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**12**

8.1 EEC shall not be liable for any Order in relation to the execution of the work and/or related to the project, unless such order is issued or confirmed on EEC's official Purchase Order Form and signed by a duly authorized officer of EEC. In the case of a contract for the supply and /or provision of work, the Contractor warrants that it understood the scope, nature and extent of the work and the project and to have visited the site, prior to the effective date and the Contractor shall make no claim against EEC founded on the Contractor allegedly having been ignorant of any aspect in such a regard.

8.2 EEC shall make decisions on all matters properly referred to it in relation to the provision of the services and the carrying out of the project by the Contractor within a reasonable time of such referral so as to not delay the delivery of the completed project.

**9. PAYMENT TO THE CONTRACTOR**

**13**

**9.1 Payment strategy**

The Employer undertakes to pay the Contractor the contract price upon the due and proper completion of the works, to the certification to that effect by the project manager, which certification the project manager shall not unreasonable withhold.

9.1.1 Subject to the provisions of this agreement the contract price shall not be paid to the contractor in a lump sum, but periodically in separate lesser sums to the contract price upon the reaching of certain milestones in the completion of the works and as more fully appears in the price schedule as to when such sums may become due and payable under the contract and in such instance.

9.1.2 An Advance Payment of .....% maximum of the contract price will become due at the commencement date. An Advance Payment Guarantee for .....% of the contract price is to be provided by the Contractor.

9.1.3 Payments shall be made for work completed to reach assessment stage listed in the price schedule.

9.1.4 The date of assessment shall be the date when all the work required to be completed to reach the assessment stage has been completed.

9.1.5 The Employer shall pay the Contractor for the execution of the works in accordance with this agreement. Provided that notwithstanding any other term of the agreement, no additional works or extra services performed and /or time expended outside of the agreement provided by the Contractor or any third party, prior to special agreement first being entered into by the parties in writing and signed by the parties, confirming the need for such works and/or services, defining their scope and the payment terms and/or rates applicable thereto, shall be applicable hereto.

## **10. PERFORMANCE RELATED CERTIFICATE**

### **14 10.1 Payment Certificate**

Taking into account *interalia* the project related progress surveys, the Project Manager shall assess the amount due to the contractor at each date of assessment and shall then certify payment to the parties within 3 (three) days of the date giving details how the amount has been computed, which amount will then be payable within 14 (fourteen) days of such certification being made by the project manager.

### **15 10.2 Final Certificate**

The Project Manager shall issue the Final Certificates within 7 days of true or actual completion of the project, which completion shall only be deemed to be an actual fact after due certification to that effect by the Project Manager in writing. Provided that the Project Manager shall not unreasonably withhold such certification when genuinely warranted in the circumstances in the context of this agreement.

## **11. COMPENSATION EVENTS**

11.1.1 The following are compensation events:-

- (a) The Project Manager shall give an instruction changing the works information.



- (b) The Employer does not give possession of the site, provide drawings, permission and licenses and/or any item which it is to provide, by the date shown on the original project plan.
- (c) The Project Manager gives an instruction to change the conduct of any or all work.
- (d) The contractor encounters particularly unfavorable physical conditions within the site, which at tender the contractor could not reasonably have expected to be a significant probability having taken into account;
  - The site information.
  - Information obtainable from a visual inspection of the site

Provided the Contractor hereby warrants having, prior to the effective date, made a fully-fledged inspection of the site with the works and the project in mind.

- (e) Particularly unfavorable weather intervenes and impacts the site, which weather conditions the Project Manager and the contractor agree in writing render the progress of the works to be less than fifty per cent (50%) of what would normally be expected in the given time interval affected by such particularly unfavorable weather.

11.1.2 Any stoppages caused for any reason other than act of God and/or the breakdown of the contractor's equipment.

11.1.3 All other events are at the contractor's risk.

16

## 12. PROCEDURE FOR COMPENSATION EVENTS

17

- 12.1 The Contractor or the Project Manager shall notify the other party as soon as one of them becomes aware of a compensation event, which has occurred or may occur. No compensation events shall be notified later than three days after the start of the event.





12.2 If the compensation event has the effect of changing the prices or delaying actual completion, the contractor shall give the Project Manager detailed reasonable quotations comprising a revised program and changes to the prices and the completion date.

12.3 Quotations shall be submitted within two weeks of confirmation of the compensation event or within any longer period stated by the Project Manager.

12.4 The proposed changes to the prices are based on the change to the contractor's past and forecast future actual cost of people, plant, materials and equipment arising as a result of the compensation event plus a fee of the percentage stated in the contract data.

### **13. RISK AND INSURANCE**

#### **13.1 Risk Allocation**

The risk of loss of or damage to physical property and of personal injury and death, which arise in connection with the contract, except those allocated to the employer are allocated to and are the responsibility of the contractor.

#### **13.2 Employer's Risk**

The following risks are allocated to the Employer (the Employer's risks):-

- (a) Claims, proceedings, compensation and costs payable for personal injury or death, loss of or damage to property (excluding the works, plant and material), nuisance or interference with any right of way in respect of:-
- Use or occupation of the site by or for the purpose of the works.
  - Negligence or breach of statutory duty done or committed by the Employer, the Project Manager, or another agent or a servant or other contractor of the Employer.

#### **13.3 Contractor's Risk**

- (a) Damage to the works, plant and material to the extent that it is due to faulty workmanship by the contractor or by any sub-contractor of the contractor.



#### **14. COMPLIANCE WITH REGULATIONS AND STANDARDS**

14.1 The works shall comply with the latest revision and amendments of the following:-

- The Safety Regulations of the Eswatini Electricity Company;
- The regulations of the Posts & Telecommunications Corporation;
- The Regulations of any Government Department where applicable; and
- The Environmental requirements as set out by the Eswatini Environmental Authority (SEA).
- Any and all pieces legislation and all regulations governing building control and/or health and/or safety in Eswatini.
- No claims for extras for failure of the Contractor to comply with any of the regulations listed above will be considered.
- Where conflicts appear or exist between any of the regulations and standards listed above, such conflicts shall be referred to the Engineer/Project Manager in writing for his ruling.
- Immediately after award of the Contract, at any time thereafter as may be necessary, the Contractor shall notify all relevant authorities, pay fees and take any other steps, which may be required or presented to execute the Works and carry out the project. Copies of such correspondence shall be forwarded to the Engineer/Project Manager who shall be kept well informed at all time. This shall not, however, release the Contractor from responsibilities in terms of this agreement.

14.2 No claims for extras for failure of the Contractor to comply with any of the regulations listed above will be considered.

14.3 Where conflicts appear or exist between any of the regulations and standards listed above, such conflicts shall be referred to the Engineer/Project Manager in writing for his ruling.

14.4 Immediately after award of the Contract, at any time thereafter as may be necessary, the Contractor shall notify all relevant authorities, pay fees and take any other steps, which may be required or presented to execute the Works. Copies of such correspondence shall



be forwarded to the Project Manager who shall be kept well informed at all times. This shall not, however, release the Contractor from his responsibilities, in terms of this agreement.

- 14.5 The Contractor hereby irrevocably undertakes to comply with any and all instructions and directives given to it by the Employer in reasonable pursuit by the Employer of lawful compliance by the Contractor with all health, safety and environmental compliance considerations pertaining to the Employer's operations and/ or that pertain to the Employer's operational practice and standards in the sound maintenance of its Depots and of its electrical network.

#### **14.6 TAX CONSIDERATIONS**

The contractor will be liable to comply with all the Tax Laws of Eswatini as they exist as at the effective date and as they may evolve and become during the currency of this agreement. In this vein, without derogating from the generality hereof, the contractor shall also comply with the following specific tax laws of Eswatini:

##### **14.6.1 Value Added Tax.**

The contractor will be subject to all Eswatini tax laws pertaining to statutory submissions, returns and declarations and the payment of all Eswatini tax laws pertaining to value added tax for local companies and withholding tax for companies registered in a foreign country.

#### **15. VARIATIONS**

This agreement can only be varied by agreement in writing entered into by the parties. Either one of the parties can initiate negotiations with a view to reach such said agreement.

#### **16. CHANGED CIRCUMSTANCES**

If circumstances arise for which the Contractor's actions or omissions are not responsible, whatsoever and which circumstances would make it irresponsible or



impossible for a reasonable man bearing similar qualifications as the most qualified and most experienced professional in the employment of the Contractor finding himself in the position of the Contractor at that time to perform in whole or in part the works and / or the project in accordance with the Agreement, the Contractor shall promptly dispatch a notice to the Employer communicating the Contractor's concerns in that specific regard.

In these circumstances if certain aspects of the works have to be suspended, the time for their completion shall be extended by written agreement between the parties until the circumstances no longer apply plus a reasonable period not exceeding 30 days for resumption of them. If the speed of performing certain of the works has to be reduced, the time for their completion shall be extended as may be made necessary by the circumstances

## **17. FORCE MAJEURE**

17.1 Neither party shall be liable under this Agreement if and so far and so long as either or both of them are prevented from carrying out the same by "force majeure", that is to say an act of God, act of war, warlike operations, civil commotion, strikes or any industrial action whatsoever, fire, tempest or any other cause or happening beyond its control.

17.2 If conditions of force majeure persist in respect of a party for a period in excess of 20 (twenty) days and have material adverse effect on the other party, and the parties are within such period unable to reach written agreement on amendments to the relevant provisions of this agreement to take into account such conditions, the other party may terminate this agreement with immediate effect on written notice.

## **18. APPLICABLE LAW**

The Applicable law will be that of the Kingdom of Eswatini.

## **19. LANGUAGE AND LAW**

The language of the Agreement shall be English. The Agreement shall be deemed to be a Eswatini Agreement and shall accordingly be governed and construed according to the laws for the time being in force in the Kingdom of Eswatini. The Contractor submits to



the jurisdiction of the Eswatini Courts for the purposes of any action and proceedings in connection with any legal proceedings whatsoever that may be occasioned against the Contractor brought by the Employer and/or involving the Employer in relation to the project. The Contractor so consents to the jurisdiction of the Eswatini Courts, whether any such said legal proceedings are occasioned by a cause of action arising within or without the area of jurisdiction of the Eswatini courts and notwithstanding that any other courts outside Eswatini might ordinarily (or otherwise) have competent jurisdiction over any such legal matter and/or proceedings. Provided that any judgment entered in favour of the Employer and against the Contractor in connection with this agreement by the Eswatini Courts, shall be binding upon the Contractor and may irrevocably be enforced against the Contractor in any other jurisdiction, besides that of the Eswatini Courts.

**20. CONFLICT OF INTEREST**

**18**

Notwithstanding any penalties that may be enforced against the Contractor under the law of the country of that of any other jurisdictions, the Client will be entitled to terminate the Agreement and the Contractor shall be deemed to have committed a material breach of this agreement, that goes to the root of this agreement, if it is shown that the Contractor is guilty of:-

- (i) offering, giving, receiving or soliciting anything of value with a view to influencing the behavior or action of anyone, whether a public official or otherwise, directly or indirectly in the selection process or in the conduct of the Agreement; or misrepresentation of facts in order to influence a selection process or the execution of a contract to the detriment of the Client, including the use of collusive practices intended to stifle or reduce the benefits of free and open competition.

**21. BREACH**

**19**

Either one of the parties shall be entitled after giving the other one of the parties 5 (five) days' notice in writing, to terminate this agreement and to claim damages from the other one of the parties, should such other one of the parties commit any breach of the agreement and fail to remedy such breach within the said 10 (ten) days of notice.



**22. AVAILING INFORMATION BY EMPLOYER AND AVOIDANCE OF UNDUE DISRUPTIONS TO EMPLOYER'S OPERATIONS BY CONTRACTOR**

**20**

22.1 It is hereby confirmed by the parties that the Employer has prior to the signing of this agreement by the parties already provided to the contractor, free of charge, all information in the possession of the Employer, which will be reasonably required for the facilitation of the execution of the works and/or the implementation of the project. The Contractor shall be entitled to rely on the accuracy and completeness of such information, in the fulfillment of the contractor's obligations to the Employer during the currency of this agreement.

22.2 The Employer undertakes to allow the Contractor reasonable access to such parts of the de-silting site in line with project scheduling agreed by the parties; provided that the Contractor shall execute the works expeditiously and without causing any undue and avoidable disruptions and / or delay to the operations of the Employer.

**23. SAFETY**

**21**

The Contractor shall be responsible for the safety of all the Contractor's activities and shall comply with all statutory safety provisions and regulations and any additional safety regulations in the works information.

**22**

**24. FINAL CERTIFICATE**

**23**

The Project Manager shall issue the Final Certificate within 7 (seven) days of when he reasonably believes, in his professional judgment, that actual technical completion of the project has been achieved.

**25. FURTHER PROPOSALS**

Provided that a cost structure and other necessary logistical mechanisms in relation thereto shall first be agreed between the parties in writing, the parties may, by agreement in writing, expand the scope of the works and/or of the project.

**24**

**26. LIABILITY AND INDEMNITY**

**25**

26.1 The Employer shall have no liability in respect of any loss, expense, damage or cost, incurred by the contractor or in respect of any claim made by any third party, arising



directly or indirectly out of the manner in which the Contractor has prepared to carry out the works and/or the project and/or is carrying out and/or has carried out the works and/or the project (as the case may be), save to the extent that such claim arises directly from a willful or negligent act of the Employer's employees( and then only if and when such employees were then acting completely within the scope and the course of their employment with the Employer).

26.2 Without prejudice to its liability for breach of any of its obligation under the Contract, the contractor shall be liable for and shall indemnify the Employer against all liability, loss, damages costs, expenses, claims or proceedings whatsoever arising under any statute or at common law as a result of or in connection with any act or omission of the contractor in the executor of the works and the project in its execution of the works and the performance of the project that arises from negligence or malice or bad faith or a lack or poor professionalism by its officers and/or agents and/or representatives and/or sub-contractors in the carrying out of the services and/or the project.

26.3 Any loss of or damage to property, whether real or personal;

26.4 Any injury to any person, including injury resulting in death;

26.5 Any financial or economic loss except in so far as such loss, shall have been caused by negligence on the part of EEC.

**26**

**27. THE APPOINTMENT OF THE PROJECT MANAGER AND HIS ROLE**

**27**

27.1 The Employer shall appoint the Project Manager to administer the Contract on Its behalf. The Project Manager's name, address and contact details shall be disclosed in the Employer's letter of appointment of the contractor to execute the works and carry out the project.

27.2 Only the Project Manager may change the Works Information or the Completion Date, certify actual completion, certify payment Completion and termination and issue the Final Certificate:



27.3 The Project Manager may delegate other responsibilities to other people after obtaining the Employer's approval and notifying the Contractor.

27.4 References to the Project Manager in this agreement shall *per se* include such persons as he delegated responsibilities to in terms of this agreement.

**28. LIMIT OF COMPENSATION**

28.1 The maximum amount of compensation payable (where legally proved as, indeed, occasioned and payable) by one of the parties to the other party in respect of liability is limited to the sum in money that is equivalent to the value of the entire contract in this agreement. This limit is without prejudice to any compensation as may otherwise be agreed by the parties in writing.

**29. RISK AND INSURANCE**

**29.1 Risk Allocation**

The risk of loss of or damage to physical property and of personal injury and death, which arise in connection with the contract, except those allocated to the employer are allocated to and are the responsibility of the contractor.

**30. DOMICILIUM**

28

The parties hereto choose *domicilium citandi et executandi* for all purposes of and in connection with this Agreement as:

.....:

Physical Address  
Physical Address  
Physical Address  
Postal Address  
Postal Address  
Telephone No: .....  
Telefax ..... No:  
.....

**THE ESWATINI ELECTRICITY COMPANY LIMITED:** Eluvatsini House  
Mhlambanyatsi Road  
MBABANE,  
ESWATINI

Post Office Box: 258





Mbabane  
Eswatini

Telephone No: 409 4000  
Telefax No: 404 2335

30.1 Either party hereto shall be entitled to change its *domicilium* from time to time, provided that any new *domicilium* selected by it shall be a physical address in the Kingdom of Eswatini other than a box number, and any such change shall only be effective upon receipt of notice in writing by the other parties of such change.

30.2 All notices, demands, communications or payments intended for either party shall be made or given at such party's *domicilium* for the time being.

30.3 A notice sent by one party to another party shall be deemed to be received:

- on the same day, if delivered by hand or telefax;
- on the fifth day after posting, if sent by prepaid registered mail.

30.4 Notwithstanding anything to the contrary herein contained a written notice or communication actually received by a party shall be an adequate written notice or communication to it notwithstanding that it was not sent to or delivered at its chosen *domicilium citandi et executandi*.

### **31. CONDITIONS INTERFERING WITH PERFORMANCE**

**29**

Each party hereto shall promptly provide written notice of the occurrence and effects of any condition which interferes with or which may reasonably interfere with, the completion and/or timely and/or effective performance of its obligations in terms of the agreement.

### **32. INDEPENDENT AUDIT**

**30**

The Contractor hereby irrevocably undertakes to fully co-operate with the Employer and/or with employer's auditors and to provide such records and, assistance to each and any of them as the Contractor may be requested by the employer or its auditors or their lawful representatives to furnish them with, from time to time, to help enable any audit



conducted by or at the request of the Employer to proceed smoothly and efficiently. Provided that such audits may include audits of any rates and/or payments claimed by the Contractor, whatsoever, as payable in terms of this agreement.

### **33. SEVERABILITY**

If any clause or term of this Agreement should be invalid, unenforceable or illegal, then the remaining terms and provisions of this Agreement shall be deemed to be severable there from and shall continue in full force and effect unless such invalidity unenforceability goes to the root of this Agreement.

### **34. PUBLICATION**

31

The Contractor shall treat the agreement and everything pertaining thereto as private and confidential. In particular, the contractor shall not publish any information concerning the works and/or the project and shall not use EEC premises for the purposes of advertisement, except with the written consent of EEC and subject to such conditions as the Employer, at EEC's sole election, may impose.

Each party hereby undertakes to the other party, for the continuance of this agreement and in perpetuity:

- (i) To keep confidential all information whether written (including information contained in electronic format) or oral concerning the business and affairs of the other party that it obtains or receives from the other party or any third party ("the information");
- (ii) Not without the other party's written consent to disclose the information in whole or in part to any person, save its employees, agents and or Contractors involved in the implementation of this agreement, and who have a need to know the information;
- (iii) To keep confidential the terms and conditions of this agreement unless they are required to be disclosed in response to a valid order of the Court or if disclosure thereof is otherwise required by law;



- (iv) Each party undertakes to the other to make all its relevant employees, agents and Contractors aware of the confidentiality of the information and the provisions of this section of this agreement and to take all such steps as shall from time to time be necessary to ensure compliance by its employees, agents and Contractors with the provisions of this section of this agreement;

### **35. SETTLEMENT OF DISPUTES / ARBITRATION**

35.1 This Agreement relies for its efficacy on the exercise by the Parties of utmost good faith. Therefore the general and specific terms and conditions of this Agreement are to be construed accordingly and will be interpreted where necessary by mutual agreement.

35.2 If the Parties are unable to resolve any dispute resulting from this Agreement by means of joint co-operation or discussion between them, within two weeks after a dispute arises, then it shall be resolved by way of Court litigation and in Court. Arbitration is hereby specifically excluded by the parties as a mechanism of dispute resolution.

35.3 Nothing in the terms of this clause shall preclude any one of the parties from bringing legal proceedings under a certificate of urgency where such proceedings are legally warranted in the circumstances in issue.

### **36. RELAXATION**

32 No latitude, extension of time or other indulgence which may be given or allowed by any party to any other party in respect of the performance of any obligation hereunder or enforcement of any right arising from this agreement and no single or partial exercise of any right by any party shall under any circumstances be construed to be an implied consent by such party or operate as a waiver or a novation of, or otherwise affect any of that party's rights in terms of or arising from this agreement or stop such party from enforcing, at any time and without notice, strict and punctual compliance with each and every provision or term hereof.

### **37. GENERAL**

37.1 This document constitutes the sole record of the agreement between the Parties in regard to the subject matter thereof.



- 37.2 No party shall be bound by any express or implied term, representation, warranty, promise or the like, not recorded herein.
- 37.3 No addition to, variation or consensual cancellation of this Agreement shall be of any force or effect unless in writing and signed by or on behalf of both the Parties.
- 37.4 No indulgence which either of the parties (“the grantor”) may grant to the other (“the grantee”) shall constitute a waiver of any of the rights of the grantor, who shall not thereby be precluded from exercising any rights against the grantee which might have arisen in the past or which might arise in the future.
- 37.5 Neither party shall be entitled to cede, assign or otherwise transfer all or any of its rights, interest or obligations under and in terms of this Agreement except with the prior written consent of the other party.
- 37.6 Whenever consent by one party is required, such consent shall not be unreasonably withheld;
- 37.7 Nothing in this agreement constitutes either party as the agent, principal, representative or partner of the other, and no party shall be entitled to hold out to any third party that the relationship between the parties is that of a partnership, joint venture or the like;
- 37.8 No failure or delay by a party to enforce any provision of this agreement shall constitute a waiver or suspension of such provision or affect in any way a party’s right to require performance of any such provision at any time in the future, nor shall the waiver of any right arising from any subsequent breach nullify the effectiveness of the provision itself;
- 37.9 No party may cede its rights and or delegate its obligations under this agreement without the prior written consent of the other party;
- 37.10 In the event that any of the terms and conditions of this agreement are found to be invalid, unlawful or unenforceable, such terms will be severable from the remaining provisions, which shall remain in full force and effect if any invalid term is capable of



amendment to render it valid, the parties agree to negotiate in good faith an amendment to remove the invalidity;

37.11 If any conflict arises in respect of the provisions contained in this agreement and any annexure attached hereto, the provisions contained in this agreement shall take precedence;

37.12 Unless otherwise agreed in writing between the parties, no party shall, for the duration of this agreement and for a period of twelve (12) months after expiry or termination thereof for its own benefit or as a representative of or agent for any third party, persuade, induce, encourage, procure or solicit, or procure such persuasion, inducement, encouragement, procurement or solicitation of, the personnel of the other party, to become employed, or interested, directly or indirectly in any manner whatsoever, by it or in any business which is in competition with the business carried on by the other party; or

37.13 To terminate his or her employment with the other party; or

37.14 To disclose any intellectual property of the other party to any person not authorized by the owner of the intellectual property to receive it;

37.15 This agreement may be signed by two or more counterparts, one or more of which may be delivered via telefax, and the signed counterparts, taken together, shall constitute a binding agreement between the parties;

37.16 Each party acknowledges that it does not enter into this agreement on the basis of and does not rely on any representation, warranty or other provision, whether express or implied, except as expressly provided in this agreement;

37.17 All conditions, warranties or other terms implied by statute or common law are excluded to the fullest extent permitted by the law of the Kingdom of Eswatini;

### **33 38. COST OF THIS AGREEMENT**



Each Party shall bear its own costs relating to and incidental to the preparation of this Agreement.

**39. SURVIVAL ON TERMINATION**

Termination of the Agreement (howsoever and whenever terminated) shall not affect any rights or obligations of either of the Parties specifically expressed to continue in force after termination of this Agreement.



THUS DONE AND SIGNED AT MBABANE ON THIS .... DAY OF ....., 2018

**AS WITNESSES:**

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

2. \_\_\_\_\_

\_\_\_\_\_  
For and on behalf of Contractor

THUS DONE AND SIGNED AT MBABANE ON THIS.... DAY OF ....., 2018

**AS WITNESSES:**

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

2. \_\_\_\_\_

\_\_\_\_\_  
For and on behalf of THE  
ESWATINI ELECTRICITY  
COMPANY LIMITED

