Operation and Maintenance contract

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**THIS AGREEMENT** is dated the day of

**BETWEEN:**

1. **ESKOM HOLDINGS SOC LIMITED**, a State Owned Company with limited liability (Registration No. 2002/015527/30) incorporated under the laws of South Africa and having its principal place of business at Megawatt Park, Maxwell Drive, Sunninghill, in the Republic of South Africa (“the Employer”).
2. [ ] (Company No. [ ]) whose registered office is at [ ] (the “the Contractor”).

**WHEREAS:**

(A). The PV plant is located on the Remainder of Portion 0 of the farm Duvha Kragstasie 337JS in Mpumalanga. The Duvha Power Station is located approximately 15 km east of Witbank and forms part of the Emalahleni Local Municipality (ELM) of the Nkangala District Municipality in Mpumalanga. Geographically, the site is in the vicinity of 25° 58'00.25" S, 29°21'33.60" E.

(B) In order to procure the construction of the Project Eskom will/has entered into contracts with (i)a Contractor in relation to the design, supply, installation, commissioning and hand over of the Project ("the ECC Contract"),

(C) The Contractor is experienced in the operation, maintenance and repair of the Solar PV and Eskom wishes to retain the Contractor to operate and maintain ( Preventative, Predictive and Corrective) the Duvha Solar PV Plant comprised in the Project for a period of two years and to warrant the availability of the Duvha Solar PV Plant

(D) The Contractor wishes to perform the operation and maintenance ( Preventative, Predictive and Corrective) of the Duvha Solar PV Plant comprised in the Project and has agreed to warrant the availability of the Duvha Solar PV Plant on which basis Parties have agreed to enter into this Agreement.

**THE PARTIES AGREE as follows:**

1. DEFINITIONS AND INTERPRETATION
   1. In this Agreement, its preamble and its recitals, the following capitalised words and expressions shall have the following meanings and cognate expressions shall have the corresponding meanings:

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| **“Additional Cost Services”** |  | means as defined in **Clause 19.4**; |
| “**Additional Services”** |  | means any additional works or services which are instructed as such by the Employer under **Clause 9** or are expressly identified as being Additional Services in this Agreement; |
| “**Additional Services Proposal**” |  | means as defined in **Clause 9.2**; |
| “**Affiliate**” |  | means any other entity that directly or indirectly through one or more intermediaries, controls or is controlled by, or is under the common control with the Party in question; |
| **“Annual Fee”** |  | means the annual fee set out in **Schedule 4** payable by the Employer to the Contractor for the provision of:  (i) the Preventative Maintenance;  (ii) the Corrective Maintenance;  (iii) Predictive Maintenance;  (iv) Operating of the Duvha Solar PV Plant;  (v) the Reporting and Monitoring Services. |
| **“Annual Fee Services”** |  | means as defined in **Clause 19.1**; |
| “**Approval**” |  | means any permission, permit, approval, consent, licence, authorization, registration, grant, exemption, acknowledgement or agreement to be obtained from any Competent Authority by either Party under any Law to enable either Party to perform its obligations in accordance with the provisions of this Agreement; |
| **“Availability”** |  | means the availability of the Duvha Solar PV Plant as calculated in accordance with **Schedule 11**; |
| **“Business Day”** |  | means a day, other than a Saturday or a Sunday or an official public holiday in the Republic of South Africa; |
| **“Change in Law”** |  | means:  (a) the adoption, enactment, promulgation, coming into effect, repeal, amendment, reinterpretation, change in application or other modification after the Effective Date of any Law, excluding (i) the enactment of any Bill, but only if such Bill is enacted without any material changes being made to the contents of such Bill from the form published in the Gazette (as defined in the Interpretation Act, 1957) as at the Effective Date, and (ii) any such modification in Law relating to any taxes, charges, imposts, duties, levies, deductions or withholdings that are assessed or payable in relation to a person’s income such as any income taxes, corporation taxes, taxes on capital gains or any one-off windfall taxes on profits;  (b) any Contractor Permit being terminated, withdrawn, amended, modified or replaced, other than (i) in accordance with the terms upon which it was originally granted, (ii) as a result of the failure by the Contractor to comply with any condition set out therein, or (iii) as a result of any act or omission of the Contractor, any Affiliate of the Contractor or any Sub-Contractor;  (c) any license, permit or similar approval for which the Contractor makes a proper application at the appropriate time to the Competent Authority, and which application the Contractor diligently pursues, not being granted, other than if the refusal by such Competent Authority to grant such approval (i) is made in accordance with any applicable Law regulating the granting of such approval, (ii) could (including by reasonable anticipation) reasonably have been or be avoided or overcome by the Contractor following Good Industry Practice, or (iii) is the result of any act or omission of the Contractor, any Affiliate of the Contractor or any Sub-Contractor; |
| **“Competent Authority”** |  | means the Government or any subdivision thereof and any ministry or governmental, electricity industry regulator other regulatory department, body, instrumentality, agency or authority of South Africa or any subdivision thereof having jurisdiction over (a) this Agreement, (b) a Party to this Agreement, or (c) any asset or transaction but excluding the Employer acting in its capacity under this Agreement; |
| **“Component Defect”** |  | means any Component supplied by the Contractor under this Agreement which is not in accordance with the requirements of this Agreement; |
| **“Component Guarantee Period”** |  | means:  (a) in respect of Components provided by the Contractor in the performance of the Services (but excluding Spare Parts purchased by the Employer for their own stock as an Additional Service) two (2) years from the date of incorporation of the Component into the Plant; and  (b) in the case of Spare Parts supplied to the Employer by the Contractor, for the Employer’s own stock as an Additional Service the earlier of (i) two (2) years from the date of incorporation into the Plant or (ii) two (2) years from the delivery of the Component to Site (or such other location as the Employer’s stock may be stored); |
| **“Components”** |  | means all materials, components, parts (including replacement parts), and accessories to be provided by the Contractor for incorporation into the Plant under this Agreement including Major Components; |
| “**Consumables**” |  | means all those items that are consumed, installed, added to or otherwise used in the process of performing the Services and actual operation of the Duvha Solar PV Plant including (but not limited to) solvents, grease, lubricants, other fluids, wire ties, wire connectors, mechanical fasteners, seals, springs and fittings; |
| **“Contractor”** |  | Means the party identified as such at the beginning of this Agreement and its successors in title and permitted assigns; |
| **“Contractor Cost Corrective Maintenance”** |  | means as defined in **Clause 6.9**; |
| **“Contractor Event of Default”** |  | means as defined in **Clause 33.1**; |
| **“Contractor’s Equipment”** |  | means all apparatus, machinery, tools, instruments, materials, equipment, vehicles and other things required for the performance of the Services excluding Components, Consumables and any other things forming part of the Plant; |
| **“Contractor’s Personnel”** |  | means all personnel whom the Contractor utilises on the Site, who may include the staff labour and employees of the Contractor and each Sub-Contractor and any other person assisting the Contractor in the performance of the Services; |
| **“Contractor’s Representative”** |  | means the person nominated by the Contractor and approved by the Employer in accordance with **Clause 34** to perform the duties delegated by the Contractor; |
| **“Control”** |  | means the beneficial ownership of the majority in number of the issued equity of any entity (or the whole or majority of the entity’s assets), and/or the right or ability to direct or otherwise control the entity or the votes attaching to the majority of the entity’s issued share capital and “controlled” or “under common control” shall have a similar meaning; |
| **“Contractor Permits”** |  | means the Permits to be obtained by the Contractor pursuant to **Clause 5.2**; |
| **“Corrective Maintenance”** |  | means any Corrective repair required to a part of the Plant in order to maintain the baseline design and to achieve the Guaranteed Performance Ratio and Availability; |
| **"Dispute"** |  | shall be interpreted in the widest sense and shall include any dispute or difference in connection with or in respect of the conclusion or existence of this Agreement, the carrying into effect of this Agreement, the interpretation or application or the provisions of this Agreement, the Parties respective rights and/or obligations in terms of and/or arising out of this Agreement and/or the validity, enforceability, rectification, termination or cancellation, whether in whole or in part, of this Agreement: |
| **“ECC Contract”** |  | means the contract for the design, supply, installation, commissioning and hand-over of the Duvha Solar PV Plant between the Employer and the ECC Contractor involving all annexes, schedules and appendices thereto; |
| **"ECC Contractor"** |  | means the person(s) whose bid to perform the ECC Contract has been accepted by the Employer under the ECC Contract and is named as the Contractor in the ECC Contract Agreement, and includes the legal successors or permitted assigns of the ECC Contractor. |
| **“Effective Date”** |  | means the date stated on the front of this Agreement, which shall be the same date as the Completion Date of the ECC Contract; |
| **“The Employer”** |  | means the party identified as such at the beginning of this Agreement and its successors in title and permitted assigns; |
| **“The Employer Cost Corrective Maintenance”** |  | means as defined in **Clause 6.9**; |
| **“The Employer Event of Default”** |  | Means as defined in **Clause 33.4**; |
| **“The Employer Policies and Procedures”** |  | the Employer’s policies and procedures attached at **Schedule 9** and any additions and modifications thereto in accordance with this Agreement; |
| **“The Employer’s Representative”** |  | means the person or company appointed by the Employer pursuant to **Clause 34;** |
| **“Event of Insolvency”** |  | means, in relation to either Party, that Party becomes bankrupt or insolvent, has a receiving order made against it, compounds with its creditors, or, if the Party is a corporation, a resolution is passed or order is made for its winding up, other than a voluntary liquidation for the purposes of amalgamation or reconstruction, a receiver is appointed over any part of its undertaking or assets, or if the Party takes or suffers any other analogous action in consequence of debt; |
| **“Facilities”** |  | means Duvha Solar PV Plant |
| **“Force Majeure”** |  | means as defined in **Clause 22.1**; |
| **“Good Industry Practice”** |  | means the practices, methods, acts, techniques and standards in accordance with best international practice which are prudent and in accordance with applicable and generally accepted good practice for O&M contractors on Solar PV projects exercising that degree of skill, diligence, prudence and foresight which would reasonably and ordinarily be expected from a skilled and experienced contractor engaged and experienced in the supply, operation and maintenance of Solar PV Plant of similar size, nature and complexity as the Duvha Solar PV Plant in similar physical conditions and environment under similar obligations to those set out in this Agreement; |
| **“Government”** |  | means the Government of the Republic of South Africa as contemplated in The Constitution of the Republic of South Africa, 1996; |
| **“Guaranteed Availability”** |  | means the Availability of the Plant as guaranteed by the O&M Contractor. |
| **Guaranteed Performance Ratio** |  | means the performance ratio of the Plant as guaranteed by the O&M Contractor. |
| **"Independent Third Party"** |  | means an independent third party who will be appointed as and when a dispute arises as more fully defined in **Clause 30;** |
| **“Law”** |  | means any constitution, statute, ordinance, treaty, decree, proclamation, by-law, regulation, delegated or subordinated legislation or other legislative measure, as well as the common law and customary law and any judgement, decision, order or rule of any court or tribunal with relevant jurisdiction, in each case having the force of law in the Republic of South Africa; |
| **“Losses”** |  | means any and all claims, judgements, demands, damages, fines, losses, liabilities, interest, awards, penalties, causes of action, litigation, lawsuits, administrative proceedings, administrative investigations, costs and expenses including reasonable legal costs; |
| **“Major Components”** |  | means with respect to a Duvha Solar PV Plant the solar panels, inverter, batteries, cables, combiner boxes, cable trays, solar PV mounting structures ,trackers, transformers and switchgear. |
| **“Month”** |  | means a period of one calendar month according to the Gregorian calendar, each such period beginning at 00:00 hours on the first day of such calendar month and ending at 24:00 hours on the last day of such calendar month; |
| **“O&M Manuals”** |  | means the operation and maintenance manuals and other relevant reference documents (including warranty service manual) relevant to the Duvha Solar PV Plant which will be provided under the ECC Contract, which O & M Manuals will become part of this Agreement; |
| **“Operational Acceptance Certificate”** |  | means “Operational Acceptance Certificate” also referred to as Take Over under the ECC Contract. |
| **“Party”** |  | means a party to this Agreement and “Parties” shall be construed; accordingly, |
| **“Permits”** |  | means all Governmental authorisations, approvals, orders, licences, permits, franchises, consents, registrations, declarations or filings required to be obtained for the lawful performance of the obligations under this Agreement; |
| **Plant** |  | Means Duvha Solar PV Plant |
| **"Performance Liquidated Damages** |  | means the amount of liquidated damages which are payable by the Contractor to the Employer on an annual basis in the event that the Contractor fails to meet the Guaranteed Availability duringeach year of the period referred to in **Clause 18.1** as calculated in accordance with **Clause 18.5**; |
| **Predictive Maintenance** |  | means condition-based maintenance carried out following a forecast derived from the analysis and evaluation of the significant parameters of the degradation of the item/equipment. |
| **“Preventative Maintenance”** |  | means the Preventative maintenance works and services to be provided in respect of all of the Plant as set out in **Schedule 1** and the O&M Manuals; |
| **“Programme of Preventative Maintenance”** |  | The programme for the provision of Preventative Maintenance to be provided in accordance with **Clause 6.3** and updated by the Contractor in accordance with **Clause 6.4**; |
| **“Rand or ZAR”** |  | means the lawful currency of South Africa and a Cent is a one hundredth (100th) part of a Rand; |
| **“Reporting and Monitoring Services”** |  | means the reporting and monitoring services to be provided by the Contractor as set out in **Clause 8**; |
| **Response Time** |  | means  (a) in relation to a fault, the time required for the Contractor to:  (i) where necessary, mobilise to attend the Site; in this instance the response time is as defined in **Schedule 15** and measured from the earlier of the time that the Contractor detects the causes and circumstances of the fault, or receives an alarm notification from Site or the time that the Employer (or a third party appointed by the Employer) notifies the Contractor of any fault.  (b) in relation to a Spare Part, the time required for the Contractor to carry out the activities identified **Schedule 15.** |
| **Response Time Price Adjustment** |  | means the sum identified in **Schedule 15** which may be deducted by the Employer from the amount payable in the relevant monthly invoice pursuant to **Clause 19**. |
| **“SCADA”** |  | means the supervisory control and data acquisition system for the Duvha Solar PV Plant and associated equipment supplied under the ECC Contract; |
| **“Services”** |  | means the Preventative Maintenance, Corrective Maintenance, Predictive Maintenance, the Reporting and Monitoring Services, Operations and any Additional Services; |
| “**Site**” |  | means the land and other places upon which the Facilities are installed, and such other land or places as may be specified in this Agreement as forming part of the Site; |
| **“Site Safety Rules”** |  | Means the Employer’s safety rules for the Site attached at **Schedule 13** as may be updated from time to time in accordance with this Agreement; |
| **“Spare Parts”** |  | means the spare Components provided or to be provided by the Contractor for incorporation into the Plant but which are not incorporated at the time of supply; and to be maintained to the minimum quantity or if no quantity is specified, at the quantity necessary for the performance of the Services in accordance with this Agreement. |
| **“Specification”** |  | means the scope of work attached at **Schedule 5**; |
| “**Sub-Contractor**” |  | including manufacturers, means any person to whom execution of the whole or any part of the Services, including preparation of any design or supply of any Components or Spare Parts, is sub-contracted directly or indirectly by the Contractor, and includes its legal successors or permitted assigns; |
| “**Term**” |  | means the period commencing upon Operational Acceptance Certificate and ending 2 (Two) years from such date unless:  (i) this Agreement is terminated by either Party in accordance with the terms of this Agreement,  (ii) |
| **“Works Defect”** |  | means any works or services provided under this Agreement which are not in accordance with the requirements of this Agreement; |
| **“Works Guarantee Period”** |  | Means twenty four (24) months from completion of any works or services carried out by the Contractor under this Agreement; |

* 1. Unless the context of this Agreement otherwise requires:
     1. the index and headings of Clauses to this Agreement are for convenience only and shall be ignored in constructing this Agreement;
     2. words importing the singular shall include the plural and vice versa;
     3. words importing one gender shall include the other gender;
     4. all references to any time shall be based on co-ordinated universal time plus two hours (UTC + 2:00);
     5. “**person**” includes a corporation, company, firm, government, state or agency of a state or any association or partnership (whether or not having separate legal personality) or any of the foregoing that is recognised by Law as the subject of rights and duties, and references to a “**person**” (or to a word incorporating a person) shall be construed so as to include that person’s successors in title and assigns or transferees;
     6. in computation of periods of time from a specified day to a later specified day, “**from**” means from and including and “**until**” or “**to**” means to and including;
     7. when any number of days is prescribed in this Agreement, that number shall be reckoned exclusively of the first and inclusively of the last unless the last day falls on a day which is not a Business Day, in which case the last day shall be the next succeeding Business Day;
     8. “**include**”, “**including**” and “**in particular**” shall not be construed as being by way of limitation, illustration or emphasis only and shall not be construed as, nor shall they take effect as, limiting the generality of any preceding words;
     9. any references to either “**Party**” or any person shall include its legal successors and permitted assignees;
     10. where figures are referred to in numerals and in words, if there is any conflict between the two, the words shall prevail.
     11. references to this “**Agreement**” or any other document shall be construed as references to this Agreement and its Schedules and Annexes or that other document as amended, varied, novated, supplemented, or replaced from time to time;
     12. any reference to “**writing**” or “**written**” shall include all methods of reproducing words in a legible and non-transitory form;
     13. any reference to days (other than a reference to Business Days), a month or year shall be construed as reference to a Gregorian calendar day, month or year, as the case may be;
     14. references to legislation include any statute, by-law, regulation, rule, subordinate or delegated legislation or order, and reference to any legislation is to such legislation as amended, modified or consolidated from time to time, and to any legislation replacing it or made under it;
     15. the terms “**hereof**”, “**herein**”, “**hereunder**” and similar words refer to this entire Agreement and not to any particular Clause, paragraph, Part, Schedule or any other subdivision of this Agreement;
     16. the rule of construction that, in the event of ambiguity, an agreement shall be interpreted against the Party responsible for the drafting thereof, shall not apply in the interpretation of this Agreement;
     17. the expiration or termination of this Agreement shall not affect such of the provisions of this Agreement as expressly provide that they will operate after any such expiration or termination or which of necessity must continue to have effect after such expiration or termination, notwithstanding that these provisions do not expressly state this; and
     18. if any provision in **Clause 1.1** is a substantive provision conferring rights or imposing obligations on either Party then, notwithstanding that such provision is contained in such Clause, effect shall be given thereto as if such provision were a substantive provision in the body of this Agreement.

1. CONTRACT DOCUMENTS
   1. This Agreement comprises these terms and conditions hereto each of which is incorporated into this Agreement herein and shall be deemed to form and be read and construed as part of this Agreement.
   2. The documents comprised in this Agreement shall have priority in the following order:
      1. these terms and conditions;
      2. the schedules.
   3. Any inconsistency or ambiguity within or between the documents comprised in this Agreement which is not resolved by the order of priority of such documents referred to in **Clause 2.2** shall be resolved by a written instruction of the Employer to resolve the ambiguity or discrepancy, which instruction shall be complied with and acted upon by the Parties. An instruction issued pursuant to this **Clause 2.3** shall not be treated as an Additional Service and the Contractor shall not be entitled to any additional payment (whether by way of adjustment to the Annual Fee or otherwise) or extension of time as a result of an instruction issued under this **Clause 2.3**.
2. TERM
   1. This Agreement shall become effective and come into force as of the Effective Date.
   2. The Contractor shall provide the Services during the Term (save for **Clauses 6.3 and 15** which shall apply in advance of the Term). The Employer shall pay the Contractor during the Term for the proper performance of such Services in accordance with the terms of this Agreement.
3. ETHICS
   1. Any offer, payment, consideration, or benefit of any kind made by the Contractor, which constitutes or could be construed either directly or indirectly as an illegal or corrupt practice, as an inducement or reward for the award or in execution of this contract constitutes grounds for terminating the Contractor’s obligation to provide the Services or taking any other action as appropriate against the Contractor (including civil or criminal action).
   2. The Employer may terminate the Contractor’s obligation to provide the Services if the Contractor (or any member of the Contractor where the Contractor constitutes a joint venture, consortium or other unincorporated grouping of two or more persons or organisations) is found guilty by a competent court, administrative or regulatory body of participating in illegal or corrupt practices. Such practices include making of offers, payments, considerations, or benefits of any kind or otherwise, whether in connection with any procurement process or contract with the Employer or other people or organisations and including in circumstances where the Contractor or any such member is removed from the an approved vendor data base of the Employer as a consequence of such practice.
   3. The Employer may claim damages as a result of termination arising from the breach by the Contractor of this clause.
4. CONTRACTOR’S GENERAL OBLIGATIONS
   1. During the Term the Contractor shall carry out and complete the Services:
      1. in accordance with all applicable Laws and Permits;
      2. in accordance with Good Industry Practice;
      3. in accordance with the O&M Manuals;
      4. in a good and workmanlike manner, using good quality materials plant goods and equipment fit for the purpose for which they are intended;
      5. in accordance with the requirements of internationally approved O&M standards for solar PV plant ; and
   2. Save for obtaining and maintaining the environmental permit( Employer Permits) which shall be the responsibility of the Employer , the Contractor shall be responsible for obtaining and maintaining all the other Permits which may be required in order for the Contractor to lawfully perform the Services in accordance with this Agreement and for complying with and discharging any conditions of such Permits. The Contractor shall indemnify the Employer against all Losses incurred or to be incurred by the Employer as a result of a failure by the Contractor to comply with its obligations under this **Clause 5.2**.
   3. The Contractor shall be responsible and hereby accepts the risk of the transport of all Components, Consumables, Contractor’s Equipment and other things required for the performance of its obligations under this Agreement to the Site. Without prejudice to the generality of the foregoing the Contractor shall:
      1. be responsible for packing, loading, transporting, receiving, and unloading, storing and protecting all Components, Consumables, Contractor’s Equipment and other things required to perform its obligations under this Agreement;
      2. provide all necessary signs or directions which may be required to transport all Components, Consumables, Contractor’s Equipment and other things required to carry out its obligations under this Agreement to the Site and obtain all necessary permissions which may be required from relevant authorities or third party landowners for the use of the access roads to the boundary of the Site;
      3. use all reasonable endeavours to prevent any road, bridge or other structure from being damaged by the Contractor’s traffic.
   4. The Contractor shall handle all imported Components, Consumables and Contractor’s Equipment at the point(s) of import and shall handle any formalities for customs clearance provided that if applicable Laws or regulations require any application or act to be made by or in the name of the Employer, the Employer shall take all necessary steps to comply with such Laws or regulations.
   5. The Contractor shall furnish its service personnel with such Contractor’s Equipment as is necessary to perform the Services in accordance with this Agreement. In performing the Services the Contractor shall use appropriately skilled and trained labour, having regard to the nature of the works and services to be performed. The Contractor shall if requested supply the Employer with the relevant training records of the Contractor’s personnel engaged or to be engaged in the performance of the Services to verify their ability to fulfil the tasks comprised in the Services. The Contractor shall if requested supply the Employer with the curricula vitae of the Contractor’s personnel engaged or to be engaged in the performance of the Services which contain the experience of the Contractor's personnel on similar projects.
   6. The Contractor shall ensure that all Components and Consumables used in the provision of the Services shall be new and of good quality unless the prior written approval of the Employer has been obtained to utilise refurbished Components.
   7. In the event that the Employer’s prior written approval is obtained to utilise refurbished Components such Components shall be refurbished in accordance with Good Industry Practice and shall be of no lesser quality (including the same design life) as new Components and shall be fit for the purpose for which they are intended. The Contractor shall throughout the Term maintain a permanent presence on the Site of suitably experienced, trained and qualified personnel to perform the Service. The Contractor’s personnel are listed in **Schedule 16**.
5. SERVICES

*Preventative Maintenance*

* 1. Throughout the Term the Contractor shall carry out the Preventative Maintenance in accordance with the terms of this Agreement including the provision of all necessary Components, Consumables, labour and Contractor’s Equipment. The Preventative Maintenance shall include the works and services as required by the O&M Manuals and as may otherwise be required in order to maintain the Plant baseline design and the Guaranteed Performance Ratio and Guaranteed Availability.
  2. The Contractor shall not be required to carry out any Preventative Maintenance which is required as a result of:
     1. The Employer operating the Plant in a manner which is not in accordance with the O&M Manuals (but excluding any operation by the Contractor);
     2. an event of Force Majeure;
     3. terrorism or vandalism of the Plant (except if such terrorism or vandalism is carried out by an employee or Sub-Contractor of the Contractor);
     4. malicious or intentional damage or negligence on the part of the Employer;
     5. work undertaken by third parties (excluding any Sub-Contractor) not approved by the Contractor save where such work is carried out as a result of a failure by the Contractor to comply with its obligations under this Agreement or the ECC Contract.
  3. The Contractor shall provide to the Employer four (4) months prior to the commencement of the Term a programme for the provision of the Preventative Maintenance, for acceptance, in accordance with this Agreement for the next twenty four (24) months which is set out in **Schedule 3** with such amendments as the Parties may from time to time agree (“**Programme of Preventative Maintenance**”). The Programme of Preventative Maintenance shall provide for the Preventative Maintenance to be carried out at such intervals as is required to comply with the requirements **Clause 5.1** of this Agreement.
  4. The Contractor shall update the Programme of Preventative Maintenance when instructed by the Employer to do so for the remainder of the Term. The Contractor shall issue each updated Programme of Preventative Maintenance to the Employer within 10 (ten) Business Days of being instructed to do so. This updated Programme of Preventative Maintenance shall be subject to the Employer's approval.
  5. The Contractor shall carry out the Preventative Maintenance on the dates and at times stated in the Programme of Preventative Maintenance provided that the Contractor shall be entitled to adjust the times and dates for the provision of the Preventative Maintenance by up to 5 (five) days (before or after) from the date for the performance of such Preventative Maintenance provided for in the Programme of Preventative Maintenance provided that the Contractor notifies the Employer in writing at least 5 (five) days in advance and provided further that such time adjustment does not have any adverse impact on the performance of the Duvha Solar PV Plant.
  6. The Contractor shall use reasonable endeavours (but without being required to prejudice its other obligations under this Agreement) to programme and carry out the Preventative Maintenance on such dates and at such times as will maximise the Availability and energy output of the Duvha Solar PV Plant and consistent with the Employer's requirements including using reasonable endeavours to avoid any shutdown of Duvha Solar PV Plant
  7. If the Contractor fails to carry out the Preventative Maintenance in accordance with the requirements of this Agreement the Employer may give written notice to the Contractor requiring the Contractor to carry out the Preventative Maintenance. If the Contractor fails to carry out the Preventative Maintenance in accordance with this Agreement within 20 (twenty) days of the Employer’s written notice then the Employer shall be entitled to retain a third party to carry out such Preventative Maintenance and to recover any costs incurred by the Employer from the Contractor. Any Preventative Maintenance carried out by a third party pursuant to this **Clause 6.7** shall be at the Contractor’s risk (and shall not invalidate any warranty, guarantee or obligation under this Agreement or the ECC Contract) provided that such Preventative Maintenance is carried out to the standards required by this Agreement. The Contractor will co-operate with the Employer and facilitates and permit the use of all required information, materials and other matter (including Contractor’s documents and all other drawings, computer aided design materials, technical data, software, models, plans, designs, programs, diagrams, evaluations, details, specifications, schedules, reports, calculations, manuals or other documents or recorded information (electronic or otherwise) which have been or are at any time prepared by or on behalf of the Contractor under the contract or otherwise for and/or in connection with the Services) and generally does all things reasonably required by the Employer to achieve this end.

*Corrective Maintenance*

* 1. Throughout the Term the Contractor shall carry out any Corrective Maintenance which may be required in accordance with this Agreement including the provision of necessary Components, Consumables, labour and Contractor’s Equipment. The Corrective Maintenance shall include the carrying out of all works and services required to effect any repair which may be required to the Plant.
  2. Any Corrective Maintenance which is required as a result of the Contractor’s failure to comply with its obligations under this Agreement or is otherwise required as the result of a negligent act or omission of the Contractor shall be carried out at the Contractor’s own cost (“**Contractor Cost Corrective Maintenance**”) otherwise it shall be carried out at the Employer’s cost (“**The Employer Cost Corrective Maintenance**”) in accordance with this **Clause 6**. Nothing in this Agreement shall limit the Contractor’s obligations or liability to correct defectsas defined in the ECC Contract) including but not limited to Latent Defects in accordance with the ECC Contract and for the avoidance of doubt the Contractor shall not be entitled to any payment under this Agreement for the correction of Defects pursuant to the ECC Contract.
  3. As soon as either Party is aware of a requirement for Corrective Maintenance they shall give immediate notice to the other Party upon becoming aware of the requirements for the Corrective Maintenance.
  4. Where the Corrective Maintenance required is Contractor Cost Corrective Maintenance the Contractor shall inform the Employer as soon as possible indicating the need to perform the Corrective Maintenance and agree on a timeline to repair the Plant and return the Plant to the baseline design and to achieve the Guaranteed Performance Ratio and Guaranteed Availability. The Employer to react reasonable in determining and agreeing the repair period. The Contractor shall proceed diligently, as agreed with the Employer and following correct processes (e.g PTW), with such Contractor Cost Corrective Maintenance and shall complete the same as agreed and as soon as reasonably practicable. Where the Contractor fails to complete the Contractor Cost Corrective Maintenance within the period required by this **Clause 6.11** and the response times specified in **Schedule 15** (which period shall be extended where resolving of Contractor Cost Corrective Maintenance is delayed by the Employer or an event of Force Majeure) the Contractor shall pay Response Time Price Adjustment as stated in **Schedule 15**.
  5. Without prejudice to the Contractor’s obligations under **Clause 6.11** within 24 hours of the Contractor becoming aware of a requirement for Contractor Cost Corrective Maintenance the Contractor shall provide to the Employer the information referred to in **Clauses 6.13.1, 6.13.2, 6.13.4 and 6.13.5** and as agreed with the Employer.
  6. Where the Corrective Maintenance required is the Employer Cost Corrective Maintenance the Contractor shall provide the Employer within the time stipulated in Operation and Maintenance Requirements but not longer than five (5) Business Days of the Contractor becoming aware of the need for such the Employer Cost Corrective Maintenance provide to the Employer a proposal which shall include:
     1. details of the Corrective Maintenance required including a prognosis of the cause of the event giving rise to the need for the Corrective Maintenance;
     2. a method statement setting out the Contractor’s proposal for carrying out the Corrective Maintenance;
     3. a proposed cost together with a detailed breakdown thereof for the carrying out of the Corrective Maintenance which shall be calculated in accordance with **Clause 19.5.2**;
     4. a programme for carrying out of the Corrective Maintenance which shall be prepared on the basis of the Contractor carrying out and completing the Corrective Maintenance as soon as reasonably practicable and in accordance with Good Industry Practice;
     5. any protective or mitigation measures which the Contractor would recommend pending completion of the Corrective Maintenance;

(“a **Proposal**”).

* 1. In the event of a dispute between the Parties as to whether any Corrective Maintenance required is Contractor Cost Corrective Maintenance or the Employer Cost Corrective Maintenance such dispute shall be referred to the Independent Third Party for determination. Notwithstanding the existence of such dispute the Employer may instruct the Contractor to proceed with the Corrective Maintenance pending resolution of such dispute.
  2. Within five (5) of receipt of the Contractor’s Proposal the Employer shall either:
     1. confirm to the Contractor whether it wishes the Contractor to carry out the Employer Cost Corrective Maintenance in accordance with the Proposal in which case the Contractor shall carry out such Corrective Maintenance in accordance with this Agreement and within the time stated in the Proposal, and the Employer shall pay the Contractor in accordance with **Clause 19.5.1**; or
     2. respond in writing with comments in respect of the Contractor’s Proposal in which case the Contractor shall re-issue the Proposal having considered and had due regard for the Employer’s comments and the provisions of this **Clause 6.15** shall re-apply; or
     3. confirm to the Contractor that it does not wish the Contractor to carry out the Employer Cost Corrective Maintenance.
  3. For the avoidance of doubt any failure by the Employer to respond to a Proposal shall constitute a rejection and not an acceptance of the Proposal.
  4. Notwithstanding **Clauses 6.13** to **6.15** the Employer may at any timeinstruct the Contractor to proceed with any Employer Cost Corrective Maintenance notwithstanding that a cost and/or time for completion of such Corrective Maintenance may not have been agreed in which case the Contractor shall carry out and complete such Corrective Maintenance within a reasonable time and shall be entitled to the cost of carrying out such the Employer Cost Corrective Maintenance, which shall be valued in accordance with **Clause 19.5.2**.
  5. If the Contractor fails to carry out the Corrective Maintenance in accordance with the requirements of this Agreement the Employer may give written notice to the Contractor requiring the Contractor to carry out the Corrective Maintenance. If the Contractor fails to carry out the Corrective Maintenance in accordance with this Agreement within twenty (20) days of the Employer’s written notice then the Employer shall be entitled to retain a third party to carry out such Corrective Maintenance and to recover the additional costs incurred by the Employer from the Contractor. Any Corrective Maintenance carried out by a third party pursuant to this **Clause 6.18** shall be at the Contractor’s risk (and shall not invalidate any warranty, guarantee or obligation under this Agreement or the ECC Contract) provided that such Corrective Maintenance is carried out to the standards required by this Agreement. The Contractor will co-operate with the Employer and facilitates and permits the use of all required information, materials and other matter (including Contractor’s documents and all other drawings, CAD materials, technical data, software, models, plans, designs, programs, diagrams, evaluations, details, specifications, schedules, reports, calculations, manuals or other documents or recorded information (electronic or otherwise) which have been or are at any time prepared by or on behalf of the Contractor under the contract or otherwise for and/or in connection with the Services) and generally does all things reasonably required by the Employer to achieve this end.

*Predictive Maintenance*

* 1. The Contractor shall throughout the Term perform Predictive Maintenance and shall use appropriate monitoring software systems for the monitoring, analysing and evaluation of significant parameters to determine degradation of an item.
  2. The Contractor shall notify the Employer of any Corrective Maintenance within 24 hours after detecting the degradation of an item. The provision of **Clauses 6.8 to 6.18** shall apply to Corrective Maintenance identified during the performance of Predictive Maintenance.

*Response Time*

* 1. The Contractor shall carry out the Services so as to meet the Response Times set out in **Schedule 15** at all times, seven (7) days a week.
     1. If the Contractor fails to meet the Response Times set out in **Schedule 15**, the Employer shall be entitled to deduct the Response Time Price Adjustment from the amount payable to the Contractor in the relevant monthly invoice pursuant to **Clause 19**.

1. **DEFECTS PERIOD**
   1. The works and Services performed and Components provided by the Contractor under this Agreement shall be guaranteed as follows:
      1. all works and services carried out by the Contractor pursuant to this Agreement shall be guaranteed for the Works Guarantee Period and the Contractor shall at its own cost correct or re-perform as appropriate any works or services required in order to rectify a Works Defect and repair any damage caused by the Works Defect notified to the Contractor (or otherwise known to the Contractor) during the Works Guarantee Period; and
      2. all Components provided by the Contractor pursuant to this Agreement shall be guaranteed for the Component Guarantee Period and the Contractor shall at its own cost repair or replace any Component Defect and rectify any damage caused by such Component Defect notified to the Contractor (or otherwise known to the Contractor) during the Component Guarantee Period.
   2. If a part of the works is repaired or replaced due to a Works Defect or Component Defect arising during the Term or during the Works Guarantee Period or the Component Guarantee Period, the Works Guarantee Period or the Component Guarantee Period, as the case may be, for the part of the works which is replaced is delayed by a period of the Works Guarantee Period or the Component Guarantee Period.
   3. In the event that the Contractor fails to correct a Works Defect and/or Component Defect in accordance with **Clause 7.1** the Employer may give written notice to the Contractor requiring them to correct such Works Defect and/or Component Defect. Within five (5) days of the Employer's notice the Contractor shall make an assessment of such Works Defect and/or Component Defect and advise the Employer in respect of the corrective action to be taken and the time required to take such action. Within five (5) days of the Contractor's advice, the Employer shall give an instruction to the Contractor to take the required corrective action within a period that the Employer deems reasonable. In the event that the Contractor fails to correct such Works Defect and/or Component Defect within the period advised by the Employer, the Employer may retain a third party to correct such Works Defect and/or Component Defect at the Contractor’s costs and risk (provided such third party meets the standard of performance required by this Agreement). The Contractor will co-operate with the Employer and facilitates and permits the use of all required information, materials and other matter (including Contractor’s documents and all other drawings, CAD materials, technical data, software, models, plans, designs, programs, diagrams, evaluations, details, specifications, schedules, reports, calculations, manuals or other documents or recorded information (electronic or otherwise) which have been or are at any time prepared by or on behalf of the Contractor under the contract or otherwise for and/or in connection with the Services) and generally does all things reasonably required by the Employer to achieve this end.
2. MONITORING AND REPORTING
   1. During the Term of the Agreement the Contractor shall carry out the Reporting and Monitoring Services which shall include the services provided for in this **Clause 8**. Monitoring and Reporting to be done, includes but is not limited to, the requirements stated in Functional Specification for Solar Photovoltaic (PV) Plant at Duvha Power Station

*Monitoring*

* 1. The Contractor shall monitor the operating status of the Duvha Solar PV Plant on and off site on a 24 hours a day 365 days a year, real-time basis, in accordance with Functional Specification for Solar Photovoltaic (PV) Plant at Duvha Power Station

*Reporting*

* 1. The Contractor shall furnish the Employer with annual, quarterly, monthly, weekly and daily performance reports, availability reports, exception reports, Corrective maintenance/service reports, analysis for predictive maintenance and any additional reports in accordance with Functional Specification for Solar Photovoltaic (PV) Plant at Duvha Power Station and **Schedule 8**.
  2. The Contractor shall provide the following documentation to the Employer within twenty (20) Days of the completion of any Corrective Maintenance under this Agreement:
     1. copies of the repair reports setting out full details of the work carried out, completion time and cost;
     2. copies of any root cause analysis reports obtained by the Contractor;
     3. details of any Components used in the performance of the Corrective Maintenance.
  3. The Contractor shall ensure that an up to date log book is maintained and located at Duvha Power Station documenting all visits (to include time, date and details concerning the visit). For the avoidance of doubt the log book shall be the property of the Employer.

*Meetings*

* 1. The Parties shall meet as stated in the requirements of Functional Specification for Solar Photovoltaic (PV) Plant at Duvha Power Station and at least on a monthly basis in order to discuss the reports issued by the Contractor pursuant to this **Clause 8**, the performance of the Plant and the Contractor. The Contractor shall be represented at such meetings by suitably qualified representatives including the Contractor’s Representative.
  2. Either Party acting reasonably may require the other to attend at a meeting in order to discuss any urgent issue in connection with the Plant or this Agreement.
  3. The Parties shall meet no less than ninety (90) Days before the expiry of the Term, to discuss the requirement for Spare Parts following the expiry of the Term. At least fifteen (15) Days before such meeting the Contractor shall provide the Employer with a recommended list of Spare Parts which an operation and maintenance contractor exercising Good Industry Practice could reasonably expect to require to ensure the continued operation of the Plant.

*Data Access*

* 1. The SCADA system is the property of the Employer and will be operated and maintained by the Contractor. The Employer requires full, unlimited access to the SCADA system, in raw format and through any IT monitoring system, both remotely and locally.

*Investigations*

* 1. In the event that Duvha Solar PV Plant is not meeting the required technical and performance requirements of this Agreement and/or the ECC Contract, the Employer shall be entitled to request that the Contractor carries out an investigation to ascertain the reason for the non-performance. If the reason is found to be a non-compliance by the Contractor with this Agreement or the ECC Contract the Contractor shall be responsible for the cost of the investigation and shall take such action necessary to rectify the issue in accordance with this Agreement as Contractor Cost Corrective Maintenance or the ECC Contract. If the investigation reveals that the non-performance is for a reason for which the Contractor is not responsible the investigation shall be treated as an Additional Service. In the event of a dispute between the Parties as to the outcome of the investigation, such dispute shall be referred to the Independent Third Party for determination. Notwithstanding the existence of such dispute the Employer may instruct the Contractor to take such action necessary to rectify the issue in accordance with this Agreement as Corrective Maintenance pending resolution of such dispute.

*Root Cause Analysis*

* 1. The Contractor shall at the Employer’s request carry out a root cause analysis following the replacement of:
     1. any Major Component; or
     2. any part of the Plant that has caused downtime or plant/component out of service for a cumulative period of more than ten (10) days during the Term ; or
     3. any part of the Plant that has caused downtime or plant/component out of service for a cumulative number of incidents of more than five (5) times during the Term.
  2. The Employer shall be entitled to inspect (on Site and/or at the facility of the Contractor or its Sub-Contractors) such Major Component or part and shall be entitled to witness any disassembly or testing of such Major Component or part. The Contractor shall give fourteen (14) Business Days, or as agreed with the Employer, notice of its intention to test or dismantle any part to which this **Clause 8.12** applies.

*Training*

* 1. On a continuing basis, and commencing on the Effective Date, the Contractor shall provide the Employer with training of the Employer’s technicians in accordance with Functional Specification for Solar Photovoltaic (PV) Plant at Duvha Power Station
  2. The Contractor shall provide to the Employer four (4) months prior to the commencement of the Term a programme for the training of the Employer's technicians.

*Tools and Equipment*

* 1. No later than six (6) months before the expiration of the Term the Contractor shall furnish the Employer with an offer to purchase at market value any Duvha Solar PV Plant specific tools and equipment that the Employer may reasonably require to operate and maintain the Duvha Solar PV Plant and troubleshoot problems.

*Cooperation with the Employer and Regulatory Authorities*

* 1. The Contractor will cooperate with regulatory authorities and cooperate with the Employer in communicating with regulatory authorities and any grid/system operator in the future, including preparing data, reports, and responses to the extent requested.

1. ADDITIONAL SERVICES
   1. The Employer may, at its sole discretion, request the Contractor to carry out such additional works or services as may be required in connection with the Duvha Solar PV Plant in accordance with this Clause 9.1. Additional Services may include a variation to the Preventative Maintenance required by this Agreement.
   2. If the Employer requires the Contractor to carry out any Additional Services it shall issue written notice to the Contractor setting out the Additional Services required. Within ten (10) Days of receipt of such notice the Contractor shall provide the Employer with a written proposal for the carrying out of the Additional Services which shall include:
      1. the additional cost of carrying out such Additional Services.
      2. the Contractor’s proposals for the performance of the Additional Service.
      3. where relevant a time for completion of the Additional Services; and
      4. any impact on the Availability warranty provided under this Agreement.

(“**Additional Services Proposal**” **Contractor note that, the Employer requires the labour rate of the Contractor staff to be used for O&M services submitted with this bid. For external services and equipment procured by the Contractor, a 10% cost plus actual expenditure must be used.**).

* 1. Where the Additional Services are a variation, addition or omission to the Preventative Maintenance the cost shall be an adjustment to the Annual Fee unless the Parties agree otherwise.
  2. Following receipt of the Contractor’s Additional Services Proposal the Employer shall either:
     1. confirm to the Contractor it wishes the Contractor to carry out the Additional Services in accordance with the Additional Services Proposal in which case the Contractor shall carry out such Additional Services in accordance with this Agreement and the Additional Services Proposal (including where applicable within the time stated in the Additional Services Proposal) and the Employer shall pay the Contractor the sum stated in the Additional Services Proposal in accordance with **Clause 19.5.1**;
     2. respond in writing with comments in respect of the Contractor’s Additional Services Proposal in which case the Contractor shall re-issue the Proposal having considered and had due regard for the Employer’s comments and the provisions of this **Clause 9.4** shall re-apply; or
     3. confirm to the Contractor that is does not wish the Contractor to carry out the Additional Services.
  3. For the avoidance of doubt any failure by the Employer to respond to the Contractor’s Additional Services Proposal shall constitute a rejection not an acceptance of the Additional Services Proposal.
  4. Notwithstanding **Clauses 9.2** to **9.4** the Employer may at any timeinstruct the Contractor to proceed with any Additional Services notwithstanding that a cost and/or time for completion of such Additional Services may not have been agreed in which case the Contractor shall carry out and complete such Additional Services within a reasonable time and shall be entitled to the cost of carrying out such Additional Services, which shall be valued in accordance with **Clause 19.5.2**.

1. HEALTH AND SAFETY
   1. The Contractor shall at all times comply with all health and safety Laws relevant to the Site (including but not limited to, all national and international legal requirements, including but not limited to the Occupational Health and Safety Act 85 of 1993, the Mine Health and Safety Act 29 of 1996, and the National Environmental Management Act 107 of 1998), the Plant and the Services and take all reasonable precautions to maintain the health and safety of the Contractor’s Personnel and such other persons authorized to be on the Site.
   2. Without prejudice to the generality of the above the Contractor shall itself and shall ensure that its employees, agents and Sub-Contractors comply with the Site Safety Rules and the Employer’s Policies and Procedures. The Employer may modify, or issue new or alternative Site Safety Rules and/or the Employer Policies and Procedures from time to time. Any such change shall be communicated in writing to the Contractor.
   3. The Contractor shall send to the Employer, details of any accident as soon as practicable after its occurrence. The Contractor shall maintain records and make reports concerning health, safety and welfare of persons, and damage to property, as the Employer may reasonably require.
   4. The Employer shall have the right, acting reasonably, upon giving notice to the Contractor, to require the Contractor to remove from the Site an employee of the Contractor or of its Sub-Contractors who is engaged in any activity which presents a risk of injury to person or property at the Site that is not inherent to the performance of the Services, whereupon the Contractor shall remove such persons from the Site and not allow their return unless otherwise agreed by the Employer.
2. SITE
   1. The Contractor shall clear away from the Site all used materials, debris, rubbish, refuse or waste generated as a result of the performance of the Services.
   2. The Contractor acknowledges and agrees that other contractors of the Employer may be present on Site and agrees to co-operate reasonably with such other contractors so as to allow the performance of their respective obligations to occur concurrently.
   3. The Employer shall be responsible for the security and management of the Site during the Term.
   4. The Contractor acknowledges that it may be required to perform certain work and/or services on the Site during the Term under the ECC Contract such as the rectification of defects, and further agrees that such work and/or services shall not entitle the Contractor to any claim for additional payment and/or relief under this Agreement.
3. TITLE AND RISK OF LOSS
   1. Title and risk of loss with respect to any Components and Consumables and other items provided by the Contractor and incorporated or to be incorporated into any part of the Plant pursuant to this Agreement shall upon the incorporation thereof into the applicable part of the Plant pass to the Employer free and clear of any security provided that title to any Spare Parts delivered by the Contractor as an Additional Service shall pass to the Employer on the date such Additional Services are paid for in full.
4. SPARE PARTS
   1. The Contractor shall maintain a sufficient supply of Spare Parts and Consumables at the Site including but not limited to that as defined in Functional Specification for Solar Photovoltaic (PV) Plant at Duvha Power Station for the proper and timely performance of its obligations under this Agreement. In addition to aforesaid the Contractor shall have available on site during the Term a spare inverter and spare SCADA system components.
   2. The Contractor shall as part of the Services be responsible for the procurement, management, replacement and replenishment of all Spare Parts and Components used in performance of the Preventative Maintenance, Corrective Maintenance and Predictive Maintenance, including where a relevant manufacturer does not perform in accordance with its obligations under its manufacturer warranty;
   3. If the quantity of any Spare Part has fallen below the quantity specified in Functional Specification for Solar Photovoltaic (PV) Plant at Duvha Power Station (or where no such quantity is specified, at the quantity necessary for the performance by the Contractor of the Preventative Maintenance, Corrective Maintenance and Predictive Maintenance in accordance with this Agreement) the Contractor must replace the Spare Part no later than the relevant Response Time identified in [**Schedule 15**](#_bookmark163) **.**
   4. If the Contractor fails to meet the Response Times set out in **Schedule 15** for Spare Parts, the Employer shall be entitled to deduct the Response Time Price Adjustment from the amount payable to the Contractor in the relevant monthly invoice pursuant to **Clause 19.**
   5. The Contractor shall allow the Employer to purchase Spare Parts for the Employer’s own stock and agrees to sell the Employer Spare Parts for the prices set out in **Schedule 10**. In the event that the Employer wishes to purchase a Spare Part for which no price is stated in **Schedule 10** the Contractor agrees to sell such Spare Part at a 10% cost plus actual expenditure must be used. The purchase of Spare Parts pursuant to this **Clause 13.4** shall be treated as an Additional Service.
   6. The price list in **Schedule 10** shall be adjusted for inflation in accordance with **Clause 19.3** on an annual basis with the first adjustment being a year after the Effective Date and subsequent adjustments on an annual basis thereafter.
5. **THE EMPLOYER’S OBLIGATIONS** 
   1. The Employer shall throughout the Term provide the Contractor with such access to the Site and the SCADA as the Contractor may require in order to carry out its obligations under this Agreement.
   2. The Employer shall be responsible for the operation and maintenance of the plant and equipment as stated in Functional Specification for Solar Photovoltaic (PV) Plant at Duvha Power Station and shall be responsible for ensuring that these Plant and equipment (including access roads on the Site) are maintained in such condition so as to allow the Contractor to perform the Services.
6. BONDS AND GUARANTEES
   1. No later than the commencement of the Term, the Contractor shall provide the Employer with a duly executed performance bond in the form set out in **Schedule 14** or such other form acceptable to the Employer to the value of 100% of the Annual Fee. The performance bond will be released two months after the end of the Term.
7. DOCUMENTATION and O&M MANUALS
   1. The Contractor provide documentation, including the O&M Manuals as per Functional Specification for Solar Photovoltaic (PV) Plant at Duvha Power Station including, but not limited to, **Schedule 7**.
   2. The Parties acknowledge that the O&M Manuals will be provided under the ECC Contract prior to Operational Acceptance and that once accepted by the Employer such O&M Manuals become the O&M Manuals for the purpose of this Agreement, subject to any revisions or amendments thereto pursuant to **Clause 16.2**. The Contractor shall comply with the most recent copy of the O&M Manuals, which includes any revisions or amendments thereto pursuant to **Clause 16.2**, that has been accepted by the Employer. The Contractor acknowledges and agrees that it shall not be entitled to any additional payment as a result of any changes contained in the final O&M Manuals agreed pursuant to **Clause 16.1** and that nothing in the final O&M Manuals shall constitute an Additional Service.
   3. The Contractor shall provide the Employer at the Contractor’s cost subscriptions to updates and revisions made to the O&M Manuals to the extent such updates and revisions are applicable to the performance of the Services. The Contractor shall ensure that any Services performed shall be in accordance with the updated or revised revisions of the O&M Manuals. Any such updates shall not decrease the required standard of performance or the frequency of the Services.
   4. During the Term the Contractor to develop safe work procedures and work instructions for all preventative maintenance tasks that was not included in the O&M manuals as supplied under the ECC Contract. In addition the Contractor to also develop safe work procedures and work instructions for all corrective maintenance work done as part of this contract. These safe work procedures and work instructions to be handed over to the Employer prior to the execution of the Work unless prior agreement has been reached with the Employer.
8. INSPECTIONS
   1. The Employer shall be entitled at its own cost to inspect the Plant (including any stocks of Spare Parts and Consumables) and the Services being undertaken by the Contractor and the Contractor shall afford the Employer such access and reasonable facilities as may be required by the Employer in order to carry out such inspection. Without prejudice to the generality of the foregoing this shall include the right to inspect any Services being undertaken at the premises of the Contractor or any of their Sub-Contractors.
   2. The Employer shall give reasonable written notice to the Contractor of its intention to inspect in accordance with **Clause 17.1**. The Employer shall use reasonable endeavours in carrying out such inspection to minimise any disruption caused to the provision of the Services by the Contractor.
9. AVAILABILITY
   1. The Availability requirements is as defined in Functional Specification for Solar Photovoltaic (PV) Plant at Duvha Power Station as well as defined in this **Clause 18**.
   2. Throughout the Term the Availability of the Duvha Solar PV Plant comprised in the Plant will be measured on an annual basis in accordance Functional Specification for Solar Photovoltaic (PV) Plant at Duvha Power Station. The Contractor guarantees to the Employer that the Plant Availability shall meet or exceed the Guaranteed Availability on an annual basis.
   3. If the Availability of the Duvha Solar PV Plant comprised in the Plant fails to achieve the Guaranteed Availability the Contractor shall pay the Employer performance damages in accordance with this **Clause 18**.
   4. Without prejudice to its obligations under **Clause 5.1** the Contractor warrants to the Employer that it shall carry out the Services so as not to invalidate the guarantee of the Availability provided under the ECC Contract or this Agreement.

*Performance Liquidated Damages*

* 1. Availability will be calculated annually at the end of each twelve (12) month period commencing one (1) year after Operational Acceptance. Contractor shall submit to the Employer for acceptance the annual Availability report as contained in **Schedule 8** (subject to verification of such reports by -the Employer) before the end of the first month of the following year under review. The Employer will submit to the Contractor within 30 days after accepting the Contractor's Availability report an Employer Availability report, where this annual Availability report will contain the Performance Liquidated Damages payable by the Contractor in the event that the Facilities do not meet the Guaranteed Availability.
  2. In the event that Availability falls below the Guaranteed Availability in any year of the Term, the Contractor will pay the Performance Liquidated Damages as stated in Schedule 11 and Functional Specification for Solar Photovoltaic (PV) Plant at Duvha Power Station
  3. For the avoidance of doubt, the Performance Liquidated Damages will be payable for every year during the period referred to in **Clause 18.1** above that the Availability does not meet the Guaranteed Availability.
  4. The Employer:
     1. may deduct such Performance Liquidated Damages from the Contractor's invoice in the month following the month in which the annual Availability report is received by the Contractor and in subsequent invoices, when applicable; and/or
     2. may require the Contractor to pay such Performance Liquidated Damages to the Employer, in which case the Contractor shall pay such Performance Liquidated Damages within thirty (30) days of receipt of the Employer’s invoice in respect of the same.
  5. In the event that the Contractor disagrees with the Performance Liquidated Damages arising from the annual Availability report each year or the annual Availability report itself, the two parties will aim to resolve the disagreements amicably within 60 days from submission of such annual Availability report by the Employer to the Contractor. In the event that the two parties fail to reach an agreement, either Party may refer such dispute for determination in accordance **Clause 30**. Nothing contained in this **Clause 18.8** shall suspend the Contractor's obligation to deduct the Performance Liquidated Damages from its invoice in the month following the month in which the annual Availability report is received by the Contractor.
  6. Contractor’s liability in respect of payment of the Performance Liquidated Damages under this **Clause 18** shall be capped annually at 100% of the Annual Fee.

1. PAYMENT

*Annual Fee*

* 1. During the Term the Employer shall pay the Contractor the Annual Fee in monthly instalments in arrears for the duration of the Term for the performance of the Preventative Maintenance, the Contractor Cost Corrective Maintenance, Predictive Maintenance and the Reporting and Monitoring Services (“the Annual Fee Services”).
  2. The Annual Fee shall be a fixed annual fee and is inclusive of all costs to the Contractor in connection with the performance of its obligations under this Agreement in respect of the Annual Fee Services, including without limitation, the cost of labour, Components, Contractor’s Equipment, Consumables, transport, fuel, accommodation and subsistence costs.
  3. The Annual Fee shall be subject to adjustment for inflation in accordance with the mechanism set out in **Schedule 4** with the adjustment being twelve (12) months after the Effective Date.

*Additional Services and the Employer Cost Corrective Maintenance*

* 1. In addition to the Annual Fee the Contractor shall be entitled to payment for any Additional Services and the Employer Cost Corrective Maintenance which they are instructed by the Employer to carry out pursuant to **Clause 6.15.1, 6.17, 9.4.1** or **9.6** as applicable (“Additional Cost Services”).
  2. Payment for the Additional Cost Services will be as follows:
     1. where The Employer has accepted a Proposal pursuant to **Clause 6.15.1** or an Additional Services Proposal pursuant to **Clause 9.4.1** the Employer shall pay the sum stated in the Proposal or Additional Services Proposal as applicable; otherwise
     2. the Contractor shall be entitled to payment of its additional costs incurred in carrying out the Additional Cost Services which:
        1. shall be based upon the rates set out in **Schedule 4**; or
        2. where no rate is stated shall be based upon the cost incurred by the Contractor in performing such Additional Services as per **Clause 9.2**
  3. Notwithstanding any other provision of this Agreement the Contractor shall not be entitled to payment for any Additional Cost Services unless the Employer has instructed them in writing to proceed with such Additional Cost Services in accordance with **Clauses 6.15.1, 6.17, 9.4.1** or **9.6** save that no such instruction shall be required in respect of the Contractor’s entitlement to payment for Additional Services pursuant to **Clauses 8.1**.
  4. Any sum due for Additional Services shall be paid in arrears on a monthly basis with the instalment of the Annual Fee payable for that month.

*Payment Terms*

* 1. The Contractor shall issue an invoice in accordance with the Employer's procedures stated below:
     1. for the amount of the Annual Fee payable less any sums which may be due from the Contractor to the Employer under this Agreement;
     2. in respect of any Additional Services in the amount due in accordance with **Clause 19.5** upon completion of the Additional Services.
     3. in respect of the Performance Liquidated Damages, the amount due by the Contractor to the Employer, if applicable; and
     4. within one week of the end of each month when each instalment of the Annual Fee is due.
  2. Until the Contractor complies with the requirements of the Value Added Tax Act No. 89 of 1991 (as amended), no payment will be made to the Contractor.
  3. Invoices must be made out to:
* Eskom Holdings SOC Limited
  1. Invoices must be addressed to:
  2. Invoices must be formatted as follows, and contain the following information:
* Attention: ACCOUNTS PAYABLE
* Read “Tax Invoice”
* Company VAT registration number
* Eskom Vat Number **4740101508**
* Invoice Number
* 45 Purchase Order Number obtained from Eskom
* Supplier Name and Address
* Vat to be indicated separately
* Order numbers to be invoiced separately
* Units to be invoiced separately
* Rate / Activity to be claimed in accordance with contract
* CPA need to refer back to Basic Invoice, together with calculations in accordance with contract
* CPA invoice need to be invoiced separately
* Local and Foreign invoices to be invoiced separately
* Invoice to be delivered not later than last day of month of assessment
* Invoice date to be same month (not later than last date) of assessment
* Incorrect claim (invoices) should be cancelled with a credit note referring to the incorrect invoice and issue a new invoice
  + 1. Invoices for Foreign Portion invoicing must contain the following information:
* Information of Foreign Beneficiary and Foreign Bank Account
* Foreign Beneficiary Invoice (Foreign Amount) to be attached to local invoice (Also to comply to General requirements)
* Bank Details and IBN No. to appear on invoice
* Rand amount claimed in accordance with contract
* Foreign currency converted at contract rate
* Amount claimed and Rand Amount to appear on Invoice
* Import and Services to be claimed on separate invoices
* VAT to be claimed separately referring to Foreign Invoice
* Services to be paid direct overseas and may not be paid into a CFC Account
* Foreign CPA calculations together with Index need to be attached
  + 1. Invoices for Import Invoicing must contain the following information:
* Import documentation to be attached
* Custom Invoice to reflect foreign currency and amount
* Bill of entry
* SARS custom release notification document
* Custom Worksheet
* Bill of Lading or Airway Bill
  1. The Employer shall pay the sum due to the Contractor within thirty (30) days of receipt of an invoice that correctly states the sum due under **Clause 19.8**. If an invoice does not correctly state the sum due under **Clause 19.8**, the Employer shall instruct the Contractor to submit a corrected invoice.
  2. The Employer shall be entitled to set off from any sum due to the Contractor under this Agreement any sum that may be due from the Contractor to the Employer under this Agreement.
  3. In the event that a net sum is due from the Contractor to the Employer under this Agreement, the Employer shall issue an invoice for such sum and the Contractor shall make payment within thirty (30) Days of receipt of such invoice.
  4. If either Party fails to make payment due under this Contractor within the period stated, the other Party shall be entitled to interest on the sum due calculated at the prime rate of interest as charged by the Standard Bank of South Africa Limited from time to time.

1. CHANGE IN LAW
   1. If, after the date twenty-eight (28) days prior to the date of Bid submission, in the Republic of South Africa, any law, regulation, ordinance, order or by-law having the force of law is enacted, promulgated, abrogated or changed which shall be deemed to include any change in interpretation or application by the competent authorities, that subsequently affects the costs and expenses of the Contractor and/or the Term, the Annual Fee shall be correspondingly increased or decreased, and/or the Term shall be reasonably adjusted to the extent that the Contractor has thereby been affected in the performance of any of its obligations under the Contract. Notwithstanding the foregoing, such additional or reduced costs shall not be separately paid or credited if the same has already been accounted for in the price adjustment provisions where applicable, in accordance with **Clause 19.3**.
   2. The Contractor shall not be entitled to additional Cost or time under this **Clause 20** for any change in the rate of income tax, capital gains tax or other existing tax imposed by the South African Revenue Services in connection with income or business activities of the Contractor, its Sub-Contractors, their employees or agents or for which any of them is obliged to account.
2. INTELLECTUAL PROPERTY
   1. The Employer acknowledges that (subject to the licence granted under **Clause 21.2**) that all rights interests in, and title to, and all past, present and future intellectual property rights in any design documentation, software, drawings, manuals, models and other documents provided to the Employer under this Agreement shall remain the property of the Contractor or the third parties from whom the Contractor has obtained rights.
   2. The Contractor hereby grants to the Employer (or undertakes to procure the grant from Sub-Contractors or any third party) a perpetual, irrevocable, non-exclusive royalty free licence to copy, reproduce and use the materials and documentation referred to in **Clause 21.1** in connection with the Plant. The licence shall:
      1. apply throughout the actual or intended working life (whichever is longer) of the relevant parts of the Plant;
      2. entitles the Employer to copy, use and communicate the materials and documentation to which the licence applies for the sole purpose of completing, operating, maintaining, adjusting, insuring, financing, modifying, dismantling, and repairing the Plant, and;
      3. in the case of computer programs and other software, permit their use on any computer on the Site and other places as envisaged by this Agreement
   3. The materials and documentation referred to in **Clause 21** shall not, without the Contractor’s consent be used, copied or communicated to a third party (other than to one of the Employer's subsidiaries) by (or on behalf of) the Employer for purposes other than those permitted by this **Clause 21**.
   4. The intellectual property rights in any design documentation, software, drawings, manuals, models and other documents provided to the Employer under this Agreement shall become the property of the Employer if such intellectual property was created specifically for the Plant.
   5. The Contractor warrants that he is the owner or licensee of all intellectual property used in the Plant. In the event that the Contractor is the licensee, the Contractor warrants that it has the requisite approvals to copy, use and reproduce such intellectual property for purposes of the Plant, and to grant the Employer such rights in respect of such intellectual property as is provided in this agreement. The Contractor shall indemnify and hold harmless the Employer and its employees and officers from and against any and all Losses which the Employer may suffer as a result of any claim against the Employer by any third party in respect of any infringement or alleged infringement of any patent, utility model, registered design, trademark, copyright or other intellectual property right registered or otherwise existing at the date of this Agreement in respect of anything provided by the Contractor to the Employer under this Agreement.
3. FORCE MAJEURE
   1. “Force Majeure” shall mean any event beyond the reasonable control of the Employer or of the Contractor, as the case may be, and which is unavoidable notwithstanding the reasonable care of the Party affected, and shall include, without limitation, the following:
      1. war, acts of terrorism, civil war, rebellion, insurrection, military or usurped power;
      2. strikes, riots and civil commotion other than those caused by the employees of the Contractorand/or Sub-Contractors;
      3. ionising radiation or radioactive contamination from nuclear fuel or nuclear waste resulting from the combustion of nuclear fuel;
      4. radioactive, toxic, explosive or other hazardous properties of an explosive nuclear device;
      5. natural disaster;
      6. impact by aircraft or other aerial device or thing dropped from them;
      7. any other event that stops the Contractor carrying out the Services and the event is one which the Contractor could not prevent

provided that the following events, other than where caused by an event listed above, shall not constitute Force Majeure:

* + 1. changes in economic or market conditions or financial hardship (including the late payment of money or the inability of the Contractor to pay its debts);
    2. rain, wind, dust and other weather conditions not amounting to a natural disaster;
    3. lack of or damage to Contractor’s Equipment;
    4. shortages of labour, goods or Components, plant and materials;
    5. infringement of any intellectual property rights; and
    6. delays by statutory authorities or third party suppliers.
  1. If either Party is prevented, hindered, or delayed from or in performing any of its obligations under this Agreement by an event of Force Majeure, then it shall notify the other in writing of the occurrence of such event and the circumstances thereof within fourteen (14) days after the occurrence of such event.
  2. The Party who has given such notice shall be excused from the performance or punctual performance of its obligations under this Agreement for so long as the relevant event of Force Majeure continues and to the extent that such Party’s performance is prevented, hindered or delayed. Neither Party shall be entitled to additional payment under this Agreement as a result of a Force Majeure event.
  3. The Party or Parties affected by the event of Force Majeure shall use reasonable efforts to mitigate the effect thereof upon its or their performance of this Agreement and to fulfil its or their obligations under this Agreement, but without prejudice to either Party’s right to terminate this Agreement in **Clauses 22.6**.
  4. No delay or non-performance by either Party hereto caused by the occurrence of any event of Force Majeure shall constitute a default or breach of this Agreement if and to the extent that such delay or non-performance is caused by the occurrence of an event of Force Majeure.
  5. If the performance of this Agreement is substantially prevented, hindered or delayed for a single period of more than sixty (60) days or an aggregate period of more than one hundred and twenty (120) days on account of one or more events of Force Majeure during the currency of this Agreement, the Parties will attempt to develop a mutually satisfactory solution, failing which either Party may terminate this Agreement by giving a notice to the other.
  6. In the event of termination pursuant to **Clause 22.6**, the rights and obligations of the Employer and the Contractor shall be as specified in **Clause 33.7**.
  7. Notwithstanding **Clause 22.5**, Force Majeure shall not apply to any obligation of the Employer to make payments to the Contractor herein.

1. INDEMNITIES
   1. The Contractor shall indemnify and hold harmless the Employer, the Employer’s Personnel, and their respective agents, against and from all Losses incurred or to be incurred by the Employer as a result of:
      1. bodily injury, sickness, disease or death of any person arising out of or in the course of or by reason of the Contractor’s design (if any), the execution and completion of the Services and the remedying of any defects, unless attributable to any gross negligence, willful act or breach of this Agreement by the Employer, the Employer’s Personnel, or any of their respective agents,
      2. damage to or loss of any property, real or personal (other than the Plant and other property of the Employer), to the extent that such damage or loss arises out of or in the course of or by reason of the Contractor’s performance of the Services, unless and to the extent that any such damage or loss is attributable to any gross negligence, willful act or breach of this Agreement by the Employer, the Employer’s Personnel, their respective agents,
      3. the non-payment by insurers of any claim as a result of the vitiation of any insurance policies due to the Contractor’s or any Sub-Contractor’s breach of any representation, declarations or conditions contained in any insurance policy, including the provision of false or misleading information, and
      4. Infringement of an Intellectual property right.
   2. If any proceedings are brought or any claim is made against the Employer arising out of the matters referred to in **Clause 23.1**, the Employer shall promptly give the Contractor notice thereof, and the Employer may, at the Contractor's expense, conduct such proceedings or claim and any negotiations for the settlement of any such proceedings or claim provided that:
      1. the Employer shall not settle or compromise those proceedings without the prior written approval of the Contractor;
      2. neither Party shall make any statement nor release anything to the media whether for publication or off the record;
      3. the Contractor shall:
         1. be kept fully informed of the progress of the matter,
         2. be furnished with copies of all pleadings and notices filed, correspondence and   
            briefs to counsel;
         3. provide all reasonable assistance to the Employer in order to conduct the defence;
         4. receive advance notice of and be entitled to attend all meetings relating to the   
            matter;
      4. the Contractor shall cooperate with the Employer's insurers to the extent required by such insurers;
      5. the Contractor shall be entitled to appoint independent lawyers to hold a watching brief;
      6. the proceedings will be conducted at the entire risk and cost of the Contractor;
      7. the Employer shall be entitled to furnish all information to its insurers as they may require;
      8. the Employer shall be entitled to require the Contractor to provide security for any costs that may be incurred by the Employer or be awarded against it.
   3. The Employer shall indemnify and hold harmless the Contractor, the Contractor’s Personnel, and their respective agents, against and from all Losses incurred or to be incurred by the Contractor as a result of bodily injury, sickness, disease or death, which is attributable to any negligence, willful act or breach of this Agreement by the Employer, the Employer’s Personnel, or any of their respective agents.
2. **CHANGE IN LEGAL STATUS**
   1. The Contractor shall immediately notify the Employer in writing of any change to its legal status. Failure on the part of the Contractor to notify the Employer of a change in legal status will constitute a reason for termination of this Agreement. In such case, the Employer shall assess the impact of the change on the contract and reserves the right to terminate this Agreement.
3. INSURANCE
   1. The Employer provides insurance against loss of or damage to the Employer’s property only when they are on site.
   2. The Contractor will provide Marine insurance against loss of or damage to Consumables and Components from outside South Africa to Site.
   3. The Contractor provides insurance in respect of death of or bodily injury to the Contractor’s Personnel arising out of and in the course of their employment in connection with the Services for a minimum limit of indemnity for any one event as prescribed in terms of the Occupational Injuries and Diseases Act No. 130 of 1993 and the Contractor’s common law liability for Contractor’s Personnel falling outside the scope of the Act with a limit of Indemnity of not less than R500 000 (Five hundred thousand Rand); and/or as provided by the laws of the Country in which the Contractor’s Personnel are domiciled.
   4. The Contractor provides insurance in respect of loss of or damage to property (except Components, Consumables and Contractor’s Equipment) and liability for bodily injury to or death of a person (not Contractor’s Personnel) arising from or in connection with the Contractor providing the Services..
   5. The Contractor shall provide professional indemnity insurance for damages arising from any negligent act, error or omission committed or alleged to have been committed by the Contractor in connection with the Services.
   6. Any amount not recovered from an insurer is borne by the Employer for events which are at the Employer’s risk and by the Contractor for events that are the Contractor’s risk
4. **SHIPPING**
   1. The Contractor is responsible for shipping
   2. The Contractor will be the “Importer of Record” for all Components imported into the Republic of South Africa by the Contractor.
   3. The Contractor delivers the Components from factory overseas and remains liable for transportation of all components to Duvha Solar PV Plant. Notwithstanding delivery in terms of this clause, all risk in the Components shall remain with the Contractor until the end of the Term.
5. **JOINT AND SEVERAL LIABILITY**
   1. If the Contractor constitutes a joint venture, consortium or other unincorporated grouping of two or more persons:
      1. these persons are deemed to be jointly and severally liable to the Employer for the performance of the contract;
      2. these persons notify the Employer of their leader who has authority to bind the Contractor and each of these persons; and
      3. the Contractor does not alter its composition or legal status without the consent of the Employer.
6. LIMITATIONS ON LIABILITY
   1. Except in cases of fraud, negligence or wilful misconduct and save for the Contractor’s liability to pay liquidated damages under **Clause 18**, neither Party shall be liable to the other Party, whether in contract, delict, or otherwise, for any indirect or consequential loss or damage which may be suffered by the other Party in connection with this Agreement.
   2. The aggregate liability of the Contractor to the Employer, whether under the Contract, in delict or otherwise, shall not exceed 10% of the Contract value. provided that this limitation shall not apply to:
      1. fraud, negligence or wilful misconduct;
      2. any obligation of the Contractor to indemnify the Employer under this Agreement;
      3. any obligation of the Contractor to pay any deductibles in respect of the Employer Generation Insurance Policy;
      4. any sums for which the Contractor is required to maintain insurance under this Agreement which is in excess of such amount;
      5. any liability of the Contractor under **Clause 18** which shall be subject to **Clause 18.8**;
      6. any liability of the Contractor under this Agreement for the correction of Serial Defects
7. QUALITY ASSURANCE
   1. The Contractor shall throughout the Term implement a quality assurance programme and procedures in accordance with the Employers technical specifications The Employer shall be entitled to request, and the Contractor shall be obliged, to provide documentary evidence in order to demonstrate the Contractor’s compliance with the quality assurance programme and procedures established pursuant to this **Clause 29**.
8. DISPUTES
   1. The term “dispute” shall be interpreted in the widest sense and shall include any dispute or difference in connection with or in respect of the conclusion or existence of the Contract, the carrying into effect of the Contract, the interpretation or application or the provisions of the Contract, the Parties respective rights and/or obligations in terms of and/or arising out of the Contract and/or the validity, enforceability, rectification, termination or cancellation, whether in whole or in part, of the Contract.
   2. The Parties have between two and four weeks after the Contractor’s or the Employer’s notification of the dispute to the other Party, the notification itself being made not more than four weeks after the Contractor or the Employer becomes aware of the dispute to refer the dispute to an Independent Third Party for resolution.
   3. The times for notifying and referring a dispute may be extended if the Contractor and the Employer agree to the extension before the notice or referral is due. If no extension is agreed the time periods referred to 30.2 remain. If a disputed matter is not notified and referred within the times set out in 30.2, neither Party may subsequently refer it to the Independent Third Party or arbitration.
   4. An Independent Third Party selected from the ICE-SA Division (or its successor body) of the South African Institution of Civil Engineering Panel of Adjudicators shall be nominated by the Party intending to refer a dispute to him. (see www.ice-sa.org.za). If the Parties do not agree on an Adjudicator, the Party notifying and referring the dispute nominates three potential adjudicators.
   5. Within a week of the date of receiving the names of the three potential adjudicators the other Party either accepts one of the nominated adjudicators or nominates three further names for consideration, to which the other Party replies within one further week.
   6. If the Parties have not chosen an adjudicator within two weeks of the notification of the dispute, either Party may ask the Arbitration Foundation of Southern Africa (AFSA) to choose one. The Adjudicator nominating body chooses an adjudicator within four days of the request. The chosen adjudicator becomes the Adjudicator.
   7. The Independent Third Party will be jointly appointed by the Parties and the cost of the Independent Third Party shall be shared by both Parties.
   8. The Independent Third Party shall have authority to determine any dispute between the Parties that this Agreement states is to be referred to the Independent Third Party. The Independent Third Party shall set such processes and procedures for the determination of any dispute as he/she shall deem necessary given the nature of the dispute between the Parties including undertaking his own inspection or investigation.
   9. The Employer and Contractor shall promptly provide the Independent Third Party with such information as the Independent Third Party may reasonably require in relation to the conduct and results of any investigation to be performed by him or report to be prepared by him.

* 1. The decision of the Independent Third Party as presented by the Independent Third Party shall be binding on the Parties until such time as it is overturned on arbitration.
  2. The obligations of the Parties shall not be altered by reason of a referral of a dispute to The Independent Third Party being conducted during the progress of the Services.

### *Amicable Settlement*

* 1. Both Parties shall attempt to settle a dispute under this Agreement amicably before the commencement of arbitration.

*Arbitration*

* 1. Any dispute not settled amicably shall be finally settled by arbitration. Unless otherwise agreed by both Parties, arbitration shall be conducted

din accordance with the laws of South Africa, and shall be conducted in terms of the Arbitration Foundation of South Africa’s commercial arbitration rules.

* 1. The arbitrator(s) shall have full power to open up, review and revise any certificate, determination, instruction, opinion or valuation. Nothing shall disqualify the Employer’s Representative from being called as a witness and giving evidence before the arbitrator(s) on any matter whatsoever relevant to the dispute.
  2. Arbitration may be commenced prior to or after completion of the Services. The obligations of the Parties shall not be altered by reason of any arbitration being conducted during the progress of the Services.

1. SUBCONTRACTING
   1. The Contractor shall not subcontract the whole or any part of the Services without the Employer’s prior written approval.
   2. The Contractor shall not sub-contract:
      1. any part of the Service to be carried out on the Site; or
      2. the supply of Major Components

without the prior written approval of the Employer provided that the Employer’s approval is deemed to have been given in respect of the Sub-Contractors listed in **Schedule 11** for the relevant works and services listed therein.

* 1. Each sub-contract shall include provisions which would entitle the Employer to require the sub-contract to be assigned to the Employer in the event of termination by the Employer under **Clause 33**.
  2. The Contractor shall be responsible for the performance by and liable for all acts or failures to act of each of its Sub-Contractors as if they were the Contractor’s own acts or omissions.
  3. Before any payment is made by the Employer to the Contractor in terms of this Agreement, the Employer is entitled to call on the Contractor to furnish reasonable proof that all payments due by the Contractor to any Sub-Contractor have been discharged. If certain payments are due to the Sub-Contractor and the Contractor has not informed the Employer in writing that it has reasonable cause for withholding such payment and submits proof that it has informed the Sub-Contractor thereof in writing, the Employer may pay the relevant portion of the amount due to the Contractor directly to the Sub-Contractor. Any payment in terms of this provision to the Sub-Contractor shall be regarded as a payment directly to the Contractor and the Employer’s obligation to the Contractor regarding payment shall be reduced accordingly.

1. SUSPENSION
   1. The Employer may order the Contractor to suspend performance of any or all of its obligations under this Agreement. Such notice shall specify the obligation of which performance is to be suspended, the effective date of the suspension and the reasons therefor. The Contractor shall thereupon suspend performance of such obligation, except those obligations necessary for the care or preservation of the Plant, until ordered in writing to resume such performance by the Employer.
   2. If, by virtue of a suspension order given by the Employer, other than by reason of the Contractor’s default or breach of this Agreement, the Contractor’s performance of any of its obligations is suspended for an aggregate period of more than ninety (90) days, then at any time thereafter and provided that at that time such performance is still suspended, the Contractor may give a notice to the Employer that the Employer shall, within twenty-eight (28) days of receipt of the notice, order the resumption of such performance or request and subsequently order a Additional Services excluding the performance of the suspended obligations from this Agreement.
   3. If the Employer has failed to pay the Contractor any sum due under this Agreement and not in dispute for a period of sixty (60) days the Contractor may give a notice to the Employer that requires payment of such sum. If the Employer fails to pay such sum within thirty (30) Days after receipt of the Contractor’s notice then the Contractor may by twenty (20) Days' notice to the Employer suspend performance of all or any of its obligations under the Contract, or reduce the rate of progress.
   4. If the Contractor’s performance of its obligations is suspended or the rate of progress is reduced pursuant to this **Clause 32**, then the period for the performance of the Contractor’s obligations under this Agreement shall be extended by a period commensurate with the period of suspension or the reduced rate of progress as appropriate and any additional costs incurred by the Contractor as a result of such suspension or reduction shall be paid by the Employer to the Contractor, except in the case of suspension order or reduction in the rate of progress by reason of the Contractor’s default or breach of this Agreement.
   5. During the period of suspension, the Contractor shall not remove from the Site any Contractor’s Equipment without the prior written consent of the Employer.
2. TERMINATION

*Termination for Contractor Default*

* 1. The following events shall constitute a Contractor Event of Default:
     1. the Contractor is in material breach of its obligations under this Agreement after such breach has not been rectified within thirty (30) Days of notice from the Employer of such breach;
     2. the Contractor has clearly abandoned the performance of the Services;
     3. the Contractor fails to pay the Employer a sum due and not in dispute under this Agreement within thirty (30) Days of notice from the Employer that the Contractor has failed to pay such sum;
     4. the Contractor has engaged in any of the acts referred to in **Clause 4** in competing for or in executing this Agreement;
     5. an Event of Insolvency in relation to the Contractor;
     6. one or more of the caps on the Contractor’s liability under this Agreement is reached or exceeded;
     7. the Contractor assigns this Agreement in breach of this Agreement;
     8. the Contractor fails to maintain insurance required to be maintained by the Contractor under this Agreement;
  2. In the event of a Contractor Event of Default the Employer shall be entitled to terminate this Agreement:
     1. in the case of a Contractor Event of Default referred to in **Clauses 33.1.4, 33.1.5, 33.1.6** and/or 33.1.9 with immediate effect by written notice to the Contractor; or
     2. in the case of a Contractor Event of Default referred to in **Clauses 33.1.1, 33.1.2, 33.1.3, 33.1.7** and/or **33.1.8** upon thirty (30) Days' written notice to the Contractor provided always that if the Contractor rectifies the Contractor Event of Default before the expiry of such notice period the notice of termination shall be deemed to have been withdrawn and no longer of any effect.
  3. If the Employer terminates this Agreement pursuant to **Clause 33.2** the Employer shall be entitled to recover:
     1. the additional costs incurred by the Employer in procuring a third party to carry out the Services on the same terms (save for price) as provided for in this Agreement (including but not limited to the provision of an Availability guarantee on the same terms as this Agreement);
     2. all reasonable direct costs incurred by the Employer as a result of the termination

*Termination for Employer Default*

* 1. The following events shall constitute a the Employer Event of Default:
     1. The Employer is in material breach of its obligations under this Agreement after such breach has not been rectified within thirty (30) Days of notice from the Contractor of such breach;
     2. The Employer fails to pay the Contractor a sum due and not in dispute under this Agreement within thirty (30) Days of notice from the Contractor that the Employer has failed to pay such sum;
     3. an Event of Insolvency in relation to the Employer;
     4. the Employer assigns this Agreement in breach of this Agreement.
  2. In the event of an Employer Event of Default the Contractor shall be entitled to terminate this Agreement:
     1. in the case of an Employer Event of Default referred to in **Clause 33.4.3** with immediate effect by written notice to the Employer; or
     2. in the case of an the Employer Event of Default referred to in **Clauses 33.4.1, 33.4.2, and/or 33.4.4** upon thirty (30) days written notice to the Employer provided always that if the Employer rectifies the Employer Event of Default before the expiry of such notice period the notice of termination shall be deemed to have been withdrawn and no longer of any effect.
  3. If the Contractor terminates this Agreement pursuant to **Clause 33.5** the Contractor shall be entitled to recover:

the value of the Services carried out by the Contractor up to the date of termination in respect of which the Contractor has not received payment under this Agreement as at the date of termination.

*Consequences of termination*

* 1. Following termination of this Agreement the Contractor shall:
     1. immediately discontinue the performance of the Services save for any work or services which may be required for the protection of life or property or the safety of the Plant;
     2. subject to **Clause 33.7.3** within thirty (30) Days of termination clear, dissemble, dismantle and remove from the Site all Contractor’s Equipment and leave the Site and the Plant in the condition necessary for its proper operation, maintenance and exploitation. If the Contractor fails to comply with this **Clause 33.7.2** the Employer may without prejudice to its other rights and remedies carry out the Contractor’s obligations under this **Clause 33.7.2** at the Contractor’s cost;
     3. The Employer shall have the right but not the obligation to purchase any Contractor’s Equipment at a fair market price. If the Employer exercises its right under this **Clause 33.7.3** the Contractor will deliver said equipment to the Employer complete with every accessory and material necessary for their immediate usage and all relevant legal, administrative and technical documentation and the Employer shall pay or allow against any sum due to the Employer under this Agreement the market price for such equipment; and
     4. If requested by the Employer to do so, assign to the Employer any sub-contract with any Sub-Contractor in relation to the Services.
  2. For the sake of clarity it is stated that, should the ECC Contract be terminated pursuant to core clause 90 of the ECC Contract, the O&M Contract will not come into existence, or alternatively will automatically terminate as at the date of such termination of the ECC Contract.

1. REPRESENTATIVES

*The Employer’s Representative*

* 1. The Employer may appoint a person or company to act as the Employer’s Representative and may delegate all or some of its powers under this Agreement to such person or company. The Employer shall notify the Contractor in writing of the identity of the Employer’s Representative and the powers which have been delegated to the Employer’s Representative. The Employer may from time to time appoint some other person or company as the Employer’s Representative in place of the person or company previously so appointed and/or vary the powers which have been delegated to the Employer’s Representative, and shall give a notice of the name to the Contractor without delay. Such appointment shall only take effect upon receipt of such notice by the Contractor.
  2. All notices, instructions, information and other communications given by the Contractor to the Employer under the Contract shall be given to the Employer’s Representative.

*Contractor’s Representative*

* 1. Within five (5) Days of the Effective Date, the Contractor shall appoint the Contractor’s Representative with the appropriate technical background and experience and shall request the Employer in writing to approve the person so appointed. If the Employer makes no objection to the appointment within fourteen (14) days, the Contractor’s Representative shall be deemed to have been approved. If the Employer objects to the appointment within fourteen (14) days giving the reason therefor, then the Contractor shall appoint a replacement within fourteen (14) days of such objection, and the foregoing provisions of this **Clause 34.3** shall apply thereto.
  2. The Contractor’s Representative shall represent and act for the Contractor at all times during the performance of this Agreement and shall give to the Employer all of the Contractor’s notices, instructions, information and all other communications under this Agreement.
  3. All notices, instructions, information and all other communications given by the Employer under this Agreement shall be given to the Contractor’s Representative or, in its absence, its deputy, except as herein otherwise provided.
  4. The Contractor shall not revoke the appointment of the Contractor’s Representative without the Employer’s prior written consent, which shall not be unreasonably withheld. If the Employer consents thereto, the Contractor shall appoint some other person as the Contractor’s Representative, pursuant to the procedure set out in **Clause 34.3**.
  5. The Contractor’s Representative may, subject to the approval of the Employer which shall not be unreasonably withheld, at any time delegate to any person any of the powers, functions and authorities vested in him or her. Any such delegation may be revoked at any time. Any such delegation or revocation shall be subject to a prior notice signed by the Contractor’s Representative, and shall specify the powers, functions and authorities thereby delegated or revoked. No such delegation or revocation shall take effect unless and until a copy thereof has been delivered to and approved by the Employer. Any act or exercise by any person of powers, functions and authorities so delegated to him or her shall be deemed to be an act or exercise by the Contractor’s Representative.
  6. The Employer may by notice to the Contractor object to any representative or person employed by the Contractor in connection with this Agreement who, in the reasonable opinion of the Employer has behaved inappropriately or who is incompetent or negligent. The Employer shall provide evidence of the same, whereupon the Contractor shall remove such person from the Site.
  7. If any representative or person employed by the Contractor is removed in accordance with **Clause 34.8**, the Contractor shall, where required, promptly appoint a replacement.

1. NON WAIVER AND NO RELEASE
   1. Subject to **Clause 35.2** no relaxation, forbearance, delay or indulgence by either Party in enforcing any of the terms and conditions of this Agreement or the granting of time be either Party to the other Party shall prejudice, affect or restrict the rights of that Party under this Agreement, nor shall any waiver by either Party of any breach of this Agreement operate as a waiver of any subsequent or continuing breach of this Agreement.
   2. Any waiver of a Party’s rights, powers or remedies under this Agreement must be in writing, must be dated and signed by an authorised representative of the Party granting such waiver and must specify the right and extent to which it is being waived.
   3. No approval, check, certificate, consent, examination, inspection, notice, issued by or on behalf of the Employer or failure to disapprove work or services performed by the Contractor shall relieve the Contractor of its liabilities under this Agreement.
2. ASSIGNMENT
   1. Neither Party shall be entitled to sell, cede, delegate, assign, transfer or otherwise dispose of (collectively, “Assign”) all or any part of its rights and/or obligations hereunder without the prior written approval of the other Party.
   2. Any actual, attempted or purported Assignment by either Party of any of its rights or obligations or interests in, under or pursuant to this Agreement that does not comply with this **Clause 36** shall be null and void and have no legal force or effect.
   3. This Agreement shall be binding on and shall inure for the benefit of the successors and permitted assigns and personal representatives (as the case may be) of the Parties.
   4. Notwithstanding **Clause 36.1**, the Employer shall be entitled to Assign its rights and obligations under this Agreement to a third party but only in the context of (a) the dissolution of the Employer, (b) the restructuring, amalgamation, reorganization or analogous event of the Employer, or (c) any of its subsidiaries or any of its present divisions or operations which may be converted into separate legal entities as a result of the restructuring of the Employer, the electricity supply industry and the electricity distribution industry.
3. CONFIDENTIALITY
   1. Each Party shall treat any and all information and data disclosed to it by the other Party in connection with this Agreement in any form whatsoever, and this Agreement itself (the **“Confidential Information”)** as confidential and proprietary, shall preserve the secrecy of the Confidential Information and shall not use the Confidential Information for any purpose other than solely in connection with this Agreement.
   2. For the purposes of this **Clause 37**, the term Confidential Information shall not include information which:
      1. at the time of disclosure or at any time thereafter is in, or becomes part of, the public domain other than through a breach of the provisions of this **Clause 37**;
      2. the Party receiving the information can prove was already known to it or was independently acquired or developed by it without being in breach of its obligations under this **Clause 37**; or
      3. became available to the Party receiving the information from another source in a non-confidential manner otherwise than in breach of an obligation of confidentiality.
   3. Notwithstanding the provisions of **Clause 37.1**, Confidential Information may be disclosed:
      1. by either Party to any of their respective consultants and advisors, or to any of the shareholders, owners, agents, consultants, contractors, advisers, investors, insurers or lenders of such Party or its affiliates “Representatives”, in each such case who needs to know the Confidential Information for the purpose of carrying out this Agreement (and for no other purpose) provided that:
         1. such Party notifies the recipient in advance of such disclosure that the Confidential Information is subject to the non-disclosure restrictions contained in this **Clause 37**; and
         2. such Party shall be responsible for ensuring that the recipient keeps the Confidential Information confidential and shall accordingly be responsible for any failure of the recipient to do so;
      2. by either Party if required by any court, any arbitrator or administrative tribunal to which the disclosing Party is a party; provided that in these circumstances, the receiving Party shall advise the disclosing Party to take whatever steps it deems necessary to protect its interests in this regard and provided further that the receiving Party will disclose only that portion of the Confidential Information which it is legally required to disclose and the receiving Party will use its reasonable endeavours to protect the confidentiality of such Confidential Information to the greatest extent possible in the circumstances; or
      3. by either Party if so agreed in writing by the Parties prior to disclosure by the Party disclosing such Confidential Information such agreement not to be unreasonably withheld or delayed.
   4. All information supplied by or on behalf of a Party shall remain the sole and exclusive property of such Party and this Agreement shall not operate to transfer ownership or any interest whatsoever therein, and the other Party shall, if requested by the Party disclosing the information following termination of this Agreement, promptly return to such Party all documents and any copies, extracts, notes or similar materials containing or based in whole on such information.
   5. The receiving Party hereby indemnifies the disclosing Party against any loss or damage which the disclosing Party may suffer as a result of a breach of this clause by the receiving Party or its Representatives.
   6. The disclosing Party may, at any time, and in its sole discretion request the receiving party to return any material and/or data in whatever form containing, pertaining to or relating to Confidential Information disclosed pursuant to the terms of this Agreement and may, in addition request the receiving Party to furnish a written statement to the effect that, upon such return, the receiving Party has not retained in its possession, or under its control, either directly or indirectly, any such material and/or data.
   7. Upon termination or expiry of this Agreement, the Parties will deliver to each other or, at each Party’s option, destroy or ensure the destruction of all material and/or data in whatever form relating to the Confidential Information disclosed pursuant to the terms of this Agreement and delete, remove or erase or use best efforts to ensure the deletion, erasure or removal from any computer or database or document retrieval system under its or the Representatives' possession or control, all Confidential Information and all documents or files containing or reflecting any Confidential Information, in a manner that makes the deleted, removed or erased data permanently irrecoverable. The receiving Party shall furnish the disclosing Party with a written statement signed by one of its directors or duly authorized senior officers to the effect that all such material has been destroyed.
   8. The provisions of this **Clause 37** shall survive the expiry or termination of this Agreement.
4. GOVERNING LAW
   1. The Agreement will be governed by and construed in accordance with the laws of the Republic of South Africa without regard to the conflicts of laws principles thereof.
5. NOTICES
   1. Unless otherwise provided in this Agreement, all notices, requests, statements and other communications required or permitted between the Parties by this Agreement shall be in writing and either hand delivered or sent by pre-paid registered post or facsimile to the address or number within South Africa of the Party concerned set out in **Clause 40.2** or such other address or number as contemplated in **Clause 40.2**. No communication shall be effective until received by the addressee and a communication shall be deemed to have been received:
      1. if delivered by hand during ordinary business hours, to its physical address in **Clause 40.2**, when so delivered;
      2. if delivered by pre-paid registered post, to its postal address in **Clause 40.2**, seven (7) Business Days after posting, subject to proof of posting; and
      3. if delivered by facsimile, upon sending, subject to confirmation of uninterrupted transmission on a transmission report and provided that a hard copy is promptly dispatched to the recipient in the manner provided in **Clause 40.1.1** or **40.1.2**.
   2. The Parties choose the postal and physical addresses and contact details set out below:
      1. Eskom: [ ]Holdings SOC Limited, Megawatt Park, Maxwell Drive, Sunninghill, Johannesburg, 2000
      2. Contractor: [ ]
   3. The Parties choose the physical address set out opposite their names in **Clause 40.2** as their *domicilium citandi et executandi* for all purposes of and in connection with this Agreement. Notwithstanding anything to the contrary herein, a written legal notice or process actually received by a Party shall be an adequate written notice or process, notwithstanding that it was not sent to or delivered at its chosen *domicilium citandi et executandi*.
   4. Either Party may change its nominated physical or postal address to another physical or postal address, as the case may be, in South Africa (and not in any other country) or its contact details by giving at least fifteen (15) days prior written notice to the other Party.
6. CORPORATE WARRANTIES

*Contractor*

* 1. The Contractor hereby represents and warrants to the Employer, as at the Effective Date and repeated on each day thereafter, as follows:
     1. it is duly incorporated under the laws of the [ to be completed by the Contractor] and has the right, power and authority to enter into this Agreement and to perform its obligations hereunder;
     2. it has obtained all necessary consents, licenses and approvals required in connection with the entry into and performance of its obligations under this Agreement; and
     3. the execution of this Agreement shall not (i) violate any provision of any law, regulation, judgment, injunction, order or decree binding upon or applicable to it or (ii) conflict with, result in a breach of, constitute a default under any agreement, contract, instrument, or other arrangement to which it is bound.

*The Employer*

* 1. The Employer hereby represents and warrants to the Contractor, as at the Effective Date, as follows:
     1. it is duly incorporated under the laws of the Republic of South Africa and has the right, power and authority to enter into this Agreement and to perform its obligations hereunder; and
     2. the execution and performance of this Agreement by it has been duly authorised by all necessary corporate action, and its obligations hereunder constitute valid, binding and enforceable obligations.

1. MISCELLANEOUS
   1. This Agreement and the documents referred to herein contain the entire understanding of the Parties with respect to the subject matter contained herein and supersede all prior agreements and understandings, oral and written, with respect thereto. For the avoidance of doubt nothing in this Agreement shall limit the Parties (if applicable) obligations and rights under the ECC Contract.
   2. Each Party acknowledges and agrees that it is entering into this Agreement not in reliance on, and shall have no right of action against the other Party in respect of, any assurance, promise, undertaking, representation or warranty made by the other Party at any time prior to the Effective Date, unless it is expressly set out in this Agreement.
   3. No amendments may be made to this Agreement unless they are in writing and signed by the authorised representative of both Parties.
   4. Each Party shall bear its own costs in relation to the negotiation and preparation of this Agreement.
   5. Nothing in this Agreement shall be construed as creating a partnership or joint venture of any kind between the Parties, or as constituting either Party as the agent of the other Party for any purpose whatsoever. No Party shall have the authority to bind the other Party or to contract in the name of the other Party or otherwise bind the other Party in any way or for any purpose.
   6. No delay or omission of any Party in exercising any right or remedy provided by Law or under this Agreement shall estop or impair such right or remedy or operate as a waiver thereof. The single or partial exercise of any right or remedy provided by Law or under this Agreement shall not preclude any other or further exercise thereof or the exercise of any other right or remedy.
   7. If any provision of this Agreement is declared to be invalid, the other provisions shall not thereby be affected or impaired, shall continue in full force and effect, and the Parties shall seek to agree valid substitute provisions which maintain each Party in an equivalent financial position to that intended herein.
   8. Each notice, instrument, certificate or other document to be given by either Party to the other Party under this Agreement shall be in the English language.
   9. Neither party may publicize the contents of this agreement or its existence without the prior written consent of the other party first having been received.
   10. Except as expressly provided under this Agreement, the rights and remedies contained in this Agreement are cumulative and are not exclusive of any other rights or remedies provided by Law or otherwise.
   11. The Parties intend that terms and conditions of this Agreement shall be solely for the benefit of the Parties and their respective successors and shall not confer any rights upon any third parties.
   12. Termination of this Agreement for any cause shall not release a Party from any liability which at the time of termination has already accrued to such Party or which thereafter may accrue in respect of any act or omission prior to such termination. The provisions of this Agreement which expressly or impliedly have effect after termination will continue to be enforceable notwithstanding termination, notwithstanding that the clauses themselves do not expressly provide for this.
   13. This Agreement may be executed in any number of identical counterparts, all of which when taken together shall constitute one agreement. Any single counterpart or a set of counterparts taken together which, in either case, the Parties execute shall constitute a full original of this Agreement for all purposes.

**SIGNED** by NAME )

duly authorised to sign for and on behalf of )

NAME OF COMPANY )

**SIGNED** by NAME )

duly authorised to sign for and on behalf of )

NAME OF COMPANY )

SCHEDULE ‎1

PREVENTATIVE MAINTENANCE

A detailed scope of Preventative maintenance in accordance with the O&M manuals and Functional Specification for Solar Photovoltaic (PV) Plant at Duvha Power Station and warranty requirements to be provided by the Contractor with the Bid.

SCHEDULE‎ 2

PERMITS

**CONTRACTOR PERMITS**

The Contractor shall be responsible for obtaining all the permits and certifications and approvals required under this Agreement.

SCHEDULE‎ 3

**FORM OF PROGRAMME OF PREVENTATIVE MAINTENANCE**

A detailed Preventative maintenance programme in accordance Functional Specification for Solar Photovoltaic (PV) Plant at Duvha Power Stationthe O&M manuals and warranty requirements is to be provided by the Contractor with the Bid.

SCHEDULE‎ 4

ANNUAL FEE

Bidders are to include here the duly completed "Schedule No. 5 O&M Services", which appears in Bidding Forms.

SCHEDULE‎ 5

SPECIFICATION: SCOPE OF WORK

SITE INFORMATION

SCHEDULE‎ 6

SERVICES NOT INCLUDED IN WORK

1. See services not included as stated in Functional Specification for Solar Photovoltaic (PV) Plant at Duvha Power Station
2. Calibration of Tariff Meters.
3. Co-ordination, communication and interface with Grid System Operator and compliance with grid protocol for Plant energy dispatch.
4. Consumables for Electrical Infrastructure and Interconnection facilities outside of Scope of Work for Duvha Solar PV Plant ECC Contract.
5. Facility security.
6. Records Management other than that required under this Contract.
7. Pest control

SCHEDULE‎ 7

OPERATION AND MAINTENANCE MANUALS AND REFERENCE DOCUMENTS

To be provided by the Contractor with the Bid as indicated in Functional Specification for Solar Photovoltaic (PV) Plant at Duvha Power Station

SCHEDULE‎ 8

REPORTING AND MONITORING SERVICES

The Contractor will submit with its bid proposed monitoring requirements and reporting forms in accordance with Functional Specification for Solar Photovoltaic (PV) Plant at Duvha Power Station and Clause 8.1, 8.2 and 8.3. Following clarifications, the finalised monitoring requirements and reporting forms will be inserted here.

SCHEDULE 9

THE EMPLOYER'S POLICIES AND PROCEDURES

Applicable Employers Policies and Procedures as stated in Functional Specification for Solar Photovoltaic (PV) Plant at Duvha Power Station

SCHEDULE 10

SPARE PARTS PRICE LIST

To be provided by the Contractor with the Bid.

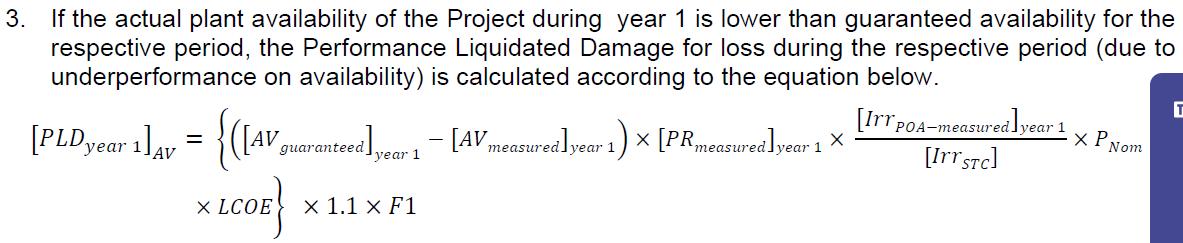
SCHEDULE‎ 11

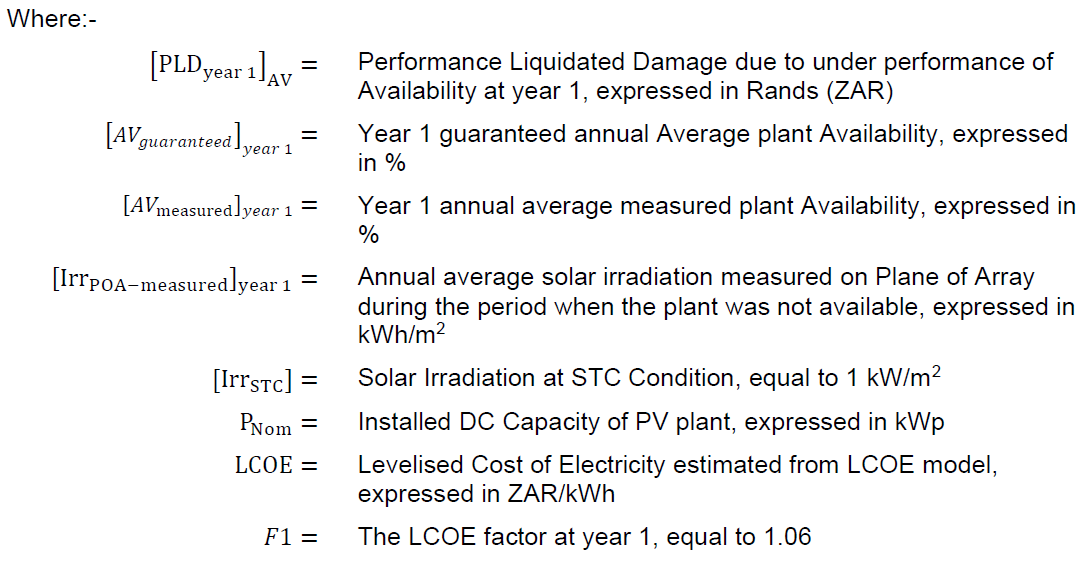
AVAILABILITY

The availability of the Plant to be as stated in the Functional Specification for Solar Photovoltaic (PV) Plant at Duvha Power Station Contractors Guarantee on Performance and Availability and the ECC Contract. The Contractor shall measure availability, in accordance Functional Specification for Solar Photovoltaic (PV) Plant at Duvha Power Station and the ECC Contract.

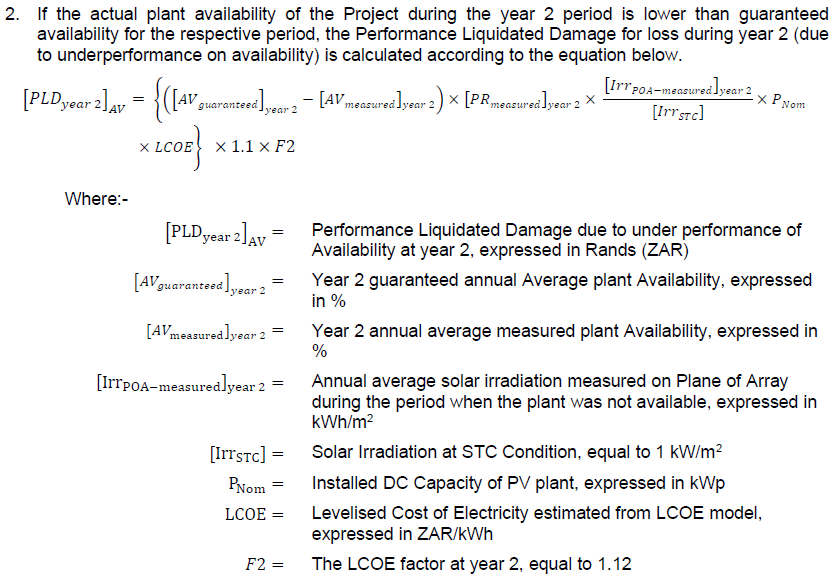
The following applicable extractions from Appendix E (PV Liquidated Damages)

Section 3.2 nr 3;





Section 3.3.1 nr 2



SCHEDULE 12

SPARE PARTS

The Contractor to provide the spare parts list, with the Bid.

SCHEDULE ‎13

SITE SAFETY RULES

**SCHEDULE 14**

**PERFORMANCE BOND**

**B PERFORMANCE BOND**

|  |  |  |
| --- | --- | --- |
| **Eskom Holdings SOC Limited**  **Megawatt Park**  **Maxwell Drive**  **Sandton**  **Johannesburg** | Date: |  |

Dear Sirs

Reference No. **[●]** *[Drafting Note: Bank reference number to be inserted]*

**Performance Bond – Demand Guarantee**: *[Drafting Note: Name of Contractor to be inserted]*

Project [ ] Contract Reference: …… *[Drafting Note: Contractor contract reference number to be inserted]*

In this Guarantee the following words and expressions shall have the following meanings:-

“Bank” - means [●], [●] Branch, (Registration No. [●]); [Drafting Note: Name of Bank to be inserted]

“Bank’s Address” - means [●]; [Drafting Note: Bank’s physical address to be inserted]

“Contract” – means the written agreement relating to the Duvha Solar PV Plant , entered into between the Employer and the Contractor, on or about the [●] day of [●] 200[●] (Contract Reference No. [.]as amended, varied, restated, novated or substituted from time to time; [Drafting Note: Signature Date and Contract reference number to be inserted]

“Contractor” – means [●] a company registered in accordance with the laws of [●] under Registration Number [●]. [Drafting Note: Name and details of Contractor to be inserted]

“Employer” - means Eskom Holdings SOC Limited, a company registered in accordance with the laws of the Republic of South Africa under Registration Number 2002/015527/06].

“Expiry Date” - means the date on which the Defects Certificate is issued in terms of the Contract.

“Guaranteed Sum” - means the sum of R [●] ([●] Rand);

“Duvha Solar PV Plant” - means the construction of up to 12.82MW Solar PV at Duvha Power Station.

At the instance of the Contractor, we the undersigned \_\_\_\_\_\_\_\_\_\_\_\_\_\_ and \_\_\_\_\_\_\_\_\_\_\_\_\_\_, in our respective capacities as \_\_\_\_\_\_\_\_\_\_\_\_\_ and \_\_\_\_\_\_\_\_\_\_\_ of the Bank, and duly authorized thereto, confirm that we hold the Guaranteed Sum at the disposal of the Employer, as security for the proper performance by the Contractor of all of its obligations in terms of and arising from the Contract and hereby undertake to pay to the Employer, on written demand from the Employer received prior to the Expiry Date, any sum or sums not exceeding in total the Guaranteed Sum.

A demand for payment under this guarantee shall be made in writing at the Bank’s address and shall:

* + - be signed on behalf of the Employer by a director of the Employer or an authorised delegate;
    - state the amount claimed (“the Demand Amount’); and
    - state that the Demand Amount is payable to The Employer in the circumstances contemplated in the Contract.

Notwithstanding the reference herein to the Contract the liability of the Bank in terms hereof is as principal and not as surety and the Bank’s obligation/s to make payment:

* is and shall be absolute provided demand is made in terms of this bond in all circumstances; and
* is not, and shall not be construed to be, accessory or collateral on any basis whatsoever.

The Bank’s obligations in terms of this Guarantee:

* shall be restricted to the payment of money only and shall be limited to the maximum of the Guaranteed Sum; and
* shall not be discharged and compliance with any demand for payment received by the Bank in terms hereof shall not be delayed, by the fact that a dispute may exist between the Employer and the Contractor.

the Employer shall be entitled to arrange its affairs with the Contractor in any manner which it sees fit, without advising us and without affecting our liability under this Guarantee. This includes, without limitation, any extensions, indulgences, release or compromise granted to the Contractor or any variation under or to the Contract.

Should the Employer cede its rights against the Contractor to a third party where such cession is permitted under the Contract, then the Employer shall be entitled to cede to such third party the rights of the Employer under this Guarantee on written notification to the Bank of such cession.

This Guarantee:

* shall expire on the Expiry Date until which time it is irrevocable;
* is, save as provided for in ‎0 above, personal to the Employer and is neither negotiable nor transferable;
* shall be returned to the Bank upon the earlier of payment of the full Guaranteed Sum or expiry hereof;
* shall be regarded as a liquid document for the purpose of obtaining a court order; and
* shall be governed by and construed in accordance with the law of the Republic of South Africa and shall be subject to the jurisdiction of the Courts of the Republic of South Africa.

Any claim which arises or demand for payment received after expiry date will be invalid and unenforceable.

The Bank chooses domicilium citandi et executandi for all purposes in connection with this Guarantee at the Bank’s Address.

Signed at \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Date\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

For and behalf of the Bank

Bank Signatory: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Bank Signatory:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Witness: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Witness\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Bank’s seal or stamp

**Schedule 15 - Response Times**

**FAULTS**

|  |  |
| --- | --- |
| **Fault** | **Response Times** |
| **The entire Facility is not generating Energy (i.e. one hundred percent (100%) generation loss)** | Four [4] hours |
| **Thirty percent (30%) or more Energy generation loss** | Six [6] hours |
| **Less than thirty percent (30%) Energy generation loss** | Twelve [12] hours |

SPARE PARTS

|  |  |
| --- | --- |
| **Spare Parts** | **Response Times** |
| **Spares Stock** | Replace the Spare Part no later than [**●**] ([**●**]) [hours/days] from the time that the shortfall arose. |

**PRICE ADJUSTMENT**

|  |  |  |
| --- | --- | --- |
| **Price Adjustment** | **CLAUSE** | **Amount** |
| **Response Time Price Adjustment** | **CLAUSE 6.21** | [**0.02%**] of annual fee per [day] of delay |

SCHEDULE 16

STAFF COMPLIMENT

The Contractor to provide a list of his proposed staff compliment that will be providing the Service. The list to specifically also indicate the staff that will be permanently based on Site , the percentage of time the staff will be on Site and normal site working hours for seven days a week.