



**Public Private Partnership in
Kenya Roads**

PROJECT AGREEMENT

KENYA NATIONAL HIGHWAYS AUTHORITY

Lot No: 6

Kilgoris - Lolgorian	B3
Turbo -Sikhendu - Endebess Turbo - Sikhendu (C622) Endebes– Sikhendu (C619)	C622/C619
Kakamega (Sichirai) – Ingotse –Namukoye - Nzoia River –Musikoma(Khalaba) Road	C777
Ruambwa – Port Victoria (Mabinju)	C672
Kehancha - Lolgorian	B1
Kimaeti – Malakisi - Lwakhakha	C807

29TH SEPTEMBER, 2017

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Part I

Preliminary

PROJECT AGREEMENT

THIS AGREEMENT is entered into on this the day of....., 2017

BETWEEN

1 **KENYA NATIONAL HIGHWAYS AUTHORITY**, established under the Roads Act, and having its principal offices at Blue Shield Towers, Hospital Road P.O. Box 49712-00100 Nairobi, in the Republic of Kenya (the **Contracting Authority**);

AND

2 [.....] **LIMITED**, a limited company incorporated under the provisions of the Companies Act, 2015 and having its registered office at and of Post office Box Number, in the Republic of Kenya (**Service Provider**).

Recital

- (A) The Republic of Kenya has entrusted to the Contracting Authority the development, maintenance and management of roads in Lot 6 with an approximate length of 233 Kilometres.
- (B) The Contracting Authority intends to construct/rehabilitate to bitumen standards the roads in Lot 6 to augment the existing roads on a finance, design, build, maintain and transfer model funded through an annuity payment (**FDBMT Annuity**) in accordance with the terms and conditions to be set forth in a project agreement to be entered into.
- (C) The Ministry of Transport, Infrastructure, Housing and Urban Development on behalf of the Contracting Authority accordingly invited application for short listing of bidders to finance, design, build, maintain and transfer on an annuity basis the Roads in Lot 6 and shortlisted bidders including, inter alia, [.....] Consortium comprising of and [.....] **LIMITED** (together the **Consortium**) with [.....] as its lead member (the **Lead Member**).
- (D) The Contracting Authority prescribed the technical and financial terms and conditions, and invited bids (the **Request for Proposals** or **RFP**) from the bidders shortlisted pursuant to the RFQ for undertaking the Project.
- (E) After evaluation of the bids received, the Contracting Authority accepted the bid of the Consortium and issued its Notice of Preferred Bidder dated [.....]2017 (**NOPB**) to [.....] Consortium.
- (F) [.....] Consortium has since promoted and incorporated the **Service Provider** in accordance with the Public Private Partnerships Act, 2013 (“**PPP Act**”) to carry out the Project in terms of this Agreement.
- (G) The Project shall be funded through the Roads Annuity Fund established by The Public Finance Management (Roads Annuity Fund) Regulations, **2015** (the **Roads Annuity Fund Regulations, 2015**) which are created under the Public Finance

Management Act, 2012, subject to the conditions and other provisions set out in the said Roads Annuity Fund Regulations.

NOW, THEREFORE, in consideration of the foregoing and agreement set forth in this Project Agreement, the receipt and sufficiency of which is hereby acknowledged, the Parties agree as follows:

CLAUSE 1

DEFINITIONS AND INTERPRETATION

1.1 Definitions

The words and expressions beginning with capital letters and defined in this Agreement shall, unless the context otherwise requires, have the meaning ascribed thereto herein, and the words and expressions defined in the Schedules and used therein shall have the meaning ascribed thereto in the Schedules.

In this Agreement, the following words and expressions shall, unless the context otherwise requires, have the following meaning:

Accounting Year means the financial year commencing from the first day of July of any calendar year and ending on the thirtieth day of June of the next calendar year.

Additional Auditors has the meaning given to it in Clause 28.2.4;

Additional Facilities means the facilities such as service stations, motels, restaurants, shopping areas and amusement parks which the Service Provider may, in its discretion and subject to Applicable Laws, provide or procure for the benefit of the Users, and which are in addition to the Project Facilities, and not situated on the Site;

Adjustments has the meaning given to it in the Payment Mechanism;

Affected Party has the meaning given to it in Clause 29.1;

Agreement or **Project Agreement** means this Agreement, the Recitals and the Schedules hereto and any amendments from time to time made in accordance with the provisions contained in this Agreement;

Agreed Form in relation to any document, is the form of document agreed between the Parties and initialled by or on behalf of the Parties for the purposes of identification;

Annual Maintenance Fund means the annual maintenance fund established for the purposes of funding routine maintenance and described in Clause 17.15;

Annuity means the quarterly annuity payable in arrears for each Annuity Payment Period by the Contracting Authority to the Service Provider as set out in the Payment Mechanism on each Annuity Payment Date;

Annuity Payment means the payment made by the Fund (on behalf of the Contracting Authority) to the Service Provider pursuant to Clause 24.1 in consideration of the obligations performed by the Service Provider under this Agreement and calculated in accordance with the Payment Mechanism;

Annuity Payment Date means each date specified as such in the Payment Mechanism, for payment by the Contracting Authority of an Annuity Payment to

the Service Provider;

Annuity Payment Period means a period of three calendar months from [1st January to 31st March, from 1st April to 30th June, from 1st July to 30th September and from 1st October to 31st December] in each year of the Project Term, except for the first Annuity Payment Period which will be determined in accordance with Schedule M;

Applicable Laws means all laws, brought into force and effect by the Government of Kenya or the local Government including but not limited to rules, regulations and notifications made thereunder, and judgements, decrees, injunctions, writs and orders of any court of record, applicable to this Agreement and the exercise, performance and discharge of the respective rights and obligations of the Parties hereunder, as may be in force and effect during the subsistence of this Agreement;

Applicable Permits means all clearances, licences, permits, authorisations, no objection certificates, consents, approvals and exemptions required to be obtained or maintained under Applicable Laws in connection with the design, construction, operation and maintenance of the Project Network during the subsistence of this Agreement;

Appointed Date means the second business day after the date on which every Condition Precedent shall have been satisfied (or to the extent possible, waived by the Contracting Authority) or an earlier date that the Parties may by mutual consent determine;

Arbitration Act means the Arbitration Act, 1995 (Laws of Kenya), and shall include modifications to or any re-enactment thereof, as in force from time to time;

Associate or **Affiliate** means, in relation to either Party, a person who controls, is controlled by, or is under the common control with such Party (as used in this definition, the expression “control” means, with respect to a person which is a company or corporation, the ownership, directly or indirectly, of more than 50% (fifty per cent) of the voting shares of such person, and with respect to a person which is not a company or corporation, the power to direct the management and policies of such person, whether by operation of law or by contract or otherwise);

Authority Contractor means such person or persons as may be authorised in writing (whether by contract or otherwise) by the Contracting Authority to act on its behalf under any of Contracting Authority’s agreements (including the right to levy the Fee), including this Agreement and shall include any person or persons having Contracting Authority to exercise any rights or perform and fulfil any obligations of the Contracting Authority under any of Contracting Authority’s agreements, including this Agreement;

Award has the meaning given to it in Clause 39.3.5;

Axle Load means the weight of a vehicle per axle;

Bank means a bank or financial institution incorporated in Kenya and licensed with the Central Bank of Kenya under the Banking Act (Chapter 488 of the laws of

Kenya);

Bank Rate means the rate of interest specified in the Financing Agreements plus a margin of two per cent (2%);

Bid means the documents in their entirety comprised in the bid submitted by the [.....] Consortium in response to the Request for Proposals in accordance with the provisions thereof;

Bid Security means the security provided by the [.....] Consortium to the Contracting Authority along with the Bid in a sum stated in the Appendix to the Bid, and which is to remain in force until substituted by the Performance Security;

Change in Ownership means a transfer of the direct and/or indirect legal or beneficial ownership of any shares, or securities convertible into shares, that causes the aggregate holding of(the Lead Member) in the total Equity to fall below 51% (fifty one per cent) until the Completion Date and thereafter below [26%] (twenty six per cent) during the period of five years;

Change of Scope has the meaning given to it in Clause 16.1.

Change of Scope Notice has the meaning given to it in Clause 16.2.1;

Change of Scope Order has the meaning given to it in Clause 16.2.3;

Company means the company acting as the Service Provider under this Agreement;

Complainant has the meaning given to it in Clause 41.1;

Complaint Register has the meaning given to it in Clause 41.1;

Completion Certificate has the meaning given to it in Clause 14.2;

Completion Date has the meaning given to it in Clause 15.1;

Conditions Precedent has the meaning given to it in Clause 4.1.1;

Confidential Information means all information a Party receives as a result of entering into this Agreement which relates to any of these:

- (a) the negotiations leading up to, and the provisions or subject matter of, the Project or any ancillary matter; and/or
- (b) the other Party's business, financial or other affairs;

Consortium has the meaning given to it in Recital (C);

Consortium Member means a company specified in Recital (C) as a member of the Consortium;

Construction Works means the construction of the Project Network and Project

Facilities to be performed by the Service Provider in accordance with this Agreement (as varied, amended or supplemented from time to time);

Construction Period means the period beginning from the Appointed Date and ending on the Completion Date;

Contract Year means any given year during the Project Term.

Contractor means the person or persons, as the case may be, with whom the Service Provider has entered into any of the Principal Sub-Contracts or any other material agreement or contract for construction, operation and/or maintenance of the Project Network or matters incidental thereto, but does not include a person who has entered into an agreement for providing financial assistance to the Service Provider;

Contracting Authority Indemnified Persons has the meaning given to it in Clause 37.1.1;

Contracting Authority Representative means such person or persons as may be authorised in writing by the Contracting Authority to act on its behalf under this Agreement and shall include any person or persons having Contracting Authority to exercise any rights or perform and fulfil any obligations of the Contracting Authority under this Agreement;

Contracting Authority Default has the meaning given to it in Clause 33.2.1;

Covenant has the meaning given to it in Clause 5.2.4;

CPI means the Consumer Price Index for all commodities as published by the Central Bank of Kenya (or any other Government agency in Kenya) and shall include any index which substitutes the CPI, and any reference to CPI shall, unless the context otherwise requires, be construed as a reference to the latest monthly CPI published no later than 30 (thirty) days prior to the date of consideration hereunder;

Cure Period means the period specified in this Agreement for curing any breach or default of any provision of this Agreement by the Party responsible for such breach or default and shall:

- (a) commence from the date on which a notice is delivered by one Party to the other Party asking the latter to cure the breach or default specified in such notice;
- (b) not relieve any Party from liability to pay Damages or compensation under the provisions of this Agreement; and
- (c) not in any way be extended by any period of Suspension under this Agreement; provided that if the cure of any breach by the Service Provider requires any reasonable action by the Service Provider that must be approved by the Contracting Authority or the Independent Expert hereunder, the applicable Cure Period shall be extended by the period taken by the Contracting Authority or the Independent Expert to accord their

approval;

Damages has the meaning given to it in Sub-clause (w) of Clause 1.2.1;

Debt Due means the aggregate of the following sums expressed in Kenyan Shillings:

- (a) all amounts outstanding at the Termination Date including principal, interest and default interest accrued as at that date from the Service Provider to the Senior Lenders in respect of the Financing Agreements for financing the Project; and
- (b) all amounts including costs of early termination of interest rate hedging and in the case of Contracting Authority Default only currency hedging arrangements and other breakage costs payable by the Service Provider to the Senior Lenders as a result of a prepayment or in the case of early termination of interest rate and currency hedging arrangements only, as a result of termination of this Agreement, subject to the Service Provider mitigating all such costs to the extent reasonably possible less, to the extent it is positive, the aggregate of (without double counting):
 - (i) all credit balances on any bank account held by or on behalf of the Service Provider on the Termination Date;
 - (ii) all amounts including costs of early termination of interest rate and/or currency hedging arrangements and other breakage costs payable by the Senior Lenders to the Service Provider as a result of prepayment of amounts outstanding or in the case of early termination of interest rate hedging arrangements only, as a result of termination of this Agreement,

provided that in the event of any Contracting Authority Default only, any Debt Due in foreign currency can be exchanged by reference to a foreign exchange conversion calculation which shall be made at the Reference Exchange Rate at the Termination Date;

Debt Service means the sum of all payments on account of principal, interest, financing fees and charges due and payable in an Accounting Year to the Senior Lenders under the Financing Agreements;

Deemed Unavailability Deductions has the meaning given to it in the Payment Mechanism;

Defects means any defects (patent or otherwise) and deficiencies in the Project Network;

Delay Event means either a Force Majeure Event or a Relief Event;

Development Period means the period from the date of this Agreement until the Appointed Date;

Direct Losses means all damage, losses, liabilities, claims, actions, costs and

expenses whether arising under statute, contract or common law but not indirect or consequential losses or loss of profit of any nature;

Direct Agreement means the direct agreement entered into between the Contracting Authority, the Lenders' Representative and the Service Provider as referred to in Clause 35.3 and substantially in the form of Schedule S;

Dispute has the meaning given to it in Clause 39.1.1;

Dispute Resolution Procedure means the procedure for resolution of Disputes set out in Clause 39;

Divestment Requirements means the obligations of the Service Provider for and in respect of Termination as set forth in Clause 34.1;

Document or **Documentation** means documentation in printed or written form, or in CD ROM, tapes, discs, drawings, computer programmes, writings, reports, photographs, films, cassettes, or expressed in any other written, electronic, audio or visual form;

Drawings means all of the drawings, calculations and documents pertaining to the Project Network as set out in Schedule H, and shall include '*as built*' drawings of the Project Network;

Effective Date means the date of this Agreement;

Emergency means a condition or situation that is likely to endanger the security of the individuals on or about the Project Network, including Users thereof, or which poses an immediate threat of material damage to any of the Project Assets but does not include a Force Majeure Event or any condition resulting from the action or inaction of the Service Provider.

Encumbrances means, in relation to the Project Network, any encumbrances such as mortgage, charge, pledge, lien, hypothecation, security interest, assignment, privilege or priority of any kind having the effect of security or other such obligations, and shall include any designation of loss payees or beneficiaries or any similar arrangement under any insurance policy pertaining to the Project Network, where applicable herein but excluding utilities referred to in Clause 11.1.

EPC Contract means the engineering, procurement and construction contract or contracts entered into by the Service Provider with one or more Contractors for, inter alia, design, engineering and construction of the Project Network in accordance with the provisions of this Agreement;

EPC Contractor means the person with whom the Service Provider has entered into an EPC Contract;

Equity means the sum expressed in Kenyan Shillings representing the paid up equity share capital of the Service Provider (or any holding company owning 100% of the equity of the Service Provider) for meeting the equity component of the Total Project Cost, and shall for the purposes of this Agreement include convertible

instruments, Subordinated Debt, any mezzanine debt or other similar forms of capital, and any interest-free funds advanced by any shareholder of the Service Provider for meeting such equity component.

Equity IRR means the meaning given to it in Clause 26.7;

FDBMT or Finance, Design, Build, Maintain and Transfer shall have the meaning set forth in Recital (B);

Fast Track Resolution Procedure means the fast track resolution procedure set out in Clause 39.4;

Fee has the meaning given to it in Clause 22.2.1;

Financial Close means the fulfilment of all conditions precedent to the availability of funds under the Financing Agreements;

Financial Default has the meaning given to it in the Direct Agreement;

Financial Model means the financial model in the Agreed Form (as updated from time to time in accordance with the terms of this Agreement) setting forth the capital and operating costs of the Project and revenues therefrom, and including a description of the assumptions and parameters used for making calculations and projections therein;

Financial Package means the financing package indicating the total capital cost of the Project and the means of financing thereof, as set forth in the Financial Model and approved by the Senior Lenders, and includes Equity (including Subordinated Debt) and all financial assistance specified in the Financing Agreements;

Financing Agreements means the Financing Agreements listed in Schedule L as at the Appointed Date or as amended with the prior approval of the Contracting Authority, and includes amendments or modifications made in accordance with Clause 5.2.2.;

First Party has the meaning given to it in Clause 24.1.8;

Force Majeure or Force Majeure Event shall have the meaning given to it in Clause 29.1;

GOK or Government means the Government of Kenya;

Good Industry Practice means the practices, methods, techniques, designs, standards, skills, diligence, efficiency, reliability and prudence which are generally and reasonably expected from a reasonably skilled and experienced operator engaged in the same type of undertaking as envisaged under this Agreement and which would be expected to result in the performance of its obligations by the Service Provider in accordance with this Agreement, Applicable Laws and Applicable Permits in reliable, safe, economical and efficient manner;

Government Instrumentality means any department, division or sub-division of the Government or the county Government and includes any commission, board,

Contracting Authority, agency or municipal and other local Contracting Authority or statutory body under the control of the Government or the County Government, as the case may be, and having jurisdiction over all or any part of the Project Network or the performance of all or any of the services or obligations of the Service Provider under or pursuant to this Agreement;

Gross Vehicle Weight or **GVW** means in respect of any vehicle the total weight of the vehicle and load certified and registered under the Applicable Laws;

Indemnified Party means the Party entitled to the benefit of an indemnity pursuant to Clause 37;

Indemnifying Party means the Party obligated to indemnify the other Party pursuant to Clause 37.

Independent Expert has the meaning given to it in Clause 20.1;

Inspection Report has the meaning given to it in Clause 13.2.1;

Insurance Cover means the aggregate of the maximum sums insured under the insurances taken out by the Service Provider pursuant to Clause 27, and includes all insurances required to be taken out by the Service Provider under Clause 27.1 but not actually taken, and when used in the context of any act or event, it shall mean the aggregate of the maximum sums insured and payable or deemed to be insured and payable in relation to such act or event;

Insurance Proceeds means the benefit proceeds paid out by any type of insurance policy as a result of a claim;

Intellectual Property means all patents, trademarks, service marks, logos, get-up, trade names, internet domain names, rights in designs, blue prints, programmes and manuals, drawings, copyright (including rights in computer software), database rights, semi-conductor, topography rights, utility models, rights in know-how and other intellectual property rights, in each case whether registered or unregistered and including applications for registration, and all rights or forms of protection having equivalent or similar effect anywhere in the world;

Kenya means the Republic of Kenya.

“Kenya Shilling” or “Kshs” means the lawful currency of the Republic of Kenya;

Lead Member has the meaning given to it in Recital (C);

Lenders’ Representative means the person duly authorised by the Senior Lenders to act for and on behalf of the Senior Lenders with regard to matters arising out of or in relation to this Agreement, and includes his successors, assigns and substitutes;

Letter of Support means the letter of support from The National Treasury dated [on or about the Appointed Date].

Licensed Site has the meaning given to it in Clause 10.2.2 and Schedule A;

Longstop Date means the date falling 180 (one hundred and eighty) days after the Scheduled Completion Date unless extended in accordance with the terms of this Agreement;

Maintenance Manual has the meaning given to it in Clause 17.3;

Maintenance Programme has the meaning given to it in Clause 17.4.1;

Maintenance Requirements means the maintenance requirements set out in the Output Specifications (Performance Standard [3]);

Major Maintenance Fund means the major maintenance fund established for the purposes of carrying out Major Maintenance Works and described in Clause 17.16;

Major Maintenance Works means maintenance works which are not of a routine nature and are projected in the Maintenance Programme;

Material Adverse Effect means a material adverse effect of any act or event on the ability of either Party to perform any of its obligations under and in accordance with the provisions of this Agreement and which act or event causes a material financial burden or loss to either Party;

Method Statement means any of the method statements set out in Schedule D;

Major Maintenance Works Proposal has the meaning given to it in Clause 17.16.4;

Nominated Company means a company selected by the Lenders' Representative and proposed to the Contracting Authority for substituting the Service Provider in accordance with the provisions of the Direct Agreement;

*[NPV means in respect of all amounts shown in the Service Provider's Financial Model as being payable from the Termination Date, either in dividends on share capital of the Service Provider or payments of interest or prepayments of principal of the Subordinated Debt made by the Service Provider discounted back at the Equity IRR from the date on which it is shown to be payable in the Service Provider's Bid Financial Model to the earlier of the Project Expiry Date **and** the date falling 3 (three) years after the Termination Date];*

O&M Contract means the operation and maintenance contract that is entered into between the Service Provider and the O&M Contractor for performance of all or any of the O&M obligations under this Agreement;

O&M Contractor means the person, if any, with whom the Service Provider has entered into an O&M Contract for discharging O&M obligations for and on behalf of the Service Provider under this Agreement;

O&M Expenses means expenses incurred by or on behalf of the Service Provider or by the Contracting Authority, as the case may be, for all O&M Services including (a) cost of salaries and other compensation to employees, (b) cost of materials, supplies, utilities and other services, (c) premia for insurance, (d) all taxes, duties,

cess and fees due and payable for O&M Services, (e) all repair, replacement, reconstruction, reinstatement, improvement and maintenance costs, (f) payments required to be made under the O&M Contract, or any other contract in connection with or incidental to the O&M Services, and (g) all other expenditure required to be incurred under Applicable Laws, Applicable Permits or this Agreement;

O&M Inspection Report has the meaning given to it in Clause 19.2;

O&M Services means services associated with the operation and maintenance of the Project Network and includes all matters connected with or incidental to such operation and maintenance and provision of services and facilities in accordance with the provisions of this Agreement;

Operation Period means the period commencing from the Completion Date and ending on the Transfer Date, or if earlier the Termination Date;

Output Specifications means the Output Specifications in respect of the Project set out in Schedule M;

Outstanding Principal means the principal amount outstanding at the Termination Date under the Financing Agreements;

Panel of Chartered Accountants has the meaning given to it in Schedule Q of the Agreement.

Payment Mechanism means the payment mechanism set out in Schedule M;

Parties means the parties to this Agreement collectively and **Party** shall mean any of the parties to this Agreement individually;

Performance Security has the meaning given to it in Clause 9.1;

Political Event has the meaning given to it in Clause 29.3;

Principal Sub-Contracts means the EPC Contract and the O&M Contract;

Prohibited Act means:

- (a) the direct or indirect offering, giving or agreeing to give to the Government of Kenya or any organ of the State or to any person employed by or on behalf of the Government or any organ of the State any gift, payment of money or consideration of any kind as an inducement or reward:
 - (i) for or not any or omission in relation to the procurement of this Agreement;
 - (ii) for favouring or not showing favour or disfavouring any person in relation to the procurement of this Agreement; or
- (b) committing, attempting or conspiracy to commit any common law or statutory offence of fraud or any offence under the Public Officer Ethics Act (Act no. 4 of 2003), the Anti-Corruption and Economic Crimes Act (Act

no. 3 of 2003) and any other existing anti-corruption or bribery law in Kenya; or

- (c) defrauding or attempting to defraud or conspiring to defraud the Contracting Authority or any Governmental Instrumentality;

Project means the design, construction, financing, operation and maintenance of the Project Network in accordance with the provisions of this Agreement, and includes all works, services and equipment relating to or in respect of the Scope of the Project as more fully described in Schedule A;

Project Assets means all physical and other assets relating to and forming part of the Site including (a) rights over the Site in the form of licence, Right of Way or otherwise; (b) tangible assets such as civil works and equipment including foundations, embankments, pavements, road surface, interchanges, bridges, culverts, road overbridges, drainage works, traffic signals, sign boards, kilometre-stones, toll plaza, electrical systems, communication systems, rest areas, relief centres, maintenance depots and administrative offices; (c) Project Facilities situated on the Site; (d) all rights of the Service Provider under the Project Agreements; (e) financial assets, such as receivables, security deposits etc.; (f) insurance proceeds; and (g) Applicable Permits and authorisations relating to or in respect of the Project Network, but does not include Additional Facilities;

Project Completion Date means the date on which the Completion Certificate or the Provisional Certificate, as the case may be, is issued by the Independent Expert under the provisions of Clause 14.

Project Completion Schedule means the progressive Project Milestones set forth in Schedule G for completion of the Project Network on or before the Scheduled Completion Date.

Project Expiry Date means the date falling ten (10) years after the Appointed Date.

Project Facilities means all the amenities and facilities situated on the Site, as described in Schedule D.

Project Operations means the carrying out of the Works and the O&M Services in relation to the Project Network.;

Project Milestones means the project milestones set out in Schedule G;

Project Network means the Site, comprising the existing roads forming Lot 6, and its subsequent development and augmentation in accordance with Schedule B of this Agreement and all Project Assets;

Project Term means the period starting on and from the Appointed Date and ending on the Project Expiry Date (as may be extended from time to time pursuant to the terms of this Agreement), or if earlier the Termination date;

Provisional Certificate has the meaning given to it in Clause 14.3;

Reference Exchange Rate means, in respect of any one currency that is to be

converted into another currency in accordance with the provisions of this Agreement, the exchange rate as of 12.00 (twelve) noon on the relevant date quoted in Nairobi by the Central Bank of Kenya

Relevant Event means any of the following which may result in an adjustment to the Annuity Payment in accordance with Clause 23 (Financial Adjustment):

- (a) any adjustment pursuant to Clause 16 (Change of Scope);
- (b) any adjustment pursuant to Clause 31 (Compensation for breach of Agreement);
- (c) pursuant to Clause 36 (Change in Law);

Relief Event means any of the following:

- (a) any embargo;
- (b) any:
 - (i) official or unofficial strike;
 - (ii) lock out;
 - (iii) go-slow; or
 - (iv) other dispute,generally affecting the road construction or operation and maintenance industry or a significant sector in it;
- (c) any civil commotion, boycott or political agitation,; and
- (d) any other event as specifically set out in this Agreement;

unless any of the events listed in paragraphs (a) to (d) inclusive arise (directly or indirectly) as a result of any wilful default or wilful act of the Service Provider or any of its Contractors;

Request for Proposals or **RFP** has the meaning given to it in Recital (D);

Request for Qualification or **RFQ** has the meaning given to it in Recital (C);

Right of Way or **ROW** means the constructive possession of the Site, together with all way leaves, easements, unrestricted access and other rights of way, howsoever described, necessary for construction, operation and maintenance of the Project Network in accordance with this Agreement;

Roads Annuity Fund Regulations, 2015 shall have the meaning set forth in Recital (G);

Safety Consultant has the meaning given to it in Clause 18.1.2;

Safety Requirements has the meaning given to it in Clause 18.1.1;

Safety Fund has the meaning given to it in Clause 18.2;

Scheduled Completion Date has the meaning given to it in Clause 12.5.1;

Scope of the Project has the meaning given to it in Clause 2.1;

Second Party has the meaning given to it in Clause 24.1.8;

Senior Debt Rate means the non-default interest defined in the Financing Agreements;

Senior Lenders means the financial institutions, banks, multilateral lending agencies, trusts, funds and agents or trustees of debenture holders, including their successors and assignees, who have agreed to guarantee or provide finance to the Service Provider under any of the Financing Agreements for meeting all or any part of the Total Project Cost and who hold *pari passu* a charge on the assets, rights, title and interests of the Service Provider;

Service Points has the meaning given to it in the Payment Mechanism;

Service Provider shall have the meaning attributed thereto in the array of Parties hereinabove as set forth in the Recitals;

Service Provider Default has the meaning given to it in in Clause 33.1.1;

Service Provider Indemnified Persons has the meaning given to it in in Clause 37.1.2;

Site has the meaning given to it in Clause 10.1;

Snag List has the meaning given to it in Clause 14.3;

Specifications and Standards means the specifications and standards relating to the quality, quantity, capacity and other requirements for the Project Network (all as set out in Schedule D), and any modifications thereof, or additions thereto, as included in the design and engineering for the Project Network submitted by the Service Provider to, and expressly approved by, the Contracting Authority;

Specified Documents has the meaning given to it in Clause 40.1;

Statutory Auditors means a reputable firm of chartered accountants acting as the auditors of the Service Provider under the provisions of the Companies Act, 2015 (Act No.17 of 2015) including any statutory modification or re-enactment thereof, for the time being in force, and appointed in accordance with Clause 28.2.;

Sub-Contractor Costs means the amounts reasonably and properly payable by the Service Provider to each of the Contractors under, respectively, the EPC Contract and the O&M Contract as a direct termination of this Agreement provided that such amounts shall be reduced to the extent that the Service Provider fails to use reasonable endeavours to mitigate such amount provided that no account shall be

taken of any liabilities and obligations of the Service Provider to the Contractor arising out of:

- (a) arrangements or agreements that were not entered into in connection with the Parties' obligations in relation to the Project; or
- (b) were not entered into in the ordinary course of business and on commercial arm's length terms;

Subordinated Debt means the aggregate of the following sums expressed in Kenyan Shillings or in the currency of debt, as the case may be, outstanding as on the Termination Date:

- (a) the principal amount of debt provided by lenders or the Service Provider's shareholders, for funding the Project and subordinated to the loans provided by the Senior Lenders in respect of this Project; and
- (b) all accrued interest on the debt referred to in Sub-clause (a) above;

Suspension has the meaning given to it in Clause 32.1;

Taxes means any Kenyan taxes including excise duties, customs duties, value added tax, sales tax, local taxes, service tax, cess and any impost or surcharge of like nature (whether central or local) on the goods, materials, equipment and services incorporated in and forming part of the Project Network charged, levied or imposed by any Government Instrumentality, but excluding any interest, penalties and other sums in relation thereto imposed on any account whatsoever. For the avoidance of doubt, Taxes shall not include taxes on corporate income;

Termination means the expiry or termination of this Agreement;

Termination Date means the date of early termination of this Agreement in accordance with its terms;

Termination Notice means the communication issued in accordance with this Agreement by one Party to the other Party terminating this Agreement;

Termination Payment means the amount payable by the Contracting Authority to the Service Provider upon Termination and may consist of payments on account of and restricted to the Debt Due, Equity and NPV and Sub-Contractor Costs, as the case may be, which form part of the Total Project Cost in accordance with the provisions of this Agreement; provided that the amount payable in respect of any Debt Due for Contracting Authority Default expressed in foreign currency shall be computed at the Reference Exchange Rate for conversion into the relevant foreign currency as on the date of Termination Payment. For the avoidance of doubt, it is agreed that within a period of [60 (sixty)] days from the Completion Date, the Service Provider shall notify to the Contracting Authority, the Total Project Cost as on the Completion Date and its disaggregation between Debt Due and Equity, and only the amounts so conveyed shall form the basis of computing Termination Payment, and it is further agreed that in the event such disaggregation is not notified to the Contracting Authority, equity shall be deemed to be the amount arrived at by

subtracting Debt Due from Total Project Costs;

Tests means the tests set out in in Schedule I to determine the completion of Project in accordance with the provisions of this Agreement;

Total Project Cost means the capital cost of the Project as set out in the Financial Package;

Transfer Date means the Project Expiry Date or if earlier the Termination Date;

Unavailability has the meaning given to it in the Payment Mechanism;

Unavailability Deductions has the meaning given to it in the Payment Mechanism;

US Dollars means the lawful currency of the United States of America;

User means a person who travels or intends to travel on the Project Network or any part thereof in/on any vehicle;

Vesting Certificate has the meaning given to it in Clause 34.4; and

Works means the design, construction, testing and commissioning of the Project Network and Project Facilities to be performed by the Service Provider in accordance with this Agreement (as varied, amended or supplemented from time to time).

1.2 Interpretation

1.2.1 In this Agreement, unless the context otherwise requires,

- (a) references to any legislation or any provision thereof shall include amendment or re-enactment or consolidation of such legislation, regulation or any provision thereof so far as such amendment or re-enactment or consolidation applies or is capable of applying to any transaction entered into hereunder;
- (b) references to laws of Kenya or Kenyan law or any regulation or statute having the force of law shall include the laws, acts, ordinances, rules, regulations, statutes, bye laws or notifications which have the force of law in the Republic of Kenya and as from time to time may be amended, replaced, modified, supplemented, extended or re-enacted;
- (c) references to a **person** and words denoting a natural person shall be construed as a reference to any individual, firm, company, corporation, society, trust, government, state or agency of a state or any association or partnership (whether or not having separate legal personality) of two or more of the above and shall include any successors, transferees and assigns;
- (d) the table of contents, headings or sub-headings in this Agreement are for convenience of reference only and shall not be used in, and shall not affect, the construction or interpretation of this Agreement;

- (e) the words **include** and **including** are to be construed without limitation and shall be deemed to be followed by “without limitation” or “but not limited to” whether or not they are followed by such phrases;
- (f) references to **construction** or **building** include, unless the context otherwise requires, investigation, developing, engineering, procurement, delivery, transportation, installation, processing, fabrication, testing, commissioning and other activities incidental to the construction, and **construct** or **build** shall be construed accordingly;
- (g) references to **development** include, unless the context otherwise requires, construction, renovation, refurbishing, rehabilitation, augmentation, upgrading and other activities incidental thereto, and “**develop**” shall be construed accordingly;
- (h) any reference to any period of time shall mean a reference to that according to Kenyan Standard Time;
- (i) any reference to day shall mean a reference to a calendar day;
- (j) references to a **business day** shall be construed as a reference to a day (other than Saturdays, Sundays and public holidays recognised in Kenya);
- (k) any reference to month shall mean a reference to a calendar month;
- (l) references to any date, period or Project Milestone shall mean and include such date, period or Project Milestone as may be extended pursuant to this Agreement;
- (m) any reference to any period commencing **from** a specified day or date and **until** a specified day or date shall include both such days or dates; provided that if the last day of any period computed under this Agreement is not a business day, then the period shall run until the end of the next business day;
- (n) any reference to the date of this Agreement shall mean the later of the date hereof or the date of the restated Agreement;
- (o) the words importing singular shall include plural and vice versa;
- (p) references to any gender shall include the other and the neutral gender;
- (q) **indebtedness** shall be construed so as to include any obligation (whether incurred as principal or surety) for the payment or repayment of money, whether present or future, actual or contingent;
- (r) references to the **winding-up, dissolution, insolvency, or reorganisation** of a company or corporation shall be construed so as to include any equivalent or analogous proceedings under the law of the jurisdiction in which such company or corporation is incorporated or any jurisdiction in which such company or corporation carries on business including the seeking of liquidation, winding-up, reorganisation, dissolution, arrangement, protection or relief of debtors;

- (s) save and except as otherwise provided in this Agreement, any reference, at any time, to any agreement, deed, instrument, licence or document of any description shall be construed as reference to that agreement, deed, instrument, licence or other document as amended, varied, supplemented, modified or suspended at the time of such reference; provided that this Sub-clause shall not operate so as to increase liabilities or obligations of the Contracting Authority hereunder or pursuant hereto in any manner whatsoever;
 - (t) any agreement, consent, approval, authorisation, notice, communication, information or report required under or pursuant to this Agreement from or by any Party or the Independent Expert shall be valid and effective only if it is in writing under the hand of a duly authorised representative of such Party or the Independent Expert, as the case may be, in this behalf and not otherwise;
 - (u) the Schedules and Recitals to this Agreement form an integral part of this Agreement and will be in full force and effect as though they were expressly set out in the body of this Agreement and any reference to **this Agreement** shall include the Schedules and the Recitals;
 - (v) references to Recitals, Clauses, Clauses, Sub-clauses or Schedules in this Agreement shall, except where the context otherwise requires, mean references to Recitals, Clauses, Clauses, Sub-clauses and Schedules of or to this Agreement, and references to a Paragraph shall, subject to any contrary indication, be construed as a reference to a Paragraph of this Agreement or of the Schedule in which such reference appears; and
 - (w) the damages payable by either Party to the other, as set forth in this Agreement, whether on per diem basis or otherwise, is the amount which represents the direct loss arising from a breach of contract likely to be suffered and incurred by the Party entitled to receive the same and are not, for the avoidance of doubt, calculated by way of penalty (the **Damages**).
- 1.2.2 Unless expressly provided otherwise in this Agreement, any Documentation required to be provided or furnished by the Service Provider to the Contracting Authority and/or the Independent Expert shall be provided free of cost and in three copies, and if the Contracting Authority and/or the Independent Expert is required to return any such Documentation with their comments and/or approval, they shall be entitled to retain two copies thereof.
- 1.2.3 The rule of construction, if any, that a contract should be interpreted against the parties responsible for the drafting and preparation thereof, shall not apply.
- 1.2.4 Any word or expression used in this Agreement shall, unless otherwise defined or construed in this Agreement, bear its ordinary English meaning.

1.3 Measurements and arithmetic conventions

All measurements and calculations shall be in the metric system and calculations done to 2 (two) decimal places, with the third digit of 5 (five) or above being rounded up and below 5 (five) being rounded down.

1.4 Priority of agreements, clauses and schedules

1.4.1 This Agreement, and all other agreements and documents forming part of or referred to in this agreement are to be taken as mutually explanatory and, unless otherwise expressly provided elsewhere in this Agreement, the priority of this Agreement and other documents and agreements forming part hereof or referred to herein shall, in the event of any conflict between them, be in the following order:

- (a) this Agreement; and
- (b) all other agreements and documents forming part hereof or referred to herein.

1.4.2 Subject to the provisions of Clause 1.4.1, in case of ambiguities or discrepancies within this Agreement, the following shall apply:

- (a) between two or more Clauses of this Agreement, the provisions of a specific Clause relevant to the issue under consideration shall prevail over those in other Clauses;
- (b) between the Clauses of this Agreement and the Schedules, the Clauses shall prevail and between Schedules and Annexes, the Schedules shall prevail;
- (c) between any two Schedules, the Schedule relevant to the issue shall prevail;
- (d) between the written description on the Drawings and the Specifications and Standards, the latter shall prevail;
- (e) between the dimension scaled from the Drawing and its specific written dimension, the latter shall prevail; and
- (f) between any value written in numerals and that in words, the latter shall prevail.

Part II
The Project

CLAUSE 2
SCOPE OF THE PROJECT

2.1 Scope of the Project

The scope of the Project (the **Scope of the Project**) shall mean and include, during the Project Term:

- (a) the design, construction, commissioning and financing of the Project Network on the Site, the provision of Project Facilities, in all cases in conformity with the Specifications and Standards (or as otherwise specified in the Schedules) and the Output Specifications;
- (b) the operation and maintenance of the Project Network in accordance with the provisions of this Agreement including without limitation the Output Specifications, the Method Statements and the Payment Mechanism; and
- (c) performance and fulfilment of all other obligations of the Service Provider in accordance with the provisions of this Agreement and matters incidental thereto or necessary for the performance of any or all of the obligations of the Service Provider under this Agreement.

CLAUSE 3
THE PROJECT

3.1 The Project

- 3.1.1 Subject to and in accordance with the provisions of this Agreement, all Applicable Laws and all Applicable Permits, the Contracting Authority hereby grants to the Service Provider the exclusive right and licence to build, operate and maintain the Project for a period of [10 (ten)] years commencing from the Appointed Date, and the Service Provider hereby agrees to implement the Project subject to and in accordance with the terms and conditions set forth herein:
- 3.1.2 The Contracting Authority may, for purposes of the Project, delegate or assign any of its statutory rights, powers or functions which the Contracting Authority is empowered by law to delegate or assign.
- 3.1.3 Subject to and in accordance with the provisions of this Agreement, the Service Provider is obliged or entitled (as the case may be) to:
- (a) the Right of Way, access and licence to the Site for the purpose of and to the extent conferred by this Agreement;
 - (b) finance, design and build the Project Network;
 - (c) operate and maintain the Project Network and regulate its use by third parties, provided that such operation and maintenance shall be consistent with the provision of Clause 17;
 - (d) allow the Contracting Authority or Contracting Authority's Contractor(s) access to and use of the Site for the purposes of collecting any Fees in accordance with Clause 22.2;
 - (e) perform and fulfil all of the Service Provider's obligations under and in accordance with this Agreement;
 - (f) bear and pay all costs, expenses and charges in connection with or incidental to the performance of the obligations of the Service Provider under this Agreement except where provided for as a shared cost in this Agreement;
 - (g) neither assign, transfer or sublet or create any lien or Encumbrance on this Agreement or on the whole or any part of the Project Network nor transfer, lease or part possession thereof, save and except as expressly permitted by this Agreement or the Direct Agreement; and
 - F(h) transfer and divest possession, operation and all other rights and interests granted to the Service Provider in respect of the Project Network under this Agreement to the Contracting Authority on the Transfer Date.

CLAUSE 4
CONDITIONS PRECEDENT

4.1 Conditions Precedent

- 4.1.1 Save and except as expressly provided in Clauses [4, 5.2.2, 6.4, 9, 10, 21, 29, 39 and 42], or unless the context otherwise requires, the respective rights and obligations of the Parties under this Agreement shall be subject to the satisfaction in full or waiver by the relevant Party of the conditions precedent specified in Clause 4.1.4 and 4.1.5 (the **Conditions Precedent**).
- 4.1.2 On or before the date of this Agreement the Contracting Authority shall facilitate the application (including assignment where applicable) of all relevant permits relating to environmental protection and conservation of the Site (if any), provided that nothing in this provision shall be construed to imply an obligation on the Contracting Authority to bear the cost of any such application, and the cost shall be borne solely by the Service Provider.
- 4.1.3 On the Effective Date the Service Provider shall:
- (a) provide a portion of the Performance Security, equivalent to 1% (one percent) of the Total Project Costs, to the Contracting Authority;
 - (b) deliver to the Contracting Authority a legal opinion from the legal counsel of the Service Provider with respect to capacity and powers of the Service Provider to enter into this Agreement;
 - (c) execute and procure execution by the relevant Contractor of the EPC Contract and the O&M Contract in form and substance satisfactory to the Contracting Authority together with confirmation that all conditions precedent to these contracts have been satisfied and deliver a CD-ROM containing executed copies of each of the Principal Sub-Contracts and
 - (d) deliver to the Contracting Authority 3 (three) true copies of the Financial Model (in MS Excel or in any other agreed form) in the Agreed Form).
- 4.1.4 The Conditions Precedent required to be satisfied by the Service Provider to achieve the Appointed Date shall be deemed to have been fulfilled when the Service Provider shall have delivered to the Contracting Authority:
- (a) the full amount of the Performance Security as set out in Clause 9.1;
 - (b) the Direct Agreement executed by all parties (other than the Contracting Authority);
 - (c) confirmation that it has procured all the Applicable Permits specified in Schedule E (unconditionally or if subject to conditions then all such conditions required to be fulfilled by the date specified therein shall have been satisfied in full) necessary for the design, construction of the Works and maintenance of the Project Network;

- (d) a confirmation that all the Financing Agreements have been executed by the Senior Lenders and, subject to the satisfaction of this condition precedent, a certificate, duly signed by an agent of the Senior Lenders (or the Senior Lenders' Representative), confirming that all conditions precedent to the Financing Agreements have been satisfied to the satisfaction of the Senior Lenders;
- (e) a CD-ROM containing the signed copies of all the Financing Documents; and
- (f) 3 (three) copies of an updated Financial Model and the Financial Package (in MS Excel) in the Agreed Form (and for the avoidance of doubt approved by the Contracting Authority).

Provided that upon request in writing by the Service Provider, the Contracting Authority may, in its discretion, waive any of the Conditions Precedent set out in this Clause 4.1.4(II). For the avoidance of doubt, the Contracting Authority may, in its sole discretion, grant any waiver hereunder with such conditions as it may deem fit.

4.1.5 The Conditions Precedent required to be satisfied by the Contracting Authority to achieve the Appointed Date shall be deemed to have been fulfilled when the Contracting Authority shall have delivered to the Service Provider the following:

- (a) the Direct Agreement executed by the Contracting Authority;
- (b) vacant access to the Site and Rights of way necessary for the Project Network (other than in relation to any Additional Facilities) as detailed in Annex I to Schedule A;
- (c) a legal opinion from the Attorney General of Kenya confirming, inter alia, that the relevant approvals under the PPP Act have been obtained and the capacity and power of the Contracting Party to enter into this Agreement;
- (d) the signed Letter of Support in the form annexed to this Agreement as Annex [***];
- (e) a certificate of an authorised officer of the Contracting Authority, dated one day prior to the Appointed Date, stating that each of the representations of the Contracting Authority set forth in Clause 7.2 is true and correct in all material respects as if made on such date;

4.1.6 Each Party shall make all reasonable endeavours to satisfy the Conditions Precedent within the time stipulated and shall provide the other Party with such reasonable cooperation as may be required to assist that Party in satisfying the Conditions Precedent for which that Party is responsible. The Parties shall notify each other in writing at least once a month on the progress made in satisfying the Conditions Precedent. Each Party shall promptly inform the other Party when any Condition Precedent for which it is responsible has been satisfied.

4.2 Damages for delay by the Service Provider

Subject to Clause 4.3, in the event that (i) the Service Provider fails to satisfy any or all of the Conditions Precedent set forth in Clause 4.1.4 within a period of 180 (one hundred and eighty) days from the date of this Agreement, and (ii) the delay has not occurred as a result of non-fulfilment or failure to fulfil the obligations under Clauses 4.1.2 and/or Clause 4.1.5 or any other breach of this Agreement by the Contracting Authority, the Service Provider shall pay to the Contracting Authority Damages in an amount calculated at the rate of 0.2% (zero point two per cent) of the Performance Security for each day's delay until the fulfilment of such Conditions Precedent, subject to a maximum of 20% (twenty per cent) of the Performance Security which, for the avoidance of doubt, is the equivalent of the full amount of the portion of the Performance Security provided at the Effective Date.

It is hereby agreed that where the failure to satisfy the Conditions Precedent within the said period of 180 days, is occasioned only by a delay in any of the following circumstances:

- (a) issuance of the Letter of Support; or
- (b) the failure to provide the Right of Way

then the Contracting Authority will, subject to any reasonable conditions it may impose, extend the time for obtaining the Conditions Precedents and, if necessary the Scheduled Completion Date.

4.3 Force Majeure

Neither Party shall be required to pay the other Party any Damages pursuant to Clause 4.2 for any delay in fulfilling any or all of the Conditions Precedent where such delay results from a Force Majeure Event (and in such circumstances the provisions of Clause 29.5.1 shall apply).

CLAUSE 5

OBLIGATIONS OF THE SERVICE PROVIDER

5.1 Obligations of the Service Provider

- 5.1.1 Subject to and on the terms and conditions of this Agreement, the Service Provider shall at its own cost and expense procure finance for and undertake the design, engineering, procurement, construction, operation and maintenance of the Project Network and observe, fulfil, comply with and perform all its obligations set out in this Agreement or arising hereunder.
- 5.1.2 The Service Provider shall at all times comply with all Applicable Laws and Applicable Permits (including any renewals as required) in the performance of its obligations under this Agreement.
- 5.1.3 Subject to the provisions of Clauses 5.1.1 and 5.1.2, the Service Provider shall discharge its obligations under this Agreement in accordance with Good Industry Practice and as a reasonable and prudent person.
- 5.1.4 The Service Provider shall, at its own cost and expense, in addition to and not in derogation of its obligations elsewhere set out in this Agreement:
- (a) make, or cause to be made, necessary applications to the relevant Government Instrumentalities with such particulars and details, as may be required for obtaining Applicable Permits (other than those set out in Clause 4.1.2) necessary for the Works and the operation and maintenance of the Project Network, and obtain and keep in force and effect such Applicable Permits in conformity with the Applicable Laws until the Transfer Date;
 - (b) procure, as required, the appropriate proprietary rights, licences, agreements and permissions for materials, methods, processes and systems used or incorporated into the Project Network;
 - (c) perform and comply with its obligations under the Financing Agreements and under the Principal Sub-Contracts to ensure that such agreements and contracts are not terminated by reason of an action or inaction of the Service Provider;
 - (d) make reasonable efforts to maintain harmony and good industrial relations among the personnel employed by it or its Contractors in connection with the performance of its obligations under this Agreement;
 - (e) ensure and procure that its Contractors comply with all Applicable Permits and Applicable Laws in the performance by them, pursuant to any Principal Sub-Contract to which they are a party, of any of the Service Provider's obligations under this Agreement;
 - (f) not do or omit to do any act, deed or thing which may in any manner contravene any provisions of this Agreement;

- (g) support, cooperate with and facilitate the Contracting Authority in the implementation and operation of the Project in accordance with the provisions of this Agreement;
 - (h) perform its obligations under this Agreement in a manner consistent with the Contracting Authority discharging its statutory duties and/or functions undertaken by it to the extent permitted by Applicable Laws;
 - (i) divest its rights and interests in relation to the Project Network to the Contracting Authority upon Termination of this Agreement, in accordance with the provisions thereof;
 - (j) ensure the security of its personnel or that of any Sub-Contractors engaged in performing its obligations in relation to the Project Network as set out in this Agreement; and
- (make reasonable effort to allow the Contracting Authority access to and use of the Site for the collection of any tolls or Fees imposed and collected by the Contracting Authority on Users of the Project Network where applicable.
- (j) comply with the undertakings set out in the Method Statements in relation to local participation and local content and all other bid parameters set out therein.

5.2 Obligations relating to Principal Sub-Contracts

- 5.2.1 It is expressly agreed that the Service Provider shall, at all times, be responsible and liable for all its obligations (and should not be relieved or excused any responsibility, liability or obligation) under this Agreement notwithstanding anything contained in the Principal Sub-Contracts (and the appointment of any Contractor thereunder) or any other agreement, and no default under any Principal Sub-Contract or agreement shall excuse the Service Provider from its obligations, responsibilities or liabilities under this Agreement.
- 5.2.2 The Service Provider shall, prior to the Appointed Date, submit to the Contracting Authority the drafts of all Principal Sub-Contracts and Financing Agreements (or any amendments or replacements thereto) for its review and comments, and the Contracting Authority shall have the right (but not the obligation) to undertake such review and provide its comments (if any), to the Service Provider within 15 (fifteen) days of the receipt of such drafts. Within 7 (seven) days of execution of any Principal Sub-Contract or Financing Agreement or amendment thereto, the Service Provider shall submit to the Contracting Authority a true copy thereof, duly attested by a director of the Service Provider for its record. For the avoidance of doubt, it is agreed that the review and comments by the Contracting Authority shall be limited to ensuring compliance with the terms and obligations under this Agreement. It is further agreed that no review and/or observation of the Contracting Authority and/or its failure to review and/or convey its observations on any document shall relieve the Service Provider of its obligations and liabilities under this Agreement in any manner nor shall the Contracting Authority be liable for the same in any manner whatsoever.

- 5.2.3 The Service Provider shall not after the Appointed Date replace, modify or otherwise amend any of the Financing Agreements (or their terms) without the prior written consent of the Contracting Authority where such modification, replacement or amendment has, or may have, the effect of imposing or increasing any financial liability or obligation on the Contracting Authority (including early termination of this Agreement) and, in the event that any replacement, modification or amendment is made without such prior consent, the Service Provider shall not enforce such replacement, modification or amendment nor permit enforcement thereof against the Contracting Authority. For the avoidance of doubt, the Contracting Authority acknowledges and agrees that it shall not unreasonably withhold its consent for restructuring or rescheduling of the debt of the Service Provider provided that as a result of such restructuring or rescheduling there is no increase in any financial liability or obligation to be assumed by the Contracting Authority.
- 5.2.4 The Service Provider shall procure that each of the Principal Sub-Contracts contains provisions that entitle the Contracting Authority to step into such agreement, in its sole discretion, in substitution of the Service Provider in the event of Termination or Suspension (the **Covenant**). For the avoidance of doubt, it is expressly agreed that in the event the Contracting Authority does not exercise such rights of substitution within a period not exceeding 90 (ninety) days from the Transfer Date, the Project Agreements shall be deemed to cease to be in force and effect on the Transfer Date without any liability whatsoever on the Contracting Authority and the Covenant shall expressly provide for such eventuality. The Service Provider expressly agrees to include the Covenant in all its Principal Sub-Contracts and undertakes that it shall, in respect of each of the Principal Sub-Contracts, procure and deliver to the Contracting Authority an acknowledgment and undertaking, in a form acceptable to the Contracting Authority, from each of the Contractors that they acknowledge and accept the Covenant and undertake to be bound by the same and not to seek any relief or remedy whatsoever from the Contracting Authority in the event of Termination or Suspension.
- 5.2.5 Notwithstanding anything to the contrary contained in this Agreement, the Service Provider agrees and acknowledges that selection or replacement of either (i) the EPC Contractor and execution of the EPC Contract; or (ii) an O&M Contractor and execution of the O&M Contract shall, in both cases, be subject to the prior approval of the Contracting Authority from a competence, national security and public interest perspective and the decision of the Contracting Authority in this respect is final, conclusive and binding on the Service Provider. The Service Provider undertakes that it shall not give effect to any such selection or contract without prior approval of the Contracting Authority. For the avoidance of doubt, it is expressly agreed that approval of the Contracting Authority hereunder shall be limited to Competence, national security and public interest perspective, and the Contracting Authority shall endeavour to convey its decision thereon expeditiously. It is also agreed that the Contracting Authority shall not be liable in any manner on account of grant or otherwise of such approval and that such approval or denial thereof shall not in any manner absolve the Service Provider or its Contractors from any liability or obligation under this Agreement (unless agreed by the Contracting Authority). Consent and approval of the Contracting Authority shall be deemed granted unless expressly withheld on the grounds above within thirty (30) days of notification by the Service Provider. For purposes of this clause ‘Competence’ shall mean that the

relevant party has at least the same qualifications from a technical, financial and legal standing as those that were used to qualify the initial EPC Contractor or O&M Contractor (as the case may be) during the evaluation process by the Contracting Authority.

5.3 Obligations relating to Change in Ownership

5.3.1 The Service Provider shall not undertake or permit any Change in Ownership, except with the prior written approval of the Contracting Authority.

5.3.2 Notwithstanding anything to the contrary contained in this Agreement and in addition to any other restriction, the Service Provider agrees and acknowledges that:

- (i) all acquisitions of Equity by an acquirer, either by himself or with any person acting in concert, directly or indirectly, including by transfer of the direct or indirect legal or beneficial ownership or control of any Equity, in aggregate of not less than 15% (fifteen per cent) of the total Equity of the Service Provider; or
- (ii) any acquisition of any control directly or indirectly of the board of directors of the Service Provider by any person either by himself or together with any person or persons acting in concert with him

shall constitute a Change in Ownership requiring the prior written approval of the Contracting Authority from national security and public interest perspective. The decision of the Contracting Authority in this respect is final, conclusive and binding on the Service Provider, and undertakes that it shall not give effect to any such acquisition of Equity or control of the board of directors of the Service Provider without such prior written approval of the Contracting Authority which shall not be unreasonably withheld. For the avoidance of doubt, it is expressly agreed that approval of the Contracting Authority hereunder shall be limited to national security and public interest perspective, and the Contracting Authority shall endeavour to convey its decision thereon within sixty (60) days of notification by the Service Provider. It is also agreed that the Contracting Authority shall not be liable in any manner on account of grant or otherwise of such approval and that such approval or denial thereof shall not in any manner absolve the Service Provider from any liability or obligation under this Agreement.

For the purposes of this Clause 5.3.2:

- (a) the expression “**acquirer**”, “**control**” and “**person acting in concert**” shall have the meaning ascribed thereto in the Capital Markets Act (Chapter 485A of the laws of Kenya) and the regulations made thereunder with such modifications as fit the provisions of this Agreement (or any statutory re-enactment thereof as in force as on the date of acquisition of the Equity, or the control of the board of directors, as the case may be, of the Service Provider);
- (b) the indirect transfer or control of legal or beneficial ownership of Equity shall mean transfer of the direct or indirect beneficial ownership or control

of any company or companies whether in Kenya or abroad which results in the acquirer acquiring control over the shares or voting rights of shares of the Service Provider; and

- (c) power to appoint, whether by contract or by virtue of control or acquisition of shares of any company holding directly or through one or more companies (whether situate in Kenya or abroad) the Equity of the Service Provider, not less than half of the directors on the board of directors of the Service Provider or of any company, directly or indirectly whether situate in Kenya or abroad, having ultimate control of not less than 15% (fifteen per cent) of the Equity of the Service Provider shall constitute acquisition of control, directly or indirectly, of the board of directors of the Service Provider.

5.3.3 The restrictions in this Clause 5.3 shall not apply to any direct or indirect Encumbrance over the shares of the Service Provider in favour of the Senior Lenders provided that, the Service Provider shall prior to the granting of any such Encumbrance by the shareholders of the Service Provider, notify the Contracting Authority of the details of the proposed Encumbrance.

5.3.4 Any consent and/or approval of the Contracting Authority required pursuant to this Clause 5.3 shall be deemed granted unless expressly withheld in writing on the grounds specified within 30 (thirty) days of notification by the Service Provider or request for such consent and/or approval.

5.4 Employment of foreign nationals

The Service Provider acknowledges, agrees and undertakes that employment of foreign personnel by the Service Provider and/or its contractors and their sub-contractors shall be subject to grant of requisite regulatory permits and approvals including employment/residential visas and work permits, if any required, and the obligation to apply for and obtain the same shall and will always be of the Service Provider and, notwithstanding anything to the contrary contained in this Agreement, refusal of or inability by the Service Provider or any of its Principal Sub-Contractors or other subcontractors to obtain any such permits and approvals shall not constitute a Force Majeure Event, and shall not in any manner excuse the Service Provider from the performance and discharge of its obligations and liabilities under this Agreement.

5.5 Employment of trained personnel

The Service Provider shall ensure that the personnel engaged by it in the performance of its obligations under this Agreement are at all times qualified and properly trained for their respective functions.

5.6 Sole purpose of the Service Provider

The Service Provider having been set up for the sole purpose of exercising the rights and observing and performing its obligations and liabilities under this Agreement, the Service Provider or any of its subsidiaries shall not, except with the previous

written consent of the Contracting Authority, be or become directly or indirectly engaged, concerned or interested in any business other than as envisaged herein.

5.7 Branding of Project Network

The Project Network or any part thereof shall not be branded in any manner to advertise, display or reflect the name or identity of the Service Provider or its shareholders. The Service Provider undertakes that it shall not, in any manner, use the name or entity of the Project Network to advertise or display its own identity, brand equity or business interests, including those of its shareholders, save and except as may be necessary in the normal course of business. For the avoidance of doubt, it is agreed that the Service Provider may display its own name at a spot where other public notices are displayed for the Users. It is further agreed that the Project Network shall be known, promoted, displayed and advertised by the name of 'Kilgoris - Lolgorian (B3), Turbo - Sikhendu (C622), Endebes– Sikhendu (C619), Kakamega (Sichirai) – Ingotse –Namukoye - Nzoia River –Musikoma(Khalaba) (C777), Ruambwa – Port Victoria (Mabinju) (C672), Kehancha – Lolgorian (B1) and Kimaeti – Malakisi - Lwakhakha (C807) Roads - Lot No 6'.

CLAUSE 6

OBLIGATIONS OF THE CONTRACTING AUTHORITY

6.1 Obligations of the Contracting Authority

- 6.1.1 The Contracting Authority shall, and with the support, financial or otherwise, of other relevant government entities or agencies where relevant, undertake, comply with and perform all its obligations set out in this Agreement or arising hereunder.
- 6.1.2 The Contracting Authority agrees to provide support to the Service Provider and undertakes to observe, comply with and perform, subject to and in accordance with the provisions of this Agreement and the Applicable Laws, the following:
- (a) upon written request from the Service Provider, and subject to the Service Provider complying with Applicable Laws, provide reasonable support and assistance to the Service Provider in procuring Applicable Permits required from any Government Instrumentality for implementation and operation of the Project, provided that the Service Provider shall have complied with the conditions set out in law for obtaining the relevant Applicable Permits;
 - (b) upon written request from the Service Provider, provide reasonable assistance to the Service Provider in obtaining access to all necessary infrastructure facilities and utilities, including water and electricity at rates and on terms no less favourable to the Service Provider than those generally available to commercial customers receiving substantially equivalent services;
 - (c) make reasonable endeavours to procure that no barriers are erected or placed on or about the Project Network by any Government Instrumentality or persons claiming through or under it, except for reasons of Emergency, national security, law and order or collection of national or county taxes;
 - (d) subject to (including any restrictions contained therein) and in accordance with any Applicable Laws (i) grant to the Service Provider the authority to regulate traffic and (ii) use all reasonable endeavours (which includes liaising with the relevant enforcement agency) to enforce the Applicable Law regarding maximum Gross Vehicle Weights and Axle Loads on the Project Network;
 - (e) assist the Service Provider in procuring police assistance for regulation of traffic, removal of trespassers and security on or at the Project Network;
 - (f) not do or omit to do any act, deed or thing which may in any manner contravene any of the provisions of this Agreement;
 - (g) support, cooperate with and facilitate the Service Provider in the implementation and operation of the Project in accordance with the provisions of this Agreement; and

- (h) upon written request from Lenders' Representative, the Contracting Authority has to undertake Suspension or Termination of the Service Provider, as the case may be, in accordance with the Direct Agreement.

CLAUSE 7

REPRESENTATIONS AND WARRANTIES

7.1 Representations and warranties of the Service Provider

The Contracting Authority has entered this Agreement in reliance on the representations and warranties of the Service Provider and the Service Provider represents and warrants to the Contracting Authority (and in the case of (k) undertakes) that:

- (a) it is duly organised and validly existing under the laws of Kenya, and has full power and authority to execute and perform its obligations under this Agreement, the Financing Agreements and the Principal Sub-Contracts and to carry out the transactions contemplated hereby;
- (b) it has taken all necessary corporate and other actions under Applicable Laws to authorise the execution and delivery of this Agreement and to validly exercise its rights and perform its obligations under this Agreement, the Financing Agreements and the Principal Sub-Contracts;
- (c) it has the financial standing and capacity to undertake the Project in accordance with the terms of this Agreement;
- (d) this Agreement constitutes its legal, valid and binding obligation, enforceable against it in accordance with the terms hereof, and its obligations under this Agreement will be legally valid, binding and enforceable obligations against it in accordance with the terms hereof;
- (e) it is subject to the laws of Kenya, and hereby expressly and irrevocably waives any immunity in any jurisdiction in respect of this Agreement or matters arising thereunder including any obligation, liability or responsibility hereunder;
- (f) the information furnished in the Bid and as updated in writing on or before the date of this Agreement is true and accurate in all respects as on the date of this Agreement;
- (g) the execution, delivery and performance of this Agreement, the Financing Agreements and the Principal Sub-Contracts will not conflict with, result in the breach of, constitute a default under, or accelerate performance required by any of the terms of its Memorandum and Clauses of Association or those of any member of the Consortium or any Applicable Laws or any covenant, contract, agreement, arrangement, understanding, decree or order to which it is a party or by which it or any of its properties or assets is bound or affected;
- (h) there are no actions, suits, proceedings, or investigations pending or, to its knowledge, threatened against it at law or in equity before any court or before any other judicial, quasi-judicial or other authority, the outcome of which would result in the breach of this Agreement or which individually

or in the aggregate may result in any material impairment of its ability to perform any of its obligations under this Agreement;

- (i) it has no knowledge of any violation or default with respect to any order, writ, injunction or decree of any court or any legally binding order of any Government Instrumentality which may result in any material adverse effect on its ability to perform its obligations under this Agreement and no fact or circumstance exists which would give rise to such proceedings that would adversely affect the performance of its obligations under this Agreement;
- (j) it has complied with Applicable Laws in all material respects and has not been subject to any fines, penalties, injunctive relief or any other civil or criminal liabilities which in the aggregate have or may have a material adverse effect on its ability to perform its obligations under this Agreement;
- (k) it shall at no time undertake or permit any Change in Ownership except in accordance with the provisions of Clause 5.3 and that the Lead Member, directly or indirectly, holds not less than [51% (fifty-one per cent)] of its issued and paid up Equity as on the date of this Agreement and up to the Completion Date and thereafter for a period of 5 (five) years after the Completion Date hold not less than [26%] of its issued and paid up Equity;
- (l) the Lead Member and other Consortium Members have the financial standing and resources to fund the required Equity and to raise the debt necessary for undertaking and implementing the Project in accordance with this Agreement;
- (m) the Lead Member and other Consortium Members are duly organised and validly existing under the laws of the jurisdiction of its incorporation, and has requested the Contracting Authority to enter into this Agreement with the Service Provider pursuant to the NOPB, and has agreed to and unconditionally accepted the terms and conditions set forth in this Agreement;
- (n) all its rights and interests in the Project Network shall pass to and vest in the Contracting Authority on the Transfer Date free and clear of all liens, claims and Encumbrances, without any further act or deed on its part or that of the Contracting Authority, and that none of the Project Assets shall be acquired by it, subject to any agreement under which a security interest or other lien or Encumbrance is retained by any person, save and except as expressly provided in this Agreement;
- (o) no representation or warranty by it contained herein or in any other document furnished by it to the Contracting Authority or to any Government Instrumentality in relation to Applicable Permits contains or will contain any untrue or misleading statement of material fact or omits or will omit to state a material fact necessary to make such representation or warranty not misleading;

- (p) no sums, in cash or kind, have been paid or will be paid, by it or on its behalf, to any person by way of fees, commission or otherwise for securing the Project or entering into this Agreement or for influencing or attempting to influence any officer or employee of the Contracting Authority or any Government Instrumentality in connection therewith;
- (q) all information provided by [*selected bidder/ Consortium Members*] in response to the Request for Qualification and Request for Proposals or otherwise, is to the best of its knowledge and belief, true and accurate in all material respects; and
- (r) it has not taken any action nor have any steps been taken or legal proceedings been started or threatened against it for its winding up, dissolution or for the appointment of any insolvency officer and it is not unable to pay its debts (as defined at section 384 of the Insolvency Act)

The representations set out in this Clause 7.1 (other than Clauses 7.1(f) and (q)) shall survive execution of this Agreement and are deemed repeated by reference to the facts and circumstances then existing on each Annuity Payment Date and in the case of (n) on the Transfer Date.

7.2 Representations and warranties of the Contracting Authority

The Contracting Authority represents and warrants to the Service Provider that as at the Effective Date :

- (a) it has full power and authority to execute, deliver and perform its obligations under this Agreement and to carry out the transactions contemplated herein and that it has taken all actions necessary to execute this Agreement, exercise its rights and perform its obligations, under this Agreement;
- (b) it has taken all necessary actions under the Applicable Laws to authorise the execution, delivery and performance of this Agreement;
- (c) it will comply and/or procure compliance with the requirements in relation to the Roads Annuity Fund Regulations 2015;
- (d)
- (e)
- (f) no representation or warranty by it contained herein will contain any untrue or misleading statement of material fact or omits or will omit to state a material fact necessary to make such representation or warranty not misleading.

7.3 Disclosure

In the event that any occurrence or circumstance comes to the attention of either Party that renders any of its aforesaid representations or warranties untrue or

incorrect, such Party shall immediately notify the other Party of the same. Such notification shall not have the effect of remedying any breach of the representation or warranty that has been found to be untrue or incorrect nor shall it adversely affect or waive any right, remedy or obligation of either Party under this Agreement.

CLAUSE 8

DISCLAIMER

8.1 Disclaimer

- 8.1.1 The Service Provider acknowledges that prior to the execution of this Agreement, the Service Provider has, after a complete and careful examination, made an independent evaluation of the Request for Qualification, Request for Proposals, Scope of the Project, Specifications and Standards and shall be deemed to have carried out any ground physical and geological investigations and to have inspected, examined and satisfied itself as to the nature of the Site, existing structures, local conditions, physical qualities of ground, load-bearing subsoil and geology, contamination, traffic volumes and all information provided by the Contracting Authority and has obtained procured or gathered otherwise, and has determined to its satisfaction the accuracy or otherwise thereof and the nature and extent of difficulties, risks and hazards as are likely to arise or may be faced by it in the course of performance of its obligations hereunder. The Contracting Authority makes no representation whatsoever, express, implicit or otherwise, regarding the accuracy, adequacy, correctness, reliability and/or completeness of any assessment, assumptions, statement or information provided by it and the Service Provider confirms that it shall have no claim whatsoever against the Contracting Authority in this regard and to avoid doubt the Service Provider accepts full responsibility for all matters referred to in this Clause 8.1.1.
- 8.1.2 The Service Provider acknowledges and hereby accepts the risk of, and all losses (whether Direct Losses or indirect losses) arising from any inadequacy, mistake or error in or relating to any of the matters set forth in Clause 8.1.1 above and hereby acknowledges and agrees that the Contracting Authority shall not be liable for the same in any manner whatsoever to the Service Provider, the Consortium Members and their Associates or any person or any funders claiming through or under any of them.
- 8.1.3 The Parties agree that any mistake or error in or relating to any of the matters set forth in Clause 8.1.1 above shall not vitiate this Agreement, or render it voidable.
- 8.1.3 In the event that either Party becomes aware of any mistake or error relating to any of the matters set forth in Clause 8.1.1 above, that Party shall immediately notify the other Party, specifying the mistake or error.
- 8.1.4 Except as otherwise provided in this Agreement, all risks relating to the Project shall be borne by the Service Provider and the Contracting Authority shall not be liable in any manner for such risks or the consequences thereof.

Part III

Development and Operations

CLAUSE 9

PERFORMANCE SECURITY

9.1 Performance Security

- 9.1.1 The Service Provider shall, as security for the performance of its obligations during the Construction Period, provide to the Contracting Authority in accordance with Clauses 4.1.3(a) and 4.1.4(a), an irrevocable and unconditional guarantee from a Bank for a sum equivalent to 5% (five per cent) of the Total Project Costs in the form set forth in Schedule F (the **Performance Security**). Until such time the Performance Security is provided by the Service Provider pursuant hereto and the same comes into effect, the Bid Security shall remain in force and effect, and upon such provision of the Performance Security pursuant hereto, the Contracting Authority shall release the Bid Security to the Service Provider.
- 9.1.2 Notwithstanding anything to the contrary contained in this Agreement, in the event the portion of Performance Security as set out in Clause 4.1.3(a) is not provided by the Service Provider by the Effective Date, the Contracting Authority may encash the Bid Security and appropriate the proceeds thereof as Damages, and thereupon all rights, privileges, claims and entitlements of the Service Provider under or arising out of this Agreement shall be deemed to have been waived by, and to have ceased with the concurrence of the Service Provider, and this Agreement shall be deemed to have been terminated by mutual agreement of the Parties.

9.2 Appropriation of Performance Security

Upon occurrence of a Service Provider Default or any failure to meet any Condition Precedent by the Service Provider, the Contracting Authority shall, without prejudice to its other rights and remedies hereunder or in law, be entitled to encash and appropriate the relevant amounts from the Performance Security as Damages for such Service Provider Default or failure to meet any Condition Precedent. Upon such encashment and appropriation from the Performance Security, the Service Provider shall, within 30 (thirty) days thereof, replenish, in case of partial appropriation, to its original level the Performance Security, and in case of appropriation of the entire Performance Security provide a fresh Performance Security, as the case may be, and the Service Provider shall, within the time so granted, replenish or furnish fresh Performance Security as aforesaid failing which the Contracting Authority shall be entitled to terminate this Agreement in accordance with Clause 33. Upon replenishment or furnishing of a fresh Performance Security, as the case may be, as aforesaid, the Service Provider shall be entitled to an additional Cure Period of 90 (ninety) days for remedying the Service Provider Default or to meet any Condition Precedent, and in the event of the Service Provider not curing its default or meeting such Condition Precedent within such Cure Period, the Contracting Authority shall be entitled to encash and appropriate such Performance Security as Damages, and to terminate this Agreement in accordance with Clause 33.

9.3 Release of Performance Security

The Performance Security shall remain in force and effect for a period of one year from the Appointed Date, but shall be released earlier upon the Service Provider expending on the construction phase of the Project an aggregate sum that is not less than 20% (twenty per cent) of the Total Project Cost; provided, however, that the Performance Security shall not be released if the Service Provider is in breach of this Agreement. Upon request made by the Service Provider for release of the Performance Security along with the particulars which establish satisfaction of the requirements specified under this Clause 9.3, the Contracting Authority shall release the Performance Security forthwith.

CLAUSE 10
RIGHT OF WAY

10.1 The Site

The Project Network shall comprise the land described in Schedule A and in respect of which the Right of Way shall be provided and granted by the Contracting Authority to the Service Provider as a licensee under and in accordance with this Agreement (the **Site**). For the avoidance of doubt, it is hereby acknowledged and agreed that references to the Site shall be construed as references to the land required for the Project Network as set out in Schedule A.

10.2 Licence, Access and Right of Way

10.2.1 The Contracting Authority hereby grants to the Service Provider access to the Site for carrying out any surveys, investigations and soil tests that the Service Provider may deem necessary during the Development Period, it being expressly agreed and understood that the Contracting Authority shall have no liability whatsoever in respect of survey, investigations and tests carried out or work undertaken by the Service Provider on or about the Site pursuant hereto in the event of Termination or otherwise.

10.2.2 In consideration of this Agreement and the covenants and warranties on the part of the Service Provider herein contained but subject to Clause 4 (Conditions Precedent), the Contracting Authority, in accordance with the terms and conditions set forth herein, hereby grants to the Service Provider, commencing from the Appointed Date, leave and licence rights in respect of all the land (along with any buildings, constructions or immovable assets, if any, thereon) comprising the Site which is described, delineated and shown in Schedule A (the **Licensed Site**) free of any Encumbrances, to develop, operate and maintain the said Licensed Site, together with all and singular rights, liberties, privileges, easements and appurtenances whatsoever to the said Licensed Sites, hereditaments or premises or any part thereof belonging to or in any way appurtenant thereto or enjoyed therewith, for the duration of the Project Term and, for the purposes permitted under this Agreement, and for no other purpose whatsoever.

10.2.3 The licence, access and right of way granted by this Agreement to the Service Provider shall always be subject to existing rights of way and the Service Provider shall perform its obligations in a manner that the Project Network or an alternative thereof are open to traffic at all times during the Construction Period.

10.2.4 It is expressly agreed that the licence granted hereunder shall terminate automatically and forthwith, without the need for any action to be taken by the Contracting Authority to terminate the licence, upon the Termination of this Agreement for any reason whatsoever. For the avoidance of doubt, the Parties expressly agree that notwithstanding any temporary or permanent structures erected on the Site by the Service Provider or its sub-licensees, the licence in respect of the Site shall automatically terminate, without any further act of the Parties, upon Termination of this Agreement.

10.2.5 The Service Provider hereby irrevocably appoints the Contracting Authority (or its nominee) to be its true and lawful attorney, to execute and sign in the name of the Service Provider a transfer or surrender of the licence granted hereunder at any time after the Project Term has expired or has been terminated earlier in terms hereof, a sufficient proof of which will be the declaration of any duly authorised officer of the Contracting Authority, and the Service Provider consents to it being registered for this purpose.

10.2.6 It is expressly agreed that:

- (i) trees on the Site are property of the Contracting Authority except that the Service Provider shall be entitled to exercise usufructuary rights in respect of such trees during the Project Term;
- (ii) Collection and appropriation of any Fee for the use of Project Network or any part thereof do not form part of the license granted to the Service Provider under this Agreement.

10.3 Vacant possession and Miscellaneous

10.3.1 The Parties agree that on or prior to the Appointed Date, the Contracting Authority shall have granted vacant access and Right of Way to that part of the Site belonging to it to the extent necessary for the Project Network. In the event Financial Close is delayed solely on account of delay by the Contracting Authority in failing to secure the grant of vacant access and Right of Way for land necessary for the Project Network, the Contracting Authority shall not be liable to payment of Damages to the Service Provider in accordance with the provisions of Clause 4.3.

10.3.2 To the extent that the design provided and adopted by the Service Provider requires any additional Right of Way then the Contracting Authority shall be responsible at its costs for the procurement of such additional land for Right of Way. If there is a delay in such acquisition shall for the purposes of this Agreement be deemed to constitute Relief Events under Clause 30.

10.3.3 The Service Provider may procure at its cost and expense and on its own the land that may be required by it for Additional Facilities and the Contracting Authority shall have no obligation or liability in respect thereof. For the avoidance of doubt, the Service Provider shall seek prior consent of the Contracting Authority to connect any Additional Facility to the Project Network and such consent shall not be unreasonably withheld.

10.4 Site to be free from Encumbrances

Subject to the provisions of Clause 10.3, the Site shall be made available by the Contracting Authority to the Service Provider pursuant hereto free from all Encumbrances and occupations and without the Service Provider being required to make any payment to the Contracting Authority on account of any costs, compensation, expenses and charges for the acquisition and use of such Site for the duration of the Project Term, except insofar as otherwise expressly provided in this Agreement.. For the avoidance of doubt, it is agreed that existing rights of way, easements, privileges, liberties and appurtenances to the Licensed Site shall not be

deemed to be Encumbrances. It is further agreed that the Service Provider accepts and undertakes to bear any and all risks arising out of the inadequacy or physical condition of the Site.

10.5 Protection of Site from encroachments

During the Project Term, the Service Provider shall protect the Site from any and all occupations, encroachments or Encumbrances, and shall not place or create nor permit any Contractor or other person claiming through or under the Service Provider to place or create any Encumbrance or security interest over all or any part of the Site or the Project Assets, or on any rights of the Service Provider therein or under this Agreement, save and except as otherwise expressly set forth in this Agreement.

10.6 Special/temporary right of way

The Service Provider shall bear all costs and charges for any special or temporary right of way required by it in connection with access to the Site. The Service Provider shall obtain at its cost such facilities on or outside the Site as may be required by it for the purposes of the Project Network and the performance of its obligations under this Agreement.

10.7 Access to the Contracting Authority and Independent Expert

The licence, right of way and right to the Site granted to the Service Provider hereunder shall always be subject to the right of access of the Contracting Authority and the Independent Expert and their employees and agents for levy of toll, inspection, viewing and exercise of their rights and performance of their obligations under this Agreement.

10.8 Geological and archaeological finds

It is expressly agreed that mining, geological or archaeological rights do not form part of the licence granted to the Service Provider under this Agreement and the Service Provider hereby acknowledges that it shall not have any mining rights or interest in the underlying minerals, fossils, antiquities, structures or other remnants or things either of particular geological or archaeological interest and that such rights, interest and property on or under the Site shall vest in and belong to the Contracting Authority or the concerned Government Instrumentality. The Service Provider shall take all reasonable precautions to prevent its workmen or any other person from removing or damaging such interest or property and shall inform the Contracting Authority forthwith of the discovery thereof and comply with such instructions as the concerned Government Instrumentality may reasonably give for the removal of such property. For the avoidance of doubt, it is agreed that any reasonable expenses incurred by the Service Provider hereunder shall be reimbursed by the Contracting Authority. It is also agreed that the Government shall procure that the instructions hereunder are issued by the concerned Government Instrumentality within a reasonable period.

CLAUSE 11

UTILITIES, ASSOCIATED ROADS AND TREES

11.1 Existing utilities advertising infrastructure and roads

Notwithstanding anything to the contrary contained herein, the Service Provider shall ensure that at all times the respective entities owning the existing roads, right of way, advertising infrastructure or utilities on, under or above or beside the Site are enabled by it to keep such utilities in continuous satisfactory use, if necessary, by providing suitable temporary or permanent diversions with the Contracting Authority of the controlling body of that road, right of way or utility, and the Contracting Authority shall, upon written request from the Service Provider, initiate and undertake at the Service Provider's cost, legal proceedings for acquisition of any right of way necessary for such diversion.

11.2 Shifting of obstructing utilities and advertising infrastructure

The Service Provider shall, subject to Applicable Laws and with assistance of the Contracting Authority, undertake shifting of any utility including electric lines, water pipes and telephone cables or advertising infrastructure, to an appropriate location or alignment within or outside the Site if and only if such utility causes or shall cause a material adverse effect on the construction, operation or maintenance of the Project Network. The costs of shifting of such utilities or advertising infrastructure shall be borne as follows:

- (i) Firstly by the Service Provider from the amounts specified for such shifting and/or relocation of utilities within the Bid submitted by the Consortium (the "**Utilities Relocation Budget**") to a maximum sum of 85% of the Utilities Relocation Budget; and
- (ii) Secondly any additional amount required over and above the Utilities Relocation Budget shall be provided by the Contracting Authority or, if permitted by law, recovered by the Service Provider from the entity owning such utility

It is agreed by the Parties that any portion of the Utilities Relocation Budget that has not been utilised by the Completion Date shall be refunded to the Contracting Authority and such portion shall be refunded within thirty (30) business days of the Completion Date

In the event of any delay in shifting thereof, the Service Provider shall be excused for failure to perform any of its obligations hereunder if such failure is a direct consequence of delay on the part of the entity owning such electric lines, water pipes or telephone cables, as the case may be.

11.3 New utilities, advertising and roads

- 11.3.1 The Service Provider shall allow, subject to such conditions as the Contracting Authority may specify, access to, and use of the Site for laying telephone lines, water pipes, electric cables, advertising infrastructure, or other public utilities. Where such access or use causes any financial loss to the Service Provider, it may

require the Contracting Authority to pay compensation to it which may be by way of remittance to it of any damages paid by the user of the Site as per Applicable Laws. For the avoidance of doubt, it is agreed that use of the Site under this Clause shall not in any manner relieve the Service Provider of its obligation to maintain the Project Network in accordance with this Agreement and any damage caused by such use shall be restored forthwith.

11.3.2 The Contracting Authority may, by notice require the Service Provider to connect any adjoining road to the Project Network. Upon receipt of a notice hereunder, the connecting portion thereof falling within the Site shall be constructed by the Service Provider at the Contracting Authority's cost in accordance with Clause 16, and the maintenance thereof shall be undertaken by the Service Provider in accordance with the provisions of Clause 17.1.3.

11.3.3 The Contracting Authority may by notice require the Service Provider to connect, through a paved road, any adjoining service station, hotel, motel or any other public facility or amenity to the Project Network, whereupon the connecting portion thereof that falls within the Site shall be constructed and maintained by the Service Provider upon advance payment of the cost to be made by the beneficiary entity in accordance with the amount and period as reasonably determined in good faith by the Contracting Authority at the time of installation. For the avoidance of doubt, any connecting road constructed prior to the Appointed Date and falling within the Site shall be maintained by the Service Provider upon advance payment to be made by the beneficiary entity in accordance with the provisions of this Clause.

11.4 Felling of trees

The Contracting Authority shall assist the Service Provider in obtaining the Applicable Permits for felling of trees to be identified by the Contracting Authority for this purpose if and only if such trees cause a material adverse effect on the construction, operation or maintenance of the Project Network. The cost of such felling shall be borne by the Service Provider, and in the event of any delay in felling thereof for reasons beyond the control of the Service Provider, it shall be excused for failure to perform any of its obligations hereunder if such failure is a direct consequence of delay in the felling of trees. For the avoidance of doubt, the Parties hereto agree that the felled trees shall be deemed to be owned by the Contracting Authority and shall be disposed in such manner and subject to such conditions as the Contracting Authority may in its sole discretion deem appropriate.

CLAUSE 12
THE WORKS

12.1 Overall responsibility

The Service Provider shall carry out the Works:

- (a) in accordance with the terms of this Agreement;
- (b) so as to procure satisfaction of the Scope of the Project and Specifications and Standards; and
- (c) so that the Works fully comply with and meet all the requirements of the Output Specifications and the Method Statements.

The Service Provider warrants that it has used, and will continue to use, the degree of skill and care in the design of the Project Network and the Project Facilities that would reasonably be expected of a competent designer experienced in carrying out design activities of a similar nature, scope and complexity to those comprised in the Works.

12.2 Obligations prior to commencement of construction

Prior to commencement of the Works, the Service Provider shall:

- (a) submit to the Contracting Authority and the Independent Expert, its detailed design (for the first milestone of the Project Network as set out in Schedule M (Output Specifications) to this Agreement), construction methodology, Project Quality Management Plan, and the procurement, engineering and construction time schedule for completion of the Project in accordance with the Project Completion Schedule;
- (b) appoint its representative duly authorised to deal with the Contracting Authority in respect of all matters under or arising out of or relating to this Agreement;
- (c) undertake, do and perform all such acts, deeds and things as may be necessary or required before commencement of construction under and in accordance with this Agreement, the Applicable Laws and Applicable Permits; and
- (d) make its own arrangements for quarrying of materials needed for the Project Network under and in accordance with the Applicable Laws and Applicable Permits.

12.3 Maintenance during Construction Period

During the Construction Period, the Service Provider shall maintain, any existing lane(s) of the Project Networks in accordance with the requirements set out in the Output Specifications. The Service Provider may, at its cost, interrupt and divert the flow of traffic if such interruption and diversion is necessary for the efficient

progress of the Works and conforms to Good Industry Practice, provided that such interruption and diversion shall be undertaken by the Service Provider only with the prior written approval of the Independent Expert (such approval shall not be unreasonably withheld). For the avoidance of doubt, it is agreed that the Service Provider shall at all times be responsible for ensuring safe operation of the Project Network.

12.4 Drawings

In respect of the Service Provider's obligations relating to the Drawings of the Project Network as set forth in the Specifications and Standards, the following shall apply:

- (a) the Service Provider shall prepare and submit, with reasonable promptness and in such sequence as is consistent with the Project Completion Schedule, 3 (three) copies each of all Drawings to the Independent Expert for review;
- (b) by submitting the Drawings for review to the Independent Expert, the Service Provider shall be deemed to have represented that it has determined and verified that the design and engineering, including field construction criteria related thereto, are in conformity with the Scope of the Project and the Specifications and Standards;
- (c) within seven (7) days of the receipt of the Drawings, the Independent Expert shall review the same and convey its observations to the Service Provider with particular reference to their conformity or otherwise with the Scope of the Project and the Specifications and Standards. The Service Provider shall not be obliged to await the observations of the Independent Expert on the Drawings submitted pursuant hereto beyond the said 7 (seven) days period and may begin or continue Construction Works at its own discretion and risk;
- (d) where the aforesaid observations of the Independent Expert indicate that the Drawings are not in conformity with the Scope of the Project or the Specifications and Standards, such Drawings shall be revised by the Service Provider and resubmitted to the Independent Expert for review. The Independent Expert shall give its observations, if any, within 7 (seven) days of receipt of the revised Drawings;
- (e) no review and/or observation of the Independent Expert and/or its failure to review and/or convey its observations on any Drawings shall relieve the Service Provider of its obligations and liabilities under this Agreement in any manner nor shall the Independent Expert or the Contracting Authority be liable for the same in any manner;
- (f) without prejudice to the foregoing provisions of this Clause 12.4, the Service Provider shall submit to the Contracting Authority for review and comments, its Drawings relating to alignment of the Project Network, finished road level and general arrangement drawings of major bridges, flyovers and grade separators, and the Contracting Authority shall have the right but not the obligation to undertake such review and provide its

comments, if any, within 28 (twenty eight) days of the receipt of such Drawings. The provisions of this Clause 12.4 shall apply *mutatis mutandis* to the review and comments hereunder; and

- (g) within 90 (ninety) days of the Project Completion Date, the Service Provider shall furnish to the Contracting Authority and the Independent Expert a complete set of as-built Drawings, in 2 (two) hard copies and in a CD-ROM form or in such other medium as may be acceptable to the Contracting Authority, reflecting the Project Network as actually designed, engineered and constructed, including an as-built survey illustrating the layout of the Project Network and setback lines, if any, of the buildings and structures forming part of Project Facilities.

12.5 Upgrading of the Project Network

12.5.1 From the Appointed Date, the Service Provider shall undertake construction of the Project Network, and in conformity with the Specifications and Standards and Output Specifications. The 730th day from the Appointed Date shall be the scheduled date for completion of the Works (the **Scheduled Completion Date**).

12.5.2 The Service Provider agrees and undertakes to the Contracting Authority that it shall use all reasonable endeavours to complete the Project Network on or before the Scheduled Completion Date in accordance with the Project Completion Schedule. In the event of a Delay Event or where Clause 31.2 applies the Longstop Date shall be extended in accordance with , respectively, Clauses 29.5 or 31.3 (as the case may be).

12.5.3 If at any time either on or before the Scheduled Completion Date the Independent Expert has notified the Contracting Authority that it has reasonable grounds to believe that the Works will not be completed by the Longstop Date the Contracting Authority shall be entitled to issue a notice requiring the Service Provider to deliver a works programme to it within 15 (fifteen) business days demonstrating that the Works will be finished prior to the Longstop Date. The Contracting Authority shall be entitled to review progress against the programme 60 days after delivery of such programme and if the Independent Expert remains of the opinion (acting reasonably) that the Works will not be completed prior to the Longstop Date the Contracting Authority shall be entitled to declare that a Service Provider Default has occurred and Clause 33.1.2 shall apply, provided that the Contracting Authority may in its sole discretion and where there are reasonable grounds to do so, grant relief to the Service Provider and not declare a Service Provider Default.

12.5.4 In the event that the Project Completion Date has not occurred by the Longstop Date the Contracting Authority shall be entitled to terminate this Agreement unless the failure is on account of reasons solely attributable to a material breach by the Contracting Authority or due to a Delay Event, provided that the Contracting Authority may, upon the request of the Service Provider, consider whether there are reasonable grounds to extend the time by which the Project Completion Date should occur.

12.5.5 The Parties each undertaken to co-operate with the Independent Expert to ensure that the Independent Expert is familiar with all necessary aspects of the Project for the purposes of its role.

CLAUSE 13

MONITORING OF WORKS

13.1 Monthly progress reports

During the Construction Period, the Service Provider shall, no later than 7 (seven) days after the end of each month, deliver to the Contracting Authority and the Independent Expert a monthly report on the progress of the Works and shall promptly give such other relevant information as may be reasonably required by the Independent Expert.

13.2 Inspection

13.2.1 During the Construction Period, the Independent Expert shall inspect the Works at such intervals (but not less than on a monthly basis) as the Contracting Authority requests and make a report of such inspection (the **Inspection Report**) stating in reasonable detail the Defects (if any) with particular reference to the Scope of the Project and Specifications and Standards. It shall send a copy of the Inspection Report to the Contracting Authority and the Service Provider within 7 (seven) days of such inspection and upon receipt thereof, the Service Provider shall rectify and remedy any identified Defects stated in the Inspection Report. Any inspection or submission of an Inspection Report by the Independent Expert shall not relieve or absolve the Service Provider of its obligations and liabilities hereunder in any manner whatsoever.

13.2.2 The Service Provider shall also ensure that the Independent Expert and/or the Contracting Authority shall have at reasonable times and on reasonable notice the right (but not so as to delay or impede the progress of the Works) to enter the Site in order to inspect the state and progress of the Works and to monitor compliance by the Service Provider with its obligations under this Agreement. In addition, the Service Provider and the Contracting Authority shall have monthly meetings to discuss the progress of the Works.

13.3 Right to Open Up

13.3.1 Provided that the Independent Expert has notified the Service Provider of its intention at any time prior to the Completion Date, the Independent Expert shall have the right to open up and inspect any part or parts of the Works where the Independent Expert reasonably believes that such part or parts of the Works is or are defective and the Service Provider shall comply with such request.

13.3.2 In the event that results of any inspection conducted under this Clause 13.3 establish the existence of any Defects in the Works, the Service Provider shall rectify and make good such Defects and any consequence of such Defects at no cost to the Contracting Authority and furnish a report to the Independent Expert confirming that this has been achieved. The Independent Expert shall require the Service Provider to carry out or cause to be carried out tests to determine that such remedial measures have brought the Works into compliance with the Specifications and Standards, and the procedure set forth in this Clause 13.3 shall be repeated until such Works conform to the Specifications and Standards. For the avoidance of

doubt, it is agreed that tests pursuant to this Clause 13.3 shall be undertaken in addition to and independent of the tests that shall be carried out by the Service Provider for its own quality assurance in accordance with Good Industry Practice. It is also agreed that a copy of the results of such tests shall be sent by the Service Provider to the Independent Expert forthwith.

- 13.3.3 If following the exercise by the Independent Expert of his right pursuant to Clause 13.3.1 the inspection shows that the relevant part or parts of the Works are not defective, any delay to the Works shall relieve the Contractor from its obligation to use reasonable endeavours to complete the Project Network on or before the Scheduled Completion Date.

13.4 Delays during construction

Without prejudice to the provisions of Clause 12.5.2, if the Service Provider fails to achieve any of the Project Milestones or the Independent Expert shall have reasonably determined that the rate of progress of the Works is such that the Works are not likely to be achieved by the Scheduled Completion Date, it shall notify the Service Provider to this effect, and the Service Provider shall, within 15 (fifteen) days of such notice deliver to the Independent Expert a detailed report setting out in reasonable detail the steps that the Service Provider and the Contractor propose to take to expedite progress and the period within which it shall achieve the Project Completion Date.

13.5 Suspension of unsafe Construction Works

- 13.5.1 Upon recommendation of the Independent Expert the Contracting Authority may by written notice require the Service Provider to suspend forthwith the whole or any part of the Works if, in the reasonable opinion of the Contracting Authority, such work threatens the safety of the Users and pedestrians.
- 13.5.2 The Service Provider shall, following receipt of a notice under Clause 13.5.1, promptly suspend the Works or any part thereof for such time and in such manner as may be specified by the Contracting Authority and thereupon carry out remedial measures to secure the safety of suspended works and the Users. The Service Provider may by written notice require the Independent Expert to inspect such remedial measures forthwith and make a report to the Contracting Authority recommending whether or not the suspension hereunder may be revoked. Upon receiving the recommendations of the Independent Expert, the Contracting Authority shall either revoke such suspension or instruct the Service Provider to carry out such other and further remedial measures as may be necessary in the reasonable opinion of the Contracting Authority, and the procedure set forth in this Clause 13.5 shall be repeated until the suspension hereunder is revoked.
- 13.5.3 Subject to Clause 29.6, all reasonable costs incurred for maintaining and protecting the Construction Works or part thereof during the period of suspension (the **Preservation Costs**), shall be borne by the Service Provider, provided that if the suspension has occurred as a result of any material breach of this Agreement by the Contracting Authority, the Preservation Costs shall be borne by the Contracting Authority.

13.5.4 If suspension of Works is for reasons not attributable to the Service Provider, the Independent Expert shall determine any extension of the dates set forth in the Project Completion Schedule to which the Service Provider is reasonably entitled, and shall notify the Contracting Authority accordingly whereupon the Contracting Authority shall extend such Project Completion Schedule dates in accordance with the recommendations of the Independent Expert. In the event that the Scheduled Completion Date is extended pursuant hereto, the Project Term shall be deemed to be extended by a period equal in length to the period of extension of the Scheduled Completion Date and Clause 31.2 shall apply provided that the Service Provider shall be placed in a no better no worse position.

13.6 Video recording

During the Construction Period, the Service Provider shall provide to the Contracting Authority for every calendar quarter, a video recording, which will be compiled into a 3 (three)-hour compact disc or digital video disc, as the case may be, covering the status and progress of the Works in that quarter. The first such video recording shall be provided to the Contracting Authority within 7 (seven) days of the Appointed Date and thereafter, no later than 15 (fifteen) days after the close of each quarter.

CLAUSE 14

COMPLETION CERTIFICATE

14.1 Tests

14.1.1 At least 30 (thirty) days prior to the anticipated completion of the Project Network, the Service Provider shall notify the Independent Expert of its intention to subject the Project Network to Tests. The date and time of each of the Tests shall be determined by the Independent Expert in consultation with the Service Provider, and notified to the Contracting Authority who may designate its representative to witness the Tests. The Service Provider shall provide such assistance as the Independent Expert may reasonably require for conducting the Tests. In the event of the Service Provider and the Independent Expert failing to mutually agree on the dates for conducting the Tests, the Service Provider shall fix the dates within 30 (thirty days) from the date of a request from the Independent Expert by giving not less than 3 (three) days' notice to the Independent Expert.

14.1.2 All Tests shall be conducted in accordance with Schedule I. The Independent Expert shall observe, monitor and review the results of the Tests to determine compliance of the Project Network with the (i) Specifications and Standards and (ii) the Output Specifications and if it is reasonably anticipated or determined by the Independent Expert during the course of any Test that the performance of the Project Network or any part thereof does not meet either (i) the Specifications and Standards or (ii) the Output Specifications, it shall have the right to suspend or delay such Test(s) and require the Service Provider to remedy and rectify the defects or deficiencies identified. Upon completion of each Test, the Independent Expert shall provide to the Service Provider and the Contracting Authority copies of all Test data including detailed Test results. For the avoidance of doubt, it is expressly agreed that the Independent Expert may require the Service Provider to carry out or cause to be carried out additional Tests, in accordance with Good Industry Practice, for determining the compliance of the Project Network with (i) the Specifications and Standards and (ii) the Output Specifications.

14.2 Completion Certificate

Upon completion and commissioning of the Works and the Independent Expert determining the Tests to be successful and the Works have been completed in accordance with the Tests, the Independent Expert shall promptly issue to the Service Provider and the Contracting Authority a certificate substantially in the form set out in Schedule J (the **Completion Certificate**) stating the date upon which, in its opinion, the Completion Date has occurred.

14.3 Provisional Certificate

14.3.1 The Independent Expert may, at the request of the Service Provider, issue a provisional certificate of completion substantially in the form set forth in Schedule J (the **Provisional Certificate**) stating the date upon which, in his opinion, the Completion Date has occurred if the Tests are successful and the Project Network can be safely and reliably placed in commercial operation though certain works or things forming part thereof are outstanding and not yet complete. In such an event,

the Provisional Certificate shall have appended thereto a list of all outstanding items signed jointly by the Independent Expert and the Service Provider (the **Snag List**), provided that the Independent Expert shall not withhold the Provisional Certificate for reason of any work remaining incomplete where the delay in completion thereof is attributable to the Contracting Authority. The issue of the Completion Certificate shall, in the absence of manifest error, bad faith or fraud, be conclusive evidence for the purpose only of ascertaining that the Completion Date has occurred on the date stated in the Completion Certificate.

14.3.2 The Parties hereto expressly agree that a Provisional Certificate under this Clause 14.3 may, upon request of the Service Provider to this effect, be issued for the operating part of the Project Network, if at least 90% (ninety per cent) of the total length of the Project Network has been completed. Upon issue of such Provisional Certificate, the provisions of Clause 15 shall apply to such completed part.

14.4 Completion of Snag List items

14.4.1 All items in the Snag List shall be completed by the Service Provider within 90 (ninety) days of the date of issue of the Provisional Certificate in a manner so as to cause as little disruption as reasonably practicable to the Users and for any delay thereafter the Contracting Authority shall be entitled to withhold an amount equal to 7% of each Annuity Payment due to the Service Provider calculated by reference to a daily rate for each day of delay commencing from the date of issue of the Provisional Certificate until all items are completed to the satisfaction of the Independent Expert. No withholdings pursuant to this Clause 14.4.1 will be made where any delay directly arises from reasons solely attributable to a breach of its obligations under this agreement by the Contracting Authority or a Delay Event. Subject to the making of such withholdings, the Service Provider shall be entitled to a further period not exceeding 120 (one hundred and twenty) days for completion of the Snag List items before a Service Provider Default shall occur. For the avoidance of doubt, it is agreed that if completion of any item is delayed for reasons either solely attributable to the Contracting Authority (being for the purpose of this Clause 14 either breach of its obligations under this Agreement or an instruction to delay the Works) or a Delay Event, the Completion Date thereof shall be determined by the Independent Expert in accordance with Good Industry Practice, and such Completion Date shall be deemed to be the date of issue of the Provisional Certificate for the purposes of deductions under this Clause.

14.4.2 Upon completion of all Snag List items, the Independent Expert shall issue the Completion Certificate. Failure of the Service Provider to complete all the Snag List items within the time set forth in Clause 14.4.1 for any reason, other than for reasons solely attributable to the Contracting Authority or a Delay Event, shall constitute a breach of contracts and shall entitle the Contracting Authority (at its sole discretion) either to itself (or engage others to) carry out the necessary Works necessary to complete the Snag List at the Service Provider's risk and costs or to terminate this Agreement.

14.5 Withholding of Provisional Certificate

- 14.5.1 If the Independent Expert determines that the Project Network or any part thereof does not conform to the provisions of this Agreement and cannot be safely and reliably placed in operation, it shall as soon as practicable deliver a report to both the Contracting Authority and the Service Provider. Upon receipt of such a report from the Independent Expert and after conducting its own inspection, where the Contracting Authority is of the opinion that the Project Network is not fit and safe for service, it shall, within 7 (seven) days of receiving the aforesaid report, notify the Service Provider in writing identifying the Defects in the Project Network and shall be entitled to direct the Independent Expert to withhold issuance of the Provisional Certificate until such time as the Defects have been rectified to its satisfaction. Upon receipt of such notice, the Service Provider shall promptly rectify such Defects and following such rectification Tests shall be undertaken in accordance with this Clause 14. Such procedure shall be repeated as necessary until the Defects are rectified or remedied.
- 14.5.2 Notwithstanding anything to the contrary contained in Clause 14.5.1, the Contracting Authority may, at any time after receiving a report from the Independent Expert under that Clause, direct the Independent Expert to issue a Provisional Certificate under Clause 14.3, and such direction shall be complied forthwith.

14.6 Rescheduling of Tests

If the Independent Expert certifies to the Contracting Authority and the Service Provider that it is unable to issue the Completion Certificate or Provisional Certificate (as the case may be) because of events or circumstances on account of which the Tests could not be held or had to be suspended, the Service Provider shall be entitled to re-schedule the Tests and hold the same as soon as reasonably practicable.

CLAUSE 15
COMPLETION

15.1 Completion Date

The Works shall be deemed to be complete when the Completion Certificate or the Provisional Certificate (as the case may be) is issued by the Independent Expert under the provisions of Clause 14, and accordingly the operation date of the Project shall be the date on which such Completion Certificate or the Provisional Certificate is issued (the **Completion Date**).

CLAUSE 16

CHANGE OF SCOPE

16.1 Change of Scope

- 16.1.1 The Contracting Authority may, notwithstanding anything to the contrary contained in this Agreement, require the provision of additional works and services which are not included in the Scope of the Project as contemplated by this Agreement (the **Change of Scope**). The Contracting Authority may not require a Change of Scope that will result in an increase by more than 0.5% of the Annuity payments payable to the Service Provider each year under this Agreement. Any such Change of Scope shall be made in accordance with the provisions of this Clause 16 and the costs thereof shall be expended by the Service Provider and reimbursed to it by the Contracting Authority in accordance with Clause 16.3.
- 16.1.2 If the Service Provider determines at any time that a Change of Scope is necessary for providing safer and improved services to the Users, or where the projected number of heavy goods vehicles as was projected in determining the Specifications and Standards and Output Specifications is materially exceeded, it shall by notice in writing require the Contracting Authority to consider such Change of Scope. The Contracting Authority shall, within 21 (twenty one) days of receipt of such notice (or in the case of Clause 16.7 such time as is reasonable for the Contracting Authority to consider the evidence), either accept such Change of Scope with modifications, if any, and initiate proceedings therefor in accordance with this Clause 16 or inform the Service Provider in writing of its reasons for not accepting such Change of Scope.
- 16.1.3 Any works or services which are provided under and in accordance with this Clause 16 shall form part of the Project Network and the provisions of this Agreement shall apply *mutatis mutandis* to such works or services.

16.2 Procedure for Change of Scope

- 16.2.1 In the event of the Contracting Authority determining that a Change of Scope is necessary, it shall issue to the Service Provider a notice specifying in reasonable detail the works and services contemplated thereunder (the **Change of Scope Notice**).
- 16.2.2 Upon receipt of a Change of Scope Notice, the Service Provider shall, with due diligence, provide to the Contracting Authority such information as is necessary, together with preliminary Documentation in support of:
- (a) the impact, if any, which the Change of Scope is likely to have on the Project Completion Schedule if the works or services are required to be carried out during the Construction Period and in all circumstances the estimate of any additional maintenance and/or operational costs (which may result in an adjustment to the Annuity Payment), and
 - (b) the options for implementing the proposed Change of Scope and the effect, if any, each such option would have on the costs and time thereof, including

a detailed breakdown by work classifications specifying the material and labour costs calculated in accordance with the schedule of rates applicable to the works assigned by the Contracting Authority to its contractors, along with the proposed premium/discount on such rates; provided that the cost incurred by the Service Provider in providing such information shall be reimbursed by the Contracting Authority to the extent such cost is certified by the Independent Expert as reasonable.

16.2.3 Upon receipt of information set forth in Clause 16.2.2, if the Contracting Authority decides to proceed with the Change of Scope, it shall convey its preferred option to the Service Provider, and the Parties shall, with assistance of the Independent Expert, thereupon make good faith efforts to agree upon the time and costs for implementation thereof including any adjustment to the Annuity Payment pursuant to clause 16.3.2 below. Upon reaching an agreement, and subject to obtaining any approvals required under the Public Private Partnerships Act, 2013 relating to approval of any Change of Scope, the Contracting Authority shall issue an order (the **Change of Scope Order**) requiring the Service Provider to proceed with the performance thereof. In the event that the Parties are unable to agree, the Contracting Authority may, by issuing a Change of Scope Order, require the Service Provider to proceed with the performance thereof pending resolution of the Dispute, or carry out the works in accordance with Clause 16.5.

16.2.4 The provisions of this Agreement, insofar as they relate to the Works, shall apply *mutatis mutandis* to the works undertaken by the Service Provider under this Clause 16.

16.3 Payment for Change of Scope

16.3.1 Within 21 (twenty one) days of issuing a Change of Scope Order, the Contracting Authority shall make an advance payment to the Service Provider in a sum equal to 20% (twenty per cent) of the cost of Change of Scope as agreed hereunder, and in the event of a Dispute, 20% (twenty per cent) of the cost assessed by the Independent Expert. The Service Provider shall, after commencement of work, present to the Contracting Authority at agreed milestone dates bills for payment in respect of the works in progress or completed works, as the case may be, supported by such Documentation as is reasonably sufficient for the Contracting Authority to determine the accuracy thereof. Within 90 (ninety) days of receipt of such bills, the Contracting Authority shall disburse to the Service Provider such amounts as are certified by the Independent Expert as reasonable and after making a proportionate deduction for the advance payment made hereunder, and in the event of any Dispute, final adjustments thereto shall be made under and in accordance with the Dispute Resolution Procedure.

16.3.2 Notwithstanding anything to the contrary contained in Clause 16.3.1, all costs arising out of any Change of Scope Order issued during the Construction Period shall be borne by the Service Provider, subject to an aggregate ceiling of 0.25% (zero point two five per cent) of the Total Project Cost. Any costs in excess of the ceiling shall be reimbursed by the Contracting Authority in accordance with Clause 16.3.1. In the event that the total cost arising out of Change of Scope Orders (if any) issued prior to the Project Completion Date is less than 0.25% (zero point two five

per cent) of the Total Project Cost, the difference thereof shall be credited by the Service Provider to the Safety Fund within a period of 180 (one hundred and eighty) days of the Project Completion Date. For the avoidance of doubt, it is agreed that the aforesaid 0.25% (zero point two five per cent) of the Total Project Cost shall, to the extent borne by the Service Provider, be deemed to form part of the actual capital cost of the Project.

16.3.2 The Parties shall agree in good faith any adjustment to the Annuity Payment to reflect any increase or decrease in maintenance and/or operational costs arising from the Change of Scope. Any revision to the Annuity Payment shall be made in accordance with Clause 23 (*Financial Adjustment*).

16.4 Restrictions on certain works

16.4.1 Notwithstanding anything to the contrary contained in this Clause 16, but subject to the provisions of Clause 16.4.2, the Contracting Authority shall not require the Service Provider to undertake any works or services if such works or services are likely to delay completion of construction; provided that in the event that the Contracting Authority in its sole discretion considers such works or services to be essential, it may issue a Change of Scope Order, subject to the condition that the works forming part of or affected by such Order shall not be reckoned for purposes of determining completion of construction and issuing the Completion Certificate or the Provisional Certificate (as the case may be).

16.4.2 Notwithstanding anything to the contrary contained in this Clause 16, the Service Provider shall be entitled to nullify any Change of Scope Order if (a) it causes the cumulative costs relating to all the Change of Scope Orders to exceed 5% (five per cent) of the Total Project Cost in any continuous period of 3 (three years immediately preceding the date of such Change of Scope Order or (b) if such cumulative costs exceed 20% (twenty per cent) of the Total Project Cost at any time during the Construction Period.

16.5 Power of the Contracting Authority to undertake works

16.5.1 Notwithstanding anything to the contrary contained in Clauses 16.1.1, 16.2 and 16.3, the Contracting Authority may, after giving notice to the Service Provider and considering its reply thereto, accrue and de-accrue any part of the Project Network in accordance with the provisions set out under Schedule T (Accrual and De-accrual of Parts of the Project Network).

16.5.2 The works undertaken in accordance with this Clause 16.5 shall conform to the Specifications and Standards and shall be carried out in a manner that minimises the disruption in operation of the Project Network. The provisions of this Agreement, insofar as they relate to Works and Tests, shall apply *mutatis mutandis* to the works carried out under this Clause 16.5.

16.6 Reduction in Scope of the Project

16.6.1 Where:

- (i) the Contracting Authority considers that a reduction in the Scope of the Project is necessary,
- (ii) the Service Provider shall have failed to complete any Works on account of a Force Majeure Event or for reasons solely attributable to the Contracting Authority, the Contracting Authority may, in its discretion, require the Service Provider to pay 80% (eighty per cent) of the sum saved as a result of a reduction in the Scope of the Project, and upon such payment to the Contracting Authority, the obligations of the Service Provider in respect of such works shall be deemed to have been fulfilled. For the avoidance of doubt, it is agreed that in the event such reduction in Scope of the Project causes or will cause a reduction in net after-tax return of the Service Provider, the Parties shall meet, as soon as reasonably practical, and agree on a full or partial waiver of the aforesaid payment of 80% (eighty per cent) so as to place the Service Provider a no better no worse position as it would have enjoyed had there been no reduction in Scope of the Project. It is further agreed that the liability of the Contracting Authority under this Clause 16.6 shall not extend beyond waiver of the aforesaid 80% (eighty per cent). It is also agreed that in the event of a dispute, the Dispute Resolution Procedure shall apply.

16.6.2 For determining the obligations of the Service Provider under this Clause 16.6, the provisions of Clauses 16.1, 16.2 and 16.4 shall apply *mutatis mutandis*, and upon issue of Change of Scope Order by the Contracting Authority hereunder, the Service Provider shall pay forthwith the sum specified therein.

16.7 Gross Vehicle Weight

Where the Service Provider is able to demonstrate, including the provision of independent expert opinions and the required data as set out in [] of the Output Specifications to the reasonable satisfaction of the Contracting Authority (acting on the advice of the Independent Expert) that as a direct result of a material number of vehicles exceeding the limits of GVW and Axle Load limits in contravention of Applicable Law or the projected number of heavy goods vehicles of class [] as defined in Schedule D as was projected in determining the Specifications and Standards is substantially exceeded which either:

- (i) results in substantially higher maintenance costs in excess of those specified in the [Financial Model]; and
- (ii) results in, or is likely to result in, a material deterioration in the condition of the Project Networks (including carriageways) (or parts thereof) which is not a result on a failure by the Service Provider to comply with the Output Specifications,

then the Service Provider shall be entitled to apply to the Contracting Authority for compensation by payment to the Service Provider of an amount agreed by both Parties to be the additional maintenance cost which the Contracting Authority shall (acting in good faith) consider, provided that:

- a) The Service Provider shall have liaised with the Contracting Authority and the relevant enforcement agencies to enforce Axle Load limits provided for under law, including stopping vehicles that have exceeded Axle Load limits and requiring such vehicles to off-load any excess weight in order to mitigate damage to the Project Network and an increase in maintenance costs; and
- b) For the period between Project Completion Date and the remainder of the Term, and subject to the enactment and implementation of legislation decriminalising the enforcement of Axle Load limits and to the gazettment of the Service Provider or its agent as an enforcement agency, the service provider shall be solely responsible for any additional maintenance costs arising from damage to the Project Network as a result of violation of Axle Load limits provided under law.

CLAUSE 17

OPERATION AND MAINTENANCE

17.1 O&M obligations of the Service Provider

17.1.1 General obligations

Throughout the Project Term the Service Provider shall provide (or procure the provision by the O&M Contractor of) the O&M Services:

- (a) in accordance with the terms of this Agreement;
- (b) in accordance with Output Specifications (including the Maintenance Standards) and the Method Statements;
- (c) in accordance with Applicable Laws and Applicable Permits;
- (d) so as to procure satisfaction of the Specifications and Standards; and
- (e) in accordance with Good Industry Practice.

17.1.2 The obligations of the Service Provider hereunder shall include:

- (a) permitting safe, smooth and uninterrupted flow of traffic on the Project Network during normal operating conditions;
- (b) allowing the Contracting Authority or Contracting Authority Contractor(s) in collecting and appropriating the Fee;
- (c) minimising disruption to traffic in the event of accidents or other incidents affecting the safety and use of the Project Network by providing a rapid and effective response and maintaining liaison with emergency services of the State;
- (d) carrying out periodic preventive maintenance of the Project Network in accordance with the Output Specifications;
- (e) undertaking routine maintenance including prompt repairs of potholes, cracks, joints, drains, embankments, structures, pavement markings, lighting, road signs and other traffic control devices in accordance with the Output Specifications;
- (f) undertaking major maintenance such as resurfacing of pavements, repairs to structures, and repairs and refurbishment of equipment in accordance with the Output Specifications;
- (g) preventing, with the assistance of concerned law enforcement agencies, any unauthorised use of the Project Network;
- (h) preventing, with the assistance of the concerned law enforcement agencies, any encroachments on the Project Network;

- (i) the protection of the environment and provision of equipment and materials therefore;
- (j) the operation and maintenance of all communication, control and administrative systems necessary for the efficient operation of the Project Network;
- (k) maintaining a public relations unit to interface with and attend to suggestions from the Users, government agencies, media and other agencies; and
- (l) complying with Safety Requirements in accordance with Clause 18 (*Safety Requirements*).

17.1.3 The Service Provider shall remove promptly from the Project Network all surplus construction machinery and materials, waste materials (including hazardous materials and waste water), rubbish and other debris (including, without limitation, accident debris) and keep the Project Network in a clean, tidy and orderly condition, and in conformity with the Applicable Laws, Applicable Permits, the Output Specifications and Good Industry Practice. For the avoidance of doubt, it is agreed that the debris and material excavated shall be carried to and deposited at a particular site to be decided in consultation with Contracting Authority/Independent Expert.

17.1.4 The Service Provider shall maintain, in conformity with the Output Specifications and Good Industry Practice, all stretches of approach roads, over-passes, under-passes or other structures situated on the Site but not forming part of the carriageway.

17.2 Maintenance Requirements for the Project Network

The Service Provider shall procure that at all times during the Operation Period, the Project Network conforms to the Output Specifications.

17.3 Maintenance Manual

17.3.1 By a date no later than the Appointed Date the Service Provider shall, in consultation with the Independent Expert, prepare a repair and maintenance manual (the **Maintenance Manual**) for the regular and preventive maintenance of the Project Network in conformity with the following:

- (a) the Specifications and Standards;
- (b) the Output Specifications;
- (c) the Safety Requirements; and
- (d) Good Industry Practice.

The Service Provider shall provide 5 (five) copies thereof to the Contracting Authority and 2 (two) copies to the Independent Expert and thereafter the

Maintenance Manual shall be revised and updated once every 3 (three) years and the provisions of this Clause 17.3 shall apply, *mutatis mutandis*, to such revision.

17.3.2 Without prejudice to the provision of Clause 17.3.1, the Maintenance Manual shall, in particular, include provisions for maintenance of Project Assets and shall provide for life cycle maintenance, routine maintenance and reactive maintenance which may be reasonably necessary for maintenance and repair of the Project Assets, including replacement thereof, such that their overall condition conforms to Good Industry Practice, the Specifications and Standards and the Output Specifications.

17.4 Maintenance Programme

17.4.1 By a date no later than the Appointed Date and thereafter no later than 45 (forty five) days prior to the beginning of each Accounting Year the Service Provider shall provide to the Contracting Authority and the Independent Expert, its proposed annual programme of preventive, routine, major and (if identified) urgent and other scheduled maintenance (the **Maintenance Programme**) to comply with the Output Specifications, Maintenance Manual and Safety Requirements and this Agreement. Such Maintenance Programme shall include:

- (a) the preventive maintenance schedule;
- (b) all arrangements and procedures for carrying out urgent repairs;
- (c) criteria to be adopted for deciding maintenance needs in respect of the Project Network (including the Project Facilities and the Project Assets);
- (d) intervals and procedures for carrying out inspection of all elements of the Project Network;
- (e) intervals at which the Service Provider shall carry out periodic maintenance;
- (f) arrangements and procedures for carrying out safety related measures; and
- (g) projected major maintenance works to be carried out in the following three years.
- (h) inspection and survey programme

17.4.2 Within 15 (fifteen) days of receipt of the Maintenance Programme, the Independent Expert shall review the same and deliver its comments to the Contracting Authority for notification to the Service Provider with particular reference to its conformity with the Output Specifications, , Maintenance Manual and Safety Requirements and this Agreement.

17.4.3 The Service Provider may modify the Maintenance Programme as may be reasonable in the circumstances, and the procedure specified in Clauses 17.4.1 and 17.4.2 shall apply *mutatis mutandis* to such modifications.

17.5 Safety, vehicle breakdowns and accidents

- 17.5.1 The Service Provider shall ensure safe conditions for the Users, and in the event of unsafe conditions, lane closures, diversions, vehicle breakdowns and accidents, it shall follow the relevant operating procedures including the setting up of temporary traffic cones and lights, and removal of obstruction and debris without delay. Such procedures shall conform to the provisions of this Agreement, Applicable Laws, Applicable Permits, Output Specifications and Good Industry Practice.
- 17.5.2 The Service Provider's responsibility for rescue operations on the Project Network shall be limited to an initial response to any particular incident until such time that the competent Government Instrumentality takes charge and shall include prompt removal of vehicles or debris or any other obstruction, which may endanger or interrupt the smooth flow of traffic.

17.6 Closure due to Emergency

- 17.6.1 If in the reasonable opinion of the Service Provider an Emergency occurs which requires the closure to traffic of the whole or any part of the Project Network, the Service Provider shall be entitled to close any part of the Project Network to traffic for so long as such Emergency is, in its reasonable opinion, continuing and the consequences thereof warrant. Details of the closure and any particulars thereof shall be notified by the Service Provider to the Contracting Authority without any delay, and the Service Provider shall diligently carry out and abide by any reasonable directions that the Contracting Authority may give for dealing with such Emergency.
- 17.6.2 The Service Provider shall re-open the Project Network or the affected part thereof as quickly as practicable after the circumstances leading to its partial closure have ceased to exist or have so abated as to enable the Service Provider to re-open the Project Network, and in any case no later than the timelines set out in the Output Specifications in relation to the occurrence of an Emergency and shall notify the Contracting Authority of the re-opening without any delay.
- 17.6.3 Any closure of any part of the Project Network and the re-opening thereof shall, as soon as practicable, be brought to the notice of affected persons by means of public announcements/notice.

17.7 Lane closure

- 17.7.1 The Service Provider shall not close any lane of the Project Network for undertaking maintenance or repair works except in accordance with the Maintenance Programme or otherwise with the prior written approval of the Contracting Authority.
- 17.7.2 The provisions of Clause 17.7.1 shall not apply to any closure under Clause 17.6.1 or to closure of any lane for a period not exceeding 2 (two) hours in a day at any time of the day and 6 (six) hours in a day at a time specified by Independent Expert the Contracting Authority as off-peak hours when the flow of traffic is comparatively lower.

17.7.3 Upon receiving the permission pursuant to Clause 17.7.1, the Service Provider shall be entitled to close the designated lane for the period specified therein, and in the event of any delay in re-opening such lane, the Service Provider shall suffer deductions in accordance with the Payment Mechanism, provided that no additional payments shall be made where the Service Provider re-opens the designated lane any time prior to the expiry of the specified period.

17.8 Damages for breach of maintenance obligations

Subject to Clause 17.13(d), in the event that the Service Provider fails to repair or rectify any Defect identified in Annex 1 to the maintenance requirements set out in the Output Specifications within the period specified therein to conform with the Output Specification, it shall be deemed to be in breach of this Agreement and the Contracting Authority shall be entitled to make Adjustments in accordance with the Payment Mechanism, the making of such Adjustments shall be without prejudice to the rights of the Contracting Authority under this Agreement, including the right of Termination thereof.

17.9 Contracting Authority's right to take remedial measures

In the event the Service Provider fails to maintain and/or repair the Project Network or any part thereof in conformity with any of (i) the Output Specifications, (ii) the Maintenance Manual (iii) the Maintenance Programme (as the case may be) and the Service Provider fails to commence remedial works within 15 (fifteen) days of receipt of the O&M Inspection Report or a notice in this from either the Contracting Authority or the Independent Expert (as the case may be), the Contracting Authority shall, without prejudice to its rights under this Agreement including Termination thereof, be entitled to undertake such remedial measures at the risk and cost of the Service Provider, and to recover its cost from the Service Provider. In addition to recovery of the aforesaid cost, an additional sum equal to 20% (twenty per cent) of such cost shall be paid by the Service Provider to the Contracting Authority as Damages. For the avoidance of doubt, the right of the Contracting Authority under this Clause 17.9 shall be without prejudice to its rights and remedies provided under Clause 17.8.

17.10 Overriding powers of the Contracting Authority

17.10.1 If in the reasonable opinion of the Contracting Authority, the Service Provider is in material breach of its obligations under this Agreement and, in particular, the Output Specification, and such breach is causing or likely to cause material hardship or danger to the Users, the Contracting Authority may, without prejudice to any of its rights under this Agreement including Termination thereof, by notice require the Service Provider to immediately take such reasonable measures as are necessary for rectifying or removing such hardship or danger (as the case may be).

17.10.2 In the event that the Service Provider, upon notice under Clause 17.10.1, fails to rectify or remove any hardship or danger within a reasonable period from receipt of such notice, the Contracting Authority may exercise its overriding powers provided to it under this Clause 17.10.2 and take over the performance of any or all the obligations of the Service Provider to the extent deemed necessary by it for rectifying or removing such hardship or danger; provided that the exercise of such

overriding powers by the Contracting Authority shall be of no greater scope and of no longer duration than is reasonably required hereunder. Any costs and expenses incurred by the Contracting Authority in discharge of its obligations hereunder shall be deemed to be O&M Expenses, and the Contracting Authority shall be entitled to recover them from the Service Provider in accordance with the provisions of Clause 17.9 along with the Damages specified therein.

17.10.3 In the event of a national emergency, civil commotion or any other act specified in Clause 29.3, the Contracting Authority may take over the performance of any or all the obligations of the Service Provider to the extent deemed necessary by it or as directed by the Government, and exercise such control over the Project Network or give such directions to the Service Provider as may be deemed necessary; provided that the exercise of such overriding powers by the Contracting Authority shall be of no greater scope and of no longer duration than is reasonably required in the circumstances which caused the exercise of such overriding power by the Contracting Authority. For the avoidance of doubt, it is agreed that the consequences of such action shall be dealt in accordance with the provisions of Clause 29. It is also agreed that the Service Provider shall comply with such instructions as the Contracting Authority may issue in pursuance of the provisions of this Clause 17.10, and shall provide assistance and cooperation to the Contracting Authority, on a best effort basis, for performance of its obligations hereunder.

17.11 Restoration of loss or damage to Project Network

Save and except as otherwise expressly provided in this Agreement, in the event that the Project Network or any part thereof suffers any loss or damage during the Project Term from any cause whatsoever, the Service Provider shall, at its cost and expense, rectify and remedy such loss or damage forthwith so that the Project Network conforms to the provisions of this Agreement.

17.12 Modifications to the Project Network

The Service Provider shall not carry out any material modifications to the Project Network save and except where such modifications are necessary for the Project Network to operate in conformity with the Specifications and Standards, Output Specifications, Good Industry Practice and Applicable Laws or in accordance with Clause 16; provided that the Service Provider shall notify the Contracting Authority of the proposed modifications along with particulars thereof at least 15 (fifteen) days before commencing work on such modifications and shall reasonably consider any suggestions that the Contracting Authority may make within 15 (fifteen) days of receiving the Service Provider's proposal. For the avoidance of doubt, all modifications made hereunder shall comply with the Specifications and Standards, Applicable Laws and the provisions of this Agreement.

17.13 Relief from performance of obligations

The Service Provider shall not be considered in breach of its obligations under this Agreement (and any Adjustments made under Clause 17.8 or compensation pursuant to Clause 34.1 shall not be payable to the Contracting Authority) if any part of the Project Network is not available to traffic and/or any failure to repair or

rectify any Defect located on the affected part of the Project Network within the time limits set out in the Maintenance Requirements) on account of any of the following for the duration thereof which for the purposes of this Agreement shall be deemed to constitute Relief Events under clause 30:

- (a) a Delay Event; or
- (b) measures taken to ensure the safe use of the Project Network except when unsafe conditions occurred because of failure of the Service Provider to perform its obligations under this Agreement; or
- (c) compliance with a written request from the Contracting Authority or the written directions of any Government Instrumentality, the effect of which is to close all or any part of the Project Network; or
- (d) where the failure to repair or rectify a Defect directly results from a breach by the Contracting Authority of this Agreement which prevents the Service Provider, despite the Service Provider using all reasonable endeavours to mitigate the effects of the breach, from rectifying or remedying the Defect within the specified period; or
- (e) where the Contracting Authority has not provided the Right of Way in respect of the remaining portion of the Site within 1 (one) year from Appointed Date; or
- (f) where the delay in performance by the Service Provider of its obligations under this Agreement arises out of or in connection with interruption by a third party with mining rights within the Project Network.

Notwithstanding the above, the Service Provider shall keep all unaffected parts of the Project Network open to traffic provided they can be operated safely and Clause 17.8 shall continue to apply for such parts of the Project Network which are unaffected by the events described in (a)-(c) above.

17.14 Barriers and diversions

The Contracting Authority shall use all reasonable endeavours to procure that during the Operation Period, no barriers are erected or placed by any Government Instrumentality on the Project Network except for reasons of Emergency, national security, law and order or collection of relevant Taxes. The Contracting Authority shall also use all reasonable endeavours to procure that no Government Instrumentality shall undertake or cause to be undertaken, except for reasons of Emergency, national security or law and order, any diversions of traffic from, or closing down of approach roads to the Project Network that may cause a material adverse effect on the flow of traffic to and from the Project Network.

17.15 Annual Maintenance Fund

17.15.1 For the duration that the debt due to the Senior Lenders remains outstanding, the Senior Lenders shall be entitled to determine the opening, funding and operation

of the Annual Maintenance Fund and the provisions of this clause shall apply with such modifications as shall be necessary to give effect to this sub-clause 17.15.1.

17.15.2 No later than the Appointed Date the Service Provider shall open and thereafter maintain an Annual Maintenance Fund.

17.15.2 An element of each Annuity Payment equal to *[insert as per technical proposal]*% of such payment shall be designated by the Contracting Authority as being allocated to the Annual Maintenance Fund (the **AMF Element**) and the Service Provider shall ensure that upon receipt of each Annuity Payment the AMF Element shall be transferred promptly to the Annual Maintenance Fund

17.15.3 The Service Provider shall be entitled to withdraw funds standing to the Annual Maintenance Fund for the sole purpose of carrying out routine maintenance on the Project Network in accordance with the Output Specifications and the Maintenance Programme.

17.16 Major Maintenance Fund

17.16.1 For the duration that the debt due to the Senior Lenders remains outstanding, the Senior Lenders shall be entitled to determine the opening, funding and operation of the Major Maintenance Fund and the provisions of this clause shall apply with such modifications as shall be necessary to give effect to this sub-clause 17.16.1.

17.16.2 No later than 1 (one) month before the Completion Date the Service Provider shall open and thereafter maintain the Major Maintenance Fund. The Service Provider shall be entitled to withdraw funds standing to the Major Maintenance Fund in accordance with the terms of this Clause 17.16 for the sole purpose of carrying out Major Maintenance Works on the Project Network.

17.16.3 It is acknowledged that within the bid submitted by the Consortium an amount was allocated for the carrying out of Major Maintenance Works at predetermined periods.

17.16.3 An element of each Annuity Payment equal to *[insert as per technical proposal]*% of such payment shall be designated by the Contracting Authority as being allocated to the Major Maintenance Fund (the **MMF Element**) and the Service Provider shall ensure that upon receipt of each Annuity Payment the MMF Element shall be transferred promptly to the Major Maintenance Fund

17.16.4 Not later than 3 (three) months before the carrying out of any Major Maintenance Works the Service Provider shall notify the Contracting Authority and the Independent Engineer and provide details of the following in relation to the Major Maintenance Works (the **MMW Proposal**):

- (a) the nature of the Major Maintenance Works;
- (b) the projected programme, including the start date;
- (c) the projects costs and payment milestones;
- (d) details of any contracts entered into (other than the O&M Contract); and

- (e) confirmation that sufficient funds are standing to the Major Maintenance Fund and if there is a shortfall how the shortfall will be met.

17.16.5 The Independent Engineer shall review and comment upon the MMW Proposal (within 1 (one) month of receipt) and confirm to the Contracting Authority that the Major Maintenance Works can commence. The Independent Engineer can only reject the MMW Proposal where, in its reasonable opinion, such proposal provides insufficient information or it has reasonable grounds to believe that such Works have been inadequately planned. Upon receipt of positive confirmation from the Independent Engineer the Contracting Authority shall promptly notify the Service Provider that the Major Maintenance Works can commence.

17.16.7 To the extent that following completion of the Major Maintenance Works has occurred and a positive balance remains, that balance shall remain in the Major Maintenance Fund

17.16.8 In the event that a Service Provider Default has occurred, no amounts from the Major Maintenance Fund may be withdrawn without the Contracting Authority's prior written consent.

CLAUSE 18

SAFETY REQUIREMENTS

18.1 Safety Requirements

- 18.1.1 The Service Provider shall (i) comply with the provisions of this Agreement, Applicable Laws and Applicable Permits and (ii) conform to Good Industry Practice for securing the safety of the Users. In particular, the Service Provider shall develop, implement and administer a surveillance and safety programme for providing a safe environment for the Project Network, and shall comply with the safety requirements set out in Schedule [D] (the **Safety Requirements/Performance Standards**).
- 18.1.2 The Contracting Authority shall at its discretion appoint an experienced and qualified firm or organisation (the **Safety Consultant**) for carrying out safety audit of the Project Network in accordance with the Safety Requirements, and shall take all other actions necessary for securing compliance with the Safety Requirements.

18.2 Expenditure on Safety Requirements

All reasonable costs and expenses arising out of or relating to Safety Requirements shall be borne by the Service Provider to the extent such costs and expenses form part of the works and services included in the Scope of the Project, and works and services, if any, not forming part of the Scope of the Project shall be undertaken in accordance with the provisions of Clause 16. Costs and expenses on works and services not covered hitherto before and arising out of Safety Requirements shall, subject to the provisions of Clause 16.3.2, be borne from out of a dedicated safety fund (the **Safety Fund**) to be funded, owned and operated by the Contracting Authority or a substitute thereof.

CLAUSE 19

MONITORING OF OPERATION AND MAINTENANCE

19.1 Status reports

During Operation Period, the Service Provider shall, no later than 7 (seven) days after the end of each Quarter (being 31 March, 30 June, 30 September and 31 December) deliver to the Contracting Authority and the Independent Expert a written report stating in reasonable detail the condition of the Project Network including:

- (a) its compliance or otherwise with the Output Specifications and Output Specifications (and identify and state in reasonable detail the Defects that require rectification) and Maintenance Manual;
- (b) updates or revisions to and works carried out in accordance with the Maintenance Programme and Safety Requirements;
- (c) Any Unavailability and the level of Adjustments;
- (d) the occurrence of any Force Majeure Event; and
- (e) details of any Emergency during the period.

The Service Provider shall promptly give such other relevant information as may be required by the Independent Expert.

19.2 Inspection

19.2.1 The Independent Expert shall inspect the Project Network at least once in every 6 (six) month period. It shall make a report of such inspection (the **O&M Inspection Report**) stating in reasonable detail the Defects, if any, with particular reference to the Output Specifications, Maintenance Manual, the Maintenance Programme and Safety Requirements, and send a copy thereof to the Contracting Authority and the Service Provider within 7 (seven) days of such inspection.

19.2.2 The Service Provider shall procure that the Contracting Authority and/or the Independent Expert shall have, in addition to the rights under Clause 19.2.1, at all reasonable times and upon reasonable notice the right to enter the Site in order to inspect the operation and maintenance of the Project Network and to monitor compliance by the Service Provider with its obligations under this Agreement.

19.3 Tests

For determining that the Project Network conforms to the Output Specifications, the Independent Expert shall require the Service Provider to carry out, or cause to be carried out, any such tests as may be required to confirm that the Project Network conforms to the Output Specifications – including such test as are in accordance with Good Industry Practice. The Service Provider shall, with due diligence, carry out or cause to be carried out all such tests in accordance with the instructions of the Independent Expert and furnish the results of such tests forthwith to the Independent

Expert. One half of the costs incurred on such tests, and to the extent certified by the Independent Expert as reasonable, shall be reimbursed by the Contracting Authority to the Service Provider.

19.4 Remedial measures

19.4.1 The Service Provider shall repair or rectify or make good at no cost to the Contracting Authority the Defects, if any, set out in the O&M Inspection Report or identified by the test results referred to in Clause 19.3 or identified by the Service Provider and furnish a report in respect thereof to the Independent Expert and the Contracting Authority within 15 (fifteen) days of receiving the O&M Inspection Report or the test results, as the case may be; provided that where the remedying of such defects or deficiencies is likely to take more than 15 (fifteen) days, the Service Provider shall submit progress reports of the repair works once every week until such works are completed in conformity with this Agreement.

19.4.2 The Independent Expert shall require the Service Provider to carry out or cause to be carried out tests, at its own cost, to determine that such remedial measures have brought the Project Network into compliance with the Output Specifications and the procedure set forth in this Clause 19.4 shall be repeated until the Project Network conforms to the Maintenance Requirements. In the event that remedial measures are not completed by the Service Provider in conformity with the provisions of this Agreement, the Contracting Authority shall be entitled to recover Damages from the Service Provider under and in accordance with the provisions of Clause 17.8.

19.5 Reports of unusual occurrence

The Service Provider shall, prior to the close of each week (or each day when a major incident occurs), send to the Contracting Authority and the Independent Expert, by e-mail, a report stating accidents and unusual occurrences on the Project Network relating to the safety and security of the Users and Project Network. A monthly summary of such reports shall also be sent within 3 (three) days of the closing of each month. For the purposes of this Clause 19.5, accidents and unusual occurrences on the Project Network shall include:

- (a) death or injury to any person;
- (b) damaged or dislodged fixed equipment;
- (c) any obstruction on the Project Network, which results in slow down of the services being provided by the Service Provider;
- (d) disablement of any equipment during operation;
- (e) communication failure affecting the operation of Project Network;
- (f) smoke or fire;
- (g) flooding of Project Network; and
- (h) such other relevant information as may be required by the Contracting Authority or the Independent Expert such as any event which impacts on the

structural integrity of any element of the Project Network (or associated infrastructure).

CLAUSE 20

INDEPENDENT EXPERT

20.1 Appointment of Independent Expert

The Contracting Authority and the Service Provider shall jointly appoint a suitably qualified and experienced consulting engineering firm of international repute selected in accordance with the selection criteria set out in Schedule O which shall be the Independent Expert under this Agreement (the **Independent Expert**). Such selection shall be in compliance with all laws relating to procurement. The appointment shall be made at or prior to the date of Financial Close and shall be for a period of 3 (three) years. On expiry or termination of this period, the Contracting Authority and the Service Provider shall jointly renew the appointment, or appoint another firm from a panel to be the Independent Expert for a term of 3 (three) years, and such procedure shall be repeated after expiry of each appointment.

20.2 Duties and functions

20.2.1 The Independent Expert shall discharge its duties and functions substantially in accordance with the terms of reference set out in Schedule P. The Independent Expert will be required to act independently, fairly and impartially and shall have a duty of care to both the Contracting Authority and the Service Provider.

20.2.2 The functions of the Independent Expert under the Roads Annuity Fund Regulations, 2015 shall be carried out by the Independent Expert.

20.2.3 The Independent Expert shall submit regular periodic reports (at least once every month) to the Contracting Authority in respect of its duties and functions asset out in Schedule P.

20.2.3 The Parties shall comply with and fulfil their respective duties and obligations arising under or in connection with the contract appointing the Independent Expert.

20.3 Remuneration

The remuneration, cost and expenses of the Independent Expert shall be paid by the Contracting Authority and subject to the limits set forth in Schedule O, one-half of such remuneration, cost and expenses shall be reimbursed by the Service Provider to the Contracting Authority within 35 (thirty five) days of receiving a statement of expenditure from the Contracting Authority.

20.4 Termination of appointment

20.4.1 The Contracting Authority and the Service Provider may together terminate the appointment of the Independent Expert at any time, but only after appointment of another Independent Expert in accordance with Clause 20.1.

20.4.2 If the Service Provider has reason to believe that the Independent Expert is not discharging its duties and functions in a fair, efficient and diligent manner, it may make a written representation to the Contracting Authority and seek termination of

the appointment of the Independent Expert. Upon receipt of such representation, the Contracting Authority shall hold a tripartite meeting with the Service Provider and Independent Expert for an amicable resolution of the Dispute, and if any difference or disagreement between the Contracting Authority and the Service Provider remains unresolved, the Dispute shall be settled in accordance with the Dispute Resolution Procedure. In the event that the appointment of the Independent Expert is terminated hereunder, the Contracting Authority and the Service Provider shall jointly appoint another Independent Expert in accordance with Clause 20.1.

20.5 Authorised signatories

The Contracting Authority shall require the Independent Expert to designate and notify to the Contracting Authority and the Service Provider up to 2 (two) persons employed in its firm to sign for and on behalf of the Independent Expert, and any communication or document required to be signed by the Independent Expert shall be valid and effective only if signed by any of the designated persons; provided that the Independent Expert may, by notice in writing, substitute any of the designated persons by any of its employees.

20.6 Dispute resolution

If either Party disputes any advice, instruction, decision, direction or award of the Independent Expert, or, as the case may be, the assertion or failure to assert jurisdiction, the Dispute shall be resolved in accordance with the Dispute Resolution Procedure or where the Parties agree through the Fast Track Resolution Procedure.

Part IV
Financial Covenants

CLAUSE 21

FINANCIAL CLOSE

21.1 Financial Close

21.1.1 The Service Provider hereby agrees and undertakes that it shall achieve Financial Close within 180 (one hundred and eighty) days from the Effective Date of this Agreement subject to any delay in Financial Close which has occurred solely as a result of any default or delay by the Contracting Authority in procuring satisfaction of the Conditions Precedent specified in Clauses 4.1.5 or due to the occurrence of a Force Majeure Event.

21.2 Termination due to failure to achieve Financial Close

21.2.1 Notwithstanding anything to the contrary contained in this Agreement, but subject to Clause 29.5.1, in the event that Financial Close does not occur, for any reason whatsoever, within the period set forth in Clause 21.1.1 (or any extended period agreed at the sole discretion of the Contracting Authority) provided thereunder, all rights, privileges, claims and entitlements of the Service Provider under or arising out of this Agreement shall be deemed to have been waived by, and to have ceased with the concurrence of the Service Provider, and the Project Agreement shall be deemed to have been terminated by mutual agreement of the Parties. For the avoidance of doubt, it is agreed that in the event the Parties hereto have, by mutual consent, determined the Appointed Date to precede the Financial Close, the provisions of this Clause 21.2.1 shall not apply, provided that the Contracting Authority shall not be required by reason of the Appointed Date preceding Financial Close to make any Annuity Payment at any time before the timelines set out in the Payment Mechanism.

21.2.2 Upon Termination under Clause 21.2.1 other than a failure by the Contracting Authority to satisfy the Conditions Precedent set out in Clause 4.1.5, the Contracting Authority shall be entitled to encash the Bid Security and appropriate the proceeds thereof as Damages; provided, however, that if Financial Close has not occurred solely as a result of the Contracting Authority being in default of any of its obligations under Clause 4.2, it shall, upon Termination, return the Bid Security. For the avoidance of doubt, it is expressly agreed that if the Bid Security shall have been substituted by the Performance Security, the Contracting Authority shall be entitled to encash therefrom an amount equal to the Bid Security.

CLAUSE 22

LEVY AND COLLECTION OF FEE

22.1 Service Provider's obligation

The Service Provider shall not levy, demand or collect from or in respect of any User, vehicle or Person, for the use of Project Network any sum whatsoever in the nature of a toll or fee.

22.2 Contracting Authority's Rights

22.2.1 Notwithstanding anything to the contrary contained in this Agreement, the Contracting Authority shall have the right and authority to levy a toll or fee on the Users and vehicles using the Project Network and/or Project Facilities (the **Fee**) and to demand, collect, retain and appropriate the Fee in accordance with the Applicable Laws.

22.2.2 The Contracting Authority may at its sole discretion levy, demand, collect, retain and appropriate the Fee either by itself or authorise the Authority Contractor to levy, demand, collect, retain and appropriate the same as Contracting Authority may deem fit in its sole discretion and in accordance with the Applicable Laws.

22.2.3 Any arrangement or contract made or entered into by the Contracting Authority for the levy and collection of the Fee shall be independent of this Agreement and no such arrangement or contract shall have the effect of adding to or enlarging in any way the obligations or the scope thereof or the liability of the Service Provider under this Agreement and the Service Provider's obligations and liabilities shall be limited to, those contained in this Agreement only.

22.2.4 The Contracting Authority and any Authority Contractor shall have access to and use of the Site for all purposes necessary or incidental to levy and collection of the Fee. To the extent such access and use allowed by the Service Provider affects the performance of any of its obligations hereunder, the Service Provider shall not be deemed or construed to be in breach of its obligations nor shall it incur/suffer any liability on account thereof, provided that (i) the Contracting Authority shall, in the event of any physical damage to the Project Network occurring as a result of such access or use, ensure that such damage is promptly repaired and the Project Network are restored at its own cost and expenses.

CLAUSE 23

FINANCIAL ADJUSTMENT

23.1 Updating the Financial Model

Whenever a Relevant Event occurs, the financial consequences (save where otherwise provided in this Agreement or where the Parties agree otherwise) shall be determined in accordance with this Clause 23. Where for the purposes of this Clause 24 the Financial Model is to be adjusted by reference to a Relevant Event, this shall be carried out by the Service Provider, in consultation with the Contracting Authority, to reflect the cumulative impact of any prior Relevant Event on the version of the Financial Model applicable immediately prior to the relevant adjustment and to reflect the impact of the Relevant Event in respect of which such adjustment is being undertaken. In assessing such adjustment the Service Provider shall be entitled to take into account, inter alia:

- 23.1.1 any reasonable change in costs resulting from the Relevant Event;
- 23.1.2 any changes in the prospective technical performance of the Project arising from such Relevant Event,

provided the Contracting Authority is not required to take into account the financial impact up to the date of the Relevant Event of those risks which the Service Provider bears under this Agreement.

23.2 Application to the Financial Model

Where either Party is entitled to payment of any sum the assessment of which properly requires reference to the Financial Model the adjustment to the Annuity Payment due shall be that required to ensure that, by reference to the Financial Model, the Service Provider is left in a no better no worse position than under the version of the Financial Model applicable immediately prior to the relevant adjustment, and shall be ascertained by determining the adjustment to the Annuity Payment required to maintain the financial position of the Contracting Authority with that in which it would have been under the version of the Financial Model applicable immediately prior to the relevant adjustment.

23.3 No Better No Worse

Any reference in this Agreement to "no better no worse" shall be construed by reference to:

- 23.3.1 the Service Provider is left in a position no better and no worse in relation to the debt service cover ratio and the Equity IRR by reference to the version of the Financial Model applicable immediately prior to the Relevant Event than had the Relevant Event not occurred; and
- 23.3.2 the ability of the Service Provider to comply with this Agreement is not adversely affected or improved as a consequence of the Relevant Event.

23.4 Replacement of Financial Model

Any Financial Model produced following adjustments in accordance with this Clause 23 shall, when it is approved by the Contracting Authority (such approval not to be unreasonably withheld or delayed) become the Financial Model for the purpose of this Agreement until it is further amended in accordance with this Agreement.

CLAUSE 24
ANNUITY PAYMENT

24.1 Annuity Payment

- 24.1.1 The Contracting Authority shall pay the Service Provider Annuity Payments in the manner set out in the Payment Mechanism. Subject to the provisions of this Agreement, the Contracting Authority shall procure that the Service Provider receives the Annuity Payment from the Roads Annuity Fund (the Fund) established by the Public Finance Management (Roads Annuity Fund) Regulations, 2015.
- 24.1.2 The Annuity Payment shall be in respect of the total project costs set out in the Financial Model and includes V.A.T on EPC and O&M Costs.
- 24.1.3 The amount of each Annuity Payment shall be calculated in accordance with the provisions of the Payment Mechanism on the basis of a quarterly annuity of Kenya Shillings [**].
- 24.1.4 The Service Provider shall raise and submit its invoices in accordance with the invoicing procedure set out in Schedule M.
- 24.1.5 All payments shall be made in Kenya Shillings by electronic transfer of funds to the account of the Service Provider specified in the relevant invoice, quoting the invoice number against which payment is made.
- 24.1.6 If either Party (acting in good faith) disputes all or any part of the Annuity Payment, the full Annuity Payment shall be paid in the manner set out in the Payment Mechanism for that Annuity Payment Period and, in respect of the disputed amount, the Parties shall use all reasonable endeavours to resolve the dispute in question within fifteen (15) business days of the dispute arising. If they fail to resolve the dispute either Party may refer the matter to the Fast Track Resolution Procedure. Following resolution of the dispute, any amount agreed or determined to have been payable or deductible shall be paid or deducted, as the case may be, by the Contracting Authority, from the Annuity Payment for the Annuity Payment Period immediately following the resolution of the dispute.
- 24.1.7 Each Party shall be entitled to receive interest on any payment not duly made pursuant to the terms of this Agreement on the due date calculated from day to day at a rate per annum equal to 2% above Bank Rate from the date after the date on which payment was due up to and including the date of payment.
- 24.1.8 Whenever any sum of money shall be agreed or determined as due and payable by one Party (the **First Party**) to the other Party (the **Second Party**) such sum may, at the discretion of the First Party, be deducted from or applied to reduce the amount of any sum then due, or which afterwards may become due under this Agreement provided the First Party applying such rights of deduction or application informs the Second Party not less than five (5) business days' notice of its intention to deduct or apply such sum.

CLAUSE 25
ADJUSTMENTS TO ANNUITY

25.1 Adjustments to Annuity Payments

Any adjustments to the Annuity Payment shall be made in accordance with the Payment Mechanism set out in Schedule M.

CLAUSE 26

REFINANCING

- 26.1 The Service Provider shall obtain the Contracting Authority's prior written consent to any Qualifying Refinancing and both the Contracting Authority and the Service Provider shall at all times act in good faith with respect to any Refinancing provided that in the case of a refinancing required as a result of the tenor of any debt being less than the Project Term such consent from the Contracting Authority shall not be required where (i) there is no increase in the Annuity Payment and (ii) no increase on the Contracting Authority's liabilities on early termination of this Agreement.
- 26.2 The Contracting Authority shall be entitled to receive a 50% share of any Refinancing Gain arising from a Qualifying Refinancing. The Contracting Authority shall not withhold or delay its consent to a Qualifying Refinancing to obtain a greater than 50% share of the Refinancing Gain.
- 26.3 The Service Provider shall promptly provide the Contracting Authority with full details of any proposed Qualifying Refinancing, including a copy of the proposed financial model relating to it (if any) and the basis for the assumptions used in the proposed financial model. The Contracting Authority shall (before, during and at any time after any Refinancing) have unrestricted rights of audit over any financial model and documentation (including any aspect of the calculation of the Refinancing Gain) used in connection with the Refinancing whether that Refinancing is a Qualifying Refinancing or not).
- 26.4 The Contracting Authority shall have the right to elect to receive its share of any Refinancing Gain as:
- 26.4.1 a single payment in an amount less than or equal to any Distribution made on or about the date of the Refinancing; or
- 26.4.2 a reduction in the Annuity Payments over the remaining term of this Agreement.
- 26.5 The Contracting Authority and the Service Provider will negotiate in good faith to agree the basis and method of calculation of the Refinancing Gain and payment of the Contracting Authority's share of the Refinancing Gain (taking into account how the Contracting Authority has elected to receive its share of the Refinancing Gain under paragraph 4 above). If the parties fail to agree the basis and method of calculation of the Refinancing Gain or the payment of the Contracting Authority's share, the dispute shall be determined in accordance with Clause 39 (*Dispute Resolution*).
- 26.6 The Refinancing Gain shall be calculated after taking into account the reasonable and proper professional costs that each party directly incurs in relation to the Qualifying Refinancing and on the basis that all reasonable and proper professional costs incurred by the Contracting Authority will be paid to the Contracting Authority by the Service Provider within twenty-eight (28) days of any Qualifying Refinancing.

26.7 For the purposes of this Agreement:

Distribution means whether in cash or in kind, any:

- (a) dividend or other distribution in respect of share capital;
- (b) reduction of capital, redemption or purchase of shares or any other reorganisation or variation to share capital;
- (c) payments under any Subordinated Debt Agreements (whether of principal, interest, breakage costs or otherwise);
- (d) payment, loan, contractual arrangement or transfer of assets or rights to the extent (in each case) it was put in place after Financial Close and was neither in the ordinary course of business nor on reasonable commercial terms;
- (e) the receipt of any other benefit which is not received in the ordinary course of business and on reasonable commercial terms;

Equity IRR means the projected blended rate of return to the Relevant Persons over the full term of this Agreement, having regard to Distributions made and projections to be made agreed as [23%].

Exempt Refinancing means:

- (a) a change in taxation or change in accounting treatment;
- (b) exercise of rights, waivers, consents and similar actions which relate to day to day administrative and supervisory matters, and which are in respect of:
 - (i) breach of representations and warranties or undertakings;
 - (ii) movement of monies between the Service Provider Project Accounts (as defined in the Financing Agreements) in accordance with the terms of the Financing Agreements as at Financial Close;
 - (iii) late or non-provision of information, consents or licences;
 - (iv) amendments to sub-contracts (including the Principal Sub-Contracts);
 - (v) approval of revised technical and economic assumptions for financial model runs (to the extent required for forecasts under the Financing Agreements);
 - (vi) restrictions imposed by the Senior Lenders on the dates at which principal can be advanced to the Service Provider under the Financing Agreements and/or amounts released from the Service Provider;

- (c) any amendment, variation or supplement of any agreement approved by the Contracting Authority as part of any Change of Scope under this Agreement;
- (d) any sale of shares in the Service Provider by the shareholders or securitisation of the existing rights and/or interests attaching to shares in the Service Provider;
- (e) any sale or transfer of the Junior Creditors' existing rights and/or interests under the Junior Funding Agreements or securitisation of the Junior Creditors' existing rights and/or interests under the Junior Funding Agreements; or
- (f) any Qualifying Bank Transaction.

Net Present Value means for the purpose of this Clause the aggregate of the discounted values, calculated as of the estimated dates of the Refinancing of each of the relevant projected Distributions, in each case discounted using the Equity IRR.

Pre-Refinancing Equity IRR means the nominal post-tax Equity IRR calculated immediately prior to the Refinancing.

Qualifying Bank Transaction means:

- (a) the syndication by a Senior Lender, in the ordinary course of its business, of any of its rights or interests in the Financing Agreements;
- (b) the grant by a Senior Lender of any rights of participation, or the disposition by a Senior Lender of any of its rights or interests (other than as specified in paragraph (a) above), in respect of the Financing Agreements in favour of:
 - (i) any other Senior Lender;
 - (ii) any institution which is recognised or permitted under the law of Kenya to carry on the business of a credit or financial institution in Kenya; or
 - (ii) any other institution in respect of which the prior written consent of the Contracting Authority.

Qualifying Refinancing means any Refinancing that will give rise to a Refinancing Gain greater than zero that is not an Exempt Refinancing.

Refinancing means:

- (a) any amendment, variation, novation, supplement or replacement of any Financing Agreement (other than in respect of any Subordinated Debt Agreement);

- (b) the exercise of any right, or the grant of any waiver or consent, under any Financing Agreement (other than in respect of any Subordinated Debt Agreement);
- (c) the disposition of any rights or interests in, or the creation of any rights of participation in respect of, the Financing Agreements (other than in respect of any Subordinated Debt agreement) or the creation or granting of any other form of benefit or interest in either the Financing Agreements (other than in respect of any Subordinated Debt Agreement) or the contracts, revenues or assets of the Service Provider whether by way of security or otherwise; or
- (d) any other arrangement put in place by the Service Provider or another person which has an effect which is similar to any of (a) to (c) above or which has the effect of limiting the Service Provider's ability to carry out any of (a) to (c) above.

Refinancing Gain means an amount equal to the greater of zero and $[(A - B) - C]$, where:

- A = the Net Present Value of the Distributions projected immediately prior to the Refinancing (taking into account the effect of the Refinancing using the Financial Model as updated (including as to the performance of the Project) so as to be current immediately prior to the Refinancing) to be made to each Relevant Person over the remaining term of this Agreement following the Refinancing;
- B = the Net Present Value of the Distributions projected immediately prior to the Refinancing (but without taking into account the effect of the Refinancing and using the Financial Model as updated (including as to the performance of the Project) so as to be current immediately prior to the Refinancing) to be made to each Relevant Person over the remaining term of this Agreement following the Refinancing; and
- C = any adjustment required to raise the Pre-Refinancing Equity IRR to the Equity IRR.

Relevant Person means a shareholder of the Service Provider and any of its Associates.

Shareholder means any person from time to time holding share capital in the Service Provider.

Subordinated Debt Agreements means the documents evidencing the provision of Subordinated Debt to the Service Provider

CLAUSE 27
INSURANCE

27.1 Insurance during Project Term

27.1.1 Subject to the provisions of Clause 27.8, the Service Provider shall effect and maintain at its own cost, during the Construction Period and the Operation Period, such insurances for such maximum sums as may be required under (a) the Financing Agreements and (b) Applicable Laws. The Service Provider shall also take out and maintain such insurances as may be necessary or prudent in accordance with Good Industry Practice. The Service Provider shall also effect and maintain such insurances as may be necessary for mitigating the risks that may devolve on the Contracting Authority as a consequence of any act or omission of the Service Provider during the Construction Period. The Service Provider shall procure that in each insurance policy, the Contracting Authority shall be a co-insured and that the insurer shall pay the proceeds of insurance (other than in respect of third party liability and proceeds payable to the Contracting Authority) to the Contracting Authority. For the avoidance of doubt, the level of insurance to be maintained by the Service Provider after repayment of Senior Lenders' dues in full shall be determined on the same principles as applicable for determining the level of insurance prior to such repayment of Senior Lenders' dues.

27.1.2 Nothing in this Clause 27.1 shall prevent the Service Provider, at its sole cost and expense, from procuring and maintaining insurance in addition to the insurance required under Clause 27.1.1.

27.2 Notice to the Contracting Authority

No later than 45 (forty-five) days prior to commencement of the Construction Period or the Operation Period, as the case may be, the Service Provider shall by notice furnish to the Contracting Authority, in reasonable detail, information in respect of the insurances that it proposes to effect and maintain in accordance with this Clause 27. Within 30 (thirty) days of receipt of such notice, the Contracting Authority may require the Service Provider to effect and maintain such other insurances as may be necessary pursuant hereto, and in the event of any difference or disagreement relating to any such insurance, the Dispute Resolution Procedure shall apply.

27.3 Evidence of Insurance Cover

All insurances obtained by the Service Provider in accordance with this Clause 28 shall be maintained with insurers on terms consistent with Good Industry Practice. Within 15 (fifteen) days of obtaining any insurance cover, the Service Provider shall furnish to the Contracting Authority, certified true copies of the certificate(s) of insurance, copies of insurance policies, any renewals, and premia payment receipts together with any excesses in respect of such insurance, and no such insurance shall be cancelled, modified, or allowed to expire or lapse until the expiration of at least 45 (forty five) days after notice of such proposed cancellation,

modification or non-renewal has been delivered by the Service Provider to the Contracting Authority.

27.4 Remedy for failure to insure

If the Service Provider shall fail to effect and keep in force all insurances for which it is responsible pursuant hereto, the Contracting Authority shall have the option to either keep in force any such insurances, and pay such premia and recover the costs thereof from the Service Provider, or in the event of computation of a Termination Payment, treat an amount equal to the Insurance Cover as deemed to have been received by the Service Provider.

27.5 Waiver of subrogation

All insurance policies in respect of the insurance obtained by the Service Provider pursuant to this Clause 27 shall include a waiver of any and all rights of subrogation or recovery of the insurers thereunder against, inter alia, the Contracting Authority, and its assigns, successors, undertakings and their subsidiaries, affiliates, employees, insurers and underwriters, and of any right of the insurers to any set-off or counterclaim or any other deduction, whether by attachment or otherwise, in respect of any liability of any such person insured under any such policy or in any way connected with any loss, liability or obligation covered by such policies of insurance.

27.6 Service Provider's waiver

The Service Provider hereby further releases, assigns and waives any and all rights of subrogation or recovery against, inter alia, the Contracting Authority and its assigns, undertakings and their subsidiaries, affiliates, employees, successors, insurers and underwriters, which the Service Provider may otherwise have or acquire in or from or in any way connected with any loss, liability or obligation covered by policies of insurance maintained or required to be maintained by the Service Provider pursuant to this Agreement (other than third party liability insurance policies) or because of deductible clauses in or inadequacy of limits of any such policies of insurance.

27.7 Application of insurance proceeds

The proceeds from all insurance claims shall be paid to the Service Provider other than in respect of:

- (a) third party liability claims which shall be paid directly to the relevant Party;
or
- (b) claims made by the Contracting Authority as co-insured which shall be paid directly to the Contracting Authority.

Subject to any requirements under the Financing Agreements, the Service Provider shall apply any proceeds received in relation to material damage under a Contractor's all risk or material damage policy to fund any necessary repair, reconstruction, reinstatement, replacement, improvement, delivery or installation

of the Project Network, and the balance (together with any business interruption insurance) shall be applied in accordance with the provisions contained in the Financing Agreements.

27.8 Uninsurable risks

“Uninsurable Risk” means either that:

- (a) insurance is not available to Service Provider in respect of the Project Network in the worldwide insurance market with reputable insurers of good standing in respect of that risk;
- (b) the insurance premium payable for insuring that Risk is at such a level that the Risk is generally not being insured against in the worldwide insurance market with reputable insurers of good standing by contractors in Kenya; or
- (c) the payments required of the Service Provider in addition to the insurance premiums (Insurance Excess Payments) exceed Kenya Shillings ten million in respect of each risk and Kenya Shillings One hundred million in aggregate.

The Service provider shall have no obligation to take out insurance in respect of an Uninsurable Risk save where the predominant cause of the Risk being Uninsurable is an act or omission of the Service Provider. If any risk that should be insured in accordance with the provision of Clause 27.1 above becomes an Uninsurable Risk then the Service Provider will notify the Contracting Authority within five (5) days and before expiry or cancellation of the relevant insurance in respect of such risk. If the Contracting Authority agrees that the risk is an Uninsurable Risk, is likely to occur and it would not be prudent to continue with the Project by reason of the Risk becoming uninsurable, the Service Provider and the Contracting Authority shall agree on the manner in which the risk should be managed. If the Parties are unable to mitigate the Uninsurable Risk and it is impossible to continue with the Project as a result, the Uninsurable Risk shall be dealt with as a Force Majeure Event and the provisions of Clause 29 (Force Majeure) shall apply.

CLAUSE 28
ACCOUNTS AND AUDIT

28.1 Audited accounts and Inspection

28.1.1 The Service Provider shall maintain books of accounts recording all its receipts (including all receipts of Annuity Payments and other revenues derived/collected by it from or on account of the Project Network and/or its use), income, expenditure, payments, assets and liabilities, in accordance with Good Industry Practice and Applicable Laws. The Contracting Authority shall have the right to inspect the records of the Service Provider during office hours and require copies of relevant extracts of books of accounts to be provided to the Contracting Authority for audit.

28.1.2 The Service Provider shall, within 180 (one hundred and eighty) days of the close of each Accounting Year, furnish to the Contracting Authority its audited annual financial accounts in respect of that Accounting Year. Such annual accounts shall be audited by the Statutory Auditors appointed pursuant to Clause 28.2.

28.2 Appointment of auditors

28.2.1 The Service Provider shall appoint, and have during the subsistence of this Agreement as its Statutory Auditors, a firm chosen by it meeting the following minimum criteria:

- (i) the firm must be registered as a practicing accountant by the Registration of Accountants board (or similar registration body in Kenya);
- (ii) the partners of the firm must be qualified accountants registered by the Institute of certified public accountants of Kenya (ICPAK);
- (iii) must have a minimum of 10 years post registration general experience in project audit; and
- (iii) the firm and its partners must be independent from the Service Provider.

For purposes of this clause independent means that that the firm and its partners do not have any material or pecuniary relationship with the Service Provider, any of its shareholders or director or related persons and the partners do not have any direct family relationships with the shareholders or directors.

28.2.2 All fees and expenses of the Statutory Auditors shall be borne by the Service Provider.

28.2.3 The Service Provider may terminate the appointment of its Statutory Auditors after a notice of 45 (forty five) days to the Contracting Authority, subject to the replacement Statutory Auditors being appointed from the Panel of Chartered Accountants.

28.2.4 Notwithstanding anything to the contrary contained in this Agreement, the

Contracting Authority shall have the right, but not the obligation, to appoint at its cost from time to time and at any time, another firm (the **Additional Auditors**) from the Panel of Chartered Accountants to audit and verify all those matters, expenses, costs, realisations and things which the Statutory Auditors are required to do, undertake or certify pursuant to this Agreement.

28.3 Certification of claims by Statutory Auditors

Any claim or document provided by the Service Provider to the Contracting Authority in connection with or relating to receipts, income, payments, costs, expenses, accounts or audit, and any matter incidental thereto shall be valid and effective only if certified by its Statutory Auditors. For the avoidance of doubt, such certification shall not be required for exchange of information in the normal course of business.

28.4 Set off

Any exercise by the Contracting Authority of its rights of set off under this Agreement shall be without prejudice to any other rights or remedies available to it under this Agreement or otherwise.

28.5 Dispute resolution

In the event of there being any difference between the findings of the Additional Auditors and the certification provided by the Statutory Auditors, such Auditors shall meet to resolve the differences and if they are unable to resolve the same, such Dispute shall be resolved by the Contracting Authority by recourse to the Fast Track Resolution Procedure.

Part V

Force Majeure, Relief Events and Termination

CLAUSE 29

FORCE MAJEURE

29.1 Force Majeure

As used in this Agreement, the expression **Force Majeure** or **Force Majeure Event** shall mean occurrence in Kenya of any or all of a Non-Political Event and/or a Political Event, as defined in Clauses 29.2 and 29.3 respectively, if it affects the performance by the Party claiming the benefit of Force Majeure (the **Affected Party**) of its obligations under this Agreement and which act or event:

- (a) is beyond the reasonable control of the Affected Party; and
- (b) is unforeseeable; and
- (c) the Affected Party could not have prevented or overcome by exercise of due diligence and following Good Industry Practice; and
- (c) has Material Adverse Effect on the Affected Party; and
- (e) directly causes that Party to be unable to comply with all or a material part of its obligations under this Agreement.

29.2 Non-Political Event

A Non-Political Event shall mean one or more of the following acts or events:

- (a) act of God, epidemic, extremely adverse weather conditions, earthquake, landslide, cyclone, volcanic eruption, chemical or radioactive contamination or ionising radiation, fire or explosion (to the extent of contamination or radiation or fire or explosion originating from a source external to the Site); or
- (b) any judgement or order of any court of competent jurisdiction or statutory Authority made against the Service Provider in any proceedings for reasons other than resulting from (i) any failure of the Service Provider to comply with any Applicable Law or Applicable Permit, or (ii) on account of breach by the Service Provider or any Contractor of any Applicable Law or Applicable Permit or of any contract, or (iii) enforcement of this Agreement by the Contracting Authority, or (iv) exercise of any of its rights under this Agreement by the Contracting Authority; or
- (c) the discovery of geological conditions, toxic contamination or archaeological remains on the Site that could not have been reasonably expected to be discovered through a site inspection.

29.3 Political Event

A Political Event shall mean one or more of the following acts or events:

- (a) nationalisation or expropriation of the Project Network and /or the Equity

by the GOK (or any Governmental Instrumentality) or any compulsory acquisition in the national interest or expropriation of all or substantially all of the Project Assets or rights of the Service Provider; or

- (b) unlawful or unauthorised or unjustified revocation of, or refusal to renew or grant without valid cause, any Applicable Permit required by the Service Provider to perform its obligations under this Agreement; provided that such delay, modification, denial, refusal or revocation did not result from the Service Provider's (or any Contractor's inability) or failure to comply with any condition relating to grant, maintenance or renewal of such clearance, licence, authorisation, no objection certificate, exemption, consent, approval or permit; or
- (c) riots and blockades except where arising solely as a result of any action or inaction of the Service Provider or its Sub-Contractors; or
- (d) a declared act of war, invasion, armed conflict or act of foreign enemy, or military action or sabotage.

29.4 Duty to report Force Majeure Event and performance

29.4.1 Upon occurrence of a Force Majeure Event, the Affected Party shall by notice report such occurrence to the other Party forthwith. Any notice pursuant hereto shall include full particulars of:

- (a) the nature and extent of each Force Majeure Event which is the subject of any claim for relief under this Clause 29 with evidence in support thereof;
- (b) the estimated duration and the effect or probable effect which such Force Majeure Event is having or will have on the Affected Party's performance of its obligations under this Agreement;
- (c) the measures which the Affected Party is taking or proposes to take for alleviating the impact of such Force Majeure Event; and
- (d) any other information relevant to the Affected Party's claim.

29.4.2 The Affected Party shall not be entitled to any relief for or in respect of a Force Majeure Event unless it shall have notified the other Party of the occurrence of the Force Majeure Event as soon as reasonably practicable, and in any event no later than 7 (seven) days after the Affected Party knew, or ought reasonably to have known, of its occurrence, and shall have given particulars of the probable material effect that the Force Majeure Event is likely to have on the performance of its obligations under this Agreement.

29.4.3 For so long as the Affected Party continues to claim to be materially affected by such Force Majeure Event, it shall provide the other Party with regular (and not less than weekly) reports containing information as required by Clause 29.4.1, and such other information as the other Party may reasonably request the Affected Party to provide.

29.5 Effect of Force Majeure Event on the Project

- 29.5.1 Upon the occurrence of any Force Majeure Event prior to the Appointed Date, the periods set forth in Clause 21.1.1 for achieving Financial Close and the dates set out in the Project Completion Schedule and the Longstop Date shall be extended by a period equal in length to the duration of the relevant Force Majeure Event.
- 29.5.2 At any time after the Appointed Date, if any Force Majeure Event occurs before the Completion Date, the Project Term and the dates set out in the Project Completion Schedule and the Longstop Date shall be extended by a period equal in length to the duration of the relevant Force Majeure Event. If the Force Majeure Event occurs after the Completion Date the Project Term shall not be extended and Clause 29.6.2 shall apply. Nothing in this Clause 29 (*Force Majeure*) shall affect, in the case of a Non-Political Event, any entitlement to make Adjustments in the period during which the Force Majeure Event is subsisting.

29.6 Allocation of costs arising out of Force Majeure

- 29.6.1 Upon occurrence of any Force Majeure Event prior to the Appointed Date, each Party shall bear its respective costs and no Party shall be required to pay to the other Party any costs whatsoever.
- 29.6.2 Upon occurrence of a Force Majeure Event after the Appointed Date, the costs incurred and attributable to such event and directly relating to the Project (the “**Force Majeure Costs**”) shall be allocated and paid as follows:
- (a) upon occurrence of a Non-Political Event, the Parties shall bear their respective Force Majeure Costs and neither Party shall be required to pay to the other Party any costs whatsoever; and
 - (b) upon occurrence of a Political Event, the Annuity Payment shall continue to be paid by the Contracting Authority to the Service Provider.

For the avoidance of doubt, Force Majeure Costs payable include (i) interest payments on the senior debt, (ii) O&M Expenses (but excluding any margin), (iii) any increase in the cost of the Works on account of inflation and all other costs properly incurred directly attributable to the Force Majeure Event, but shall not include loss of the Annuity Payment.

- 29.6.3 Save and except as expressly provided in this Clause 29, neither Party shall be liable in any manner whatsoever to the other Party in respect of any loss, damage, cost, expense, claims, demands and proceedings relating to or arising out of occurrence or existence of any Force Majeure Event or exercise of any right pursuant hereto.

29.7 Termination Notice for Force Majeure Event

If a Force Majeure Event subsists for a period of 180 (one hundred and eighty) days or more within a continuous period of 365 (three hundred and sixty five) days, either Party may in its discretion terminate this Agreement by issuing a Termination Notice to the other Party without being liable in any manner whatsoever, save as provided in this Clause 29, and upon issue of such Termination Notice, this

Agreement shall, notwithstanding anything to the contrary contained herein, stand terminated forthwith; provided that before issuing such Termination Notice, the Party intending to issue the Termination Notice shall inform the other Party of such intention and grant 15 (fifteen) days' time to make a representation, and may after the expiry of such 15 (fifteen) days period, whether or not it is in receipt of such representation, in its sole discretion issue the Termination Notice.

29.8 Termination Payment for Force Majeure Event

29.8.1 If Termination is on account of a Non-Political Event, the Contracting Authority shall make a Termination Payment to the Service Provider within [120] business days of demand by the Service Provider to the Contracting Authority in an amount equal to 100% (one hundred per cent) of the Debt Due less Insurance Proceeds plus Equity at the Termination Date (less in the case of Subordinated Debt payments of interest made by the Service Provider and in the case of shares less dividends or other distributions paid to shareholders by the Service Provider).

29.8.2 If Termination is on account of a Political Event, the Contracting Authority shall make a Termination Payment to the Service Provider within [120] business days of demand by the Service Provider to the Contracting Authority in an amount that would be payable under Clause 33.3.2 as if it were an Contracting Authority Default.

29.9 Dispute resolution

In the event that the Parties are unable to agree in good faith about the occurrence or existence of a Force Majeure Event, such Dispute shall be finally settled in accordance with the Dispute Resolution Procedure; provided that the burden of proof as to the occurrence or existence of such Force Majeure Event shall be upon the Party claiming relief and/or excuse on account of such Force Majeure Event.

29.10 Relief from performance of obligations

If the Affected Party is (or claims to be) rendered wholly or partially unable to perform its obligations under this Agreement because of a Force Majeure Event, it shall be excused from performance of such of its obligations to the extent it is unable to perform on account of such Force Majeure Event; provided that:

- (a) the suspension of performance shall be of no greater scope and of no longer duration than is reasonably required by the Force Majeure Event;
- (b) the Affected Party shall make all reasonable efforts and take all reasonable steps to (i) mitigate the consequences of such an event upon the performance of its obligations under this Agreement and (ii) to mitigate or limit damage to the other Party arising out of or as a result of the existence or occurrence of such Force Majeure Event and to cure the same with due diligence; and
- (c) when the Affected Party is able to resume performance of its obligations under this Agreement, it shall give to the other Party notice to that effect and shall promptly resume performance of its obligations hereunder.

CLAUSE 30
RELIEF EVENTS

- 30.1 If and to the extent that a Relief Event is the direct cause of:
- (a) a failure by the Service Provider to achieve any Project Milestone within the specified period or the Completion Date by the Scheduled Completion Date;
 - (b) a failure by the Service Provider to rectify Defects within the periods specified in the Output Specifications;
 - (c) the events set out in Clauses 17.13 and 29.10;
 - (d) failure or delay by any statutory authority, utility company, local authority county government or like body, to carry out works or provide services, including failure to undertake any required works for the movement of utilities or reinstatement of the Project Network after carrying out such works or the removal of any geological or archaeological findings;
 - (e) any action or inaction of a county government or other government agency other than the Contracting Authority whose effect is to delay any Project Milestone

then without prejudice to any other rights of the Service Provider under this Agreement, the Service Provider shall be entitled to apply for any relief from any rights of the Contracting Authority arising under Clauses 12.5.2, 12.5.3, 17.8 and 33.1 of this Agreement).

- 30.2 To obtain relief, the Service Provider must within 20 (twenty) days after it becomes aware that a Relief Event has or is likely to cause a delay provide to the Contracting Authority a notice of claim for relief, including full details of the nature of the Relief Event, the date of occurrence and its likely duration. Thereafter and, in any event within 60 (sixty) days, it must demonstrate to the reasonable satisfaction of the Contracting Authority that:
- (a) neither it nor its contractors could have avoided such occurrence and its consequences without incurring material expenditure;
 - (b) the Relief Event directly caused a delay to the achievement of, respectively, a Project Milestone, the Scheduled Completion Date or rectification of a Defect within the time period specified in the Output Specifications;
 - (c) the need for relief;
 - (d) the time lost which could not reasonably be mitigated or recovered by its contractors acting in accordance with Good Industry Practice; and
 - (e) the Service Provider has used and is continuing to use reasonable

endeavours to perform its obligations under this Agreement.

30.3 In the event that the Service Provider has complied with its obligations under Clause 30.2 then:

- (a) the relevant Project Milestone and/or Scheduled Completion Date and Longstop Date;
- (b) the time to repair the Defect,

shall be postponed by such time as is reasonable for such a Relief Event, taking into account the likely effect of the delay; and

- (c) the Contracting Authority shall not be entitled to exercise its right to terminate this Agreement in respect of such relevant Relief Event,

Provided that where the Service Provider fails to achieve any revised date or time as agreed pursuant to this Clause 30.4 the Contracting Authority shall be entitled to make Adjustments in accordance with the relevant provisions and may enforce any of its rights under this A

CLAUSE 31

COMPENSATION FOR BREACH OF AGREEMENT

31.1 Compensation for default by the Service Provider

Subject to the provisions of Clause 31.5, in the event of the Service Provider being in material default or material breach of this Agreement, it shall pay to the Contracting Authority by way of compensation, all direct costs suffered or incurred by the Contracting Authority as a consequence of such material default or material breach to place the Contracting Authority in a no better no worse position, provided that no compensation shall be payable under this Clause 31.1 for any material breach or material default in respect of which Damages are expressly specified and payable under this Agreement or for any indirect or consequential losses incurred by the Contracting Authority or for loss of profit. The Contracting Authority shall make a claim in respect of any such material default or material breach within 90 (ninety) days of occurrence and shall procure that any such demand is supported by necessary and full particulars thereof.

31.2 Compensation for default by the Contracting Authority or pursuant to Clause 13.5

Subject to the provisions of Clause 31.3 and 31.5, in the event of the Contracting Authority being in material default or material breach of this Agreement at any time after the Appointed Date or a result of a suspension pursuant to Clause 13.3.3, the Contracting Authority shall pay to the Service Provider by way of compensation, all direct costs suffered or incurred by the Service Provider as a consequence of such material default or material breach or arising out of or which are a consequence of such suspension pursuant to [Clause 13.3.3] to place the Service Provider (without double counting) in a no better no worse position provided that no such compensation shall be payable for any material breach or material default in respect of which Damages or costs have been expressly specified in this Agreement. The Service Provider shall make any claim in respect of a material default or material breach within 90 (ninety) days of occurrence and shall procure that any such demand is supported by necessary and full particulars thereof.

For the avoidance of doubt, compensation payable may include interest payments on debt, O&M Expenses, any increase in capital costs on account of inflation and all other costs directly attributable to such material breach or material default but shall not include loss of Annuity or debt repayment obligations or any other indirect or consequential losses or loss of profit and for determining such compensation, information contained in the Financial Package and the Financial Model may be relied upon to the extent it is relevant. Any compensation made by the Contracting Authority shall be made by an adjustment to the Annuity Payment in accordance with Clause 23 (*Financial Adjustment*).

31.3 Extension of Longstop Date

Subject to the provisions of Clause 31.5, in the event that a material default or material breach of this Agreement set forth in Clause 31.2 or where [Clause 13.3.3] applies which in either case causes delay in achieving the Completion Date the

Contracting Authority shall, in addition to payment of compensation under Clause 31.2 to place the Service Provider in a no better no worse position, extend the Longstop Date, such extension being equal in duration to the period by which the Completion Date was delayed. The Contracting Authority shall have the option to extend the Project Term rather than pay compensation pursuant to Clause 31.2 provided that the Service Provider is placed in a no better no worse position.

31.4 Compensation to be in addition

Compensation payable under this Clause 31 shall be in addition to, and not in substitution for, or derogation of, Termination Payment, if any.

31.5 Mitigation of costs and damage

The Affected Party shall use all reasonable efforts to mitigate or limit any delay, costs and/or damage arising out of or as a result of breach of Agreement by the other Party. Any dispute arising under this Clause 31 shall be referred to the Fast Track Resolution Procedure.

CLAUSE 32

SUSPENSION OF SERVICE PROVIDER'S RIGHTS

32.1 Suspension upon Service Provider Default

Upon occurrence of a Service Provider Default, the Contracting Authority shall be entitled, without prejudice to its other rights and remedies under this Agreement including its rights of Termination hereunder, to (i) suspend all rights of the Service Provider under this Agreement including the Service Provider's right to receive the Annuity Payments, and other revenues pursuant hereto, and (ii) exercise such rights itself and perform the obligations hereunder or authorise any other person to exercise or perform the same on its behalf during such suspension (the **Suspension**). Any Suspension hereunder shall be effective forthwith upon issue of written notice by the Contracting Authority to the Service Provider and may extend up to a period not exceeding [180 (one hundred and eighty) days]¹ from the date of issue of such notice provided that upon written request from the Service Provider and the Lenders' Representative, the Contracting Authority may at its sole discretion extend the aforesaid period of 180 (one hundred and eighty) days by a further period not exceeding 90 (ninety) days.

32.2 Contracting Authority to act on behalf of Service Provider

32.2.1 During the period of Suspension, the Contracting Authority shall, on behalf of the Service Provider, operate and maintain the Project Network under and in accordance with this Agreement. The Contracting Authority shall be entitled to be reimbursed by the Service Provider by way of deduction from the Annuity for meeting the costs incurred by it for remedying and rectifying the cause of Suspension, and thereafter for defraying the expenses specified in Clause 27.3.

32.2.2 During the period of Suspension hereunder, all rights and liabilities vested in the Service Provider in accordance with the provisions of this Agreement shall continue to vest therein and all things done or actions taken, including expenditure incurred by the Contracting Authority for discharging the obligations of the Service Provider under and in accordance with this Agreement and the Project Agreements, shall be deemed to have been done or taken for and on behalf of the Service Provider and the Service Provider undertakes to indemnify the Contracting Authority for all costs reasonably incurred during such period. The Service Provider hereby licenses and sub-licenses respectively, the Contracting Authority or any other person authorised by it under Clause 32.1 to use during Suspension, all Intellectual Property belonging to or licenced to the Service Provider with respect to the Project Network and its design, engineering, construction, operation and maintenance, and which is used or created by the Service Provider in performing its obligations under the Agreement.

32.3 Revocation of Suspension

32.3.1 In the event that the Contracting Authority rectifies or removes the cause of Suspension within a period not exceeding 90 (ninety) days from the date of

¹ Discuss.

Suspension, it shall revoke the Suspension forthwith and restore all rights of the Service Provider under this Agreement. For the avoidance of doubt, the Parties expressly agree that the Contracting Authority may, in its discretion, revoke the Suspension at any time, whether or not the cause of Suspension has been rectified or removed hereunder.

32.3.2 Upon the Service Provider having cured the Service Provider Default within a period not exceeding [90 (ninety)]² days from the date of Suspension, the Contracting Authority shall revoke the Suspension forthwith and restore all rights of the Service Provider under this Agreement.

32.4 Substitution of Service Provider

At any time during the period of Suspension, the Lenders' Representative, on behalf of Senior Lenders, shall be entitled to substitute the Service Provider under and in accordance with the Direct Agreement, and upon receipt of notice thereunder from the Lenders' Representative, the Contracting Authority shall withhold Termination for a period not exceeding 180 (one hundred and eighty) days from the date of Suspension, and any extension thereof under Clause 35.1, for enabling the Lenders' Representative to exercise its rights of substitution on behalf of Senior Lenders.

32.5 Termination

32.5.1 At any time during the period of Suspension under this Clause 32, the Service Provider may by notice require the Contracting Authority to revoke the Suspension and issue a Termination Notice. Subject to the rights of the Lenders' Representative to undertake substitution in accordance with the provisions of this Agreement and within the period specified in Clause 32.4, the Contracting Authority shall within 15 (fifteen) days of receipt of such notice, terminate this Agreement under and in accordance with Clause 33.

32.5.2 Notwithstanding anything to the contrary contained in this Agreement, in the event that Suspension is not revoked within 180 (one hundred and eighty) days from the date of Suspension hereunder or within the extended period, if any, set forth in Clause 32.1, the Project Agreement shall, upon expiry of the aforesaid period, be deemed to have been terminated by mutual agreement of the Parties and all the provisions of this Agreement shall apply, *mutatis mutandis*, to such Termination as if a Termination Notice had been issued by the Contracting Authority upon occurrence of a Service Provider Default.

² Discuss.

CLAUSE 33
TERMINATION

33.1 Termination for Service Provider Default

33.1.1 Save as otherwise provided in this Agreement, in the event that any of the defaults specified below shall have occurred, and where there is a stated Cure Period the Service Provider fails to cure the default within the Cure Period set out below, the Service Provider shall be deemed to be in default of this Agreement (a **Service Provider Default**), unless the default has occurred solely as a result of any breach of this Agreement by the Contracting Authority or due to a Force Majeure Event or due to a Relief Event. Each of the following constitute a Service Provider Default:

- (a) the Performance Security has been encashed and appropriated in accordance with Clause 9.2 and the Service Provider fails to replenish or provide fresh Performance Security within a Cure Period of 30 (thirty) days;
- (b) subsequent to the replenishment or furnishing of fresh Performance Security in accordance with Clause 9.2, the Service Provider fails to cure, within a Cure Period of 90 (ninety) days, the Service Provider Default for which whole or part of the Performance Security was appropriated;
- (c) the Service Provider does not achieve the latest outstanding Project Milestone due in accordance with the provisions of Schedule G and continues to be in default for 120 (one hundred and twenty) days;
- (d) the Service Provider abandons or manifests intention to abandon the construction or operation of the Project Network for a continuous period of time that exceeds 1 (one) month without the prior written consent of the Contracting Authority;
- (e) the Project Completion Date does not occur by the Longstop Date or where pursuant to Clause 12.5.3 the Contracting Authority is entitled to call a Service Provider Default;
- (f) the Snag List items have not been completed within 210 (two hundred and ten) days of the issue of the Provisional Certificate as specified in Clause 14.4.1;
- (g) the Service Provider has failed to make any payment due and owing in excess of 25% of the yearly amount of the Annuity Payment [*or Kshs. 1,000,000*] to the Contracting Authority within the period specified in this Agreement and such amount (if undisputed) remains unpaid for 30 days from the date of non-payment;
- (h) upon occurrence of a Financial Default, the Lenders' Representative has by notice required the Contracting Authority to undertake Suspension or Termination, as the case may be, in accordance with the Direct Agreement and the Service Provider fails to cure the default within the Cure Period specified hereinabove;

- (i) a breach of any of the Principal Sub-Contracts by the Service Provider or any Contractor which causes a Material Adverse Effect which is not cured within a Cure Period of 30 (thirty) days;
- (j) the Service Provider creates any Encumbrance in breach of this Agreement;
- (k) the Service Provider repudiates this Agreement or otherwise takes any action or evidences or conveys an intention not to be bound by the Agreement;
- (l) a Change in Ownership has occurred in breach of the provisions of Clause 5.3;
- (m) there is a transfer either of (i) the rights and/or obligations of the Service Provider under the Project Agreement, or of (ii) all or part of the assets or undertaking of the Service Provider, except as specifically provided for under this Agreement;
- (n) an execution levied on any of the assets of the Service Provider has caused a Material Adverse Effect;
- (o) the Service Provider is adjudged bankrupt or insolvent, or if a trustee or receiver is appointed for the Service Provider or for the whole or material part of its assets that has a material bearing on the Project;
- (p) the Service Provider has been, or is in the process of being liquidated, dissolved, wound-up, amalgamated or reconstituted in a manner that would result in, in the reasonable opinion of the Contracting Authority, a Material Adverse Effect;
- (q) a resolution for winding up of the Service Provider is passed, or any petition for winding up of the Service Provider is admitted by a court of competent jurisdiction and a provisional liquidator or receiver is appointed and such order has not been set aside within [90 (ninety)]³ days of the date thereof or the Service Provider is ordered to be wound up by Court except for the purpose of amalgamation or reconstruction; provided that, as part of such amalgamation or reconstruction, the entire property, assets and undertaking of the Service Provider are transferred to the amalgamated or reconstructed entity and that the amalgamated or reconstructed entity has unconditionally assumed the obligations of the Service Provider under this Agreement and the Principal Sub-Contracts; and provided that:
 - (i) the amalgamated or reconstructed entity has the capability and operating experience necessary for the performance of its obligations under this Agreement and the Principal Sub-Contracts;
 - (ii) the amalgamated or reconstructed entity has the financial standing to perform its obligations under this Agreement and the Project Agreements and has a credit worthiness at least as good as that of

³ Discuss.
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the Service Provider as at the Appointed Date; and

- (iii) each of the Principal sub-Contracts remains in full force and effect;
- (r) any representation or warranty made or deemed to be repeated in this Agreement is false, incorrect in any material respect or misleading when made or deemed to be repeated to be in breach thereof which is not remedied within a Cure Period of 30 (thirty) days;
- (s) the Service Provider submits to the Contracting Authority any statement, notice or other document, in written or electronic form, which has a material effect on the Contracting Authority's rights, obligations or interests and which is false in material particulars;
- (t) the Service Provider has failed to fulfil any obligation, for which failure Termination has been specified in this Agreement;
- (u) the Service Provider (i) commits a material breach of its obligations under this Agreement and such breach causes a Material Adverse Effect on the Contracting Authority or (ii) wilfully breaches Clause 26 (*Refinancing*);
- (v) the Service Provider is in breach of (i) Clause 26 or (ii) where the Contracting Authority elects to terminate this Agreement pursuant to its rights under Clause 33.7;]
- (w) the Service Provider fails to meet the standards specified in the Service Performance Requirements resulting in Unavailability Deductions and Deemed Unavailability Deductions that add up to [*to be confirmed from Schedule M*] % or more of the Annuity Payment due for that Annuity Payment Period as set out in Schedule M; and
- (x) in any 2 (two) consecutive Annuity Payment Periods, the number of Service Points exceed [*to be confirmed from Schedule M*] as set out in Schedule M.

33.1.2 Without prejudice to any other rights or remedies which the Contracting Authority may have under this Agreement, upon occurrence of a Service Provider Default, the Contracting Authority shall be entitled to terminate this Agreement by issuing a Termination Notice to the Service Provider provided that prior to issuing the Termination Notice, the Contracting Authority shall by a notice inform the Service Provider of its intention to issue such Termination Notice and grant to the Service Provider and the Lenders' Representative a period of 30 (thirty) days to decide whether or not to make a representation, and may after the expiry of such 30 (thirty) days, whether or not it is in receipt of such representation, issue the Termination Notice, subject to the provisions of clause 33.1.3.

33.1.3 The Contracting Authority shall send a copy of its notice of intention to issue a Termination Notice referred to in Clause 33.1.2 to inform the Lenders' Representative (on behalf of the Senior Lenders) and grant 30 (thirty) days to the Lenders' Representative to decide whether or not to make a representation on behalf of the Senior Lenders stating their intention to substitute the Service Provider in accordance with the Direct Agreement. In the event the Contracting Authority

receives such representation on behalf of Senior Lenders, it shall, in its discretion, either suspend its right to exercise Termination for a period not exceeding 180 (one hundred and eighty) days from the date of such representation or exercise its right of Suspension, as the case may be, for enabling the Lenders' Representative to exercise the Senior Lenders' right of substitution in accordance with the Direct Agreement. The Lenders' Representative may, instead of exercising the Senior Lenders' right of substitution, procure that the default specified in the notice is cured within the aforesaid period of [180 (one hundred and eighty)]⁴ days, and upon such curing thereof, the Contracting Authority shall withdraw its notice referred to above and restore all the rights of the Service Provider. Upon the written request of the Lenders' Representative and the Service Provider, the Contracting Authority may at its sole option decide to extend such period of 180 (one hundred and eighty) days by a further period not exceeding 90 (ninety) days.

33.2 Termination for Contracting Authority Default

33.2.1 In the event that any of the defaults specified below shall have occurred, and the Contracting Authority fails to cure such default within a Cure Period of 90 (ninety) days or such longer period as has been expressly provided in this Agreement, the Contracting Authority shall be deemed to be in default of this Agreement (“**Contracting Authority Default**”) unless the default has occurred as a result of any breach of this Agreement by the Service Provider or due to Force Majeure. Each of the following constitute a Contracting Authority Default:

- (a) The Contracting Authority commits a material default in complying with any of the provisions of this Agreement (other than as specified in (b) (below) and such default has a Material Adverse Effect on the Service Provider;
- (b) the Contracting Authority has failed to make any payment due to the Service Provider under this Agreement (which are undisputed) which singly, or in aggregate, exceed [30%] of the annual Annuity Payment and such failure continues for 90 (ninety) days after notice of non-payment;
- (c) any representation or warranty made or deemed to be repeated in this Agreement is false, incorrect in any material respect or misleading when made or deemed to be repeated to be in breach thereof which is not remedied within a Cure Period of 60 (thirty) days; or
- (g) the Contracting Authority has failed to fulfil any obligation, for which failure Termination has been specified in this Agreement;

33.2.2 Without prejudice to any other right or remedy which the Service Provider may have under this Agreement, upon occurrence of an Contracting Authority Default, the Service Provider shall, subject to the provisions of the Direct Agreement, be entitled to terminate this Agreement by issuing a Termination Notice to the Contracting Authority; provided that before issuing the Termination Notice, the Service Provider shall by a notice inform the Contracting Authority of its intention to issue the Termination Notice and grant 30 (thirty) days to the Contracting

⁴ Discuss.

Authority to make a representation, and may after the expiry of such 30 (thirty) days, issue the Termination Notice.

- 33.3A The Contracting Authority shall be entitled to terminate this Agreement at any time on six (6) months' notice to the Service Provider. In the event of notice being given by the Contracting Authority in accordance with Clause 33.3A the Contracting Authority at any time before the expiration of such notice shall be entitled to direct the Service Provider, where the Works (or any part of them) have not commenced, to refrain from commencing any such Works.
- 33.3B Subject to Clause 42.8 (*Survival*), this Agreement shall terminate on the expiry of the Project Term unless it shall have been terminated earlier in accordance with the terms of this Agreement.

33.3 Termination Payment

- 33.3.1 Upon Termination on account of Service Provider Default the Contracting Authority shall pay to the Service Provider an amount equal to:
- (a) until the Completion Date, 90 (ninety)% of the Debt Due less Insurance Proceeds; and
 - (b) following the Completion Date, 80 (eighty)% of the Debt Due less Insurance Proceeds.

For the avoidance of doubt no payment shall be made for Equity.

- 33.3.2 Upon Termination on account of a Contracting Authority Default or where the Contracting Authority terminates pursuant to Clause 33.3A, the Contracting Authority shall pay to the Service Provider, by way of Termination Payment, an amount equal to:
- (a) Debt Due;
 - (b) NPV; and
 - (c) Sub-Contractor Costs.

- 33.3.3 The Termination Payment payable under Clause 29.8 or this Clause 33 or other provisions of this Agreement shall become due and payable to the Service Provider subject to Clause 33.4 within 90 (ninety) days of a demand being made by the Service Provider to the Contracting Authority with the necessary particulars, and in the event of any delay, the Contracting Authority shall pay interest at a rate equal to the Senior Debt Rate on the amount of Termination Payment remaining unpaid; provided that such delay shall not exceed 90 (ninety) days. For the avoidance of doubt, it is expressly agreed that Termination Payment shall constitute full discharge by the Contracting Authority of its payment obligations in respect thereof hereunder.

- 33.3.4 The Service Provider expressly agrees that the Termination Payment under this

Clause 33 shall constitute a full and final settlement of all rights and claims of the Service Provider on account of Termination of this Agreement for any reason whatsoever including breach and that the Service Provider or any shareholder thereof shall not have any further right or claim under any law, treaty, convention, contract or otherwise.

33.3.5 If any amount of compensation payable by the Contracting Authority pursuant to Clauses 29.8, 33.3 or 33.7 is subject to Taxes in Kenya, then the Contracting Authority shall pay to the Service Provider such additional amount as will put the Service Provider in the same after Tax position as it would have been had the payment not been subject to Taxes taking account of any relief, allowance deduction, setting off or credit in respect of Taxes which may have been available to the Service Provider to reduce the Taxes to which the payment is subject.

33.4 Instalments

The Contracting Authority may elect to pay any Termination Payment on the dates (the **Instalment Dates**) and in the amounts that the Service Provider would have required to pay principal to the Senior Lenders under the terms of the Financing Agreements had Termination not occurred or as the Parties otherwise agree Interest shall accrue on any unpaid Due Debt element of any Termination Payment at the Bank Rate.

33.5 Other rights and obligations of the Contracting Authority

Upon Termination for any reason whatsoever, the Contracting Authority shall:

- (a) be deemed to have taken possession and control of the Project Network forthwith;
- (b) take possession and control of all materials, stores, implements, construction plants and equipment on or about the Site;
- (c) be entitled to restrain the Service Provider and any person claiming through or under the Service Provider from entering upon the Site or any part of the Project;
- (d) require the Service Provider to comply with the Divestment Requirements set forth in Clause 34.1; and
- (e) succeed upon election by the Contracting Authority, without the necessity of any further action by the Service Provider, to the interests of the Service Provider under such of the Project Agreements as the Contracting Authority may in its discretion deem appropriate, and shall upon such election be liable to the Contractors only for compensation accruing and becoming due and payable to them under the terms of their respective Project Agreements from and after the date the Contracting Authority elects to succeed to the interests of the Service Provider. For the avoidance of doubt, the Service Provider acknowledges and agrees that all sums claimed by such

Contractors as being due and owing for works and services performed or accruing on account of any act, omission or event prior to such date shall constitute debt between the Service Provider and such Contractors, and the Contracting Authority shall not in any manner be liable for such sums. It is further agreed that in the event the Contracting Authority elects to cure any outstanding defaults under such Project Agreements, the amount expended by the Contracting Authority for this purpose shall be deducted from the Termination Payment.

33.6 Survival of rights

Notwithstanding anything to the contrary contained in this Agreement, but subject to the provisions of Clause 33.3.4, any Termination pursuant to the provisions of this Agreement shall be without prejudice to the accrued rights of either Party including its right to claim and recover money damages, insurance proceeds, security deposits, and other rights and remedies, which it may have in law or contract. All rights and obligations of either Party under this Agreement, including Termination Payments and Divestment Requirements, shall survive the Termination to the extent such survival is necessary for giving effect to such rights and obligations.

33.7 Corrupt Gifts

- 33.7.1 If the Service Provider or any Contractor (or anyone employed by or acting on behalf of any of them) or any of its or their agents or shareholders commits any Prohibited Act in relation to this Project, then the Contracting Authority shall be entitled to act in accordance with this Clause 33.7.
- 33.7.2 If a Prohibited Act is committed by the Service Provider or any Contractor or by an employee not acting independently or by any shareholder or Associate, then the Contracting Authority may terminate this Agreement by giving notice to the Service Provider.
- 33.7.3 If a Prohibited Act is committed by an employee of the Service Provider and/or Contractor acting independently, then the Contracting Authority may give notice to the Service Provider of termination of this Agreement and this Agreement will terminate, unless within 30 (thirty) days of receipt of such notice the Service Provider terminates, or procures that the Contractor terminates, the employee's employment.
- 33.7.4 On termination of this Agreement in accordance with this Clause 33.7 the Contracting Authority shall pay to the Service Provider an amount equal to 100% of the Debt Due less any Insurance Proceeds. The Termination payment shall be paid in accordance with Clause 33.3.3.

CLAUSE 34

DIVESTMENT OF RIGHTS AND INTEREST

34.1 Divestment Requirements

34.1.1 Upon Termination, the Service Provider shall comply with and conform to the following Divestment Requirements:

- (a) notify to the Contracting Authority in writing no later than 30 days prior to the Transfer Date the location and particulars of all Project Assets;
- (b) deliver forthwith the actual or constructive possession of the Project Network, free and clear of all Encumbrances, save and except to the extent set forth in the Direct Agreement and Permitted Encumbrances;
- (c) cure all Project Assets, including the road, bridges, structures and equipment, of all defects and deficiencies so that the Project Network is compliant with the Divestment Requirements as set out in the Output Specifications provided that in the event of Termination during the Construction Period, all Project Assets shall be handed over on 'as is where is' basis after bringing them to a safe condition;
- (d) deliver and transfer relevant records, reports, Intellectual Property and other licences pertaining to the Project Network and its design, engineering, construction, operation and maintenance, including all programmes and manuals pertaining thereto, and complete 'as built' Drawings as on the Transfer Date. For the avoidance of doubt, the Service Provider represents and warrants that the Intellectual Property delivered hereunder shall be adequate and complete for the design, engineering, construction, operation and maintenance of the Project Network and shall be assigned to the Contracting Authority free of any encumbrance;
- (e) transfer and/or deliver to the Contracting Authority all necessary Applicable Permits to the extent permissible under Applicable Laws;
- (f) execute such deeds of conveyance, documents and other writings as the Contracting Authority may reasonably require for conveying, divesting and assigning all the rights, title and interest of the Service Provider in the Project Network, including manufacturers' warranties in respect of any plant or equipment and the right to receive outstanding insurance claims to the extent due and payable to the Contracting Authority, absolutely unto the Contracting Authority or its nominee; and
- (g) comply with all other requirements as may be prescribed or required under Applicable Laws for completing the divestment and assignment of all rights, title and interest of the Service Provider in the Project Network, free from all Encumbrances, absolutely unto the Contracting Authority or to its nominee.

34.1.2 Subject to the exercise by the Contracting Authority of its rights under this Agreement or under any of the Principal Sub-Contracts to perform or procure the

performance by a third party of any of the obligations of the Service Provider, the Parties shall continue to perform their obligations under this Agreement, notwithstanding the giving of any Termination Notice, until the Termination of this Agreement becomes effective in accordance with its terms.

34.2 Inspection and cure

Not earlier than 90 (ninety) days prior to the proposed Transfer Date but not later than 15 (fifteen) days prior to the effective date of such Transfer Date, the Independent Expert shall verify, after giving due notice to the Service Provider of the time, date and venue of such verification, compliance by the Service Provider with hand-back requirements as set out in the Output Specifications, and if required, cause appropriate tests to be carried out at the Service Provider's cost for this purpose. Defaults, if any, in the fulfilment of the Service Provider's obligations under the Output Specifications shall be cured by the Service Provider at its cost.

34.3 Cooperation and assistance on transfer of Project

34.3.1 The Parties shall cooperate on a best effort basis and take all necessary measures, in good faith, to achieve a smooth transfer of the Project in accordance with the provisions of this Agreement so as to protect the safety of and avoid undue delay or inconvenience to the Users, other members of the public or the lawful occupiers of any part of the Site.

34.3.2 The Parties shall provide to each other 9 (nine) months prior to the Transfer Date in the event of Termination by efflux of time and immediately in the event of either Party conveying to the other Party its intent to issue a Termination Notice, as the case may be, as much information and advice as is reasonably practicable regarding the proposed arrangements for operation of the Project following the Transfer Date. The Service Provider shall further provide such reasonable advice and assistance as the Contracting Authority may reasonably require for operation of the Project until the expiry of 6 (six) months after the Transfer Date.

34.3.3 The Contracting Authority shall have the option to purchase or hire from the Service Provider at a fair market value and free from any encumbrance all or any part of the plant and machinery used in connection with the Project but which does not form part of the assets specified in Clause 34.1.1 and is reasonably required in connection with operation of the Project. For the avoidance of doubt, in the event of dispute or difference relating to fair market value, the Dispute Resolution Procedure shall apply.

34.4 Vesting Certificate

The divestment of all rights, title and interest in the Project Network shall be deemed to be complete on the date when all of the Divestment Requirements have been fulfilled, and the Contracting Authority shall, without unreasonable delay, thereupon issue a certificate substantially in the form of Schedule R (**Vesting Certificate**), which will have the effect of constituting evidence of divestment by the Service Provider of all of its rights, title and interest in the Project Network, and their vesting in the Contracting Authority pursuant hereto. It is expressly agreed that any defect or deficiency in the Divestment Requirements shall not in any

manner be construed or interpreted as restricting the exercise of any rights by the Contracting Authority or its nominee on, or in respect of, the Project Network on the footing that all Divestment Requirements have been complied with by the Service Provider.

34.5 Additional Facilities

Notwithstanding anything to the contrary contained in this Agreement, all Additional Facilities shall continue to vest in the Service Provider upon and after Termination.

34.6 Divestment costs etc.

34.6.1 The Service Provider shall bear and pay all costs incidental to divestment of all of the rights, title and interest of the Service Provider in the Project Network in favour of the Contracting Authority upon Termination, save and except that all stamp duties payable on any deeds or Documents executed by the Service Provider in connection with such divestment shall be borne by the Contracting Authority.

34.6.2 In the event of any dispute relating to matters covered by and under this Clause 34, the Dispute Resolution Procedure shall apply.

Part VI

Other Provisions

CLAUSE 35

ASSIGNMENT AND CHARGES

35.1 Restrictions on assignment and charges

35.1.1 Subject to Clauses 35.2 and 35.3, the Service Provider may not transfer or assign any of its rights, obligations or liabilities under this Agreement to any person, save and except with the prior consent in writing of the Contracting Authority at its absolute discretion.

35.1.2 Subject to the provisions of Clause 35.2, the Service Provider shall not create nor permit to subsist any Encumbrance, or otherwise transfer or dispose of all or any of its rights and benefits under this Agreement or any Project Agreement to which the Service Provider is a party except with prior written consent of the Contracting Authority at its absolute discretion.

35.2 Permitted assignment and charges

The restrictions set out in Clause 35.1 shall not apply to any of the following:

- (a) liens arising by operation of law (or by an agreement evidencing the same) in the ordinary course of business of the Project Network;
- (b) mortgages/pledges/hypothecation of goods/assets other than Project Assets, and their related documents of title, arising or created in the ordinary course of business of the Project Network, and as security only for indebtedness to the Senior Lenders under the Financing Agreements and/or for working capital arrangements for the Project Network and
- (c) liens or encumbrances required by any Applicable Law;

(collectively, the “**Permitted Encumbrances**”).

35.3 Direct Agreement

35.3.1 The Lenders’ Representative, on behalf of Senior Lenders, may exercise the right to step-in and, if necessary, substitute the Service Provider pursuant to a lenders direct agreement to be entered into amongst the Service Provider, the Contracting Authority and the Lenders’ Representative, on behalf of Senior Lenders (the **Direct Agreement**).

35.3.2 Upon substitution of the Service Provider under and in accordance with the Direct Agreement, the Nominated Company substituting the Service Provider shall be deemed to be the Service Provider under this Agreement and shall enjoy all rights and be responsible for all obligations of the Service Provider under this Agreement as if it were the Service Provider

35.4 Assignment by the Contracting Authority

Notwithstanding anything to the contrary contained in this Agreement, the Contracting Authority may, after giving 60 (sixty) days’ notice to the Service

Provider, assign and/or transfer any of its rights and benefits and/or obligations under this Agreement; to an assignee who is, in the reasonable opinion of the Contracting Authority, capable of fulfilling all of the Contracting Authority's then outstanding obligations under this Agreement.

35.5 Sub-Contracting

Nothing in this Agreement shall prohibit the Service Provider from providing or procuring the Works or performing the O&M Services from a Contractor having the legal capacity, power and authority to become a party to and perform the obligations of the relevant EPC Contract or O&M Contract and employing persons having the appropriate qualifications, experience and technical competence and having the resources available to it which are sufficient to enable it to perform the obligations of a Contractor under, respectively, the EPC Contract and the O&M Contract and whose identity has been notified to the Contracting Authority (and who the Contracting Authority has approved, such approval not to be unreasonably withheld and to be given (or withheld) within 30 (thirty) days of notice), provided that the Service Provider remains liable for the Service Provider's obligations under this Agreement. Consent and approval of the Contracting Authority shall be deemed granted unless expressly withheld in writing within 30 (thirty) days on the grounds specified above.

CLAUSE 36
CHANGE IN LAW

36.1 Qualifying Change in Law

If a Qualifying Change in Law occurs or is shortly to occur, then either Party may write to the other to express an opinion on its likely effects, giving details of its opinion of:

- 36.1.1 any necessary change to the Services;
- 36.1.2 whether any changes are required to the terms of this Agreement to deal with the Qualifying Change of Law;
- 36.1.3 any loss of revenue that will result from the relevant Qualifying Change of Law;
- 36.1.4 any Estimated Change in Project Costs that directly results from the Qualifying Change of Law; and
- 36.1.5 any Capital Expenditure that is required or no longer required as a result of a Qualifying Change of Law taking effect following the Completion Date,

in each case giving in full detail the procedure for implementing the change in O&M Services. Responsibility for the costs of implementation (and any resulting variation to the Annuity Payment) shall be dealt with in accordance with Clauses 36.2 to Clause 36.6.

36.2 Parties to discuss

As soon as practicable after receipt of any notice from either Party under Clause 36.1, the Parties shall discuss and agree the issues referred to in Clause 36.1, and any ways in which the Service Provider can mitigate the effect of the Qualifying Change of Law, including:

- 36.2.1 providing evidence that the Service Provider has used reasonable endeavours (including (where practicable) the use of competitive quotes) to oblige its sub-contractor(s) to minimise any increase in costs and maximise any reduction in costs;
- 36.2.2 demonstrating how any capital expenditure to be incurred or avoided is being measured in a cost effective manner, including showing that when such expenditure is incurred or would have been incurred, foreseeable Changes of Law at that time have been taken into account by the Service Provider; and
- 36.2.3 demonstrating that any expenditure that has been avoided, which was anticipated to be incurred to replace or maintain assets that have been affected by the Qualifying Change in Law concerned, has been taken into account in the amount which in its opinion has resulted or is required under this Clause 36.

36.3 Finance for Capital Expenditure

If the Parties agree or it is determined under Clause 39 (*Dispute Resolution*) that the Service Provider is required to incur additional capital expenditure due to a Qualifying Change of Law (excluding the Service Provider's Share of any Capital Expenditure agreed or determined to be required as a result of a General Change of Law under this Clause 36), then the Service Provider shall use its reasonable endeavours to obtain finance for such capital expenditure on terms reasonably satisfactory to it and the Senior Lenders.

36.4 Liability for costs

The Service Provider's Share shall be solely liable for the account of the Service Provider

36.5 Failure to obtain Finance for Capital Expenditure

If the Service Provider has used reasonable endeavours to obtain funding for the Capital Expenditure referred to in Clause 36. 3, but has been unable to do so within 40 (forty) days of the date that the agreement or determination in Clause 36.3 occurred, then the Contracting Authority shall pay to the Service Provider an amount equal to that Capital Expenditure on or before the date falling 60 (sixty) days after the Capital Expenditure has been incurred (which for the avoidance of doubt excludes the Service Provider's Share)⁵.

36.6 Adjustment to Annuity Payment

Any compensation payable under this Clause 36 by means of an adjustment to the Annuity Payment shall be made by means of an adjustment to the Annuity Payment determined and made in accordance with Clause 23 (*Financial Adjustment*).

36.7 Change in Highways Standards

36.7.1 On the occurrence of a Change in Highways Standards that does not comprise Guidance, the Service Provider shall within a reasonable time, provide to the Contracting Authority, (at the Service Provider's cost), a notice setting out:

- (a) what the proposed Change in Highways Standards comprises;
- (b) how the proposed Change in Highways Standards shall affect the Project Network;
- (c) a plan of how the Service Provider shall implement the proposed Change in Highways Standards;
- (d) the cost and/or savings of implementing the proposed Change in Highways

⁵ Same as footnote 27
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Standards including proposals as to how to minimise any cost of the implementation of a Change in Highways Standards and maximise any savings gained from the implementation; and

- (e) the net cost (being the cost of implementation less the savings identified pursuant to Clause 36.7.1 (d) above) of implementing the Change in Highways Standards.

For the avoidance of doubt, the occurrence of a Change in Highways Standards that comprises Guidance shall be deemed to be a General Change in Law for purposes of this Agreement.

- 36.7.2 Where it is identified in the notice referred to in Clause 36.7.1 that the net cost of implementing the proposed Change in Highways Standards does not exceed Kshs 1,000,000 (the **Threshold**) then within 30 (thirty) days of the date of receipt of such notice, the Contracting Authority shall notify the Service Provider of whether it requires the Service Provider to implement the proposed Change in Highways Standards.
- 36.7.3 If the Contracting Authority notifies the Service Provider that it requires the Service Provider to implement the proposed Change in Highways Standards pursuant to Clause 36.7.2, the Service Provider shall implement such Change in Highways Standards at no additional cost to the Contracting Authority.
- 36.7.4 Where it is identified in the notice referred to in Clause 36.7.1 that the net cost of implementing the Change in Highways Standards exceeds the Threshold, then within 30 (thirty) days of the date of receipt by the Contracting Authority of such notice, the Contracting Authority shall notify the Service Provider of whether it requires the Service Provider to implement the proposed Change in Highways Standards.
- 36.7.5 If the Contracting Authority notifies the Service Provider that it requires the Service Provider to implement the proposed Change in Highways Standards pursuant to Clause 36.7.4, the Contracting Authority shall issue a Change in Scope Notice within 40 (forty) days of the date of receipt of the notice referred to in Clause 36.7.4 (to deal with the difference in cost between the Threshold and the net cost to the Service Provider) and Clause 16 shall apply.
- 36.7.6 If the Contracting Authority determines that it does not require the Service Provider to implement a proposed Change in Highways Standards (whether pursuant to Clause 36.7.2 or Clause 36.7.4), such proposed Change in Highways Standards shall not be deemed to be a Change in Highway Standards (for the purposes of this Agreement) and the Service Provider shall continue, and be entitled for the purposes of this Agreement, to comply with the Highways Standards as if such proposed Change in Highway Standards had not occurred.

36.8 Definitions

For the purposes of this Clause 36, the following definitions apply:

Capital Expenditure means expenditure which is treated as capital expenditure in accordance with generally accepted accounting principles in Kenya from time to time.

Change in Highways Standards means a change in any of the Highways Standards whether by way of amendment, replacement, withdrawal, revocation or the publication of additional Highways Standards coming into effect after the date of this Agreement that was not reasonably foreseeable to the highways maintenance industry at the date of this Agreement and with which the Contracting Authority requires the Service Provider to comply (pursuant to Clause 36.7).

Change in Law means the coming into effect after the date of this Agreement of:

- (a) the enactment of any new Kenyan law or Guidance;
- (b) the repeal, modification or re-enactment of any existing Kenyan law or Guidance;

the commencement of any Kenyan law or Guidance which has not entered into effect until the date of the Bid;

- (d) a change in the interpretation or application of any Kenyan law or Guidance by a judgement of a court of record which has become final, conclusive and binding;

Discriminatory Change in Law means a Change in Law, the terms of which expressly apply to the Project or any part thereof and/or the Service Provider and not to other persons or projects.

Estimated Change in Project Costs means in relation to this Clause 36 the aggregate of any estimated increase in construction costs, installation costs, operating costs (including Major Maintenance Works) and financing costs less the aggregate of any estimated reduction in construction costs, installation costs, operating costs (including Major Maintenance Works) and financing costs.

General Change in Law means a Change in Law which is not a Discriminatory Change in Law or a Specific Change in Law.

Guidance means any applicable guidance or direction with which the Service Provider is bound to comply.

Highway Standards means (save to the extent that the same are inconsistent with the Output Specifications in which case the Output Specification shall take precedence) all standards, specifications, codes of practice, all department technical advice notice, technical design notes, supplements, bulletins and any other documents of a similar nature issued by the GOK or any Government Instrumentality in respect of the design, construction or maintenance of highways.

Qualifying Change in Law means:

- (a) a Discriminatory Change in Law;

- (b) a Specific Change in Law; and/or
- (c) a General Change in Law which comes into effect after the Completion Date which involves Capital Expenditure;

which was not foreseeable at the date of the Bid submission.

Service Provider's Share is 2.5% of the Total Project Cost.

Specific Change in Law means any Change in Law which specifically refers to the provision, applies in relation to highways, of services the same as or similar to the services of the EPC Contractor and or O&M Services hereunder or to the holding of shares in companies whose main business is providing, in relation to highways, services the same as or similar to the services of the EPC Contractor and O&M Services under this Agreement.

CLAUSE 37

LIABILITY AND INDEMNITY

37.1 General indemnity

37.1.1 The Service Provider will indemnify, defend, save and hold harmless the Contracting Authority and its officers, servants, agents, advisers, Government Instrumentalities and Government owned and/or controlled entities/enterprises, (the **Contracting Authority Indemnified Persons**) against any and all suits, proceedings, actions, demands and claims from third parties for any loss, damage, cost and expense of whatever kind and nature, whether arising out of any breach by the Service Provider of any of its obligations under this Agreement or any related agreement or on account of any defect or deficiency in the provision of services by the Service Provider to any User or from any negligence of the Service Provider under contract or tort or on any other ground whatsoever, except to the extent that any such suits, proceedings, actions, demands and claims have arisen due to any negligent act or omission, or breach or default of this Agreement on the part of the Contracting Authority Indemnified Persons.

37.1.2 The Contracting Authority will indemnify, defend, save and hold harmless the Service Provider, its respective officers, servants, agents, advisers (the **Service Provider Indemnified Persons**) against all Direct Losses resulting in any and all suits, proceedings, actions, demands and claims from third parties for any loss, damage, cost and expense of whatever kind and nature (including where arising out of any defect in title and/or the rights of the Contracting Authority in the land comprised in the Site which materially and adversely affects the performance by the Service Provider of its obligations under this Agreement except to the extent that: (a) any such suits, proceedings, actions, demands and claims have arisen due to any negligent act or omission, or breach of any of its obligations under any provision of this Agreement and/or breach of its statutory duty on the part of the Service Provider, its subsidiaries, affiliates, contractors, servants or agents, the same shall be the liability of the Service Provider Indemnified Persons; or (b) any liability, loss or damage is for the occurrence of risks against which and to the extent to which the Service Provider is bound to insure under this Agreement.

37.2 Indemnity by the Service Provider

37.2.1 Without limiting the generality of Clause 37.1, the Service Provider shall fully indemnify, hold harmless and defend the Contracting Authority and the Contracting Authority Indemnified Persons from and against any and all loss and/or damages arising out of or with respect to:

- (a) failure of the Service Provider to comply with Applicable Laws and Applicable Permits;
- (b) payment of taxes required to be made by the Service Provider in respect of the income or other taxes of the Service Provider's contractors, suppliers and representatives; or
- (c) non-payment of amounts due as a result of materials or services furnished

to the Service Provider or any of its contractors which are payable by the Service Provider or any of its contractors.

37.2.2 Without limiting the generality of the provisions of this Clause 37, the Service Provider shall fully indemnify, hold harmless and defend the Contracting Authority Indemnified Persons from and against any and all suits, proceedings, actions, claims, demands, liabilities and damages which the Contracting Authority Indemnified Persons may hereafter suffer, or pay by reason of any demands, claims, suits or proceedings arising out of claims of infringement of any domestic or foreign patent rights, copyrights or other intellectual property, proprietary or confidentiality rights with respect to any materials, information, design or process used by the Service Provider or by the Service Provider's Contractors in performing the Service Provider's obligations or in any way incorporated in or related to the Project. If in any such suit, action, claim or proceedings, a temporary restraint order or preliminary injunction is granted, the Service Provider shall make every reasonable effort, by giving a satisfactory bond or otherwise, to secure the revocation or suspension of the injunction or restraint order. If, in any such suit, action, claim or proceedings, the Project Network, or any part thereof or comprised therein, is held to constitute an infringement and its use is permanently enjoined, the Service Provider shall promptly make every reasonable effort to secure for the Contracting Authority a licence, at no cost to the Contracting Authority, authorising continued use of the infringing work. If the Service Provider is unable to secure such licence within a reasonable time, the Service Provider shall, at its own expense, and without impairing the Specifications and Standards, either replace the affected work, or part, or process thereof with non-infringing work or part or process, or modify the same so that it becomes non-infringing.

37.3 Notice and contest of claims

In the event that either Party receives a claim or demand from a third party in respect of which it is entitled to the benefit of an indemnity under this Clause 37 (the **Indemnified Party**) it shall notify the other Party (the **Indemnifying Party**) within 15 (fifteen) days of receipt of the claim or demand and shall not settle or pay the claim without the prior approval of the Indemnifying Party, which approval shall not be unreasonably withheld or delayed. In the event that the Indemnifying Party wishes to contest or dispute the claim or demand, it may conduct the proceedings in the name of the Indemnified Party, subject to the Indemnified Party being secured against any costs involved, to its reasonable satisfaction.

37.4 Defence of claims

37.4.1 The Indemnified Party shall have the right, but not the obligation, to contest, defend and litigate any claim, action, suit or proceeding by any third party alleged or asserted against such Party in respect of, resulting from, related to or arising out of any matter for which it is entitled to be indemnified hereunder, and reasonable costs and expenses thereof shall be indemnified by the Indemnifying Party. If the Indemnifying Party acknowledges in writing its obligation to indemnify the Indemnified Party in respect of loss to the full extent provided by this Clause 37, the Indemnifying Party shall be entitled, at its option, to assume and control the defence of such claim, action, suit or proceeding, liabilities, payments and

obligations at its expense and through the counsel of its choice; provided it gives prompt notice of its intention to do so to the Indemnified Party and reimburses the Indemnified Party for the reasonable cost and expenses incurred by the Indemnified Party prior to the assumption by the Indemnifying Party of such defence. The Indemnifying Party shall not be entitled to settle or compromise any claim, demand, action, suit or proceeding without the prior written consent of the Indemnified Party, unless the Indemnifying Party provides such security to the Indemnified Party as shall be reasonably required by the Indemnified Party to secure the loss to be indemnified hereunder to the extent so compromised or settled.

37.4.2 If the Indemnifying Party has exercised its rights under Clause 37.3, the Indemnified Party shall not be entitled to settle or compromise any claim, action, suit or proceeding without the prior written consent of the Indemnifying Party (which consent shall not be unreasonably withheld or delayed).

37.4.3 If the Indemnifying Party exercises its rights under Clause 37.3, the Indemnified Party shall nevertheless have the right to employ its own counsel, and such counsel may participate in such action, but the fees and expenses of such counsel shall be at the expense of the Indemnified Party, when and as incurred, unless:

- (a) the employment of counsel by such party has been authorised in writing by the Indemnifying Party; or
- (b) the Indemnified Party shall have reasonably concluded that there may be a conflict of interest between the Indemnifying Party and the Indemnified Party in the conduct of the defence of such action; or
- (c) the Indemnifying Party shall not, in fact, have employed independent counsel reasonably satisfactory to the Indemnified Party, to assume the defence of such action and shall have been so notified by the Indemnified Party; or
- (d) the Indemnified Party shall have reasonably concluded and specifically notified the Indemnifying Party either:
 - (i) that there may be specific defences available to it which are different from or additional to those available to the Indemnifying Party; or
 - (ii) that such claim, action, suit or proceeding involves or could have a material adverse effect upon it beyond the scope of this Agreement:

Provided that if Sub-clauses (b), (c) or (d) of this Clause 37.4.3 shall be applicable, the counsel for the Indemnified Party shall have the right to direct the defence of such claim, demand, action, suit or proceeding on behalf of the Indemnified Party, and the reasonable fees and disbursements of such counsel shall constitute legal or other expenses hereunder.

37.5 No consequential claims

Notwithstanding anything to the contrary (including in this Clause 37):

- (a) the indemnities herein provided shall not include any claim or recovery in respect of any cost, expense, loss or damage of an indirect, incidental or consequential nature, including loss of profit, except as expressly provided in this Agreement; and
- (b) neither Party shall be liable to the other in respect of an indirect, incidental or consequential loss or for loss of profit, except as expressly provided in this Agreement.

37.6 Survival on Termination

The provisions of this Clause 37 shall survive Termination.

CLAUSE 38

RIGHTS AND TITLE OVER THE SITE

38.1 Rights

For the purpose of this Agreement, the Service Provider shall have rights to the use of the Site as sole licensee subject to and in accordance with this Agreement and to this end, it may regulate the entry and use of the Project Network by third parties in accordance with and subject to the provisions of this Agreement.

38.2 Access rights of the Contracting Authority and others

38.2.1 The Service Provider shall allow free access to the Site at all times for the authorised representatives and vehicles of the Contracting Authority, Senior Lenders, and the Independent Expert, and for the persons and vehicles duly authorised by any Government Instrumentality to inspect the Project Network or to investigate any matter within their Contracting Authority, and upon reasonable notice, the Service Provider shall provide to such persons reasonable assistance necessary to carry out their respective duties and functions.

38.2.2 The Service Provider shall, for the purpose of operation and maintenance of any utility or road specified in Clause 11, allow free access to the Site at all times for the authorised persons and vehicles of the controlling body of such utility or road.

38.3 Property taxes

All property taxes on the Site shall be payable by the Contracting Authority as owner of the Site; provided, however, that any such taxes payable by the Service Provider under Applicable Laws for use of the Site shall not be reimbursed or payable by the Contracting Authority.

38.4 Restriction on sub-letting

The Service Provider shall not sublicense or sublet the whole or any part of the Site, save and except as may be expressly set forth in this Agreement; provided that nothing contained herein shall be construed or interpreted as restricting the right of the Service Provider to appoint Contractors for the performance of its obligations hereunder including for operation and maintenance of all or any part of the Project Network.

CLAUSE 39

DISPUTE RESOLUTION

39.1 Dispute resolution

39.1.1 Any dispute, difference or controversy of whatever nature howsoever arising under or out of or in relation to this Agreement (including its interpretation) between the Parties, and so notified in writing by either Party to the other Party (the **Dispute**) shall, in the first instance, be attempted to be resolved amicably in accordance with the conciliation procedure set forth in Clause 39.2.

39.1.2 The Parties agree to use all reasonable endeavours for resolving all Disputes arising under or in respect of this Agreement promptly, equitably and in good faith, and further agree to provide each other with reasonable access during normal business hours to all non-privileged records, information and data pertaining to any Dispute.

39.2 Conciliation

In the event of any Dispute between the Parties, either Party may call upon, in the case of technical issues, the Independent Expert to mediate and assist the Parties in arriving at an amicable settlement thereof. Failing mediation by the Independent Expert or without the intervention of the Independent Expert, either Party may require such Dispute to be referred to the Director General of the Contracting Authority and the chairman of the board of directors of the Service Provider for amicable settlement, and upon such reference, the said persons shall endeavour to meet no later than 7 (seven) days from the date of reference to discuss and attempt to amicably resolve the Dispute. If such meeting does not take place within the 7 (seven) day period or the Dispute is not amicably settled within 15 (fifteen) days of the meeting or the Dispute is not resolved as evidenced by the signing of written terms of settlement within 30 (thirty) days of the notice in writing referred to in Clause 39.1 or such longer period as may be mutually agreed by the Parties, either Party may refer the Dispute to Fast Track Dispute Resolution and arbitration in accordance with the provisions of Clause 39.3 and Clause 39.4.

39.3 Fast Track Dispute Resolution

39.3.1 Any Dispute arising out of or relating to this Agreement which cannot be amicably settled by the Parties in accordance with Clause 39.2 above shall be referred to Fast Track Dispute Resolution (as provided for in this clause) and the following provisions shall apply:

- (a) either Party may upon written notice to the other refer the Dispute to an expert named by the Parties to act as expert who shall be an independent person with appropriate qualifications and experience (the “Relevant Expert”) in respect of the matter under Dispute (the **Reference**). The first Party shall deliver a notice to the other Party and propose an expert (the “Proposing Notice”) from a list of experts, which list it shall also deliver to the other Party and the other Party shall confirm the proposed Relevant Expert or choose from the list of experts proposed as the case may be, or object to the proposed Relevant Expert or list of experts, giving reasons for

the objection and proposing an alternative expert instead. In the event that the Parties are unable to agree upon the Relevant Expert within 5 (five) business days of the Proposing Notice, the provisions of Clause 39.3.1(f) shall operate;

- (b) the Relevant Expert shall act as an expert and not as an arbitrator and shall act fairly and impartially. The Relevant Expert shall have the power to request either party to provide him with such statements (which shall be written unless otherwise specifically required), documents or information that he may in his discretion determine;
- (c) the expert shall have power to revise or overrule any decision or instruction of the Parties;
- (d) the Relevant Expert shall, within ten (10) business days of the date of the Reference, provide written notice of his decision to the Parties. If so requested by another Party, the expert shall provide written reasons for his decisions within five (5) business days of any such request, which request shall be made within five (5) business days of receipt of the Relevant Expert's decision;
- (e) the Relevant Expert's fees shall be payable by such Party as the Relevant Expert may, at his discretion, determine and in the absence of any such determination, in equal shares; and
- (f) in the event that the Parties cannot so agree, or have been unable to agree upon the Relevant Expert pursuant to paragraph 39.3.1(a), either Party may request the Chairman for the time being of the Kenyan Branch of the Chartered Institute of Arbitrators to make an appointment.

39.4.2 The expert's decision shall be final and binding and shall forthwith be given effect to by the Parties save in the case of manifest error or bad faith on the Relevant Expert part, in which event either Party may commence proceedings in accordance with Clauses 39.4.

39.4 Arbitration

39.4.1 Any Dispute arising out of or relating to this Agreement which cannot be amicably settled by the Parties in accordance with Clause 39.2 above shall be settled by arbitration initiated by either Party by submission to arbitration under the United Nations Commission on International Trade Law (UNCITRAL) in accordance with the arbitration rules of UNCITRAL, 2013 (or such amended rules in force on the date on which the proceeding is instituted). The Parties hereby consent and submit to arbitration hereunder. The venue of such arbitration shall be Nairobi. This Clause incorporates the Arbitration Act and its Rules except where they conflict with its express terms.

39.4.2 There shall be a Board of three arbitrators, of whom each Party shall select one, and the third arbitrator shall be appointed by the two arbitrators so selected, and in the event of disagreement between the two arbitrators, the appointment shall be made

in accordance with the UNCITRAL rules.

39.4.3 The proceedings shall be conducted in the English language, or if in another language, be accompanied by a certified English translation.

39.4.4 Where the UNCITRAL rules or the Arbitration Act do not make provision for the manner in which the proceedings will be conducted, the arbitrators shall make rules of procedure to govern the proceedings.

39.4.5 The arbitrators shall make a reasoned award (the **Award**). Any Award made in any arbitration held pursuant to this Clause 39 shall be final and binding on the Parties as from the date it is made, and the Service Provider and the Contracting Authority agree and undertake to carry out such Award without delay.

39.4.6 The Service Provider and the Contracting Authority agree that an Award may be enforced against the Service Provider and/or the Contracting Authority, as the case may be, and their respective assets wherever situated.

39.5 **Other Provisions Regarding Dispute Resolution**

39.5.1 This Agreement and the rights and obligations of the Parties shall remain in full force and effect, pending the Relevant Expert's decision under Fast Track Dispute Resolution or the Award in any arbitration proceedings hereunder.

39.5.2. If any dispute arising out of or in connection with this Agreement raises issues which are substantially the same as issues arising out of or in connection with the Government Letter of Support issued in connection with this Project Agreement, then notwithstanding that arbitrators may have been agreed to be appointed under the Government Letter of Support, the Service Provider may, by written notice to Contracting Authority and the arbitrators who have already been agreed or appointed pursuant to the Government Letter of Support, require the dispute in connection with the Government Letter of Support to be referred to and finally settled by the arbitral tribunal under this Agreement.

CLAUSE 40

DISCLOSURE AND CONFIDENTIALITY

40.1 Disclosure of Specified Documents

The Service Provider shall make available for inspection by any person, copies of this Project Agreement, the Maintenance Manual, the Maintenance Programme and the Output Specifications (hereinafter collectively referred to as the **Specified Documents**), free of charge, during normal business hours on all working days at the Service Provider's site camp. The Service Provider shall prominently display at public notices stating the availability of the Specified Documents for such inspection, and shall provide copies of the same to any person upon payment of copying charges on a 'no profit no loss' basis.

40.2 Disclosure of Documents relating to safety

The Service Provider shall make available for inspection by any person copies of all Documents and data relating to safety of the Project Network, free of charge, during normal business hours on all working days, at the Service Provider's Registered Office. The Service Provider shall make copies of the same available to any person upon payment of copying charges on a '*no profit no loss*' basis but the Contracting Authority shall be entitled to direct the Service Provider from time to time to withhold the disclosure of Protected Documents (being such Specified Documents or documents referred to Clauses 40.1 and 40.2 or sections of such documents, the disclosure of which the Contracting Authority is entitled to withhold under the Official Secrets Act, Chapter 187 of the laws of Kenya).

40.3 Confidentiality

40.3.1 Confidential Information

The Parties shall keep confidential all Confidential Information received by one Party from the other Party relating to this Agreement, any Project Agreements or the Project.

40.3.2 Permitted Disclosures

Clause 40.3.1 shall not apply to:

- (a) any matter which a Party can demonstrate is already or becomes generally available and in the public domain otherwise than as a result of a breach of this Clause 40.3;
- (b) any disclosure to enable the determination of a dispute to be made under and in accordance with this Agreement;
- (c) any disclosure which is required pursuant to any statutory, legal (including any order of a Court) placed upon the Party making the disclosure or the rules of any stock exchange or governmental or regulatory Contracting Authority having the force of law or, if not having the force of law, compliance with which is in accordance with the general practice of persons

subject to the stock exchange or governmental or regulatory Contracting Authority concerned;

- (d) any disclosure of information which is already lawfully in the possession of the receiving Party, prior to its disclosure by the disclosing Party;
- (e) any provision of information to the Parties' own shareholders, Senior Lenders or their respective professional advisers or insurance advisers;
- (f) any disclosure by the Contracting Authority of information:
 - (i) relating to the assessment, appraisal, design, construction, supply, operation and maintenance of the Project and such other information as may be reasonably required for the purpose of conducting a due diligence exercise or making any required disclosures in relation to the Project to any proposed new service provider, its advisers and lenders;
 - (ii) to the extent required for the design, construction, operation, maintenance or improvement of the Project Network and/or Project Facilities in the event of termination of the Agreement; or
 - (iii) for any purpose relating to public relations, accountability and reporting, capability or experience statements
- (g) any disclosure of information by the Contracting Authority to any other department, office or agency of the government or their respective advisers or to any person engaged in providing services to the Contracting Authority for any purpose related to or ancillary to this Agreement.

CLAUSE 41

REDRESSAL OF PUBLIC GRIEVANCES

41.1 Complaints Register

- 41.1.1 The Service Provider shall maintain a public relations office at a specified location where it shall keep a register (the **Complaint Register**) open to public access at all times for recording of complaints by any person (the **Complainant**). Information relating to the availability of and access to the Complaint Register shall be prominently displayed by the Service Provider at the specified location so as to bring it to the attention of all Users.
- 41.1.2 The Complaint Register shall be securely bound and each page thereof shall be duly numbered. It shall have appropriate columns including the complaint number, date, name and address of the Complainant, substance of the complaint and the action taken by the Service Provider. Immediately after a complaint is registered, the Service Provider shall give a receipt to the Complainant stating the date and complaint number.
- 41.1.3 Without prejudice to the provisions of Clauses 41.1.1 and 41.1.2, the Contracting Authority may, in consultation with the Service Provider, specify the procedure for making complaints in electronic form and for responses thereto.

41.2 Redressal of complaints

- 41.2.1 The Service Provider shall inspect the Complaint Register every day and take prompt and reasonable action for redress of each complaint. The action taken shall be briefly noted in the Complaint Register and a reply stating the particulars thereof shall be sent by the Service Provider to the Complainant under a certificate of posting.
- 41.2.2 Within 7 (seven) days of the close of each month, the Service Provider shall send to the Contracting Authority and to the Independent Expert a true photocopy each of all the pages of the Complaint Register on which any entry has been recorded during the course of such month, and upon perusal thereof, the Contracting Authority may, in its discretion, advise the Service Provider to take such further action as the Contracting Authority may deem appropriate (acting reasonably) for a fair and just redress of any grievance. The Service Provider shall consider such advice and inform the Contracting Authority of its decision thereon, and if the Contracting Authority is of the opinion that the Complainant is entitled to further relief, it may refer the matter to the competent forum for its disposal in accordance with Applicable Law, and advise the Complainant to pursue the complaint at his own risk and cost.

CLAUSE 42
MISCELLANEOUS

42.1 Governing law and jurisdiction

This Agreement shall be construed and interpreted in accordance with and governed by the laws of Kenya.

42.2 Waiver of immunity

42.2.1 Each Party unconditionally and irrevocably:

- (a) agrees that the execution, delivery and performance by it of this Agreement constitute commercial acts done and performed for commercial purpose;
- (b) agrees that, should any proceedings be brought against it or its assets, property or revenues in any jurisdiction in relation to this Agreement or any transaction contemplated by this Agreement, no immunity (whether by reason of sovereignty or otherwise) from such proceedings shall be claimed by or on behalf of the Party with respect to its assets; and
- (c) agrees that the enforcement of any judgement or award against the Contracting Authority shall be in accordance with the Government Proceedings Act. (Chapter 40 of the Laws of Kenya).

42.3 Depreciation and Interest

42.3.1 For the purposes of depreciation under the Applicable Laws, the property representing the capital investment made by the Service Provider in the Project shall be deemed to be acquired and owned by the Service Provider. For the avoidance of doubt, the Contracting Authority shall not in any manner be liable in respect of any claims for depreciation to be made by the Service Provider under the Applicable Laws.

42.3.2 Unless otherwise specified, any interest payable under this Agreement shall accrue on a daily outstanding basis and shall be compounded on the basis of quarterly rates.

42.4 Delayed payments

The Parties hereto agree that payments due from one Party to the other Party under the provisions of this Agreement shall be made within the period set forth therein, and if no such period is specified, within 30 (thirty) days of receiving a demand along with the necessary particulars. In the event of delay beyond such period, the defaulting Party shall pay interest for each day of the period of delay calculated at a rate equal to 2% above the Bank Rate, and recovery thereof shall be without prejudice to the rights of the Parties under this Agreement including Termination thereof.

42.5 Waiver

42.5.1 Waiver, including partial or conditional waiver, by either Party of any default by the other Party in the observance and performance of any provision of or obligations under this Agreement:-

- (a) shall not operate or be construed as a waiver of any other or subsequent default hereof or of other provisions of or obligations under this Agreement;
- (b) shall not be effective unless it is in writing and executed by a duly authorised representative of the Party; and
- (c) shall not affect the validity or enforceability of this Agreement in any manner.

42.5.2 Neither the failure by either Party to insist on any occasion upon the performance of the terms, conditions and provisions of this Agreement or any obligation thereunder nor time or other indulgence granted by a Party to the other Party shall be treated or deemed as waiver of such breach or acceptance of any variation or the relinquishment of any such right hereunder.

42.6 Liability for review of Documents and Drawings

Except to the extent expressly provided in this Agreement:

- (a) no review, comment or approval by the Contracting Authority or the Independent Expert of any Principal Sub-Contract, Financing Agreement, Document or Drawing submitted by the Service Provider nor any observation or inspection of the construction, operation or maintenance of the Project Network nor the failure to review, approve, comment, observe or inspect hereunder shall relieve or absolve the Service Provider from its obligations, duties and liabilities under this Agreement, the Applicable Laws and Applicable Permits; and
- (b) the Contracting Authority shall not be liable to the Service Provider by reason of any review, comment, approval, observation or inspection referred to in Sub-clause (a) above.

42.7 Exclusion of implied warranties etc.

This Agreement expressly excludes any warranty, condition or other undertaking implied at law or by custom or otherwise arising out of any other agreement between the Parties or any representation by either Party not contained in a binding legal agreement executed by both Parties.

42.8 Survival

42.8.1 Termination shall:

- (a) not relieve the Service Provider or the Contracting Authority, as the case may be, of any obligations hereunder which expressly or by implication survive Termination hereof; and

- (b) except as otherwise provided in any provision of this Agreement expressly limiting the liability of either Party, not relieve either Party of any obligations or liabilities for loss or damage to the other Party arising out of, or caused by, acts or omissions of such Party prior to the effectiveness of such Termination or arising out of such Termination.

42.8.2 All obligations surviving Termination shall only survive for a period of 3 (three) years following the date of such Termination.

42.9 Entire Agreement

This Agreement and the Schedules together and the Bid constitute a complete and exclusive statement of the terms of the agreement between the Parties on the subject hereof, and no amendment or modification hereto shall be valid and effective unless such modification or amendment is agreed to in writing by the Parties and duly executed by persons especially empowered in this behalf by the respective Parties. All prior written or oral understandings, offers or other communications of every kind pertaining to this Agreement are abrogated and withdrawn other than those set out in the Bid. For the avoidance of doubt, the Parties hereto agree that any obligations of the Service Provider arising from the Request for Qualification or Request for Proposals, as the case may be, shall be deemed to form part of this Agreement and treated as such.

42.10 Severability

If for any reason whatever, any provision of this Agreement is or becomes invalid, illegal or unenforceable or is declared by any court of competent jurisdiction or any other instrumentality to be invalid, illegal or unenforceable, the validity, legality or enforceability of the remaining provisions shall not be affected in any manner, and the Parties will negotiate in good faith with a view to agreeing to one or more provisions which may be substituted for such invalid, unenforceable or illegal provisions, as nearly as is practicable to such invalid, illegal or unenforceable provision. Failure to agree upon any such provisions shall not be subject to the Dispute Resolution Procedure set forth under this Agreement or otherwise.

42.11 No partnership

This Agreement shall not be interpreted or construed to create an association, joint venture or partnership between the Parties, or to impose any partnership obligation or liability upon either Party, and neither Party shall have any right, power or authority to enter into any agreement or undertaking for, or act on behalf of, or to act as or be an agent or representative of, or to otherwise bind, the other Party.

42.12 Third parties

This Agreement is intended solely for the benefit of the Parties, and their respective successors and permitted assigns, and nothing in this Agreement shall be construed to create any duty to, standard of care with reference to, or any liability to, any person not a Party to this Agreement.

42.13 Successors and assigns

This Agreement shall be binding upon, and inure to the benefit of the Parties and their respective successors and permitted assigns.

42.14 Notices

Any notice or other communication to be given by any Party to the other Party under or in connection with the matters contemplated by this Agreement shall be in writing and shall:

- (a) in the case of the Service Provider, be given by facsimile or e-mail and by letter delivered by hand to the address given and marked for attention of the person set out below or to such other person as the Service Provider may from time to time designate by notice to the Contracting Authority; provided that notices or other communications to be given to an address outside Nairobi may, if they are subsequently confirmed by sending a copy thereof by registered acknowledgement due, air mail or by courier, be sent by facsimile or e-mail to the number as the Service Provider may from time to time designate by notice to the Contracting Authority;
- (b) in the case of the Contracting Authority, be given by facsimile or e-mail and by letter delivered by hand and be addressed to the Chairman of the Contracting Authority with a copy delivered to the Contracting Authority Representative or such other person as the Contracting Authority may from time to time designate by notice to the Service Provider; provided that if the Service Provider does not have an office in Nairobi it may send such notice by e-mail and by registered acknowledgement due, air mail or by courier; and
- (c) any notice or communication by a Party to the other Party, given in accordance herewith, shall be deemed to have been delivered when in the normal course of post it ought to have been delivered and in all other cases, it shall be deemed to have been delivered on the actual date and time of delivery; provided that in the case of facsimile or e-mail, it shall be deemed to have been delivered on the working day following the date of its delivery.

42.15 Language

All notices required to be given by one Party to the other Party and all other communications, Documentation and proceedings which are in any way relevant to this Agreement shall be in writing and in English language.

42.16 Counterparts

This Agreement may be executed in 2 (two) counterparts, each of which, when executed and delivered, shall constitute an original of this Agreement.

42.17 Variation by Service Provider and Contracting Authority

The Parties agree that the variation and/or amendment of this Agreement may be made upon the request of the Service Provider or the Contracting Authority within

(two) months after the signing or initialling of the Agreement as the case may be, provided that any such amendments shall be in relation only to those provisions affecting the financing terms and shall be in accordance with international best practice standards.

42.18 Variation by Senior Lenders

The Parties agree that the variation and/or amendment of this Agreement may be made, and shall use reasonable endeavours in good faith to effect such variation and/or amendment, upon the request of the Senior Lender(s) within 2 (two) months after the signing or initialling of the Agreement as the case may be, provided that any such amendments shall be in relation only to those provisions affecting the financing terms and shall be in accordance with international best practice standards. Nothing in this provision shall be construed to permit a delay in reaching Financial Close within the timelines specified in this Agreement.

IN WITNESS WHEREOF THE PARTIES HAVE EXECUTED AND DELIVERED THIS AGREEMENT AS OF THE DAY, MONTH AND YEAR FIRST ABOVE WRITTEN.

SIGNED, SEALED AND DELIVERED

By KENYA NATIONAL HIGHWAYS AUTHORITY

In the presence of:

Signature: _____

Name: _____

Designation: _____

In the presence of:

Signature: _____

Name: _____

Designation: _____

SIGNED, SEALED AND DELIVERED

By [.....] CONSORTIUM

In the presence of:

Signature: _____

Name: _____

Designation: _____

In the presence of:

Signature: _____

Name: _____

Designation: _____