

IRT VEHICLE OPERATOR CONTRACT

between

CITY OF CAPE TOWN

("the City")

and

VEHICLE OPERATOR COMPANY

("the Operator")



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PART A - PRELIMINARY

1. Definitions and interpretation

1.1 In this Agreement, the following words shall, unless otherwise stated or inconsistent with the context in which they appear, bear the following meanings and other words derived from the same origins as such words (that is, cognate words) shall bear corresponding meanings:

1.1.1 **"Act"** means the National Land Transport, Act 5 of 2009;

1.1.2 **"Additional Vehicles"** means all Vehicles, excluding the Initial Fleet, purchased and paid for by the Operator in terms of this Agreement, after the Commencement Date;

1.1.3 **"Adjudicator"** means a person, appointed by the City, who is an official of the City but not employed directly by the Public Transport Entity nor involved in any way with the management of the IRT System;

1.1.4 **"Agreed"** means agreed in writing by the City on the one hand and the Operator on the other hand;

1.1.5 **"Agreement"** means this agreement including the Specifications; and the Annexures, as amended from time to time in terms of clause 33 (variation, cancellation and waiver);

1.1.6 **"Annexures"** means the Annexure[s] attached to this Agreement;

- 1.1.7 **“Assets for Loan for Use Agreement”** means the agreement, Annexure "A" hereto, to be entered into between the City, or its nominee and the Operator for the lease by the City to the Operator of certain fare collection equipment to be fitted on the Feeder Vehicles, as well as the Communication Equipment;
- 1.1.8 **“Authorised Stops”** means Stations on Trunk Routes and Feeder Routes;
- 1.1.9 **“Business Days”** means any day other than a Saturday, Sunday or gazetted national public holiday in the Republic of South Africa;
- 1.1.10 **“Capacity”** means the maximum number of persons that may lawfully be carried in the Vehicle concerned including all seated and standing passengers but excluding the driver;
- 1.1.11 **“Change of Control”** means a change of control in a person as contemplated in clause 18;
- 1.1.12 **“City of Cape Town” or “the City”** means the City of Cape Town, a metropolitan municipality as contemplated in section 1 of the Local Government: Municipal Structures Act, Act 117 of 1998 of Civic Centre, 12 Hertzog Boulevard, Cape Town;
- 1.1.13 **“Commencement Date”** means the date upon which the operational phase and the Services to be provided by the Operator will commence under this Agreement,

namely **[insert date]** or such later date as the City may stipulate on notice in writing given to the Operator;

1.1.14 **“Communications
Equipment”**

means the following equipment as described in the Specifications: a GPS receptor device, a computer where the Trunk Vehicle or Feeder Vehicle itinerary, as the case may be, is programmed and a communications system by which the Operator reports and receives information from the Control Centre and enables voice and data communication between the Control Centre and the Trunk and Feeder Vehicles;

1.1.15 **“Conditions Precedent”**

means the conditions precedent in clause 3;

1.1.16 **“Contract Rates”**

means the rates per Revenue Kilometre for each Vehicle Type, as set out in Annexure "B" at which the Operator shall be paid by the City for rendering the Services;

1.1.17 **"Contracted Maintenance"**

means all maintenance and repair of the Vehicles which the Vehicle Manufacturer is obliged to carry out in terms of either a maintenance agreement or a Vehicle Manufacturer's warranty, which includes all routine service and repair work as referred to in the Vehicle Manufacturer's manuals or Preventative Maintenance programme

- 1.1.18 **“Control Centre”** means the IRT control centre occupied by the City which is equipped with communications equipment for the monitoring, control, management and co-ordination of transport services on the corridors of the IRT System and the monitoring of security on the Stations;
- 1.1.19 **“Control Centre Agreement”** means the agreement entered or to be entered into between the City and a successful tenderer in respect of the provision of the Control Centre Services and the supply of the equipment to be used for the operation of the Control Centre;
- 1.1.20 **“Control Centre Services”** means the services related to the operation of the Control Centre described in Control Centre Agreement;
- 1.1.21 **“CPIX”** means the weighted average consumer price index as defined by Statistics South Africa or its successor-in-title;
- 1.1.22 **“Depot Lease Agreement”** means the agreement, Annexure "C" hereto, to be entered into between the City and the Operator for the lease by the City to the Operator of one of the Depots;
- 1.1.23 **“Depots”** means the immovable properties owned by the City which are to be used as depots for the Vehicles together with

- 1.1.27 **“Event of Force Majeure”** means:
- 1.1.27.1 an act of God, governmental intervention, war, fire, flood, explosion, civil commotion, armed hostilities, act of terrorism, power failure, telecommunication failure, revolution; or
- 1.1.27.2 blockade, embargo, strike, lock-out, sit-in or industrial or trade dispute (provided that such blockage, embargo, strike, lock out, sit-in, or industrial or trade dispute does not involve employees of the Operator); or
- 1.1.27.3 any event (including any act or omission of any third party) beyond any Party's reasonable control;
- 1.1.28 **“Fare Services”** means the services relating to operation of the Fare System and services ancillary thereto, as further described in the Fare System Agreement;
- 1.1.29 **“Fare System”** means the automated fare system of the IRT System, as further described in the Fare System Agreement;
- 1.1.30 **“Fare System Agreement”** means the agreement entered or to be entered into between the City and a successful tenderer in respect of the supply of the Fare System and the provision of the Fare System Services;
- 1.1.31 **“Feeder Routes”** means the road routes described in the Specifications or such other routes as

my be specified by the City from time to time which connect with and feed into Trunk Routes and are to be serviced by the Operator using Feeder Vehicles;

1.1.32 **“Feeder Vehicle(s)”** means the Vehicles described in the Specifications which are to be used by the Operator on Feeder Routes;

1.1.33 **"Financial Institution"** means [●]

1.1.34 **“Guaranteed Kilometres”** means the number of Revenue Kilometres guaranteed by the City in accordance with the provisions of clause 12;

1.1.35 **“Information”** means information provided by either Party as providing party including all information (whether in written, oral or electronic format) related to the providing party and its business, technical or commercial systems and Know-How, trade secrets, plans and strategies, products, clients (including former and potential clients), business methods, finances, marketing strategies, sales, management, legal issues, employees (including former and potential employees) and all record bearing media (inclusive of samples) containing or disclosing such information, but shall not include information that:

1.1.35.1 at the time of its disclosure was already in the public domain or subsequent to its disclosure became (through no fault

- or failure of the recipient) part of the public domain; or
- 1.1.35.2 at the time of its disclosure can be shown by the recipient to have been legally in its possession prior to the disclosure thereof free of any obligation of confidence with regard thereto; or
- 1.1.35.3 was lawfully received by the recipient from a third party free of any obligation of confidence of or to such third party; or
- 1.1.35.4 was or is independently developed by employees, consultants or agents of the recipient, without access to the providing party's Information; or
- 1.1.35.5 is released for disclosure by the providing party with its written consent; or
- 1.1.35.6 is required to be disclosed by law;
- and such "Information" will also include information regarding any subsidiary or associated company within the group of companies to which either of the Parties belong;
- 1.1.36 **"Initial Fleet"** means specifically those Vehicles purchased by the City prior to the Commencement Date and transferred to the Operator in accordance with clause 9.1, it being further recorded that the Initial Fleet shall include the Reserve Fleet;

- 1.1.37 **“Intellectual Property”** means the intellectual property pertaining to a Party and which may include any patents (including applications), designs (including applications), Know-How, trade marks (including applications and unregistered ones), copyright (including rights in computer software) and all rights having equivalent or similar effect which may exist anywhere in the world;
- 1.1.38 **“IRT System”** means the set of infrastructure, properties, Depots, Stations, Control Centre, assets, equipment, operating and control system and Fare System forming the bus-based urban transport system for Cape Town, a component of the Cape Town Integrated Rapid Transit System;
- 1.1.39 **“Know-How”** means all confidential Information of whatever nature relating to a Party, its Intellectual Property and the exploitation thereof, as well as all other confidential Information generally relating to the business of a Party including technical information, manufacturing techniques, design specifications, formulae, systems, processes, information concerning materials and marketing and business information generally;
- 1.1.40 **“Month”** means a calendar month;
- 1.1.41 **“Operating Licence”** means an operating licence as defined in the Act which is necessary to enable

time to its most favoured customers on unsecured overdraft accounts in which regard a certificate purportedly signed by an official of the said bank stating the interest rate applicable from time to time shall be *prima facie* proof of such interest rate;

1.1.48 **“Programmed Capacity”** means, in relation to the number of persons that may be carried in a Vehicle in addition to seated passengers, more than 4.5 persons per square metre of Vehicle floor;

1.1.49 **“Prospectus”** means the written Vehicle Operating Company Prospectus issued by the City to Phase 1A industry stakeholders, in first draft format on [●] 2009 and updated from time to time during negotiations with stakeholders and the Operator, which sets out, *inter alia*, an overview of the Cape Town Integrated Rapid Transit System, and more particularly, Phase 1A of the IRT System, its business structure and operational plan;

1.1.50 **“Public Transport Entity”** means the Municipal entity established or to be established by the City as contemplated in clauses 2.4 and 2.5 of this Agreement and to be known as [●];

1.1.51 **“R” or “Rand”** means South African Rand, the lawful currency of the Republic of South Africa;

- 1.1.52 **“Reserve Fleet”** means a spare fleet of Vehicles purchased, as part of the Initial Fleet, in order to maintain the service to passengers in the event of a breakdown of any of the Vehicles;
- 1.1.53 **“Revenue Kilometres”** means Scheduled Kilometres in respect of each Vehicle Type actually operated on approved Routes for which the Operator is entitled to be compensated in terms of this Agreement;
- 1.1.54 **“Route”** means a Trunk and/or Feeder Route, as the case may be, as described in the Specifications or as specified by the City by notice in writing to the Operator from time to time;
- 1.1.55 **“Scheduled Kilometres”** means those Kilometres which are authorized in accordance with the Timetable, as approved and amended from time to time;
- 1.1.56 **“Scheduled Trips”** means those Trips which are authorized in accordance with the Timetable, as approved and amended from time to time;
- 1.1.57 **“Service Area”** means the residential, business, industrial and other areas served by the Routes;
- 1.1.58 **“Services”** means the transportation of passengers, as part of a public transport service, along Trunk Routes and/or Feeder Routes within the Service Area by means of Trunk

Vehicles and/or Feeder Vehicles at specified times and frequencies and stopping at the Authorised Stops or as varied by the City from time to time in terms of clause 16.1;

- 1.1.59 **“Signature Date”** means, when this Agreement has been signed by each Party (whether or not in counterpart), the latest of the dates on which this Agreement (or any counterpart) was signed by any Party;
- 1.1.60 **“Specifications”** means the specifications as set out in the attached Annexure "D" in which the Vehicles; Routes, Authorised Stops and any additional related information are described, subject to variation by the City from time to time in accordance with the provisions of this Agreement;
- 1.1.61 **“Stations”** means the covered passenger embarkation and disembarkation points situated along Trunk Routes or Feeder Routes, as the case may be, as described in the Specifications;
- 1.1.62 **“Station Services”** means the services as defined in the Station Services Agreement;
- 1.1.63 **“Station Services Agreement”** means the agreement entered or to be entered into between the City and a successful tenderer in respect of the provision of the Station Services;
- 1.1.64 **“Surviving Provisions”** means clauses 1 , 3, 7, 17, 19, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36,

Financial Institution and the Operator as contemplated in clause 9.1 below;

- 1.1.69 **“Trunk Route(s)”** means the largely segregated road systems which are to be serviced by the Operator using Trunk Vehicles, together with complementary infrastructure such as Stations described in the Specifications and subject to variation in accordance with the provisions of this Agreement;
- 1.1.70 **“Trunk Stations”** means Stations on the Trunk Routes;
- 1.1.71 **“Trunk System”** means the set of Trunk Routes which form the IRT System;
- 1.1.72 **“Trunk Vehicle(s)”** means the Vehicles described in the Specifications which are to be used by the Operator on Trunk Routes;
- 1.1.73 **“VAT”** means value-added tax levied in terms of the Value-added Tax Act, 89 of 1991, as amended;
- 1.1.74 **“Vehicle Manufacturer”** means the manufacturer of the Feeder and/or Trunk Vehicles, as the context dictates;
- 1.1.75 **“Vehicles”** means Feeder and/or Trunk Vehicles, as the context dictates;
- 1.1.76 **“Vehicle Type”** means a particular type of Vehicle as more fully described in the Specifications;
- 1.1.77 **“Week”** means the period commencing at 00h00 on Monday and ending at 24h00 on Sunday each calendar week;



- 1.2 In this Agreement:
- 1.2.1 references to a statutory provision include any subordinate legislation made from time to time under that provision and include that provision as modified or re-enacted from time to time;
- 1.2.2 words importing the masculine gender include the feminine and neuter genders and vice versa; the singular includes the plural and vice versa; and natural persons include artificial persons and vice versa;
- 1.2.3 references to a "**person**" include a natural person, company, close corporation or any other juristic person or other corporate entity, a charity, trust, partnership, joint venture, syndicate, or any other association of persons;
- 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, 61 of 1973, or its successor-in-title, the Companies Act, 71 of 2008, as the case may be;
- 1.2.5 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;
- 1.2.6 any definition, wherever it appears in this Agreement, shall bear the same meaning and apply throughout this Agreement unless otherwise stated or inconsistent with the context in which it appears;
- 1.2.7 if there is any conflict between any definitions in this Agreement then, for purposes of interpreting any clause of the Agreement or paragraph of any Annexure, the definition appearing in that clause or paragraph shall prevail over any other conflicting definition appearing elsewhere in the Agreement;
- 1.2.8 where any number of days is prescribed, those days shall be reckoned exclusively of the first and inclusively of the last day unless the last day falls on a day which is not a Business Day, in which event the last day shall be the next succeeding Business Day;

- 1.2.9 where the day upon or by which any act is required to be performed is not a Business Day, the Parties shall be deemed to have intended such act to be performed upon or by the next succeeding Business Day;
- 1.2.10 any provision in this Agreement which is or may become illegal, invalid or unenforceable in any jurisdiction affected by this Agreement shall, as to such jurisdiction, be ineffective to the extent of such prohibition or unenforceability and shall be treated as having not been written (i.e. *pro non scripto*) and severed from the balance of this Agreement, without invalidating the remaining provisions of this Agreement or affecting the validity or enforceability of such provision in any other jurisdiction;
- 1.2.11 the use of any expression covering a process available under South African law (such as but not limited to a winding-up) shall, if any of the Parties is subject to the law of any other jurisdiction, be interpreted in relation to that Party as including any equivalent or analogous proceeding under the law of such other jurisdiction;
- 1.2.12 references to any amount shall mean that amount exclusive of VAT, unless the amount expressly includes VAT;
- 1.2.13 the rule of construction that if general words or terms are used in association with specific words or terms which are a species of a particular genus or class, the meaning of the general words or terms shall be restricted to that same class (ie the *eiusdem generis* rule) shall not apply, and whenever the word "*including*" is used followed by specific examples, such examples shall not be interpreted so as to limit the meaning of any word or term to the same genus or class as the examples given.
- 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 contract shall be interpreted against or to the disadvantage of the Party responsible for the drafting or preparation of the Agreement (ie the *contra proferentem* rule), shall not apply.

2. Introduction

- 2.1 The City is improving and extending the public transport system within the Cape Metropolitan Area. Its major municipal public transport initiative is the development and implementation of the Cape Town Integrated Rapid Transit System. The City's strategic vision has been guided by the principles of equality, equity, security, sustainability and integrity. The City's strategic vision is to put in place a full-system network, encompassing high quality rail and road services, which will ultimately place at least seventy-five percent of its population within 500 metres of the system.
- 2.2 The main road-based component of the Cape Town Integrated Rapid Transit System is a high-quality bus-based urban transit system (a concept known internationally as Bus Rapid Transit, or BRT, but referred to as Integrated Rapid Transit or IRT). The IRT portion of the Cape Town Integrated Rapid Transit System will be introduced in phases over a period of approximately twelve years in accordance with the City's integrated transport plan as amended from time to time.
- 2.3 The IRT System will deliver fast, comfortable and cost-effective transport services to passengers by providing frequent services on Trunk Vehicles using segregated road infrastructure which comprise Trunk Routes and on Feeder Vehicles servicing Feeder Routes linking into Trunk Routes.
- 2.4 In December 2008, the City resolved, in terms of section 78(4) of the Local Government: Municipal Systems Act, Act 32 of 2000 ("**the Municipal Systems Act**"), and subject to the outcome of the process prescribed by section 84 of the Local Government: Municipal Finance Management Act, Act 56 of 2003 ("**the Municipal Finance Management Act**"), to support the establishment of a municipal entity ("**the IRT Entity**") for the provision of certain municipal public transport services, including operating, controlling

and managing the IRT System. The City has embarked on the process prescribed by section 84 of the Municipal Finance Management Act and anticipates being in a position either to approve or to disapprove the establishment of the IRT Entity during the second half of 2009.

2.5 If the City establishes the IRT Entity, the City intends:

2.5.1 assigning to the IRT Entity (as contemplated in section 80 of the Municipal Systems Act) various municipal public transport responsibilities, including the responsibility to procure IRT System related contractors and to conclude agreements with those contractors; and

2.5.2 assigning to the IRT Entity, the various IRT System related agreements which the City has concluded or is in the course of concluding, including this Agreement, which the City itself concluded prior to the establishment of the IRT Entity.

2.6 As soon as the assignment of this Agreement has been implemented, the IRT Entity will effectively replace the City as the Operator's contractual counterparty under this Agreement, and the City will have no further rights or duties under the Agreement.

2.7 The IRT System will comprise the following:

2.7.1 Trunk Routes on which Trunk Vehicles will operate;

2.7.2 Feeder Routes on which Feeder Vehicles will operate;

2.7.3 a largely automated fare collection system, ("**Fare System**"). The technology supporting the Fare System allows for the swiping of cards based on a Smart Card System. Fares for passengers travelling on Trunk Vehicles are paid before passengers board Trunk Vehicles and fares for passengers travelling on Feeder Vehicles are paid on the Feeder Vehicles using certain fare collection equipment installed on the Feeder Vehicles which is the subject of the Assets for Loan for Use Agreement. The Fare System for Phase 1 A of the IRT System is to be

- supplied and the Fare Services are to be provided by a successful tenderer in terms of the Fare System Agreement;
- 2.7.4 a Control Centre which will monitor, control and manage the movement and scheduling of both Trunk and Feeder Vehicles. These services, namely the Control Centre Services, are to be provided by a successful tenderer in terms of the Control Centre Agreement;
- 2.7.5 Trunk and Feeder Vehicles which are to be fitted with Communications Equipment. Via the Communications Equipment, information will be reported from the Trunk and Feeder Vehicles to the Control Centre and be sent by the Control Centre to the drivers of the Trunk and Feeder Vehicles in order to monitor, control and manage the movement and scheduling of Trunk and Feeder Vehicles. The Communications Equipment will allow the Control Centre to locate the position of Trunk and Feeder Vehicles at all times;
- 2.7.6 Stations on the Trunk Routes, which will be secure, closed and covered spaces monitored by CCTV cameras linked to the Control Centre. Security and cleaning services (i.e. the Station Services) are to be provided in respect of the Stations by a successful tenderer in terms of the Station Services Agreement.
- 2.8 In order to access Stations on Trunk Routes, passengers must use pre-paid fare cards which are to be scanned and read by turnstiles equipped with fare collection payment point equipment located at the entrances. This equipment and the provision of the pre-paid fare cards form part of the Fare System and the Fare System Services which are to be provided as part of the Fare System Agreement. All fares shall accrue to the City, and not the Operator;
- 2.9 Feeder Vehicles will operate along Feeder Routes which may connect with Trunk Routes. Feeder Vehicles will also be equipped with fare collection equipment to be provided as part of the Assets for Loan for Use Agreement. All fares collected through the operation of the Feeder Vehicles will also accrue to the City and not the Operator.

- 2.10 The IRT System is being implemented in phases. Phase 1 consists of several corridor components which are critical to the City fulfilling its commitments as a host city for the 2010 Soccer World Cup. Phase 1 is divided into two phases:
- 2.10.1 Phase 1A represents infrastructure that will be delivered prior to March 2010 in time for the 2010 Soccer World Cup and consists of the Trunk Routes and Feeder Routes which are to be serviced by the Operator in terms of this Agreement. Phase 1A is more fully described in Annexure "F";
- 2.10.2 Phase 1B represents infrastructure that will be delivered as the remainder of the total complete Phase 1. Phase 1B is more fully described in Annexure "G";
- 2.11 The City embarked on a process of informing potential partners and relevant stakeholders, particularly from the minibus taxi and bus industries, about the Cape Town Integrated Rapid Transit System in general and more particularly, Phase 1A of the IRT System.
- 2.12 The process, with a view to identifying a suitable operator to deliver the Services, commenced with the issuing by the City of the Prospectus and inviting comments in relation thereto and culminated in the City calling for interested parties to respond to its Request for Proposals ("RFP"). The Operator, having considered the Prospectus and responded to the RFP, duly engaged the City in negotiations with a view to its appointment as Operator in respect of Phase 1A in terms of the Agreement.
- 2.13 The City now wishes, in respect of Phase 1A, to appoint the Operator on a non-exclusive basis to provide the Services and the Operator wishes to accept such appointment.
- 2.14 The Operator acknowledges that it shall be obliged to enter into the following additional agreements:
- 2.14.1.1 the Depot Lease Agreement for the lease of the Depot where the Vehicles are to be held overnight, fuelled, cleaned and washed and maintained;

2.14.1.2 the Asset Loan for Use Agreement for the lease of certain fare collection equipment, as described in clause 2.9, which will be installed on the Feeder Vehicles and be maintained by the City or its agent.

2.15 The Parties wish to record their agreement in writing as they hereby do.

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 and with effect from the Signature Date), are subject to the fulfillment or waiver of the following Conditions Precedent, namely:

3.1.1 that the following agreements are signed and become unconditional in accordance with their terms (save for any condition which is related to this Agreement) by not later than **[insert date]**:

3.1.1.1 the Control Centre Agreement;

3.1.1.2 the Fare System Agreement;

3.1.1.3 the Station Services Agreement;

3.1.1.4 the Depot Lease Agreement;

3.1.1.5 Assets for Loan for Use Agreement;

3.1.1.6 the Tripartite Agreement.

3.1.2 that the Operator, by not later than fourteen (14) days after the Signature Date or by such later date as the City may stipulate by notice in writing given to the Operator, furnishes the City with a performance guarantee substantially in the form of Annexure "H" from a banking institution registered in terms of the Banks Act, 1990, or an insurer registered in terms of the Short Term Insurance Act, 1998 or the Long Term Insurance Act, 1998 to do insurance business, or the Small Business Development Corporation, or cash, negotiable government stock, or a security bond to the satisfaction of the City, or such other

form of security as may be approved by the City, for R[•], as security for the due and faithful fulfilment by the Operator of all the terms and conditions of the Agreement. Whether or not a performance guarantee is acceptable shall be in the sole discretion of the City. Upon expiry of this Agreement the guarantor(s) shall be released unless the Operator still has to meet outstanding obligations and claims in terms of this Agreement and the cost of such obligations cannot be covered by any outstanding payment standing to the Operator's credit. The cost of providing the performance guarantee shall be for the Operator's account. In addition to the performance guarantee, the City may, in its discretion, in writing impose special audit requirements on the Operator, in which case the latter shall be obliged to comply therewith;

3.1.3 that the Operator applies for an Operating Licence within seven (7) days after the Signature Date and acquires an Operating Licence by not later than fourteen (14) days prior to the Commencement Date. The Operator must take all reasonable steps to obtain the granting and issuing thereof as expeditiously as possible. If required by the City, the Operator must inform the City in writing on a weekly basis of the progress made regarding such application. If the City in its discretion, after consultation with the Operator, decides that it is unlikely that the Operator will obtain the Operating Licences in time to enable it to timeously fulfil the Condition Precedent in this clause 3.1.3, the City may by notice in writing to the Operator extend the date of fulfilment of the said Condition Precedent and if necessary postpone the Commencement Date on written notice to the Operator until the Operating Licence has been obtained.

3.2 The Parties shall, where it is within their respective power and control to do so, use their reasonable endeavours to procure the fulfillment of each of the Conditions Precedent within the respective times permitted in terms of clause 3.1.

3.3 The Conditions Precedent are for the benefit of the Parties. The Parties may, by agreement in writing by no later than the date stipulated for fulfillment thereof, waive (unless such condition is incapable of waiver) or

extend to a date not later than [●], the period for the fulfillment or waiver of any one or more or part of any of the Conditions Precedent.

3.4 If any Condition Precedent is not fulfilled or waived on or prior to the date or extended date stipulated in terms of clause 3.3 for such fulfillment or waiver, the Surviving Provisions shall continue to be of force or effect, but the remaining provisions of this Agreement shall never become effective.

3.5 If any Condition Precedent is not fulfilled or waived in terms of this clause 3 (*Conditions Precedent*), 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 by a Party of any of its obligations under clause 3.2), and the Parties indemnify each other accordingly.

PART B. APPOINTMENT OF OPERATOR, DURATION OF APPOINTMENT AND INTERIM PERIOD BETWEEN AWARD OF TENDER AND COMMENCEMENT OF SERVICES

4. Appointment

4.1 The City hereby appoints the Operator to provide the Services on a non-exclusive basis.

4.2 The Operator hereby accepts such appointment.

5. Non-exclusivity of appointment

5.1 The appointment of the Operator in terms hereof is non-exclusive and the City makes no undertaking not to enter into any similar agreement with any other operator of public transport services for the same Route or Routes.

5.2 The City has overall responsibility for the planning, management and control of the IRT System and may in accordance with public transportation demand, vary the IRT System, the Routes and Timetables, determine the frequency of operations and other factors relevant to providing an efficient mass public transportation service.

5.3 The City may also seek tenders for the renewal of the Services prior to the expiry of the Agreement so that all tender formalities may be completed in order to allow for continuity of the Services.

5.4 At the end of the contract period, or if the Agreement is terminated in terms of clause 25, the Operator undertakes to surrender the Operating Licences to the competent board in accordance with the requirements of the Act or other applicable legislation for cancellation or amendment, whichever is applicable, and undertakes not to oppose any applications for Operating Licences made by other operators who may obtain contracts from the City to continue the Services insofar as they relate to the Routes in question.

6. **Duration of appointment**

6.1 The Operator shall commence the Services on the Commencement Date.

6.2 The Agreement shall terminate on the twelfth anniversary of the Commencement Date.

6.3 At the end of the contract period the City may decide to invite new proposals for the provision of Services in substantially the same Service Area. If this is done, such invitation shall amount to a totally new contract on the terms and conditions set out in the new proposal documents.

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

7. **Establishment activities to be undertaken by the Operator during the Pre-operational Period**

7.1 During the Pre-operational Period the Operator must arrange the following activities, among others:

7.1.1 use its reasonable endeavours to procure the fulfillment of each of the Conditions Precedent in clauses 3.1.1.4, 3.1.1.5, 3.1.2 and 3.1.3 within the respective times permitted in terms of clause 3.1;

- 7.1.2 procure offices and complete the installation of maintenance, workshop, washing and other equipment required for the operation of the Depots and the setting up of necessary stores in accordance with the Depot Lease Agreement;
 - 7.1.3 recruitment and training of necessary drivers and other personnel;
 - 7.1.4 preparation of driver Duties in accordance with the operational plan provided by the City, and other forms necessary for the Services;
 - 7.1.5 preparation of publicity material for passengers in respect of Feeder Routes in conjunction with the City;
 - 7.1.6 other activities necessary for the commencement of the Services as requested by the City.
- 7.2 Within twenty-one (21) days of the Signature Date, the Operator shall provide the City with a programme of action regarding the activities required to be undertaken by the Operator during the Pre-operational Period, stating target, starting and completion dates for each activity.

PART C – SERVICES TO BE PROVIDED

8. Standard of operation of Services

- 8.1 The Operator must exercise the highest degree of skill, care and diligence in the provision of the Services and operate the Services strictly in accordance with the provisions of this Agreement to the satisfaction of the City and in accordance with the standards normally expected of an operator of the Vehicles in question. The Operator must comply with and strictly adhere to the City's instructions and directions from time to time regarding the operation of the Services. The Operator must take instructions and directions only from a duly authorised representative of the City.
- 8.2 The Operator shall have no cause to refuse to convey a person on a Trip or part thereof unless the passenger Capacity will be exceeded at the time in question by the person wishing to be conveyed, or on grounds of violent, or otherwise offensive conduct on the part of that person or other grounds contemplated in the Act or applicable road traffic legislation, or because the

person refuses to pay the fare on boarding a Feeder Vehicle, as contemplated by the Fare System.

- 8.3 Should the Operator become aware of circumstances or problems which have prevented it, are preventing it or will prevent it from providing the Services as specified, it must, as soon as is reasonably possible after becoming so aware, advise the City of such circumstances or problems and also indicate the manner in which the provision of the Services were, are or are going to be influenced thereby, if applicable. Such advice must be confirmed in writing as soon as reasonably possible.

9. Operator's responsibilities

9.1 The Initial Fleet and Encumbrance of Vehicles

- 9.1.1 It is recorded that the City shall purchase the Initial Fleet by utilizing available funding from the Public Transport Infrastructure and Systems Grant or such other funds as may be available to it.
- 9.1.2 The City and the Operator shall as soon as is reasonably possible after the Signature Date, enter into the Tripartite Agreement with the Financial Institution, the salient terms of which shall include, *inter alia*, the following:
- 9.1.2.1 the City shall dispose of the Initial Fleet to the Financial Institution at market value;
- 9.1.2.2 the City shall invest the proceeds of the sale of the Initial Fleet to the Financial Institution with the said Financial Institution as security;
- 9.1.2.3 the Financial Institution will, in turn, lease the Initial Fleet to the Operator;
- 9.1.2.4 the City shall make regular and timeous monthly payments to the Operator by drawing down on its investment with the Financial Institution thereby funding the lease costs incurred by the Operator; [Note: To consider whether the full lease costs are subsidized.]

- 9.1.2.5 the Operator shall be obliged to utilize the Initial Fleet solely for the purposes contemplated in this Agreement or for such other purpose as may be authorized by the City or the Public Transport Entity;
- 9.1.2.6 the Operator shall be obliged to procure comprehensive insurance cover in respect of the Vehicles for the duration of this Agreement and shall be liable for payment of the relevant insurance premiums [Note: Consider whether this insurance should not rather be paid by the Financial Institution, with provisions that the Operator is responsible for relevant excesses and any insurance claims repudiated due to operator non-compliance];
- 9.1.2.7 for the duration of this Agreement, ownership of the Initial Fleet shall vest in the Financial Institution subject to the proviso that upon termination of this Agreement the Parties intend for ownership of the Initial Fleet to be transferred to the Operator; [Note: Tax consequences to be considered]
- 9.1.3 The Operator is entering into this Agreement in the knowledge and on the understanding that it will be obliged to enter into the Tripartite Agreement with the City and Financial Institution.
- 9.1.4 It is envisaged that the Operator may enter into third party financing arrangements in respect of the purchase of Additional Vehicles purchased in accordance with the further provisions of this Agreement. In this regard, and in order to secure the Operator's obligations under any financing agreements with such third parties:
- 9.1.4.1 the Operator shall be entitled to cede up to 70% of its revenue received in terms of this Agreement as security for any finance raised by it for the purchase of the Additional Vehicles; and
- 9.1.4.2 the City shall, on behalf of the Operator, be entitled to pay directly to the third party financier, any payment due to the Operator under this Agreement as may be equal to any amount due to the third

party financier. The City shall pay any balance thereafter to the Operator.

9.2 Operational matters in relation to the Vehicles

9.2.1 The Operator shall provide the Services with the Vehicles procured in terms of clause 9.1.

9.2.2 The Operator shall make the Vehicles available for installation of required tracking and monitoring systems, Communications Equipment and fare collection equipment. The installation of this equipment shall be effected prior to the commencement of operation of any additional or replacement Vehicles as contemplated below.

9.2.3 Depending on the requirements of the Agreement as to which type or combination of types of Vehicles are to be provided by the Operator, it must provide for each Trip:

9.2.3.1 on a Trunk Route, a Trunk Vehicle that conforms fully with the Capacity, maintenance and operational requirements of clause [●] of the Specifications;

9.2.3.2 on a Feeder Route, a Feeder Vehicle that conforms fully with the Capacity, maintenance and operational requirements of clause [●] of the Specifications.

9.2.4 Within 30 days prior to the Commencement Date, the City may require the Operator to carry out such operational tests using the Operator's fleet of Vehicles as the City may in its discretion deem necessary in order to test the IRT System's infrastructure and communication with the Control Centre, provided that any tests may not exceed 250 kilometres of travel by any one Vehicle.

9.2.5 The Operator shall:

9.2.5.1 ensure that the Vehicles are used exclusively on the IRT system. Except in relation to travelling directly to and from a Depot, as the case may be, the Vehicles may not be operated on any road other than the roads forming part of the IRT System;

- 9.2.5.2 operate the Vehicles on the Routes and in accordance with the schedules and Timetable provided by the City from time to time.
- 9.2.5.3 ensure that all Vehicles, after leaving the Depots are under the Control of the Control Centre, and that the drivers adhere to all instructions given by the Control Centre from time to time during the course of their Duties.
- 9.2.6 Vehicles may only be maintained in service under this Agreement if they are kept in perfect operating condition, fair wear and tear excepted, in accordance with the Vehicle Manufacturer's Specifications and as stipulated by the City from time to time and in accordance with the regulations or manuals in force and issued by the City from time to time. The Operator shall develop and implement a maintenance program based on the Vehicle Manufacturer's recommendation for the chassis, engine and body of the Vehicles.
- 9.2.7 Under no circumstances may the Operator modify the Vehicles in any way except with the prior written approval of the City and then only in circumstances where the City is satisfied in its sole discretion that such modifications will improve the operation of the IRT System. The cost of any modifications shall be for the account of the Operator.
- 9.2.8 The City may order the Operator to replace and/or exclude from service, without obligation on the City to compensate the Operator for any loss it may suffer, any Vehicle which:
- 9.2.8.1 has travelled in excess of the number of kilometres stipulated in clause 9.3.3 below;
- 9.2.8.2 in the opinion of the City, presents a risk to passenger safety or to the safety of other vehicles or pedestrians;
- 9.2.8.3 shows deficiencies which directly or indirectly results in noise or air pollution above the limits prescribed in the Specifications or by law;

9.2.8.4 has been modified from its initial Specifications and such modifications have not been approved in writing by the City;

9.3 The Additional Vehicles

9.3.1 If the City considers that the fleet of Vehicles should be increased to respond to an increased demand or an anticipated increase in demand for the Services or for other operational reasons, the City may give the Operator six months' notice in writing to procure Additional Vehicles, at the Operator's cost, not exceeding **[insert number of vehicles]** for Trunk and Feeder Vehicles in accordance with Specifications as directed by the City. Any maintenance obligations in this Agreement shall apply equally to the Additional Vehicles; [Note: To consider whether there should be a limit on the number of Trunk and Feeder Vehicles respectively]

9.3.2 Without limiting, in any manner, the generality of the City's rights contemplated in clause 9.3.1 above, and merely for purposes of illustration, the City may consider Additional Vehicles necessary in circumstances where, for example, the City, based on projections for any particular Route during peak hour, determines a Vehicle to be overcrowded to such an extent that its Programmed Capacity will be exceeded by 110% for more than 2 consecutive Months.

9.3.3 The Operator shall be obliged, during the period of the Agreement, to immediately notify the City in writing of any Vehicle which has travelled more than 900 000 kilometres ("the **Affected Vehicle**"), and shall specifically state, in a written, motivated opinion, whether or not it deems a replacement Vehicle necessary. The City may, at its election, (which election shall be exercised in writing):

9.3.3.1 require the Operator to continue operating the Affected Vehicle for the remaining period of the Agreement; or

9.3.3.2 require the Operator to acquire an Additional Vehicle to replace the Affected Vehicle at its own cost.

- 9.3.4 The Operator shall be obliged to purchase and pay for (either utilizing its own resources or third party financing) any Additional Vehicles required in terms of this Agreement, subject to the provisions of clause 9.3.5 below;
- 9.3.5 The Operator will be entitled to recoup the direct costs incurred in acquiring Additional Vehicles by means of an increase in the Contract Rate per Vehicle Type calculated as follows:
- 9.3.5.1 the cost of amortization of the purchase price of the Additional Vehicle over the remaining period of the Agreement subject to a maximum applicable rate of interest of Prime plus 2% shall be reckoned, taking into account the provisions of clause 9.3.5.3 below;
- 9.3.5.2 the aggregate of the amount contemplated in clause 9.3.5.1 above shall be divided by the number of Guaranteed Kilometres remaining over the balance of the term of the Agreement and added to the Contract Rate;
- 9.3.5.3 in determining the aggregate amount contemplated in clause 9.3.5.1 above, a residual value will be determined based on the proportion of the remaining term of the Agreement in relation to the total life of the Vehicle, i.e. 12 years. [Note: A “worked example” will be inserted here.]
- 9.3.6 The Operator shall be obliged, in terms of clause 21 below, to, *inter alia*, effect and maintain comprehensive Vehicle insurance which shall include cover in respect of damage to or theft of the Vehicles;
- 9.3.6.1 In the event of the theft of or damage to a Vehicle the Operator shall first obtain the prior written approval from the City in relation to a replacement Vehicle, more specifically, the Specifications required in respect thereof, before procuring same;
- 9.3.6.2 The City shall be entitled to change the required Specifications from that of the stolen or damaged Vehicle, as the case may be, and the Operator shall be obliged to acquire an Additional Vehicle

in accordance with such new Specifications as may be directed by the City;

9.3.6.3 Where the change in the Specifications to the Additional Vehicle contemplated in clause 9.3.6.2 above results in the purchase price of the Additional Vehicle exceeding the insured value of the stolen or damaged Vehicle, as the case may be, the Operator shall be obliged to purchase the Additional Vehicle at the stipulated price, but shall be entitled to recoup the difference on the same basis as set out in clause 9.3.5 above.

9.3.7 No order shall be placed by the Operator with the Vehicle Manufacturer for the purchase of any Additional Vehicles without the prior written approval of the City.

9.4 **Operations**

The Operator shall:

9.4.1 prepare and implement appropriate industrial safety practices and measures necessary for the adequate performance of the Services and set up internal controls which allow compliance monitoring ;

9.4.2 provide the City with all the information it requires and which is necessary for the proper planning, coordination and control of the IRT System;

9.4.3 maintain a permanent and updated inventory of all Vehicles with the service record for each on electronic media, in which maintenance/service events shall be detailed, together with the number of Kilometres travelled, faults and accidents, all of which shall be kept at the operational headquarters of the Operator and shall be available to the City for inspection upon request at any time during the term of this Agreement;

9.4.4 keep, a permanent and updated daily performance report for each driver on electronic media, detailing number of Kilometres covered, complaints received, accidents, fines, score certification and training, all

of which will be kept at the operational headquarters of the Operator and be available to the City for inspection at any time during the term of this Agreement;

9.4.5 design, develop and implement a permanent and continuous training program for all drivers over the life of the Agreement on the regulations and manuals issued by the City from time to time, first aid, inter-personal relations and especially, a driving module of articulated buses on special corridors. The training courses will have a duration of 40 hours per year and shall be subject to the prior approval of the City. Drivers who satisfactorily complete the training and pass physical and psychological tests stipulated by the City will be issued by the City with IRT System driving cards;

9.4.6 design, develop and implement a permanent and updated training program for its maintenance personnel over the life of this Agreement, which will include basic knowledge on transport, knowledge of regulations and manuals issued or to be issued by the City, first aid, inter-personal relations and in particular, an overall mechanic maintenance module and repair work and general cleanliness. The training costs and the courses, as well as those of medical and psychological examinations, will be for account of the Operator.

9.5 **Drivers**

The Operator shall:

9.5.1 employ an adequate number of drivers and support staff required for the performance of the Service to the standards set by the City and in accordance with the terms and conditions of this Agreement. Each driver employed by the Operator shall be required as part of his terms and conditions of employment to sign a code of conduct which shall amongst other things give guidance on standards of driving; uniforms, punctuality, personal attributes and general conduct;

- 9.5.2 adhere to labour conditions of employment for drivers and adhere to additional conditions that the City may specify on hours of shifts and total hours or operation;
- 9.5.3 train drivers through training programmes approved by the City;
- 9.5.4 permit its drivers to be examined by the City on their knowledge and expertise, and to accept the issue of competence certificates;
- 9.5.5 not permit drivers to drive for more than 5 hours continuously in any one shift and no shift shall be longer than 8 hours per day;

9.6 **Scheduled Trips**

The Operator shall:

- 9.6.1 only operate Scheduled Trips with the Vehicles;
- 9.6.2 only load and permit passengers to alight the Vehicles at Authorised Stops. All Authorised Stops must be authorised in writing by the City and any relevant authority with due consideration to regulations and proclamations of such authority that may be applicable;
- 9.6.3 comply with and ensure all its staff, agents and subcontractors, comply with any operating instructions, manuals and regulations issued by the City from time to time;
- 9.6.4 allow the adequate supervision of the execution of its duties under this Agreement by the City through its authorised representatives, officers, agents, auditors, inspectors and supervisors;
- 9.6.5 not be permitted to cancel Scheduled Trips unless Agreed to in writing by the City. Where the Operator is of the opinion that Scheduled Trips should be cancelled due to boycott or strike action, either against the Operator's firm or generally, or where the Operator is of the opinion that
- 9.6.6 there is immediate danger to life or of personal injury or of serious damage to property, the Operator must refer the matter to the City via

the Control Centre for decision. The City's decision as to whether the Scheduled Trips should be cancelled or not shall be decisive.

9.7 Depots

The Operator shall in accordance with the provisions of the Depot Lease Agreement:

- 9.7.1 exercise overall management and maintain in the best condition the Depots, garages, offices, park yards and other buildings comprising the Depots. The Operator shall bear the cost of the maintenance, water, electricity, security, sewerage, rates and taxes from the date of commencement of the Depot Lease Agreement;
- 9.7.2 use the Depots exclusively to park, refuel and maintain the Vehicles;
- 9.7.3 establish and manage a system of treating waste materials and recycling of disposable materials approved by the City and by the environmental authorities. The Operator shall within three months from the Signature Date, send to the City for its approval the environmental management plan that shall be used for treatment of waste and recycling of waste materials;
- 9.7.4 allow other operator(s) to park and share facilities at the Depots under an arrangement to be Agreed upon by the parties concerned and on the terms approved by the City;
- 9.7.5 respect and maintain social responsibility in relation to any community in the immediate vicinity of the Depots;
- 9.7.6 allow the City and its authorized personnel and agents at any time upon a short notice unrestricted access to the Depots to supervise and inspect the operation and maintenance of the Depots;
- 9.7.7 not allow or authorize any advertisement to be fixed in the Depots without prior written approval of the City;
- 9.7.8 use the parking area exclusively to park the Vehicles;

- 9.7.9 keep the Depots in optimum condition for its use and in accordance with applicable environmental law;
- 9.7.10 not modify any buildings and facilities on the Depot without the prior written approval of the City;
- 9.7.11 have no claim against the City for any loss or damage suffered by the Operator by reason, directly or indirectly, of:
- 9.7.11.1 any breach by the City or any agent or servant of or contractor to the City of any of the City's obligations under the Depot Lease Agreement;
 - 9.7.11.2 any act or omission of the City or any agent or servant of or contractor to the City, whether or not negligent, wrongful or otherwise actionable at law and including (without limiting the generality of the foregoing) any act or omission of any cleaner, maintenance person, handyman, labourer, security guard, excluding gross negligence and/or lawful people;
 - 9.7.11.3 any breakdown of, or interruption or delay in the operation of, any machinery, plant, equipment, installation, or system situated in or on, or serving, the Depot, and including (without limiting the generality of the foregoing) any geyser, boiler, burglar alarm or security installation or system, again regardless of cause;
 - 9.7.11.4 any interruption of, or interference with, the enjoyment or beneficial occupation of the Depot or any parts of the common Depot caused by any building operations or other works to or in the Depot, whether by the City or by anybody else; or
 - 9.7.11.5 any other event or circumstance whatever occurring, or failing to occur, upon, in, or about the Depot, whether or not the City could otherwise have been held liable for such occurrence or failure,

and the Operator indemnifies the City and holds it harmless against any and all liability to any employee or agent of the Operator, its guests and other invitees, and all other persons who may occupy or be entitled to occupy the

Depot or any parts thereof through or under the Operator, in consequence of any such matter as is referred to in clauses 9.7.11.1 to 9.7.11.5 above.

9.7.12 The City shall not, however, be excused from specific performance of any of the City's obligations under this Agreement, whether express or implied, and particularly (but not only) the City's obligations to afford the Operator occupation and enjoyment of the Depot as contemplated by this Agreement.

9.8 Vehicle Maintenance

9.8.1 Period from the Commencement Date and until 31 May 2013 ("the First Maintenance Period")

9.8.1.1 For the duration of the First Maintenance Period, all Contracted Maintenance in respect of the Vehicles will be carried out by the Vehicle manufacturer [Note: subject to re-assessment regarding vehicles not yet purchased];

9.8.1.2 During the First Maintenance Period, the Operator shall be obliged to indentify and recruit potential trainee technicians, in consultation with the City, for employment by the Vehicle Manufacturer.

9.8.1.3 Notwithstanding 9.8.1.1 above, the Operator shall be responsible for maintenance, repairs or replacement caused by the following(which is excluded from Contracted Maintenance):

9.8.1.3.1 accidental or intentional damage;

9.8.1.3.2 improper or negligent use of the Vehicles, including exceeding speed limits or engine speeds;

9.8.1.3.3 incompetence of the Operator in driving, handling or dealing with the Vehicles;

9.8.1.3.4 the use of contaminated or non-Vehicle Manufacturer's approved fuels and/or lubricants;

- 9.8.1.3.5 servicing, maintenance or repairs to the Vehicle by any third party other than:
- 9.8.1.3.5.1 in accordance with the directions of the Vehicle Manufacturer and with the prior written approval of the Vehicle Manufacturer; and/or
 - 9.8.1.3.5.2 in respect of minor repairs strictly necessary and carried out in an emergency situation or breakdown;
 - 9.8.1.3.5.3 failure to comply with the Vehicle Manufacturer's driver manual;
 - 9.8.1.3.5.4 shock loading conditions (including exceeding legally permitted gross vehicle and/or gross combination mass);
 - 9.8.1.3.5.5 theft of vehicle equipment and components;
 - 9.8.1.3.5.6 cannibalising, transfer of components from one vehicle to the next without prior approval from the Vehicle Manufacturer's senior management;
 - 9.8.1.3.5.7 vehicle modifications by any third party other than the Vehicle Manufacturer;
 - 9.8.1.3.5.8 tampering with vehicle odometer, controls and any other specialised vehicle equipment;
 - 9.8.1.3.5.9 operating vehicles in adverse weather conditions that may harm the vehicles' electrical and driveline components;
 - 9.8.1.3.5.10 vehicle component damage due to the Operator's negligence in checking and maintaining oil and fluid levels as stipulated in the Vehicle Manufacturer's driver manual;

9.8.1.3.5.11 operation of vehicle on routes and road surfaces for which the vehicle was not designed and/or specifically authorised by the City.

9.8.2 **Period as from 1 June 2013 until termination ("the Remaining Maintenance Period")**

9.8.2.1 The Operator shall be solely responsible for all maintenance repairs and replacements in respect of all Vehicles during the Remaining Maintenance Period of this Agreement.

9.8.2.2 The cost of the aforesaid maintenance, repairs and replacements shall be included in the Revenue Kilometre rate payable to the Operator in terms of this Agreement.

9.8.2.3 The Operator shall at all times during the Remaining Maintenance Period be required to maintain (whether internally or on an outsourced basis) the Vehicles in accordance with the Vehicle Manufacturer's Specifications, as reasonably notified to the Operator from time to time.

9.8.2.4 The Operator shall at all times comply with any guidelines that the City may issue to the Operator from time to time during the currency of this Agreement in connection with the maintenance of the Vehicles to the extent not otherwise prescribed by the Vehicle Manufacturer and with due regard to the prevailing international standards in the bus operating industry in relation to the subject matter of such guidelines.

9.8.2.5 The Operator shall be obliged to take all steps or procure the taking of all steps necessary to ensure the due, proper and timeous discharge of all the Preventative Maintenance obligations prescribed by the Vehicle Manufacturer from time to time.

9.8.3 The Operator shall:

9.8.3.1 deliver to the City upon request, the Vehicle Manufacturer's maintenance manual and maintenance specifications, detailing

the maintenance inspection procedures, as well as the frequency and type of inspection for each technical condition specified for each Vehicle. The maintenance manuals must provide, as a minimum, a schedule of preventive maintenance, services and major overhauls according to the number of kilometres travelled and internal regulations which enable an evaluation to be made of the need for corrective maintenance on the basis of information supplied by the driver;

9.8.3.2 appoint a sufficient number of maintenance employees with the necessary skills, knowledge, experience and qualifications to ensure that it is and remains able to discharge all its maintenance obligations in terms of this Agreement in a timeous and effective manner and to that end shall ensure, at its sole cost and expense, that all its maintenance employees undergo the necessary ongoing training and /or instructions and evaluations to ensure compliance with the foregoing [Note: Assess clause to account for option of outsourcing maintenance function.];

9.8.3.3 deliver to the City, every six months from the Commencement Date during the term of this Agreement, a certification issued by the Vehicle Manufacturer or by a technical auditor [Note: this person will presumably be employed by the Operator during the Remaining Maintenance Period – to be settled] for previously authorized and accredited by the Vehicle manufacturer, in a format as approved by the City providing the following information:

9.8.3.3.1 confirmation that the maintenance procedures recommended by the Vehicle Manufacturer have been carried out at the recommended intervals and indicating the date, number of kilometres the Vehicle has travelled, work done, spare parts used and cost in respect of each Vehicle;

9.8.3.3.2 confirmation in respect of each Vehicle that the quality of the maintenance work done is adequate in terms of maintaining the Vehicle in a roadworthy and safe condition in accordance with the Vehicle Manufacturer's Specifications.

9.9 **Operating Licences**

9.9.1 The Operator must promptly do everything in its power to obtain and maintain in force all Operating Licences required by applicable law to provide the Services, pay all fees and levies and issue all notices as may be necessary for or be connected with the due operation of the Services in accordance with the Act and other applicable legislation.

9.9.2 It shall be the Operator's responsibility to apply timeously to the competent Provincial Operating Licensing board or other relevant board for the necessary Operating Licences covering the Routes. The City will provide a letter to the board notifying it of the awarding of the contract to the Operator. The Operating Licence or Licences must be applied for the duration of the contract period only. When such Operating Licences are issued, the Operator must supply copies to the City forthwith.

9.10 **Fare collection**

9.10.1 The onus of collecting fares will be on the City, and all fares collected by the City shall be retained by it for its own account.

9.10.2 The fares to be charged by the City on all Routes described in the Specifications shall be set by the City in its sole discretion and the onus will be on the City to comply with any applicable legislation in this regard.

9.10.3 Notice of change of fares must be given to the passengers in the manner stipulated by the City.

9.11 **Advertising**

The City shall have the right to place advertising material on the exterior and interior of Vehicles. No advertising may be carried on the exterior or interior of Vehicles without the prior written authorisation of the City. Any revenue arising from advertising on or in the Vehicles shall accrue for the benefit of the City.

9.12 **Scheduling and Timetables**

The City shall formulate daily Timetables each week or at such other periods as the City may determine from time to time during the period of the Agreement in respect of the Services that the City requires the Operator to comply with from time to time.

9.13 **Environmental issues** [Note: Any additional environmental issues to be considered]

9.14 **Waste Management Plan**

The Operator shall prepare and deliver to the City for its approval prior to implementation by the Operator a waste management plan for all waste generated by the operation including but not limited to: catalytic converters, oils, used fuels, tires, batteries, glass, plastics, metal parts, etc.

9.15 **External audit and internal control**

The Operator shall:

- 9.15.1 submit on a quarterly basis an account of its business for the review and report by a reputable external auditor and will have a statutory auditor perform the audit;
- 9.15.2 deliver to the City quarterly financial statements within the first 10 Business Days of the Month following the period on which the report was prepared;
- 9.15.3 deliver to the City within six months of the end of its financial year a copy of its audited financial statements;
- 9.15.4 adopt an appropriate management organisation and internal control mechanisms which guarantee the quality of its management, its financial and accounting information and the transit service it provides.

10. **Responsibilities of the City**

The City shall:

- 10.1 be responsible for the overall planning, monitoring of passenger demand, time scheduling, preparation of Timetables, management, control, monitoring and supervision of the IRT System and the performance of the Operator pursuant to this Agreement;
- 10.2 issue to the Operator regular operating instructions and guidelines as the City deems fit in order to ensure the efficient operation, safety, quality and functionality of the IRT System;
- 10.3 supervise the performance and execution of this Agreement by the Operator and shall have access to documentation and information recording the Operator's activities;
- 10.4 be entitled to communicate directly with drivers via the Control Centre and to issue instructions to them and shall be entitled to restrict direct communication between the Operator and its drivers during service if such communication is likely to interfere with the efficient performance of the Services;
- 10.5 evaluate and decide on the need for the establishment of new Routes and the possibility of optimising the integration of the IRT System with other modes of public transport;
- 10.6 be responsible for determining the optimal use of the Operator's fleet of Vehicles in accordance with overall requirements of the IRT System;
- 10.7 be responsible for informing the Operator of the Routes, frequencies and Timetables which must be observed in order to ensure that the IRT System as a whole provides an optimal service to passengers;
- 10.8 be responsible for monitoring, managing and controlling the location and movement of Vehicles through the services to be rendered to it in terms of the Control Centre Agreement. This will enable the City to maintain a record of the Revenue Kilometres travelled by each Vehicle and to be aware of emergency and other operational incidents affecting the performance of the Services;

- 10.9 inspect and monitor the condition of the Vehicles to ensure that the maintenance and cleanliness standards set in this Agreement are complied with by the Operator. The Operator shall permit the City and its authorised representatives access to its premises, its Vehicles and the Depots in order to carry out inspection of the Vehicles, Depots and maintenance registers and other books and records of the Operator;
- 10.10 be entitled to direct that the Operator outsources the maintenance of the Vehicles to an appropriately qualified service provider, at the Operator's cost, if, in the opinion of the City, the Operator is unable to maintain the Vehicles adequately;
- 10.11 be responsible, through its agent, the successful tenderer under the Fare Collection System Agreement, for all fare collection on Trunk Routes and the provision and maintenance of all fare collection equipment at point of sale and at turnstiles providing access to Stations so that passengers can use the IRT System on a pre-paid smart card basis. The Operator shall be responsible for fare collection on Feeder Vehicles i.e. ensuring that passengers on Feeder Routes swipe their pre-paid cards on the fare collection equipment installed on the Feeder Vehicles;
- 10.12 be responsible, through its agent, the successful tenderer under the Station Services Agreement, for the cleaning, maintenance and provision of security services at the Stations in order to provide a high quality transport service to passengers which will encourage use of the IRT System by residents of Cape Town;
- 10.13 guarantee the provision of security services between certain hours of operation 365 days a year during the life of the Agreement;
- 10.14 provide security personnel holding particular qualifications and education to maintain safety of passengers on the Stations;
- 10.15 ensure that security personnel have certain equipment i.e. cell phones or walkie-talkies;
- 10.16 assume responsibility for damage to property or premises on the Station platforms;

- 10.17 assume responsibility for acts or omissions of its agent providing the security services which cause damage to the Operator or third parties;
- 10.18 ensure that the successful tenderer under the Security Services Agreement maintains adequate insurance cover to cover liability which it in turn will assume in relation to the City;
- 10.19 be responsible, through its agent, the successful tenderer under the Control Centre Agreement, for monitoring the movement and scheduling of Vehicles on the Routes in order to ensure that Vehicles arrive at and depart from Authorised Stops on time;
- 10.20 be responsible for provision of the necessary infrastructure to establish and maintain the Trunk Routes in so far as it is possible to do so, as dedicated Vehicle lanes which no other traffic is permitted to access;
- 10.21 be responsible for all structural planning of the IRT System;
- 10.22 plan the daily operations of the IRT System and the Services to be performed by the Operator under this Agreement;
- 10.23 assume overall responsibilities for control of the IRT System operations;
- 10.24 issue to the Operator, the operating instructions which it in its discretion considers necessary for the operation, quality and functionality of the IRT System;
- 10.25 supervise the performance and execution of the Operator's obligations under this Agreement;
- 10.26 develop a planning report on the indicative schedule for the operations for ever six month period and a detailed daily schedule on a weekly basis, in consultation with the Operator, on a rolling basis;
- 10.27 provide to the Operator a weekly schedule of operations;
- 10.28 provide the Operator with a detailed schedule daily in advance of operations for the following day;

- 10.29 be responsible for controlling the operations of the Vehicles on departure from the initial departure point, i.e. the first Authorised Stop on any Route;
- 10.30 be responsible for adjusting the scheduled operations from time to time as required;
- 10.31 provide the IT data to be fed into the Vehicle AVL system;
- 10.32 determine the training requirements for drivers of the Vehicles;
- 10.33 carry out examination and competency testing of the drivers if necessary;
- 10.34 be responsible for monitoring the operations including carrying out of inspections of Vehicles and Depots;
- 10.35 be responsible for enforcement of the dedicated lanes comprising the Trunk Routes;
- 10.36 be entitled to specify special conditions of employment for drivers in terms of items such as shifts and hours of operation, subject to compliance with applicable labour legislation;
- 10.37 be responsible for the provision of and maintenance of CCTV equipment on Trunk Vehicles. The Operator shall be responsible for recording CCTV footage on a continuous basis during the operation of each Trunk Vehicle and shall maintain a record of all such footage for 15 days and shall provide the City with such footage on request;
- 10.38 be entitled to receive all fare revenues;
- 10.39 be entitled to set and adjust all fares for Trunk and Feeder Routes;
- 10.40 have the right to sell and to exclusively authorise advertisement inside the Vehicles, and in the Depots and in the IRT System as a whole.

PART D – PAYMENT FOR SERVICES

11. Payment

11.1 Subject always to the provisions of clause 12, (Guaranteed Kilometres), the City shall pay the Operator weekly in arrears for providing the Services in an amount calculated by multiplying the total Revenue Kilometres operated by the Operator in the preceding Week (as appears from the records maintained by the Control Centre) by the Contract Rate, less any penalties. For the avoidance of doubt, payment made in terms of this clause 11.1 shall be determined according to the following formula:

$$P_i = K_{i-1}(T18) \times C(T18)_m + K_{i-1}(F12) \times C(F12)_m - F_{i-1}$$

in which the symbols have the following meanings:

- 11.1.1 P_i denotes the amount in Rand to be paid to the Operator in any current Week.
- 11.1.2 $K_{i-1}(T18)$ denotes the number of Revenue Kilometres travelled by the 18m Trunk Vehicles in Week i-1;
- 11.1.3 $K_{i-1}(F12)$ denotes the number of Revenue Kilometres travelled by the 12m Trunk/Feeder Vehicles in Week i-1
- 11.1.4 m denotes the Month in which Week i-1 occurs;
- 11.1.5 $C(T18)_m$ is the Contract Rate for 18m Trunk Vehicles in Month m
- 11.1.6 $C(F12)_m$ is the Contract Rate for 12m Trunk Vehicles in Month m
- 11.1.7 F_{i-1} denotes the penalties incurred in week $i - 1$
- 11.1.8 week $i-1$ denotes the Week prior to the Week in respect of which payment is to be made.
- 11.2 The amount payable will be escalated in terms of clause 14, after which amounts to be withheld under clause 15 will be deducted. The City shall calculate the Revenue Kilometres based on the records of Trips travelled by the Operator maintained by the Control Centre. The City's determination of

Revenue Kilometres operated each Week shall, in the absence of manifest error or clerical error, be final and binding on the Operator. The Operator will not be paid for Positioning Kilometres.

- 11.3 The City shall effect payment to the Operator on Wednesday each Week in respect of Services performed in the previous Week, provided that if Wednesday is not a Business Day, payment shall be effected on the following Business Day. All payments shall be made directly into the bank account of the Operator, details of which must be supplied by the Operator.
- 11.4 Should the Operator, for whatever reason, owe any amount to the City, the City shall have the right to set it off against any moneys that may be owing to the Operator by the City.
- 11.5 No payment by the City shall deprive the City of any right they may have regarding wrongful acts or breach of contract on the part of the Operator that may appear or become known later.
- 11.6 The City may, in its sole discretion and with the consent of the accounting officer of the City as required by the Local Government: Municipal Finance Management Act, 2000 (Act No. 56 of 2007) and any other relevant person or body, amend the Contract Rates in the case of extraordinary circumstances. Such amendment will take effect from the date, as determined by the City, upon which such circumstances arose. For the purposes of this sub-clause "extraordinary circumstances" shall include, but not be limited to:
- 11.6.1 the fact that roads or other physical conditions have deteriorated or improved to an unforeseeable extent;
- 11.6.2 the fact that there has been an unforeseeable number of strikes, stayaways, boycotts or incidents of unrest of a general nature, i.e. not confined to the Operator's organisation; and
- 11.6.3 any other unforeseeable circumstance that is extraordinary in the opinion of the City, and excludes natural growth in patronage and service requirements.

11.7 The City and the Operator agree that the Operator shall not issue a tax invoice in respect of the provision of the Services under this Agreement.

11.8 The City shall, with the prior approval of the Commissioner for the South African Revenue Service, create a tax invoice as contemplated in terms of the Value-added Tax Act 89 of 1991, as amended ("**VAT Act**"), containing the particulars specified in section 20 of the VAT Act in respect of each payment due to the Operator in terms of this Agreement for the Services rendered by the Operator to the City. The City shall provide such tax invoice to the Operator simultaneously with any payment made under this Agreement and shall retain a copy for its records.

12. **Guaranteed Kilometres**

12.1 Notwithstanding the provisions of clause 11, and in order to ensure the continued financial viability of the Operator, the City hereby guarantees that the Operator shall receive a minimum number of Revenue Kilometres on an annual basis for the entire duration of this Agreement.

12.2 To the extent that the actual number of Revenue Kilometres exceeds the corresponding Guaranteed Kilometres for any given year, such excess kilometres shall be applied towards reducing the Guaranteed Kilometres in respect of the ensuing year.

13. **Information**

13.1 To support the calculation of payments due to the Operator and penalties incurred by the Operator the City shall procure that the Control Centre maintains an accurate record of the following statistical data and information for each driver's Duty or part thereof:

13.1.1 Revenue Kilometres of each Trip;

13.1.2 the scheduled and actual departure and arrival time of each Trip, Late and Early Trips, with proper identification of Trips ;

13.1.3 details of any Early and Late Trips;

13.1.4 details of any Vehicle breakdowns;

- 13.1.5 details of failure to stop at any Authorised Stops;
 - 13.1.6 details of any deviation from the Route;
 - 13.1.7 passenger numbers for each Trip;
 - 13.1.8 any other information that may be required from time to time by the City which may be relevant to the Agreement.
- 13.2 The Operator shall supply the City daily with the following statistical data and information for each driver's Duty/shift or part thereof in the format required by the City:
- 13.2.1 detail of Trips not operated and reasons therefor;
 - 13.2.2 any other information that may be required from time to time by the City which may be relevant to this Agreement.

the Operator must retain the abovementioned data and information and keep it available to the City for inspection for at least three (3) years after the end of the contract period.

- 13.3 The City must supply the Operator with such of the information referred to in clause 13.1 as is relevant for the calculation of the weekly payments due to the Operator and any deductions in respect of fines, summarised into a weekly format and this summary, certified by the City as correct must be submitted to the Operator simultaneously with the weekly payment in terms of clause 11.1.
- 13.4 To collect and supply that portion of the required data and information (as listed in clause 13.1) which is capable of being electronically collected, the Operator must prior to the Commencement Date, have installed and operational on all Vehicles the required Communications Equipment.
- 13.5 The Control Centre operator [Note: Detail to be inserted] shall at its expense repair and maintain the Communications Equipment in perfect working order, fair wear and tear excepted, as specified by the City. If the Communications Equipment is not operating as required, the Operator shall

immediately advise the City and the Control Centre operator accordingly and:

- 13.5.1 remove the relevant Vehicle from service and replace same from the Reserve Fleet forthwith; and
- 13.5.2 arrange for the Communications Equipment to be repaired without delay by Control Centre operator at its own cost. [Note: The Agreement will provide that the communications equipment is to be insured by the City under limited trigger events, such as theft and vandalism].
- 13.6 In addition to any statutory obligations, the Operator must, within twenty-four (24) hours of its occurrence, report to the City any accident in which persons have been injured or killed. This must be followed by a written report containing full details of the occurrence within four (4) Business Days of the occurrence.
- 13.7 The Operator must forthwith upon the occurrence of any of the following events notify the City in writing of the details thereof:
 - 13.7.1 any revocation, suspension or refusal to renew any Operating Licence necessary for the provision of the Services, and
 - 13.7.2 the imposition of any condition upon such Operating Licence or any other circumstance which would prevent the Operator from providing the Services in accordance with the Agreement.

In addition to the information referred to in this clause 13, the Operator must supply the City with additional information, if so requested by the City in writing. Failure to do so would result in penalties to be imposed as set out in clause 15.

14. Escalation

- 14.1 The Contract Rate shall be increased or decreased monthly in arrears on the first day of each calendar month by applying the following escalation factor, calculated according to the formula and conditions below.

- 14.2 The Contract Rate shall be increased or decreased by the amount obtained by multiplying the Contract Rate, by the escalation factor determined according to the following formula:

$$\frac{(b \times F_t)}{F_o} + \frac{[(1 - b) \times CPIX_t]}{CPIX_o}$$

in which the symbols have the following meanings:

- 14.2.1 "b" is the coefficient deemed to represent the proportionate value of fuel and the value shall be [●];
- 14.2.2 "F" is the diesel fuel price of wholesale diesel with a 0.05% sulphur content published by the Department of Minerals and Energy on a Monthly basis;
- 14.2.3 The suffix "o" denotes the basic index applicable to the base Month. The base Month shall be the month prior to the month in which the Commencement Date falls. The actual base Month will be specified in the Specifications;
- 14.2.4 The suffix "t" denotes the current CPIX index and price. The current CPIX indices are applicable to the month in which the last day of the period falls to which the relevant payment relates.
- 14.3 If any index relevant to any particular payment is not known at the time the value of the payment is calculated, the latest published figures shall be used. Any correction that may be necessary shall be made by increasing or decreasing the subsequent weekly payments to the Operator.
- 14.4 Should it be necessary to make a pecuniary correction later as a result of any dispute over Revenue Kilometres, or as a result of an arithmetical error or any other cause, the price adjustment factor in force during that period in which the Services were performed shall be used.
- 14.5 The escalation factor will be calculated by the City.

15. Penalties

- 15.1 Penalties shall be imposed against the Operator for each offence in accordance with the Penalty Schedule as set out in Annexure "K" to this Agreement and the City shall advise the Operator on a weekly basis of penalties so imposed.
- 15.2 The Services shall be fully monitored in the first Month of operation and all offences shall be listed, but penalties will not be imposed. Thereafter penalties shall be imposed as set out in Annexure "K" hereto. In both cases Revenue Kilometres shall only be paid for Trips which have been operated.
- 15.3 The City shall through the operations of the Control Centre maintain a data base of all information pertaining to the performance of the Operator which is relevant to the imposition of penalties.
- 15.4 The Operator may appeal to the City against the imposition of any Penalty by giving written notice to the City within 7 days of being informed of the Penalty setting out its grounds for appeal.
- 15.5 The City shall be obliged to adjudicate the matter on appeal and communicate its decision to the Operator, in writing, within 10 days of receipt of the written notice contemplated in clause 15.4 above. If the City fails to adjudicate the appeal within the 10 day time period, it shall be deemed to have decided in the Operator's favour.
- 15.6 If the Operator is not satisfied with the outcome of the appeal, it may declare a dispute ("the Penalty Dispute") for final resolution in accordance with the following provisions:
- 15.6.1 The Operator shall refer the Penalty Dispute to the Adjudicator within 3 (three) days of receiving the City's reply contemplated in clause 15.5 above;
- 15.6.2 The Adjudicator shall use his best endeavours to resolve the Penalty Dispute within 14 days of receiving notification of such dispute;
- 15.6.3 The Adjudicator shall act as expert and not arbitrator and his decision shall be final and binding on the Parties;

15.6.4 The costs of the Adjudicator shall be borne as he shall direct.

15.7 Notwithstanding the foregoing, in the event that the Operator accepts, in writing, the Penalties imposed by the City in any given Week (as communicated through the Control Centre) within 3 (three) days of being informed thereof, it shall be entitled to [●]% reduction in the Rand value of such Penalties.

16. Variations

16.1 The City may make the following variations to the Services:

16.1.1 increase or decrease the number of Scheduled Trips on any Route or Routes;

16.1.2 omit any Route or add a new Route;

16.1.3 lengthen, shorten or alter an existing Route;

16.1.4 alter the number or location of Authorised Stops, in consultation with the relevant traffic authority where applicable; and

16.1.5 change the Timetable of any portion of the Services;

16.2 The City must notify the Operator electronically via the Control Centre of any variations made to the existing Services and the Operator must comply with any such variations.

16.3 If the City requires Services to be provided in areas outside the Service Area these will be negotiated under a supplementary agreement.

PART E – MISCELLANEOUS MATTERS

17. Confidentiality

17.1 The Parties acknowledge that each of them have a proprietary interest in the confidentiality of the Information being maintained. Each party as recipient shall keep the other party's Information confidential and will refrain from

using such Information for any purpose other than as contemplated in this Agreement, or in any way that is detrimental to the providing party.

- 17.2 In complying herewith each recipient undertakes to protect the Information using at least the same standard of care that would be applied in respect of its own proprietary, secret or confidential Information, and undertakes that the Information shall be stored and disclosed in such a way as to prevent unauthorised access.
- 17.3 Nothing herein shall obligate a party to disclose any particular Information.
- 17.4 If it is uncertain whether any Information is to be treated as confidential, the recipient shall treat such Information as confidential until written clearance is obtained from the providing party.
- 17.5 Except with the prior written consent of the providing party, the recipient shall not make any copy, reproduction, facsimile or duplicate of the Information by any means or for any purpose whatsoever, other than for the purposes set out in clause 17.1.
- 17.6 All Information disclosed will remain the property of the providing party. On demand of the providing party, the recipient shall redeliver at its own costs to the providing party all copies, photographs and other reproductions (in whatever format) of the providing party's Information.
- 17.7 In case of a destruction of any Information disclosed, the recipient shall confirm such destruction and details thereof in writing to the providing party as soon as possible thereafter.
- 17.8 Each party must take and implement reasonable steps to secure the Information and to prevent third parties from gaining unauthorised access thereto.
- 17.9 If the recipient is requested in any proceeding to disclose the other party's Information, it will give the providing party prompt written notice of such request so that the providing party may seek an appropriate protective order. If in the absence of a protective order the recipient is nonetheless compelled to disclose the other party's Information, the recipient may disclose such

Information without liability hereunder; provided, however, that it gives the providing party written notice of the Information to be disclosed as far in advance of its disclosure as is practicable and, upon the providing party's request, uses reasonable efforts to obtain assurances that such Information will be treated as confidential.

- 17.10 The restrictions and obligations regarding confidentiality, non-disclosure and usage herein shall remain binding on all Parties indefinitely, notwithstanding the termination of this Agreement.

18. Change of Control of the Operator

- 18.1 For the purposes of this clause 18, a Change of Control of the Operator shall have occurred if:

- 18.1.1 within 5 years of the Signature Date, 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
- 18.1.2 within 5 (five) years of the Signature Date, 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
- 18.1.3 within 5 (five) years of the Signature Date, 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
- 18.1.4 the Operator sells, transfers or otherwise disposes of all or substantially all of its assets or business;
- 18.1.5 the Operator is placed under any final order of winding-up or judicial management or enters into any voluntary winding-up; or
- 18.1.6 an event as contemplated in clauses 18.1 to 18.1.4 occurs in relation to the holding company of the Operator. [Note: This clause may be

deleted depending on the final shareholding structure of the Operator considered during the envisioned RFP process]

18.2 No Change of Control of the Operator may occur without the prior written approval of the City.

19. Accounting matters

19.1 The Operator must keep proper accounting and financial records in respect of the Agreement in accordance with generally accepted accounting practice and have such records audited annually. The Operator must further annually, within six (6) Months of the end of the Operator's financial year, submit to the City copies of such financial statements, together with the auditors' report and such operating data as the City may require. All accounting records must be kept for a period of at least three (3) years after termination or expiration of the Agreement.

19.2 Where in terms of this Agreement any amount is owing to the City by the Operator, a certificate under the hand of an officer of the City responsible for management of the Agreement shall be prima facie proof:

19.2.1 that such amount is owing;

19.2.2 of the fact that such officer signed the certificate; and

19.2.3 that the relevant amount is due and payable.

20. Access and disclosure of information

20.1 The City and its authorised representatives shall at all reasonable times have access to all Vehicles, workshops and Depots of the Operator for purposes of monitoring service quality, patronage, ticket and general inspection, and the Operator must afford every facility for and render every assistance regarding such access or in obtaining the right thereto. The City shall at all reasonable times have access to the financial statements and other relevant documentation of the Operator and will under all circumstances treat the information as confidential and undertakes that it would not be disclosed to or discussed with third parties, unless so ordered by a Court of Law or unless required by Law.

20.2 The Operator must, at the request of the City, produce proof of the validity of all Operating Licences, and other requirements arising from the Agreement, or, where applicable, proof that application has been made for such Operating Licence, or requirement. Such proof must be furnished not later than seven (7) Business Days from the date of receipt of a written request.

21. Insurance

21.1 The Operator must take steps to ensure the safety of passengers and property while they are being conveyed on the Vehicles. The City shall not be liable for any loss or damages resulting from damage to property or the death of or injury to any person which is caused by an intentional or negligent act or omission of the Operator or its agents or employees. The Operator hereby indemnifies the City against all claims, demands, lawsuits, damages, costs (including attorney and client costs), charges and expenses whatsoever in this regard. Nothing contained in this provision shall, however, be deemed to render the Operator liable for, or to indemnify the City against, any compensation or damages with respect to injuries or damage to persons or property resulting from any negligent act or omission done or committed during the currency of the Agreement by the City or its agents or employees in respect of any claims, demands, lawsuits, damages, costs, charges and expenses in respect thereof or pertaining thereto.

21.2 The Operator must, regarding any Vehicles owned by the Operator, effect and maintain throughout the duration of the Agreement, at its own expense, public passenger liability insurance for at least R [●]m ([●] Million Rand) per any one incident and full comprehensive vehicle insurance (which, for the avoidance of doubt, shall include, but not be limited to, insurance in respect of damage to or theft of the Vehicles) based on the realistic market value of the Vehicle(s) with an insurance company chosen by the Operator and acceptable to the City, registered with the Financial Services Board established by the Financial Services Board Act, 1990, and registered in the Republic of South Africa in terms of the Short Term Insurance Act, 1998 or other applicable legislation. Proof of such insurance must be submitted to the City prior to the Commencement Date of the Services and the Operator must advise the City in writing of any changes thereto and provide the City

with proof of payment of monthly premiums on a monthly basis. Such insurance shall inter alia provide cover in respect of loss or damage suffered by reason of damage to property or death of or injury to any person resulting from an intentional or negligent act or omission by the Operator or its agents or employees in connection with the provision of the Services. [Note: (a) To reassess in view of ownership by Financial Institution; (b) To provide that, where Insurance is paid for by another Entity (Financial Institution), the Operator is responsible for all excesses, and for increases in premiums due to high claims history (excl risks re political instability etc); (c) To include provision for the City taking out appropriate insurance for the Communications Equipment in the event of specific trigger events, such as vandalism and theft]

22. Operator operates as an independent contractor

The Operator shall act as an independent contractor and not as an employee or agent of the City and does not have the authority to bind the City contractually to any other party. The City shall not be liable to pay any retrenchment or severance benefits to any of the employees of the Operator on dismissal or on expiry of the contract period.

23. Force Majeure

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

23.2 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.

23.3 If a default due to an Event of Force Majeure continues for more than 30 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.

24. Cession, assignment, delegation and sub-contracting

- 24.1 The Operator shall not cede its rights or delegate its obligations under the Agreement or any part thereof, or any benefit or interest therein, to another person, or sub-contract any portion of the Services, without the prior written consent of the City.
- 24.2 The City may at any time during the currency of this Agreement cede its rights and delegate its obligations in terms thereof to any third party.

25. Termination of contract

- 25.1 If the Operator:
- 25.1.1 commits any breach of this Agreement other than a breach of payment obligations and fails to remedy the breach within 14 (fourteen) days after receipt from the City of written notice calling upon it to do so;
 - 25.1.2 commits a breach of any payment obligation in terms of this Agreement and fails to make payment within 7 (seven) days after receipt from the City of written notice calling upon it to do so;
 - 25.1.3 commits or attempts to commit an act of insolvency (as defined in the Insolvency Act No. 24 of 1936) or is actually insolvent in that the Operator's liabilities exceed its assets;
 - 25.1.4 publishes a notice of surrender of its estate or presents a petition for the acceptance of the surrender of its estate as insolvent;
 - 25.1.5 makes a compromise with its creditors or an assignment in favour of its creditors;
 - 25.1.6 agrees to carry out the Agreement under the supervision of a committee representing its creditors;
 - 25.1.7 is sequestrated or goes into liquidation, whether provisionally or finally (other than a voluntary liquidation for the purpose of amalgamation or reconstruction) or the Operator is placed under judicial management;
 - 25.1.8 has judicial execution levied on its goods;

- 25.1.9 has judgement of a material nature 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 7 (seven) days of becoming aware thereof;
- 25.1.10 delegates, cedes or sub-contracts the Agreement or part thereof without having obtained the City's consent in writing; or
- 25.1.11 undergoes a Change of Control without the prior written approval of the City as contemplated in clause 18.2; or
- 25.1.12 has its Operating Licences necessary to provide the Services withdrawn or suspended; or
- 25.1.13 offers, promises or gives a bribe or other gift or remuneration to any officer or employee in the service of the City or the City in connection with the obtaining or execution of this Agreement; or
- 25.1.14 acts in a fraudulent manner in obtaining or executing a contract with any government department, provincial administration, municipality, public body, company or person; or
- 25.1.15 approaches any official or agent of the City or any person in the service of the City or the City with the aim of influencing the award of the Agreement in its favour; or
- 25.1.16 enters into any agreement or arrangement, whether legally binding or not, with any other person, firm or company to refrain from formally responding to the City's calls for proposals or entering into any negotiations with the City in relation to this Agreement; or
- 25.1.17 abandons any of its obligations in terms of the Agreement; or
- 25.1.18 deliberately furnishes inaccurate, false or fraudulent information in its Tender either as regards its previous experience or with regard to any other material information; or
- 25.1.19 has penalties imposed in terms of clause 15, amounting to more than five percent (5%) per month of the total amount payable in respect of that month, i.e. before deduction of penalties, for any three (3)

consecutive months or for any five (5) months during the contract period; or

- 25.1.20 consistently fails to observe the Agreement or the Specifications, whether or not penalties have been imposed, with the result that the quality of the Services is unacceptable to the City,

the City 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 enforce specific performance of the terms of this Agreement; or cancel this Agreement forthwith on written notice to the Operator, subject to the provisions of clause 25.4 below; and in either event, recover such damages as it may have sustained.

- 25.2 For the purpose of clause 25.1.20, the Operator will be regarded as having consistently failed to observe the Agreement or the Specifications where the City provides a written certificate to that effect. If the Operator disagrees with the City's opinion, it may declare a dispute under clause 26.

- 25.3 Without prejudice to its rights under clause 25.1 or to any other rights of the City in terms of the Agreement, the City may, without terminating the Agreement, take steps itself or have steps taken by others on its behalf to give effect to the City's orders not carried out by the Operator, and notify the Operator in writing that:

- 25.3.1 such steps have been taken; and

- 25.3.2 the Operator must satisfy the City by written proof within a time stated in the notice that the Operator will be able to resume the Services to the City's satisfaction by a stated date; and

- 25.3.3 the Operator must resume the Services to the satisfaction of the City by that date;

- 25.3.4 if the Operator fails to comply the City may act under clause 25.1.

- 25.4 The City may only cancel this Agreement in terms of clause 25.1.1 if the breach is material and is not capable of being remedied by the payment of money, or if it is capable of remedy by payment of money, if the Operator

fails to make payment within 14 (fourteen) days after final determination of the amount.

25.5 Where the penalties imposed in terms of clause 15, amount to more than ten percent (10%) in a particular month of the total amount payable in respect of that Month, the City may deliver a written notice to the Operator informing it that the Agreement will be terminated without further notice if such penalties so exceed ten percent (10%) in any subsequent Month. If such a notice is sent and the penalties do again exceed that percentage in any subsequent Month, the City may terminate the Agreement without further notice and without granting the Operator any further opportunity to rectify the matter.

25.6 Notwithstanding anything to the contrary contained in this Agreement, the City may terminate the Agreement on three (3) Months' written notice of such termination being given to the Operator, where:

25.6.1 there has been some defect, error or failure to comply with applicable laws or rules in awarding the appointment contemplated in this Agreement that requires the Agreement to be terminated;

25.6.2 applicable transport planning shows that the Services are no longer required or required to be subsidised or are no longer required in their present form or that another transport mode will be more suitable;

25.6.3 national, provincial or local transport policy requires it.

In such a case the City will be obliged to pay to the Operator such damages as the Operator is able to prove, provided that such damages shall not exceed ten percent (10%) of the value of the uncompleted Services. Apart from the foregoing, the Operator shall not be entitled to claim any other amounts whatsoever in respect of such termination of the Agreement.

25.7 Where the Agreement is terminated by the City pursuant to this clause 25, the City may require the Operator to continue providing the Services for a maximum of sixty (60) days after the date of termination.

25.8 Where the Agreement is terminated by the City:

- 25.8.1 the Operator must leave the Service Area at the expiry of the period contemplated in clause 25.7, or on the date of termination of the Agreement, as required by the City, despite the fact that a dispute has been declared under clause 26 or that any Party has applied to a court for relief under the Agreement, and whether or not the Operator disputes the validity of the relevant notice of termination;
- 25.8.2 the Operator undertakes not to operate Services in the Service Area, whether on Trunk or Feeder Routes, after the expiry of the period contemplated in clause 25.7, or on the date of termination of the Agreement, as the case may be, despite the fact that the Operator may hold Operating Licences authorising such operation, and undertakes to submit any such Operating Licences to the relevant Operating Licence board for cancellation;
- 25.8.3 the City may call upon the guarantors under the Performance Guarantee referred to in clause 3.1.2, in writing, to make good to the City all losses, costs and damages as the case may be. To reduce its liability the guarantor may, with the consent of the City, find an alternative acceptable operator to continue the Services, on the same terms and conditions, or the City may itself employ another operator to complete the Agreement or any part thereof at its option;
- 25.9 Should the amounts the City must pay to complete the Agreement where it is terminated as contemplated in this clause exceed the sum that would have been payable to the Operator on due completion by it, the Operator shall upon demand pay to the City the difference and it shall be deemed a debt due by the Operator to the City and shall be recoverable accordingly, provided that, should the Operator on demand not pay such amount to the City, the City may, without prejudice to any other rights the City may have, deduct such difference from any sum due to or that may become due to the Operator under this or any previous or subsequent contract between the Operator and the City.
- 25.10 Termination of the Agreement shall be without prejudice to any rights of the City in respect of any antecedent breach of contract by the Operator.

25.11 In the event of the City breaching any terms or conditions of the Agreement, the Operator shall give the City at least thirty (30) days' written notice of such breach, calling upon the City to remedy the same. Should the City fail to remedy the breach in accordance with the notice, this Agreement may either be terminated after a further fourteen (14) days' written notice period, during which the Operator must still provide the Services under the Agreement, or at the option of the Operator, it may institute a claim for damages and/or sue for specific performance against the City, or claim any other lawful remedy that the Operator may have against the City, without prejudice to any other rights the Operator may have.

25.12 The Operator may only cancel this Agreement in terms of clause 25.1.11 if the breach is material and is not capable of being remedied by the payment of money, or if it is capable of remedy by payment of money, if the City fails to make payment within 14 days after final determination of the amount.

25.13 In the case of termination of the Agreement in terms of this clause 25, the City may immediately appoint auditors to check and verify all relevant books, records and other data of the Operator, and the Operator shall give full cooperation in that regard and make all such information available to the City on request.

[Note: Consideration will be given to the consequences of termination, particularly in the context of the appointment of a new operator. In this regard, the Agreement may be amended to take into account, handover arrangements by the Operator to a new service provider, "run-off" insurance to deal with claims not brought to the attention of the City at the time of termination or unsettled claims at termination, training and transfer of skills, and the possible issues around deemed retrenchments as envisaged in terms of the Labour Relations Act etc.]

26. Settlement of disputes

26.1 Mediation in non-urgent matters

26.1.1 Except in relation to a dispute declared in terms of clause 15.6 above, should any dispute or difference of any nature whatsoever arise between the Parties in connection with or arising from the Agreement, the Party declaring the dispute or difference must notify the other Party in writing, and the Parties must attempt to resolve the matter within twenty-one (21) days of the notice. If no resolution can be achieved within that period, the dispute or difference must be settled by way of mediation, or where applicable, by arbitration as provided for hereunder.

26.1.2 The mediation procedure is commenced by either Party giving the other written notification that the matter must proceed to mediation. Where such a notification is delivered:

26.1.2.1 the Parties must each in writing and within twenty-one (21) days after the notice to proceed to mediation, nominate a mediator who:

26.1.2.1.1 has been a judge; or

26.1.2.1.2 is a practising advocate of not less than ten (10) years standing.

If the Parties cannot agree on one mediator within a further seven (7) days, the President of the Association of Law Societies of the RSA shall be requested to nominate a mediator within fourteen (14) days after the request, to be appointed by the City in writing.

26.1.3 The Parties must commit themselves in every respect to the speedy finalisation and solution of the mediation proceedings.

26.1.4 Any party may furnish the mediator in advance with written documentation and information and may make the same available to the other party.

26.1.5 The mediator must establish and regulate procedures for the mediation so long as the Parties continue to agree to participate in the mediation process.

- 26.1.6 The Parties acknowledge that mediation is a voluntary process that may be terminated at any time by any Party on written notice to the other.
- 26.1.7 The mediator must give each Party the opportunity to present its case by means of written and/or oral representations and to submit settlement alternatives, and the mediator must aid the Parties in reaching a mutually acceptable agreement.
- 26.1.8 The mediator must record the settlement reached by the Parties, if any, and request the Parties to sign the draft settlement within three (3) days after a settlement has been reached and give a copy thereof to each Party.
- 26.1.9 The Parties must pay the costs of the mediator in equal shares, unless the mediator orders one Party to pay a larger share or the full amount.
- 26.1.10 The signed settlement shall be final and binding on both Parties.
- 26.1.11 The mediator shall not have the power to render a binding decision or award in the dispute, nor will it be empowered to force any party to settle the dispute.
- 26.1.12 Any information, documentation and material disclosed or made available to the mediator privately or in caucus will remain confidential and will not be disclosed by it or any Party without the prior consent of the Party who made available such information, documentation or material.
- 26.1.13 Mediation will take place on a confidential and "without prejudice" basis. The Parties undertake that they will never subpoena any person who is a party to or who is involved in the mediation, including the mediator, for the purpose of giving evidence as to what took place during mediation. The Parties must ensure that the confidentiality of the mediation process is assured.
- 26.1.14 If the Parties are unable to reach a settlement within sixty (60) days the mediator must certify this in writing and either Party may proceed to

arbitration, under clause 26.2 without the City having certified the matter as urgent.

26.2 Arbitration in urgent matters

26.2.1 Where a dispute is declared under clause 26.1.1 and the City certifies in writing that the matter is urgent, mediation shall not apply, and the matter must proceed to urgent arbitration as follows:

26.2.1.1 Except as otherwise provided in this Agreement, the arbitration proceedings shall be conducted in accordance with the arbitration laws of the Republic of South Africa.

26.2.1.2 The arbitration proceedings must be conducted on an informal basis, it being the intention that a decision should be reached as expeditiously and inexpensively as possible, but in any event within 30 (thirty) days after the dispute was declared, subject only to the due observance of the principles of justice.

26.2.1.3 The Parties must each nominate an arbitrator in writing within four days of receiving the notification of the dispute. If they fail to agree on an arbitrator within three days thereafter, or a Party fails to nominate an arbitrator, the chairperson of the Cape Bar Council may be asked by either Party to nominate an arbitrator on an urgent basis, who must be an advocate with at least ten years' experience in practice at the bar and will be appointed in writing by the City.

26.2.1.4 Within 10 (ten) days after the arbitrator is appointed, each Party must submit to the arbitrator a full written statement of his, her or its case in which must be set out all the evidence, sworn statements, facts, submissions and expert opinion as such Party deems necessary to support its contentions in regard to the matter(s) in dispute and simultaneously serve a copy thereof on the other party. The arbitrator may, on good cause being shown, grant the Party an extension of not more than five days to submit such statement of case. If a Party fails to submit a statement of

case within such time limits, the arbitrator may proceed to make an award without it.

26.2.1.5 Within seven days after receipt of the copy of the other Party's statement of case, either Party may submit a further supplementary statement to the arbitrator, and must serve a copy thereof on the other Party.

26.2.1.6 If the arbitrator considers that the matter cannot be decided on the papers before it, the arbitrator may call for other evidence or for witnesses to testify at a place determined by the arbitrator. Witnesses must testify in the presence of both Parties, who may question such witnesses. The arbitrator may appoint a commissioner to take evidence of any person within or outside the Republic and forward it to the arbitrator as if it were a commissioner appointed by the court;

26.2.1.7 Subject to this clause, the arbitrator shall have discretion and all powers allowed by law to ensure the just, expeditious, economical and final determination of the dispute, including the matter of costs, and without derogating from the generality of the foregoing, shall also have the power:

26.2.1.7.1 to determine the official language in which the proceedings shall be conducted and to order any party to cover the cost of an interpreter;

26.2.1.7.2 to determine the time, place and venue of the hearing and the hours during which it will take place;

26.2.1.7.3 to strike out or dismiss a claim or defence on grounds of failure by a Party to comply timeously with any ruling or interim award by the arbitrator, or on grounds of delaying conduct by a Party which is likely to cause substantial prejudice to the other party;

- 26.2.1.7.4 to proceed with the arbitration in the absence of or without hearing a Party who is in default or fails to appear or to comply with any ruling or interim award of the arbitrator;
- 26.2.1.7.5 to make any ruling or give any direction necessary or advisable for the just, expeditious, economical and final determination of all disputed matters raised in the statements of case, including the matter of costs;
- 26.2.1.7.6 to determine the validity of the Agreement and order its rectification;
- 26.2.1.7.7 to permit the amendment of a Party's statement of case (but not affidavits submitted therewith) and require a Party to amend its statement of case so that it is not evasive and, on application of a Party, to strike out from the other Party's statement averments which are vague, scandalous, vexatious or irrelevant;
- 26.2.1.7.8 to make rulings or give interim awards on matters of onus, admissibility of evidence and procedure, including ones of an interlocutory or interim nature, and rulings or interim awards relating to costs and the implementation of interim or final awards;
- 26.2.1.7.9 to make such findings of fact and law as may be required for purposes of the proceedings and the award, including an order as to costs, and including an award whereby a Party is restrained from any conduct, either on an interim or final basis;
- 26.2.1.7.10 before making a final award and on the application of a Party, to state any question of law arising in the course of the proceedings as a special case for the opinion of senior counsel, which opinion shall be final and binding on the arbitrator and the Parties, and not subject to appeal;

- 26.2.1.7.11 in determining the procedure for the arbitration, and after hearing the Parties, to direct:
- 26.2.1.7.11.1 that the dispute must be determined summarily at an informal hearing attended by both Parties;
- 26.2.1.7.11.2 the summary trial of an issue to decide whether any issue or point has no reasonable prospect of success and should be dismissed or struck out, or as to whether an interim award should be made for a sum indisputably due (whether on account of a debt or damages or on any other basis);
- 26.2.1.7.11.3 that a Party should furnish more particulars or details on any issue;
- 26.2.1.7.11.4 that a Party must produce or make available for inspection to the other Party and to the arbitrator any document, property or thing under the Control of the first Party;
- 26.2.1.7.11.5 that there shall be one or more inspections in loco;
- 26.2.1.7.11.6 that there should be discovery on oath or otherwise of documents and recordings (subject to valid legal objection), either in regard to all relevant matters or in regard to issues determined by the arbitrator;
- 26.2.1.7.11.7 that Parties must provide each other with a list of names of witnesses to be called, with a statement of the substance of their evidence. Save with the leave of the arbitrator, no witness shall be called in respect of whom such name and summary has not been provided;
- 26.2.1.7.11.8 that the hearing should proceed on documents (including written submissions) only, without the presentation of other evidence.

26.2.1.8 The arbitrator must at all times have regard to the intention of the Parties underlying the Agreement, and especially the need for passengers to be served by prompt and affordable public transport, and must resolve the dispute in a summary manner. The arbitrator must in any event do all in its power to make an award within thirty (30) days after it was appointed, or as soon as possible thereafter.

26.2.1.9 Any award made by the arbitrator:

26.2.1.9.1 shall be final and binding on the Parties;

26.2.1.9.2 shall be carried into effect forthwith by the Parties;

26.2.1.9.3 may be made an order of court by a Party only if the other Party fails to heed the terms of the award, and

26.2.1.9.4 may include an order directing the unsuccessful Party to pay the costs of the arbitrator and the expenditure incurred by the successful Party.

26.2.1.10 This sub-clause constitutes each Party's irrevocable consent to arbitration proceedings and neither Party shall be entitled to withdraw from such proceedings or to claim that it is not bound by this clause, once the City has certified that the matter is urgent under this sub-clause, or arbitration proceedings have been instituted in terms of clause 26.1.14.

26.3 General matters regarding disputes

26.3.1 Where procedures spelled out in clauses 26.1 and 26.2 are deemed to be inappropriate by the Parties to the dispute, nothing in this Agreement will prevent a party from approaching a court for urgent relief.

26.3.2 The Operator must, notwithstanding any dispute, difference or settlement procedure, continue to provide the Services in accordance with the Agreement.

26.3.3 This clause shall survive the termination or cancellation of this Agreement.

27. Interrelationship between this agreement and documents

27.1 All the documents constituting the Agreement are to be read in conjunction with each other.

27.2 The several documents constituting the Agreement are to be regarded as mutually explanatory. In the case of ambiguities or discrepancies in these documents, or in the case of uncertainty as to the meaning or intention of any part of these documents, the Operator must refer this to the City so that it may be explained and rectified. The Operator shall be responsible for the consequences arising from neglect to take this precaution. When the City is notified of such ambiguities, discrepancies or uncertainties, it must, issue instructions to the Operator directing what is to be done: provided always that if the Operator is of the opinion that the City's instructions will result in additional expenses for it which it could not reasonably have anticipated, it may declare a dispute in accordance with clause 26.

27.3 In case of a conflict the order of precedence of the documents shall be as follows:

27.3.1 this Agreement, including Addenda;

27.3.2 the Tender documents, subject to any amendment thereto in writing;

27.4 These documents, together with any such amendments, constitute the contract documents.

27.5 If there is any conflict or inconsistency between the provisions of this Agreement and the Prospectus, the provisions of this Agreement shall prevail.

28. Postal address

28.1 Any written notice in connection with this Agreement may be addressed:

28.1.1 in the case of the City to:

address : [•]
[•]
[•]
fax no : [•]
e-mail : [•]

and is marked for the attention of [•];

28.1.2 in the case of the Operator to:

address : [•]
[•]
[•]
fax no : [•]
e-mail : [•]

and is marked for the attention of [•].

28.1.3 The notice shall be deemed to have been duly given:

28.1.3.1 5 Business Days after posting (14 Business Days if the address is not in the Republic of South Africa), if posted by registered post (airmail, if available) to the Party's address in terms of clause 28.1;

28.1.3.2 on delivery, if delivered to the Party's physical address in terms of either clause 28.1 or clause 29.1 between 08h30 and 17h00 on a Business Day (or on the first Business Day after that if delivered outside such hours);

28.1.3.3 on despatch, if sent to the Party's then fax number or e-mail address between 08h30 and 17h00 on a Business Day (or on the first Business Day after that if despatched outside such hours);

unless the addressor is aware, at the time the notice would otherwise be deemed to have been given, that the notice is unlikely to have been received by the addressee through no act or omission of the addressee.

- 28.2 A Party may change that Party's address or fax number or e-mail address for this purpose by notice in writing to the other Party, such change to be effective only on and with effect from the 7th Business Day after the giving of such notice.
- 28.3 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 that Party notwithstanding that it was not sent to or delivered at that Party's chosen address in clause 28.1.

29. Address for service of legal documents

29.1 The Parties choose the following physical addresses at which documents in legal proceedings in connection with this Agreement may be served (ie their *domicilia citandi et executandi*):

29.1.1 in the case of the City:

address : [•]
[•]
[•]

29.1.2 in the case of the Operator:

address : [•]
[•]
[•]

- 29.2 A Party may change that Party's address for this purpose to another physical address in the Republic of South Africa by notice in writing to the other Party such change to be effective only on and with effect from the 7th Business Day after the giving of such notice.
- 29.3 Notwithstanding anything to the contrary herein contained, a written notice or communication actually received by a Party shall be an adequate service of such written notice or communication to that Party notwithstanding that it was not sent to or delivered or served at that Party's chosen *domicilium citandi et executandi*.

30. Entire agreement

This Agreement contains all the express 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.

31. No stipulation for the benefit of a third person

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

32. No representations

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.

33. Variation, cancellation and waiver

No contract varying, adding to, deleting from or cancelling this Agreement, and no waiver of any right under this Agreement, shall be effective unless reduced to writing and signed by or on behalf of the Parties.

34. Indulgences

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.

35. Applicable law

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

36. **Jurisdiction of South African courts**

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

37. **Costs**

37.1 Each Party shall bear that Party's own legal costs and disbursements of and incidental to the negotiation, preparation, settling, signing and implementation of this Agreement.

37.2 Any costs, including all legal costs on an attorney and own client basis and VAT, incurred by a Party arising out of or in connection with a breach by another Party shall be borne by the Party in breach, unless provided otherwise in terms of clause 26.

38. **Signature in counterparts**

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.

39. **Independent advice**

Each of the Parties hereby respectively agrees and acknowledges that:

39.1 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

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

40. **Good faith**

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

41. Co-operation

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.

Signed at _____ on _____ 2010

Witness _____ for **CITY OF CAPE TOWN**

DRAFT - NOT FOR SIGNATURE

.....

.....
duly authorised and warranting such
authority

Signed at _____ on _____ 2010

Witness _____ for **OPERATOR**

DRAFT - NOT FOR SIGNATURE

.....

.....
duly authorised and warranting such
authority

Annexure "A"

ASSETS FOR LOAN FOR USE AGREEMENT

Annexure "B"

CONTRACT RATES

Annexure "C"

DEPOT LEASE AGREEMENT

ISSUES FOR CONSIDERATION IN THE DEPOT LEASE AGREEMENT

1. Amount of rental?
2. The City shall give the Operator at least 30 days notice of the date upon which the Operator may take occupation of the Depot.
3. The lease must provide for the rules, guidelines and manuals applicable to the operation and management of the depot.
4. The handing over of the Depot may be partial, where the Depot is to be shared by another operator, or when the construction of the Depot is incomplete.
5. Damage caused as result of work in the areas which have been partially delivered and or handed over will be for the account of the City unless the Operator is liable as a result of its actions.
6. The Operator to be responsible for maintenance, repair of premises, all costs in respect of utilities, rates and taxes.
7. The Operator will be liable to all other operators if Depots are shared for damage to fleet of other operators.
8. Every depot will be handed over after being duly fenced, paved and equipped with electricity, water supplies and sewerage connections and [fuel bowsers?].
9. If Depots are to be shared the lease should regulate how that is to occur and potential for disputes between operators.

Annexure "D"

SPECIFICATIONS

1. Vehicles
2. Performance Criteria
3. Distances Fares
4. Operating Standards
5. Performance
6. Routes
7. Stations
8. Initial Timetables
9. Communications Equipment

Annexure "F"

DESCRIPTION OF PHASE 1A OF IRT SYSTEM

Annexure "G"

DESCRIPTION OF PHASE 1B OF IRT SYSTEM

Annexure "H"

PERFORMANCE GUARANTEE

Note: The following issues need to be covered in the guarantee. The guarantee should guarantee all obligations under the Agreement including:

1. the performance of the Operator's obligations in the Pre-operational Period as well as in the operational period and should be effective as of the Signature Date;
2. the obligations of the Operator to purchase new replacement or additional fleet as required by the terms of the Agreement;
3. the Operator's obligations to maintain Communications Equipment and certain fare collection equipment;
4. the Operator's obligations regarding cleaning and maintenance of Vehicles;
5. the Operator's obligations to not encumber any of the Vehicles;
6. the Operators obligations in terms of the City's call option to purchase the Vehicles on expiry of the Agreement;
7. the Operator's obligations to take out and maintain in force public liability and vehicle insurance;
8. the indemnity granted by Operator to the City to hold the City harmless from any loss or damages resulting from damage to property or the death of or injury to any person which is caused by an intentional or negligent act or omission of the Operator or its agents or employees.

Note: the IRT agreement provides for various levels of cover depending on what breach of performance there has been under the Agreement and at what stage the breach of performance occurs. Do we want to consider similar levels of cover?

Annexure "J"

PENALTIES

OPERATIONS

Reference in Contract Document	Description of Infringement	Offence Category	No of Kms
	Vehicle operating on an unauthorised route		
	Vehicle operating on an unauthorised service		
	Failure to stop at authorised stations and stops		
	Picking up or setting down passengers at unauthorised station and stops		
	Parking of the vehicle in unauthorised locations		
	Failure to perform the trip scheduled by the Control Centre		
	Delay of greater than xx minutes to provide trunk trip scheduled by the Control Centre caused by the failure of the operator		
	Failure to complete the trip scheduled by the Control Centre		
	Failure to advise the Control Centre of a cancelled trip		
	Failure to obey the instructions of the Control Centre		
	Response time to attend to vehicle breakdown more than xx minutes		

Further offences to consider:

- 1 Providing Trips that depart earlier than scheduled.
- 2 Deal with breakdowns at the starting point of a route separately to breakdowns at other points, e.g. the Operator is expected to provide a replacement Vehicle immediately, and also provided that no breakdowns will be accepted as such inside Depots.
- 3 In all cases, however, where there are more than [●] percent Vehicle breakdowns per Month, a penalty of [●Revenue Kilometres] per breakdown over [●]% will be imposed.

This percentage will be based on the average number of Trips per Month totalled over the Month in question.

- 4 Failing to display correct destinations or Duty boards or to display any destinations or Duty boards at all.

CONDITION OF VEHICLES

Reference in Contract Document	Description of Infringement	Offence Category	No of Kms
	Applying decoration, lamps or non functional material inside or outside the vehicle, not originally installed by the manufacturer of the body or chassis		
	Placing any advertising material not authorised by IRT Entity		
	Polarizing, totally or partially, side, front, and back windows		
	Altering the paintwork or visual appearance of the vehicles unless directed and authorised by the IRT Entity		
	Vehicle with damaged sidewalls or worn tyres		
	Vehicle with severe dents and visible damage		
	Vehicle operating with visible excessive exhaust smoke		
	Vehicle operating with excessive levels of noise		
	Vehicle with oil leaks		
	Outside of the vehicle dirty at the start of the first trip of the day		
	Inside of the vehicle dirty at the start of the first trip of the day		
	Lights not working		
	Cracked, broken, or missing rear view mirrors or windows		
	Defective windscreen wipers		
	Defective restraints for wheelchairs		

	Missing, Broken or torn seats		
	Broken or damaged grab rails		
	Malfunctioning of doors and emergency exits		
	Loose or broken floor strips		
	Absence of fire extinguishing equipment, or use beyond manufacturer's certified expiry date		
	Lack of first aid kit		
	Failure to operate the Fare Collection equipment or the AVL equipment at the start of the journey		
	Operate the vehicle with a failure to report defective Fare Collection equipment to the Control Centre		
	Operate the vehicle with a failure to report defective AVL system to the Control Centre		
	Operate the vehicle with a failure to report defective passenger information system to the Control Centre		

Further offences to consider:

- 5 Vehicles must be roadworthy and comply at all times with the National Road Traffic Act, 1996 (Act No. 93 of 1996) and other relevant legislation. Where a vehicle fails to comply with any legal requirement, it must be withdrawn from service immediately until the defect is rectified, and penalties will be imposed for failing to operate.
- 6 The Operator shall not provide any Services other than in Vehicles of the right type, quality and age as specified in the Specifications.
- 7 Failing to maintain or repair or to maintain operational the Communications Equipment

ADMINISTRATION

Reference in Contract Document	Description of Infringement	Offence Category	No of Kms
	Failure to provide complete and accurate information as stipulated by the IRT Entity		

	Failure to keep proper and complete maintenance records on vehicles including history of defects and repairs		
	Failure to adhere to the maintenance protocols as stipulated by the vehicle manufacturer		
	Failure to keep maintain valid operating licences		
	Failure to provide access to ITR Entity officials for the inspection of records stipulated by the IRT Entity		
	Failure to give access and allow inspection of depots to IRT officials		
	Failure to adhere to the conditions of employment of drivers with respect to hours of operation		
	Employment in service of a driver under suspension		

Further offences to consider:

If the Operator fails to comply with the targets and milestones of the BEE Codes of Good Practice a penalty of [**•Revenue Kilometres**] shall be imposed. Should a Section 9 BEE Sector Code of Good Practice be gazetted for the Vehicle industry in terms of the BEE Act, the provisions thereof will be used to determine and evaluate the BEE status of tenderers.

PENALTIES AND DRIVER SANCTION

Reference in Contract Document	Description of Infringement	Action against Driver	Offence Category	No of Kms
	Leaving of vehicle in service without cause and authority of the Control Centre			
	Failure to carry company identity document			
	Causing an accident and damage to a IRT vehicle or IRT infrastructure			
	Refusal to give access to the vehicle by IRT entity officials	One day suspension		
	Failure to report an accident to the Control Centre	One day suspension		

	Failure to obey the instructions of the Control Centre	One day suspension		
	Failure to obey instructions from the Control Centre more than 3 occurrences in a month	Withdrawal from the system		
	Conveying of companions	One day suspension		
	Exceeding the speed limit	One day suspension		
	Crossing a red light	One day suspension		
	Drunk on duty or failure of a test for alcohol or drugs	Withdrawal from the system		
	Carrying of weapons	Withdrawal from the system		
	Charging and collections of fares	Withdrawal from the system		
	Verbal or physical abuse of passengers	Withdrawal from the system		