**INDEPENDENT E&S CONSULTANT AGREEMENT**

**entered into between**

The eThekwini Municipality

**and**

**[*insert the name of the Concessionaire*]**(Registration Number: **[•]**)

and

[*insert name of the Independent E&S Consultant*]

This **E&S CONSULTANT AGREEMENT** (this "**Agreement**") is made on \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ between:

1. eThekwini Municipality, a municipality established pursuant to the Constitution of the Republic of South Africa Act, 108 of 1996, as amended, and the Municipal Structures Act, 117 of 1998, as amended, with its headquarters at City Hall, 253 Dr Pixley Ka Seme (West) Street, Durban, South Africa (the "Municipality")
2. [*NAME OF CONCESSIONAIRE*], a [*type of company*] company established under the laws of [*country*] whose [*registered office/principal place of business*] is at [*address*] [*and whose registered number is [number]*] (the "Concessionaire"); and
3. [E&S CONSULTANT], a [*type of company*] established in [*country*] whose [*registered office/principal place of business*] is at [*address*] [*and whose registered number is* [*number*]] (the "E&S Consultant"),

(each a "**Party**" and together the "**Parties**").

**Background**

1. In 20[], the Municipality undertook to implement the uMdloti and Umkomaas sewage treatment projects on a PPP basis.
2. The Municipality has the power to develop, maintain and regulate water supply and sewerage works in the eThekwini Municipality. With a view to implementing the programme, the Municipality has decided to engage a concessionaire to undertake the Project on a PPP basis.
3. On [], the Municipality commenced a competitive bid process for the Project by issuing a request for proposal (the "**RFP**"), inviting all interested pre-qualified parties to submit their proposals to the Municipality for undertaking the Project.
4. Following its submission of a proposal in response to the RFP, the Concessionaire was selected as the Municipality's preferred bidder for the development of the Project.
5. The Municipality and the Concessionaire intend to enter into a long-term concession agreement governing the Concessionaire's development and operation of the Project (the "**Concession Agreement**")
6. It is a requirement of the Concession Agreement that the Concession Agreement Parties jointly appoint an E&S Consultant to carry out the functions and duties assigned to the E&S Consultant in the Concession Agreement.
7. The E&S Consultant is an independent expert willing to provide the Services and the Additional Services to the Concession Agreement Parties.
8. The Concession Agreement Parties have agreed to appoint the E&S Consultant on a joint basis, and the E&S Consultant is willing to fulfil the role of "E&S Consultant" under the Concession Agreement in accordance with the terms of this Agreement.
9. Definitions

Unless inconsistent with the context, terms defined in the Concession Agreement which are used herein have the meanings given in the Concession Agreement and the rules of interpretation as set out in Clause 1.1 (*Definitions*) and 1.2 (*Interpretation*) of the Concession Agreement, and the words and expressions set forth below shall bear the following meanings and cognate expressions shall bear corresponding meanings:

1. "**Additional Services**" means the services to be performed by the E&S Consultant pursuant to Clause 6.2 (*Additional Services*).
2. "**Affiliate**" means, in respect of a person, any person which Controls (directly or indirectly) that person and any other person Controlled (directly or indirectly) by such first-mentioned person, including, where a person is a company, the ultimate holding company of such person, any holding company of such person and any subsidiary (direct or indirect) of such holding company.
3. "**Business Day**" means any day other than Saturday, Sunday or any official public holiday in South Africa.
4. "**Services**" means the services to be performed by the E&S Consultant in accordance with Clause 6.1 (*Services*) and as set out in Schedule 1 (*Scope of Services*).
5. "**Change in Control**" means any change whatsoever in Control, whether effected directly or indirectly, excluding any change of Control in respect of a company listed on a stock exchange.
6. "**Concession Agreement Parties**" means the Municipality and the Concessionaire, and "**Concession Agreement Party**" shall, as the context requires, be a reference to either one of them.
7. **"Confidential Information"** has the meaning given to it in Clause 10.1 (*Confidentiality*).
8. "**Contractors**" means any contractor directly engaged by the Concessionaire to undertake the whole or any part of the construction, operation and/or maintenance of the [PV Plant].
9. "**Dispute**" has the meaning given to it in Clause 13.1 (*Dispute Resolution*).
10. "**E&S Consultant's** **Group**" means the E&S Consultant and its Affiliates.
11. "**Limit of Liability**" means, in relation to:
    1. any claims of the Concessionaire or the E&S Consultant against the other of them, an amount equal to [][[1]](#footnote-1); and
    2. any claim of the Municipality against the E&S Consultant, an amount equal to the higher of:
12. one hundred per cent (100%) of the aggregate fees (excluding VAT) paid or to be paid to the E&S Consultant for the Services (calculated as if all the contemplated Services are completed), and
13. one hundred per cent (100%) of the aggregate fees (excluding VAT) paid or to be paid to the E&S Consultant in the twelve (12) months preceding the date on which the claim arises,
14. less any amounts previously claimed by the Municipality from the E&S Consultant and which have been paid to the Municipality in full.
15. "**Quarter**" means the three month period ending on 30 June, 30 September, 31 December and 31 March, or such shorter period as determined from the Effective Date under the Concession Agreement until the first of the dates specified above.
16. Appointment and Acceptance

With effect from the date of this Agreement, the Concession Agreement Parties jointly appoint the E&S Consultant to perform the Services and the Additional Services, and the E&S Consultant accepts such appointment on the terms and conditions set out herein.

1. Duration of Agreement

This Agreement shall commence on the date of this Agreement and, subject to Clauses 11 (*Termination*) and 12 (*Breach of Agreement*), shall subsist until the termination or expiry of the Concession Agreement.

1. Consultation with the Concession Agreement Parties
   1. The E&S Consultant undertakes to perform the Services and Additional Services in close consultation and, subject to Clause 4.2, co-operation with the Concession Agreement Parties.
   2. The E&S Consultant shall comply with all reasonable instructions given to it by a Concession Agreement Party for the purposes of the E&S Consultant conducting the Services and Additional Services, except and to the extent that the E&S Consultant reasonably considers that any such instructions vary or might vary the Services or the Additional Services or its responsibilities under this Agreement, or prejudice or might prejudice the exercise by the E&S Consultant of its professional, fair and impartial judgement under this Agreement.
   3. If a Dispute arises between either or both of the Concession Agreement Parties and the E&S Consultant in respect of any instructions given to the E&S Consultant in accordance with Clause 4.2, such Dispute shall be referred to dispute resolution pursuant to Clause 13 (*Dispute Resolution*), save that where a Dispute arises between the Concession Agreement Parties in respect hereof, such Dispute shall be resolved in accordance with Clause 28 (*Dispute Resolution*) of the Concession Agreement.
   4. All instructions to the E&S Consultant shall be given in writing by the relevant Concession Agreement Party copied to the other Concession Agreement Party.
   5. Where the Concession Agreement contemplates that instructions could be given to the E&S Consultant by either Concession Agreement Party, and the Concession Agreement Parties issue conflicting instructions to the E&S Consultant, the E&S Consultant shall inform both Concession Agreement Parties of this fact, and shall not commence with any Service or Additional Service to which such instruction relates until the Concession Agreement Parties have issued a joint written statement to the E&S Consultant in which the instruction is clarified.
2. Project Documents
   1. The E&S Consultant shall be deemed to have full knowledge and understanding of the Concession Agreement to the extent necessary to perform its obligations under this Agreement, and shall carry out the duties of the E&S Consultant prescribed in the Concession Agreement.
   2. Subject to Clause 10 (*Confidentiality*), the Concessionaire shall provide to the E&S Consultant all required or requested information that is necessary for the performance of the Services and Additional Services and is available or ought reasonably to be available to the Concessionaire. This information includes, but is not limited to, the following information (which shall be deemed to be available to the Concessionaire):
      1. a signed copy of the Concession Agreement, including all Schedules thereto in completed form and all details of any change to any Scheduled Commercial Operation Date in accordance with the Concession Agreement;
      2. copies of working drawings, schedules and specifications prepared by the Concessionaire and Contractors sufficient to demonstrate compliance by the Concessionaire and Contractors with the requirements of the Concession Agreement;
      3. ''copies of each EPC Contract and each O&M Agreement entered into in respect of the Project by the Concessionaire and the relevant counterparty;
      4. as and when requested by the E&S Consultant, copies of data relating to the Project and any other information as reasonably necessary for the E&S Consultant to discharge its obligations under this Agreement.
   3. Within five (5) Business Days of termination of this Agreement in accordance with Clause 11 (*Termination*)or Clause12 (*Breach of Agreement*)or the termination or expiry of the Concession Agreement, the E&S Consultant shall deliver to the Concessionaire all copies of the Concession Agreement and as well as all other agreements, documentation, plans, drawings, records and any other materials made available to it by the Concessionaire pursuant to this Agreement, with complete copies thereof to the Municipality. Notwithstanding the foregoing, the E&S Consultant may retain one copy of any such materials if so required under applicable laws or in connection with any Dispute referred for resolution pursuant to Clause 13 (*Dispute Resolution*).
3. Services and Additional Services
   1. **Services**
      1. **[Environmental and Social Matters**
         1. The E&S Consultant shall:
4. review for compliance with the requirements of E&S Laws and the IFC Performance Standards (in each case, as further guided by the EHS Guidelines):
5. the ESIA to be prepared by the Concessionaire in accordance with Clause 3.6 (Environmental and Social Conditions of Effectiveness) of the Concession Agreement; and
6. the RAP and the LRP to be prepared by the Concessionaire in accordance with Clause 3.6 (*Environmental and Social Conditions of Effectiveness*) of the Concession Agreement,

and, where any such assessment/plan is not compliant, (i) recommend changes to address any shortcomings and (ii) review revisions to such documents as and when submitted to consider if the elements of non-compliance have been sufficiently rectified or addressed;

1. determine and confirm in writing whether:
2. under Clause 3.6 (Environmental and Social Conditions of Effectiveness) of the Concession Agreement, all applicable portions of the RAP and the LRP have been implemented in a manner consistent with E&S Laws, the E&S Minimum Requirements and the E&S Standards, including whether compensation has been made available and, where applicable, resettlement sites and moving allowances have been provided, to physical and/or economic displaced persons;
3. the portions of the RAP and the LRP other than those described under (I) above have been implemented in a manner consistent with E&S Laws, the E&S Minimum Requirements and the E&S Standards as guided by the EHS Guidelines according to the timeline defined in the RAP and the LRP.

Where the E&S Consultant cannot make such confirmation due to shortcomings in the implementation of any plan, the E&S Consultant shall recommend actions to address such shortcomings.

1. review for compliance with the requirements of the E&S Law, IFC Performance Standards as further guided by EHS Guidelines, the ESMS and associated programs to be prepared by the Concessionaire in accordance with Clause 10.7 (*Environmental and Social Management System*) and Schedule 14 (*Management Programs for Inclusion in ESMS*) of the Power Purchase Agreement (and drafts and revisions of any of the same) and when any of these aspects is not compliant recommend changes to address any shortcomings and review to confirm whether non-compliance has been rectified.
2. During the Construction Period, on a monthly basis:
3. inspect each Site to verify that the Concessionaire's activities are being implemented in compliance its environmental and social obligations under the Concession Agreement;
4. review environmental and social management, monitoring and reporting undertaken by the Concessionaire;
5. undertake independent verification field monitoring of the Concessionaire's compliance with its environmental and social obligations under the Concession Agreement;
6. undertake the [OHS Audit], which it shall submit to the Concession Agreement Parties within [twenty] ([20]) days of the end of the relevant month;
7. meet with the representatives of the affected communities as identified in the ESIAs and the stakeholder engagement mechanism to be developed by the Concessionaire pursuant to Clause 13.2 (Environmental and Social Management System); and
8. review the implementation of the LRPs and the RAPs, the Concessionaire monitoring activities, confirm when the process is completed (in case of corrective actions, review to continue until completion according to a review timeline for commensurate with the risks).
9. during the period from the Effective Date to the Project Commercial Operation Date, on a [quarterly] basis:
10. review environmental and social management, monitoring and reporting undertaken by the Concessionaire; and
11. inspect the Sites, review grievance logs and interview representatives of affected communities,

in each case, as needed to ascertain whether the Concessionaire's activities are in compliance with E&S Laws and the IFC Performance Standards as further guided by the EHS Guidelines;

1. from the achievement of the Commercial Operation Date for each Plant and for the remainder of the Term, on a semi-annual basis:
2. review environmental and social management, monitoring and reporting undertaken by the Concessionaire; and
3. undertake independent verification field monitoring and review grievance logs,

in each case, as needed to ascertain whether the Concessionaire's activities are compliant with the E&S Laws, E&S Minimum Requirements and the E&S Standards as set out in the Concession Agreement; and

1. within sixty (60) days following the end of the first year following the achievement of the respective Commercial Operation Date for each Plant, the E&S Consultant shall issue a report indicating whether:
2. the Concessionaire has constructed and is operating the Project in accordance with E&S Laws and the IFC Performance Standards as further guided by the EHS Guidelines and has in place adequate procedures and practices to manage environmental and social risks and impacts; and
3. the Municipality (or any relevant Governmental Authority) is adequately equipped to monitor and enforce, and is effectively monitoring and enforcing, the parties' environmental and social obligations under the Concession Agreement.

If both of the foregoing conditions are met, there will be no need for further annual review. If at least one of the two foregoing conditions is not met, the Parties will in good faith agree on a supplementary scope of work to be carried out by the E&S Consultant for a period up to the duration of the Project.]

* 1. **Additional Services**
     1. The Concession Agreement Parties may at any time request a proposal from the E&S Consultant for the performance of services beyond those set out in Schedule 1 (*Scope of Services*). The E&S Consultant shall, within 15 Business Days of such request, respond with a proposal setting out how it intends to perform the requested additional services and the increase to the Fee in consideration for the performance of these.
     2. The Concession Agreement Parties shall, within a further 15 Business Days of their receipt of the E&S Consultant's proposal, notify the E&S Consultant whether:
        1. The proposal is accepted, following which the requested services shall be the "**Additional Services**" and the Concessionaire shall be liable for the increased Fee payable to the E&S Consultant as set out in Attachment 1 (*Payment Particulars*);
        2. The proposal is rejected, in which case the E&S Consultant shall continue with the performance of its obligations under this Agreement; or
        3. It has comments or queries on the proposal, which the E&S Consultant shall answer within 5 Business Days, and the process set out in Clause 6.2.2 above shall re-commence.

1. Obligations of the E&S Consultant
   1. **Performance of the Services and the Additional Services**

The E&S Consultant shall carry out and complete the Services and the Additional Services in accordance with the requirements of this Agreement.

* 1. **Standards for providing the Services and the Additional Services**

In carrying out its obligations under this Agreement, the E&S Consultant shall:

* + 1. act fairly, impartially and independently and not as an arbitrator;
    2. exercise that degree of skill, prudence, diligence and foresight which would reasonably and ordinarily be expected from a person in the wastewater industry with skills in the relevant fields of environmental and social impact management (in the application of IFC Performance Standards and EHS Guidelines) seeking in good faith to comply with its contractual obligations and complying with all applicable laws and regulations, and any orders or directives of its governing authority;
    3. owe a professional duty of care to the Concession Agreement Parties encompassing the standards set out in Clauses 7.2.1 and 7.2.2;
    4. allocate and furnish adequate resources, including a sufficient number of qualified and experienced personnel to enable the E&S Consultant to comply with its obligations under this Agreement, and the E&S Consultant shall ensure that reasonable levels of care and responsibility will be exercised by all such personnel; and
    5. co-operate with any other contractors, consultants, and service providers who may be engaged by the Concession Agreement Parties and schedule its performance of the Services and the Additional Services so as to facilitate the overall requirements of the Project.
  1. **Limitation of liability**
     1. The liability of either Concession Agreement Party to the E&S Consultant and of the E&S Consultant to either Concession Agreement Party arising out of or in connection with this Agreement, shall be as detailed in this Agreement.
     2. The Concessionaire and the E&S Consultant acknowledge and agree that the Municipality shall have no liability to either of them whatsoever in connection with the performance by the Concessionaire and the E&S Consultant of their respective obligations under this Agreement and, without limiting the foregoing, the Concessionaire shall be solely liable to the E&S Consultant for the payment of any fee, cost, claim or liability as may be due and payable to the E&S Consultant under this Agreement.
     3. Subject to Clause 7.3.7, the maximum liability of:
        1. each of the Concessionaire and the E&S Consultant to the other of them under this Agreement; and
        2. save in respect of third party indemnified claims pursuant to Clause 7.3.6, the E&S Consultant to the Municipality for any claim under this Agreement,

shall in either case be limited to an aggregate amount equal to the applicable Limit of Liability.

* + 1. No Party shall be liable to any other Party for any loss of profits, revenues or business opportunity or any indirect, special or consequential losses.
    2. The Parties shall comply with their common law duties to mitigate any losses which they incur under this Agreement for which another Party is liable.
    3. The E&S Consultant shall indemnify and hold harmless the Municipality, the Concessionaire, their Affiliates, and their respective officers, employees, consultants, agents and representatives (the "**Indemnified Parties**") against any and all claims by a third party which may be asserted against or suffered by any of the Indemnified Parties, which relate to any death, injury or loss or damage to property suffered by the relevant third party, to the extent resulting from any negligent act or omission of the E&S Consultant and its respective officers, employees, consultants, agents and representatives, provided that the death, injury, loss or damage suffered by the relevant third party is not attributable to any act or omission of any one or more of the Indemnified Parties or to the failure of one or more of the Indemnified Parties to take reasonable steps to mitigate or avoid the death, injury, loss or damage in question.
    4. The limits on liability set out in this Clause 7.3 shall not apply in respect of:
       1. any liability for death or personal injury resulting from the negligence of a Party, its officers, employees, consultants, agents or representatives;
       2. any liability for fraud or fraudulent misrepresentation by a Party, its officers, employees, agents or representatives; or
       3. any other liability to the extent which it cannot be lawfully excluded.
  1. **Scope of authority**

The E&S Consultant shall have no authority or power to, amongst other things, incur liability on behalf of the Concession Agreement Parties, grant an extension of time under any EPC Contract or any other agreement or issue instructions on behalf of either Concession Agreement Party, in the absence of a written instruction from that Concession Agreement Party given in accordance with this Agreement, and then only to the extent consistent with that instruction.

* 1. **Compliance with laws**
     1. The E&S Consultant undertakes that the performance of all the Services and the Additional Services hereunder shall comply with all applicable laws, including but not limited to, the health, safety, security and environmental requirements applicable to the Sites and the Project.
     2. Subject to Clauses 7.3.3 to 7.3.5, the E&S Consultant shall indemnify and hold harmless the Concession Agreement Parties from and against any and all liability arising by reason of the E&S Consultant and the E&S Consultant's employees' and agents' failure to comply with the applicable laws.
  2. **Access to information**
     1. The E&S Consultant shall allow each of the Concession Agreement Parties access at all reasonable times and on reasonable prior written notice by the requesting Concession Agreement Party to technical records and documents prepared by or for the E&S Consultant in connection with the performance by the E&S Consultant of its obligations under this Agreement including any and all results of any test.
     2. The E&S Consultant shall be obliged to maintain such technical records and documents for a minimum period of five (5)years from:
        1. the completion of the relevant Service or Additional Service; or
        2. earlier termination of this Agreement.
  3. **Responsibility of the E&S Consultant**

No enquiry, inspection, approval, sanction, comment, consent, decision or instruction by or on behalf either of the Concession Agreement Parties shall exclude or limit the E&S Consultant's obligation to act in accordance with the requirements of Clause 7.2 (*Standards for providing the* Services *and the Additional Services*).

* 1. **Timing for decisions**

On all matters properly referred to it for its review, decision or determination in accordance with the Concession Agreement, the E&S Consultant shall give its review findings, decision or determination in writing within the time period referred to in the relevant provision of the Concession Agreement or, if no such period is prescribed, within a reasonable time period which in such latter event, shall be no later than twenty (20) Business Days after being referred to the E&S Consultant or other time period agreed between the Parties. The E&S Consultant shall perform its functions under this Agreement reasonably and fairly and shall not unreasonably withhold or delay its review, decision or determination.

* 1. **Inducement**

The E&S Consultant shall not offer or give to or accept from any member, employee or representative of either Concession Agreement Party any gift or consideration of any kind.

* 1. **Insurance**
     1. The E&S Consultant shall obtain and maintain in effect, at its own cost and expense, such insurance coverage as is required by any applicable laws and the standards set forth in Clause 7.2.2 with reputable insurers acceptable to the Concession Agreement Parties, acting reasonably.
     2. The E&S Consultant shall as and when so requested by either Concession Agreement Party on reasonable written notice produce for inspection by the Concession Agreement Parties, documentary evidence from its insurers or auditors that such insurance is being properly maintained.
  2. **Qualifications, experience and conflicts**
     1. The E&S Consultant represents and warrants to the Concession Agreement Parties, as of the date of this Agreement and each day thereafter during the term hereof, that:
        1. it is duly qualified, skilled and experienced to conduct the Services and the Additional Services in accordance with the standards referred to in this Agreement;
        2. the qualifications, skills and experience of all its personnel, contractors and contractors' personnel engaged from time to time in the conduct of such services shall be sufficient to conduct such services in accordance with the standards referred to in this Agreement;
        3. it is not rendering or providing any services to the Concessionaire or any of its Affiliates in respect of or in connection with the Project other than pursuant to this Agreement; and
        4. it is not rendering or providing any services to any shareholder of the Municipality, the Concessionaire, any EPC Contractor, any O&M Contractor or any Lenders or any Affiliate of any of them in respect of or in connection with the Project.
     2. The Parties acknowledge that the E&S Consultant's Group provide consultancy services internationally to clients other than the Concession Agreement Parties some of whom may have interests adverse to either Concession Agreement Party or their Affiliates, and each Concession Agreement Party hereby agrees that any member of the E&S Consultant's Group may at any time and from time to time provide professional engineering and/or consultancy services to any other clients who may have interests in any one or more wastewater projects, subject at all times to and without limitation of the representations and warranties made by the E&S Consultant pursuant to Clause 7.11.1 or its obligations pursuant to Clause 10 (*Confidentiality*).

1. Obligations of the Concession Agreement Parties
   1. The Concession Agreement Parties shall render such assistance to the E&S Consultant as shall reasonably be required for the carrying out by the E&S Consultant of its obligations under this Agreement.
   2. The Concessionaire shall allow the E&S Consultant access to each Site at all times reasonably required in order for the E&S Consultant to carry out its obligations under this Agreement.
   3. Subject to Clause 12.1.1 (*Breach of Agreement*), in the event that a matter is referred to dispute resolution pursuant to Clause 13 (*Dispute Resolution*), the E&S Consultant shall continue with its Services and Additional Services (as applicable) until the relevant PV Plant Completion Form or other work product has been issued.
2. Fees Payable and Payment
   1. The Concessionaire shall be liable to pay the E&S Consultant for the Services and Additional Services to be performed by the E&S Consultant hereunder on the terms and conditions set forth in Attachment 1 - Payment Particulars. If there is any conflict between any provision of Attachment 1 - Payment Particulars and any provision of the main body of this Agreement, then the provision of the main body of this Agreement shall prevail.
   2. The E&S Consultant acknowledges and agrees that the Municipality shall not have any liability to the E&S Consultant in connection with the performance by the Concessionaire or the E&S Consultant of its obligations hereunder.
   3. The E&S Consultant acknowledges and agrees that it shall not be entitled to suspend its performance of the whole or any part of the Services or the Additional Services pending the resolution of any Dispute between it and the Concessionaire concerning any invoice submitted by the E&S Consultant or pending payment of any overdue amount by the Concessionaire.
   4. To the extent that the E&S Consultant performs any act without the written instructions of a Concession Agreement Party, without limiting the provisions of Clause 12 (*Breach of Agreement*) such act shall be for the cost of the E&S Consultant, unless such act is performed in response to any emergency relating to health, safety or the environment and is subsequently ratified by the Concession Agreement Parties.
3. Confidentiality
   1. The E&S Consultant undertakes to keep and hold confidential any information disclosed to it by the Concession Agreement Parties ("**Confidential Information**") in performing its obligations under this Agreement and not to disclose the same to any other person in any way whatsoever without the prior written consent of the Concession Agreement Parties. The E&S Consultant shall ensure that any Confidential Information shall be disclosed only to those of its and its Affiliates' advisors, agents, contractors, directors and employees who have signed undertakings of secrecy and confidentiality and who have a need to know such information for the purposes of performing their obligations in respect of this Agreement.
   2. The E&S Consultant acknowledges and agrees to sign any non‑disclosure agreements as may be required by Contractors, on reasonable and market-related terms. Should the E&S Consultant refuse to sign such non-disclosure agreement, the Concessionaire, with the prior written consent of the Municipality, shall be entitled to terminate this Agreement pursuant to Clause 11 (*Termination*).
   3. The E&S Consultant undertakes to ensure that all copies of all reports generated by it will be identified by a specific number and that such numbers will be collated on a master distribution list to enable management of security of documents.
   4. All Confidential Information and any further information pertaining to the Project acquired by the E&S Consultant from the Municipality or the Concessionaire shall be treated as confidential by the E&S Consultant and shall not be used by the E&S Consultant for any purpose other than the purpose of performing its obligations under this Agreement, save to the extent that such information, or the disclosure thereof:
      * 1. is or comes into the public domain other than through breach of this Agreement by the E&S Consultant;
        2. is required by any court, arbitrator, administrative tribunal or expert in the course of any proceedings in which the E&S Consultant appears before it;
        3. is required by the rules or any recognised securities exchange upon which the share capital of the E&S Consultant (or any of its shareholders (direct or indirect)) is or is proposed to be from time to time listed or dealt in;
        4. must be used in order to comply with any obligation it may have under applicable laws;
      1. shall not be reproduced, distributed or otherwise made available to any third party; and
      2. shall remain the property of the Municipality or the Concessionaire (as the case may be) and be returned to the Municipality or the Concessionaire (as the case may be) on demand,

unless otherwise agreed to by the Concession Agreement Parties.

1. Termination
   1. **Termination by the Concession Agreement Parties**

The Concessionaire shall be entitled to terminate this Agreement, upon written notice to the E&S Consultant, with the prior written consent of the Municipality, in the following cases:

* + 1. with immediate effect where the Concession Agreement expires or is terminated in accordance with its terms;
    2. with immediate effect if an order has been made for the winding-up, liquidation, business rescue or dissolution of the E&S Consultant (in any of these cases, where applicable, whether provisional or final and whether voluntary or compulsory);
    3. on 30 days' prior written notice if a Change in Control of the E&S Consultant occurs without the consent of the Concession Agreement Parties, such consent not to be unreasonably withheld or delayed;
    4. with immediate effect if the E&S Consultant commits a material breach and fails to remedy the breach within thirty (30) days of receipt of written notice by the Concessionaire, copied to the Municipality, identifying the breach and requiring that it be remedied; or
    5. on sixty (60) days' written notice, copied to the Municipality, for convenience.
  1. **Termination by the E&S Consultant**
  2. The E&S Consultant shall be entitled to terminate this Agreement upon written notice to the Concession Agreement Parties:
     1. with immediate effect if the Concessionaire fails to pay any amount due or outstanding to the E&S Consultant or a Concession Agreement Party commits a material breach, and such non-payment or breach remains unremedied within thirty (30) Business Days of written notice to the Concession Agreement Parties, identifying the failure and requiring that it be remedied; or
     2. in the event of the Concessionaire's insolvency.
  3. **Replacement E&S Consultant**

In the event of the termination of this Agreement, the E&S Consultant acknowledges that Clause 3.7(d) (*Appointment of Independent E&S Consultant*) of the Concession Agreement requires the Concessionaire to nominate a replacement E&S Consultant. The Concession Agreement Parties shall notify the E&S Consultant of the intended replacement and the E&S Consultant shall cooperate with the Concession Agreement Parties and the replacement consultant in order to effect the transition of the Services and/or Additional Services.

1. Breach of Agreement
   1. In the event of a breach by the E&S Consultant of any of the terms and conditions of this Agreement, the Concession Agreement Parties shall be entitled to exercise all or any number of the following rights:
      1. if the E&S Consultant fails to remedy the breach within three (3) Business Days after receiving written notice from the Concessionaire (copied to the Municipality) describing the breach, then the Concession Agreement Parties (acting jointly) may on written notice to the E&S Consultant:
         1. suspend the obligations of the E&S Consultant under this Agreement; and
         2. in their sole discretion, appoint a replacement E&S Consultant from the list set out at Schedule 25 (*List of Independent E&S Consultants*) to perform the *Services and Additional Services*;
      2. to claim specific performance from the E&S Consultant; and/or
      3. terminate this Agreement in accordance with Clause 11.1 (*Termination by the Concession Agreement Parties*),
   2. without prejudice to any other rights or remedies they may have under applicable laws, including their rights to claim any damages.
   3. If the Concession Agreement Parties appoint a third party to carry out the obligations of the E&S Consultant under this Agreement during the period that they suspend the services of the E&S Consultant pursuant to paragraph (i) of Clause 12.1.1 (*Breach of Agreement*), then the E&S Consultant shall forthwith following the issue of the notice of suspension give access to and make available all information specified in Clause 5 (*Project Documents*)asmay be in its possession or under its control to such third party.
   4. Should the E&S Consultant dispute the existence of a breach the matter may be referred at the request of any Party to dispute resolution pursuant to Clause 13 (*Dispute Resolution*).
   5. In the event of any breach by either Concession Agreement Party of the terms and conditions of this Agreement, the E&S Consultant shall, within five (5) Business Days, give written notice to:
      1. the non-breaching Concession Agreement Party, specifying the particulars of such breach; and
      2. the breaching Concession Agreement Party, specifying the particulars of such breach and calling for rectification thereof;
   6. In the event of the breaching Concession Agreement Party remaining in default after thirty (30) Business Days of the written notice contemplated in Clause 12.4.2, the E&S Consultant shall be entitled to:
      1. claim specific performance from the breaching Concession Agreement Party and claim such damages as it may have suffered; and/or
      2. terminate this Agreement in accordance with Clause 11.2 (*Termination by the* ) and claim all damages as it may have suffered from the breaching Concession Agreement Party.
   7. The provisions of Clauses 12.3 and 13 (*Dispute Resolution*)shall apply *mutatis mutandis* in the event of the Concession Agreement Parties disputing the existence of a breach entitling the E&S Consultant to the rights and remedies envisaged in Clauses 12.4 and 12.5.
   8. If the existence of a breach is disputed pursuant to Clause 12.3 or Clause 12.6 and referred to dispute resolution in accordance with Clause 13 (*Dispute Resolution*), the Concession Agreement Parties may suspend the obligations of the E&S Consultant and the provisions of Clause 12.1.1 shall apply *mutatis mutandis*.
2. Dispute Resolution

**General**

* 1. Any dispute, claim, controversy or difference between the Parties arising out of or relating (in any manner whatsoever) to this Agreement or any documents entered into pursuant to it (including a dispute relating to the validity or existence of this Agreement and any non-contractual obligations arising out of or in connection with this Agreement) shall be considered a dispute for the purposes of this Clause 13 (a "**Dispute**").
  2. This Clause 13 shall be governed by and construed in accordance with the laws of the Republic of South Africa.

**Amicable Resolution**

* 1. In the event of a Dispute, a Party may provide written notice of that Dispute to the other Party in accordance with Clause 14 (*Notices*) (a "**Dispute Notice**"). The Parties shall have a period of seven (7) Business Days following the date of a Dispute Notice to enter into negotiations to resolve the Dispute during which they shall refer the Dispute to the Municipality Representative and the Concessionaire Representative.
  2. Save where any Dispute has been expressly referred for determination pursuant to Clause 0 (*Fast-*Track *Dispute Resolution*), the Dispute shall be referred to and finally resolved by arbitration in accordance with Clauses 13.20 to 13.25 (*Arbitration*).

**Interlocutory Proceedings**

* 1. Notwithstanding the previous provisions of this Clause 13, any Party shall have the right to seek appropriate interdictory relief or an order of specific performance against any other in an appropriate court having jurisdiction in South Africa.

**Fast Track Dispute Resolution**

* 1. Disputes expressly referred for determination pursuant to this Clause 13 shall be determined by the relevant Independent Expert as defined in Clause 13.7 below.
  2. "**Independent Expert**" means, as the Dispute may require:
     1. an accountant of not less than ten (10) years' professional experience, preferably in engineering service agreements, agreed to between the Parties, and failing agreement nominated (at the request of either of the Concession Agreement Parties or the E&S Consultant) by the President for the time being of the South African Institute of Chartered Accountants from the ranks of accountants suitably qualified as provided above, if the matter is primarily financial;
     2. an attorney or advocate of not less than ten (10) years' professional experience, preferably in concession arrangements or project finance, agreed to between the Parties, failing agreement nominated (at the request of either Party) by the President for the time being of the KwaZulu-Natal Law Society from the ranks of attorneys or advocates suitably qualified as provided above, if the matter is primarily legal;
     3. a construction project manager or quantity surveyor or engineer of not less than ten (10) years' professional experience, preferably in concession arrangements or design build and operate projects, agreed to between the Parties, and failing agreement nominated (at the request of either Party) by the President for the time being of the South African Council for the Construction and Project Management Profession or South African Council for the Quantity Surveying Profession or Engineering Council of South Africa from the ranks of registered professionals suitably qualified as provided above, if the matter is primarily technical or engineering in nature; and
     4. a facilities manager of not less than ten (10) years' professional experience, preferably in concession arrangements or design build and operate projects nominated at the request of any Party by the President for the time being of the South African Facilities Management Association, if the matter is primarily related to facilities management.
  3. Prior to the appointment of an Independent Expert pursuant to Clause 13.7 the Parties may, in the absence of any dispute and from time to time, agree to appoint an Independent Expert from the list set out in Schedule 24 (*Panel of Independent Experts*) to the Concession Agreement.
  4. Within five (5) Business Days after a dispute has been referred by either of the Concession Agreement Parties or the E&S Consultant to the appropriate Independent Expert, the Independent Expert shall require the Concession Agreement Parties (who shall prepare one submission representing their combined view) and the E&S Consultant to submit in writing their respective arguments. The Independent Expert shall, in their absolute discretion, consider whether a hearing is necessary in order to resolve the dispute.
  5. The Independent Expert may decide upon any matters related to the proper preparation of the dispute for hearing and in that regard the Independent Expert shall direct the Parties accordingly.
  6. The Independent Expert shall set the date for the hearing, choose the venue for the hearing and determine all matters regarding any aspect of the hearing, and shall decide whether at the hearing the Parties should present their respective cases in writing or are required to give oral evidence. In this regard, the Independent Expert must be guided by considerations of fairness, the cost-effective resolution of the dispute, and the need to resolve the dispute without delay.
  7. The Independent Expert shall provide the Parties with their written decision on the dispute, within fifteen (15) Business Days of the referral (or such other period as the Parties may agree after the referral). The Independent Expert shall give their reasons for the award.
  8. The Independent Expert's costs of any referral shall be borne by the Concessionaire. Each Party shall bear its own costs arising out of the referral, including its legal costs and the costs and expenses of any witnesses.
  9. The Independent Expert shall act impartially and may take the initiative in ascertaining the facts and the law. The Independent Expert need not strictly observe the principles of law and may decide the matter submitted to them in accordance with what they consider equitable in the circumstances.
  10. Should the need arise for any Party to seek interim or temporary relief before the adjudication is finalised, that Party may apply to the Independent Expert to grant such interlocutory order or give the required temporary relief and the Independent Expert shall have the same power to do so as if the matter were one heard by a judge in the High Court of South Africa, save that if by law such power or order cannot be exercised or given by an Independent Expert then, and then only, should the Parties refer such matter to such High Court.
  11. The proceedings shall be confidential and all information, data or documentation disclosed or delivered by any Party to the Independent Expert in consequence of or in connection with his/her appointment as Independent Expert shall be treated as confidential. Neither the Parties nor the Independent Expert shall, save as permitted by Clause 10 (*Confidentiality*) of this Concession Agreement, disclose to any person any such information, data or documentation unless the Parties otherwise agree in writing, and all such information, data or documentation shall remain the property of the Party disclosing or delivering the same and all copies shall be returned to such Party on completion of the Independent Expert's work.
  12. The Independent Expert is not liable for anything done or omitted in the discharge or purported discharge of his functions as Independent Expert, unless the act or omission is grossly negligent or in bad faith. Any employee or agent of the Independent Expert is similarly protected from liability.
  13. Should any Party fail to co-operate with the Independent Expert with the result that, in the view of the Independent Expert, such default or omission prejudices the adjudication process, then the Independent Expert can either:
      1. give that Party written notice that unless it remedies the default or omission within a given time, it will forfeit the right to continue to participate in the adjudication; or
      2. warn the Party in writing that its default or omission may make it liable to a punitive order of costs irrespective of whether it succeeds in the adjudication or not.
  14. The Independent Expert shall be deemed not to be an arbitrator but shall render his decision as an expert and the provisions of any Law relating to arbitration shall not apply to the Independent Expert or his/her determination or the procedure by which they reach their determination. The Independent Expert's decision shall be final and binding on the Parties.

**Arbitration**

* 1. Subject to Clauses 13.1 (*Amicable Resolution*) and 13.6 (*Fast Track Dispute Resolution*), either Party may, by written notice to the other Party, require that any Dispute shall be referred to and finally resolved by arbitration conducted in accordance with the terms of reference of the Arbitration Foundation of South Africa (the "**AFSA Rules**").
  2. The AFSA Rules are incorporated by reference into Clauses 13.20 - 13.25 and capitalised terms used therein which are not otherwise defined in this Agreement have the meanings given in the Rules.
  3. The number of arbitrators shall be one.
  4. The seat or legal place of arbitration shall be Durban, Republic of South Africa, with the venue for arbitration being Durban.
  5. The language used in the arbitral proceedings shall be English. All documents submitted in connection with the proceedings shall be in the English language, or, if in another language, accompanied by an English translation.
  6. Service by the Secretariat of any Request for Arbitration made pursuant to this Clause shall be at the address given for the sending of notices under this Agreement at Clause 14 (*Notices*) and in the manner provided for in that Clause.

1. Notices
   1. **Writing and delivery**

Any notice or other communication in connection with this Agreement (each, a "**Notice**") shall be in writing, in English and delivered by hand, email or courier using an internationally recognised courier company.

* 1. **Addresses**
     1. A Notice to the Concessionaire shall be sent to the following address, or such other person or address as the Concessionaire may notify to the Municipality and the E&S Consultant from time to time:

Name: []

Address: []

Email: []

Attention: [] [Title]

* + 1. A Notice to the Municipality shall be sent to the following address, or such other person or address as the Municipality may notify to the Concessionaire and the E&S Consultant from time to time:

Address: c/o Ethekwini Municipality, City Hall, 263 Dr. Pixley Ka Seme (West) Street, Durban, Republic of South Africa

Email: []

Attention: Project Officer

* + 1. A Notice to the E&S Consultant shall be sent to the following address, or such other person or address as the E&S Consultant may notify to the Concessionaire and the Municipality from time to time:

Name: []

Address: []

Email: []

Attention: [] [Title]

* 1. **Time of receipt**

A Notice shall be effective upon receipt and, for these purposes, shall have been received or deemed to have been received:

* + 1. at the time of delivery, if delivered by hand or courier; or
    2. at the time of sending, if sent by email, provided that receipt shall not occur if the sender receives an automated message indicating that the email has not been delivered to the recipient.

1. General
   1. Subject to Clause 15.2, the E&S Consultant shall not sub-contract, assign, grant any security interest over, hold on trust or otherwise transfer the benefit of the whole or any part of this Agreement to any other person or entity without the prior written consent of the Concession Agreement Parties.
   2. The E&S Consultant may sub-contract the whole or any part of the tests and inspections described in Clause 6 (*Services and Additional Services*)*,* provided that the E&S Consultant shall not be relieved of any obligation, responsibility or liability under this Agreement in respect of such sub-contracted activities and shall be responsible under this Agreement for payment, performance, acts, defaults, omissions, breaches and negligence of all its sub-contractors.
   3. Nothing in this Agreement shall be deemed to constitute a partnership between the Parties or constitute any Party the agent of any other Party for any purpose.
   4. No variation of this Agreement shall be effective unless in writing and signed by or on behalf of each Party.
   5. No failure or delay by any Party in exercising any right or remedy provided under this Agreement shall operate as a waiver of it, nor shall any single or partial exercise of any right or remedy preclude any other or further exercise of it or the exercise of any other right or remedy. Any waiver of a breach of this Agreement shall not constitute a waiver of any subsequent breach.
2. This Agreement may be entered into in any number of counterparts, all of which, taken together, shall constitute one and the same instrument. Any Party may enter into this Agreement by executing any such counterpart.
   1. A person who is not a Party to this Agreement has no right under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of, or enjoy any benefit under this Agreement.
   2. This Agreement and any non-contractual obligations arising out of or in connection with it shall be governed by and construed in accordance with English law.

**In witness** whereof this Agreement has been executed on the date first stated above.

***[INSERT APPROPRIATE SIGNATURE BLOCKS FOR EACH OF SELLER, PURCHASER AND E&S CONSULTANT.]***

1. Executed by **[*SELLER*]** acting by:
2. ………………………..
3. Name:
4. Title:
5. Executed by **ETHEKWINI MUNICIPALITY** acting by:
6. ………………………..
7. Name:
8. Title:
9. Executed by **[*E&S CONSULTANT*]** acting by:
10. ………………………..
11. Name:
12. Title:

# Attachment 1 - Payment Particulars

## The Concessionaire shall pay to the E&S Consultant a maximum amount of R[●] (\_\_\_\_\_\_\_\_\_\_\_\_\_\_rand) including disbursements, excluding VAT for the Services and Additional Services (the "**Fee**").

## Subject to this Clause 9 (*Fees Payable and* Payment) and this Attachment 1 - Payment particulars, the Fee shall be paid to the E&S Consultant by the Concessionaire on the following basis:

### [[10]% of the Fee will be retained as a retention amount until all the [Services and Additional Services] have been completed in accordance with the terms of this Agreement (the "**Retention Amount**"); and

### subject to Clause 1.3 of this Attachment 1 – Payment particulars, the total Fee less the Retention Amount, will be divided into monthly payments [*based on the estimated length of this Agreement*], to be paid monthly in arrears.

## The Parties shall review the monthly payments on a quarterly basis. At the end of each Quarter, to the extent there has been a change or a variation under the Concession Agreement which necessitates a change to the Fee (including the Retention Amount and the monthly payments in accordance with Clause 1.2 of this Attachment 1 - Payment Particulars), the Parties shall agree on the appropriate adjustment to the Fee and the provisions of Clause 1.2 *shall mutatis* mutandis apply.

## The E&S Consultant shall submit an invoice for interim payments for acceptance by the Concessionaire.

## All invoices shall be duly signed by the E&S Consultant before being submitted to the Concessionaire. Upon receipt of such invoice, the Concessionaire shall approve such invoice or raise any queries in respect of such invoice within seven (7) Business Days of receipt thereof, failing which it shall be deemed to have been approved by the Concessionaire.

## The Concessionaire shall pay the Retention Amount to the E&S Consultant on its completion of the Services and any Additional Services.

## If any invoice is not certified and approved by the Concessionaire, it shall provide reasons for such refusal to and shall certify such portion of the invoice, if any, as is not in contention.

## The Concessionaire shall pay the invoice submitted by the E&S Consultant within fifteen (15) Business Days of approval or deemed approval thereof by the Concessionaire.

## If the Services and Additional Services have not been rendered to the satisfaction of the Concession Agreement Parties, the Concession Agreement Parties may require the E&S Consultant to rectify or improve the work done before payment is made for that portion of work outstanding.

## In assessing the quality of the Services and Additional Services rendered by the E&S Consultant, the Concession Agreement Parties may appoint any third party with substantially the same skills and experience as the E&S Consultant to conduct such assessment and the Parties shall be bound by such assessment.

## If any overpayment of whatever nature has been made to the E&S Consultant, the E&S Consultant will be obliged to repay such amount to the Concessionaire or, at the election of the E&S Consultant, the Concessionaire shall be entitled to deduct such amount from any amounts due to the E&S Consultant.

**SCHEDULE 1 – SCOPE OF SERVICES**

The Services to be performed by the E&S Consultant shall include:

## Reviewing the Concessionaire's compliance with the E&S obligations of the Concession Agreement;

## Reporting to the Concession Agreement Parties the outcomes of the review and presenting all areas of compliance and non-compliance and, where applicable, advising on corrective measures to be undertaken by the Concessionaire and setting out a timeline for their completion and reporting on the same when completed.

## Reviewing the ESIAs for each of the uMdloti Plant, Umkomaas Plant and the Expansion Plant, the LRPs and the RAPs and the ESMS and all plans/procedures and reporting on the same to the Municipality with any recommended amendments / comments no later than 30 days prior to the commencement of the Construction Period and the Operation Period for each of the uMdloti Plant, the Umkomaas Plant and the Expansion Plant.

## During the Construction Period, on a monthly basis:

* 1. Inspecting each of the uMdloti Site, the Umkomaas Site and the Expansion Site to verify that the activities are being implemented in line with the Concessionaire's environmental and social obligations in the Concession Agreement;
  2. reviewing environmental and social management, monitoring and reporting undertaken by the Concessionaire;
  3. undertaking independent verification field monitoring of the Concessionaire’s compliance with the environmental and social obligations under the Concession Agreement;
  4. undertaking an Occupational Health and Safety audit;
  5. meeting with the representatives of the affected communities as identified in the ESIAs and Stakeholder engagement plan;
  6. reviewing the implementation of the LRPs and RAPs, the Concessionaire's monitoring activities, confirming when the process is completed (in case of corrective actions, reviewing to continue until completion according to a review timeline commensurate with the risks).
  7. Annually for the first 5 years following the Effective Date:
  8. Reviewing the Concessionaire's E&S management, monitoring and reporting undertaken;
  9. specifically reviewing the implementation of the environmental and social mitigation programs and plans/procedures, and undertaking independent verification field monitoring as needed; and
  10. reviewing grievance logs.

## At the expiry of 5 years following the Effective Date the E&S Consultant shall assess and issue a report indicating whether:

* 1. the Concessionaire has complied with its environmental and social obligations under the Concession Agreement and the Concessionaire has in place adequate procedures and practices to manage environmental and social and impacts
  2. monitoring/enforcement by Governmental Authorities sufficiently covers the environmental and social aspects of the Project.

## If both conditions above are met, the E&S Consultant not be required to perform a further annual review. If at least one of the two is not met, the Parties will agree on a review plan for the remaining years of the Term based on the risks as assessed by the E&S Consultant.

1. ***Note: This amount is the amount agreed between the Seller (and its funders) and the E&S Consultant.*** [↑](#footnote-ref-1)