

THE SOUTH AFRICAN NATIONAL

ROADS AGENCY



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**Contract No: SAPR NO304102/1**

**CONCESSION CONTRACT FOR THE DESIGN, CONSTRUCTION, FINANCING, OPERATION AND MAINTENANCE OF A PORTION OF NATIONAL ROUTE 3 FROM CEDARA IN KWAZULU-NATAL TO HEIDELBERG SOUTH INTERCHANGE IN GAUTENG AS A TOLL HIGHWAY TOGETHER WITH THE DEVELOPMENTS AND ASSOCIATED FACILITIES**

# **CONCESSION CONTRACT**

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## **6. INDEPENDENT ENGINEER**

### **6.1 Appointment of the Independent Engineer**

- 6.1.1. The Agency and the Concessionaire shall appoint the Independent Engineer (who shall be a Person) for the duration of the Concession Period. It is acknowledged that the identity of the Independent Engineer may be changed from time to time by agreement between the Parties. The Independent Engineer will report directly to the Agency and the Concessionaire, and the costs of the Independent Engineer will be paid by the Agency and the Concessionaire, in the manner set forth in the Independent Engineer's Agreement.
- 6.1.2. Where the Agency and the Concessionaire fail to agree on the Person to be appointed as Independent Engineer under Clause 6.1.1, the Agency and the Concessionaire shall each nominate up to two Persons who shall each submit a tender for the position of Independent Engineer. Such tenders shall be evaluated by a committee comprising an equal number of representatives of the Agency and the Concessionaire. If, following such process, the Agency and the Concessionaire fail to agree on any aspect of the evaluation process or a Person to be appointed Independent Engineer, the Independent Engineer shall be appointed at the request of either Party by a majority decision of a panel consisting of one independent expert engineer appointed by each of the Agency and the Concessionaire and an independent expert engineer chosen by the two panel members previously appointed by the Agency and the Concessionaire.

### **6.2 Performance of the Duties of the Independent Engineer**

- 6.2.1. The Independent Engineer shall be required to perform the duties set forth herein, in the Independent Engineer's Agreement, in the Construction Contracts and in the Operation and Maintenance Contracts. The Agency and the Concessionaire agree to enter into the Independent Engineer's Agreement. The Independent Engineer shall be required to act impartially and within the terms of the relevant contract when exercising its discretion and discharging its professional duty.
- 6.2.2. The Agency, the Concessionaire and the Lenders shall be entitled to consult with the Independent Engineer on any matter relating to the Project and may request that the Independent Engineer deliver and issue an opinion, instruction, certificate or valuation, or other determination as applicable with respect to all technical matters relating to the Project. The Parties shall comply with such decisions of the Independent Engineer.
- 6.2.3. Wherever under this Concession Contract a determination is required to be made by the Independent Engineer with respect to any request of the Concessionaire for extension of time, the Independent Engineer shall make such determination save that in the event of any request of the Concessionaire for extension of the Concession Period, the Agency shall make such determination taking into account any recommendation by the Independent Engineer.
- 6.2.4. Whenever under this Concession Contract a determination is required to be made with respect to any request of the Concessionaire for compensation for increased costs, the Independent Engineer shall, subject to Clause 21.4, make such determination; however, where a determination is to be made with respect to any



request of the Concessionaire for loss of revenues or profits or for acceleration costs, the Concessionaire shall, subject to Clause 21.4, submit such request to the Independent Engineer with a copy to the Agency, and, upon submission of such request, the Independent Engineer shall as soon as reasonably practicable make recommendations thereon to the Agency with a copy to the Concessionaire. The Agency shall, within 21 (twenty one) days of its receipt of such recommendations, have the right to concur with such recommendations or suggest alternative remedies to the Concessionaire. Should the Agency, within the 21 day period referred to above, either concur with or not respond to the Independent Engineer's recommendations, such recommendations shall become the Independent Engineer's decision. Should the Concessionaire agree with any alternative remedies proposed by the Agency, such agreement shall be final and binding on the Parties. Should the Concessionaire not so agree, the Independent Engineer shall at the request of either Party, make a determination in respect of the Concessionaire's initial request for loss of revenues or profits or for acceleration costs.

- 6.2.5. The scope of services of the Independent Engineer shall include but not be limited to review, inspection, testing and certification in accordance with the Independent Engineer's Agreement of each Contractor's work to ensure proper performance and completion of the Preliminary Design, Detailed Design and the Construction Works in accordance with the terms of the Concession Contract and the relevant Construction Contracts. The scope of services of the Independent Engineer shall also include but not be limited to review, inspection and testing in accordance with the Independent Engineer's Agreement of the Concessionaire's work to ensure the Operation and Maintenance is carried out in accordance with the terms of this Concession Contract and the relevant Operation and Maintenance Contract.
- 6.2.6. Nothing in this Clause shall alter the rights and obligations of the Parties under the Concession Contract nor prevent the Parties from challenging any opinion, instruction, determination, certification or evaluation of the Independent Engineer in accordance with Clause 21.2, provided that the Parties shall comply with such decisions by the Independent Engineer until and unless otherwise determined pursuant to Clause 21.
- 6.2.7. If any determination which is required to be made by the Independent Engineer in terms of this Concession Contract involving the evaluation or assessment of any matter outside the Independent Engineer's field of expertise as Independent Engineer, the Independent Engineer shall insofar as practicable rely on independent expert advice in making such evaluation or assessment.
- 6.2.8. If the Agency or the Concessionaire questions any determination or instruction of an assistant of the Independent Engineer, the Agency or the Concessionaire may within 7 (seven) Business Days of receipt of such determination or instruction, refer the matter to the Independent Engineer, who shall confirm, reverse or vary such determination or instruction.
- 6.2.9. The Concessionaire shall ensure that the Independent Engineer is timeously provided with copies of all information received from any Contractor or O&M Contractor in relation to the Project, insofar as such information relates to the functions of the Independent Engineer specified in Appendix A of the Independent Engineer's Agreement.
- 6.2.10. Unless otherwise advised in writing by the Agency, the Independent Engineer shall ensure that the Agency is timeously provided with copies of all information received from the Concessionaire, any Contractor or O&M Contractor as well as all information issued by the Independent Engineer to the Concessionaire, any

Contractor or O&M Contractor, insofar as such information relates to the functions of the Independent Engineer specified in Appendix A of the Independent Engineer's Agreement.

- 6.2.11 The price for any Construction Works that are the subject of the Initial Construction Works Contract, the Upgrade, Repair and Replacement Contract or the De Beers Pass Works Contract, insofar as they are in addition to those works set out in Annexure 5 or are undertaken as a result of any change to the scope of works set out in Annexure 5 or are undertaken pursuant to any variation of the works set out in Annexure 5, shall be determined or approved, as the case may be, by the Independent Engineer on the basis of the prevailing fair market values using to the extent possible, the Cost Matrix and the scope of works set out in Annexure 5 as a benchmark.