

SCHEDULE 10 OF THE POWER PURCHASE AGREEMENT

INDEPENDENT ENGINEER AGREEMENT

pursuant to the

STELLENBOSCH MUNICIPALITY INDEPENDENT POWER PRODUCER
PROCUREMENT PROGRAMME

between

STELLENBOSCH LOCAL MUNICIPALITY

(as "**Buyer**")

and

(as "**Seller**")

and

(as "**Independent Engineer**")

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INDEPENDENT ENGINEER AGREEMENT

1. PARTIES

- 1.1. Stellenbosch Local Municipality (the "**Buyer**");
- 1.2. _____, a limited liability company (Registration No. **[Insert Registration Number]**) incorporated under the laws of South Africa and having its principal place of business at **[Insert Address]** in the Republic of South Africa (the "**Seller**"); and
- 1.3. **[INDEPENDENT ENGINEER]**, a limited liability company (Registration No. **[●]**) incorporated under the laws of **[●]** and having its principal place of business at **[●]** in **[●]** (the "**Independent Engineer**"),
- (together the "**Parties**", and "**Party**" shall mean any one of them).

2. INTRODUCTION

- 2.1. The Seller has legal authority to Construct, own, Operate and Maintain a _____ MW **[insert Technology type of the Facility]** power generation facility located at **[insert general location of the Facility]**.
- 2.2. The Seller has entered into, or is about to enter into, a Power Purchase Agreement (the "**PPA**") with the Buyer following the Seller's selection by the Buyer pursuant to the Stellenbosch Municipality Independent Power Producer Procurement Programme ("**STMIPPPP**").
- 2.3. The PPA requires the appointment of an Independent Engineer by the Seller, and with the approval of the Buyer, to carry out certain functions and duties assigned to the Independent Engineer in the PPA.
- 2.4. The Independent Engineer is an independent expert willing to provide the functions contemplated in this Agreement to the Appointers on the terms and conditions of this Agreement.
- 2.5. The Appointers have agreed to jointly appoint the Independent Engineer, and the Independent Engineer is willing to fulfil the role of "Independent Engineer" under the PPA in accordance with the terms of this Agreement.

3. DEFINITIONS

Unless inconsistent with the context, terms defined in the PPA which are used herein have the meaning given to them in the PPA and the rules of interpretation as set out in clause 1.2 (*Interpretation*) of the PPA will apply to this Agreement, and the words and expressions set forth below shall bear the following meanings and cognate expressions shall bear corresponding meanings:

- 3.1. **"Agreement"** means this Independent Engineer agreement including all schedules hereto;
- 3.2. **"Anti-Bribery and Corruption Laws"** means the Prevention and Combating of Corrupt Activities Act, 12 of 2004, or any other anti-bribery and corruption laws, or any other national or international regulatory enactment of similar import, that may have a bearing on the activities of the Independent Engineer;
- 3.3. **"Appointers"** means the Buyer and the Seller, and **"Appointer"** shall, as the context requires, be a reference to any one of them;
- 3.4. **"Commencement Date"** means the date of signature of this Agreement by the Party last signing it;
- 3.5. **"Expiry Date"** means the date which falls [**one month**] after the date of determination of the "Approved FPC" as contemplated in clause 1.6 of Schedule 6 (*Deemed Energy Payment*) of the PPA;
- 3.6. **"Group"** has the meaning set forth in clause 10.10.2;
- 3.7. **"Quarter"** means the three (3) month period ending on 30 September, 31 December, 31 March and 30 June, or such shorter period as determined from the Effective Date under the PPA until the first of the dates specified above; and
- 3.8. **"Services"** means the functions contemplated to be performed by the Independent Engineer in the PPA set out in clause 5 (*The Functions to be Performed by the Independent Engineer*) of this Agreement.

4. APPOINTMENT AND ACCEPTANCE

- 4.1. With effect from the Commencement Date, the Appointers hereby appoint the Independent Engineer to carry out the Services, and the Independent Engineer hereby

accepts such appointment.

4.2. The provisions of this Agreement shall not vary or supersede any of the obligations each of the Buyer and Seller owe the other under the PPA.

4.3. The Independent Engineer shall act on behalf of and owe a duty of care to both the Appointers equally, and shall be required to have an informed and independent opinion on the advancement of the Facility.

5. THE FUNCTIONS TO BE PERFORMED BY THE INDEPENDENT ENGINEER

5.1. Maintenance of records

The Independent Engineer shall:

5.1.1. receive, maintain and keep on record all documentation provided by the Seller or the Buyer to the Independent Engineer; and

5.1.2. create, maintain and update from time to time a list that details all documentation provided by the Seller or the Buyer to the Independent Engineer.

5.2. The Commencement of Construction of the Project by the Seller

5.2.1. The Independent Engineer shall have the function of issuing the Commencement of Construction Confirmation Form as contemplated in clause 3.6.1 (*General Construction Obligations*) of the PPA, on the written request of the Seller and copied to the Buyer.

5.2.2. In order to carry out the function referred to in clause 5.2.1, the Independent Engineer shall be entitled and obliged to:

5.2.2.1. review the Seller's authorisation to its Contractor to commence works under the terms of a binding written contract that is directly related to the Construction of the Project;

5.2.2.2. conduct a physical inspection of the ground works at the Project Site;

5.2.2.3. review the Seller's documentation in relation to the engineering and design of the Facility;

5.2.2.4. review the Seller's documentation in relation to the procurement of Key Equipment;

5.2.2.5. review the Seller's documentation in relation to safety, health,

environmental, quality and risk management during the construction of the Facility;

5.2.2.6. review the Seller's documentation and Contractor reports in relation to the construction of the Facility;

5.2.2.7. review the Seller's documentation in relation to the site acceptance testing and commissioning of the Facility;

5.2.2.8. review and warrant that the layout of the Facility and its connection to the System does not allow for simultaneous import and export of Energy; and

5.2.2.9. in terms of clause 6 (*Maintenance Inspections*) of the PPA, conduct or cause the conduct of inspections and/or non-intrusive tests to ascertain whether the Facility is being Maintained to the standard of a Reasonable and Prudent Operator by the Seller.

5.2.3. The provisions of clause 30 (*Fast Track Dispute Resolution*) of the PPA shall apply *mutatis mutandis* to any dispute arising in relation to the functions performed by the Independent Engineer in accordance with this clause 5.2 (*The Commencement of Construction of the Project by the Seller*).

5.3. **Project Compliance prior to commencement of Operation**

5.3.1. The Independent Engineer shall have the function of confirming, prior to the Commercial Operation Date and in compliance with the Codes, that the Facility has been demonstrated by the Seller to comprise the Key Equipment specified in Part 1 (*Facility*) of Schedule 1 (*Details of the Project and Facility*) of the PPA, and that the Facility has been designed, manufactured and installed in accordance with applicable and relevant industry standards and specifications.

5.3.2. In order to carry out the function referred to in clause 5.3.1, the Independent Engineer shall be entitled and obliged to review all documentation submitted to the Independent Engineer by the Seller including but not limited to the certifications evidencing that (a) the design of the Facility complies with applicable and relevant industry standards; and (b) the Facility, including all Key Equipment, has been installed in accordance with its designs and original equipment manufacturers' installation manuals.

5.4. **Issue of the Facility Completion Form**

5.4.1. If the Seller has, to the reasonable satisfaction of the Independent Engineer:

5.4.1.1. complied with all of its obligations in this Agreement; and

5.4.1.2. successfully completed the tests required in terms of the PPA, the Codes and the standards of a Reasonable and Prudent Operator,

then the Independent Engineer shall issue the Facility Completion Form duly signed by the Independent Engineer, provided, for the avoidance of doubt, that the conditions listed in clauses 5.4.1.1 to 5.4.1.8 have been met. In the Facility Completion Form, the Independent Engineer shall be obliged to confirm and state:

5.4.1.3. that the Facility is compliant with the Codes and the Seller has successfully demonstrated to NERSA, or any person nominated by NERSA, that the Facility complies with the Codes;

5.4.1.4. that the Facility has passed the relevant acceptance tests and has been successfully commissioned in accordance with the relevant construction contracts, the Codes and the Consents;

5.4.1.5. the Achieved Capacity of the Facility (being the net Capacity of the Facility estimated at the Delivery Point and expressed as AC power capacity, net of self-consumption and electrical losses up to the Delivery Point) as determined pursuant to the acceptance tests described in 5.4.1.4 above;

5.4.1.6. that the Facility has a mechanism installed to limit the Capacity exported from the Facility to the lower of the Achieved Capacity and the Contracted Capacity;

5.4.1.7. that the Facility is ready to commence commercial operation and to deliver Commercial Energy to the Buyer;

5.4.1.8. that the Reference Pyranometer and a Backup Reference Pyranometer [applicable to solar PV technology only] have been installed at the location agreed in the PPA or an alternative location agreed by the Buyer, have been successfully commissioned and are capable of performing their functions as set out in the PPA; and

5.4.1.9. that the Reference Temperature Sensor and a Backup Reference Temperature Sensor [applicable to solar PV technology only] have been

installed at the location agreed in the PPA or an alternative location agreed by the Buyer, and have been successfully commissioned and are capable of performing their functions as set out in the PPA.

5.5. Determination of Deemed Energy Payments [solar PV projects only]

On the written request of either Appointer, the Independent Engineer shall make a determination in relation to Deemed Energy Payments, as required by Schedule 6 (*Deemed Energy Payment*) of the PPA.

5.6. Other functions

5.6.1. On the written request of the Seller, the Independent Engineer shall provide the Buyer with the confirmation contemplated in clause 3.5.3.1 of the PPA, and shall provide the Seller with such information, data and/or documentation as may be requested by the Buyer from the Seller in terms of clause 3.5.2 of the PPA.

5.6.2. The Independent Engineer shall visit the Project Site as and when required to ensure that he can form an independent opinion of the advancement of the Facility, which opinion shall, in addition to his on-site visits, be informed by other relevant information and verifications obtained by the Independent Engineer, and shall not be limited to the Independent Engineer's reliance on monthly reports received from the Seller, the Contractors, and or any of the Lender's advisers and/or engineer.

5.6.3. The Independent Engineer shall track the advancement of the Facility against the Project Schedule as provided in Schedule 2 (*Completion Milestones and Forms of Notices*) of the PPA. Any delays or potential delays shall be quantified by the Independent Engineer, including the impact of such delays on the COD.

5.6.4. On the request of the Appointers jointly, the Independent Engineer shall determine any other issue or dispute of a technical nature which arises under or in connection with the PPA.

5.7. LAST COD UNDER THE PPA

5.7.1. The Independent Engineer shall not issue a Facility Completion Form at or any time after 17h01 on the Last COD.

6. TEST PROCEDURES IN TERMS OF CLAUSE 4.3 (*Facility completion and commissioning*) OF THE PPA

- 6.1. The Seller shall, not later than six (6) Months before the date on which it is anticipated that the relevant test will be undertaken on the Facility, propose to the Independent Engineer the detailed procedure for the inspection and testing of the Facility for the purposes of the Independent Engineer carrying out its functions in clause 5 (*The Functions to be Performed by the Independent Engineer*) above. These tests shall include, but not be limited to the following:
- 6.1.1. all tests required to demonstrate compliance with applicable and relevant industry standards and the Codes; and
- 6.1.2. any other functional test referred to in the PPA or as required by the Independent Engineer, including for purposes of determining the Achieved Capacity of the Facility.
- 6.2. The Independent Engineer shall accept, reject and or modify the detailed procedure for inspection and testing of the Facility, as the case may be, proposed by the Seller in accordance with clause 6.1, within twenty (20) Business Days of receipt of such detailed procedure.
- 6.3. If the detailed procedure for inspection and testing of the Facility, as the case may be, proposed by the Seller is rejected and or modified, then the Seller shall be entitled to repeat the process in clause 6.1 iteratively until the date three (3) Months before the anticipated date of the test described in the detailed procedure.
- 6.4. If the detailed procedure for inspection and testing of the Facility, as the case may be, proposed by the Seller in accordance with clause 6.1 has not been accepted by the date three (3) Months before the anticipated date of the test, then the Independent Engineer shall determine the detailed procedure for the inspection and testing of the Facility.

7. DURATION OF AGREEMENT

This Agreement shall commence on the Commencement Date and, subject to clauses 19 (*Termination*) and 20 (*Breach of Agreement*) of this Agreement, shall subsist until the Expiry Date to give effect to the duties and functions of the Independent Engineer, unless extended by written agreement between the Parties.

8. CONSULTATION WITH THE APPOINTERS

- 8.1. The Independent Engineer undertakes to perform its functions in close consultation

and, subject to clause 8.4, co-operation with the Appointers.

- 8.2. In the period between the Commencement Date and the Commercial Operation Date, the Independent Engineer shall report, independently of any other reports from the Seller or its contractors, to the Appointers in writing on a monthly basis within fifteen (15) Business Days of the end of the previous month, on all those matters relating to compliance by the Seller with those of its obligations under the PPA which are relevant for the purposes of completing the Facility Completion Form.
- 8.3. The Independent Engineer shall report to the Appointers in writing on any anticipated delays that would or might reasonably prevent or hinder the Seller from achieving the Commercial Operation Date by the Scheduled COD and, if the Seller does not achieve the Commercial Operation Date by the Scheduled COD, from achieving the Commercial Operation Date by the Last COD.
- 8.4. The Independent Engineer shall comply with all reasonable instructions given to it by an Appointer for the purposes of the Independent Engineer carrying out its functions, except and to the extent that:
- 8.4.1. such instruction, if given by the Buyer, would or might reasonably, unjustifiably delay or prevent the issue of the Facility Completion Form; and/or
- 8.4.2. the Independent Engineer reasonably considers that any such instructions vary or might vary its functions or its responsibilities under this Agreement, materially change the scope of the performance requirements of the Facility or prejudice or might prejudice the exercise by the Independent Engineer of its professional, fair and impartial judgement under this Agreement.
- 8.5. In the event that a dispute arises between any of the Appointers and the Independent Engineer in respect of any instructions given to the Independent Engineer in accordance with clause 8.4, such dispute shall be referred to dispute resolution in terms of clause 21 (*Dispute Resolution*) of this Agreement; save that where a dispute arises between the Appointers in respect hereof, such dispute shall be resolved in accordance with clause 29 (*Dispute Resolution*) of the PPA.
- 8.6. All instructions to the Independent Engineer shall be given in writing by the relevant Appointer copied to the other Appointer.
- 8.7. Where the PPA contemplates that instructions could be given to the Independent

Engineer by either Appointer, and the Appointers issue conflicting instructions to the Independent Engineer, the Independent Engineer shall inform both Appointers of this fact, and shall not commence with any activities to which such instruction relates until the Appointers have issued a joint written statement to the Independent Engineer in which the instruction is clarified.

9. PROJECT DOCUMENTS

9.1. The Independent Engineer shall be deemed to have full knowledge and understanding of the PPA to the extent necessary to perform its obligations in terms of this Agreement, and shall carry out the functions of the Independent Engineer in accordance with all of the requirements and applicable time periods as prescribed in the PPA, so as not to cause any delays in relation to the Seller's obligations to the Buyer in terms of the PPA.

9.2. Subject to clause 16 (*Confidentiality*), the Seller shall, within five (5) Business Days of written request by the Independent Engineer, provide to the Independent Engineer, all information that is required by, necessary for, and or requested by the Independent Engineer for the performance of its functions and is available or ought reasonably to be available to the Seller. This information includes, but is not limited to, the following information (which shall be deemed to be available to the Seller):

9.2.1. copies of the signed PPA including all Schedules thereto in completed form and all details of any change to the Scheduled COD in accordance with the PPA;

9.2.2. copies of working drawings, schedules and specifications prepared by the Seller and Contractors sufficient to demonstrate compliance by the Seller and Contractors with the requirements of the PPA;

9.2.3. detailed summaries of the Seller's quality control and quality assurance records;

9.2.4. information related to the energy yield as appropriate and necessary for the Independent Engineer to discharge its obligations under this Agreement;

9.2.5. copies of the Seller's and any Contractor's monthly progress reports covering the Project implementation. The Seller progress reports shall include:

9.2.5.1. the monthly Construction progress reports contemplated in clause 3.8 (*Monthly Construction Progress Reports*) of the PPA; and

9.2.5.2. details of its progress in mobilising the Operations team, any Operations

- and Maintenance Contractors, and provisions or spares;
 - 9.2.5.3. copies of the Seller's testing and commissioning procedures and reports;
 - 9.2.5.4. copies of all Project Data as and when requested by the Independent Engineer;
 - 9.2.5.5. copies of any engineering, procurement and Construction agreements entered into by the Seller or its Contractors in relation to the Project;
 - 9.2.5.6. copies of any operation and or maintenance agreements entered into by the Seller or its Contractors in relation to the Project;
 - 9.2.5.7. copies of Maintenance schedules required in terms of Schedule 3 (*Scheduled and Unscheduled Outages*) of the PPA;
 - 9.2.5.8. copies of any technical standards, specifications, manuals and procedures used by the Seller;
 - 9.2.5.9. copies of the Seller's safety and environmental performance records;
 - 9.2.5.10. copies of the records of design changes, deviations and modifications made by the Seller during the Construction of the Facility; and
 - 9.2.5.11. other information as may be reasonably necessary for the Independent Engineer to discharge its obligations under this Agreement.
- 9.3. Within five (5) Business Days of termination of this Agreement in accordance with clauses 19 (*Termination*) or 20 (*Breach of Agreement*) or at the Expiry Date, and or the termination of the PPA, the Independent Engineer shall deliver to the Seller all copies of the PPA and Project Documents in its possession in whatever format, as well as all other documentation, plans, drawings, records and any other materials made available to it by the Seller pursuant to this Agreement, with complete copies thereof to the Buyer. Notwithstanding the foregoing, the Independent Engineer may retain one copy of any such materials if so required in terms of applicable Law or in connection with any dispute referred for resolution pursuant to clause 21 (*Dispute Resolution*) of this Agreement.
10. **GENERAL OBLIGATIONS OF THE INDEPENDENT ENGINEER IN PERFORMING ITS FUNCTIONS**
- 10.1. **Performance of the functions set out in this Agreement**

The Independent Engineer shall carry out and complete the functions set out in this Agreement in accordance with the requirements of this Agreement.

10.2. Standards for performing its functions

In carrying out its functions and obligations under this Agreement, the Independent Engineer shall:

- 10.2.1. act fairly, impartially and independently and not as an arbitrator;
- 10.2.2. exercise that degree of skill, prudence, diligence and foresight which would reasonably and ordinarily be expected from a person in the renewable energy industry with skills in the relevant fields of engineering seeking in good faith to comply with its contractual obligations and complying with all applicable Laws and regulations, and any orders or directives of its governing authority;
- 10.2.3. owe a professional duty of care to both the Appointers equally encompassing the standards set forth in clauses 10.2.1 and 10.2.2;
- 10.2.4. allocate and furnish adequate resources, including a sufficient number of qualified and experienced personnel, which must include local resources, resident in South Africa, to enable the Independent Engineer to comply with its obligations under this Agreement, and the Independent Engineer shall ensure that reasonable levels of care and responsibility will be exercised by all such personnel; and
- 10.2.5. co-operate with the Contractors and or Suppliers, as well as any other contractors, consultants, and service providers who may be engaged by the Appointers, and schedule the performance of its functions so as to facilitate the overall requirements of the Project.

10.3. Scope of Authority

The Independent Engineer shall have no authority or power to, amongst other things, incur liability on behalf of the Appointers, grant an extension of time under the relevant Construction contracts or any other agreement, or issue instructions on behalf of an Appointer, in the absence of a written instruction from that Appointer given in accordance with this Agreement, and then only to the extent consistent with that instruction.

10.4. Compliance with Law

10.4.1. The Independent Engineer undertakes that the performance of all of its functions hereunder shall comply with all applicable Law, including but not limited to, the health, safety, security and environmental requirements applicable to the Project Site and the Project.

10.4.2. Subject to clauses 14.2 to 14.5, the Independent Engineer shall indemnify and hold harmless the Appointers from and against any and all liability arising by reason of the Independent Engineer and the Independent Engineer's employees' and agents' failure to comply with the applicable Laws.

10.5. **Access to Information**

10.5.1. The Independent Engineer shall allow each of the Appointers access at all reasonable times and on reasonable prior written notice by the requesting Appointer to technical records and documents prepared by or for the Independent Engineer in connection with the performance by the Independent Engineer of its obligations under this Agreement including any and all results of any test.

10.5.2. The Independent Engineer shall be obliged to maintain such technical records and documents for a minimum period of five (5) years from (i) the completion of the relevant activity, or (ii) termination of this Agreement.

10.6. **Responsibility of the Independent Engineer**

No enquiry, inspection, approval, sanction, comment, consent, decision or instruction by or on behalf of any one of the Appointers shall exclude or limit the Independent Engineer's obligation to act in accordance with the requirements of this Agreement, and in particular, in accordance with the requirements of clause 10.2 (*Standards for performing its functions*).

10.7. **Timing for Decisions**

On all matters properly referred to it for its review, decision or determination in accordance with the PPA, the Independent Engineer shall give its review findings, decision or determination in writing within the time period referred to in the relevant provision of the PPA or if no such period is prescribed, within a reasonable time period which in such latter event, shall be no later than twenty (20) Business Days after being referred to the Independent Engineer. The Independent Engineer shall perform its

functions under this Agreement reasonably and fairly and shall not unreasonably withhold or delay its review, decision or determination.

10.8. Inducement

The Independent Engineer shall not offer or give to or accept from any member, employee or representative of either Appointer any gift or consideration of any kind.

10.9. Insurance

10.9.1. The Independent Engineer shall obtain and maintain in effect, at its own cost and expense, such insurance coverage as is required by any applicable Laws and the standards set forth in clause 10.2.2 with reputable insurers.

10.9.2. The Independent Engineer shall as and when so requested by either Appointer on reasonable written notice produce for inspection by the Appointers, documentary evidence from its insurers or auditors that such insurance is being properly maintained.

10.10. Qualifications, Experience and Conflicts

10.10.1. The Independent Engineer represents and warrants to the Appointers as of the date of this Agreement and each day thereafter during the term hereof that:

10.10.1.1. it is duly qualified, skilled, registered with a professional body of engineers and experienced to carry out its functions in accordance with the standards referred to in this Agreement;

10.10.1.2. the qualifications, skills and experience of all its personnel, contractors and contractors' personnel engaged from time to time in the conduct of such services shall be sufficient to conduct such services in accordance with the requirements of the PPA and the standards referred to in this Agreement;

10.10.1.3. it is not rendering or providing any services to the Seller or any of its Affiliates in respect of or in connection with the Project other than pursuant to this Agreement; and

10.10.1.4. it is not rendering or providing any services to any shareholder of the Seller, any Contractor or any Lender or any Affiliate of any of them in respect of or in connection with the Project.

- 10.10.2. The Parties acknowledge that the Independent Engineer and its Affiliates (the "**Group**") provide professional engineering and or consultancy services internationally to clients other than the Appointers, some of whom may have interests adverse to either Appointer or its Affiliates. Each Appointer hereby agrees that any member of the Group may at any time and from time to time provide professional engineering and or consultancy services to any other clients which may have interests in any one or more Renewable Energy projects including any other projects selected pursuant to the STMIPPPP but excluding, except, in respect of an Affiliate of the Independent Engineer, with the prior written consent of the Seller and the Buyer (which consent may not be unreasonably withheld or delayed), this Project, subject at all times to and without limitation of the representations and warranties made by the Independent Engineer pursuant to clause 10.10.1 or its obligations pursuant to clause 15 (*Intellectual Property Rights*) and clause 16 (*Confidentiality*).

11. OBLIGATIONS OF THE APPOINTERS

- 11.1. The Appointers shall render such assistance to the Independent Engineer as shall reasonably be required for the carrying out by the Independent Engineer of its obligations under this Agreement.
- 11.2. The Seller shall allow the Independent Engineer access to the Project Site and Project at all times reasonably required in order for the Independent Engineer to carry out its obligations under this Agreement provided that the Independent Engineer shall ensure that its representatives shall comply with all Project Site health and safety rules, precautions and standards, and any other reasonable requirements of the Seller and its Contractors, and shall not interfere with the Construction or Operation of the Facility.
- 11.3. Subject to clause 20.1.1 of this Agreement, in the event that a matter is referred to dispute resolution in terms of clause 21 (*Dispute Resolution*), the Independent Engineer shall continue with its obligations under this Agreement, save where otherwise instructed in writing by the Appointers acting jointly.

12. LIMITATION OF RIGHTS

The Independent Engineer shall have no authority to approve or accept the Seller's performance of its obligations under the PPA as being properly performed in accordance

with the PPA, except insofar as is required for the purposes of issuing the Facility Completion Form in accordance with the PPA.

13. FEES PAYABLE AND PAYMENT

- 13.1. The Seller shall be liable to pay the Independent Engineer the fees set forth in Schedule 1 (*Schedule of Fees payable and Conditions of Payment*). If there is any conflict between any provision of Schedule 1 (*Schedule of Fees payable and Conditions of Payment*) and any provision of the main body of this Agreement, then the provision of the main body of this Agreement shall prevail.
- 13.2. The Independent Engineer acknowledges and agrees that the Buyer shall not have any liability to the Independent Engineer in connection with the performance by the Seller or the Independent Engineer of its obligations hereunder.
- 13.3. The Independent Engineer acknowledges and agrees that it shall not be entitled to suspend its performance of the whole or any part of its functions pending the resolution of any dispute between it and the Seller concerning any invoice submitted by the Independent Engineer or pending payment of any overdue amount that is not in dispute.
- 13.4. To the extent that the Independent Engineer performs any act without the written instructions of an Appointer, without limiting the provisions of clause 20 (*Breach of Agreement*) such act shall be for the cost of the Independent Engineer, unless such act is performed in response to any emergency relating to health, safety or the environment and is subsequently ratified by the Seller.

14. LIABILITY OF THE INDEPENDENT ENGINEER

- 14.1. The liability of either Appointer to the Independent Engineer and of the Independent Engineer to either Appointer, whether under contract or delict, shall be as detailed in this Agreement (save in respect of any losses, liabilities, expenses, damages, costs and claims in respect of the obligations and indemnities provided under clause 19.3.6 (*Indemnity*)).
- 14.2. The Seller and the Independent Engineer acknowledge and agree that the Buyer shall have no liability to either of them whatsoever in connection with the performance by the Seller and the Independent Engineer of their respective obligations under this Agreement and, without limiting the foregoing, the Seller shall be solely liable to the

Independent Engineer for the payment of any fee, cost, claim or liability as may be due and payable to the Independent Engineer under this Agreement.

14.3. The maximum liability of (a) each of the Seller and the Independent Engineer to the other of them under this Agreement; and (b) save in respect of third party indemnified claims contemplated in clause 14.6 below, the Independent Engineer to the Buyer for any claim under this Agreement, shall in either case be limited to the higher of:

14.3.1. 200% (two hundred percent) of the aggregate fees (excluding VAT) paid or to be paid to the Independent Engineer for the Services (calculated as if all the contemplated Services are completed); and

14.3.2. 200% (two hundred percent) of the aggregate fees (excluding VAT) paid or to be paid to the Independent Engineer in the 12 (twelve) Months preceding the date on which the claim arises,

less any amounts previously claimed by the Seller from the Independent Engineer, and which have been paid to the Seller in full.

14.4. No Party shall be liable to any other Party for any loss of profits, revenues or business opportunity or any indirect, special or consequential losses (save in respect of any losses, liabilities, expenses, damages, costs and claims in respect of the obligations and indemnities provided under clause 19.3.6 (*Indemnity*)).

14.5. The Buyer, the Seller and the Independent Engineer shall comply with their common law duties to mitigate any losses, liabilities, damages and claims they may have pursuant to this Agreement.

14.6. The Independent Engineer shall indemnify and hold harmless the Buyer, its Affiliates, and their respective officers, employees, consultants, agents and representatives (the "**Indemnified Parties**") against any and all claims by a third party which may be asserted against or suffered by any of the Indemnified Parties, which relate to any death, injury or loss or damage to property suffered by the relevant third party, to the extent resulting from any negligent act or negligent omission of the Independent Engineer and its respective officers, employees, consultants, agents and representatives, provided that the death, injury, loss or damage suffered by the relevant third party is not attributable to any act or omission of any one or more of the Indemnified Parties or to the failure of one or more of the Indemnified Parties to take reasonable steps to mitigate or avoid the death, injury, loss or damage in question.

15. INTELLECTUAL PROPERTY RIGHTS

- 15.1. All documents furnished or supplied by the Appointers and, subject to clause 15.2, all documentation, information and data prepared by the Independent Engineer pertaining to the Project and this Agreement, including but not limited to all designs, engineering details and other data or information, shall become or remain (as appropriate) the property of the Appointers.
- 15.2. To the extent that any documentation, information and or data pertaining to the Project and this Agreement which is prepared by the Independent Engineer from time to time:
- 15.2.1. is or are prepared applying intellectual property, processes and procedures which the Independent Engineer demonstrates belongs to it or is used by it under licence from any third party, and not previously in the possession of or used by either Appointer, then no Appointer shall have any proprietary interest in such intellectual property, processes and procedures; provided that (a) for the avoidance of doubt, the documentation, information and or data so prepared by the Independent Engineer shall become the property of the Appointers in equal undivided shares (save as provided in clause 15.2.2), and (b) the Independent Engineer hereby grants or shall cause to be granted to each Appointer in perpetuity an irrevocable, non-exclusive, royalty-free right to use such intellectual property, processes and procedures in connection with their usage of such documentation, information and or data for the Project; and
- 15.2.2. contains any content which the Independent Engineer demonstrates belongs to (a) the Independent Engineer, or (b) a bona fide third party (not being an Affiliate of the Independent Engineer or any of its shareholders or members), and in either case was acquired by the Independent Engineer or such third party (as applicable) prior to the appointment of Independent Engineer, then no Appointer shall have any proprietary interest in such content; provided that the Independent Engineer hereby grants or shall cause to be granted to each Appointer in perpetuity an irrevocable, non-exclusive, royalty-free right to use such content for the purposes of the Project.
- 15.3. The copyright in all documentation, information and or data pertaining to the Project and this Agreement which is prepared by the Independent Engineer and which pursuant to the foregoing belongs to the Appointers shall vest in the Appointers jointly,

and such documentation, information and or data may not be reproduced, published, used or circulated by the Independent Engineer to any other person or to any institution in any way, without the prior written permission of the Appointers.

- 15.4. The Independent Engineer hereby indemnifies the Appointers (and their advisors, agents, contractors, directors and employees) against any action or claim that may be brought against either or both of them on the grounds of an alleged infringement of copyright or any other intellectual property.

16. **CONFIDENTIALITY**

- 16.1. The Independent Engineer undertakes to keep and hold confidential any information disclosed to it in performing its obligations under this Agreement and not to disclose same to any other person in any way whatsoever without the prior written consent of the Appointers, and shall ensure that all such information shall be disclosed only to those of its and its Affiliates' advisors, agents, contractors, directors and employees who have signed undertakings of secrecy and confidentiality and who have a need to know such information for the purposes of performing their obligations in respect of this Agreement.
- 16.2. The Independent Engineer acknowledges and agrees to sign any non-disclosure agreements as may be required by the Contractors and or Suppliers, on reasonable and market-related terms. Should the Independent Engineer refuse to sign such non-disclosure agreement, the Appointers shall be entitled to terminate this Agreement in terms of clause 19 (*Termination*).
- 16.3. The Independent Engineer undertakes to ensure that all copies of all reports generated by it will be identified by a specific number and that such numbers will be collated on a master distribution list to enable the management of the security of documents.
- 16.4. All information pertaining to the Project acquired by the Independent Engineer from the Appointers shall be treated as confidential by the Independent Engineer and:
- 16.4.1. shall not be used by the Independent Engineer for any purpose other than the purpose of performing its obligations under this Agreement, save to the extent:
- 16.4.1.1. that such information is or comes into the public domain other than through breach of this Agreement by the Independent Engineer;

- 16.4.1.2. that such information is published by, or the publication of which is required by any court, arbitrator, administrative tribunal or expert in the course of any proceedings in which the Independent Engineer appears before it;
 - 16.4.1.3. that such information is required by the rules or any recognised securities exchange upon which the share capital of the Independent Engineer (or any of its shareholders (direct or indirect)) is or is proposed to be from time to time listed or dealt in;
 - 16.4.1.4. as may be necessary to comply with any obligation it may have under applicable Law;
 - 16.4.1.5. that the Independent Engineer can prove that the information was already known to it, or was independently acquired or developed by it without being in breach of its obligations under this clause 16 (*Confidentiality*); or
 - 16.4.1.6. that such information became available to the Independent Engineer from another source in a non-confidential manner otherwise than in breach of an obligation of confidentiality;
 - 16.4.2. shall not be reproduced, distributed or otherwise made available to any other party; and
 - 16.4.3. shall remain the property of the Buyer or the Seller (as the case may be) and be returned to the Buyer or the Seller (as the case may be) on demand,
- unless otherwise agreed to by the Appointers.

17. NO AGENCY OR PARTNERSHIP

The relationship between the Parties is that of independent contracting parties and shall not create any partnership, employment or agency relationship between the Parties, nor shall it constitute any Party to be the agent or authorised representative of another Party.

18. PROTECTION OF PERSONAL INFORMATION

- 18.1. Each Party (each a "**Receiving Party**") cannot perform its obligations under this Agreement without Processing certain Personal Information, including the Personal Information provided by the other Party (each a "**Disclosing Party**").
- 18.2. Accordingly, the Disclosing Party hereby expressly consents to share the Personal Information with the Receiving Party and further consents to the Receiving Party

Processing of the Personal Information disclosed to it by the Disclosing Party in accordance with this Agreement.

18.3. The Parties record that the Receiving Party will Process the Personal Information in accordance with the provisions of this Agreement and the Disclosing Party's reasonable instructions. When Processing the Personal Information, the Receiving Party will take all reasonable and appropriate technical and organisational precautions and measures necessary to prevent any (i) loss of, damage to, or unauthorised destruction of the Personal Information; or (ii) unauthorised or unlawful access to or Processing of the Personal Information. For this purpose, the Receiving Party will:

18.3.1. identify all reasonably foreseeable internal and external risks to the Personal Information in its possession or under its control; and

18.3.2. ensure that the safeguards are continually updated in response to new risks or deficiencies in previously implemented safeguards.

18.4. The Disclosing Party hereby warrants, represents and undertakes that in respect of all Personal Information provided by it to the Receiving Party, all the consents necessary to ensure compliance by the Disclosing Party and the Receiving Party with applicable laws, including data protection legislation, have been obtained from the person or entity to whom such Personal Information relates, as well as any regulators or other third parties, in relation to:

18.4.1. the transmission by the Disclosing Party to the Receiving Party in accordance with this Agreement or otherwise permitted by law;

18.4.2. the transmission by the Disclosing Party or the Receiving Party of the Personal Information to the third parties in accordance with this Agreement or otherwise permitted by law; and

18.4.3. the Processing by the Receiving Party of any Personal Information provided to it by the Disclosing Party in any country in which the Personal Information is held or Processed by the Receiving Party.

19. TERMINATION

19.1. The Seller shall, on its own initiative or upon request by the Buyer (and if the Seller refuses such a request, the Buyer may refer the dispute for determination in accordance with the provisions of clause 30 (*Fast Track Dispute Resolution*) of the

PPA which shall apply *mutatis mutandis*), be entitled to terminate this Agreement, upon written notice to the Independent Engineer and with the prior written consent of the Buyer, in the following circumstances:

- 19.1.1. with immediate effect where the PPA is terminated in accordance with its terms;
- 19.1.2. with immediate effect if an order has been made for the winding-up, liquidation, business rescue or dissolution of the Independent Engineer (in any of these cases, where applicable, whether provisional or final and whether voluntary or compulsory);
- 19.1.3. on thirty (30) Business Days' prior written notice if a Change in Control of the Independent Engineer occurs without the consent of the Appointers (not to be unreasonably withheld or delayed);
- 19.1.4. on five (5) Business Days' prior written notice if the Independent Engineer unreasonably fails to issue the Facility Completion Form when required to do so in accordance with the PPA, and fails to rectify the breach within ten (10) Business Days of receipt of written notice by the Seller, copied to the Buyer identifying the failure and requiring that it be remedied;
- 19.1.5. on ten (10) Business Days' written notice if the Parties are unable to agree on an updated hourly rate, if applicable, in terms of Schedule 1 (*Schedule of Fees payable and Conditions of Payment*);
- 19.1.6. with immediate effect if the Independent Engineer commits a material breach and fails to remedy the breach within thirty (30) Business Days of receipt of written notice by the Seller, copied to the Buyer identifying the breach and requiring that it be remedied; or
- 19.1.7. on sixty (60) Business Days' written notice, for convenience.
- 19.2. The Appointers acknowledge that clause 4.2.4 of the PPA requires a new independent engineer to be appointed in accordance with the provisions of clause 4.2.4 of the PPA, or as agreed between the Appointers, acting reasonably, if the appointment of the Independent Engineer in terms of this Agreement terminates prior to the Expiry Date for any reason.
- 19.3. **Termination for Corrupt Practices**
 - 19.3.1. Warranties in regard to Corrupt Practices

The Independent Engineer hereby warrants to the Appointers that, as at the Commencement Date in relation to the Project, the Project Activities, this Agreement, or the Project Documents, as applicable:

- 19.3.1.1. to the best of its knowledge and belief after having made due and careful enquiries, acting as a Reasonable and Prudent Independent Engineer, no member of the Group or any of their respective directors or employees;
- 19.3.1.1.1. has at any time during the 5 (five) years preceding the Commencement Date violated, or is violating, either directly or indirectly, any Anti Bribery and Corruption Laws; or
- 19.3.1.1.2. is party to or has at any time during the 5 (five) years preceding the Commencement Date participated in any Corrupt Practice; and
- 19.3.1.2. each member of the Group to the best of its knowledge and belief after having made due and careful enquiries, acting as a Reasonable and Prudent Independent Engineer, maintains appropriate policies and procedures designed to promote compliance with applicable Anti Bribery and Corruption Laws.

19.3.2. Undertakings in regard to Corrupt Practices and Anti Bribery and Corruption Laws

The Independent Engineer hereby undertakes to the Appointers that for the duration of this Agreement it:

- 19.3.2.1. shall not (and shall procure that no member of the Group at any time shall) participate in a Corrupt Practice or contravene any Anti Bribery and Corruption Laws;
- 19.3.2.2. shall take all reasonable steps to ensure that appropriate controls and safeguards are in place, designed to prevent the Independent Engineer (and any member of the Group) from being or becoming involved in a Corrupt Practice, or from contravening any Anti Bribery and Corruption Laws; and
- 19.3.2.3. shall (and shall take reasonable steps procure that all members of the Group shall) maintain in effect and enforce policies and procedures designed to promote compliance, in all material respects by the

Independent Engineer, each member of the Group and their respective directors, officers, employees and agents, with applicable Anti Bribery and Corruption Laws.

19.3.3. Indemnity

The Independent Engineer hereby indemnifies the Appointers against any loss, damage or harm suffered by the Appointers as a direct or indirect consequence of a breach of any of the warranties or undertakings contained in clauses 19.3.1 (*Warranties in regard to Corrupt Practices*) and 19.3.2 (*Undertakings in regard to Corrupt Practices and Anti Bribery and Corruption Laws*).

19.3.4. Reporting Obligations

19.3.4.1. The Independent Engineer hereby undertakes to notify the Appointers in writing immediately:

19.3.4.1.1. upon becoming aware thereof of any breach of any of the provisions in clauses 19.3.1 (*Warranties in regard to Corrupt Practices*) and 19.3.2 (*Undertakings in regard to Corrupt Practices and Anti Bribery and Corruption Laws*) above; and

19.3.4.1.2. should it become aware that any of its directors, employees, or any of the directors, employees of any member of the Group, have participated in any Corrupt Practice, and/or contravened any applicable Anti Bribery and Corruption Laws.

19.3.4.2. Where the Independent Engineer becomes aware of the conduct listed in clauses 19.3.4.1.1 or 19.3.4.1.2 the Independent Engineer shall report to the Appointers on steps taken to mitigate (i) the breach referred to in clause 19.3.4.1.1; and (ii) the impact of the contravention referred to in clause 19.3.4.1.2, on any loss, damage or harm to the Project and the Appointers.

19.3.5. Breach and termination for Corrupt Practices

Any failure on the part of the Independent Engineer to comply with the obligations contemplated in clauses 19.3.1 (*Warranties in regard to Corrupt Practices*) and 19.3.2 (*Undertakings in regard to Corrupt Practices and Anti Bribery and Corruption Laws*) shall constitute a material breach of the

Agreement by the Independent Engineer, and shall entitle the Appointers to terminate this Agreement by issuing the Independent Engineer with written notice of such termination, provided that if the breach involves conduct by a contractor or any of its directors or officers or employees, committed without the prior knowledge of the Independent Engineer, the Appointers must, prior to termination of the Agreement, give written notice to the Independent Engineer of its intention to terminate this Agreement unless within sixty (60) Business Days of its receipt of such notice, the Independent Engineer terminates the contract with the relevant contractor in question or that employee's, director's or officer's involvement in the Project is terminated, as applicable and provides the Appointers with proof to the reasonable satisfaction of the Appointers that it has procured the performance of the relevant part of the construction, operation or maintenance of the Facility by another person.

19.3.6. Indemnity

19.3.6.1. The Independent Engineer hereby indemnifies the Appointers against any loss, damage or harm suffered by the Appointers as a direct consequence of a breach of any of the warranties or undertakings contained in clauses 19.3.1**Error! Reference source not found.** and 19.3.2. Such compensation to the Appointers shall be as contemplated in clause 19.3.6.2.

19.3.6.2. Without prejudice to its other rights or remedies under this clause 19 (*Termination*), the Appointers shall be entitled to recover from the Independent Engineer, the greater of:

19.3.6.2.1. the amount or value of the item of value which is the subject of the Corrupt Practice; and

19.3.6.2.2. any direct losses sustained by the Appointers in consequence of any breach of this clause 19 (*Termination*), including any costs which are incurred by the Appointers in investigating and pursuing any claim against the Independent Engineer or a Contractor in respect of clauses 19.3.1**Error! Reference source not found.** or 19.3.2 above.

19.3.7. **“Reasonable and Prudent Independent Engineer”** for purposes of this clause

shall mean a person seeking in good faith to perform its contractual obligations and, in so doing and in the general conduct of its undertaking, exercising that degree of skill, diligence, prudence, responsibility and foresight which would reasonably and ordinarily be expected from a skilled and appropriately experienced engineer, who is complying with all applicable Laws, engaged in the same or a similar type of undertaking, in the same or similar circumstances and conditions, and any references herein to the "standards of a Reasonable and Prudent Engineer" shall be construed accordingly.

20. BREACH OF AGREEMENT

20.1. In the event of a breach by the Independent Engineer of any of the terms and conditions of this Agreement, the Appointers shall be entitled to exercise all or any number of the following rights:

20.1.1. if the Independent Engineer fails to remedy the breach within five (5) Business Days after receiving written notice from the Seller, copied to the Buyer describing the breach, then the Appointers (acting jointly) may on written notice to the Independent Engineer:

20.1.1.1. suspend the obligations of the Independent Engineer under this Agreement; and

20.1.1.2. in their sole discretion, appoint a third party of their choice (as set out in the PPA) to carry out the obligations of the Independent Engineer under this Agreement, including the issuance of the Unit Completion Form or the Facility Completion Form in accordance with clause 5 (*The Functions to be Performed by the Independent Engineer*);

20.1.2. to claim specific performance from the Independent Engineer; and or

20.1.3. if the breach is material, to terminate this Agreement with immediate effect upon written notice to the Independent Engineer by the Appointers, if the Independent Engineer has failed to remedy the breach within thirty (30) Business Days of written notice by the Appointers or either one of them (identifying the breach and requiring that it be remedied),

without prejudice to any other rights or remedies they may have under applicable Law, including their rights to claim any damages.

- 20.2. If the Appointers appoint a third party to carry out the obligations of the Independent Engineer under this Agreement during the period that they suspend the services of the Independent Engineer pursuant to clause 20.1.1.1, then the Independent Engineer shall forthwith following the issue of the notice of suspension give access to and make available all information specified in clause 9.2 as may be in its possession or under its control to such third party.
- 20.3. If the Appointers terminate this Agreement for material breach on the part of the Independent Engineer, the Independent Engineer shall (at its own cost) comply with all reasonable instructions of the Appointers to assist and cooperate with any other person appointed by the Appointers to replace the Independent Engineer in the resumption of the outstanding services of the Independent Engineer.
- 20.4. Should the Independent Engineer dispute the existence of a breach the matter may be referred at the request of any Party to dispute resolution in terms of clause 21 (*Dispute Resolution*).
- 20.5. In the event of any breach by either Appointer of the terms and conditions of this Agreement, the Independent Engineer shall, within five (5) Business Days, give written notice to:
- 20.5.1. the non-breaching Appointer, specifying the particulars of such breach; and
 - 20.5.2. the breaching Appointer, specifying the particulars of such breach and calling for rectification thereof.
- 20.6. In the event of the breaching Appointer remaining in default after thirty (30) Business Days of the written notice contemplated in clause 20.5.2, the Independent Engineer shall be entitled to:
- 20.6.1. claim specific performance from the breaching Appointer and claim such damages as it may have suffered;
 - 20.6.2. if the breach is for non-payment of an amount due and payable by the Seller to the Independent Engineer or is otherwise material, and is continuing, cancel this Agreement and claim all damages as it may have suffered from the breaching Appointer.
 - 20.6.3. The provisions of clauses 20.2 and 21 (*Dispute Resolution*) shall apply *mutatis mutandis* in the event of the Appointers disputing the existence of a breach

entitling the Independent Engineer to the rights and remedies envisaged in clauses 20.5 and 20.6.

20.7. In the event that the existence of a breach is disputed in terms of clause 20.2 or clause 20.7 and referred to dispute resolution in accordance with clause 21 (*Dispute Resolution*), the Appointers may suspend the obligations of the Independent Engineer and the provisions of clause 20.1.1 shall apply *mutatis mutandis*.

21. DISPUTE RESOLUTION

21.1. Any dispute between the Parties in regard to:

- 21.1.1. the interpretation of;
- 21.1.2. the effect of;
- 21.1.3. the Parties' respective rights and obligations under;
- 21.1.4. a breach of; or
- 21.1.5. any matter arising out of,

this Agreement, shall be decided by arbitration in the manner set out in this clause.

21.2. The said arbitration shall be held subject to the provisions of this clause and unless agreed otherwise by the Parties:

- 21.2.1. in Cape Town;
- 21.2.2. by one (1) arbitrator; and
- 21.2.3. otherwise in accordance with the provisions of the Arbitration Act, 1965;

it being the intention that if possible it shall be held and concluded within twenty one (21) Business Days after it has been demanded.

21.3. Any arbitrator appointed pursuant to this Agreement shall be:

- 21.3.1. an independent accountant of no less than ten (10) years standing agreed upon between the Parties if the question in issue is primarily an accounting matter;
- 21.3.2. a practising senior counsel of no less than ten (10) years standing agreed upon between the Parties if the question in issue is primarily a legal matter; or
- 21.3.3. an independent person agreed upon between the Parties if the question in issue is on any other matter.

- 21.4. The Parties shall appoint the arbitrator by agreement. If the Parties cannot agree upon a particular arbitrator within seven (7) Business Days after the arbitration has been demanded, the nomination in terms of clauses 21.3.1, 21.3.2 or 21.3.3 as the case may be, shall be made by the President for the time being of the Legal Practice Council within seven (7) Business Days after the Parties have so failed to agree.
- 21.5. The Parties irrevocably agree that the decision in these arbitration proceedings:
- 21.5.1. shall be binding on them;
- 21.5.2. shall be carried into effect; and
- 21.5.3. may be made an order of any Court of competent jurisdiction.
- 21.6. This clause shall survive termination of this Agreement for whatever reason.
- 21.7. This clause shall constitute each Party's irrevocable consent to the arbitration proceedings and no Party shall be entitled to withdraw therefrom or to claim that such Party is not bound by this clause.
- 21.8. If a Party fails to take part in these proceedings, such conduct shall constitute consent to an award being made against such Party.

22. **AMENDMENTS, VARIATIONS AND ADDITIONS**

No amendment of, variation or addition to this Agreement will be valid unless the amendment, variation, or addition has been reduced to writing and signed by all Parties.

23. **NOTICES**

23.1. **Methods of delivery**

Unless otherwise provided in this Agreement, all notices, requests, statements and other communications required or permitted between the Parties by this Agreement shall be in writing and either hand-delivered or sent by pre-paid registered post, email or facsimile to the address or number within South Africa of the Party concerned set out in clause 23.2 (*Addresses*) or such other address or number as contemplated in clause 23.4 (*Change in address*). No communication shall be effective until received by the addressee and a communication shall be deemed to have been received:

- 23.1.1. if delivered by hand during ordinary business hours, to its physical address in clause 23.2 (*Addresses*), when so delivered;
- 23.1.2. if delivered by pre-paid registered post, to its postal address in clause 23.2

(Addresses), seven (7) Business Days after posting, subject to proof of posting;

- 23.1.3. if delivered by email, upon receipt by the sender of a return email from the recipient in which the sender's communication is acknowledged (it being the responsibility of the sender to obtain such acknowledgement); and

23.2. **Addresses**

The Parties choose the postal and physical addresses and contact details set out below:

23.2.1. **Seller:**

Postal Address:

Physical Address:

Attention:

Email Address:

Tel No.:

23.2.2. **Independent Engineer:**

Postal Address:

Physical Address:

Attention:

Email Address:

Tel No.:

23.2.3. **Buyer:**

Postal Address:

Physical Address:

Attention:

Email Address:

Tel No.:

23.3. **Domicilium citandi et executandi**

The Parties choose the physical address set out opposite their names in clause 23.2

(Addresses) as their *domicilium citandi et executandi* for all purposes of and in connection with this Agreement. Notwithstanding anything to the contrary herein, a written legal notice or process actually received by a Party shall be an adequate written notice or process, notwithstanding that it was not sent to or delivered at its chosen *domicilium citandi et executandi*.

23.4. Change in address

Any Party may change its nominated physical or postal address to another physical or postal address, as the case may be, in South Africa (and not in any other country) or its contact details by giving at least fifteen (15) Business Days prior written notice to the other Parties.

24. ASSIGNMENT AND SUBCONTRACTING

24.1. Subject to clause 23.3 (*domicilium citandi et executandi*), the Independent Engineer shall not have the right to assign, cede, sub-contract or transfer any benefit, right or obligation, or any part thereof, in terms of this Agreement to any other person or entity without the prior written consent of the Appointers.

24.2. The provisions of clause 26 (*Assignment*) of the PPA shall be applicable *mutatis mutandis* to the Appointers under this Agreement.

24.3. The Independent Engineer may subcontract the whole or any part of the tests and inspections described in clause 5.2.2.9, provided that the Independent Engineer shall not be relieved of any obligation, responsibility or liability under this Agreement in respect of such subcontracted activities and shall be responsible under this Agreement for payment, performance, acts, defaults, omissions, breaches and negligence of all its subcontractors.

25. MISCELLANEOUS

25.1. No partnership or agency

This Agreement shall not constitute or imply any partnership, joint venture, agency, fiduciary relationship or other relationship between the Parties other than the contractual relationship expressly provided for in this Agreement. No Party shall have, nor represent that it has, any authority to make any commitments on the other Parties' behalf.

25.2. **Waiver**

25.2.1. The failure of any Party to exercise any contractual right or remedy shall not constitute a waiver thereof.

25.2.2. No waiver shall be effective unless it is communicated in writing to the other Parties.

25.2.3. No waiver of any right or remedy arising from a breach of contract shall constitute a waiver of any right or remedy arising from any other breach of this Agreement.

25.3. **Third Parties**

The Parties intend that the terms and conditions of this Agreement shall be solely for the benefit of the Parties and their respective successors, and shall not confer any rights upon any third parties.

25.4. **Counterparts**

This Agreement may be executed in any number of counterparts or duplicates, each of which shall be an original, and such counterparts or duplicates shall together constitute one and the same agreement.

25.5. **Entire Agreement**

25.5.1. This Agreement contains the whole agreement between the Parties in respect of the subject matter hereof and supersedes any prior written or oral agreement between them.

25.5.2. Each Party acknowledges and agrees that it is not entering into this Agreement in reliance on, and shall have no right of action against the other Parties in respect of, any assurance, promise, undertaking, representation or warranty made by the other Parties at any time prior to the Effective Date, unless it is expressly set out in this Agreement.

25.6. **Further assurances**

Each Party agrees to execute, acknowledge and deliver such further instruments, and do all further similar acts as may be necessary or appropriate to carry out the purposes and intent of this Agreement.

25.7. **Language**

This Agreement is made only in the English language. Each document referred to in

this Agreement or to be delivered under it shall be in the English language.

25.8. **Costs**

Each Party shall bear its own costs in relation to the negotiation and preparation of this Agreement.

25.9. **Severability**

If any provision of this Agreement is held by a court to be unlawful, void or unenforceable, it shall be deemed to be deleted from this Agreement and shall be of no force and effect and this Agreement shall remain in full force and effect as if such provision had not originally been contained in this Agreement. In the event of any such deletion the Parties shall negotiate in good faith in order to agree on the terms of a mutually acceptable and satisfactory alternative provision in place of the provision so deleted.

25.10. **Governing Law**

25.10.1. The Agreement shall be governed by, construed and interpreted according to the law of South Africa.

25.10.2. The Parties agree that the High Court of South Africa, Western Cape Division, Cape Town shall have jurisdiction in respect of any matter arising from this Agreement, subject to the provisions of clause 21 (*Dispute Resolution*).

25.11. **Public Relations and Publicity**

25.11.1. The Independent Engineer shall not communicate with representatives of the press, television, radio or other communications media on any matter concerning this Agreement without the prior approval of the Appointers.

25.11.2. To the extent that the Buyer is obliged to disclose or publish information for the purpose listed below, it undertakes to the Independent Engineer, if time permits, to consult with the Independent Engineer prior to any communication contemplated in this sub-clause, and if time does not so permit, such consultation shall be dispensed with by the Parties, such purposes will include:

25.11.2.1. The Buyer's statutory reporting obligations from time to time in response to enquiries from:

25.11.2.1.1. Parliament and its members and officers in accordance with the

- provisions of the Public Finance Management Act, 1 of 1999;
- 25.11.2.1.2. the Auditor-General under the Public Audit Act, 25 of 2004; and
- 25.11.2.1.3. persons acting in the public interest in accordance with the provisions of the Promotion of Access to Information Act, 2 of 2000.
- 25.11.3. No facilities to photograph or film in or upon the Project Sites shall be given to or permitted by the Independent Engineer unless the Appointers has given prior written approval.

IN WITNESS WHEREOF, the Parties have caused this Agreement to be executed by their duly authorised representatives.

By:

Name:

Title:

Date:

STELLENBOSCH LOCAL MUNICIPALITY

By:

Name:

Title:

Date:

[NAME OF INDEPENDENT ENGINEER]

By:

Name:

Title:

Date:

SCHEDULE 1 - Schedule of Fees Payable and Conditions of Payment

NOTE TO DRAFT: This schedule is a sample form. The Seller and the Independent Engineer may structure their fee and payment arrangements as they wish; however, in the event of any conflict between any provision of this Schedule and any other provision of this Agreement, the latter shall prevail.

1. For the period beginning on the Commencement Date and ending on the Commercial Operation Date:
 - 1.1. the Seller shall pay to the Independent Engineer [a fixed amount of [●] Rand]¹ excluding VAT for the Services (the "**Fee**"). Such fee shall be [inclusive/exclusive] of any disbursements for out-of-pocket expenses;
 - 1.2. subject to this clause 1.2, the Fee shall be paid to the Independent Engineer by the Seller on the following basis:
 - 1.2.1. [●] percent ([●]%) of the Fee will be retained as a retention amount until the Facility Completion Form has been issued (the "**Retention Amount**").
 - 1.2.2. subject to clause 1.2.1 of this Schedule 1, the total Fee less the Retention Amount, will be divided into [●] payments based on the estimated period between the Commencement Date and the Scheduled COD, to be paid [●] in arrears.
 - 1.2.3. The Seller shall review the [●] payments on a [●] basis. At the end of each Quarter to the extent that there has been a change in the Scheduled COD during any Quarter (the "**Revised Scheduled COD**"), the [●] fee payable by the Seller to the Independent Engineer shall be the total remaining fee (that is, the Fee less any payments made up until the date of the determination that such change is made less the Retention Amount) divided by the number of remaining [●] until the Revised Scheduled COD.
2. For every Contract Year following the Commercial Operation Date, up to the Expiry Date, and for any additional services requested by the Seller:

¹ Note to Bidder: This may be extended to include any additional fees for periodic services, e.g. monthly fee for monthly inspection and reporting services.]

- 2.1. the fee charged by the Independent Engineer shall be based on an [●] rate;
- 2.2. not later than [●] Months prior to the commencement of each applicable Contract Year following the Commercial Operation Date, the Independent Engineer shall submit to the Seller its proposed [●] rate for the next Contract Year;
- 2.3. the Seller and the Independent Engineer shall attempt to agree on the new [●] rate proposed by the Independent Engineer. Should the Seller and the Independent Engineer fail to agree to such new [●] rate, the Seller shall be entitled to terminate this Agreement in accordance with clause 19.1.5;
- 2.4. the [●] rate charged by the Independent Engineer for the first Contract Year following the Commercial Operation Date shall be [●];
3. For all services provided after the Commercial Operation Date or upon request, the Independent Engineer shall submit to the Seller an invoice for payment, duly signed by the Independent Engineer, together with a written report detailing the services provided for acceptance by the Seller.
4. Within [●] Business Days of receipt of the invoice and written report in accordance with paragraph 3 of this Schedule 1, the Seller shall either approve such invoice or dispute the invoice by providing written notice to the Independent Engineer, failing which it shall be deemed to have approved the invoice.
5. Where the Seller disputes an invoice, in whole or in part, the Seller shall set out in the notice to the Independent Engineer, pursuant to paragraph 1 of this Schedule 1, the reasons why the invoice or part thereof is disputed. The amount not in dispute shall be promptly paid as described in this Schedule, and any disputed amount which is ultimately determined to have been payable shall be paid with interest at the Agreed Interest Rate. Without prejudice to the terms of clause 21 (*Dispute Resolution*), in the cases where an invoice is fully or partially disputed, the Seller and the Independent Engineer shall try to find an amicable resolution of their dispute.
6. The Seller shall pay the invoice submitted by the Independent Engineer within [●] Business Days of approval or deemed approval thereof by the Seller.
7. If any overpayment of whatever nature has been made to the Independent Engineer, the Seller shall in its discretion either require the Independent Engineer to repay such amount to the Seller or the Seller shall be entitled to deduct such amount from any amounts due to

the Independent Engineer.

8. Save as provided in the VAT Act, every payment due and payable by either Party to the other pursuant to this Agreement shall be subject to VAT.