

**NEGOTIATED OPERATOR AGREEMENT FOR THE PROVISION OF MUNICIPAL PUBLIC  
TRANSPORT SERVICES IN THE AREA OF THE MUNICIPALITY OF GEORGE**

**between**

**THE MUNICIPALITY OF GEORGE**

**("the Municipality")**

**and**

**VEHICLE OPERATOR COMPANY LIMITED**

**("the Operator")**

**and**

**THE WESTERN CAPE PROVINCIAL GOVERNMENT VIA ITS DEPARTMENT OF  
TRANSPORT AND PUBLIC WORKS("the Province")**

*DRAFT*  
*Not for Contract Purposes*

## PART A –DEFINITIONS, INTERPRETATION AND CONDITIONS

### 1 DEFINITIONS AND INTERPRETATION

1.1 In this Agreement, unless inconsistent with, or otherwise indicated by the context:

- 1.1.1 **"Agreement"** means the agreement contained herein and includes the Annexures hereto;
- 1.1.2 **"Annexures"** means the following attachments to this Agreement:
- 1.1.2.1 Annexure A – Specifications Schedule;
  - 1.1.2.2 Annexure B – Routes and Timetables Schedule;
  - 1.1.2.3 Annexure C – Contract Rates Schedule;
  - 1.1.2.4 Annexure D –Penalties Schedule;
  - 1.1.2.5 Annexure E – Depot Service Level Agreement;
  - 1.1.2.6 Annexure F – Pre-Operational Costs Schedule;
  - 1.1.2.7 Annexure G – GIPTN Brand Schedule; and
  - 1.1.2.8 Annexure H – Authorised Employment and Operator Registers of Affected Persons.
- 1.1.3 **"Annual Contract Amount"** means the total amount estimated for the provision of the Public Transport Services, based on Annexure C which is attached to and incorporated in the Agreement;
- 1.1.4 **"Authorised Employment and Operator Registers of Affected Persons"** means the register developed by the Contracting Authority of the individuals employed in the mini-bus taxi industry in George that have registered with the Contracting Authority, included in Annexure H which is attached to and incorporated in the Agreement;
- 1.1.5 **"Authorised Representatives"** means person/s authorised by each of the Contracting Authority and the Operator in writing as contemplated in terms of this Agreement;
- 1.1.6 **"Authorised Stop"** means a stop, interchange or terminus authorised by the Contracting Authority for passengers to embark or disembark from Vehicles;
- 1.1.7 **"BBBEE"** means Broad-based Black Economic Empowerment in terms of the Broad-based Black Economic Empowerment Act, 23 of 2003;

- 1.1.8 "**Brand**" means any colour, trademark, image, design or other relevant intellectual property that serves to identify the GIPTN.
- 1.1.9 "**Business Day**" means any day other than a Saturday, Sunday or public holiday in the Republic of South Africa;
- 1.1.10 "**Capacity**" means the maximum number of passengers that may lawfully be carried in a particular Vehicle, including all seated and standing passengers but excluding the Driver;
- 1.1.11 "**Change of Control**" means:
- 1.1.11.1 if a third party acquires ownership of more than 50% of the issued share capital of the Operator which confers, in the aggregate, more than 50% of the total voting rights conferred by all the shares in that issued share capital at the time of the acquisition; or
  - 1.1.11.2 if a third party acquires the right to appoint or remove directors holding a majority of the voting rights at meetings of the board of the Operator; or
  - 1.1.11.3 if a third party acquires the sole right to control a majority of the voting rights exercisable at any general meeting of the Operator, whether pursuant to an agreement with other members of the Operator or otherwise; or
  - 1.1.11.4 if the Operator sells, transfers or otherwise disposes of all or a greater part of its assets or business; or
  - 1.1.11.5 if the Operator is placed under any final order of winding-up, business rescue supervision, judicial management or enters into any voluntary winding-up; or
  - 1.1.11.6 if an event as contemplated in 1.1.11.1 to 1.1.11.5 occurs in relation to the holding company of the Operator;
- 1.1.12 "**Charter Service**" means a public transport service operated by road involving the hire of a Vehicle and a Driver for a journey required by the Contracting Authority, at a charge arranged beforehand with the Operator, where:
- 1.1.12.1 neither the Operator nor the Driver charges the passengers individual fares;
  - 1.1.12.2 the Contracting Authority has the right to decide the route, date and time of travel; and
  - 1.1.12.3 the passengers are conveyed to a common destination;
- 1.1.13 "**Commencement Date**" means the date upon which the Operator will commence rendering the first Public Transport Services, as envisaged under this

Agreement, namely [●] or such later date as may be agreed to by the Parties in writing;

1.1.14 "**Conditions Precedent**" means the conditions precedent contained in clause3;

1.1.15 "**Confidential Information**" means all information, without limitation, of whatsoever nature:

1.1.15.1 relating to the Disclosing Party's business, operations, processes, drawings, sketches, plans, models, product information, know-how, market opportunities, customers and business affairs; or

1.1.15.2 relating to the relationship of the Disclosing Party with its customers and suppliers; or

1.1.15.3 relating to the contents of this Agreement and any other information received pursuant to this Agreement, but excludes information which:

1.1.15.3.1 is required to be disclosed under any law or regulation, or by any governmental or competent authority, including any stock exchange on which a Receiving Party may be listed, provided that the Receiving Party in question shall first consult with the Disclosing Party before making any such disclosure, statement or announcement; or

1.1.15.3.2 is in the public domain or enters into the public domain in any way (including, without limitation, through publication in the ordinary course on the Stock Exchange News Service) provided that the entry of such information into the public domain did not entail a breach of this Agreement by the Receiving Party; or

1.1.15.3.3 the Receiving Party can show was within its possession or knowledge, such information being in its use or having been recorded in its files, computers or other recording media, prior to receipt thereof from the Disclosing Party, and which information was not previously acquired by the Receiving Party under any obligations of confidence or unlawfully; or

1.1.15.3.4 is disclosed by the Receiving Party with the prior written approval of the Disclosing Party; or

1.1.15.3.5 was disclosed by the Disclosing Party to a third party without restriction on disclosure or use, including without limitation, by way of a patent specification; or

- 1.1.15.3.6 is hereafter disclosed or made available in good faith to the Receiving Party from a source other than the Disclosing Party, without breach by the Receiving Party of any obligation of confidentiality or non-use owed to the Disclosing Party or without breach by such other source who, to the knowledge of the Disclosing Party, is not subject to an obligation of confidentiality or non-use owed to the Disclosing Party; or
- 1.1.15.3.7 is developed independently by the Receiving Party without reference to the Confidential Information, it being recorded that, for purposes of this clause 1.1.15:
- 1.1.15.3.7.1 "**Disclosing Party**" means the Party disclosing Confidential Information to the Receiving Party; and
- 1.1.15.3.7.2 "**Receiving Party**" means the Party receiving Confidential Information from the Disclosing Party; and
- 1.1.15.3.7.3 "**Contract Rate**" means the contract rate contained in Annexure C agreed to for the provision of the Public Transport Services;
- 1.1.16 "**Contract Rates Schedule**" means the schedule setting out the agreed contract rate in respect of each Vehicle class, attached as Annexure C and incorporated in the Agreement;
- 1.1.17 "**Contracting Authority**" is the Municipality, supported by the Province, as described in the Intergovernmental Agreement;
- 1.1.18 "**CPI**" means the Consumer Price Index (all items) specific to the Western Cape Province as published by Stats SA (<http://www.statssa.gov.za>);
- 1.1.19 "**Depot**" means the immovable property at Erf 3472, George used by the Operator in rendering the Services in terms of the Depot Service Level Agreement;
- 1.1.20 "**Depot Service Level Agreement**" means the depot service level agreement attached as Annexure E entered into between all the Parties hereto concurrently with the Agreement;
- 1.1.21 "**Drivers**" means those employees of the Operator who are to drive and operate the Vehicles;
- 1.1.22 "**Drivers' Schedule**" means the schedule setting out the name, nationality and identity number or working permit number of each Driver, driver's licence number, licence code(s) and expiry date, Professional Driver's Permit number and expiry

date, to be furnished by the Operator to the Contracting Authority as contemplated in terms of clause 28.2;

- 1.1.23 **"Employees"** means the employees of the Operator, employed to perform a part of the Public Transport Services;
- 1.1.24 **"Event of Force Majeure"** means an act of God, fire, explosion, earthquake, perils of the sea, flood, storm or other adverse weather conditions, war declared or undeclared, civil war, revolution, civil commotion or other civil disorder, sabotage, riot, blockade, embargo, strikes, lock-outs or other labour disputes (excluding any blockade, embargo, strike, lockout or other labour dispute involving employees or subcontractors of the Operator and engaged upon by such employees or subcontractors for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between the employees or subcontractors on one side and the employer on the other, or between the employees of a subcontractor and the subcontractor, or any similar action engaged upon by employees or sub contractors of the Operator in sympathy with other persons or any course whether or not such action is related to any transportation service), sanctions, epidemics, act of any Government, compliance with law, regulations or lawful demands of any Government or Governmental agency;
- 1.1.25 **"Fares"** means the money to be collected in cash or otherwise from passengers in exchange for the right to travel on the GIPTN;
- 1.1.26 **"Fixed Costs"** means the schedule of fixed costs contemplated in Annexure C;
- 1.1.27 **"Fleet"** means the fleet of Vehicles utilised by the Operator in the rendering of the Services as envisaged under this Agreement;
- 1.1.28 **"GIPTN"** means the Contracting Authority's integrated public transport network, more fully described in clause 2;
- 1.1.29 **"GIPTN Information"** means a specific piece of recorded information generated, collected or received in the initiation, conduct or completion of any activity undertaken to provide Public Transport Services in the Service Area and comprises sufficient content, context and structure to provide proof or evidence of that activity.
- 1.1.30 **"GIPTN Manager"** means the person appointed in terms of the Intergovernmental Agreement to oversee the implementation of the responsibilities of the Contracting Authority in relation to the GIPTN, to administer the Agreement, to monitor the Operator's compliance with the terms and conditions of the Agreement, and to liaise with the Operator;
- 1.1.31 **"IGA"** means the Intergovernmental Agreement concluded between the Province and the Municipality on 14 September 2011;

- 1.1.32 "**Intellectual Property**" means any and all intellectual property rights of any nature anywhere in the world whether registered, registerable or otherwise, including patents, utility models, trademarks, registered designs and domain names, applications for any of the foregoing, trade or business names, goodwill, copyright and rights in the nature of copyright, design rights, rights in databases, know-how, trade secrets and any other intellectual property rights which subsist in computer software, computer programs, websites, documents, information, techniques, business methods, drawings, logos, instruction manuals, lists and procedures and particulars of customers, marketing methods and procedures and advertising literature, including the "look and feel" of any websites;
- 1.1.33 "**in writing**" means written and printed communication, and includes letters, facsimiles and email communications from registered email addresses;
- 1.1.34 "**Month**" means a calendar month;
- 1.1.35 "**NLTA**" means the National Land Transport Act No. 5 of 2009, or as amended or substituted;
- 1.1.36 "**Operating Licence**" means an operating licence as defined in the NLTA, which is necessary to enable the Operator to provide the Public Transport Services in terms of this Agreement;
- 1.1.37 "**Operations Manager**" means the person appointed by the Operator to take operational decisions on behalf of the Operator, to ensure that the Operator complies in all respects with the Operator's obligations as set out in this Agreement, and to liaise with the GIPTN Manager;
- 1.1.38 "**Operator Vehicles**" means those existing mini-bus taxis owned by the Operator or its members as the case may be, as at the Commencement Date and which have been submitted for pre-inspection and approval by the Contracting Authority in accordance with the Specifications.
- 1.1.39 "**Overhead Costs**" means ongoing expense of operating a business and describes the expenses that are necessary to the continued functioning of the business but cannot be immediately associated with the products / services being offered. Overhead costs include, but are not limited to, accounting fees, insurance, legal fees, rent, repairs, supplies, taxes, telephone bills, travel and utilities costs.
- 1.1.40 "**Party**" means a party to this Agreement;
- 1.1.41 "**Passenger**" means a fare paying member of the public or a person being conveyed by Charter Service;
- 1.1.42 "**Penalties**" means the penalties imposed on the Operator in terms of this Agreement and the Penalties Schedule as recorded in Annexure D, attached to and incorporated in the Agreement;

- 1.1.43 "**Penalties Schedule**" means the Penalties Schedule set out in Annexure D;
- 1.1.44 "**Phase(s)**" means the phase(s) of the GIPTN as described in the Routes and Timetable Schedule, attached as Annexure B and incorporated in the Agreement;
- 1.1.45 "**Positioning Kilometres**" means kilometres travelled by a Vehicle:
- 1.1.45.1 from a Depot to the starting point of a Scheduled Trip; and/or
- 1.1.45.2 from the end of a Scheduled Trip to a Depot; and/or
- 1.1.45.3 from the end of a Scheduled Trip to the starting point of the next Scheduled Trip, for which the Operator is not entitled to be compensated in terms of this Agreement;
- 1.1.46 "**Pre-Operational Costs**" means the costs set out in the Pre-Operational Costs Schedule, attached as Annexure F and incorporated in the Agreement;
- 1.1.47 "**Public Transport Services**" means the Scheduled public transport services for the carriage of passengers by road, in terms of this Agreement for a fare or any other consideration or reward;
- 1.1.48 "**Rand**" or "**R**" means the lawful currency of the Republic of South Africa;
- 1.1.49 "**Registered email addresses**" means the email addresses of the Contracting Authority, Province and the Operator respectively, agreed as addresses for communication between the parties, and recorded as such in a register;
- 1.1.50 "**Regulatory Entity**" means the relevant Provincial Operating Licensing Board, the National Public Transport Regulator, Provincial Regulatory Entity or a municipality to which the Operating Licensing Function has been assigned, to receive, consider and decide upon applications for operating licences in the Service Area;
- 1.1.51 "**Revenue Kilometres**" means Scheduled Kilometres actually operated for which the Operator is entitled to be compensated in terms of this Agreement;
- 1.1.52 "**Routes**" means the Routes for each of the Services set out in the Routes and Timetable Schedule;
- 1.1.53 "**Routes and Timetable Schedule**" means the Routes and Timetable Schedule set out in Annexure A, in which the Routes, distances, Services, Timetables, performance criteria, Stops and any additional related information are described;
- 1.1.54 "**Scheduled Kilometres**" means the kilometres scheduled to be operated in accordance with the Routes and Timetable Schedule (Annexure A);

- 1.1.55 "**Scheduled Trips**" means those Trips which are authorised in accordance with the Timetable, as approved and amended by the Contracting Authority from time to time;
- 1.1.56 "**Service Area**" means all areas served by the Routes, as described in the Routes and Timetable Schedule, in which the Public Transport Services will be operated;
- 1.1.57 "**Signature Date**" means the latest date on which this Agreement has been signed by all Parties;
- 1.1.58 "**Specifications**" means the specifications as set out in Annexure A(Specifications Schedule), incorporated in the Agreement,read together with the Routes and Timetable Schedule (Annexure B);
- 1.1.59 "**Standing Kilometres**" means kilometres which are scheduled in accordance with the Timetable and for which the Operator is compensated where it is unable to operate scheduled trips. Standing kilometres arise where, agreed by the Contracting Authority, there is:
- 1.1.59.1 danger to life;
  - 1.1.59.2 danger of personal injury;
  - 1.1.59.3 danger of serious damage to property;
  - 1.1.59.4 Force Majeure;
  - 1.1.59.5 Boycott action not of the Operator's staff; and
  - 1.1.59.6 Any other event agreed by the Contracting Authority.
- 1.1.60 "**Surviving Provisions**" means clause1 (Interpretation and definitions); 17(Penalties); 36 (Breach and termination); 37(Dispute resolution); andclauses 38 to 55 (Miscellaneous Matters);
- 1.1.61 "**Termination Date**" means 12 years after the Commencement Date or the date on which the Agreement is terminated in terms of clause36, whichever shall be the earlier;
- 1.1.62 "**Timetable**" means the times at which Trips must take place as referenced in the Specifications;
- 1.1.63 "**Trip**" means the operation of a Vehicle, carrying fare paying passengers, travelling in a single direction on one or more Routes as set out in the Routes and Timetable Schedule (Annexure B);
- 1.1.64 "**Variable Costs**" means the schedule of variable costs as set out in Annexure D;

- 1.1.65 "**VAT**" means value-added tax levied in terms of the Value-Added Tax Act, 89 of 1991;
- 1.1.66 "**Vehicles**" means the vehicles as contemplated in the Specifications, to be utilised in terms of this Agreement;
- 1.2 In addition to the definitions in clause 1.1, unless the context requires otherwise:
- 1.2.1 in the event of conflict between the Annexures and the provisions of this Agreement (excluding the Annexures), the provisions of this Agreement shall prevail;
- 1.2.2 any definition in this Agreement, shall bear the same meaning and apply throughout this Agreement including Annexes hereto, unless otherwise stated or inconsistent with the context in which it appears;
- 1.2.3 the singular includes the plural and vice versa;
- 1.2.4 references to a "subsidiary" or a "holding company" shall be references to a subsidiary or holding company as defined in the Companies Act, 2008;
- 1.2.5 a reference to a statutory provision includes any subordinate legislation made from time to time under that provision and includes those provisions as re-enacted from time to time;
- 1.2.6 any one gender, whether masculine, feminine or neuter, includes the other two;
- 1.2.7 any reference to a natural person includes an artificial person and vice versa;
- 1.2.8 references in this Agreement to "clauses" or to "Annexures", are to clauses of and Annexures to this Agreement;
- 1.2.9 unless otherwise provided, any number of days prescribed shall be determined by excluding the first and including the last day or, where the last day falls on a day that is not a Business Day, the next succeeding Business Day;
- 1.2.10 references to day/s, months or years shall be construed as Gregorian calendar day/s, months or years, as the case may be;
- 1.2.11 if a definition imposes substantive rights and obligations on a Party, such rights and obligations shall be given effect to and shall be enforceable, notwithstanding that they are contained in a definition;
- 1.2.12 a reference to a Party includes that Party's successors and permitted assigns;
- 1.2.13 any reference to an enactment is to that enactment as amended, from time to time;
- 1.2.14 the use of the word "including" followed by a specific example/s shall not be construed as limiting the meaning of the general wording preceding it and the

*eiusdem generis* rule shall not be applied in the interpretation of such general wording or such specific example/s.

- 1.2.15 all the headings and subheadings in this Agreement are for convenience only and are not to be taken into account for the purposes of interpreting this Agreement.
- 1.3 The expiration or termination of this Agreement shall not affect such of the provisions of this Agreement which are expressly provided to operate after any such expiration or termination, or which of necessity must continue to have effect after such expiration or termination, notwithstanding that the relevant provisions themselves do not provide for this.
- 1.4 Each of the provisions of this Agreement has been negotiated by the Parties and drafted for the benefit of the Parties, and accordingly the rule of construction that the agreement shall be interpreted against or to the disadvantage of the Party responsible for the drafting or preparation of the Agreement (i.e. the *contra proferentem* rule), shall not apply.

## **2 INTRODUCTION**

- 2.1 The GIPTN has been developed by the Municipality and the Province to transform the road-based public transport sector in the Service Area through the establishment of a high quality, flexible and integrated public transport network.
- 2.2 The Municipality undertook an investigation in terms of the Municipal Systems Act and concluded that an external operator would be required to deliver the Public Transport Services. The investigation concluded that the Municipality would require the assistance of the Province to manage and administer this Agreement.
- 2.3 The Municipality and the Province are entering into this Agreement with the Operator for the provision of Public Transport Services as set out in this Agreement.

## **3 CONDITIONS PRECEDENT**

- 3.1 The provisions of this Agreement (other than the Surviving Provisions which shall be unconditional and of immediate force and effect on the Signature Date) shall be of no force and effect until the fulfilment or waiver of the Condition Precedent as set out in clause 3.2.
- 3.2 The Operator shall, not later than 14 Business Days after the Signature Date, provide one or more Suretyships, or such other form of security agreed to by the Contracting Authority, from a bank or financial institution acceptable to the Contracting Authority for 10% of the Annual Contract Amount, as security for the due and faithful fulfilment by it of all the terms and conditions of the Agreement. The Contracting Authority may, in its sole discretion, agree in writing to extend the period for the fulfilment of the condition precedent.

- 3.3 If the Condition Precedent is not fulfilled or waived, neither Party shall have any claim against the other Party as a result of or in connection with any such non-fulfilment or non-waiver (other than a claim for a breach of the Surviving Provisions).

#### **4 RESOLUTIVE CONDITION**

- 4.1 In the event that the Operating Licences required to deliver the Public Transport Services are not granted to the Operator by the Commencement Date, then this Agreement, with the exception of the Surviving Provisions, shall cease to be of any further force or effect and shall be *void ab initio* and to the extent that this Agreement may have been partially implemented, the Parties shall be restored, as nearly as possible, to the position they were in at the Signature Date.
- 4.2 If the Resolutive Condition is not fulfilled by the Commencement Date, the Operator shall not have any claim against the Contracting Authority as a result of or in connection with any such non-fulfilment in terms of this Agreement except for a breach of the Surviving Provisions.

#### **5 INTERGOVERNMENTAL AGREEMENT**

- 5.1 Section 11(1) of the NLTA assigns responsibility for land transport to the three spheres of government. The Municipality entered into an IGA with the Province to assist the Municipality with the exercise and performance of its powers and functions under the NLTA and to ensure the effective implementation of this Agreement.
- 5.2 In terms of the IGA:
- 5.2.1 The Province is required to be a signatory to this Agreement;
  - 5.2.2 The Province shall assume certain financial responsibilities stipulated therein; and
  - 5.2.3 The Municipality shall in the course of time and after agreement with the Province assume sole responsibility for the duties and obligations in this Agreement

### **PART B - APPOINTMENT, COMMENCEMENT AND DURATION OF SERVICES**

#### **6 APPOINTMENT OF OPERATOR**

- 6.1 The Contracting Authority hereby appoints the Operator to provide the Public Transport Services from the Commencement Date.

6.2 The Operator hereby accepts the aforesaid appointment by the Contracting Authority and undertakes to provide the Public Transport Services to the Contracting Authority in accordance with the terms and conditions set out in this Agreement.

## **7 COMMENCEMENT AND DURATION OF THE PUBLIC TRANSPORT SERVICES**

7.1 The Operator shall provide the Public Transport Services from the Commencement Date until the Termination Date.

7.2 Prior to the Termination Date of this Agreement, the Contracting Authority may invite new tenders for the provision of the Public Transport Services in substantially the same Service Area, provided that such services commence after the Termination Date.

7.3 If a subsequent contract is awarded to a different operator, the Operator must give its full co-operation in effecting the transition of the Public Transport Services to the new operator.

7.4 Nothing in this Agreement is intended to, nor shall, give the Operator a legitimate expectation regarding any extension of this Agreement.

## **PART C - SERVICES AND AMENDMENT TO SERVICES**

### **8 PUBLIC TRANSPORT SERVICES**

8.1 The Operator shall provide all the Public Transport Services in accordance with the Specifications Schedule (Annexure A) and Routes and Timetable Schedule (Annexure B), and upon the further terms and conditions set out in this Agreement.

8.2 The Operator must exercise a high degree of skill, care and diligence in the provision of the Public Transport Services, in accordance with the instructions of the Contracting Authority.

8.3 The Operator may only receive instructions in writing and must adhere to all such instructions.

8.4 All communication between the Operator and the Contracting Authority will be through the GIPTN Manager.

8.5 The Operator must notify the Contracting Authority of any circumstances or conditions that affect the provision of the Public Transport Services. Such notification must be made immediately of the Operator becoming aware of the circumstances or condition, and must be confirmed in writing within 24 hours, if the notification concerned was not in writing.

## **9 TEMPORARY VARIATION**

- 9.1 The Operator shall make allowance for a temporary adjustment of the Public Transport Services, including but not limited to:
- 9.1.1 the increase or decrease of the number of Scheduled Trips on any Route or Routes;
  - 9.1.2 the omission of any Route or Routes or the addition of a new Route or Routes within the Service Area;
  - 9.1.3 the lengthening or shortening or alteration of any existing Route or Routes;
  - 9.1.4 the alteration of the number or location of Authorised Stops; and
  - 9.1.5 changing the Timetable of any portion of the Public Transport Services.
- 9.2 The instruction to operate such altered Public Transport Services will only be valid for up to 1 Month.

## **10 PERMANENT VARIATIONS**

- 10.1 The Contracting Authority may, without the agreement of the Operator, issue instructions for permanent variations to the Public Transport Services, including but not limited to:
- 10.1.1 the increase or decrease of the number of Scheduled Trips on any Route or Routes;
  - 10.1.2 the omission of any Route or Routes or the addition of a new Route or Routes within the Service Area;
  - 10.1.3 the lengthening or shortening or alteration of any existing Route or Routes;
  - 10.1.4 the alteration of the number or location of Authorised Stops; and
  - 10.1.5 changing the Timetable of any portion of the Public Transport Services.
- 10.2 Notwithstanding Clause 10.1, where a permanent variation implies a material change to the fleet composition or results in a change of 10% or more in annual payment to the Operator, the Contracting Authority must effect such variation after obtaining agreement from the Operator and such agreement shall not be unreasonably withheld.

## **11 CHARTER SERVICES**

- 11.1 The Operator may provide Charter Services, as required by the Contracting Authority.

## **12 SERVICES OUTSIDE OF THE AGREEMENT**

- 12.1 In addition to the Public Transport Services which the Operator is obliged to provide in accordance with this Agreement, it may operate any other passenger transport service, provided that:
- 12.1.1 the operation of such services does not take place within 2 years of the Commencement Date;
  - 12.1.2 the operation of such service does not in any way interfere with or inhibit its ability to provide the Public Transport Services in terms of this Agreement;
  - 12.1.3 the additional services do not operate in competition with the Public Transport Services; and
  - 12.1.4 the Operator does not use or deploy the Vehicles utilised for the purpose of this agreement for any purpose other than to fulfil its obligations in respect of the Public Transport Services.

## **13 AMENDMENT OF SPECIFICATIONS**

- 13.1 The parties may amend the Specifications Schedule (Annexure A) by written agreement, but only if such amendments do not result in a significant change to the Brand of the GIPTN or a significant additional cost to the Operator.

## **PART D- PAYMENT FOR SERVICES, ESCALATION, PENALTIES AND INVOICING**

### **14 PRE-OPERATIONAL PAYMENT**

- 14.1 The Contracting Authority shall pay the Operator's Pre-Operational Costs in accordance with the Pre-Operational Costs Schedule (Annexure F).

### **15 PAYMENT**

- 15.1 The Operator shall be paid the sum of:
- 15.1.1 the Revenue Kilometres, at the Variable Cost rates stipulated in Annexure C;
  - 15.1.2 the Standing Kilometres, at ten percent (10%) of the Variable Cost rates stipulated in Annexure C;
  - 15.1.3 the Fixed Costs, at the Fixed Cost rates stipulated in Annexure C; and
  - 15.1.4 the Overhead Costs, as per the amount stipulated in Annexure C.

15.2 The Operator will not be paid for Positioning Kilometres.

15.3 Payment will be adjusted monthly in accordance with changes in CPI.

## **16 PAYMENT CALCULATION**

16.1 Payment will be calculated as follows:

16.1.1 The Operator shall separately total the Revenue Kilometres and Standing Kilometres on each Route for the particular month without rounding off any figures further than one decimal point.

16.1.2 Once a total has been obtained, the total kilometre number is to be rounded off to the nearest full kilometre.

16.1.3 Penalties imposed according to Clause 17 will be deducted from the total thus calculated.

16.1.4 After deductions, the final total will be adjusted in accordance with changes in CPI.

16.2 Additional Vehicles will be charged at the same Variable Cost rates as similar existing Vehicles. Should a completely new vehicle class be introduced, a Variable Cost rate for that class will be determined by agreement with the Contracting Authority in writing and included in Annexure C.

16.3 Additional Vehicles will be charged at the same Fixed Cost rates as similar existing Vehicles. Should a completely new vehicle class be introduced, a Fixed Cost rate for that class will be determined by agreement with the Contracting Authority in writing and included in Annexure C.

## **17 PENALTIES**

17.1 Penalties shall be imposed as set out in Annexure D.

17.2 No timetable Penalties will be imposed during the first two (2) weeks of operation of any new Route.

17.3 The Contracting Authority shall impose Penalties on the Operator according to the following process:

17.3.1 The Operator shall calculate Penalties due and shall incorporate these into the Invoice;

17.3.2 The Contracting Authority shall verify the Penalties;

- 17.3.3 Where a change to the Penalties included in the Invoice is required, the Contracting Authority shall communicate in writing such change to the Operator within two (2) Business Days of Invoice submission, including reasons;
- 17.3.4 The resultant additional or reduced Penalties shall be incorporated into the next month's Invoice;
- 17.3.5 Should the Operator not agree with the additional or reduced Penalties, the Operator shall submit in writing such disagreement to the Contracting Authority within two (2) Business Days of receiving the communication from the Contracting Authority contemplated in clause 17.3.3, including reasons and proof; and
- 17.3.6 The Contracting Authority shall communicate a decision in writing regarding the Operator's submission contemplated in clause 17.3.5 within two (2) Business Days of receiving the submission, including reasons.

## 18 INVOICING

- 18.1 The Operator must submit to the GIPTN Manager an Invoice on the second Wednesday of every month, or if the second Wednesday of the month is a holiday, the next Business Day.
- 18.2 The invoice must cover the period starting on the first day of the preceding month and ending on the last day of the preceding month.
- 18.3 The invoice must be in a format determined by the Contracting Authority, and communicated to the Operator, as may be amended and communicated by the Contracting Authority from time to time.
- 18.4 The Contracting Authority must effect payment to the Operator as soon as possible but not later than 30 days after receipt of the Invoice.
- 18.5 All payments shall only be made into the bank account of the Operator.
- 18.6 If the Operator owes any amount to the Contracting Authority in terms of this Agreement, the Contracting Authority has the right to set it off against any moneys that may be owing to the Operator by the Contracting Authority.
- 18.7 The Contracting Authority shall not be bound by approval of an Invoice should it at any time thereafter transpire that the Invoice was based on incorrect information or that a mistake occurred.
- 18.8 The approval of an Invoice by the Contracting Authority is made without prejudice to any of the Contracting Authority's rights in terms of this Agreement or law.

## **PART E ADDITIONAL OBLIGATIONS OF THE OPERATOR**

### **19 FARES**

- 19.1 All Fares shall be determined by the Contracting Authority and the Operator shall not charge any other Fares.
- 19.2 All Fares charged for Public Transport Services accrue to the Contracting Authority.
- 19.3 The Operator must ensure that all passengers are fare-paying and will be liable for any financial losses to the Contracting Authority arising from fare evasion.
- 19.4 Where a Cash Fare is chargeable for a Public Transport Service, the Operator shall be responsible for collecting the relevant Cash Fare, unless notified otherwise by the Contracting Authority.
- 19.5 The Operator shall ensure that a record of sales and all Cash Fares collected are transferred to the Contracting Authority not later than 1 (one) Business Day after the collection Business Day and in accordance with a process determined by the Contracting Authority and communicated to the Operator, as may be amended and communicated by the Contracting Authority from time to time.

### **20 DEPOTS**

- 20.1 The Operator shall make use of the Depot in a manner determined by the Contracting Authority and on the terms and conditions set out in the Depot Service Level Agreement (Annexure D).
- 20.2 The Contracting Authority may instruct the Operator to use appropriate municipal or provincial property as remote depots. Separate agreements will be entered into for such facilities.

### **21 VEHICLES**

- 21.1 All Vehicles must be compliant with the Specifications Schedule (Annexure A), save for the provisions of clause 21.2.
- 21.2 For a period of not longer than nine (9) Months after the Signature Date, the Operator shall be entitled to use Vehicles not fully compliant with the Specifications Schedule (Annexure A) and the Routes and Timetables Schedule (Annexure B) to render the Public Transport Service, subject to approval by the Contracting Authority. All Vehicles must be compliant with relevant legislation and regulations.

- 21.3 The Operator is required to obtain prior written approval from the Contracting Authority for the purchase of Vehicles. The financing model for the Fleet must be pre-approved by the Contracting Authority.
- 21.4 All Vehicles shall be maintained and operated to comply with all applicable legislative and safety standards, and to the satisfaction of the Contracting Authority.
- 21.5 The Operator agrees to have its Vehicles fitted with all necessary equipment required for monitoring of the Public Transport Service, ensuring passenger safety and the collection of Fare, as determined by the Contracting Authority.
- 21.6 The Operator must enter into a written agreement with the owner of equipment fitted pursuant to clause 21.5 for, *inter alia*, maintenance, repair and replacement of such equipment.
- 21.7 The Contracting Authority shall not bear the risk for damaged equipment fitted pursuant to clause 21.5.

## 22 INSURANCE

- 22.1 The Operator shall effect, pay for and maintain the following insurance cover:
- 22.1.1 comprehensive Vehicle insurance cover at replacement value of the Vehicles;
  - 22.1.2 passenger liability or public liability insurance of at least R25 000 000 per incident; and
  - 22.1.3 insurance cover related to the Depot at a value determined by the Contracting Authority.
- 22.2 The insurance effected, paid for and maintained in terms of clause 22.1 must be in a form acceptable to the Contracting Authority and proof of such insurance must be produced at the request of the Contracting Authority.
- 22.3 The Operator shall reimburse the Contracting Authority for any excess payable by the Contracting Authority in respect of an insurance claim made by the Contracting Authority pursuant to any Contracting Authority assets being damaged by the Operator or its agents or employees.
- 22.4 The Operator shall be liable for any claims for passenger liability or public liability which are repudiated by the insurer due to any act or omission of the Operator, its directors, agents or Employees.
- 22.5 The Operator indemnifies the Contracting Authority against all claims for damages arising out of loss of property or injury or death, as a direct or indirect result of the provision of the Public Transport Services, and records that the Contracting Authority will not be liable for any such damages.

## **23 ACCESS AND DISCLOSURE**

- 23.1 The Operator must provide the Contracting Authority and its service providers with reasonable access to all its Vehicles, workshops and depots for monitoring and evaluation purposes.
- 23.2 The Operator must have available at all reasonable times, for inspection by the Contracting Authority and its service providers, proof of the validity of all licences or permits, insurance and other requirements arising from the Agreement.

## **24 ACCESS CONTROL**

- 24.1 The Operator may only convey Passengers on a Trip.
- 24.2 The Operator may not refuse to convey Passengers on a Trip or part thereof unless:
- 24.2.1 the Capacity of the Vehicle will be exceeded at the time in question by the person wishing to be conveyed;
  - 24.2.2 on grounds of violent, abusive or otherwise offensive conduct on the part of the person wishing to be conveyed;
  - 24.2.3 other grounds contemplated in the NLTA or other applicable legislation; or
  - 24.2.4 the person does not pay the appropriate fare.

## **25 APPOINTMENT OF EXECUTIVES**

- 25.1 The Operator shall appoint suitably qualified executive managers, after consultation with the Contracting Authority on the appointments.
- 25.2 The Operator will appoint, and maintain appointed, an existing experienced public transport operator to provide advisory services to the Operator's executive management. Appointment of this external advisory service will be subject to approval by the Contracting Authority.
- 25.3 The Operator will consult the Contracting Authority on the qualifying criteria for directors of the company as per its Memorandum of Incorporation.
- 25.4 The Chief Executive Officer and Chief Financial Officer will be *ex officio* members of the Board of Directors.

## **26 STAFFING**

- 26.1 The Operator shall offer employment to all those persons listed on the Authorised Employment and Operator Registers of Affected Persons (Annexure H) when recruiting and appointing its staff.
- 26.2 The Operator shall offer employment similar to that indicated in the Register by the affected person, subject to verification that the applicant is qualified to perform that function.
- 26.3 Where the applicant is not qualified to perform the function, the Operator must ensure that the applicant receives training for that function through the training programmes of the Operator or Contracting Authority.
- 26.4 The Employees' employment contracts shall create no uncertainty or confusion in respect of the Operator being the employer and the Operator hereby exempts from and indemnifies the Contracting Authority against any claim arising out of its employment and labour practices.

## **27 MANDATORY TRAINING OF STAFF**

- 27.1 The Operator must allow its Employees to participate in the mandatory training programmes identified by the Contracting Authority, including, but not limited to:
- 27.1.1 advanced driving course for public transport vehicles (Drivers); and
  - 27.1.2 public transport customer liaison course (Employees interacting with the public).
- 27.2 This training will be funded through a combination of skills development levy funding, claimed by the Operator, with targeted supplementary funding from the Municipality and/or the Province.

## **28 OPERATOR DRIVERS**

- 28.1 The Operator shall, by no later than ten (10) Business Days before the commencement of Driver's duties, furnish the GIPTN Manager in respect of each Driver with certified copies of:
- 28.1.1 an appropriate valid driver's licence;
  - 28.1.2 an identification document; and
  - 28.1.3 a Professional Driver's Permit.
- 28.2 The Operator shall deliver to the GIPTN Manager a schedule setting out the Drivers ("Driver's Schedule") by no later than five (5) Business Days before the Commencement

Date, and shall keep the schedule updated and submit to the GIPTN Manager within fourteen (14) Business Days of any changes to the schedule.

## **29 UNIFORMS**

- 29.1 All Employees interacting with the public must wear Uniforms in accordance with the Specifications Schedule (Annexure A).
- 29.2 The Operator shall ensure that the Uniforms are kept in good condition and worn in a professional manner and in accordance with the standards required by the Contracting Authority.

## **30 OPERATING LICENCES**

- 30.1 The Operator shall only operate Services for which it has a valid Operating Licence.
- 30.2 The Operator shall make timely application for Operating Licences for the provision of the Public Transport Services.
- 30.3 The Operator must immediately notify the GIPTN Manager in writing of:
- 30.3.1 any revocation and suspension of an Operating Licence necessary for the provision of the Services; and
  - 30.3.2 the imposition of any condition upon such Operating Licence or any other circumstance which would prevent the Operator from providing the Public Transport Services in accordance with the Agreement.

## **31 ACCOUNTING MATTERS AND AUDITING**

- 31.1 The Operator must keep proper accounting and financial records in accordance with International Financial Reporting Standards (IFRS) and have such records audited annually.
- 31.2 The Operator must submit to the Contracting Authority its monthly management report, as approved by the Operator's executive management, within two (2) weeks of approval.
- 31.3 The Operator is required to instruct its auditors to conduct a review every six (6) Months of its ability to continue as a going concern. The findings of the review must be made available to the Contracting Authority, along with the proposed response by the Operator's Board, within ten (10) Business Days of the report being submitted to the Operator.
- 31.4 The Operator must, within six (6) Months of the end of the Operator's financial year, submit to the Contracting Authority its audited financial statements, together with the

auditor's report and the Board of Director's response to the auditor's report, and such operating data as the Contracting Authority may require.

- 31.5 The Contracting Authority may appoint Auditors to check and verify all books and records of the Operator and the Operator hereby accepts liability for all auditors, attorney and own client costs and all other costs so incurred, if such appointment is the result of proven inappropriate conduct on the part of the Operator.

## **32 MEETINGS**

- 32.1 The Operator shall ensure that its Operations Manager attends scheduled monthly meetings with the GIPTN Manager, and such additional meetings as are reasonably required.
- 32.2 The Contracting Authority may call special meetings with the Chief Executive Officer of the Operator on reasonable notice.
- 32.3 The Operations Manager shall be obliged to attend any site inspection or Service Area inspection convened by the GIPTN Manager on notice to the Operator.
- 32.4 A failure to attend meetings as set out in this clause shall attract Penalties as set out in the Penalties Schedule (Annexure D).

## **33 BRANDING, MARKETING AND COMMUNICATION**

- 33.1 The GIPTN Brand, as described in Annexures A and G, is the property of the Contracting Authority and the Operator must ensure that it does not bring the Brand into disrepute.
- 33.2 The Operator shall not be permitted to affix or display advertising material of any kind on the interior or exterior of any of the Vehicles, Depots, Stations or Stops or allow or permit same to be affixed or displayed without prior written approval from the Contracting Authority.
- 33.3 No commercial advertising of any kind shall be allowed on any publications, Operator staff uniforms, or any Vehicle associated with the GIPTN, except by prior written agreement with the Contracting Authority.
- 33.4 Any commercial advertising associated with the GIPTN is for the benefit of the Contracting Authority.
- 33.5 The Contracting Authority is solely responsible for communication and marketing of the GIPTN.

## **34 REPORTING AND INFORMATION**

- 34.1 All GIPTN Information is the property of the Contracting Authority and must be made available to the Contracting Authority on request.
- 34.2 The Operator shall store all GIPTN Information for a period of at least three (3) years in a form and manner accessible to the Contracting Authority and its service providers.
- 34.3 The Operator must supply the Contracting Authority with the information necessary to complete the National Transport Register.
- 34.4 The Operator must, within fourteen (14) Business Days of the Signature Date, provide the Contracting Authority, with a list of its shareholders and a certified copy of its Memorandum of Incorporation and, if applicable, relevant shareholders agreements. The Operator must afford the Contracting Authority an opportunity to comment on the Memorandum of Incorporation and any shareholder agreements, and must report to the Contracting Authority, in writing and within fourteen (14) Business Days of receipt of the comments, how these comments are taken into account.
- 34.5 The Operator must annually provide the Contracting Authority with a valid, original Tax Clearance Certificate of good standing, at a date determined by the Contracting Authority.
- 34.6 The Operator must provide the Contracting Authority with a signed occupational health and safety plan within fourteen (14) Business Days of the Signature Date, and annually thereafter, at a date determined by the Contracting Authority.
- 34.7 The Operator must immediately inform the GIPTN Manager, and confirm in writing:
- 34.7.1 Any incident that causes disruption to the Public Transport Services, to be followed by a written report containing full details of the incident as soon as possible after the occurrence;
  - 34.7.2 Any incident-related adjustment and/or cancellation of any Trips;
  - 34.7.3 Any legal action instituted against it or any of its Directors or executive managers; and/or
  - 34.7.4 Any changes to the company's Shareholders, Directors and executive managers.

## **PART F: BREACH, TERMINATION AND RELATED PROVISIONS**

### **35 FORCE MAJEURE**

- 35.1 Neither Party shall be liable for any breach of its obligations hereunder resulting from an Event of Force Majeure.

- 35.2 Each of the Parties hereto agrees to give notice forthwith to the other upon becoming aware of an Event of Force Majeure, such notice to contain details of the circumstances giving rise to the Event of Force Majeure.
- 35.3 If a default due to an Event of Force Majeure continues for more than thirty (30) Business Days, then the Party not in default shall be entitled to terminate this Agreement. Neither Party shall have any liability to the other in respect of the termination of this Agreement as a consequence of an Event of Force Majeure.

## **36 BREACH AND TERMINATION**

### By the Operator

#### 36.1 If the Operator:

- 36.1.1 commits a material breach of this Agreement and fails to remedy the breach within five (5) Business Days after receipt from the Contracting Authority of written notice calling upon it to do so;
- 36.1.2 receives any audit report that indicates that the Operator is not able to continue as a going concern;
- 36.1.3 commits or attempts to commit an act of insolvency;
- 36.1.4 makes an assignment in favour of its creditors;
- 36.1.5 agrees to carry out this Agreement under the supervision of a committee representing its creditors;
- 36.1.6 goes into liquidation, whether provisionally or finally (other than a voluntary liquidation for the purpose of amalgamation or reconstruction to which the Contracting Authority has given its prior written consent) or the Operator is placed under judicial management or business rescue supervision;
- 36.1.7 has judgment taken against it likely to affect the Operator's status as a going concern, and fails to satisfy or apply to have same set aside within ten (10) Business Days of becoming aware thereof;
- 36.1.8 delegates, cedes or sub-contracts this Agreement or part thereof without having obtained the Contracting Authority's prior written consent;
- 36.1.9 undergoes a Change of Control, without the prior written approval of the Contracting Authority;
- 36.1.10 offers, promises or gives a bribe or other gift or remuneration to any officer or employee in the service of the Municipality or the Province in connection with the execution of this Agreement;

- 36.1.11 acts in a fraudulent manner in obtaining or executing a contract with an organ of state, company or person;
- 36.1.12 Colludes with any other party in relation to the provision of any public transport services in and around the Service Area;
- 36.1.13 deliberately furnishes inaccurate information;
- 36.1.14 consistently fails to adhere to the Specifications (Annexure A) and Routes and Timetables Schedule (Annexure B), whether or not Penalties have been imposed, with the result that the Public Transport Services may be regarded by the Contracting Authority as being materially defective;
- 36.1.15 incurs Penalties amounting to more than five percent (5%) per Month of the total amount payable in respect of the Invoice for any three (3) consecutive Months or for any five (5) Months in a twelve (12) Month period;
- 36.1.16 claims Standing Kilometres in excess of 30% of the monthly Scheduled Kilometres for three (3) consecutive Months;
- 36.1.17 fails to submit any information required in terms of this Agreement;
- 36.1.18 fails to maintain the insurance required by this Agreement; or
- 36.1.19 fails or refuses to carry out a written instruction of the Contracting Authority issued in terms of this Agreement;
- 36.2 then the Contracting Authority shall be entitled, in addition to and without prejudice to any other right it may have in law or in terms of this Agreement, to:
- 36.2.1 enforce specific performance of the terms of this Agreement; or
- 36.2.2 temporarily take over control and management of the Operator; or
- 36.2.3 cancel this Agreement; and
- 36.2.4 in any event, to recover such damages as it may have sustained.
- 36.3 During the period that the Contracting Authority manages the Public Transport Services contemplated in clause 36.2.2, the Board of Directors and Operator management team will be present and will take instruction from the Contracting Authority.
- 36.4 In the case of termination of this Agreement in terms of this clause 36.2.3, the Contracting Authority may audit the Operator. The Operator shall give full co-operation in this regard and make all information available to the Contracting Authority on request.
- 36.5 The Contracting Authority may, for any reasons other than those contemplated above, terminate this Agreement on three (3) Months' written notice to the Operator.

36.6 Termination of the Agreement is without prejudice to any rights of the Contracting Authority in respect of any antecedent breach of the Agreement by the Operator.

By the Contracting Authority

36.7 In the event of a material breach by the Contracting Authority of any terms or conditions of this Agreement, the Operator shall give the Contracting Authority at least thirty (30) Business Days' written notice of such breach, calling upon the Contracting Authority to remedy the breach.

36.8 If the Contracting Authority fails to remedy the breach in accordance with the notice, this Agreement may either be terminated, or the Operator may institute a claim for damages and/or sue for specific performance against the Contracting Authority, or claim any other lawful remedy that the Operator may have against the Contracting Authority, without prejudice to any other rights the Operator may have.

### **37 DISPUTE RESOLUTION**

37.1 Without detracting from either Party's right to institute action or motion proceedings in the High Court or other Court of competent jurisdiction in respect of any dispute that may arise out of or in connection with this Agreement, the Parties may, by mutual consent, follow the mediation and/or arbitration procedure as set out in clauses 37.2 and 37.3.

37.2 Mediation

37.2.1 Subject to the provisions of clause 37.1, the Parties may refer any dispute arising out of or in connection with this Agreement without legal representation to a Mediator.

37.2.2 The dispute shall be heard by the Mediator at a place and time to be determined by him or her in consultation with the Parties.

37.2.3 The Mediator shall be selected by agreement between the Parties.

37.2.4 If an agreement cannot be reached upon a particular Mediator within three (3) Business Days after the Parties have agreed to refer the matter to mediation, then the President for the time being of the Law Society of the Cape of Good Hope shall nominate the Mediator within seven (7) Business Days after the Parties have failed to agree.

37.2.5 The Mediator shall at his or her sole discretion determine whether the reference to him or her shall be made in the form of written or verbal representations, provided that in making this determination he or she shall consult with the Parties and may be guided by their common reasonable desire of the form in which the said representations are to be made.

- 37.2.6 The Parties shall have seven (7) Business Days within which to finalise their representations. The Mediator shall within seven (7) Business Days of receipt of the representations express in writing an opinion on the matter and furnish the Parties each with a copy thereof by hand or by registered post.
- 37.2.7 The opinion so expressed by the Mediator shall be final and binding on the Parties unless either Party is unwilling to accept the opinion expressed by the Mediator. In such event, the aggrieved Party may institute legal proceedings in a court of competent jurisdiction, unless the Parties agree to refer the dispute to arbitration in accordance with clause 37.3. The expressed opinion of the mediator shall not prejudice the rights of either Party in any manner whatsoever in the event of legal proceedings or arbitration, as the case may be.
- 37.2.8 The Mediator shall determine the costs of mediation.
- 37.2.9 Liability for such costs shall be apportioned by the Mediator and shall be due and payable to the Mediator on presentation of his or her written account.

### 37.3 Arbitration

- 37.3.1 Subject to the provisions of clause 37.1, the Parties may agree to refer any dispute arising out of or in connection with this Agreement to arbitration.
- 37.3.2 Arbitration shall be held in George informally and otherwise in accordance with the provisions of the Arbitration Act, No. 42 of 1965, it being intended that if possible it shall be held and concluded within ten (10) Business Days.
- 37.3.3 Save as otherwise specifically provided herein, the Arbitrator shall be if the matter in dispute is:
- 37.3.3.1 primarily a legal matter, a practising Senior Advocate of the Cape Bar;
- 37.3.3.2 any other matter, an independent and suitably qualified person as may be agreed upon between the Parties to the dispute.
- 37.3.4 If agreement cannot be reached on whether the question in dispute falls under 37.3.3.1 or 37.3.3.2 and/or upon a particular Arbitrator within three (3) Business Days after the Parties have agreed to refer the dispute to arbitration, then the Chairperson for the time being of the Cape Bar Council shall
- 37.3.4.1 determine whether the question in dispute falls under 37.3.3.1 or 37.3.3.2; and/or
- 37.3.4.2 nominate the Arbitrator within seven (7) Business Days after the Parties have failed to agree.
- 37.3.5 The Arbitrator shall give his or her decision within five (5) Business Days after completion of the arbitration. The Arbitrator may determine that the costs of the arbitration are to be paid by one or the other or by both of the Parties.

37.3.6 The decision of the Arbitrator shall be final and binding and may be made an order of the Western Cape High Court upon application by either Party to the arbitration.

## **PART G: MISCELLANEOUS MATTERS**

### **38 INTELLECTUAL PROPERTY**

38.1 The Operator shall not acquire any right, title or interest in or to the Intellectual Property of the Contracting Authority, and all Intellectual Property developed pursuant to this Agreement shall vest exclusively in the Contracting Authority, unless agreed otherwise in writing by the Parties.

### **39 NO AGENCY**

39.1 No provision of this Agreement shall be construed as constituting an agency, partnership, or joint venture between the Parties, and neither Party shall have any express or implied authority to bind the other Party in any way or to represent the other Party unless specifically provided to the contrary in this Agreement. It is specifically recorded that the Operator operates as an independent contractor and not as an employee or agent of the Contracting Authority and does not have the authority to bind the Contracting Authority contractually to any other party.

### **40 CONFIDENTIALITY**

40.1 The Operator shall at all times keep in confidence the Confidential Information of the Contracting Authority which it may acquire for the purposes of or in connection with this Agreement, and shall not use or permit the use of such Confidential Information, and shall ensure that its employees shall not use the Confidential Information, for any other purpose, and shall not disclose such Confidential Information to any third party.

40.2 The Operator shall take all such steps as may be reasonably necessary to prevent the Confidential Information of the Contracting Authority from falling into the hands of an unauthorised third party.

40.3 The Operator shall not make any comments to the media relating to this Agreement and any related matter nor shall it respond to any queries from the media without the prior written approval of the Contracting Authority.

**41 CESSION AND ASSIGNMENT**

- 41.1 The Operator shall not cede, assign, delegate or transfer its rights and/or obligations in terms of this Agreement, or any part thereof, to any third party or entity without the prior written approval of the Contracting Authority.
- 41.2 The Municipality and the Province shall be entitled to cede, assign, delegate or transfer all rights and/or obligations under this Agreement to each other or to any other organ of state or public entity, and the Operator hereby consents to such cession, assignment, delegation or transfer.

**42 ADDRESSES, NOTICES AND REPRESENTATIVES**

42.1 The Parties choose as their respective *domicilium citandi et executandi* for the purposes of legal proceedings and for the purpose of giving or sending any notice provided for or necessary in terms of this Agreement the following addresses:

- 42.1.1 .....
- 42.1.2 .....
- 42.1.3 .....

- 42.2 The GIPTN Manager is the Authorised Representative of the Contracting Authority.
- 42.3 The Operations Manager is the Authorised Representative of the Operator.
- 42.4 The Authorised Representatives of the Contracting Authority and the Operator, or their designee, must be available to be contacted at all times, by the other representative.
- 42.5 The Contracting Authority and the Operator shall within seven (7) Business Days of the signature of this agreement notify each other of the name and contact details of their respective Authorised Representatives.

**43 ENTIRE AGREEMENT**

43.1 This Agreement contains all the provisions agreed on by the Parties with regard to the subject matter of the Agreement and supersedes and novates in its entirety any previous understandings or agreements between the Parties in respect thereof, and the Parties waive the right to rely on any alleged provision not expressly contained in this Agreement.

#### **44 NO STIPULATION FOR THE BENEFIT OF A THIRD PERSON**

44.1 Save as is expressly provided for in this Agreement, no provision of this Agreement constitutes a stipulation for the benefit of a third person (i.e. a *stipulatioalteri*) which, if accepted by the person, would bind any Party in favour of that person.

#### **45 NO REPRESENTATIONS**

45.1 A Party may not rely on any representation which allegedly induced that Party to enter into this Agreement, unless the representation is recorded in this Agreement.

#### **46 VARIATION, CANCELLATION AND WAIVER**

46.1 No variation or cancellation of this Agreement, and no waiver of any right under this Agreement, shall be of any force or effect unless reduced to writing and signed by the Parties.

#### **47 INDULGENCES**

47.1 The grant of any indulgence, extension of time or relaxation of any provision by a Party under this Agreement shall not constitute a waiver of any right by the grantor or prevent or adversely affect the exercise by the grantor of any existing or future right of the grantor.

#### **48 GOVERNING LAW**

48.1 This Agreement is to be governed, interpreted and implemented in accordance with the laws of the Republic of South Africa.

#### **49 SURVIVAL OF RIGHTS, DUTIES AND OBLIGATIONS**

49.1 Termination of this Agreement for any cause shall not release either Party from any liability which at the time of termination has already accrued to the other Party or which thereafter may accrue in respect of any act or omission prior to such termination.

#### **50 JURISDICTION OF SOUTH AFRICAN COURTS**

50.1 The Parties consent to the non-exclusive jurisdiction of the High Court of South Africa, Western Cape High Court, Cape Town, for any legal proceedings arising out of or in connection with this Agreement.

## **51 COUNTERPARTS**

51.1 This Agreement may be executed in counterparts, each of which shall be deemed to be an original and which together shall constitute one and the same agreement.

## **52 INDEPENDENT ADVICE**

52.1 Each of the Parties hereby respectively agrees and acknowledges that:

52.2 it has been free to secure independent legal advice as to the nature and effect of each provision of this Agreement and that it has either taken such independent legal advice or has dispensed with the necessity of doing so; and

52.3 each provision of this Agreement (and each provision of the Annexes) is fair and reasonable in all the circumstances and is part of the overall intention of the Parties in connection with this Agreement.

## **53 GOOD FAITH**

53.1 The Parties shall at all times act in good faith towards each other and shall not bring any of the other Parties into disrepute.

## **54 CO-OPERATION**

54.1 Each of the Parties undertakes at all times to do all such things, perform all such acts and take all such steps, and to procure the doing of all such things, within its power and control, as may be open to it and necessary for and incidental to the putting into effect or maintenance of the terms, conditions and import of this Agreement.

## **55 COSTS**

55.1 Each party shall pay its own costs incurred by it to its attorneys and other professional advisors for the preparation and signing of this Agreement.

Signed at \_\_\_\_\_ on \_\_\_\_\_ 2011

**Witness** \_\_\_\_\_ for the **Municipality**

**DRAFT - NOT FOR SIGNATURE**

.....

.....  
duly authorised and warranting such authority

Signed at \_\_\_\_\_ on \_\_\_\_\_ 2011

**Witness** \_\_\_\_\_ for **Vehicle Operator Company (Pty) Limited**

**DRAFT - NOT FOR SIGNATURE**

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.....  
duly authorised and warranting such authority

Signed at \_\_\_\_\_ on \_\_\_\_\_ 2011

**Witness** \_\_\_\_\_ for **The Western Cape Department of Transport and Public Works**

**DRAFT - NOT FOR SIGNATURE**

.....

.....  
duly authorised and warranting such authority

*DRAFT*  
*Not for Contract Purposes*