease Agreements in order for the Council to discharge its obligations in 11.1. The Council undertakes to use such rentals solely for the purpose of discharging its obligations referred to in 11.1.

11.3. Within 30 (thirty) days after the Effective Date the Council will deliver to the Concessionaire unaudited management accounts in respect of the supply of Water Services as at and for the 12 (twelve) month period ending on the Effective Date. The Council will deliver the Effective Financial Statements to the Concessionaire within 90 (ninety) days of the Effective Date.

11.4. The use of any existing asset forming part of the capital projects referred to the capital project schedule annexed hereto marked Annexure [H2], which have not been completed and taken over by the Council on or before the Effective Date will be made available to the Concessionaire on their completion and delivery to the Council pursuant to the terms and conditions of each Contract. The Council shall be deemed with effect from the date of the delivery of those Existing Assets to the Council to have leased such Existing Assets to the Concessionaire on the same terms and conditions of the Lease Agreements for no additional rental and all Existing Assets so delivered shall be made available to the Concessionaire on an “as is” basis and no representation or warranty is given by the Council as to the nature, condition, fitness for purpose or merchantability or suitability of any such

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26 Cost of existing assets can be dealt with in different ways in a concession, one way, as is the case here, is for the Council to maintain responsibility and to charge the Concessionaire rental for use of the assets. Another way might be to assign the cost of financing the assets to the Concessionaire (especially where there is a transfer of the assets for the duration of the concession).

27 See footnote 28.
assets and they shall be regarded as Concession Assets for the purposes of this Contract.

11.5. The funds which the Council received or retained as a guarantee or retention money on capital projects Contracts referred to in the capital projects schedule annexed hereto marked Annexure [H2] will not be released or returned to the respective Contractors, on the discharge of all obligations by the Contractor and final take over of the Works by the Council without prior written consent of the Concessionaire. Should the Concessionaire, contrary to the terms and conditions of the Contract governing such Works, fail to consent timeously or fail to consent at all, the Concessionaire shall be liable for any damages or costs arising out of such act or omission and shall indemnify and hold the Council harmless against all claims, demands, proceedings, damages, costs, Charges and expenses (excluding legal fees on a full indemnity basis) due to such failure, unless such failure is due to the Council’s default or negligence.

11.6. The Council hereby cedes and assigns to the Concessionaire all right, title and interest that it may have in respect of the Contracts reflected in Annexure [H2] hereto on the basis set out in 48. Documents or policies received by the Council as a guarantee in respect of such Works will where permissible or possible be endorsed by the Council in favour of the Concessionaire and handed over to the Concessionaire on delivery thereof from the Contractor.

11.7. It is recorded that an amount constituting [ ]% ([ ] per centum) of the total Consumer deposits held by the Council as at the Effective Date in respect of the Supply of municipal services is applicable to the Supply of Water Services and is held by the Council as such. The amounts (including accrued interest) of customer deposits in respect of the Supply of Water Services held by the Council as at the Effective Date will by no later than 14 (fourteen) days after the Effective Date, be determined by the auditors of the Council and forthwith transferred to an escrow account opened under the name “[ ] deposits account” to held at the [ ] branch of [bank] to which the Concessionaire will, for the duration of this Contract, have access to pursuant to the drawdown procedure annexed hereto marked Annexure [K].

11.8. All customer deposits payable or paid after the Effective Date, whether in respect of new customers or customers who defaulted in respect of the payment of their Water Services accounts rendered by the Concessionaire will be paid directly to the Concessionaire and may be used by the Concessionaire as part of its operating capital and funds.

28 The water supply services have been part of the council and have not operated as a separate unit and there has been no separation of costs and revenues – here the parties have agreed to assign a portion of the revenues of the council for the benefit of the water supply and sanitation services and to create management accounts to indicate costs of operation prior to Effective Date. This is a difficult area where there is no clear data to show costs of operation and revenues and will need to be considered carefully.
11.9. In the event that there are any capital projects in respect of which service contributions have been paid or are payable to the Council as at the Effective Date which projects are to be completed after the Effective Date the Concessionaire will not be obliged to undertake or complete any of such capital projects prior to the date on which the first rental payment is due and payable under the Lease Agreements. The amount of any such service contributions will be deducted from the first rental payment due and payable by the Concessionaire under the Lease Agreements and shall be deposited into an escrow account opened under the name “[ ] contribution account” to held at the [ ] branch of [bank] to which the Concessionaire will for the duration of the Contract have access to pursuant to the drawdown procedure annexed hereto marked Annexure [K].

11.10. The amounts of any service contributions due and payable in respect of the Supply of Water Services as from the Effective Date will be determined and calculated in accordance with the service contributions procedures annexed hereto marked Annexure [L] and will be forthwith paid to the Council and transferred by the Council to the escrow account referred to in 11.9 to which the Concessionaire will, for the duration of this Contract, have access to in accordance to the drawdown procedure set out in Annexure [K].

11.11. All amounts due and payable by Consumers in respect of invoices issued -

11.11.1. prior to the Effective Date shall be due and payable and will continue to accrue to the Council; or

11.11.2. as from and including the Effective Date shall be due and payable and will accrue to the Concessionaire,

regardless of when the Water Services so invoiced were supplied and when payment thereof is effected.

11.12. 29 The Council shall issue its final invoices in respect of Water Services to Consumers by no later than the last day of the month prior to the month in which the Effective Date falls for amounts due and payable in respect of the Supply of Water Services -

11.12.1. to metered Service Connection Points, in respect of all meter readings done up to and including the date of invoice; and

11.12.2. to unmetered Service Connection Points, in respect of the

29 Process for hand over of invoicing and how this is to be handled should be established where the Concessionaire is going to be invoicing in its own name. Due diligence should be carried out to determine whether it will be possible for Concessionaire to do so as this may be a service that the Council is not permitted to delegate by law. In such case the Concessionaire will have to continue invoicing in Council's name – thought will need to be given to how to enforce payment in such a case as it may be difficult for the Concessionaire to have to rely on the Council to enforce payment.
period up to and including the day prior to the Effective Date,

and shall not, for the duration of this Contract thereafter, issue any further invoices to Consumers in respect of the Supply of Water Services but shall be entitled to collect and recover all amounts invoiced by it up to the Effective Date.

11.13. The Concessionaire shall issue invoices to Consumers for amounts due and payable in respect of the Supply of Water Services -

11.13.1. to metered Service Connection Points, in respect of all meter readings done after the date referred to in 11.12.1; and

11.13.2. to unmetered Service Connection Points, in respect of all periods after the date referred to in 11.12.2.

11.14. The Council shall pay over to the Concessionaire, forthwith upon receipt thereof, any and all amounts received by it from Consumers but due to the Concessionaire under the preceding provisions of this clause 11.

11.15. The Concessionaire shall pay over to the Council, forthwith upon receipt thereof, any and all amounts received by it from Consumers but due to the Council under preceding provisions of this clause 11,

11.16. The Council will be liable for all Service Tax accrued in respect of amounts invoiced by it in respect of the Supply of Water Services and undertakes to advise the [revenue authority] of the fact prior to or within 7 (seven) days after the Effective Date. A copy of the notification will be delivered to the Concessionaire by the Council by no later than the Effective Date.

11.17. As from and including the Effective Date, the Concessionaire will be liable for the payment of Service Tax in respect of the Supply of Water Services and such other taxes that may be payable by the Concessionaire in respect of its activities pursuant to the Contract.

11.18. Liability for Service Tax that accrues continuously over time and is assessed for periods that commence before and end after the Effective Date will be apportioned as follows -

11.18.1. the Council will be liable for the number of days between the beginning of the period to which the Service Tax assessment refers and the Effective Date exclusive.

11.18.2. the Concessionaire will be liable for the number of days between the Effective Date inclusive, and the end of the period to which

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30 where service tax is payable
the Service Tax assessment refers.

11.19. In the event of any dispute as to the amounts in 11.5, 11.7 and 11.10 the dispute shall be referred to an independent firm of chartered accountants agreed to by the Parties and failing agreement within 3 (three) days accountants appointed by the President of the [relevant Institute of Chartered Accountants] for decision. The firm of chartered accountants shall act as experts not as arbitrators and their decision will be final and binding on the Parties. The costs of the firm of chartered accountants will be apportioned equally between the Parties.

11.20. The Concessionaire shall, as soon as reasonably possible after having received same (but in any event prior to concluding any Financing Agreement), submit to the Council details of all terms and conditions contained in the term sheets in respect of any proposed Financing Agreement to be concluded by the Concessionaire that may affect the Council. The Concessionaire shall on the Effective Date deliver to the Council a letter signed by the Lenders and the Concessionaire certifying that the Financing Agreements have been concluded on the basis set out in the term sheets referred to above to the extent that any such Financing Agreements may affect the Council.

12. WARRANTIES

12.1. This Contract has been entered into on an “as is” basis and that instead of full commercial warranties being given by the Council to the Concessionaire in respect of the Supply of Water Services, the Existing Assets and the Works, due diligence investigations were completed by the Concessionaire prior to the submission of its Tender and prior to entering into this Contract so that the Concessionaire could, on the basis of the information made available to it during such due diligence investigations, determine whether or not to submit a Tender and enter into this Contract, and the terms and conditions on and subject to which the transactions contemplated herein should be implemented.

12.2. Subject to any common law rights which the Concessionaire may have in respect of latent defects and subject further to the other provisions of this Contract specifically including but not limited to 12.4.8, all Existing Assets leased by the Council to the Concessionaire in terms of this Contract are leased in the condition, in the place in which they are situate and subject to all benefits, rights and restrictions to which they are subject at the Effective Date

31 This is appropriate where the concessionaire has had an opportunity to review the assets fully/ the records of the Council are accurate and up to date. In many cases the bidders will not have sufficient access to data and assets prior to contract signature to verify the information and so there will either be a need for amendment of a base case in the event that the performance and asset condition varies materially from the information provided or there will need to be a transition period during which the concessionaire will carry out due diligence and performance indicators etc are set. Concessionaires/ lenders will have difficulty in accepting existing risks if the data is not accurate.
and no representation or warranty is given by the Council as to the nature, condition, fitness of purpose, merchantability or suitability of any existing asset.

12.3. The Concessionaire hereby represents and warrants to the Council that:

12.3.1. it is duly incorporated in accordance with the applicable legislation;

12.3.2. it has full corporate power and authority to carry on its business as proposed to be conducted under this Contract, and to enter into, legally bind itself by, and perform its obligations under the Contract;

12.3.3. the Contract has been duly authorised, executed, and delivered by the Concessionaire and constitutes legal, valid and binding obligations of the Concessionaire;

12.3.4. the execution, delivery and performance of the Contract does not constitute a violation of:

12.3.5. any statute, judgement, order, decree or regulation or rule of any court, Competent Authority or arbitrator of competent jurisdiction applicable or relating to the Concessionaire, its assets or its business; or

12.3.6. the Concessionaire's memorandum, articles of association or any other documents or any binding obligation, Contract or agreement to which it is a Party or by which it or its assets are bound.

12.4. The Council represents and warrants that:

12.4.1. it is an entity duly created pursuant to statute;

12.4.2. it has full power and authority to enter into, legally bind itself by, and perform its obligations under the Contract;

12.4.3. the Contract has been duly authorised, executed, and delivered by the Council and constitutes legal, valid and binding obligations of the Council; and

12.4.4. the execution of the Contract does not violate any statute, judgement, order, decree or regulation, right or obligation or rule of any court, Competent Authority or arbitrator of competent jurisdiction applicable in relation to the Council, the Existing Assets or the Supply of the Water Services;

12.4.5. it has the exclusive authority to Supply Water Services in the Concession Area and is fully authorised and entitled to authorise the Concessionaire to do so on its behalf on the basis set out in this Contract;
12.4.6. it has the legal capacity and authority to appoint the Concessionaire as a private sector independent Water Services provider for the Concession Area on the basis set out in this Contract;

12.4.7. it is not aware of any claim of any kind that has already been made or which may be made in relation to the Existing Assets,

12.4.8. it enjoys full and unrestricted rights of ownership in respect of the Existing Assets and that the Existing Assets are as at the signature date hereof, and will, as at the Effective Date, be unencumbered (specifically including, but not limited to, free of any pledge, lien, bond and right of retention or pre-emption) and will remain so unencumbered for the Contract Term.

12.4.9. No warranties or representations which are not set forth in this Contract shall be binding on either Party.

13. ACKNOWLEDGEMENTS AND UNDERTAKINGS

13.1. The Concessionaire shall be responsible for obtaining all surveys zoning, planning permissions and/or clearances for the development of the Works and information for carrying out its obligations under the Contract. The Council shall assist the Concessionaire in obtaining the above on the basis set out in 9.5 for the duration of the Contract Term and on the basis that same shall be transferable to the Council and/or any Substitute Entity appointed in terms hereof.

13.2. Subject to the other provisions of this Contract and to any warranty given by the Council as set out in this Contract, the Council shall not be liable for any costs or delays arising due to the Concessionaire's failure to perform its obligations under 13 due to any lack of knowledge which the Concessionaire is deemed to have hereunder.

13.3. The Council undertakes that it will not for duration of the Contract Term sell, dispose of, encumber or grant any right of security in respect of the Existing Assets without the prior written approval of the Concessionaire and the Lenders.

13.4. The Council undertakes to cede and assign to the Concessionaire all warranties received by it from any equipment manufacturers in respect of any software and/or hardware associated with or connected to the Existing Assets.

14. RISK AND BENEFIT

14.1. Subject to the other provisions of this Contract, the risk of and the benefit to the supply of Water Services and the Existing Assets will pass to

32 It may be appropriate for some permits to be responsibility of the Council
and be the responsibility of the Concessionaire with effect from the Effective Date. It is recorded that to the extent that any Existing Assets are not delivered on the Effective Date then the risk and benefit in such assets will only pass to the Concessionaire on the date of delivery thereof.

14.2. The Concessionaire shall not be held liable for any actions or claims which arose or may arise in respect of the Supply of Water Services, the Existing Assets prior to the Effective Date or the date on which they are delivered, whichever is the later, and the Council hereby indemnifies and holds the Concessionaire harmless in respect of any such claim or action.

14.3. As from the Effective Date or the delivery date whichever is the later the Concessionaire shall be responsible to the Council for the maintenance and safekeeping of all the Concession Assets connected to or associated with the Works and shall subject to the provisions of the Contract assume all risks, Liabilities and obligations pertaining to the design, operation, maintenance, acquisition, financing and construction of the existing and New Assets connected to or associated with the Works.

15. INVENTORY

15.1. Within a period of [3 (three)] 33 months after the Effective Date the Concessionaire shall, on the basis of a comprehensive inventory carried out by it of the Existing Assets, notify the Council -

15.1.1. which of those Existing Assets or parts of them will not be required for the purpose of the Contract and deliver them to the Council on the basis provided for in 20.1 whereupon the risk and benefits in such assets will pass to the Council;

15.1.2. of the existence of any specific latent defects of which the Concessionaire becomes aware in respect of or state of disrepair of any of the Existing Assets.

15.2. The Concessionaire shall maintain an updated Concession Assets register during the Contract Term and grant the Council and the Lenders access thereto on reasonable notice.

15.3. The Concessionaire shall, as soon as reasonably possible, rectify and repair all Existing Assets to the extent that such rectification and repair is necessary for the Concessionaire to supply the Water Services in terms of this Contract. Pending the rectification and repair of any latent defect and/or state of disrepair in any of the Existing Assets identified pursuant to 15.1 and notified to the Council, the Concessionaire shall be deemed not to be in breach of any provision of this Contract and the Council undertakes to waive its right to exercise any remedy as a result of such breach (including, but not

33 For below ground assets this may be difficult to achieve in the timeframe
limited to, its right to levy a penalty in respect of any act and/or omission of
the Concessionaire attributable thereto), provided that such breach is
attributable to the existence of such latent defect and/or state of disrepair.

15.4. In the event that any of the Existing Assets reflected in the schedules
to the Lease Agreements cannot be located despite diligent search by the
Concessionaire or in the event that the Concessionaire cannot confirm the
existence of any such existing asset in the course and scope of the inventory
referred to in 15.1 and the Concessionaire notifies the Council of such fact
and that such Existing Assets are required by the Concessionaire to enable it
to operate the Works and/or fulfil its other obligations under this Contract the
Concessionaire shall be entitled to purchase a similar asset on an arms length
basis at its cost and recover the cost associated with the purchase of the asset
from the Council by off-setting same against and deducting same from the
rentals due to the Council in terms of the Lease Agreements, provided that,
should such cost exceed the amount of the rentals due under the Lease
Agreements, the Council shall refund such excess to the Concessionaire
within 30 (thirty) days of the date on which the Concessionaire purchased
such asset.

15.5. In the event that any of the Existing Assets or immovable New Assets
are attached after the Effective Date by any third Party in pursuance of a claim
of that third Party against the Council, then, in such event, the following shall
occur -

15.5.1. the Concessionaire shall as soon as reasonably possible, but in any
event within 5 (five) days from the date of the Concessionaire becoming
aware of such attachment, notify the Council of such fact in writing; and

15.5.2. the Council shall forthwith, but in any event within 5 (five) days after
receipt of the Concessionaire's notice in terms of 15.5.1, procure the
release of the relevant existing asset from attachment, at the Council's
cost and expense, and procure the delivery thereof to the Concessionaire;
and

15.5.3. should the Council fail to fulfil its obligations in terms of 15.5.2
timeously, then, without prejudice and in addition to the Concessionaire's
other rights and remedies that it may have in terms of this Contract or at
law, the Concessionaire shall be entitled to procure the release of the
relevant existing asset from attachment and to recover its costs and
expenses associated therewith from the Council mutatis mutandis in the
manner envisaged in 15.4.

34 This may not be practicable where there is little knowledge of the assets register prior to
contract and will vary from project to project.
16. **STOCK**

16.1. The Council shall, on the Effective Date, hand over, transfer and permit the Concessionaire to use and consume all the Stock reflected on the Stock schedule annexed hereto marked *Annexure [C]* for no consideration and the Concessionaire shall not assume any liability in respect thereof.

16.2. On termination and/or expiration of this Contract, the Concessionaire shall hand over and transfer to the Council, all stocks of chemicals, spare parts, equipment and raw materials on hand as at the date of termination of the Contract, for no consideration or assumption by the Council of any liability in respect thereof.

17. **MOVABLE AND IMMOVABLE CONCESSION ASSETS**

17.1. Subject to the provisions of 11.4 of this Contract, the Existing Assets will be delivered by the Council to the Concessionaire on the Effective Date in the manner set out and recorded in the handover certificate referred to in 10.4.

17.2. The movable Existing Assets will be leased to the Concessionaire pursuant to the Lease Agreement annexed hereto marked *Annexure [B6]*.

17.3. The immovable Existing Assets will be leased to the Concessionaire pursuant to the Lease Agreement annexed hereto marked *Annexure [B7]*. The Parties will, as soon as reasonably possible after the Effective Date, [reduce to notarial form][enter into] the Lease Agreement referred to in 17.3 [and such Lease Agreement will be registered by the Concessionaire at its cost against the title deed of each particular property concerned].

17.4. The Concessionaire shall acquire full rights of ownership in respect of all movable New Assets acquired by it during the Contract Term.

17.5. [All land and servitudes acquired for New Assets shall be registered in the name of the Council.]

17.6. **35** The Concessionaire shall have no right of ownership or lien in respect of any of the Existing Assets, nor have title to, or ownership of the land of the Council on which the Concession Assets will be situated, but the Council shall grant and/or procure, subject to the extent of its statutory powers and the Regulatory Provisions and the conditions of title and/or the provisions of any servitude or Right of Way, rights of access and/or Rights of Way in favour of the Concessionaire in respect of the Concession Assets and shall have same registered against the relevant title deeds. To the extent that the Council is not able to procure the right for the Concessionaire to use any

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35 It is important for Concessionaire to have rights of access to lay pipes etc

- 38 –
such personal or other servitude, such servitude concerned will be transferred by the Council to the Concessionaire pursuant to [relevant legislation].

17.7. The Concessionaire shall have no right during the Contract Term to dispose of any of the Concession Assets leased to the Concessionaire by the Council pursuant to the Lease Agreements but shall return all such Concession Assets no longer required in respect of the supply of Water Services to the Council in the absence of any agreement to the contrary on the basis provided for in 20.

17.8. As soon as reasonably possible, but in any event within 5 (five) days from the date of the Council becoming aware thereof, the Council undertakes to notify the Concessionaire of any land claims that may be lodged or may have been lodged in respect of any of the Concession Assets and shall do everything in its power to ensure the continued use of the Concession Assets so affected for the Concessionaire on the basis envisaged in this Contract. Should the Council be unsuccessful to do so, the Parties agree that such event shall be deemed to be a Material Adverse Governmental Action and the provisions of 56 shall apply.

18. PROCEEDS OF ACTS OF DISPOSAL

18.1. Should the Concessionaire wish to dispose of any movable New Assets during the Contract Term the Concessionaire shall obtain the prior written consent of the Lenders in respect thereof to the extent that the Lenders have any security interest in respect of such New Assets.

18.2. Any proceeds from the disposal of movable New Assets by the Concessionaire shall be reinvested by the Concessionaire in the Supply of Water Services and/or the Works. The results of and/or proceeds of such disposals will not be considered or taken into account for the purposes of evaluating any modification to prevailing Charges.

18.3. Subject to compliance with the Regulatory Provisions, the Council shall as soon as reasonably possible sell or otherwise dispose of all Existing Assets and immovable New Assets returned to it in terms of 18.1 on an arm's-length basis and an amount equal to the proceeds from the disposal by the Council thereof shall be off-set against and deducted from the amounts due and payable by the Concessionaire to the Council under the Lease Agreements and be reinvested by the Concessionaire in the Supply of Water Services and/or the Works. Should the amount so to be off-set and deducted exceed the total amount due and payable by the Concessionaire to the Council, the Council shall refund such amount to the Concessionaire within 30 (thirty) days of the date on which the Council sold or otherwise disposed of the asset concerned.

19. LAND, SERVITUDES AND RIGHTS OF WAY
19.1. Any expansion of the Works identified in any five (5) year plan shall be constructed on land owned or leased by the Council or in respect of which the Council has obtained a servitude in its favour from the registered owner of such land. Where it is necessary for additional land to be acquired or for servitudes to be registered for such expansion then the Concessionaire shall -

19.1.1. identify the location and size of the area of land required for such expansion in the Five Year Plan;

19.1.2. take account of all the likely costs in respect of obtaining the necessary land or acquiring the servitude rights in the cost benefit calculations and decision making process;

19.1.3. undertake identification of the required areas, produce surveys and diagrams of the area required and provide all possible assistance to the Council;

19.1.4. give the Council at least 12 (twelve) months (or such shorter period that may be acceptable to the Council) notice in advance of such land being required to facilitate the purchase, alternatively the obtaining of a servitude or Right of Way or further alternatively the institution of expropriation procedures as the case may be.

19.2. Any expansion of the Works not identified in a 5 (five) year plan shall be done mutatis mutandis on the same basis as set out in 19.1, provided that the Concessionaire shall give the Council as much advance notice in terms of 19.1.4 as is reasonably possible in the circumstances and the Parties shall thereupon consult with each other with a view to reaching agreement in writing in respect thereof.

19.3. The Council shall be responsible for -

19.3.1. acquiring the land or servitude rights timeously and for the payment of the purchase price or other compensation payable associated with such acquisition;

19.3.2. the institution of any expropriation proceedings in respect of any land rights;

19.3.3. the registration of land rights so acquired in the [registration office].

19.4. [On registration of the land rights so acquired, Annexure [B7] shall be amended to incorporate the identity and particulars of the land, where necessary and no proportionate increase in the rental shall be payable by the Concessionaire pursuant to the provisions of Annexure [B7].]

20. RETURN OF CONCESSION ASSETS
20.1. **Interim Returns**

20.1.1. At any time during the Contract Term, the Concessionaire may with the prior written approval of the Lenders indicate to the Council which items of Existing Assets or immovable New Assets should be totally or partly withdrawn from the Concession Assets. The Concessionaire shall hand over and return such items to the Council to be dealt with in terms of 18.3 provided that in the case of partial withdrawals the division of the assets is both economically and technically feasible in the opinion of the Concessionaire. The Concessionaire shall be entitled to decommission or disassemble any of the Concession Assets and use any such items of equipment or components in respect of the remaining Concession Assets.

20.1.2. Should there be no objection from the Council and, in case of partial withdrawals, provided that the division of assets is economically feasible in the opinion of the Concessionaire, the Concessionaire shall hand over and return the assets withdrawn to the Council at a date and time set by the Council which shall be within 7 (seven) days of request.

20.1.3. Such items shall be handed over to the Council at no cost and free of any encumbrance save as otherwise agreed to by the Council and save for any encumbrance that existed at the Effective Date or that existed at the date of delivery of such assets to the Concessionaire (if any).

20.1.4. Subject to 18.3, no consideration shall be paid nor shall any liability in existence at the date of return be assumed or taken over by the Council in respect of the early return of any of the Concession Assets.

20.2. **Return on termination of Contract**

20.2.1. On the termination of the Contract all the Concession Assets directly associated with or connected to the Supply of Water Services, except those assets returned pursuant to 20.1, whether transferred pursuant to the Lease Agreements or acquired or constructed during the Contract Term, will be returned and/or transferred or handed over free of any encumbrance including without limitation any mortgage or notarial bond, cession of claims, lien, hypothec, pledge or any security interest or whatsoever form of intercession save for any encumbrance in respect of New Assets created pursuant to any Financing Agreement and at no cost to the Council and no liability shall be assumed, taken over or settled by the Council in respect of the Concession Assets save as specifically provided herein. The Concessionaire shall indemnify and hold the Council harmless in respect of any such claim by a third Party in respect of such Concession Assets that arose after the Effective Date but prior to the date of return of such Concession Assets save for any claim by a Lender pursuant to a Financing Agreement or any encumbrance created pursuant to any Financing Agreement.
20.2.2. All Concession Assets, shall be returned and/or transferred in good condition of use and operation, fair wear and tear excepted based on the premise that the Works are an integral system that must be returned to the Council in proper functioning order to ensure the uninterrupted and continued Supply of Water Services, provided that the provisions of this clause 20.2.2 shall not apply in respect of any Concession asset that the Concessionaire is in the process of constructing and/or rehabilitating and such Concession asset shall be returned and/or transferred in the condition in which they stand at the date of return.

20.2.3. Upon return of any of the Concession Assets by the Concessionaire to the Council all risk and benefit to such assets shall pass to the Council on the date of such return.

21. **TRANSFER OF PERSONNEL**

21.1. A provisional personnel schedule identifying the Transferring Employees to be transferred to the Concessionaire with effect from the Effective Date, is annexed hereto marked Annexure D1.

21.2. It is recorded that a further provisional schedule identifying the Transferring Employees to be transferred to the Concessionaire with effect from the Effective Date, together with all particulars relating to remuneration and benefits has been handed to the Concessionaire by the Council before the signing hereof. This further provisional schedule shall be treated by the Concessionaire as confidential and personal.

21.3. A final personnel schedule containing remuneration and benefit information of all Transferring Employees as on the Effective Date shall be handed to the Concessionaire on the Effective Date. The Council warrants to the Concessionaire that the final personnel schedule shall be substantially the same as the provisional personnel schedule referred to in 21.1 and the further provisional personnel schedule referred to in 21.2 and, in particular, shall not reflect a higher number of employees than reflected in the provisional personnel schedule and the further provisional personnel schedule nor shall it reflect, in respect of any employee whose name appears thereon, a higher amount of remuneration and other benefits than as reflected in the further provisional personnel schedule.

21.4. The number and categories of Transferring Employees as set out in Annexure [D1] will not be changed but there may be replacements of persons referred to in it provided each substitute falls within the same or a similar category of employee as the person substituted, with due regard to the

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36 the parties should identify the personnel and associated benefits and costs as early in the process as possible – this should not be left until after contract signature

37 It is important that the Concessionaire is not surprised by promotions and new hirings, in order to ensure that the costings are in line with what was anticipated prior to contract
category of person to be substituted.  

A moratorium on promotions other than those promotions approved by the Council prior to [date] in respect of employees listed on the employee schedule have been implemented by the Council with effect from [date].

21.5. At the Effective Date the final personnel schedule will be updated to reflect any resignations or terminations of service that may have taken place prior to the Effective Date.

21.6. The cost of any annual supplementary payment (such as thirteenth cheques and bonuses) shall be deemed to have accrued to the Transferring Employees concerned over the entire year to which such payment relates and the cost thereof shall be shared between the Parties pro rata to the time worked by the Transferring Employees for each Party over that year. The Council shall pay its share of such costs to the Concessionaire upon request from the Concessionaire. In the event of any dispute as to the amount payable, the matter shall be referred to an independent firm of chartered accountants agreed to by the Parties, or failing agreement between the Parties nominated by the President of the [relevant Institute of Chartered Accountants] for decision. The firm of chartered accountants shall act as experts and not as arbitrators in determining the dispute and their decision shall be final and binding on the Parties. The costs of the firm of chartered accountants will be apportioned equally between the Parties.

21.7. [All the rights and obligations between the Council and each Transferring Employee will be transferred on the Effective Date to the Concessionaire as if they were rights and obligations between the Concessionaire and each Transferring Employee before the Effective Date and anything done before the Effective Date by the Council will be considered to have been done by the Concessionaire.] The Council shall and hereby does indemnify the Concessionaire against any loss or damage suffered by the Concessionaire after the Effective Date due to any act or omission of the Council relating to the employment of the Transferring Employees prior to the Effective Date.

21.8. The Council undertakes to render all reasonable assistance to the Concessionaire on request in its dealings with the Transferring Employees on or after the Effective Date (including, but not limited to, assistance with the transfer of the Transferring Employees from the Council to the Concessionaire on the basis envisaged in clauses 21 to 25 of the Contract, with the Concessionaire fulfilling its obligations with regard to the Transferring Employees after the Effective Date and with the Concessionaire fulfilling all statutory obligations with regards to the Transferring Employees after the Effective Date), provided that the Council shall not be liable for any

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38 See footnote 30
39 Some jurisdictions have labor laws that provide for rights of employees of a business that is being transferred
costs or Liabilities incurred in rendering such assistance.

21.9. The Council will, until the Effective Date, continue to discharge all its obligations towards the Transferring Employees including, inter alia, paying all wages, [Pension Fund Contributions], [unemployment insurance fund contributions], other statutory contributions and taxes in respect of them. If, after the Effective Date, the Council on written request of the Concessionaire, continues to carry out any functions in this regard, such functions shall be regarded as having been carried out for and on behalf of the Concessionaire and the costs incurred by the Council in the performance of such functions shall be reimbursed by the Concessionaire to the Council on demand. In the event of any dispute as to the quantum of the amount to be paid to either the Council or the Concessionaire, the dispute shall be referred to an independent firm of chartered accountants agreed to by the Parties and failing such agreement within 3 (three) days, an independent firm of chartered accountants appointed by the President of the [relevant Institute of Chartered Accountants]. The firm of chartered accountants shall act as experts and not as arbitrators and their decision will be final and binding on the Parties. The costs of the firm of chartered accountants will be apportioned equally between the Parties.

21.10. The Concessionaire undertakes -

21.10.1. not to terminate a Contract of employment of any Transferring Employee due to the conclusion of the Contract;

21.10.2. to allow continued enjoyment by each Transferring Employee of the rights to freedom of association and collective bargaining rights enjoyed prior to the Effective Date in as far as the composition of collective bargaining mechanisms in the sector or industry to which the Concessionaire belongs allows for the enjoyment of such rights.

21.11. The undertakings in 21.9 and the transfer of Contracts in terms of 21.7 will not prevent the Concessionaire from consulting with any Transferring Employee on a change in benefit structures and/or terms and conditions of employment at any time after the Effective Date and implementing such change with due regard to the principles of fair labour practices.


21.13. It is recorded that certain Transferring Employees are members of

40 The basis on which the private sector is hoping to reform/ improve the service will need to be taken account when negotiating provisions as to maintaining existing employees – a key tool for improving efficiencies may be to reduce the size of the workforce and so care should be taken as to the number of employees to be taken on in the first place, how long a moratorium on redundancies is to be in place etc. These are likely to be politically sensitive issues but need to be addressed before the contract is entered into.
21.14. The Concessionaire undertakes, subject to the constitutions of the Trade Unions and relevant bargaining council and other collective agreements, to:

21.14.1. enter into negotiations with and to take all reasonable steps to enter into a recognition agreement with each of the Trade Unions, shall make application to become a member of the local government bargaining council/forum as soon as possible after the Effective Date on condition that the relevant Trade Union continues to be representative and subject to the constitutions of the respective Trade Unions, and that bargaining council;

21.14.2. subject to 21.14.1 continue to deduct trade union subscriptions from Transferring Employees after the Effective Date;

21.14.3. ensure the continuation of enjoyment of rights enjoyed by the Trade Unions against or in relation to the Council before the Effective Date in respect of the Concessionaire in as far as it is practicable with reference to any bargaining council or other collective bargaining arrangements in the trade or industry in which the Concessionaire finds itself.

21.15. The Council hereby:

21.15.1. warrants and represents to the Concessionaire that any and all information -

21.15.2. set out in the personnel schedules referred to in 21.1, 21.2 and 21.3; and

21.15.3. furnished to the Concessionaire, whether prior to or after the Effective Date, and relating to any of the Transferring Employees, the amounts or other benefits due to them, their terms and conditions of service or in any other manner related to their employment with the Council up to the Effective Date,

is true, correct and not misleading in any manner whatsoever; and

21.15.4. warrants and represents to the Concessionaire that it complied fully with all laws, by-laws, regulations, orders, proclamations and the like having the force of law and relating to the Transferring Employees and their employment with the Council;

41 This may be appropriate where there is a significant trade union presence
42 Trade unions should be consulted and involved prior to contract signing – they should be involved as early in the project planning process as possible as a workforce that is well-informed and consulted is likely to be key to the success of the project
21.15.5. represents to the Concessionaire that the recognition agreements concluded between the Council and the Trade Unions, copies of which have been furnished to the Concessionaire prior to the signature date hereof, read together with all relevant legislation, set out all the rights and obligations of the Trade Unions vis-a-vis the Council relating to the employment of the Transferring Employees;

21.15.6. indemnifies and holds the Concessionaire harmless against any claim made or instituted against the Concessionaire and against any and all costs, expenses, loss and damage incurred, suffered or and/or ordered against the Concessionaire and relating to -

21.15.6.1. any act or omission of the Council and/or any of its employees, representatives or agents in relation to any of the Transferring Employees; and

21.15.6.2. the information referred to in 21.15.1 and/or the copies referred to in 21.15.3 being untrue, incorrect or misleading and/or the Concessionaire's reliance on such information or copies; and

21.15.6.3. a breach of any of the warranties and representations set out in 21.15.1, 21.15.2 and/or 21.15.3.

22. **[RETIREMENT FUNDS AND MEDICAL AID]**

22.1. [43] It is recorded that the Transferring Employees are members of one or more of the following funds, namely [LIST RETIREMENT FUNDS]

22.2. The Council will seek to procure an amendment of the relevant rules of the funds referred to in 22.1 in order to permit the Concessionaire to commence participating in such funds with the rights and obligations of a participating employer as defined in the rules of such funds.

22.3. In the event that the Concessionaire is unable to become an employer member of any existing retirement fund, it will establish and register a retirement fund offering benefits which are deemed as a whole are at least equivalent to the benefits previously enjoyed by the Transferring Employees.

22.4. The Concessionaire warrants that the contribution rates and the insured benefits offered by the retirement fund to be established by the Concessionaire shall be no less favourable than the contribution rates and insured benefits enjoyed by the Transferring Employees prior to the Effective Date.

23. **TRAINING AND DEVELOPMENT**

[43] Appropriate where a retirement fund exists
23.1. The Concessionaire shall be obliged to develop and implement all the necessary training plans for all employees transferred and/or employed by it, at all levels and in sufficient quality and quantity to ensure that such employees are made aware of significant Regulatory Provisions that may impact upon their specific job tasks.

23.2. All training plans shall be undertaken in accordance with any Regulatory Provision applicable to such training and pursuant to the employee development plan as set out in Annexure [K10].

23.3. In addition, the Concessionaire shall implement and adhere to the development incentives set out in the development incentive schedule annexed hereto marked Annexure [M12].

24. [AFFIRMATIVE ACTION]

[44] The Concessionaire shall comply with the Regulatory Provisions in respect of employment equity and implement the affirmative action and equal opportunity employment plan in the affirmative action schedule annexed hereto marked Annexure [L11] as from the Effective Date.

25. GENERAL CONDITIONS OF SERVICE

45 It is recorded that the general conditions of service attached at Annex [ ] is a summary of the Council’s terms and conditions of employment as applicable to the employees on the Effective Date. The Council warrants and it is further recorded that the representatives of the employees who participated in the negotiation of this agreement, agreed that such summary is a true and fair reflection of the terms and conditions of employment applicable to employees as at the Effective Date.

26. PERFORMANCE GUARANTEE AND RESERVE TRUST ACCOUNT

26.1. The Concessionaire will deliver a Performance Guarantee in favour of the Council and the Lenders, issued by a bank or other financial institution approved by the Council and the Lenders, substantially in the format of the pro forma Performance Guarantee annexed hereto marked Annexure [N13]. The amount of the Performance Guarantee for the first 12 (twelve) month period of the Contract Term will be the sum of [AMOUNT AND CURRENCY].

26.2. The quantum of the Performance Guarantee referred to in 26.1 will be revised annually with effect from each anniversary of the Effective Date in accordance with the increase in the CPI for such period in order that its initial

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44 If relevant to particular country
45 It is important to avoid arguments at a later stage that the general conditions of service are identified formally
value will be maintained relative to the increase in the CPI for such period. Any dispute as to the value of the Performance Guarantee in any given year of the Contract shall be referred to an independent firm of chartered accountants agreed to by the Parties and the Lenders for decision. In the absence of the agreement within 3 (three) days between the Parties and the Lenders as to the identity of the independent firm of chartered accountants, the President of the [relevant Institute of Chartered Accountants] shall appoint an independent firm of chartered accountants from amongst the 5 (five) largest chartered accountancy firms in [country]. The firm of chartered accountants shall act as experts not as arbitrators and their decision will be final and binding on the Parties and the Lenders. The costs of the chartered accountants will be apportioned equally between the Parties. Pending determination of the dispute the value of the Performance Guarantee for the next year shall be equivalent to the value of the Performance Guarantee in the preceding year.

26.3. In the event of a default or breach of Contract by the Concessionaire entitling the Council and the Lenders in terms of the relevant provisions of 57 to enforce the Performance Guarantee, the Council may by notice in writing to the Concessionaire and the Lenders, and/or the Lenders may by notice in writing to the Council and the Concessionaire -

26.3.1. notify the Concessionaire of the breach or default giving rise to the right of enforcement of the Performance Guarantee; and

26.3.2. request the Concessionaire to remedy the breach or default (if capable of remedy) within 60 (sixty) days of receipt of such notice.

If such default or breach is not remedied within the period mentioned in 26.3.2 above, the Council may without prejudice to its other rights under the Contract be entitled to enforce the Performance Guarantee in accordance with its terms. Should the Council not enforce the Performance Guarantee within 7 (seven) days after the effluxion of the period mentioned in 26.3.2 the Lenders may without prejudice to their other rights under the Contract be entitled to enforce the Performance Guarantee in accordance with its terms.

26.4. The Performance Guarantee may only be enforced in respect of the amount of any costs, losses or damages suffered or incurred or reasonably expected to be suffered or incurred as a result of the relevant breach giving rise to the right of enforcement, which amount shall be calculated as the sum of-

26.4.1. the amount referred to in 26.11.1;

26.4.2. the amount referred to in 26.11.2;

26.4.3. the amount referred to in 26.11.3; and

26.4.4. the reasonable net amount (taking into account all income to be
derived from Consumers) required to operate and maintain the Works and to supply the Water Services until the date on which a Substitute Entity has been appointed or until a date 3 (three) months after the enforcement of the Performance Guarantee, whichever date occurs first.

26.5. In addition to the Performance Guarantee to be delivered in terms of 26.1, the Concessionaire will deliver a further Performance Guarantee in favour of the Council for the purpose envisaged in 26.7, also substantially in accordance with Annexure[N13]. The amount of such further Performance Guarantee for the first 12 (twelve) month period of the Contract Term will be the sum of [AMOUNT AND CURRENCY].

26.6. The quantum of such further Performance Guarantee in 26.5 will be revised annually mutatis mutandis in accordance with the provisions of 26.2.

26.7. The Council may only enforce such further Performance Guarantee in respect of the amount of customer deposits referred to in 11.8 not available to the Council on the termination or expiration of the Contract. In the event that the full amount of such customer deposits is not available to the Council on the termination or expiration of the Contract, the Council shall send a notice to the Concessionaire -

26.7.1. notifying the Concessionaire of that fact and of the amount that it intends to claim under such further Performance Guarantee; and

26.7.2. requesting the Concessionaire to remedy the position within 60 (sixty) days of receipt of such notice.

26.7.3. If the position is not remedied within the period mentioned in 26.7.2, the Council will be entitled without further notice to enforce such further Performance Guarantee in accordance with its terms.

26.8. A joint interest bearing trust account shall be opened by the Council and the Lenders before the Effective Date ("the reserve trust account") with the [ ] branch of [bank] ("the account bank"). Withdrawals and transfers from the reserve trust account shall be made only upon the written instructions of two signatories. The signatories of the reserve trust account shall comprise 1 (one) representative appointed by the Council and 1 (one) representative appointed by the Lenders. Upon the discharge of the Financing Agreements, the mandate of the representative appointed by the Lenders shall expire. Thereafter, until the termination or expiry of this Contract, the signatory of the reserve trust account shall comprise the representative appointed by the Council.

26.9. Amounts received as a result of an enforcement of the Performance Guarantee referred to in 26.1 ("the proceeds") shall be paid into the reserve trust account. Such payment of the proceeds into the reserve account shall satisfy the Concessionaire’s obligation to effect payment of the relevant
amount.

26.10. The proceeds shall be applied by the signatories in accordance with the joint instructions of the Council and the Lenders (or, if the Financing Agreements have been discharged, on the instructions of the Council) or, in the case of a failure of the Council and the Lenders to reach an agreement on such instructions within 7 (seven) days of the date of payment of the proceeds into the reserve trust account in terms of 26.9, then in accordance with 26.11.

26.11. The proceeds paid into the reserve trust account shall, unless otherwise agreed between the Council and the Lenders in terms of 26.10, be applied as follows and in the following order -

26.11.1. towards the expenses of rectifying any damage to the Works (or any part thereof) to ensure the Supply of Water Services as envisaged in this Contract where such costs have resulted from the breach by the Concessionaire of this Contract that resulted in the proceeds being paid into the reserve trust account, or an Event of Force Majeure which is not covered by an insurance policy referred to in 27;

26.11.2. towards the reasonable costs and expenses incurred by the Council and/or the Lenders in appointing a Substitute Entity in terms of 60;

26.11.3. towards the payment of any amount due and payable to the Council by the Concessionaire under the Lease Agreements as at the date that the Performance Guarantee is enforced less any amount properly set-off against such rentals pursuant to this Contract;

26.11.4. towards the payment of any outstanding amount due and payable to the Lenders under the Financing Agreements which the Concessionaire is unable to discharge or any unfunded amounts in the reserve accounts that the Concessionaire is required to maintain under the Financing Agreements;

26.11.5. towards any actual and quantified loss, damage, cost or expense suffered or incurred by the Council, as a result of such breach;

26.11.6. towards any actual and quantified loss, damage, cost or expense suffered or incurred by the Lenders, as a result of such breach.

26.12. Any amount standing to the credit of the reserve trust account on termination or expiry of this Contract shall be applied for the benefit of the Concessionaire.

26.13. Any and all amounts paid by the guarantor pursuant to the enforcement of the Performance Guarantee shall for the purposes of this Contract, be deemed to have been paid on account of the Concessionaire’s obligations.
hereunder.

27. **INSURANCE**

27.1. Without limiting the responsibilities and Liabilities of the Concessionaire in respect of the Supply of Water Services in terms of the Regulatory Provisions and the Contract, the Concessionaire shall effect and maintain for the duration of the Contract the insurances reflected on the insurance schedule annexed hereto marked *Annexure [O14]* in accordance with the terms and conditions reflected therein and any amendment thereto approved by the Parties and by the Lenders. The Concessionaire shall further, at its own expense, and without the need to obtain the approval of the Council arrange its own insurance in respect of all road vehicles, Liabilities and other risks which are required by the Lenders and/or any Regulatory Provision or considered necessary by the Concessionaire.

27.2. The Council, the Operator, any other Subcontractor and the Lenders shall be named as a co-insured and their interests noted against all policies referred to the insurance schedule annexed hereto marked *Annexure [O14]*. Each insurance policy shall include-

27.2.1. a waiver of subrogation against the Council, the Lenders, the Concessionaire, the Operator and any other Subcontractor, their agents, employees, officers and Contractors and vice versa;

27.2.2. a provision whereby the policy of insurance shall apply to each of the co-insureds as if a separate policy had been issued to each of them other than in the event of exhaustion of the sum insured or the limit of indemnity;

27.2.3. an exclusion of any cut-through clause in respect of any primary insurer or re-insurers in respect of each policy;

27.2.4. a breach of condition or warranty/severability/non-vitiation provision acceptable to the Council and the Lenders or if such provision is not generally available in equivalent policies written in the worldwide insurance market, the Concessionaire, the Council and the Lenders shall covenant, for the duration of the non-availability, in writing that it will not breach any condition or warranty made to, the insurer which would cause the relevant insurance policy to fail;

27.2.5. a provision that a notice of a claim given to the insurer by the Concessionaire or the Council or any other insured under the policy shall, in the absence of manifest error, be accepted by the insurer as valid notification of a claim in respect of the interests of all co-insureds;

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46 Insurance provisions need to be reviewed by local expert in light of what is permitted and available locally.
27.2.6. a provision that such insurance shall be primary and no other policy shall be called into contribution;

27.2.7. a loss payee provision in accordance to 27.8;

27.2.8. a provision that requires the insurer to send copies of all notices of cancellation or any other notices pertaining to any amendments or notices of change given under or in relation to the policy to all co-insureds;

27.2.9. a provision that notification must be given to all co-insureds at least 90 (ninety) days in advance of the date on which the omission or breach concerned may result in the lapsing or loss of the validity of the policy, in whole or in part. Each policy shall also provide that it will not lapse or lose validity in whole or in part if the insurer has not complied with the obligation referred to herein within the prescribed period from the date of notification;

27.2.10. a provision providing for an extension cover note of 90 (ninety) days in respect of each policy pending the removal of such policy.

27.3. The Concessionaire shall, at its own expense, insure and keep insured all persons employed by it in connection with the Contract against all risks of injury or death arising out of their employment. [The benefits payable in terms of such insurance shall be at least equivalent to [existing/ state health provisions].

27.4. During the Contract Term the Concessionaire shall within 90 (ninety) days prior to the anniversary date of each policy and whenever the Council or the Lenders so request provide evidence, including copies of all insurance policies proof of payment of premium and that all policies continue in force and that the insurance has been taken out and is being maintained by the Concessionaire as required hereunder.

27.5. The Concessionaire shall inform the Council and the Lenders in writing as soon as reasonably practicable after it becomes aware of the occurrence of any event that may give rise to a claim under a policy of insurance required by this clause where the estimated claim exceeds [AMOUNT AND CURRENCY] after deduction of any applicable excess and will ensure that the Council and the Lenders are kept fully informed of the subsequent action and developments concerning the claim.

27.6. If the Concessionaire does not maintain the validity of the insurance policies reflected on the insurance schedule the Council and/or the Lenders may maintain their validity or take out new policies, at the Concessionaire's expense and cost, provided that same is done on commercially reasonable terms available in the worldwide insurance market. The amount paid by the Council or the Lenders in respect of the premiums shall be reimbursed by the Concessionaire to the Council or the Lenders, as the case may be, within a
period of not more than 30 (thirty) days from the date of demand. The Council undertakes not to act in terms of this clause 27.6 without the prior written consent of the Lenders. If such insurance cover is not so available to the Council and/or Lenders the provisions of 27.13 will apply *mutatis mutandis*.

27.7. In order to give effect to a satisfactory insurance programme the Concessionaire must prepare and submit to the Council and the Lenders for approval, a Contract insurance procedure manual. The said manual will, *inter alia*, deal with procedures to be adopted on all aspects of insurance dealt with under this clause 27 with particular reference to underwriting information, declarations, returns and claims procedures. The Council shall, as soon as possible after being requested to do so by the Concessionaire, Supply all the information which is deemed necessary or which may be required by the insurers or as set out in the Concessionaire’s Contract insurance procedure manual.

27.8. On each and every occasion when any part or the whole of the Works is destroyed or damaged and the Concessionaire estimates that the estimated loss is [amount and currency] or more -

27.8.1. the agreement of loss shall be signed by both the Council and the Concessionaire;

27.8.2. all monies received under any physical damage insurance policy taken out in accordance with this clause 27 shall be paid into a Trust Account, opened in the joint names of the Council and the Lenders with the [    ] branch of [bank], such monies to be released to the Concessionaire against application by or on behalf of the Concessionaire with such supporting information and documentation as the Council and the Lenders may reasonably require;

27.8.3. the Concessionaire shall notify the Council and the Lenders in writing whether it is able and/or whether it is necessary to reinstate or repair the Concession asset which is the subject of the insurance claim;

27.8.4. should the Concessionaire notify the Council and the Lenders that it is able and it is necessary to reinstate or repair the Concession asset which is the subject of the insurance claim, the Council, the Lenders and the Concessionaire shall consult with one another with a view to reaching agreement, in writing, whether the amount received or to be received under the insurance policy will be sufficient for such purpose taking into account *inter alia* the Concessionaire’s obligations under the Financing Agreements and its continued ability to fulfil same. In the absence of such written agreement within 5 (five) days, the dispute shall be referred to a panel consisting of 3 (three) persons one of whom shall be a representative from an independent firm of chartered accountants and the other 2 (two) shall be 2 (two) independent consulting engineers agreed to
between the Parties or in the absence of such agreement, appointed by the President of the [relevant Institute of Chartered Accountants]. The panel shall act as experts and not as arbitrators and their decision will be final and binding on the Parties. The cost plus Service Tax of the persons on the panel will be apportioned between the Council and the Concessionaire on the basis that the Council shall be responsible for the payment of $33\frac{1}{3}$ of the costs payable in respect of the persons on the panel and the Concessionaire shall be responsible for the payment of $66\frac{2}{3}$ of the costs payable in respect of the persons on the panel;

27.8.5. if agreement has been reached in terms of 27.8.4 that the relevant Concession asset is to be reinstated or repaired, or if the panel referred to in 27.8.4 determines that the amount available is sufficient to reinstate or repair the relevant Concession asset, then the full amount retained in the trust account referred to in 27.8.2 shall forthwith be paid to the Concessionaire and the Concessionaire shall forthwith lay out all insurance proceeds and at its own expense all other such money as shall be necessary -

27.8.5.1. to reinstate, rebuild and/or replace the Concession asset in a workmanlike manner in accordance with all such consents and approvals as shall be necessary and to the extent that the Council and the Concessionaire agree that any reinstatement, rebuilding or replacement shall be in accordance with drawings and specifications approved in writing by the Council (such approval not to be unreasonably withheld or delayed); or

27.8.5.2. to make good any loss sustained by the Concessionaire or settling any claim made by the Concessionaire.

27.8.6. Should the Concessionaire indicate that it is not able or that it is not necessary to reinstate or repair the Concession asset which is the subject of the insurance claim, it shall satisfy the Council and the Lenders that the non-reinstatement and non-repair of such Concession asset will not negatively impact on its ability to fulfil its obligations in terms of this Contract and the Financing Agreements and shall furnish the necessary independent reports in support thereof to the Council and the Lenders whereupon all monies referred to in 27.8.2 shall be paid to the Concessionaire to be used as part of its operating capital and funds;

27.8.7. If agreement has been reached in terms of 27.8.4 that the Concession asset is not to be reinstated or repaired, or if the panel referred to in 27.8.4 determines that the amount available will not be sufficient to reinstate or repair the relevant Concession asset and if in either case such non-reinstatement or non-repair negatively impacts materially upon the Concessionaire’s ability to fulfil its obligations in terms of this Contract and/or the Financing Agreements, the Concession and this Contract may forthwith be terminated by the Council in accordance with the provisions
of [59], in which event the full amount retained in the trust account referred to in 27.8.2 shall unless the Council and the Lenders agree otherwise, forthwith be paid to the Lenders on account of the Council's obligations to the Lenders in terms of [59].

27.9. On each and every occasion not dealt with in terms of 27.8 (where the Concessionaire estimates that the estimated loss is less than [amount and currency] -

27.9.1. the Concessionaire shall be responsible to reinstate, re-build and/or replace the Concession Assets destroyed or damaged; and

27.9.2. the Concessionaire shall be entitled to sign the agreement of loss and to institute and finalise all relevant insurance claims for and on behalf of the all co-insureds.

27.10. Upon request by the Council, the Concessionaire shall satisfy the Council that off-site manufacturing and fabrication risks are adequately covered by insurance arranged by the Concessionaire, Furthermore, where required by the Council and to the extent that the Council has an insurable interest in such asset at any Contractor's off-site manufacturing or fabrication facilities, such interest shall be noted by endorsement to the policies. If requested by the Council copies of such endorsed policies shall be made available to the Council.

27.11. Where plant and/or materials and/or equipment are to be transported to the Concession Area from outside [country], the Concessionaire shall in the joint names of the Council, the Lenders, the Concessionaire, the Operator insure and keep same insured with a [country] registered insurer for the full replacement value thereof under a policy of marine transit insurance subject to instituted cargo clauses (All risks), war, strikes, riots and civil commotion clauses as well as 60 (sixty) days concealed damage and on-site storage cover.

27.12. Where the Concessionaire in terms of the Contract is responsible and/or liable for any loss or damage, it shall bear the amount of all uninsured losses which shall include the amount of all applicable deductibles under any relevant policy of insurance.

27.13. Should insurance cover as covered by any policy of insurance required from the Concessionaire in terms of this clause 27 become unavailable at a commercial price in the worldwide insurance market for any reason whatsoever other than through the fault or negligence of or on behalf of the Concessionaire, then -

27.13.1. the Concessionaire shall forthwith notify, in writing, the Council and the Lenders of such fact. Such notice shall contain the Concessionaire’s proposals as to what it considers reasonable and appropriate to mitigate, manage and control the relevant uninsured risks.
(which proposals will include measures to share the risks and costs associated with the absence of insurance and may include, without limitation, proposals to amend or vary the Supply and Water Services and/or to alter the Works); and

27.13.2. within 5 (five) days of receipt of the notice in 27.13.1 the Parties and the Lenders shall meet to discuss both the unavailability of the insurance cover and the proposals submitted by the Concessionaire in that regard. Should the Parties and the Lenders be unable to reach agreement in writing within 30 (thirty) days of first having met, the Concessionaire shall be entitled but not obliged to elect by way of further written notice delivered to the Council and to the Lenders within a further 30 (thirty) days whether or not the Concession and the Contract should be terminated;

27.13.3. should the Concessionaire indicate that the Concession and this Contract should continue and should not be terminated, then this Contract shall continue to be of full force and effect, save for the obligations of the Concessionaire to effect the insurance cover concerned and the occurrence of any event that would have been covered by the relevant policy of insurance had it still been of full force and effect, shall be deemed to be an Event of Force Majeure; or

27.13.4. should the Concessionaire elect that the Concession and this Contract should be terminated, the Concession and this Contract shall forthwith be terminated in accordance with the provisions of 58.

27.14. The Council and the Lenders retain the right to approve the carrying capacity of any insurer under any policy of insurance referred to in the insurance schedule and taken out after the Effective Date.

27.15. Subject to the preceding provision of this clause 27 the effecting and taking out of insurance will not diminish the liability of the Concessionaire, who will remain directly responsible and liable for the discharge of all obligations in terms of the Contract.

28. **CONDITIONS OF SERVICE**

28.1. Notwithstanding anything to the contrary contained in this Contract, the Concessionaire shall be responsible to supply Water Services to Consumers in the Developed Areas and in all Expansion Areas and New Areas in respect of which agreement has been reached in terms of 8.2.3.1. Subject to 8.2.4 hereof, the Concessionaire shall accordingly not be responsible to supply Water Services to any other Consumers or to any other area within the Concession Area.

28.2. The Supply of Water Services shall be provided by the Concessionaire in accordance with the Regulatory Provisions and on such conditions that
ensure its affordability, continuity, regularity, quality and sustainability thereby ensuring an efficient Supply to Consumers on the basis set-out in this Contract and the protection of the environment subject to -

28.2.1. the adequate availability of Raw Water from Water Sources and bulk water suppliers and the equitable allocation of Potable Water to all Consumers within the Concession Area;

28.2.2. subject to 38, Consumers paying Tariffs in accordance with prescribed Tariffs;

28.2.3. the nature, topography, zoning and situation of the land;

28.2.4. the right to limit or discontinue the Supply of Water Services on the occurrence of any of the following -

28.2.4.1. an emergency situation and/or an Event of Force Majeure;

28.2.4.2. failure by a Consumer fully and timeously to pay for Water Services despite demand and/or to comply with the conditions of the Supply of Water Services;

28.2.4.3. the Consumer has interfered with a water service;

28.2.4.4. maintenance and repairs including but not limited to extraordinary maintenance or repairs.

28.2.5. The conditions of and service requirements in respect of the Supply of Water Services are set out in the conditions of performance and service levels annexed hereto marked Annexure [E5].

29. SERVICE REQUIREMENTS

29.1. The Supply of Water Services is a public service and shall be developed by the Concessionaire contemporaneously endeavouring to avoid installing water borne Sanitation Services Works without installing an appropriate level of Water Supply Services Works and vice versa.

29.2. The Water Services must be operated in such a manner that the Concessionaire's information systems make it possible to identify the distinction between the costs for Sanitation Services and Water Supply Services.

47 If expansion of the services to new areas/ connections is a key feature of the project then detailed provisions should be included in the contract providing for how the Concessionaire is to achieve expansion – often the contract only contains a general vague provision that a feature of the objectives of the contract are to increase connections, with little detail – this is unsatisfactory of the Council is keen to see improvements as it will be low on the Concessionaire's priorities to supply poor areas unless it is contracted to do so and is incentivized to do so.
29.3. In addition to the provisions pertaining to performance levels set out in Annexure E5, the Concessionaire undertakes that:

29.3.1. all broken water meters of legally connected Service Connection Points as at the Effective Date will be replaced with working meters within 12 (twelve) months as from the Effective Date;

29.3.2. the Concessionaire will, at its own cost and expense, effect the first replacement of each broken meter referred to in 29.2.1 with a working meter, whereafter such replacements shall be done by the Concessionaire at the cost and expense of the Consumer concerned subject to 29.2.3;

29.3.3. it will replace or repair, at its own cost and expense, all water meters of legally connected Service Connection Points where such replacement or repair may be necessary due to normal wear and tear.

29.4. The Concessionaire shall use its best endeavours to legalise and improve all informal connections of Consumers in the Developed Areas by installing water meters at its own cost within the first 2 (two) years of the Contract Term subject to the Consumer:

29.4.1. purchasing a high level break tank complete with ball valve but excluding any piping of a capacity of not less than 170lt (one hundred and seventy litres) which will be available from the Concessionaire at 50% (fifty per centum) of the normal selling price during the first 2 (two) years of the Contract Term. The Consumer will be responsible for the installation of the tank as well as the piping to connect the tank to the Water Supply Services Connection Point on the property based on technical advice that will be provided by the Concessionaire;

29.4.2. paying the necessary deposit as reflected in the Tariff Schedule to initiate the credit for monthly billing for the Supply of Water Supply Services.

It is recorded that the Consumer will have access to a water supply at any time during a 24 (twenty four) hour period due to the storage availability in the high level break tank referred to in 29.4.1, provided that the Consumer does not misuse the water stored in such high level break tank.

29.4.3. As an alternative to 29.4, a Consumer may purchase a 200 (two hundred) litre ground level storage tank which will be available from the Concessionaire at 50% (fifty per centum) of the normal selling price

48 Informal connections and the formalizing of them is a politically sensitive and highly negotiated topic – different solutions will suit different projects – appropriate levels of service, invoicing and bill collection arrangements and where to position connections (standpipe/ individual connections etc), who is to pay for connections/ whether subsidized, how property rights to be affected etc will all need to be considered.
during the first 2 (two) years of the Contract Term. The Consumer will be responsible for the installation of the tank on the property as well for the piping to connect the tank to the Water Supply Services Connection Point based on technical advice which will be provided by the Concessionaire at no cost. The water bailiff will be responsible to fill the tank daily on pre-payment of the prescribed Tariff.

29.4.4. Should a Consumer fail to legalise and improve his connection in the manner set out in 29.3, 29.4 or 29.5, the Concessionaire shall not be required to legalise that Consumer’s connection and shall be entitled to cut off the Supply of Water Services to the Consumer concerned.

29.4.5. The Concessionaire will implement a scheme in terms whereof Consumers will be afforded an opportunity to pay the amount referred to in 29.4.1 and 29.5 over a 3 (three) month period.

29.5. The Concessionaire will where required and subject to the viability thereof improve the local distribution system of the Water Supply Services Works connected to or associated with the supply of Water Supply Services in the Developed Areas.

29.6. [The Concessionaire will establish a dedicated technical team to advise and train Consumers on how to construct VIP units or similar sanitation units. The Concessionaire will for the first 2 (two) years of the Contract Term provide and deliver at no cost to all Consumers in the Developed Areas who have completed the necessary excavation for the construction of their VIP units, a precast concrete slab unit, pedestal, cover, ventilation pipe and fly screen.]

29.7. The Concessionaire will for the duration of the Contract Term establish customer liaison teams who will identify groups of Consumers within areas to which the Concessionaire supplies Water Services who wish to receive a higher level of Water Supply Services and/or Sanitation Services and subject to the demand therefor and technical restraints and provided such Consumers are willing and able to pay for an upgraded water Supply and/or Sanitation Services and provided further, to the extent required under the Financing Agreements, that the Lenders consent thereto, the necessary Works will be designed and implemented by the Concessionaire.

29.8. Should it prove impossible and/or impractical as a result of intervention by third Parties, to effect extensions of the supply of Water Services, the Concessionaire shall notify the Council sufficiently in advance to prepare for adjustments to the service improvement and expansion plan to be implemented and the Concessionaire will be relieved of all or part of such obligations in regard to levels of service that are directly affected by such adjustments that would have been incumbent upon it pursuant to such plan.

30. **COVERAGE OF SERVICES**
30.1. The Supply of Water Services shall be made available to Consumers within the Developed Areas by the dates stipulated in the conditions of performance and service levels annexed hereto marked Annexure [E5] as amended from time to time. The capital works programme to be undertaken by the Concessionaire in respect of the first 5 (five) year period as from the Effective Date is attached at Annexure [ ]. The capital works programme for any approved Five Year Plan will be adjusted to take cognisance of actual payment levels achieved by the Concessionaire.

30.2. Notwithstanding anything to the contrary set out in this Contract, should -

30.2.1.1. the actual pattern of demand for the Supply of Water Services at any time differ from the projected pattern of demand used by the Concessionaire for purposes of the capital expenditure programme referred to in 30.1 or for any other similar capital expenditure programme, whether set out in or contained as part of any current Five Year Plan or otherwise; or

30.2.1.2. the level of Consumer payments for Water Services at any time differ from the projected level of Consumer payments used by the Concessionaire for purposes of the capital expenditure programme referred to in 30.1 or for any other similar capital expenditure programme, whether set out in or contained as part of any current Five Year Plan or otherwise,

30.2.1.3. then the Concessionaire shall, without prejudice to any other right or remedy which it may have in terms hereof or at law, be entitled to adjust its capital expenditure programme and to amend any current and future programme accordingly in consultation with the Council and the Lenders, provided that the Concessionaire shall at all times Supply Water Services in accordance with the service levels stipulated in the performance and service levels annexed hereto marked Annexure [E5] or such other performance and service levels which may be agreed in writing from time to time between the Parties and give preference to the provision of a Basic Water Supply service and a Basic Sanitation service to all Consumers within the areas to which the Concessionaire supplies Water Services.

30.3. The standards of Water Services may, subject to the Regulatory Provisions and with the prior approval of the Council, differentiate on an equitable basis between different Consumers of Water Services, different types of Water Services and different geographic areas within the Concession Area taking into account inter alia the socio-economic and physical attributes of each area.

30.4. The Concessionaire shall be responsible for the Supply of fire hydrants
where they are contiguous with the development of Water Supply Services and the maintenance of all fire hydrants in all areas to which it provides Water Services in accordance with the Regulatory Provisions and ensure that Water Supply Services are provided under suitable conditions at all such fire hydrants.

30.5. When a water Supply service is available and Consumers have been notified by the Concessionaire, Consumer Installations must be connected to the Works by the Concessionaire pursuant to a work sequence that minimizes Water Services interruption. The Concessionaire shall, after prior notice to the Consumer, be entitled to isolate any other unauthorised or illegal water Supply service.

30.6. The Concessionaire shall subject to the Regulatory Provisions recognise all alternative water Supply sources legally used by Consumers as at the Effective Date. As from the Effective Date should a Consumer wish to maintain a water Supply source for his own use other than that supplied by the Concessionaire, the Consumer shall apply to the Council to retain the water Supply. The Council may with the prior written approval of the Concessionaire permit use of the alternative source provided that the alternative source is not unlawful, the alternative source is kept independent from the Works, the alternative source is used solely for the personal use of the Consumer concerned, there is no risk to the public health, the environment, the protection of the Water Source, the Supply of Water Services and against payment of any required amounts specified in the Tariff Schedule. Should the Council grant a permit for the use of an alternative source, the Concessionaire shall have no responsibility in respect of such water Supply source and such source may not be connected to the Water Services Works without the prior written approval of the Concessionaire.

30.7. Once a sanitation supply service is available and there is sufficient capacity within the Works for conveying and treating effluents, sewage and waste water, Consumer Installations shall be connected to it by the Concessionaire after an application by the Consumer has been approved by the Concessionaire. Redundant Sanitation Services as determined by the Concessionaire may be sealed off by the Concessionaire.

30.8. The Concessionaire shall subject to the Regulatory Provisions recognise all alternative water borne sanitation systems legally used by Consumers as at the Effective Date. As from the Effective Date should a Consumer wish to use or maintain an alternative water borne Sanitation Service where a water borne sanitation system is available, the Consumer must apply to the Council to use alternatively retain such alternative sanitation system. The Council may with the prior written approval of the Concessionaire grant such request, provided that there is no risk to the public health, the protection of Water Sources, the environment or the Supply of Water Services and against payment of any required amounts specified in the Tariff Schedule. Should the Council grant a permit for the use of such
alternative sanitation system, the Concessionaire shall have no responsibility in respect of such sanitation system and such alternative sanitation system may not be connected to the Sanitation Services Works without the prior written approval of the Concessionaire.

30.9. Should a Consumer wish to discontinue an approved alternative water Supply source and/or sanitation system and be connected to the Works, such connection may only occur with the prior written approval of the Concessionaire and against payment of the required amounts specified in the Tariff Schedule.

31. **WATER QUALITY AND QUANTITY**

31.1. Potable water supplied by the Concessionaire must meet the technical requirements prescribed by the quality specification annexed hereto marked *Annexure [E5]*.

31.2. The Concessionaire shall inform the Council of any significant change in the Raw Water quality which cannot be dealt with by the treatment process at the treatment plants comprised in the Works. In such event the Concessionaire shall take all reasonable measures required for detecting and preventing Raw Water pollution from entering any such treatment plant.

31.3. In respect of bulk treated water purchased by the Concessionaire for distribution to Consumers, the Concessionaire shall not be responsible for any deviation from the specification stated in *Annexure [E5]* if such deviation is attributable to the bulk treated water supplier.

31.4. The Concessionaire shall submit a monthly report of the results of its control tests in respect of water quality to the Council.

31.5. The Concessionaire shall not be liable for any changes of quality and/or quantity of Raw Water due to any reason whatsoever outside the reasonable Control of the Concessionaire. The charge reviews to be done from time to time pursuant to Part VIII of this Contract shall take into account all additional capital and/or operational costs incurred by the Concessionaire in overcoming any deterioration in the Raw Water quality that may arise from time to time.

32. **WATER PRESSURE**

32.1. Potable water supplied shall have a minimum residual pressure as defined in the quality specification annexed hereto marked *Annexure [E5]*.

32.2. The Concessionaire shall control the maximum pressure in the Works to prevent damage to any Consumer Installations legally connected to Service Connection Points and to reduce water losses.
33. **CONNECTION RESPONSIBILITY**

33.1. The Concessionaire shall against payment of the relevant amount specified in the Tariff Schedule by the Consumers and subject to 38, be responsible for the connection of all Consumers installations to the Service Connection Points. The Consumers shall at their cost be responsible for the installation of Consumer Installations and for the maintenance of such installations.

33.2. Consumers shall be obliged to pay for new and/or upgraded connections of Consumer Installations to the Water Services Works and the Sanitation Services Works in accordance with the Tariff Schedule applicable from time to time.

33.3. Consumers shall furthermore be obliged to pay for the repair of all damaged connections of Consumer Installations to the Water Services Works and Sanitation Services Works in accordance with the Tariff Schedule applicable from time to time, provided that such damage was not caused by any negligent act or omission of the Concessionaire (in which event the Concessionaire shall repair same free of charge).

34. **FLOODING BY SEWER OVERFLOW**

34.1. The Concessionaire shall eliminate sewer overflows systematically during the Contract Term in order to keep such overflows to a minimum level and in accordance with the then current Five Year Plan.

34.2. Should a sewer overflow occur, the Concessionaire shall -

34.2.1. take such immediate steps as the Concessionaire deems necessary to remove the cause of the overflow except in circumstances where such overflow is directly attributable to insufficient capacity in the Sanitation Service Works. The rectification of any such incapacity in the Sanitation Service Works shall fall within the provisions of the then current Five Year Plan;

34.2.2. take all reasonable actions to eliminate any re-occurrence of any such sewer overflow;

34.2.3. minimise the extent of the overflow by the provision of pumping and other appropriate actions;

34.2.4. submit a detailed report to the Council as to the cause of the overflow and the remedial actions implemented to prevent a re-occurrence.

35. **WASTE WATER TREATMENT**

35.1. **Effluents**
35.1.1. The Concessionaire shall conform to the requirements for treated effluent as set out in Annexure B4.

35.1.2. The Concessionaire shall establish, maintain and operate both an ordinary and an emergency sampling system at different points in the Works, in respect of effluents discharged in accordance with such quality control methods as the Concessionaire may from time to time apply to ensure compliance with all quality control standards required in terms of the Regulatory Provisions and the rules applicable to the sampling regime specified in the quality specification annexed hereto marked Annexure B4.

35.1.3. Should any problem arise in the Works and/or treatment that causes non fulfilment of any standards or quality specifications, the Concessionaire must inform the Council within 12 (twelve) hours of becoming aware of the occurrence stating the causes and setting out the remedial actions to be implemented for re-establishing Sanitation Services quality and Sanitation Services Works reliability.

35.1.4. Any sludge disposal costs save for any costs associated with the acquisition of land and other immovable property for such purpose shall in all cases be the responsibility of the Concessionaire. The Concessionaire must also, whatever the method employed, conform to the standards in force in each case that are laid down in Regulatory Provisions pertaining to such disposal. In deciding on which sludge disposal system to adopt, the Concessionaire shall adopt the most cost effective method after including the full costs of any land acquisition and related expenses provided that the Concessionaire shall be entitled to continue with the existing sludge disposal systems of the Council as at the Effective Date.

35.2. **Industrial effluent**

35.2.1. The Concessionaire shall conform to the Regulatory Provisions in respect of the management and acceptance of Industrial Effluent and with the requirements for Industrial Effluent as set out in the quality specification annexed hereto marked Annexure B4.

35.2.2. The Concessionaire shall be entitled in consultation with the Council to set minimum standards from time to time, in respect of the technical specifications and conditions to which Industrial Effluent must comply prior to the discharge thereof by the Consumers into the Sanitation Services Works including circumstances under which the provision and disposal may be limited. Until otherwise agreed between the Parties such minimum standards shall be the minimum standards in force at the signature date of this Contract.

35.2.3. The Concessionaire shall, in addition, be entitled to levy a surcharge
and/or refuse acceptance of any Industrial Effluent not complying with the minimum standards referred to in 35.2.2.

36. **INTEGRITY OF WATER SERVICES WORKS**

If the Concessionaire wishes to make use of assets associated with or connected to the Supply of Water Services within the Concession Area owned and/or operated by a Party other than itself or the Council, the Concessionaire shall ensure, upon the termination of the Contract, the continued use thereof for the Council or any Substitute Entity on the same terms and conditions, in order to allow the Council or the Substitute Entity concerned to continue the Supply of Water Services, to Supply Water Services and to operate the Works within the Concession Area on an uninterrupted basis in accordance with the Regulatory Provisions.

37. **CUTTING OF SERVICE**

37.1. The Concessionaire will in its discretion be entitled to proceed to cut off alternatively restrict the water flow in respect of Water Supply Services or cut off Sanitation Services for failure or refusal by a Consumer to make timely or full payment or to meet other conditions for the Supply of Water Services, subject to the adherence to the following conditions:

37.1.1. the protection of the public health shall be considered at all times;

37.1.2. should any hospital, school, correctional service facility or other approved institution whether public or private, be in default of its conditions of Supply in respect of Water Services, the Concessionaire shall notify the Council of the fact at least 14 (fourteen) days prior to cutting off the Supply of Water Services;

37.1.3. default on an invoice must be for at least a period of 60 (sixty) days from its due date;

37.1.4. the Concessionaire must have demanded payment from the Consumer in respect of the outstanding amount in writing;

37.1.5. the Concessionaire must give the Consumer at least 7 (seven) days prior notice in accordance with the manner set out in the Consumer Rules for the cutting off of the Supply of Water Services.

37.2. Upon payment by the Consumer of the outstanding amount due and payable in terms of the Tariff Schedule, including interest thereon, the prescribed reconnection charge and increased deposit payment, the

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49This is a sensitive area – whilst Concessionaire/ consumers will not want to have to subsidize defaulting customers, water is regarded as an essential service and it is illegal in many countries to cut off the service even to defaulting customers – consideration needs to be given to the parameters where cutting off the service is justifiable, if at all
Concessionaire shall re-establish the Supply of Water Services within a maximum period of 24 (twenty four) hours.

37.3. If the water Supply service is not re-established on the expiry of the period referred to in 37.2, the Concessionaire will not be entitled to recover any additional sum over and above the amounts referred to in 37.2 on the re-establishment of the Supply of Water Services.

37.4. Should the Concessionaire have unlawfully cut off the Supply of Water Services to a Consumer, the Concessionaire shall re-establish the Supply of Water Services within a maximum period of 24 (twenty four) hours and will not be entitled to charge any sum in respect of the re-establishment of the water service.

37.5. In an emergency situation due to a national disaster or on the occurrence of an Event of Force Majeure the Concessionaire shall use its reasonable endeavours to Supply a Basic Water Supply and Basic Sanitation service to all Consumers within the Developed Areas and all other areas to which the Concessionaire supplies Water Services.

37.6. The Concessionaire may with the prior written consent of the Council (where it is possible to obtain same), impose appropriate limitations on the Supply of Water Services in an emergency situation or an Event of Force Majeure with due regard to the provisions of this Contract and the Regulatory Provisions.

37.7. The Concessionaire will have the right to eliminate informal connections in terms of the following procedure -

37.7.1. the Concessionaire will undertake an investigation to determine the scale of clandestine and informal connections;

37.7.2. the Concessionaire will notify those Consumers identified with clandestine and/or informal connections of the details of the programme as described in 31.3 for eliminating them and advise them that the provision of Water Services will be the Concessionaire's responsibility; and

37.7.3. should any Consumer referred to in 37.7.1 and 37.7.2 fail to legalise their connection to the Works within 60 (sixty) days of receipt of the notification in 37.7.2 time period, the Concessionaire shall be entitled, without prejudice and in addition to its other rights in respect of the Consumer, to forthwith cut-off the Supply of any or all Water Services to such Consumer provided that the Water Services of all Consumers who reconnect illegally to the Water Services Works may be cut-off forthwith by the Concessionaire without any further notice.
37.8. [50] Access to a Basic Water Supply must be available to Consumers at all times in accordance with [relevant legislation].

38. **TARIFF POLICY**<sup>51</sup>

38.1. [52] It is recorded that in terms of the Regulatory Provisions, the Council being a democratically elected legislative body, has the statutory power and authority and the social duty to set and levy Tariffs on Consumers for the Supply of Water Services in the Concession Area in accordance with the Regulatory Provisions.

38.2. It is recorded that the primary source of the operating income of the Concessionaire, being a private sector water services provider, will be dependent on the Tariffs set and levied by the Council and will consist of the collection of such Tariffs from Consumers in consideration of the Water Services supplied by the Concessionaire to the Consumers as envisaged in this Contract.

38.3. As part of the competitive Tendering process that lead to the conclusion of this Contract -

38.3.1. it is recorded that the Concessionaire made certain projections regarding the operating income required by it to fulfil its obligations in terms of this Contract during the Contract Term (specifically in order to meet the required service and performance levels set our herein) and on the level of the revenue required by it to do so, whilst recognising that the Tariffs as set and levied by the Council do not, in itself, guarantee or ensure a certain level of operating income or rate of return for the Concessionaire; and

38.3.2. the Concessionaire and the Council have reached agreement on a set of Charges for the Contract Term (which Charges will be escalated and modified as set out below), which are required for the Concessionaire to attain the required operating income referred to above.

38.4. It is recorded that the structure of the Tariffs will be in accordance with the norms and standards in respect of Tariffs for the Supply of Water Services set by the Minister in terms of the Regulatory Provisions and the Council shall have the legislative responsibility to promulgate such Tariff in

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50 country specific requirement for provision of a basic water supply. Where this applies, need to establish, if not already established by law, which entity is responsible for paying for a basic supply – is it the government through subsidies/grants, the municipality or the concessionaire (and charged back to consumers through the tariff)

51 Levels of tariffs and escalation thereof will be of great interest to the Concessionaire/ lenders as this is their source of revenue. The Council may wish to retain flexibility as to what is charged as this is often a politically sensitive area – however, if it wishes to maintain flexibility then it will need to be ready to compensate the Concessionaire to the extent that projected income is not achieved/create some sort of risk sharing mechanism, otherwise the project will be put under strain and may fail

52 The body responsible for tariff setting will vary from country to country
accordance with the Regulatory Provisions.

38.5. Should any objection be lodged to any proposed Tariff published by the Council by any Consumer or any other interested third Party, the Council shall, in accordance with its statutory and other duties, properly consider such objection.

38.6. Should the Council be of the opinion that the objection is well founded and that it may be necessary to promulgate a different Tariff to the one published, the Council shall forthwith notify the Concessionaire, whereupon the Parties and the Lenders shall meet and consult with one another as to the most appropriate method to address the objection lodged and as to any change that may be made to the proposed Tariff so published. The Council retains the legislative power to deal with the objection so lodged as it sees fit.

38.7. If, for any reason whatsoever, the Tariff in force at any given time does not match the Charges determined in terms of this Contract at the same time, the Concessionaire shall only be entitled to charge and recover from Consumers amounts in accordance with the Tariff.

38.8. Should at any time, for whatsoever reason not within the control of the Concessionaire, the Tariffs as promulgated by the Council be at variance to the Charges applicable in terms of this Contract, (including, but not limited to, as a result of any objection by a Consumer or other interested third Party, or of the implementation date of a promulgated Tariff not according with the date on which the Charges escalate in terms of this Contract or otherwise), then -

38.8.1. the Concessionaire shall forthwith notify the Council and the Lenders of that fact, indicating in such notice the date as from when the promulgated Tariffs will be at variance to the Charges or from when the promulgated Tariffs were at variance to the Charges, as the case may be;

38.8.2. the Parties and the Lenders shall forthwith but in any event within 5 (five) days after receipt by the Council and the Lenders of the Concessionaire’s notice in terms of 38.8.1 meet with a view to the Parties reaching agreement, in writing, on the most appropriate method to address the situation.

38.9. As part of the discussions between the Parties referred to in 38.8, the Parties shall also determine -

38.9.1. the period for which the variance is expected to continue ("the shortfall period"); and

38.9.2. the amount of the shortfall in revenues suffered and to be suffered by the Concessionaire as a result of such variance during the period for which the variance will continue which are required to ensure the Supply
of Water Services as envisaged in this Contract, the amount of which will be determined on the following basis -

38.9.2.1. the Charges applicable in terms of this Contract and the promulgated Tariffs will both be applied to the demand for Water Services as forecasted by the Concessionaire in its operating budget for the period as from the date on which the variance arose or is expected to arise, as the case may be, to the end of the then current financial year of the Concessionaire (when the true amount of the shortfall for such period can be determined as envisaged in 38.11) or to the end of the shortfall period, whichever is to occur first ("the current shortfall period"), taking into account the consequences of any compounding effect from past discrepancies between the promulgated Tariffs and the Charges;

38.9.2.2. the present value as at the time of the meeting referred to in 38.8 of the resulting difference between the Concessionaire's budgeted revenue based on the Charges applicable for the current shortfall period and the forecasted revenue based on the promulgated Tariffs for the current shortfall period will be determined; and

38.9.2.3. to the extent that the shortfall period extends to a further financial year of the Concessionaire, the procedure set out in 38.9.2.1 and 38.9.2.2 will be repeated mutatis mutandis for each and every financial year of the Concessionaire until such time as no variance exists between the promulgated Tariffs and the Charges.

38.10. Should the Parties be unable to reach agreement on any alternative method to address the situation as envisaged in 38.8.2 within 30 (thirty) days after having first met, the Council shall -

38.10.1. forthwith pay to the Concessionaire the amount determined in terms of 38.9.2.2 in respect of the then current financial year of the Concessionaire; and

38.10.2. forthwith, on the commencement of each and every further financial year of the Concessionaire referred to in 38.9.2.3 pay to the Concessionaire the amount determined in terms of 38.9.2.2 in respect of such further financial year of the Concessionaire,

together with any and all interest and other funding costs incurred by the Concessionaire in having had to arrange bridging funding facilities to fund any such shortfall on the basis that the Concessionaire shall be entitled to deduct and off-set such amounts against the rentals due to the Council in terms of the Lease Agreements and notwithstanding 8.5.3 thereafter against any other amount due to the Council in terms of this Contract. Any shortfall which the Concessionaire is unable to so deduct or set-off shall be paid to the

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Concessionaire in cash by the Council.

38.11. The true amount of the shortfall referred to in 38.9 shall be determined by the auditors of the Concessionaire at the end of the financial year concerned based on the audited financial statements of the Concessionaire. The auditors shall issue a signed audit certificate confirming the amount of the shortfall. The audit certificate shall in the absence of manifest error be *prima facie* proof of the amount of the shortfall and any amount paid in terms of 38.10 shall be adjusted accordingly.

38.12. Should the Council not fulfil its obligations in terms of 38.10 or should same not be possible or practicable in the circumstances, same will be deemed to be a Material Adverse Governmental Action and the provisions of 56 shall apply.

38.13. The Council may require the Concessionaire to publish at the Concessionaire's cost the promulgation of any Tariff amendment.
39. **CHARGES APPLICABLE AS FROM THE EFFECTIVE DATE**

39.1. The Charges in terms of the Contract will be structured in terms of the Regulatory Provisions and formulated as set out in the Charge Schedule annexed hereto marked *Annexure [F1]*, or such other format that is consistent with the Regulatory Provisions that may be agreed to in writing between the Parties.

39.2. Should the Effective Date occur before [    ], then -

39.2.1. the Charges in terms of this Contract for the period commencing on the Effective Date and terminating on [    ] shall be the Tariffs of the Council as levied at the date of signature hereof; and

39.2.2. the Charges in terms of this Contract for the period commencing [    ] and terminating on [    ] will be that reflected in the Charges schedule annexed hereto marked *Annexure F1*, as escalated for a full 12 (twelve) month period in accordance with the charge escalation schedule annexed hereto marked *Annexure F2*, using the weighting as envisaged in the Financial Base Case, and as modified in terms of the applicable provisions of 43.

39.3. Should the Effective Date occur on or after [    ], then the Charges in terms of this Contract for the period commencing on the Effective Date and terminating on [    ] will be that reflected in the Charges schedule annexed hereto marked *Annexure F1*, as escalated for a full 12 (twelve) month period in accordance with the charge escalation schedule annexed hereto marked *Annexure F2* and as modified in terms of the applicable provisions of 43.

40. **WATER SERVICES TARIFF STRUCTURES**

40.1. Water Supply Services

40.1.1. [It is recorded that in terms of [relevant legislation], the Water Supply Services Tariff to the Consumer shall be structured as layered Tariff bands based on actual consumption and shall include a lifeline Tariff and shall comply with the Regulatory Provisions.

40.1.2. The Concessionaire, in consultation with the Council, shall establish and implement within the first 6 (six) months of the Contract Term an opportunity to participate in a scheme designed to cover excessive water accounts attributable to an undetected and unforeseen underground water leak occurring on the Consumer’s side of the water meter.]
40.2. **Sanitation Services**

40.2.1. It is recorded that [the Sanitation Services Tariff structure shall comply with the Regulatory Provisions and be based on the following -

40.2.1.1. the domestic Tariff shall be calculated with reference to the quantity of water consumed subject to a maximum of [    kilolitres] per month per premises;

40.2.1.2. the industrial sewage Tariff will be structured having regard to both the volume and strength of the sewerage discharge;

40.2.1.3. the Tariff in respect of on-site Sanitation Services will take into account the average cost incurred.]

41. **ESCALATION OF CHARGES**

41.1. The Charges in force in terms of this Contract in terms of 39.2 or 39.3 as the case may be, shall further automatically increase on [date] (“the charge escalation date”) and thereafter on 1 July of each subsequent year or such other date as may be agreed between the Parties and the Lenders on the basis set out in the charge escalation formula annexed hereto marked Annexure F2.

41.2. Should the charge adjustment date not occur on 1 July of any year, the relevant provisions of Annexure F2 shall be adjusted to take cognisance of such variation in dates.

41.3. By no later than a date 6 (six) months prior to the end of the 5th (fifth) anniversary of the charge adjustment date, the Concessionaire and the Council shall meet at a mutually convenient date, venue and time in order to renegotiate, in good faith-

41.3.1. the base charge applicable as from the 5th (fifth) anniversary of the charge adjustment date for the next ensuing 5 (five) year period of the Contract with due regard to the required debt service level ratios contained in the Financial Base Case to the extent that any repayment obligations under any Financing Agreement have not been discharged; and

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54 See footnote 45
55 This provision explains how charges are to be escalated to ensure that the concessionaire's income is in line with projections and that it can meet its debt service obligations. The base charge and escalation for the first 5 years of the concession are set out in the contract and escalation for further 5 year periods is to be determined each 5th anniversary by mutual agreement, taking into account the elements set out in clause 41.4, and failing agreement, by a panel of experts. 5 year review periods are generally deemed sufficient periods of time for the concessionaire to meet performance targets and to have sufficient certainty to obtain debt funding and are not uncommon in long-term concession arrangements.
41.3.2. the basis on which such base charge is to be escalated during such next ensuing 5 (five) year period.

41.4. In reviewing and renegotiating the base Charges applicable from the 5th (fifth) anniversary of the charge adjustment date for the next ensuing 5 (five) year period of the Contract and thereafter in respect of each subsequent 5 (five) year period the Parties will carry out a review consisting of -

41.4.1. an analysis based on prices and Charges in force;

41.4.2. an analysis of the whole cost structure of the Concessionaire;

41.4.3. an analysis of the revenues obtained by the Concessionaire compared with the projections made in the Financial Base Case;

41.4.4. an analysis of the performance of the Concessionaire and the Operator as evidenced by the records pertaining to the performance of the Concessionaire in terms of this Contract submitted to the Council by the Concessionaire and/or retained by the Council;

41.4.5. determination of any appropriate modification (which must be of uniform application) to prices and Charges in force,

provided that if the Parties are unable to reach agreement, in writing, within 30 (thirty) days of first having met in terms of 41.3 a panel of 3 (three) independent experts consisting of a representative from an independent firm of chartered accountants, an independent consulting engineer and an independent actuary will be jointly appointed by the Council and the Concessionaire to consider the matters referred to above taking into account the provisions of this Contract. In the absence of agreement as to the identity of the panel of experts, the panel shall be appointed by the President of [relevant Institute of Chartered Accountants] or his successor in title.

41.5. The panel shall act as experts not as arbitrators and their decision in respect of 41.3.1 and 41.3.2 shall be final and binding on the Parties provided that, notwithstanding anything to the contrary contained in this Contract -

41.5.1. the base charge applicable as from the 5th (fifth) anniversary of the charge adjustment date for the next ensuing 5 (five) year period of the Contract will not be less than the Charges in force on the day immediately prior to the 5th (fifth) anniversary of the charge adjustment date, duly escalated in accordance with the provisions of Annexure [F2];

and

41.5.2. the basis on which such base charge is to be escalated during such next ensuing 5 (five) year period shall not be lower than the basis of escalation set out in Annexure [F2].
41.6. Pending determination of the dispute, the Charges then in force shall continue to apply and escalate in accordance to Annexure [F2].

41.7. The provisions of 41.3 shall apply, *mutatis mutandis*, in respect of each succeeding 5 (five) year period (ie in respect of the 5 (five) year periods commencing on the 10th (tenth), 15th (fifteenth), 20th (twentieth) and 25th (twenty fifth) anniversaries of the charge adjustment date.

41.8. If, at any stage during the Contract Term, the percentage annual increase in the CPI for the Concession Area exceeds [  ]% ([ ] per centum), the Concessionaire shall be entitled (but not obliged) to request, by way of written notice to such effect to the Council and the Lenders, that the escalation in the Charges in terms of this clause 41 be effected 6 (six) monthly, namely on the relevant anniversary of the charge adjustment date and on a date 6 (six) months thereafter, having regard to the previous 6 (six) month period as opposed to annually as envisaged in 41.1 and 41.3. Should the Concessionaire elect in terms of this clause 41.8 to have the Charges escalated 6 (six) monthly, then, for ease of calculation -

41.8.1. the escalation factor to be applied in accordance with the provisions of Annexure F2 to the Charges for each such charge escalation which is to be effected 6 (six) months before or after the relevant anniversary of the charge adjustment date shall be deemed to be equal to the increase in the CPI for the period since the last charge escalation date; and

41.8.2. the escalation factor to be applied to the Charges in accordance with the provisions of Annexure F2 for each escalation which is to be effected on each relevant anniversary of the charge adjustment date will be calculated in accordance with the provisions of Annexure F2, duly taking into account all charge escalations referred to in 41.8.1.

41.9. If, for any reason whatsoever, the Charges are not escalated in terms of this clause 41 on the charge escalation adjustment date or any anniversary of the charge adjustment date, the next annual escalation of the Charges to be done in terms of this clause 41, shall take account of such time delay with a view to placing the Concessionaire in the position it would have been in had the Charges been escalated with effect from the charge adjustment date or the relevant anniversary of the charge adjustment date as the case may be.

42. **MAXIMUM PRICES, EXCEPTIONS AND DISCOUNTS**

42.1. *The Tariffs determined and promulgated by the Council and in force at any given time will be regarded as regulated maximum values. The Concessionaire may, with the prior written approval of the Lenders and subject to the promulgation thereof by the Council, in the exercise of its*

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56 This provision gives the concessionaire flexibility re charging and granting discounts to certain groups
legislative discretionary powers, propose to the Council that amounts less than the promulgated Tariffs be charged to Consumers, provided that the discount or exemption established is of a general nature for similar situations or category of Consumer. The Concessionaire may with prior written consent of the Council and subject to the promulgation thereof in the exercise of its legislative discretionary powers, reverse the benefit granted provided 30 (thirty) days’ notice (or such other notice period as may be agreed between the Parties) is given to all affected Consumers by the Concessionaire in advance of such reversal.

42.2. The Concessionaire shall subject to the promulgation thereof by the Council in the exercise of its legislative discretionary powers, be entitled to levy surcharges and interest by way of compensation and sanction for Consumers who fail to pay for the supply of Water Supply Services and Sanitation Services accounts timeously in accordance to the provisions of the Tariff Schedule.

43. MODIFICATION TO CHARGES

43.1. Over and above any charge escalation in 41 the Charges in force at any time may be modified, adjusted, increased or decreased in the manner provided in 43.

43.2. The Charges in force at any time shall be capable of modification in terms of 43 in the following circumstances and manner -

43.2.1. there shall be an automatic proportionate increase or decrease in the Charges if the cost of the bulk water supplied by Ministry of Environment or any other Competent Authority increases or decreases with effect from the date of such increase or decrease as the case may be;

43.2.2. the Parties shall, without prejudice to any other rights or remedies in terms of this Contract, meet and re-negotiate the Charges in good-faith with a view to reaching agreement in writing in the circumstances envisaged in this Contract and in the event of -

43.2.2.1. Material Adverse Governmental Action;

43.2.2.2. [the failure of central and/or provincial government to provide the Council with grant finance or rebates in lieu of grants for which the Council qualifies under established government subsidy and/or grant schemes or the provision of lesser or greater sums than are anticipated in the Financial Base Case:]

43.2.2.3. [the failure of the Council to make available to the Concessionaire any grant finance or rebate in lieu of any grant referred to in 43.2.2.2:]

- 75 –
43.2.2.4. withdrawal by the [revenue service] of any ruling or a change in the treatment of any deduction by the [revenue service] claimed by the Concessionaire;

43.2.2.5. the occurrence of any event which actually affects or will prospectively affect the Concessionaire's revenues, costs (including, but not limited to, income or other tax) or general economic position and the occurrence of which is beyond the Concessionaire's reasonable control;

43.2.2.6. [the municipal services grant paid by the Council to the Concessionaire in terms of the grant support procedures referred to in 44 during any 12 (twelve) month period as from the Effective Date be less than [amount and currency] which amount shall be escalated by the CPI on each anniversary of the Effective Date for each successive year as from the Effective Date:]

43.2.2.7. if, at the 5th (fifth) anniversary of the Effective Date, the actual capital and/or other costs of any items of equipment or components connected to or associated with the Works as set out in the first Five Year Plan contained in Schedule I to Annexure J incurred by the Concessionaire is less than envisaged therein.

43.3. Subject to the Regulatory Provisions, the Concessionaire may, with the prior approval of the Council amend the Charge Schedule so as to include a surcharge pertaining to the supply of Water Supply Services during a drought period, the occurrence of an emergency situation or an Event of Force Majeure or should any water restrictions be imposed in relation to any area within the Concession Area in terms of the Regulatory Provisions or in terms of this Contract. Upon promulgation of such surcharge by the Council, as part of the Tariffs, the Concessionaire may collect same from Consumers.

43.4. The Concessionaire shall submit to the Council a substantiated proposal regarding any modification to or amendment of the Charges required by it under this clause 43, whereafter -

43.4.1. the Charges then in force shall automatically be increased as envisaged in 43.2.1 or 43.2.2.6;

43.4.2. the Parties shall meet and re-negotiate the proposed Charges as envisaged in 43.2.2 other than 43.2.2.6,

as the case may be.

43.5. Any application for a charge modification must be justified from technical, economic, financial and legal analyses accompanied by such reports substantiating the facts and their consequences that give rise to the application.
43.6. The Council will reject any charge increase requests or any portion of any such charge increase request in terms of 43.2.2 (other than 43.2.2.6) based in whole or in substantial part on any of the following grounds -

43.6.1. subject to 10, any circumstances or facts attributable to the state of Existing Assets as at the Effective Date or at the date of delivery thereof to the Concessionaire, whichever is the later, or Stock made available to the Concessionaire;

43.6.2. for the duration of the first Five Year Plan, any difference between the actual pattern of demand for the Supply of Water Services and the projection made by the Concessionaire;

43.6.3. circumstances attributable to decisions adopted by the Concessionaire that do not involve facts affecting the Supply of Water Services;

43.6.4. any increase in the real capital expenditure costs to be undertaken by or on behalf of the Concessionaire during the first 3 (three) years of the Contract Term which costs should have been foreseen by the Concessionaire at the Effective Date.

43.6.5. circumstances attributable to inefficiencies of the Concessionaire in the Supply of Water Services as evidenced by the reports submitted to the Council and/or prepared by the Council in respect of the performance by the Concessionaire of its obligations in respect of the Supply of Water Services in terms of the Contract;

43.6.6. low payment levels by Consumers.

43.7. If the Parties are unable to reach agreement, in writing, on any modification requested by the Concessionaire within 15 (fifteen) days of first having met in terms of 43.2.2, a panel of 3 (three) independent experts will be jointly appointed by the Council and the Concessionaire to consider the requested modification and any intermediate modification. In the absence of agreement as to the identity of the panel of experts, the panel shall be appointed by the President of the Institute of Chartered Accountants or his successor in title. The panel will consider the provisions of this Contract and carry out a review consisting of -

43.7.1. an analysis based on prices and charge values in force;

43.7.2. an analysis of the whole cost structure of the Concessionaire compared with the projections made in the Financial Base Case;

57 This is an important limitation on the concessionaire's right to seek modification to charges. Where there has been less opportunity for due diligence prior to contract / the base case data is not reliable, then such a limitation may not be appropriate in its entirety.
43.7.3. an analysis of the revenues obtained by the Concessionaire compared with the projections made in the Financial Base Case;

43.7.4. determination of any appropriate modification (which must be of uniform application) to prices and charge values in force.

43.8. If the study carried out does not show the appropriateness of effecting a modification to prices and charge values in force, the modification will not be approved and at least 90 (ninety) days must pass after refusal of such modification before the Concessionaire or the Council may request the reopening of the study in question pursuant to the terms herein. If on the contrary the study shows the appropriateness of a modification, the modification to the Charges shall be deemed to be approved by the Council whereafter the Council shall be entitled but not obliged to amend the promulgated Tariff accordingly.

43.9. Should the Council not amend the promulgated Tariff in force at the time to take account of the modification to the Charges in terms of this clause 43, then, if the Parties so agree in writing, the Charges shall be deemed to be amended not with effect from the date on which the modification to the Charges is approved or deemed to be approved, but with effect from the next charge adjustment date referred to in 41, in which event the escalation of the Charges in terms of 41 shall take account of the modification approved in terms of this clause 43 and any time delay in the implementation of the approved modified charge since the date of such approval or deemed approval.

43.10. If the Parties do not so agree, the Charges shall be amended with effect from the date of the Concessionaire’s request.

43.11. The Parties record that the Charges applicable in respect of the Supply of Water Services reflected in Annexure [ ] have been calculated on the basis that -

43.11.1. the total amount payable by the Concessionaire to the Council in respect of electricity costs for the 12 (twelve) month period immediately succeeding the Effective Date, will be [amount and currency] provided that the Concessionaire takes immediate steps to optimise its electricity consumption;

43.11.2. the Council will purchase vouchers, coupons or tokens from the Concessionaire to provide indigent families with Potable Water to the value of [amount and currency] exclusive of Service Tax during each 12 (twelve) month period as from the Effective Date;

43.11.3. the Concessionaire will pay a bulk Water Tariff and will receive a 5 (five) year bulk water subsidy from Ministry in terms of the Bulk Water Supply Agreement in the amounts set out in the Financial
43.12. Accordingly, should -

43.12.1. the total amount payable by the Concessionaire to the Council in respect of electricity costs for the 12 (twelve) month period immediately succeeding the Effective Date, be more than or less than [amount and currency];

43.12.2. the Council, for whatsoever reason, not purchase vouchers, coupons or tokens to the value of [amount and currency];

43.12.3. the Concessionaire pay a different bulk Water Tariff or should it not receive the full subsidies referred to in 43.11.3 or should the Bulk Water Supply Agreement not be concluded on the basis set out in Annexure [ ] or

43.12.4. the Concessionaire be required to take over and employ more persons than the persons referred to in 43.11.4,

the Charges in force as from [DATE] shall automatically be adjusted to a level sufficient to compensate the Concessionaire for its total loss suffered as a result thereof, on the basis that -

43.12.4.1. the Concessionaire shall furnish the Council with a written reconciliation, based on the Financial Base Case and the actual amounts received and expended by it, of its total loss for the period from the Effective Date up to the date of the escalation to be done in terms of this clause 43.12.4;

43.12.4.2. in calculating the factor with which the Charges then in force should be escalated, the effluxion of time from the Effective Date to the date of implementation of the Charges as adjusted in terms of this clause 43.12.4 shall be taken into account;

43.12.4.3. the total loss of the Concessionaire referred to above shall be the aggregate of all actual losses incurred by it up to the date on which it furnishes the Council with the reconciliation referred to in 43.12.4, all anticipated losses from the date of such reconciliation to the date of implementation of the charge as adjusted in terms of this clause 43.12.4 and all anticipated losses from such implementation date to the date of the next annual charge escalation date in terms of 41;

43.12.4.4. the total loss of the Concessionaire shall be divided by the revised total forecasted income of the Concessionaire from Consumers from the Effective Date to the date of the next annual
charge escalation in terms of 41.1 and the factor so derived shall be expressed as a percentage;

43.12.4.5. the percentage determined in terms of 43.12.4.4 shall be applied to the weighted average charge then in force and all individual Charges shall be adjusted accordingly.

44. [GRANT SUPPORT PROCEDURE]58

44.1. [The Council undertakes to make all grant funding received from central government in respect of the supply of Water Services available to the Concessionaire in accordance with and subject to the conditions stipulated in respect of such grant funding, provided that any such grant funding received for purposes of assisting indigent families to pay for the Supply of basic Water Services shall be utilised by the Council in accordance with 44.2. The Council furthermore undertakes to procure that all such grant funding shall be paid directly into a separate account of the Council from which account withdrawals and payments may only be made and against which account debits may only be effected in order to apply the funds as provided for in this Contract.

44.2. The Council and the Concessionaire shall from time to time agree on methods whereby funds which are allocated by Council to assist indigent families to pay for the Supply of basic Water Services may be best utilised provided that any reduction in the Tariffs to support such indigent Consumers will require the prior written approval of the Lenders. It is recorded that, as from the Effective Date such assistance shall be in the form of the Council purchasing from the Concessionaire vouchers, coupons or tokens which will be provided to such Consumers by the Council and the Concessionaire undertakes to accept and abide by such scheme. The decision as to which Consumers are eligible for such support shall be made by Council exclusively pursuant to procedures and criteria adopted by the Council.

45. LIABILITY

45.1. Subject to the other provisions of this Contract, the Concessionaire undertakes and assumes the Supply of Water Services and the Works at its own technical, economic and financial risk and will be liable to the Council for the fulfilment and discharge of all obligations and requirements for the Supply of Water Services in terms of this Contract with effect from the Effective Date.

45.2. The Concessionaire shall, at its own expense and with effect from the

58 Relevant only where there is grant support of water supply by central government
59 In some cases where the data is limited/ extensive due diligence is not possible prior to contract, it may be appropriate at the beginning of a contract period to have an initial period during which the concessionaire is not fully liable for problems arising as a result, for example, of the condition of the assets.
Effective Date, take all reasonable precautions for the protection of life and property on and about or in any way connected with the whole or any part of the Works and shall and hereby does indemnify and hold the Council 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 this Contract or at law in respect of injury to or death of any person or loss of or damage to any person or property accruing after the Effective Date but prior to the termination of the Contract unless such injury, death, loss or damage was caused by any act or omission of the Council or any of its employees, Subcontractors, consultants, agents or representatives or other third Parties for whom the Council is liable in law and/or under this Contract. The Concessionaire shall report all serious accidents to the Council within 24 (twenty four) hours of becoming aware of their occurrence.

45.3. The Council shall and hereby does 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 this Contract or at law in respect of any injury to or death of any person or loss of or damage to any person or property where such injury, death, loss or damage was caused by any act or omission of the Council or any of its employees, Subcontractors, consultants, agents or representatives or other third Parties for whom the Council is liable in law and/or under this Contract, whether prior to or after the Effective Date and the Council will be obliged to intervene and shall assume responsibility in respect of any such claim arising.

45.4. Subject to the other provisions of this Contract, the Concessionaire will be obliged to intervene in any claim arising and to indemnify and hold the Council harmless from any claim, damage, loss, cost, expense (including reasonable legal expenses on a full indemnity basis) arising from or attributable to the Concessionaire in respect of the Supply of Water Services and/or the operation and maintenance of the Works unless such injury, death, loss or damage was caused by any act or omission of the Council or any of its agents employees, Subcontractors, consultants, or representatives or other third Parties for whom the Council is liable in law and/or under this Contract.

45.5. The Council shall and hereby does indemnify and hold the Concessionaire harmless against all losses, claims, demands, proceedings, damages, costs, Charges and expenses (including the reasonable legal expenses on a full indemnity basis) of whatsoever nature arising from or attributable to the Council in discharging any of its rights or obligations under the Contract where such injury, death, loss or damage was caused by any act or omission of the Council or any of its agents, employees, Subcontractors, consultants, or representatives or other third Parties for whom the Council is liable in law and/or under this Contract and the Council will be obliged to intervene in any such claim arising.
45.6. Subject to the other provisions of the Contract and as from the Effective Date the Concessionaire will be responsible to the Council and third Parties for all risks and obligations, pertaining to the Supply or failure to Supply Water Services in accordance with this Contract, and shall be responsible for the payment of any damages, claims and/or losses due to any act or omission of the Concessionaire and shall indemnify and hold the Council harmless for all losses, damages, penalties, legal fees and costs (including reasonable expert's fees) due to a breach of this undertaking. The Concessionaire will be obliged to intervene and shall assume responsibility in respect of any action or right that is instituted against the Council in respect of any acts or omissions of the Concessionaire, the Operator or any other Subcontractor or any person for whom it may be liable in law in respect of the Supply or failure to Supply Water Services that may occur as from the Effective Date. The Council shall forthwith notify the Concessionaire in writing of any claim made against it in this regard or of any such claim that comes to its knowledge.

46. **INTELLECTUAL PROPERTY INDEMNITY**

46.1. The Council hereby -

46.1.1. 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 Concessionaire and 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 Contract, any and all Intellectual Property rights of third Parties used and/or applied by the Council in respect of the Supply of Water Services and/or the operation and maintenance of the Existing Assets as at the Effective Date; and

46.1.2. indemnifies the Concessionaire and the Operator and undertakes to keep the Concessionaire and 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 Concessionaire and/or the Operator as from the Effective Date in respect of any Intellectual Property rights of third Parties referred to in 46.1.1.

46.2. The Concessionaire hereby indemnifies the Council and undertakes to keep the Council 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 Concessionaire and/or 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 46.1.1.

46.3. The indemnities set out in 46.1 and 46.2 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.

46.4. The indemnified Party shall give to indemnifier prompt notice in writing of any claim being made or action threatened or brought against it and shall permit the indemnifier (at the indemnifier's expense) to conduct any litigation which may ensue and all negotiations for a settlement of any claim, giving the indemnifier all reasonable assistance (at the indemnifier's expense) and the indemnified Party agrees not to make any admission which might be prejudicial thereto.

46.5. The conduct by the indemnifier 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.

46.6. If any claim of infringement by a third Party of Intellectual Property rights as aforesaid prevents the Concessionaire and/or the Operator from fully conducting its business or any part thereof or receiving the benefit of any of the Water Services, the Concessionaire shall forthwith, to the extent possible, replace or modify the 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-

46.6.1. compensate the Council for the amount of any direct losses and/or damages sustained or expenses incurred by the Council during such replacement or modification in circumstances envisaged in 46.2; or

46.6.2. be entitled to set-off the amount expended by it in doing so and the amount of any direct losses and/or damages sustained by it against any rental payments due and payable by the Concessionaire under the Lease Agreements during the first 10 (ten) years of the Contract and thereafter against any amount due and payable to the Council by it (or, if no amount is so due, be entitled to be refunded by the Council the amount so expended by it) in any other circumstances.

46.7. To the extent that it is not possible or practical for the Concessionaire to replace or modify the Works and/or its operations or to obtain a licence as envisaged in 46.6, and should -

46.7.1. the Concessionaire notify the Council and the Lenders that, without such replacement or modification, it will not be in a position to fulfil its obligations under the Contract, the Contract may in respect of an infringement of Intellectual Property rights referred to in 46.2 be terminated in accordance with the provisions of 57 alternatively the
Contract may be terminated in accordance with the provisions of 58 in respect of an infringement of any other Intellectual Property rights;

46.7.2. the Concessionaire notify the Council and the Lenders that it will, notwithstanding such inability or impracticability to replace or modify or to obtain a licence, be able to fulfil its obligations under the Contract, the Contract shall not be terminated as provided for in 46.7.1, but the Parties and the Lenders shall negotiate with one another in good faith with a view to amending the provisions of the Contract to the extent necessary so as to enable the Concessionaire to continue to fulfil its obligations under the Contract. Should the Parties and the Lenders fail to reach agreement as to the amendments to be effected to the Contract within 90 (ninety) days of receipt of the notification from the Concessionaire the Contract shall be terminated on the basis set out in 46.7.1.

46.8. Any replacement or modification envisaged in 46.6 will be carried out reasonably promptly so as to minimize any interruption in the Concessionaire's business operations.

47. **SANCTIONS**

47.1. On the occurrence of the events set out in the schedule of sanctions annexed hereto marked Annexure [ ] the Concessionaire may be liable to a sanction of a warning alternatively a penalty in accordance to the provisions of Annexure [ ].

47.2. No sanction shall be imposed by the Council on the Concessionaire in respect of the occurrence of any of the following events provided the occurrence of the event is not attributable to any act or omission on the part of the Concessionaire, namely -

47.2.1. an Event of Force Majeure;

47.2.2. an emergency situation;

47.2.3. the non-availability of Potable Water in terms of the Bulk Water Supply Agreement, the non-availability or contamination of Raw Water, acts of sabotage or obstruction of the Water Service Works beyond the Concessionaire's reasonable control or implementation or non-enforcement of any Regulatory Provision;

47.2.4. any eventuality for which the Council bears the risk or is responsible for;

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60 Local rules may vary as to whether penalties may be imposed for breach of contract. In many common law jurisdictions any predetermined contractual remedy should be a genuine pre-estimate of loss and not be a penalty and it is more appropriate to establish liquidated damages for non-performance.
47.2.5. Material Adverse Governmental Action;

47.2.6. the non availability or inadequate Supply of electricity.

47.3. The Council will suspend the implementation of any monetary sanction should the implementation of such penalty cause or be likely to cause the Concessionaire to breach any of its financial obligations to the Lenders in terms of any Financing Agreement subject to the following -

47.3.1. interest shall accrue on the amount of penalty due and payable at the Prime Rate from the due date to the date preceding the date of actual payment in full;

47.3.2. receipt of written confirmation from the Lenders confirming the likely breach of the Financing Agreement on each occasion;

47.3.3. an acknowledgement and waiver by the Concessionaire of the right to raise prescription in respect of the collection of any such penalty.

47.4. Any monetary sanction suspended in terms of 47.3 will remain suspended until the Lenders notify the Concessionaire and the Council in writing that the payment thereof will no longer cause or be likely to cause the Concessionaire to breach any of its financial obligations to the Lenders in terms of any Financing Agreement.

47.5. Should the Concessionaire not object in writing to the imposition and/or the amount of the penalty within 30 (thirty) days after receipt by the Concessionaire and the Lenders of a notification by the Council of the imposition thereof, the Concessionaire will be deemed to have acknowledged that the penalty is due and payable and to have waived its right to review or appeal against the imposition and/or the amount of the penalty.

47.6. Notwithstanding anything to the contrary contained in this Contract, the Council shall not be entitled to impose any penalty or other monetary sanction on the Concessionaire in terms of the provisions of this clause 47-

47.6.1. where the aggregate amount of such penalties and/or monetary sanctions will exceed an amount of more than double the maximum single monetary sanction payable in respect of Annexure G in respect of any calendar year; and

47.6.2. where the aggregate amount of all such penalties and monetary sanctions will exceed the amount of [AMOUNT AND CURRENCY]) during the Contract Term. In order to calculate whether the maximum amount referred to above has been reached, the amount of [AMOUNT AND CURRENCY]) referred to above will be escalated with the CPI on each anniversary of the Effective Date and any penalty imposed will similarly be escalated with the CPI on each anniversary of the Effective
Date subsequent to the imposition of the penalty concerned.

48. **TRANSFER OF CONTRACTS**

48.1. The Council hereby cedes, assigns and delegates all of its rights and obligations in respect of the Contracts reflected in the Contract schedule annexed hereto marked **Annexure [ ]** to the Concessionaire.

48.2. The Council warrants that -

48.2.1. the rights and obligations ceded, assigned and delegated pursuant to 48.1 are necessary for the Concessionaire to discharge its obligations in terms of the Contract;

48.2.2. all agreements, arrangements and understandings between the Council and third Parties pertaining to the Supply of Water Services as at the Effective Date were disclosed to the Concessionaire in writing prior to the signature date hereof;

48.3. The Council will use its best endeavours and will take all steps within its power to procure that the other Parties to the Contracts reflected in **Annexure [ ]** will, to the extent required, consent to the assignment, cession and delegation set out in 48.1 with effect from the Effective Date. Should it prove impossible, for whatsoever reason, to obtain such consent in respect of any such Contracts where such consent is indeed required -

48.3.1. the Concessionaire shall be entitled as between it and the Council to the benefit of and shall bear the risk of such Contracts from the Effective Date and the Council shall bear the risk and be entitled to the benefit of such Contracts prior to the Effective Date;

48.3.2. the Council shall ensure that the Concessionaire shall enjoy the undisturbed use and possession of and shall be entitled to the full benefit of the rights under the Contracts reflected in **Annexure [ ]** as from the Effective Date;

48.3.3. the Concessionaire shall be obliged at its cost but in the Council’s name to discharge the Council’s obligations under the Contracts after the Effective Date;

48.3.4. the Parties respectively indemnify each other against any loss of any nature which may arise as a result of the other of them failing to comply with their obligations hereunder.

49. **CONTRACTING PROCEDURES AND ECONOMIC EMPOWERMENT**

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61 it is important to establish what contracts the council has entered into and how they are to be transferred to the concessionaire
49.1. The Concessionaire shall use its best endeavours to ensure that all material Contracts relating to or associated with the Supply of Water Services or the operation and maintenance of the Works concluded by the Concessionaire 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 such Substitute Entity is appointed, the right of the Council) to continue with such Contracts in force at the time of the termination of the Contract to ensure the continuity of the Supply of Water Services.

49.2. It is recorded that the Concessionaire shall ensure that on termination of this Contract otherwise than in terms of 58 and otherwise than as a result of any eventuality that will make same impossible or impractical, the Operating Agreement shall at the election of the Council continue for a further period of 90 (ninety) days as from the date of termination of this Contract, provided that the Council has notified the Operator of its election 60 (sixty) days prior to date of termination of the Contract.

49.3. Contracts pertaining to the design, construction, rehabilitation, operation and/or maintenance of the Works in the sum of more than alternatively in the aggregate of [AMOUNT AND CURRENCY] and such Contracts with the same Subcontractor in the aggregate sum of more than [amount and currency] not undertaken directly by the Operator or any of their affiliated companies shall be preceded by a transparent Tendering process or other competitive procedure the outcome of which shall form the basis of the Tender award. Preference shall be given to Tenders received from previously disadvantaged persons or groups, including small, micro or medium enterprises and local suppliers and Contractors within the Concession Area pursuant to the provisions of the economic empowerment incentives schedule annexed hereto marked Annexure [ ] provided such Tenders are commercially and economically competitive. The sum of [AMOUNT AND CURRENCY] will be revised annually with effect from each anniversary of the Effective Date in order that its initial value will be maintained relative to the percentage year on year increase in the CPI for such period.

49.4. The provision and/or rehabilitation of the Concession Assets, that are financed by either loans or grant aid from national and/or international financial organisations must be undertaken and conducted in accordance with the provisions applicable to and/or appended to the respective loan agreements or grants should the Concessionaire make use of such funds.

49.5. The Concessionaire undertakes to adhere to and to use its best endeavours to ensure that the Operator adheres to the economic empowerment incentives as set out in the economic empowerment incentives

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62 this provision may be required by law and/or may be deemed to be appropriate to encourage small/medium sized business in the area
50. **SUB-CONTRACTING**

50.1. The Council consents to the sub-Contracting by the Concessionaire of such obligations as are contained in the Operating Agreement term sheet annexed hereto as **Annexure [ ]** to the Operator or any other entity in the Operator Group and the obligations pertaining to the design, rehabilitation and construction of the Works by the Concessionaire to any entity in the Operator Group.

50.2. If the Concessionaire wishes to appoint a replacement to the Operator, it shall apply in writing to the Council and the Lenders for approval of such replacement entity and shall Supply the Council and the Lenders with such information as the Council and the Lenders may reasonably request in respect of the proposed replacement entity. The Council shall only approve the appointment of the replacement entity to the Operator with the prior written consent of the Lenders.

50.3. The appointment by the Concessionaire of the Operator or any other Subcontractor shall not release the Concessionaire of any of its obligations under the terms of this Contract or in any way affect the Concessionaire’s direct responsibility to the Council in respect of the discharge of all obligations in terms of the Contract.

50.4. Nothing contained in this Contract is intended to create, or should be construed as creating, any privity of Contract between the Council and any Subcontractor, and the Concessionaire shall procure that a provision to this effect is inserted in every Subcontract entered into.

50.5. In the event of the termination of this Contract pursuant to the provisions of 57 and/or 59 the Council or the Substitute Entity appointed in terms of 60 shall be entitled to take over at its own cost, benefit and risk, any Subcontract concluded by the Concessionaire and/or the Operator for the Supply of labour, materials and plant as well as for the construction, erection, commissioning, installation of any Works on the same terms and conditions of such Subcontract. The Concessionaire acknowledges and undertakes that a condition allowing for the take over of such Subcontract as set out above by the Council shall be embodied in all Subcontracts and shall be binding on any Subcontractor.

51. **CONTRACT RECORDS**

The Concessionaire shall keep detailed records of all Contracts entered into by

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[63] the council is likely to have chosen the consortium based partly on the experience and financial strength of the Operator. It is therefore important to establish if and with what criteria the Operator may be replaced.
the Concessionaire and the Operator in connection with or associated with the Supply of Water Services and the Works, including details of the duration, nature and quantum involved, and shall furnish the Council and/or the Lenders with such information in this regard as the Council and/or the Lenders may require from time to time.

52. **REPORTING REQUIREMENTS**

The Concessionaire shall comply with the provisions of the reporting schedule annexed hereto marked Annexure [ ] respects of the maintenance, preparation and delivery of the prescribed plans, studies and reports associated with or connected to the Works and the Supply of Water Services.

53. **REGULATION**

53.1. The activities and performance of the Concessionaire, in respect of the operation and maintenance of the Works and the Supply of Water Services will be monitored by the Council in accordance with the provisions of this Contract and the Regulatory Provisions.

53.2. The Council will, subject to the provisions of the Contract -

53.2.1. monitor the provision and the conditions of Supply in respect of the Supply of Water Services including the limitation or termination of the Supply of Water Services;

53.2.2. perform inspections of the Works and monitor any impact which the Supply of Water Services may have on the environment;

53.2.3. collect information which it deems necessary from the Concessionaire and Consumers pertaining to the Supply of Water Services necessary for the preparation and adoption of the prescribed Water Services development plan;

53.2.4. collect information in respect of the quality, quantity and sustainability of the Supply of Water Services and/or the Water Source having regard to prescribed minimum standards and standards set by the Council and the Regulatory Provisions;

53.2.5. collect information in respect of the nature, operation, sustainability,

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64 A complex contract of this sort will need to be closely monitored over time. In the absence of a separate regulator to monitor the performance of the concessionaire a party will need to be identified that is to carry out this function. In some cases this will be a committee formed by representatives of each party, in others it may be a third party such as an expert consultant. Care needs to be taken to ensure that the Council carries out its obligations as regulator of the contract objectively. Some contracts may have a provision that such rights and obligations will cede to a Regulatory body in the event that one is created subsequent to the date of the Agreement. This may also be the subject of legislation/ regulations.
operational efficiency and economic viability of the Supply of Water Services and the Works;

53.2.6. collect information in respect of the design, construction and functioning of the Works and Consumer Installations;

53.2.7. monitor the performance of the Concessionaire against any condition or criteria in terms of this Contract, the Consumer Rules or the Regulatory Provisions;

53.2.8. review the operating procedure and emergency plans on a regular basis.

53.3. The Concessionaire will not be responsible to the Council or any third Party for any loss or damage to person or property that may arise from the exercise by the Council of such powers except where such loss or damage is directly attributable to an act or omission of the Concessionaire and the Operator or any other Subcontractor or such persons for whom such Parties are liable in law. The Council shall and hereby does indemnify and hold the Concessionaire harmless in respect of any such loss or damage attributable to an act or omission of the Council in exercising its powers as aforesaid.

53.4. The Council shall co-operate with the Concessionaire to facilitate implementation of the Contract and in exercising its powers of monitoring, inspection and regulation in a reasonable manner having regard to especially the rights and interests of Consumers. The Council shall without limitation and at its own cost-

53.4.1. facilitate as far as possible and within the agreed time-frames the performance of the tasks of the Council pertaining to the Supply of Water Services;

53.4.2. take the necessary action and render all necessary support and assistance to the Concessionaire in respect of applications to and in the conclusion of agreements with international, national, provincial, municipal, public or private persons for the purposes of Supplying the Water Services provided that (save for any provision of any such agreement to the contrary) the Council shall not incur any liability of whatsoever nature or howsoever called nor be liable for any costs associated with such agreements or the failure to conclude such agreements;

53.4.3. approve within a reasonable time period, applications for restrictions on ownership and Rights of Way or other servitudes made by the Concessionaire subject to its statutory powers in accordance with prevailing Regulatory Provisions. Should there be impediments to the creation of such restrictions and Rights of Way, the Council will notify the Concessionaire within a period of 7 (seven) days of becoming aware of such fact;
53.4.4. answer within 14 (fourteen) days from date of receipt thereof and to the best of its ability any queries addressed to it from the Concessionaire regarding any aspect of the Concession Area or the regulation of the Supply of Water Services;

53.4.5. on request, timeously and to the best of its ability render all reasonable assistance to the Concessionaire in the resolving of any conflicts that may arise where it is necessary to remove or adapt Concession Assets with a view to the construction and/or operation of the Works and/or to comply with approved plans. Such assistance shall not imply the assumption by the Council of any liability, responsibility and/or costs pertaining to such conflicts which shall remain the responsibility of the Concessionaire in terms of this Contract and the Concessionaire shall hold the Council harmless and indemnify the Council in respect of a liability or costs arising in respect thereof;

53.4.6. issue decisions as soon as may be required in the circumstances but in any event within a maximum period of 5 (five) days from the date of receipt of a request therefor concerning requests for authorisation presented to it by the Concessionaire with a view to eliminating breaches committed by Consumers that may result in the pollution of a watercourse or a natural Water Source or prejudice the Supply of Water Services and/or the Works;

53.4.7. not unreasonably interfere with the business operations of the Concessionaire and/or the Operator;

53.5. The Concessionaire shall comply with the Regulatory Provisions during the duration of this Contract.

53.6. The Concessionaire shall, issue and publish within 3 (three) months calculated with effect from the Effective Date a set of "Consumer Rules" regulating its relationships with Consumers in respect of the Supply of Water Services complying with the minimum criteria set out in 53.7 and shall update the Consumer Rules on a regular basis having regard to the Regulatory Provisions.

53.7. The Consumer Rules shall inter alia -

53.7.1. provide that the Concessionaire shall attend to all queries and complaints from Consumers within prescribed times and in accordance with prescribed procedures;

53.7.2. provide that the Concessionaire's commercial offices shall be open during normal business hours set by the Concessionaire, subject to the provision that a 24 (twenty four) hour a day 7 (seven) days a week telephonic help line service shall be maintained by the Concessionaire to ensure access to Consumers for the reporting of complaints and lodging
of queries;

53.7.3. prescribe the rights and obligations of Consumers in respect of the Supply of Water Services including without limitation the following -

53.7.3.1. conditions of the Supply of Water Services;

53.7.3.2. payment conditions;

53.7.3.3. determination of surcharges and interest payable for non-payment;

53.7.3.4. determination of the deposit payable and the conditions applicable thereto in respect of new connections;

53.7.3.5. determination of the connection and/or reconnection fee payable including the conditions applicable thereto;

53.7.3.6. prescribe the rights and obligations of the Concessionaire, the Council and the Consumer in respect of the limitation, interruption and/or termination of the Supply of Water Services.

53.8. The Parties shall co-operate with one another so as to facilitate fulfilment of their obligations in terms of the Contract in regard to the Supply of the Water Services, including inter alia the area of water management and pollution, the eduction of Consumers in regard to water usage and conservation, public health and safety and adherence to the Regulatory Provisions.

54. AUTOMATIC TERMINATION

54.1. Subject to the other provisions of the Contract, the Contract will terminate -

54.1.1. automatically at the expiry of the Contract Term, unless extended by the Parties in writing prior to the expiry date in terms of 8.3.2; and

54.1.2. where the Concessionaire, the Council and the Lenders so agree in writing which agreement will address the consequences of such termination.

55. NEW FINANCING

55.1. Should the Concessionaire require additional debt funding facilities after the Effective Date over and above the facilities referred to in the

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65 it may be appropriate to ensure that certain provisions survive termination, such as governing law and dispute resolution and confidentiality provisions, etc.
Financial Base Case where the expected repayment period of such facilities extend beyond the Contract Term, the Concessionaire shall only be entitled to accept same with prior written consent of the Council.

55.2. Should the Council consent to the Concessionaire incurring additional debt funding obligations as envisaged in 55.1, then the Council shall as well as its other obligations and Liabilities on termination according to the terms and provisions of this Contract also assume all outstanding Liabilities and obligations of the Concessionaire’s additional debt funding referred to as at such date including without limitation, refunding the Concessionaire any additional amounts as may become due pursuant to 58.3.1 and 58.3.2 as such shall apply to any additional Equity subscription necessary to secure any additional debt funding. In such event notwithstanding any other obligations of the Council upon termination of this Contract the Council shall pay to the Lenders all sums outstanding under all Financing Agreements, unless the Council and the Lenders reach agreement in writing that the Council is to assume the payment and other relevant obligations of the Concessionaire under such Financing Agreements.

55.3. Should the Council not consent to the Concessionaire incurring additional debt funding obligations as envisaged in 55.1, then notwithstanding anything to the contrary contained herein, all rights accruing to the Council arising out of any breach by the Concessionaire of the provisions of this Contract (including but not limited to the imposition of any penalty or the exercise of any other remedy in respect of such breach) will be waived by the Council, provided that such breach is attributable to the non availability of such additional funds.

56. MATERIAL ADVERSE GOVERNMENTAL ACTION

56.1. Should any Material Adverse Governmental Action occur, the Concessionaire shall give written notice to the Council containing reasonable particulars of such action and its likely economic consequences to the Concessionaire. The Council shall have 60 (sixty) days from the date of receipt of such notice to effect a remedy for the situation which restores the general economic position of the Concessionaire to that in which it would have been if such Material Adverse Governmental Action had not occurred. If the Council does not effect such a remedy within such period, the Parties and the Lenders shall consult within 21 (twenty one) days after the expiration of such period with a view to reaching a mutually satisfactory resolution to the situation. In the event that a mutually satisfactory resolution is not reached within such 21 (twenty one) day period with respect to-

56.1.1. any appropriate adjustment of charge and/or the extension of time as may be fair and reasonable under the circumstances; and/or

56.1.2. any monetary relief as may be fair and reasonable under the circumstances; and/or
56.1.3. any appropriate extension of the Contract Term,

the Contract may be terminated by the Concessionaire in accordance with 58
where any other remedy provided for in this clause shall not be sufficient to
place the Concessionaire in as good an economic position as it would have
been had the Material Adverse Governmental Action not taken place, having
regard to the Concessionaire's continued obligations in terms of the Contract
and under any Financing Agreements.

57. **TERMINATION BY THE COUNCIL**

57.1. The Council shall subject to the remaining provisions of this clause 57,
be entitled to terminate this Contract on written notice to such effect to the
Concessionaire, the Operator and to the Lenders should any of the following
events occur -

57.1.1. the Concessionaire breaches its obligations under the Lease Agreement
to make payment of the rental consideration to the Council on the due
date subject to the Concessionaire’s right in terms of this Contract to off-
set any monies due and payable against such rental consideration;

57.1.2. the monetary sanctions imposed on the Concessionaire in terms of this
Contract in the aggregate exceed [AMOUNT AND CURRENCY] per
year which amount will be escalated by CPI on each anniversary of the
Effective Date provided that the amount of any monetary sanction that is
being contested by the Concessionaire shall not be taken into account for
the purposes of this clause 57.1.2;

57.1.3. the Concessionaire fails to make payment of the Concession Fee
payable in terms of 8.5 on due date;

57.1.4. should the Concessionaire sub-Concession the Supply of Water
Services without the prior written agreement of the Council;

57.1.5. 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
Concessionaire, save for any voluntary liquidation for the purposes of
reconstruction or amalgamation (which reconstruction or amalgamation
has been approved by the Council and the Lenders);

57.1.6. the members of the Concessionaire adopt a resolution for the voluntary
winding up or judicial management of the Concessionaire, save for a
voluntary liquidation for the purposes of reconstruction or amalgamation
(which reconstruction or amalgamation has been approved by the Council
and the Lenders);

57.1.7. the Concessionaire defaults under any of the Financing Agreements
and, as a result of such default an amount of [AMOUNT AND CURRENCY] or more becomes due and payable by the Concessionaire to any Lender prior to the stated maturity date set for the payment thereof in the Financing Agreement concerned and where the Lenders require this Contract to be terminated as a result thereof;

57.1.8. [any Equity contributions of the shareholders of the Concessionaire in an amount constituting [   ]% ([   ] per centum) or more of the total of such Equity contributions as envisaged in the Financial Base Case is not made in the amounts and at the dates contemplated in the shareholders’ agreement relating to the Concessionaire and where the Lenders require this Contract to be terminated as a result thereof;]

57.1.9. the Concessionaire, 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 Concessionaire fails to Supply any Water Services for a continuous period of 5 (five) days or 15 (fifteen) discontinuous days per calendar year;

57.1.10. subject to 73, the Concessionaire 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 the Council in holding that the Concessionaire's conduct is inconsistent with its intention or ability to carry out the terms and conditions of the Contract;

57.1.11. the Concessionaire breaches any warranty or representation made to the Council or wilfully conceals material information which it is obliged to Supply to the Council, where the concealment of such information will result in the Council to be in breach of its statutory obligations in terms of the Regulatory Provisions and suffering material damage or loss;

57.1.12. the Concessionaire breaches its obligations under this Contract to furnish, renew or replenish the Performance Guarantees or insurance policies in breach of the provisions of this Contract, save where such failure is a result of the Council, the Lenders and the Concessionaire failing to reach agreement on any matter relating to such Performance Guarantees or insurance policies;

57.1.13. the Operator fails to maintain its prescribed minimum shareholding of [   ]% ([   ] per centum) in issued share capital of the Concessionaire.

57.2. Prior to the Council exercising any right to cancel this Contract, it shall
deliver a written notice to each Lender, the Operator and the Concessionaire notifying them of the breach giving rise to such right and requesting the Concessionaire to remedy the breach in question to be remedied 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 Concessionaire within a 60 (sixty) day of the date of receipt of such notice to the Concessionaire, provided that no such notice shall be required where the breach complained of is contemplated in 57.1.2, 57.1.5, 57.1.7 and 57.1.9 in circumstances where the Concessionaire fails to Supply any Water Services for a continuous period of 5 (five) days.

57.3. Should -

57.3.1. the Concessionaire fail to remedy the breach in question within the period reflected in the rectification notice referred to in 57.2; or

57.3.2. no notice be required in terms of 57.2;

and a Substitute Entity in terms of 60 not have been appointed, the Council shall terminate the Contract forthwith on written notice to the Concessionaire and the Lenders.

57.4. Upon any termination of the Contract by the Council in terms of this clause 57 -

57.4.1. the Lenders shall be paid by the Council all sums outstanding (excluding penalty interest and all amounts payable to the Lenders solely as a penalty, premium or fee for early termination) under the Financing Agreements as at the date of payment thereof, unless the Council and the Lenders reach agreement in writing that the Council is to assume the payment and other relevant obligations of the Concessionaire under such Financing Agreements;

57.4.2. the Council and/or the Lenders shall be entitled to call up and claim against the Performance Guarantee;

57.4.3. the Council shall be entitled to claim and recover from the Concessionaire such damages as it may have suffered as a result of the breach by the Concessionaire and the amounts of any deposits not returned by the Concessionaire to the Council, provided that the amount referred to in 59.4.1 shall not be set-off against any damages suffered by the Council for which the Concessionaire may be liable; and

57.4.4. subject to 60, the Council may take-over the Operating Agreement and any other Subcontract that it may elect.

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66Important to establish clearly in the contract a formula for termination payments for each category of termination
57.5. Notwithstanding anything to the contrary contained in this Contract, the Council's remedies arising from any breach of any term, condition, undertaking, warranty or representation in this Contract shall be limited to a claim for specific performance of this Contract or the remedies set out in clause 47 and this clause 57.

58. TERMINATION BY CONCESSIONAIRE

58.1. Subject to the remaining provisions of this clause 58, the Concessionaire shall, without prejudice to its other rights or remedies in terms hereof or at law, be entitled to forthwith terminate this Contract on written notice to such effect to the Council and the Lenders should any of the following events occur -

58.1.1. the Council breaches a material provision of this Contract (including, but not limited, to the non payment of any amount due to the Concessionaire in terms hereof or a breach by the Council of any warranty given by it in terms of this Contract) and fails to remedy same within 60 (sixty) calendar days after receipt of a written notice from the Concessionaire a copy of which notice the Concessionaire shall send to the Lenders requiring such breach to be remedied;

58.1.2. any compulsory acquisition or expropriation by any Competent Authority of a material part of the Works, or other rights necessary for the Supply of Water Services or operation of the Contract;

58.1.3. the Concessionaire and/or the Operator or any share in or claim against the Concessionaire and/or the Operator is nationalised or expropriated by any Competent Authority;

58.1.4. the business of the Concessionaire and/or the Operator is nationalised or expropriated by any Competent Authority; and/or

58.1.5. Ministry or any other Competent Authority unlawfully withdraws, revokes or materially varies any permit, licence, consent or other authority necessary for the Concessionaire and/or the Operator to undertake the supply of Water Services;

58.1.6. the failure to address adequately the consequences suffered by the Concessionaire on the occurrence of Material Adverse Governmental Action as envisaged in 56.

58.2. Upon any termination of the Contract by the Concessionaire, the Council shall pay to the Lenders all sums outstanding under the Financing Agreements and all hedging agreements concluded between the Lenders and third Parties as at the date of payment thereof (including breakage costs), unless the Council and the Lenders reach agreement in writing that the Council is to assume the payment and other relevant obligations of the Council.
Concessionaire under such Financing Agreements.

58.3. Upon termination of the Contract by the Concessionaire the Council shall pay to the Concessionaire:

58.3.1. an amount equal to all Equity contributed to the Concessionaire by the shareholders of the Concessionaire; and

58.3.2. an amount required to attain the premise and basis of the Financial Base Case in respect of the period that has elapsed between the Effective Date and the date of termination,

less any amounts paid to the Concessionaire or the shareholders of the Concessionaire or any Lender under any insurance policy referred to in the insurance schedule provided that the Concessionaire shall only be entitled to receive payment of the amount in 58.3 after the Lenders have received payment in full of the amount in 58.2 or the Lenders have consented in writing thereto.

58.4. Upon termination of this Contract in accordance with the provisions of this clause 58, the Council shall and hereby does indemnify the Concessionaire against any and all claims arising and/or made against the Concessionaire and against any and all costs, expenses, loss and damage incurred and/or suffered by the Concessionaire relating to the Concessionaire's employment of its employees (specifically including, but not limited to, all redundancy payments and the payment of approved benefits such as leave, pension and the like).

59. TERMINATION DUE TO FORCE MAJEURE

59.1. If this Contract is terminated by any Party pursuant to an Event of Force Majeure in terms of 73, the Council shall:

59.1.1. pay to the Lenders all sums outstanding (excluding penalty interest and all amounts payable to the Lenders solely as a penalty, premium or fee for early termination but including [ ]% ([ ] per centum) of all breakage costs under any Financing Agreement as at the date of payment thereof and under all hedging agreements concluded between the Lenders and third Parties outstanding as at such date, unless the Council and the Lenders reach agreement in writing that the Council is to assume the payment and other relevant obligations of the Concessionaire under such Financing Agreements; and

59.1.2. pay to the Concessionaire an amount equal to the Equity contributed to the Concessionaire by the shareholders of the Concessionaire, less any amounts paid to the Concessionaire or the shareholders of the Concessionaire or any Lender under any insurance policy referred to in the insurance schedule provided that the Concessionaire shall only be
entitled to receive payment of the amount in 59.2 after the Lenders have received payment in full of the amount in 59.1 or the Lenders have consented in writing thereto.

60. **SUBSTITUTE ENTITY**

60.1. **Substitute entity nominated by the Council**

60.1.1. Should any of the events referred to in 57.1 occur, the Council shall be entitled to nominate a Substitute Entity in terms of the provisions of this clause 60.1 to take over the operation and maintenance of the Works and Supply of Water Services if -

60.1.1.1. the Concessionaire fails to remedy the breach in question within the period provided in 57.2; or

60.1.1.2. no notice to remedy the breach in question is required in terms of 57.3.2.

60.1.2. Upon the occurrence of any event referred to in 57.3, the Council shall forthwith but no later than 21 (twenty one) days or such further period agreed to in writing between the Council and the Lenders of such occurrence notify the Lenders whether or not it intends to nominate a Substitute Entity pursuant to 60.1 and, if the Council in such notice indicates that it does so intend the provisions of 60.1.3 up to and including 60.1.7 shall apply or, if the Council in such notice indicates that it does not so intend or if it fails for whatsoever reason to notify the Lenders timeously, the provisions of 60.1.7 shall apply.

60.1.3. The notice shall contain -

60.1.3.1. the full identity of the proposed Substitute Entity; and

60.1.3.2. such other details pertaining to the proposed Substitute Entity as the Lenders may reasonably require to enable the Lenders to consider its appointment as Substitute Entity.

60.1.4. The proposed Substitute Entity shall be required within 30 (thirty) days of such notice to provide evidence satisfactory to all the Lenders that -

60.1.4.1. it is legally and validly constituted and has the necessary capabilities to enter into such agreements as may reasonably be required by the Lenders and by the Council to give effect to the substitution;

60.1.4.2. it has sufficient financial and technical capabilities to perform and assume the obligations of the Concessionaire under this Contract and all Financing Agreements;

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60.1.4.3. it has the necessary financial capability to pay any damages or other sums outstanding which the Council is entitled to receive from the Concessionaire before or at the time of such substitution.

60.1.5. The Lenders shall be entitled, within 21 (twenty one) days of receipt of such evidence from the proposed Substitute Entity, to notify the Council of their acceptance or non-acceptance of the substitution.

60.1.6. Where the Lenders notify the Council in terms of 60.1.5 of their acceptance of the Substitute Entity proposed by the Council and of the substitution, the Council shall proceed forthwith, but in any event by no later than 14 (fourteen) days after the date of receipt by the Council of the Lenders' notification with the appointment of that Substitute Entity and the designated Substitute Entity shall thereupon assume all obligations of the Concessionaire under the Financing Agreements.

60.1.7. If -

60.1.7.1. the Council notifies the Lenders that it does not wish to nominate a Substitute Entity, which shall be deemed to be the case if the Council fails, for any reason whatsoever, to notify the Lenders timeously or at all; or

60.1.7.2. the Lenders notify the Council in terms of 60.1.5 of their non-acceptance of the proposed Substitute Entity, the Lenders may forthwith and directly proceed in terms of 60.2.3.

60.2. Substitue entity nominated by Lenders

60.2.1. Should -

60.2.1.1. any event of default occur as defined in any Financing Agreement; or

60.2.1.2. any amount outstanding under a Financing Agreement be accelerated for payment,

the Lenders shall be entitled to notify the Council of such fact and of their intent to have a Substitute Entity nominated.

60.2.2. Where the Lenders have notified the Council in terms of 60.2.1, the Council shall forthwith (but in any event within 14 (fourteen) days after the date of the Lenders' notice to the Council) notify the Lenders and the Concessionaire whether it intends to nominate a Substitute Entity itself and, if so -

60.2.2.1. the provisions of 60.1.3 up to 60.1.6 shall be applicable; and
60.2.2.2. should no substitution agreement be entered into with a proposed Substitute Entity within a further 21 (twenty one) days or such further period agreed to in writing between the Council and the Lenders in terms of 60.1.6, then the Lenders may forthwith and directly proceed pursuant to 60.2.3.

60.2.3. Should -

60.2.3.1. the Council at any time notify the Lenders that it does not intend to nominate a Substitute Entity or where it is deemed, that the Council has so notified the Lenders; or

60.2.3.2. the Lenders at any time notify the Council of the non acceptance of a Substitute Entity proposed by the Council or any time be or become entitled to nominate a Substitute Entity pursuant to 60.1 or the preceding provisions of this clause 60.2

60.2.3.3. no substitution agreement be entered into with a proposed Substitute Entity in terms of 60.1.6,

the Lenders shall be entitled to nominate a Substitute Entity themselves and to notify the Council of the Substitute Entity proposed by them, whereupon -

60.2.3.4. the Substitute Entity nominated by the Lenders may be required, upon the written request of the Council, to provide the Council within 30 (thirty) days of such request with the following information and evidence satisfactory to the Council that -

60.2.3.4.1. it is legally and validly constituted and has the necessary capabilities to enter into such agreements as may reasonably be required by the Lenders and by the Council to give effect to the substitution;

60.2.3.4.2. it has sufficient financial and technical capabilities to perform and assume the obligations of the Concessionaire under this Contract and all Financing Agreements;

60.2.3.4.3. it has the necessary financial capability to pay any damages or other sums outstanding which the Council is entitled to receive from the Concessionaire before or at the time of such substitution.

60.2.4. The Council shall, within 21 (twenty one) days of receipt of such evidence, inform the Lenders of its acceptance or non-acceptance of the substitution, which acceptance shall not be withheld if the conditions set out in 60.2.3 have been satisfied.
60.2.5. The Council undertakes to conclude the necessary substitution agreement with the agreed Substitute Entity.

60.2.6. Should the Lenders notify the Council in terms of 60.2.1 that they wish to nominate a Substitute Entity and no substitution agreement is entered into for whatsoever reason with such a Substitute Entity within a further 21 (twenty one) days from the date of the Lenders' notice in terms of 60.2.1 or from the date of the Council's notice in terms of 60.2.4, whichever is the later and irrespective of whether any notice has been given in terms of 60.2.4 or not, then the Council shall forthwith terminate this Contract in terms of 57.

60.3. Failure to nominate a Substitute Entity

Should -

60.3.1. the Council at any time elect not to nominate a Substitute Entity or where such is deemed to be the case and should the Lenders then also elect not to nominate a Substitute Entity; or

60.3.2. the Lenders fail to notify the Council in terms of 60.2.1,

then the Council shall forthwith terminate the Contract in terms of 57.

60.4. Cession and delegation to a Substitute Entity

Where a Substitute Entity is appointed to the satisfaction of the Council and the Lenders and when such appointment is unconditional, this Contract and all Financing Agreements shall be ceded and delegated to such Substitute Entity and, to the extent necessary, the Parties hereto hereby agree to such cession and delegation.

61. USE OF THIRD PARTY FACILITIES ON TERMINATION OF CONTRACT

Facilities owned and/or operated by a Party other than the Concessionaire shall be handed over to the Council on termination of the Contract to ensure that the Council and/or their duly appointed representatives and agents shall be in a position to operate the Works without being reliant upon the consent of any other person.

62. EFFECT OF TERMINATION

62.1. On termination of the Contract -

62.1.1. the Council shall not be entitled to call up or claim in terms of the Performance Guarantee and shall return same to the Concessionaire, save where the Council is entitled to do so in terms of 57.4;
62.1.2. the Contract shall cease to be of any further force or effect, subject to all accrued rights and obligations of the Parties existing as at the termination date;

62.1.3. the amount of the deposits referred to in 11.8 (including accrued interest) shall be transferred to the Council within 30 (thirty) days of the date of termination;

62.1.4. the Parties shall implement the take over procedures *mutatis mutandis* set out in Annexure [ ];

62.1.5. the Council shall be entitled (but not obliged), and the Operating Agreement shall so provide, to require the Operator to continue to operate the Works and undertake the Supply of Water Services on the basis set out in 49.2.

62.1.6. all the records, plans, specifications, engineering documents, operating procedures, utility location plans, record maps, licences, permits and Contracts associated with or connected to the employment of any personnel, the Works and the Supply of Water Services shall be handed over to the Council.
63. **EMPLOYMENT PROVISIONS ON TERMINATION OF CONTRACT**

On the termination of the Contract or appointment of a Substitute Entity, arrangements shall be made for the employment of personnel employed by the Concessionaire so as to ensure the continuity of the Supply of Water Services, with due regard to and in strict compliance with the Regulatory Provisions. In particular -

63.1. personnel will be transferred to or offered employment by the entity designated to continue to Supply the Water Services, as from the date on which the Contract is terminated("the date of transfer");

63.2. the Concessionaire shall be responsible for and shall discharge all obligations in respect of all payments and amounts accrued to all personnel arising out of their employment with the Concessionaire prior to the date of transfer and shall indemnify and hold the Council harmless in respect of all such obligations;

63.3. the Concessionaire shall be liable for and indemnify and hold the Council harmless in respect of all claims in respect of personnel to be transferred which claims accrued on or after the Effective Date but prior to the date of transfer or caused by the transfer in accordance with prevailing Regulatory Provisions;

63.4. any debt or liability arising from or connected to the employment of the personnel by the Concessionaire after the date of transfer will be the exclusive responsibility of the entity to which responsibility for the Supply of the Water Services is granted;

63.5. any obligation on the Concessionaire to make contributions to any pension, provident, retirement and/or medical aid or health care funds of which the Concessionaire's personnel are members at the date of transfer will with effect from the date the transfer become the obligation of the entity entrusted with the continuation of the Supply of the Water Services and such entity shall indemnify and hold the Council and/or the Concessionaire harmless in respect of all such claims, costs and expenses.

64. **NON-INTERFERENCE**

64.1. Subject to the provisions of this Contract, the Council undertakes not to do, or refrain from doing anything which would prevent or adversely affect the Concessionaire's ability to perform its obligations under this Contract or the operation of or free access of the Concessionaire to the Works or the collection by the Concessionaire of Tariffs from Consumers save as may be reasonably necessary on the grounds of national security, public safety or for the discharge and performance of its duties under any Regulatory Provision.
64.2. Subject to 56 and 73 if any operation or action is carried out by the Council or its representatives on the grounds of national security or public safety, which will prevent or adversely affect the Concessionaire's ability to perform its obligations under this Contract or the operation of or free access to the Works or the collection by the Concessionaire of Tariffs from Consumers, the Council shall ensure that same will cause the minimum interference with activities of the Concessionaire and the Operator and that (excepting in the case of an emergency situation where it is impossible to do so), written notice thereof is first given to the Concessionaire reasonably in advance to enable the Parties to discuss the method of carrying out such operations or action to ensure the minimal disruption to the Concessionaire and the Supply of Water Services within the limits imposed by the Regulatory Provisions in respect of national security, public safety or health. Without prejudice to any other rights or remedies of the Concessionaire under this Contract or at law, should the Council receive any monies from Government on the occurrence of the events referred to above, then the Concessionaire shall be entitled to recover any costs and losses incurred by it that are directly attributable to such events from the Council and/or the Concessionaire shall be entitled to set-off such costs and losses against and deduct same from rental payments due and payable by the Concessionaire under the Lease Agreements.

65. **PRESERVATION OF THE POWERS AND DUTIES OF THE COUNCIL**

Subject to the sole and exclusive appointment of the Concessionaire in terms of this Contract, nothing in this Contract shall curtail the statutory powers or the responsibilities of the Council in its capacity as a water service authority in respect of the Supply of Water Services within the Concession Area in any manner whatsoever.

66. **DATA OWNERSHIP**

66.1. All -

66.1.1. data and information pertaining to the Concession, the Works and/or the supply of the Water Services;

66.1.2. documents prepared by the Concessionaire and/or the Operator in the execution of their obligations in terms of this Contract, the Operating Agreement and/or an agreement for the design, rehabilitation and construction of Works envisaged in 50.1 and the entire contents thereof; and

66.1.3. all copyright and other Intellectual Property rights in, to and in respect of thereof,

shall vest in and remain the exclusive property of the Concessionaire and/or the Operator, as the case may be.
66.2. On termination of this Contract for whatsoever reason, the Concessionaire will, grant to the Council and/or obtain for the Council at its cost a royalty free, non-exclusive, non-transferable licence to use all such data, information and documents of which it, the Operator is the proprietor and which is required by the Council to continue with the Supply of the Water Services and/or the operation and maintenance of the Works.

67. CONFIDENTIALITY AND PUBLICITY

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

67.1.1. not, during the existence of this Contract 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 any other Party (or any portion thereof) that may have been disclosed or communicated to or acquired by the recipient;

67.1.2. not, during the existence of this Contract or at any time thereafter, to use, exploit, permit the use of or in any other manner whatsoever apply the confidential information of any 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 Contract; and

67.1.3. during the existence of this Contract 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.

67.2. Notwithstanding the provisions of 67.1, any Party shall be entitled to disclose the confidential information of another Party to such of its shareholders, directors, employees, advisors and/or agents ("associated 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 67 and each conclude a separate confidentiality and non-disclosure agreement mutatis mutandis on the terms and conditions set out in this clause 67 in order to prevent the unauthorised disclosure of the confidential information to third Parties.

67.3. Each Party hereby -
67.3.1. acknowledges that the unauthorised disclosure of the confidential information of another 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 each 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 first mentioned Party or any associated Party of the first mentioned Party of the provisions of this Contract; and

67.3.2. undertakes to take all such steps as may be necessary to prevent the confidential information of another Party (or any portion thereof) falling into the hands of unauthorised third Parties; and

67.3.3. accepts responsibility for all acts and omissions of its associated Parties in relation to the confidential information of another Party.

67.4. Any and all documentation or records relating to the confidential information of any Party which comes into the possession of another Party or any one or more of its associated Parties during the existence of this Contract or at any time thereafter -

67.4.1. shall be deemed to form part of the confidential information of the firstmentioned Party;

67.4.2. shall be deemed to be the property of the firstmentioned Party;

67.4.3. 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 terms of this Contract or to conduct its business mutatis mutandis on the basis set out in 67.2;

67.4.4. shall be surrendered to the firstmentioned Party on demand on termination of this Contract 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 Contract or to conduct its business mutatis mutandis on the basis set out in 67.2.

67.5. Any and all information which is acquired by a Party pursuant to the implementation of this Contract, 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.

67.6. The above undertakings relating to confidentiality and non-disclosure shall not apply to any information which -

67.6.1. the Council is required to disclose to any Competent Authority, or
customer pursuant to the Regulatory Provisions provided that in such circumstances the Party about to disclose any confidential information of another Party shall give such 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;

67.6.2. is disclosed to the Operator or to any Subcontractor of the Concessionaire or of the Operator;

67.6.3. 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;

67.6.4. 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;

67.6.5. a Party can demonstrate was independently acquired or developed in circumstances that do not amount to a breach of the provisions of this Contract by it or by any of its associated Parties, as proved by such Party's written records;

67.6.6. 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 another Party, as proved by such Party's written records;

67.6.7. 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 such 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;

67.6.8. a Party uses or discloses in order to pursue any legal remedy available to it;

67.6.9. 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

67.6.10. a Party discloses to its shareholders to enable such shareholders to consider the value and prospects of their shareholdings;
67.6.11. a Party discloses to the Lenders, provided that the Party about to disclose any confidential information of another 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.

67.7. In order to protect the confidential information of the Parties, each Party hereby undertakes -

67.7.1. 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

67.7.2. 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.

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

67.9. For purposes of this clause 67, "confidential information" of any Party means all technical, trade, commercial, financial and management information and secrets of a 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.

67.10. It is recorded that a copy of the Contract will be submitted to the
Minister.

68. **FAILURE TO REACH AGREEMENT**

Where it is specified in this Contract that certain matters are to be agreed between the Parties, failure to reach agreement in respect of such matter will not affect the validity and enforceability of the whole or any other part of this Contract.
69. **CO-OPERATION AND GOOD FAITH**

The Parties shall in their dealings with each other display good faith, co-operate in the implementation of the Contract and undertake to do all such things, perform all necessary acts and procure the taking of all necessary steps and sign all such other documents that may be necessary or incidental or conducive to give effect to the intention and the terms and conditions of the Contract.

70. **ASSIGNMENT, TRANSFER, CESSION AND DELEGATION**

70.1. Save as may be provided for in this Contract, no Party shall be entitled to assign, transfer, cede or delegate any of its rights and obligations in terms of this Contract without the prior written consent of the other Party, which consent it undertakes shall not be unreasonably delayed or withheld. This clause shall be binding on the liquidator/judicial manager/trustee (whether provisional or not) of any Party.

70.2. Notwithstanding 70.1 or any other provision of this Contract to the contrary, the Concessionaire shall be entitled if so required by the Lenders to cede and assign all or some of its rights, title and interest in and to this Contract to the Lenders as security for its obligations as may be required under any Financing Agreement.

71. **SEVERABILITY**

71.1. Any provision in this Contract which is or may become illegal, invalid or unenforceable [in any jurisdiction affected by this Contract shall, as to such jurisdiction, be ineffective to the extent of such illegality, invalidity or unenforceability and] shall be treated [pro non scripto and] severed from the balance of this Contract, without invalidating the remaining provisions of this Contract or affecting the legality, validity or enforceability of such provision[ in any other jurisdiction].

71.2. It is recorded that the provisions of 38.8, 38.9, 38.11 and 38.12 are severable from the remaining provisions of the Contract. Should any provision contained within any one or more of the clauses referred to above be or become illegal, invalid or unenforceable [in any jurisdiction affected by this Contract, ]such provisions shall be treated [pro non scripto and be] severed from the balance of this Contract without invalidating the remaining provisions of this Contract or affecting the legality, validity or enforceability

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67 many jurisdictions, particularly civil law jurisdictions, imply into the contract a duty on the parties to act in good faith. The consequences of such an obligation will vary from jurisdiction to jurisdiction.

68 it is important that the concessionaire is able to assign the payment obligations to the lenders, particularly in cases where the assets must remain with the municipality as the payment stream may be the lender’s only form of security. Local legislation should be checked to ensure that this assignment is permissible.
of such provision[ in any other jurisdiction].

72. AGREEMENT BINDING ON SUCCESSORS IN TITLE

This Contract shall be binding on any and all successors-in-title of the Council.

73. FORCE MAJEUR\textsuperscript{69}

73.1. Save as may be provided for in this Contract, 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 -

73.1.1. causes material physical damage or destruction to all or a substantial part of the Works or other Concession Assets; or

73.1.2. materially delays the scheduled time of completion of all or any Water Services to be rendered or Works to be executed by the Concessionaire; or

73.1.3. materially interrupts the full and regular Supply of Water Services by the Concessionaire in terms of this Contract,

(each an "Event of Force Majeure").

73.2. The Party affected by an Event of Force Majeure shall promptly notify the others 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 73.1.

73.3. 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 others of such cessation.

73.4. \textsuperscript{70}In the event of any delay caused by an Event of Force Majeure, the

\textsuperscript{69} Important to establish what constitutes force majeure and the consequences thereof

\textsuperscript{70} The consequence of force majeure are an important area of contract negotiation. The
Contract Term shall automatically be extended by a time period equal to the extent and duration of the Event of Force Majeure or by such time period as may be necessary to take account of the effects of such Event of Force Majeure, whichever is the longer.

73.5. To the extent that the consequences of an Event of Force Majeure are covered by the insurance policies required in terms of this Contract and subject to any rights that the Lenders may have under the Financing Agreements, the Concessionaire shall forthwith make the appropriate claims thereunder and shall subject to and in accordance with the provisions of 27 apply the proceeds to offset the impact effect of the Event of Force Majeure.

73.6. If, as a result of an Event of Force Majeure, the performance of a Party's obligations under this Contract is only partially affected, such Party shall nevertheless remain liable for the performance of those obligations not affected by the Event of Force Majeure.

73.7. If an Event of Force Majeure continues for 90 (ninety) or less consecutive days from the date of any notification thereof in terms of 73.2, 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 Parties.

73.8. If an Event of Force Majeure continues for more than 90 (ninety) consecutive days from the date of any notification thereof in terms of 73.2 and notice of cessation in terms of 73.3 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 then either Party be entitled on written notice to the other Party and the Lenders to terminate this Contract and the provisions of 59 shall apply.

74. ARBITRATION71

74.1. Save in respect of those provisions of the Contract which provide for their own remedies which would be incompatible with arbitration, a dispute which arises in regard to -

74.1.1. the interpretation of; or

74.1.2. the carrying into effect of; or

concessionaire/ lenders may seek to ensure that it receives a minimum level of compensation to cover debt service at least during this period and so an extension of the contract time may not always be sufficient recompense.

71 parties need to consider whether it is appropriate to consider expert determination prior to resorting to arbitration, whether arbitration is appropriate and if so what rules are to govern it, where it is to take place. It is also important to establish whether the local laws will require courts to enforce international arbitration rulings/ can interfere with decisions etc.
74.1.3. any of the Parties' rights and obligations arising from; or

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

74.1.5. the rectification or proposed rectification of

this Contract, or out of or pursuant to this Contract or which relates in any way to any matter affecting the interests of the Parties in terms of this Contract or on any matter which in terms of this Contract 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.

74.2. That arbitration proceedings shall be in English and be held -

74.2.1. 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;

74.2.2. in [LOCATION].

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.

74.3. The arbitration shall be subject to the arbitration legislation for the time being in force in [country] and the [UNCITRAL Rules] shall apply to such proceedings.

74.4. The 72 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 [arbitration court/ bar association]. If that person fails or refuses to make the nomination, either Party may approach [relevant body] to make such an appointment.

74.5. The Parties shall keep the evidence in the arbitration proceedings and

72 parties need to consider whether they are happy with one arbitrator or want a panel of three arbitrators – one chosen by each party and third agreed on or chosen by an independent body.
any order made by any arbitrator confidential unless otherwise contemplated herein save for the purposes of making such order an order of Court.

74.6. The arbitrator shall be obliged to give his award in writing fully supported by reasons.

74.7. The provisions of this clause are severable from the rest of this Contract and shall remain in effect even if this Contract is terminated for any reason.

74.8. 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.

74.9. Save where otherwise provided in this Contract, no Party shall be excused from the performance of its obligations under this Contract pending the outcome of the arbitration.

74.10. Notwithstanding anything to the contrary contained in this clause 74 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.
75. **GOVERNING LAW**

75.1. The interpretation, implementation and termination of this Contract will be in accordance with the laws of [country] which shall, for all purposes of this Contract, be the governing law of this Contract.

76. **NOTICES**

76.1. 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:

76.1.1. when delivered in the case of personal delivery or post; or

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

76.1.3. when received in the case of facsimile,

76.1.4. 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 Council:
[ ]
for the attention of [ ]
Fax: [ ]

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

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

76.3. A 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.

77. **LANGUAGE**

All notices and correspondence in respect of this Contract shall be in the English language.
78. **WHOLE AGREEMENT, NO AMENDMENT**

78.1. This Contract including the annexures constitutes the whole the agreement between the Parties relating to the subject matter hereof.

78.2. No amendment or consensual cancellation of this Contract or any provision or term hereof or of any agreement, bill of exchange or other document issued or executed pursuant to or in terms of this Contract and no settlement of any disputes arising under this Contract and no extension of time, waiver or relaxation or suspension of or agreement not to enforce or to suspend or postpone the enforcement of any of the provisions or terms of this Contract or of any agreement, bill of exchange or other document issued pursuant to or in terms of this Contract shall be binding unless recorded in a written document signed by the Parties. Any such extension, waiver or relaxation or suspension which is so given or made shall be strictly construed as relating strictly to the matter in respect whereof it was made or given.

78.3. No extension of time or waiver or relaxation of any of the provisions or terms of this Contract or any agreement, bill of exchange or other document issued or executed pursuant to or in terms of this Contract, shall operate as an estoppel against any Party in respect of its rights under this Contract, nor shall it operate so as to preclude such Party thereafter from exercising its rights strictly in accordance with this Contract.

78.4. To the extent permissible by law no Party shall be bound by any express or implied term, representation, warranty, promise or the like not recorded herein, whether it induced the Contract and/or whether it was negligent or not.

79. **COUNTERPARTS**

This Contract, together with its annexures, may be executed in several counterparts, each of which shall together constitute one and the same document.
80. **STIPULATIONS FOR THE BENEFIT OF THIRD PARTIES**

The Parties agree that the provisions of the Contract that refer to the Lenders or the Operator as the case may be, comprise stipulations for the benefit of the Lenders or the Operator and that the Lenders or the Operator may at any time accept such stipulations in their favour. The Lenders and/or the Operator shall have no obligations under the Contract save for such obligations that are expressly provided for herein.

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**CLAUSES 81 – 83 APPROPRIATE WHERE CONCESSIONAIRE NOT PERMITTED BY LAW TO INVOICE AND COLLECT FEES AND TARIFFS IN ITS OWN NAME**

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81. **TARIFF COLLECTION**

81.1. The Parties record and agree that -

81.1.1. under [relevant legislation], the Council is not entitled to authorise the Concessionaire to recover from Consumers any levies, fees, taxes and Tariffs levied on Consumers by the Council in respect of the Supply of Water Services to Consumers; and

81.1.2. the preceding provisions of this Contract envisage that the Concessionaire will indeed recover the Tariff from Consumers in respect of the Water Services supplied to Consumers by the Concessionaire.

81.1.3. Accordingly, as from the Effective Date and until such time as the relevant provisions of [relevant legislation] referred to in 81.1.1 have been repealed, replaced or amended so as to enable the Concessionaire to recover the Tariff from Consumers as envisaged in the preceding provisions of this Contract and notwithstanding anything to the contrary in any other part of this Contract (specifically including, but not limited to, clauses 1.2.68, 1.2.89, 10.1.3, 13.8, 13.11, 13.17, 37.2.3, 39.1.4 and 39.3), the provisions of **clauses 81 to 83** of the Contract shall apply, take precedence over the provisions of any other part of the Contract and be given effect to by the Parties.

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*specific to jurisdiction that recognizes third party rights in relation to contracts. Many common law jurisdictions rely on privity of contract which allows for little if no benefit to third parties. Local legal advice should be sought.*
82. **RECOVERY AND PAYMENT**

82.1. The Council shall, recover and collect from Consumers all amounts due by Consumers in respect of Water Services supplied to Consumers by the Concessionaire.

82.2. The Council shall, in so recovering and collecting amounts from Consumers, strictly adhere to the Consumer Rules pertaining to the collection and recovery of amounts from Consumers and the performance criteria as set out in the recovery performance criteria schedule annexed hereto marked Annexure [ ]. Should the Council fail to achieve the performance criteria set out in Annexure [ ], the Concessionaire shall as its sole and exclusive remedy be entitled to levy a penalty of the Council pursuant to the provisions of Annexure [ ] in respect thereof.

82.3. The Council shall, as soon as reasonably possible after the signature date hereof, establish and open a dedicated Water Services fund account with the [location] branch of [bank] under the name "Dedicated Water Services Fund" ("the dedicated fund"). Deposits into and withdrawals and transfers from the dedicated fund shall be restricted to those deposits, withdrawals and transfers associated with and connected to the Charges and surcharges in respect of the Supply of Water Services and shall only be made by the Council for the purpose and on the basis envisaged in this clause 82.

82.4. All amounts (including any surcharge in terms of 43.3 hereof) recovered and collected by the Council from Consumers in terms 82.1 and which should have been received by the Concessionaire but limited to the total amount invoiced by the Council in respect of the Supply of Water Services shall forthwith (but in any event by no later than the close of business on the day on which payment thereof was effected) be deposited to the credit of the dedicated fund.

82.5. As soon as reasonably possible after the close of business of each and every day as from the Effective Date (but in any event by no later than 18:00 on each and every day) -

82.5.1. all amounts recovered and collected by the Council from Consumers as envisaged in 82.1 shall be paid over to the Concessionaire in cash, free of the cost of transfer of funds, without any deduction or set-off of whatsoever nature and otherwise in accordance with the written payment instructions of the Concessionaire from time to time;

82.5.2. the Council shall furnish the Concessionaire, on such medium as the Concessionaire may require, with a list containing the identity of all Consumers that effected payment of an amount paid over in terms of 82.5.1 the amount paid by each Consumer concerned and the identity of all Consumers in default of their payment obligations at such date.
82.6. The amounts deposited by the Council into the dedicated fund in terms
of 82 shall be reconciled against the amounts paid over to the Concessionaire
in terms of 82.5 on the next succeeding business day by the Council and the
Concessionaire and the next amount to be paid by the Council in terms of
82.5 shall be adjusted to take account of any under or overpayment by the
Council in terms of 82.5.

82.7. As security for the obligations of the Council in terms of this clause 82,
the Council shall and hereby [does out and out cede, in securitatem
debiti] assigns by way of security, to the Concessionaire, which hereby
accepts same, the entire amount standing to the credit of the dedicated
account from time to time and all of the Council’s rights, title and interest in
and to such amounts and all amount that may in future be deposited into the
dedicated account.

82.8. The Council -

82.8.1. acknowledges and agrees that the cession referred to in 82.7 shall
remain in force as a continuing covering security notwithstanding any
fluctuation in the Council’s indebtedness to the Concessionaire or even
any temporary extinction thereof for such sum or sums of money as may
now or hereafter be owing to the Concessionaire, its successors,
cessionaries or assigns;

82.8.2. agrees and declares that, if any sum owing to the Concessionaire from
whatever cause is not paid on due date, the Concessionaire shall
irrevocably be entitled, authorised and empowered, then or at any time
thereafter and without further authority or consent, to collect for its own
benefit or, at its discretion, dispose of the amounts and rights ceded in
such manner (including by private treaty, public auction or public
Tender) and upon such terms and conditions as the Concessionaire may
deer most expedient, to institute any legal proceedings which the
Concessionaire may deem necessary or convenient in connection
therewith and to give good, valid and sufficient receipts and discharge for
all sums of money paid to the Concessionaire pursuant thereto;

82.8.3. agrees that the Concessionaire may apply the proceeds of any
collection or disposal of the amounts or rights ceded after deduction of
the costs of and incidental thereto (including the costs of any legal
proceedings), towards the liquidation of any indebtedness which the
Council may have to the Concessionaire secured hereunder and for the
purposes aforesaid the Concessionaire shall be at liberty to appropriate
such proceeds as it in its sole and absolute discretion may determine;

82.8.4. [renounces the benefits of the legal exceptions of non numeratae
pecuniae, exceptio non causa debiti, revision of accounts, errore calculi
and declare the Council to be fully acquainted with the full meaning and
effect thereof;] and
82.8.5. agrees that this [cession/] [assignment] shall be irrevocable by the Council and shall continue in force until its liability hereunder (including any contingent liability) has been discharged in full, whereupon this cession shall be cancelled; and

82.8.6. agrees that any certificate under the hand of any director or manager (whose appointment it shall not be necessary to prove) for the time being of the Concessionaire as to the Council’s indebtedness to the Concessionaire shall be prima facie evidence of its indebtedness to the Concessionaire for the purpose of provisional sentence or summary judgment or other judgment proceedings.

82.9. Subject to any agreement to the contrary that may be reached between the Parties in writing in terms of 82.10, the Council shall and hereby does indemnify the Concessionaire against all claims made against the Concessionaire by the Consumers and/or third Parties and against all costs, expenses, losses and damages incurred or suffered by the Concessionaire relating to or as a result of any incorrect information furnished to the Concessionaire by the Council as envisaged in clauses 81 to 83 of this Contract and/or as a result of any act or omission of the Concessionaire based thereon.

82.10. It is recorded that the Parties shall, during the period as from the signature date hereof up to the day prior to the Effective Date, consult with one another in good faith with a view to reaching agreement, in writing, as to each Party’s specific responsibilities and role with regards to the actions set out in 81, 82 and Annexure [ ] and regarding the day-to-day implementation of the process set out in Annexure [ ]. To the extent that such written agreement is reached between the Parties, same shall be deemed to form part of Annexure [ ] and shall be given effect to accordingly.

83. TERMINATION

83.1. With effect from the date on which the provisions of the [relevant legislation] referred to in 81.1.1 are repealed, replaced and/or amended so that the prohibition referred to in 81.1 no longer applies and such fact is confirmed by a written opinion furnished by an independent senior counsel practising in Johannesburg appointed by the Concessionaire, the whole of clauses 81 to 83 of the Contract (save for 83.2) shall automatically terminate and be of no further force or effect.

83.2. Upon termination of clauses 81 to 83 of the Contract, all amounts standing to the credit of the dedicated account, if any, shall forthwith be paid to the Concessionaire and the dedicated account shall be closed.

83.3. Notwithstanding anything to the contrary contained in this Contract, should the provisions of the [relevant legislation] referred to in 81.1.1 not be repealed, replaced or modified on or before a date 18 (eighteen) months after

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the Effective Date (or such other date as the Parties and the Lenders may agree upon in writing) so as to enable the Concessionaire to recover the Tariff from Consumers as envisaged in the preceding provisions of this Contract and so that the prohibition referred to in 81.1 no longer applies, then this Contract shall forthwith be terminated in accordance with 60 due to a Material Adverse Governmental Action.

SIGNED by the Parties and witnessed on the following dates and at the following places respectively:

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<th>PLACE</th>
<th>WITNESS</th>
<th>SIGNATURE</th>
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Reviewed: Victoria R. Delmon, LEGPS
November 2007
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