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**ENERGY EFFICIENCY CONTRACT**

**A Contract between**

**Eskom Holdings SOC Ltd (Reg No. 2002/015527/30)**

**And**

**[Please insert full name of the Project Developer]** **(Reg No.)**

**for the implementation of the following project:**

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Project Number** | **Project Name** | **Average Demand (MW) Reduction** | **Energy Savings (kWh) Per Quarter** | **Maximum contracted Value (R)** | **Contract Start Date** | **Contract End Date** |
|  |  |  |  |  |  |  |

**ENERGY EFFICIENCY CONTRACT**

# PARTIES

## The Parties to this Contract are:

**ESKOM HOLDINGS SOC LTD**

**(Registration Number: 2002/015527/30)** a state-owned company with limited liability incorporated in terms of the laws of the Republic of South Africa with its registered office at Megawatt Park, Maxwell Drive, Sandton (“Eskom”)

herein represented by***\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_*** *in his/her/their capacity as* \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_.

### -AND-

[Insert name of Project Developer], (Registration Number: ……) a [private or public] company incorporated in terms of the laws of the Republic of South Africa with limited liability with its registered office at………… (“the Project Developer”)

***[Drafting note:*** *ensure that the correct type of company is inserted. This could be a private company …. (Pty) Ltd or a public company … Limited]*

herein represented by……………………………………………………………in his/her/their capacity/capacities as …………………………………………..

# DEFINITIONS

### **“Adjusted M&V Baseline”** means the M&V baseline/s of the Approved Project that has been modified by the M&V Body to account for the conditions of the energy-governing factors during the measurement period.

### **“Annexure A”** means the technical specifications agreed to by the Parties in respect of each particular installation, detailing scope of works and project plan.

### **“Annexure B”** means the methodology agreed to by the Project Developer and M&V Body outlining how the M&V Baseline and savings will be determined and the obligations of each Party with regard to the measurement and verification of the Approved Project, also referred to as M&V Plan, and the M&V Baseline report.

### **“Annexure C”** refers to the SHE Plan, detailing safety compliance.

### **“Annexure D”** refers to the Energy Efficiency Programme rules which govern the implementation of this Contract.

### **“Approved Project”** means a project approved by ESKOM for participation in the programmes.

### **Average Demand Saving**” means the average Megawatts as verified by the M&V Body during the defined measurement period.

### **“Business Day”** means a day, other than a Saturday, Sunday or official public holiday in South Africa.

### **“Certificate of Completion” or “CoC”** means a certificate issued by the Project Developer to ESKOM and the M&V Body, certifying that the installation of the Approved Project is completed.

### **“Consumption”** means the electrical energy used at the Premises whether supplied by ESKOM or any other distributor licensed by the National Energy Regulator of South Africa (NERSA).

### **“Contract”** means this written Contract signed by the duly authorised representatives of both Parties, including all its annexures.

### **“Energy Efficiency Programme”** means the funding programme by which ESKOM supports the approved energy savings initiatives proposed by the approved Project Developer upon proposal and submission of the Approved Project.

### **“Energy Saving”** means in a measurement-period, the difference between the actual consumption as measured by the M&V Body during the installation and implementation of the Approved Project in the measurement period and the M&V Baseline, or adjusted M&V Baseline (as applicable).

### “**Fixed Price per Kilowatt hour**” means the applicable incentive rate in cents per Kilo Watt hour(c/kWh) excluding VAT, for the applicable verified energy saving achieved.

### **“Force Majeure”** means any act, event or circumstance or any combination of acts, events or circumstances which:

### is beyond the reasonable control of the Party affected by such event or circumstance (the “Affected Party”);

### is without fault or negligence on the part of the Affected Party and not the direct or indirect result of a breach by the Affected Party to perform any of its obligations under the electricity supply;

### could not have been avoided or overcome by the Affected Party, taking reasonable action;

### prevents, hinders or delays the Affected Party in its performance of all (or part) of its obligations under the electricity supply agreement.

### Without limiting the generality of the foregoing, a Force Majeure Event may include any of the following acts, events or circumstances, but only to the extent that it satisfies the requirements set out in paragraphs (a) – (d) above:

### war, hostilities, belligerence, blockade, acts of terrorism, sabotage, civil commotion, riot, revolution or insurrection occurring in South Africa;

### any Laws, decrees, regulations of Governmental authorities;

### strikes that are widespread, nation-wide or political in nature (but excluding strikes, lockouts and other industrial disturbances of the Affected Party’s employees which are not part of a wider industrial dispute materially affecting other employees within South Africa);

### an Act of God, including, drought, fire, earthquake, volcanic eruption, landslide, flood, storm, cyclone, tornado, typhoon or other natural disasters;

### epidemic or plague;

### fire, explosion or radioactive or chemical contamination;

### air crash, shipwreck or train crash; and

### any act, event or circumstance of a nature analogous to any of the foregoing, each such act, event or circumstance a combination thereof being a “Force Majeure Event”, provided that the following shall not constitute a Force Majeure Event: (aa) shortage of cash, (bb) any inability or failure to pay money, (cc) any inability to raise finance or (dd) any changes in price and market conditions.

### “**Implementation Phase**” means the period indicated in months from the Contract Start Date up to and including the date on which the CoC is issued by the Project Developer.

### “**Initial Purchase Price**” means the anticipated total payment to be made by Eskom to the Project Developer over the duration of the Sustainability Term.

### “**Kilowatt Hour (kWh)**”means a measure of electrical energy equivalent to power consumption of one thousand watts for one hour.

### “**Measurement and Verification (M&V) Baseline**” means a typical usage profile before installation of the Approved Project and as adjusted by agreement by all parties thereafter as described in the M&V Plan and set out in Annexure B.

### **“M&V Body”** means the measurement and verification entity appointed by Eskom to independently conduct the M&V Process.

### **“M&V Equipment”** means any equipment as specified by the M&V Plan for the purposes of establishing the M&V Baseline, measuring and verifying the Approved Project.

### **“M&V Plan”** means the document produced and distributed by the M&V Body comprising an overview of the activities undertaken by the M&V Body to establish the Average Demand Savings and associated Energy Savings during the Eskom prescribed periods set out in Annexure B.

### **“M&V Process”** means the processes followed to measure and verify the activities as stipulated in the M&V Plan;

### “**Mega Watt or “MW”** means a unit for measuring power that is equivalent to one million watts.

### **“Parties”** means the parties to this Contract as described in clause 1 of this Contract and ‘Parties’ shall be construed accordingly.

### **“Performance Assessment Period”** means an assessment conducted by the M&V Body over a 3 (three) month period to determine the performance of the Approved Project.

### **“Proposed Energy Saving”** means the total estimated reduction in consumption to be realised from the implementation of the Approved Project per quarter during the Sustainability Term.

### **“Safety Health Plan or SHE”** means a documented planthat addresses hazards identified and includes safe work procedures to mitigate, reduce or control the hazards identified.

### **“Sustainability Term”** means a 24 (twenty-four) month term beginning on the first day of the first Performance Assessment Period.

### **“Verified Energy Saving”** means the Energy Saving as verified by the M&V Body.

# INTERPRETATION

### The headings to the clauses and sub-clauses in this Contract are for the purpose of convenience and reference only, and shall not be used in the interpretation, modification, and/or amplification of any clause thereof.

### In this Contract, unless stated otherwise, expressions which indicate:

#### a gender includes the other gender and neuter;

#### the singular includes the plural and vice versa;

#### any reference to any law, rules, regulations, guidelines, schedules, standards, licences or codes shall include any amendments, modifications, extensions and shall mean any replacements or re-enactments thereof in force at the applicable time;

#### any reference to ‘writing’ or ‘written’ shall include all methods of reproducing words in a legible and non-transitory form;

#### any reference to ‘persons’ shall include natural or juristic persons, firms, joint ventures, trusts, unincorporated associations and organisations, partnerships and any other entities, irrespective of whether such entity has a separate legal personality;

#### any reference to either ‘Party’ or ‘any person’ shall include its legal successors and permitted assignees;

#### days shall refer to calendar days unless Business Days are specified;

#### any reference in this Contract to a ‘clause’ or ‘sub-clause’ is a reference to a clause or sub-clause contained in this Contract;

#### any reference to an ‘Annexure’ or ‘Annex’ is a reference to an annexure or annex to this Contract; and

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

### The rule that a contract should interpreted against the party responsible for the drafting or preparation thereof or who would benefit from the insertion of a clause, does not apply to this Contract.

# CONTRACT

### The Project Developer hereby agrees to participate in the Energy Saving programme through the Approved Project situatedat *[Please insert the location of the Facility]* (“Premises”) and Eskom hereby agrees to compensate the Project Developer for participation in the Energy Saving programme on the terms and conditions set out in this Contract.

# COMMENCEMENT AND DURATION

### This Contract will commence on the date the last Party signs hereto (“Contract Start Date”) and will endure to the end of the Sustainability Term (“Contract End Date”).

### The duration of the Contract will include both the Implementation Phase and a Sustainability Term and will remain in force for the fixed period not exceeding 32 (thirty two) months.

# Implementation phase

### Implementation Phase shall be up to a maximum of***\_\_\_\_\_\_\_\_\_\_\_\_*** months from the Signature Date.

# ENERGY SAVING

### The Energy Saving represents the energy that would have been consumed by the customer at the approved site for the duration of this Contract had the Approved Project not been implemented.

### The eligible Energy Saving shall exclude any reduction in energy consumption contracted for a reward or compensation and shall only include a reduction in consumption between 06:00 (six o’clock in the morning) and 20:00 (eight o’clock at night), on weekdays (including public holidays, but excluding Saturdays and Sundays).

# SUSTAINABIliTY PHASE

### The contracted Energy Savings for the Sustainability Term shall be **\_\_\_\_\_\_\_ kWh** per quarter as per the table A below:

|  |  |  |
| --- | --- | --- |
| **Sustainability Periods** | **Average Demand savings (MW)** | **Contracted Energy Savings (kWh)** |
| Quarter 1 | 0.1 | 910 000 |
| Quarter 2 | 0.1 | 910 000 |
| Quarter 3 | 0.1 | 910 000 |
| Quarter 4 | 0.1 | 910 000 |
| Quarter 5 | 0.1 | 910 000 |
| Quarter 6 | 0.1 | 910 000 |
| Quarter 7 | 0.1 | 910 000 |
| Quarter 8 | 0.1 | 910 000 |

### ESKOM shall not be liable to compensate the Project Developer for any additional savings above the agreed energy savings tabulated above.

### The Energy Savings for the 24 (twenty-four) month Sustainability Term, shall be measured and verified over 8 (eight) quarterly periods by the M&V Body after issuance of the CoC by the Project Developer.

# SAFETY

### The Project Developer shall comply with Eskom’s minimum safety requirements and also make safety commitment as guided by Eskom.

# MEASUREMENT AND VERIFICATION

### The M&V Body shall at all times be the only authorised body to do measurement and verification of the M&V Process.

### All measurement and verification shall take place in accordance with the M&V Plan.

### The Project Developer shall be responsible for ensuring that the M&V Process takes place by allowing Eskom and the M&V Body reasonable access to the Premises subject to prior written notice to the Project Developer.

### The Project Developer shall at its own cost purchase, install and maintain all measurement equipment and measurement data.

# PAYMENT PROCESS

### Eskom shall upon receipt of the quarterly performance assessment reports from the M&V Body, calculate the applicable rebate payable to the Project Developer for the quarter.

### The calculations in terms of sub-clause 11.1 above, shall be based on the approved Fixed Price per Kilowatt Hour (cents/kWh)

*Incentive Rate – \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_Cents/kWh*

*Payments per Quarter will be based on the formula at the end of each Quarter of the Sustainability Period:*

*QP1 = (C1 x D1)*

*Where:*

*A1 = Actual Quarterly Performance*

*B1 = the Forecasted Proposed Energy Saving per Quarter C1 = the lower of: A1 and B1*

*D1 = the approved incentive rate.*

*QP1 = quarterly performance incentive payments.*

### Subsequent to the calculations in terms of sub-clauses 11.1 and 11.2 above, Eskom shall provide the Project Developer within 7 (seven) Business Days after the receipt of Performance Assessment Report with the amounts to be invoiced for that specific quarter based on the performance reflected in the Performance Assessment Period.

### Eskom shall pay the Project Developer within 60 (sixty) Business Days from date of receipt of the invoice from the Project Developer.

### Eskom shall cap the amount paid to a maximum performance value of 100% (one hundred percent).

# PROJECT DEVELOPER’s Obligations

### Subject to the terms and conditions set out in this Contract, the PROJECT DEVELOPER shall:

#### commence and complete the Approved Project at the Premises at its sole cost and risk and shall not enlist the services of any sub-contractor without Eskom’s approval, which approval shall not be unreasonably withheld and shall not absolve the Project Developer from its obligations in terms of this Contract;

#### ensure that the necessary M&V Equipment is available in order for the M&V Body to conduct their activities;

#### Maintain the accuracy of the M&V Equipment, at its own cost for the duration of the Contract;

#### provide a CoC upon completion of the Implementation Phase;

#### comply with all applicable legislation which relate to the implementation and continued operation of the Approved Project; and

#### operate and maintain, at its own cost and risk, the Approved Project for the duration of the Contract;

#### inform Eskom of any change to any Premises, which will have an impact on the reduction in Consumption at the Premises and which relates to the rights and obligations created by this Contract;

#### dispose of old luminaries or other goods or equipment which needs to be disposed of, in accordance with the requirements of the Hazardous Substances, Act 15 of 1973, National Environmental Management Act, Act 107 of 1998 and regulations of the Department of Water Affairs and Forestry and any other applicable legislation, regulation or standard

#### obtain a certificate by an independent disposer indicating the total numbers disposed of and that the disposal of equipment or other goods was executed in an environmentally friendly manner and that they will not be reused; and

#### where the Project Developer is not the owner of the Premises, provide evidence that, the Project Developer has and shall maintain the exclusive right to implement the Approved Project at the Premises. Further that the owner is aware of the implementation of the Approved Project at the Premises and that he/she has no objection to such implementation and will provide necessary reasonable access to the Premises required in terms of this Contract.

### The Project Developer shall not:

#### implement any technologies other than those proposed for the Approved Project and set out in Annexure A;

#### claim payment or reward from any public body in respect of the Verified Energy Saving realised in terms of this Contract, save as set out herein; and

#### in any way exploit any intellectual property rights of Eskom.

# WARRANTIES, GUARANTEES and indemnity

### Eskom does not guarantee or undertake any liability in respect of the skill and expertise of the Project Developer or any party that the Project Developer uses to implement, commission, maintain, repair or replace the Approved Project.

### Eskom does not guarantee that the Approved Project will achieve or maintain any level of Consumption reduction, or any other level of Energy Savings

### The Project Developer defends, indemnifies and holds Eskom harmless against any claim a third party may have or institute against Eskom relating to any loss or damages allegedly suffered by such third party and which relates to any aspect of this Contract, which includes, but is not limited to, claims for equipment failure or other loss of property or goods, consequential loss (which includes, but is not limited to,loss of profits, loss of use, business interruption, loss of data, cost of cover, loss of income and loss of production), payment for any Consumption reduction of any type, death or personal injury or guarantees, quality of supply or interruption of electricity supply on any equipment, or any abuse by any employee or agent of the Project Developer of another Party’s intellectual property rights.

### In the event that the Project Developer is not the owner of the Premises, the Project Developer undertakes to procure the consent of the owner with respect to the implementation of the Approved Project at the Premises, that it has no objection to such implementation and will allow all necessary access to Eskom and the M&V Body for the purposes of discharging any obligations and exercising any rights they may have in respect of this Contract. Eskom agrees to adhere, and the Premises owner can insist that the M&V Body adheres to any reasonable safety and health requirements of the Project Developer or owner of the Premises, to the extent that it has been advised thereof in writing.

### In the event that the Project Developer is not the owner of the Premises, it guarantees that it has and will maintain the exclusive right to implement the Approved Project at the Premises and defends, indemnifies and holds Eskom harmless against any claims from any other person in respect of payment for any Consumption reduction achieved by the Approved Project to the extent that such claim may not be covered by the indemnity contained in sub-clause 13.3 above.

# DISPUTES and dispute resolution

### All disputes between the Parties shall be determined in accordance with the provisions of this clause 14.

### In the event that the Parties, notwithstanding the use of reasonable endeavours to do so, are unable to resolve any dispute between them arising out of or in connection with this Contract (including, without limitation, any question regarding its existence, validity, interpretation, rectification or termination), such dispute shall be settled in accordance with the procedures set out in this clause 14.

### Where such a dispute arises as contemplated in sub-clause 14.2 above, either Party (the “Disputing Party”) shall within 2 (two) Business Days of the date on which the dispute arose, give written notice of the dispute to the other Party (the “Receiving Party”), in accordance with the provisions of this clause 14 .

### The notice, which shall be sent to the address of the Receiving Party as specified in clause 19 of this Contract, shall:

#### inform the Receiving Party of the dispute;

#### refer to the reasons for declaring the dispute; and

#### describe the nature of the dispute with sufficient clarity for the Receiving Party to be able to identify it.

### Within 3 (three) Business Days of receipt of the notice, the Receiving Party shall be obliged to send a written notice to the Disputing Party acknowledging receipt of the notice.

### Within 3 (three) Business Days of receipt of the notice from the Disputing Party, the negotiation representatives of the Parties, possessing sufficient authority to be able (if necessary with consultation back to their respective organisations) to resolve the dispute, shall meet or communicate in such a manner expedient to resolving the dispute (if it is impractical to meet in person, by way of example via email, video/telephone conferencing etc.) to attempt to settle the dispute in an amicable manner, within a period of 3 (three) days after the commencement of the negotiations. In the event that the dispute is resolved between the negotiation representatives, the outcome of such negotiations shall be reduced to writing and signed by the Parties.

### The negotiation representatives are;

For the Project Developer:

[Name of the representative]

[Designation]

[Telephone number/s]

For Eskom:

[Name of the representative]

[Designation]

[Telephone number/s]

### The Parties agree that while a dispute is continuing, they shall both continue to perform their respective obligations under this Contract until the dispute has been fully and finally resolved in accordance with the provisions of this clause 14. It being specifically agreed that where the nature of the dispute precludes compliance (whether in full or in part) with this clause 14, the Party who is so precluded from performing shall forthwith notify the remaining Party/Parties that it is so unable to perform and the reasons therefor. Any Party receiving notice of an inability to perform in terms of this clause may dispute the content thereof, which dispute shall in itself be dealt with contemporaneously with the main dispute.

### If the dispute is not resolved by the negotiation representatives within the period stated in sub-clause 14.6 above, either Party shall, within a period of 5 (five) Business Days after the last day of the that period, and by written notice to the other Party (the “Mediation Notice”) refer the dispute to mediation by 1 (one) mediator appointed in accordance with the remaining provisions of this clause.

### The Mediation Notice, which shall be sent to the service address of the other Party, shall:

#### record the failure of the negotiation representatives to resolve the dispute within the period stated in sub-clause 14.6 above;

#### notify the other Party of the identities and details of 3 (three) mediators nominated by the Party sending the Mediation Notice, and request the other Party to, within 3 (three) Business Days of receipt of the Mediation Notice, and by written response, agree to the appointment of 1 (one) of such nominated mediators; and

#### advise the other Party of its right to nominate 3 (three) mediators of its own should it object to the nominated mediators.

### Should the other Party fail to respond to such Mediation Notice within 5 (five) Business days of the giving of the Mediation Notice, the other Party will be deemed to have agreed to the use of the first listed mediator as nominated on the Mediation Notice.

### If the Parties are not able to agree on the appointment of such mediator within 3 (three) Business days of the giving of the written response, either Party shall within 3 (three) Business Days thereafter, by written notice to the other Party, refer the appointment of the mediator to the Arbitration Foundation of Southern Africa (or its successor or body nominated in writing by it in its stead) (“AFSA”).

### Only persons with the adequate level of skill and expertise in relation to the nature of the dispute and the scope of this Contract shall be appointed as mediators. No person shall be eligible to be nominated or appointed as a mediator pursuant to this Contract, if such person:

#### is presently or has been in the previous 24 (twenty four) months an employee or agent of, or consultant or counsel to, either Party or any affiliate of either Party, or

#### acted against either Party or any affiliate of either Party in the previous 24 (twenty four) months in a litigious proceeding, or

#### is not in good standing with any professional body that such person is affiliated with, or

#### is a national of a state with which the domicile of any Party does not maintain diplomatic relations.

### The mediation shall be conducted according to the directions of the mediator, and the Parties shall participate in the mediation in good faith, and shall respond to all reasonable directions and requests of the mediator in attempting to resolve the dispute. The costs of the mediation shall be determined by the mediator.

### No prior direction, decision, conclusion or recommendation (or similar act) by any Party or the mediator shall be referred to, or used in any subsequent arbitration proceedings, whether in respect of the dispute or any subsequent dispute which may arise, irrespective of whether or not such subsequent dispute is the same subject matter as the dispute.

### Should the mediation not resolve the dispute within 7 (seven) Business Days of its commencement, either Party shall by written notice to the other Party (the “Arbitration Notice”) refer the dispute for resolution by arbitration in terms of the rules of the Arbitration Foundation of Southern Africa from time to time in force, subject to the remaining provisions of this clause 14:

#### the then-current rules for expedited arbitration of AFSA (which shall not act as the administrator of the arbitration) shall govern such arbitration;

#### Regarding any arbitration conducted in accordance with this clause 14:

### The seat shall be the Republic of South Africa;

### The arbitration shall be held and conducted in the city of Johannesburg in South Africa;

### The arbitration shall be conducted in the English language and all documents submitted in connection with such proceeding shall be in the English language or, if in another language, accompanied by a certified English translation;

### The arbitration shall be conducted before 1 (one) arbitrator appointed in accordance with the provisions of this Contract; and

### The arbitration shall be final and binding on the Parties. The cost of arbitration shall be determined by the arbitrator.

### The Arbitration Notice, which shall be sent to the Service Address of the other Party, shall:

#### record the failure of the Parties to resolve the dispute within 7 (seven) Business Days of commencement of mediation;

#### notify the other Party of the identities and details of 3 (three) arbitrators nominated by the Party sending the Arbitration Notice, and request the other Party to, within 3 (three) Business Days of receipt of the Arbitration Notice, and by written response, agree to the appointment of 1 (one) of such nominated arbitrators; and

#### advise the other Party of its right to nominate 3 (three) arbitrators of its own should it object to the nominated arbitrators.

### If the Parties cannot agree on the arbitrator within a period of 2 (two) Business Days after the giving of the response notice referral, either Party shall within 3 (three) Business Days thereafter, by written notice to the other Party, refer the appointment of the arbitrator to the Secretariat of AFSA, which shall, as it deems fit, appoint any 1 (one) of the arbitrators nominated by either Party.

### Only persons with the adequate level of skill and expertise in relation to the nature of the dispute and the scope of this Contract shall be appointed as arbitrators. No person shall be eligible to be nominated or appointed as an arbitrator pursuant to this Contract, if such person:

#### is presently or has been in the previous 24 (twenty-four) months an employee or agent of, or consultant or counsel to, either Party or any Affiliate of either Party; or

#### acted against either Party or any affiliate of either Party in the previous 24 (twenty-four) months in a litigious proceeding; or

#### is not in good standing with any professional body that such person is affiliated with; or

#### is a national of a state with which the domicile of any Party does not maintain diplomatic relations.

### Notwithstanding the AFSA rules for expedited arbitrations, the arbitrators shall be obliged to provide written reasons for the award or other decision, together with reasons for such decision to the Parties within 14 (fourteen) Business Days after the conclusion of the arbitration hearing.

### The Parties irrevocably agree that the decision of the arbitrators in any such arbitration proceedings shall be final and binding upon them, will forthwith be put into effect and may be made an order of any court of competent jurisdiction.

### This clause will not preclude any party from access to an appropriate court of law for interim relief in respect of urgent matters by way of an interdict, or mandamus pending finalisation of this dispute resolution process, for which purpose the Parties irrevocably submit to the jurisdiction of the South Gauteng High Court, a division of the High Court of the Republic of South Africa.

### The periods for negotiation, mediation or arbitration may be shortened or lengthened by written Contract between the Parties.

### This clause is separate, divisible agreement from the rest of this Contract and shall remain in effect even if the Contract terminates, is nullified, held to be void or cancelled for any reason or cause.

# Force Majeure

### If the Affected Party desires to invoke a Force Majeure Event as a cause for delay in the performance of any obligation hereunder, the Affected Party shall notify the other Party **(“the Other Party”)** in writing setting out:

#### the date of commencement of the Force Majeure Event;

#### full particulars of the Force Majeure Event;

#### the impact of the Force Majeure Event on the Affected Party's obligations under this Contract;

#### the Affected Party’s reasonable estimate of the length of time which its performance has been and will be affected by such Force Majeure Event; and

#### the steps which it is taking or intends to take to remove and mitigate the adverse consequences of the Force Majeure Event on its performance hereunder.

provided that such notice (the **“Force Majeure Notice”)** must be sent by the Affected Party not later than 3 (three) days after the date on which the Affected Party first had knowledge of the effect of such Force Majeure Event. If the Affected Party does not deliver a Force Majeure Notice in respect of a Force Majeure Event, such Party shall not be entitled to invoke the benefits of this clause 15 in relation to such Force Majeure Event.

### The Affected Party shall have the burden of proving both the existence of the Force Majeure Event and the effect (both as to nature and extent) which such Force Majeure Event has on its performance.

### If the Parties are, on the basis of the Force Majeure Notice and any supporting documentation, unable to agree as to the existence or as to the effect of a Force Majeure Event by the date falling 60 (sixty) days after the receipt by the non-Affected Party of the Force Majeure Notice, then either Party shall be entitled to refer the Dispute for determination in accordance with clause 14 of this Contract.

### The Affected Party shall:

#### use reasonable endeavours to mitigate, rectify and overcome the effects of the Force Majeure Event on the performance of its obligations under this Contract (including by recourse to alternate sources of services, equipment and materials and construction equipment);

#### use reasonable endeavours to ensure resumption of normal performance of this Contract promptly following the cessation of the Force Majeure Event; and

#### give the other Party (i) regular reports on the progress of the mitigation measures and (ii) notice promptly on the cessation of the Force Majeure Event.

### If it is agreed or determined that a Force Majeure Event has occurred, the Affected Party shall, provided that it has complied with the requirements of this clause 15, not be liable for any failure to perform an obligation under this Contract as a consequence of the Force Majeure Event but only to the extent that:

#### such performance is prevented, hindered or delayed by a Force Majeure Event; and

#### such failure could not have been removed, mitigated, rectified or overcome by the Affected Party acting as a Reasonable and Prudent Operator.

### If the Affected Party’s performance of all or a material part of its obligations under this Contract is prevented, hindered or delayed by a Force Majeure Event then, provided that the Affected Party has complied with the requirements of this clause 15, the time limits for the performance of those obligations (or any dates by which performance of those obligations are to be achieved) shall be extended by a period equal to the period by which its performance is prevented, hindered or delayed.

### If the Force Majeure Event continues in effect for more than 30 (thirty) consecutive days, the Non-Affected Party shall have the right to terminate this Contract after having given 14 (fourteen) days written notice to the Affected Party of such termination at any time prior to the cessation of such Force Majeure Event.

### Notwithstanding that a Force Majeure Event otherwise exists, the provisions of this clause 15 shall not excuse:

#### failure of either Party to make any payment of money in accordance with its obligations under this Contract;

#### late delivery of equipment, machinery, plant, spare parts or materials caused by negligent conduct or wilful misconduct on the part of the Affected Party or any of its contractors;

#### late performance by either Party, caused by such Party’s or such Party’s subcontractor’s failure to engage qualified subcontractors and suppliers or to hire an adequate number of personnel or labour;

#### mechanical or electrical breakdown or failure of equipment, machinery or plant owned or operated by either Party due to the manner in which such equipment, machinery or plant has been operated or maintained;

#### failure of either Party to perform any of its obligations under this Contract in accordance with the requirements hereof prior to the occurrence of an Force Majeure Event;

#### delays resulting from reasonably foreseeable unfavourable weather or reasonably foreseeable unsuitable ground conditions or other similar reasonably foreseeable adverse conditions;

#### any failure by the Affected Party to obtain and/or maintain or cause to be obtained or and maintained any Approval, unless such failure is due to a change in Law;

#### strikes, lockouts and other industrial action by the employees of the Affected Party, any of its Affiliates or any contractor of the Affected Party or of any Affiliate, unless such action is part of any wider industrial action involving a significant section of the public sector, the public administration, the construction industry or the electricity supply sector; or wear and tear or random flaws in materials and equipment or breakdown in or degradation of equipment or machinery of the Affected Party.

# BREACH AND TERMINATION

### Either Party has the right to terminate this Contract for convenience and without consequence, if, after approval of the M&V Plan, the Party is of the opinion that it is no longer economically feasible to continue with the Contract. This right is only available for 15 (fifteen) Business Days after the date of written approval of the M&V Plan and, despite termination, previously accrued liabilities will remain intact.

### Eskom has the right to terminate this Contract, upon notice in writing and without consequence, should the Approved Project not be Completed within 2 (two) months of the Implementation Phase.

### In any other circumstance, if either Party breaches a term or condition of this Contract, the innocent Party may serve a notice of default on the defaulting party, calling on the defaulting Party to rectify the breach within a period of 30 (thirty) days after date of the notice of default.

### Should the defaulting Party not rectify the breach as requested, the innocent Party may terminate the Contract with immediate effect and without losing any right to claim damages suffered as a result of such breach or which otherwise may have accrued to it, from the defaulting party.

# LIABILITY

### No Party will be liable to the other for any consequential loss (which includes, without limitation,loss of profits, loss of use, business interruption, loss of data, cost of cover, loss of income and loss of production), arising from any action or inaction of any Party. This sub-clause does not apply to the indemnities provided to Eskom by the Project Developer in terms of sub-clauses 13.3 and 13.5 of this Contract.

### No Party will be liable to the other, whether in this Contract or delict for the payment of any loss or damage in excess of the Initial Purchase Price. This sub-clause does not apply to the indemnities provided to Eskom by the Project Developer in terms of sub-clauses 13.3 and 13.5 of this Contract.

# ASSIGNMENT AND CHANGE IN CONTROL

### Neither Party shall be entitled to sell, cede, delegate, assign, transfer or otherwise dispose of (collectively, “Assign”) all or any part of its rights and/or obligations hereunder without the prior written approval of the other Party.

### Any actual, attempted or purported Assignment by either Party of any of its rights or obligations or interests in, under or pursuant to this Contract that does not comply with this clause 18 shall be null and void and have no legal force or effect.

### Notwithstanding the provisions of sub-clause 18.1 above, either Party may, without the prior written consent of the other, cede, delegate, or assign all or any of its rights, obligations, or liabilities under the Contract:

#### to any to any entity that its business, or part thereof is transferred to, following any restructuring of the current business model; or

#### where the control of the funds from which payment in terms of this Contract must be made is transferred to another entity, to such entity.

### This Contract shall be binding on and shall inure for the benefit of the successors and permitted assigns and personal representatives (as the case may be) of the Parties.

1. **NOTICES / ADDRESSES**

### Any written notice in connection with this Contract (other than a notice comprising legal process contemplated in sub-clause 19.2 below may be addressed:

#### in the case of the **Project Developer**, to:

Physical Address

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Postal Address

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Electronic mail address: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

with a copy to: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

marked for the attention of: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

#### in the case of **Eskom**, to:

Physical Address

Megawatt Park

Maxwell Drive

Sunninghill Ext. 3

2199 SANDTON

Postal Address

PO Box 1091

SANDTON

2199

Electronic mail address: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Marked for the attention of: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

#### The notice will be deemed to have been duly given:

### on delivery, if delivered to the Party's physical address set out in sub-clause 19.1;

### on despatch, if sent to the Party's then electronic mail address set out in sub-clause 19.1; unless the addressor is aware, at the time the notice would otherwise be deemed to have been given, that the notice is unlikely to have been received by the addressee through no act or omission of the addressee.

#### A Party may change its address by notice in writing to the other Party.

#### Notwithstanding anything to the contrary herein contained a written notice or communication actually received by a Party will be an adequate written notice or communication to it notwithstanding that it was not sent to or delivered at its chosen address set out in sub-clause 19.1.

#### All notices and correspondence in connection with this Contract shall be in the English language.

### Address for Service of Legal Documents

#### The Parties choose the following physical addresses at which documents in legal proceedings in connection with this Contract may be served (i.e., their *domicilia citandi et executandi*):

#### **The Project Developer:** \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

**Eskom:** Megawatt Park

Maxwell Drive

Sunninghill Ext. 3

Sandton, 2199

#### A Party may change its address for this purpose to another physical address in the Republic of South Africa at which legal process can be served, by notice in writing to the other Party.

**SIGNED** for and on behalf of the **Project Developer** by the signatory below who warrants that [he/she/they] [is/are] is duly authorised.

Date:

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Name: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Title: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

As Witnesses:

1. \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Print Name

1. \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Print Name

**SIGNED** for and on behalf of **Eskom** by the signatory below who warrants that [he/she/they] [is/are] is duly authorised.

Date:

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Name: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Title: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

As Witnesses:

1. \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Print Name

1. \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Print Name

**ANNEXURES**

ANNEXURE A: SCOPE OF WORK AND PROJECT PLAN

ANNEXURE B: M&V PLAN AND BASELINE

ANNEXURE C: SHE PLAN

ANNEXURE D: LOAD MANAGEMENT PROGRAMME RULES