

**BOCA PHASE 1B – DRAFT ONE FOR NEGOTIATIONS**

[Tracked 27<sup>th</sup> June 2013]

**BUS OPERATING COMPANY AGREEMENT**

Between

**CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY**

And

[ \_\_\_\_\_ ] PROPRIETARY LIMITED

Registration Number: \_\_\_\_/\_\_\_\_/07

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### PART A: DEFINITIONS, PURPOSE AND SUSPENSIVE CONDITIONS

#### 1 DEFINITIONS

In this agreement, unless the context indicates otherwise, the words and expressions set out below shall have the meanings assigned to them and cognate expressions shall have a corresponding meaning, namely:

- |     |                                 |  |
|-----|---------------------------------|--|
| 1.1 | “Additional Vehicles”           | the additional Vehicles that the City may request the BOC to procure as contemplated in 41;  |
| 1.2 | "AFC"                           | The equipment, infrastructure, systems and procedures utilized collectively to automate fare collection for the Rea Vaya System;   |
| 1.3 | “Affected Operator Entity(ies)” | the person(s) who will be shareholders in the BOC, directly or indirectly through their shareholdings in the relevant Affected Operator Entity, once their individual status and/or compliance with qualification criteria has been verified by the City;  |
| 1.4 | "Agreement"                     | this Agreement and all the Schedules thereto;  |
| 1.5 | "APTMS"                         | the Advanced Public Transport Management System including all verbal and displayed communications, geographic positioning, service planning, operations and information systems and equipment;   |
| 1.6 | "Assignee"                      | the City's successor-in-title and/or assign, being a municipal entity appointed in terms of the Local Government: Municipal Systems Act, 2000 (as amended), if and to the extent to which the City elects to cede all its rights and delegates all its obligations pursuant to this Agreement to such entity, on the basis contemplated in 51.2; |

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- 1.7 "Bus Manufacturing Company" the company appointed by the City to manufacture 134 Vehicles for Phase 1B in terms of the Bus Acquisition Agreement;
- 1.8 "BOC" \_\_\_\_\_ Proprietary Limited, Reg No. \_\_\_\_/\_\_\_\_/\_\_\_ a private company with limited liability incorporated under the laws of South Africa,;
- 1.9 "BOC Services" collectively, the Bus Operating Services set out in **Part C**, the Bus Maintenance Services set out in **Part D**, and the monitoring, reporting, contract management, care and ensuring security of the On-board Fare Payment Subsystem and the On-board APTMS Units set out in **Part F**;
- 1.10 "BOC Service Fee" shall have the meaning as set out in 6.1.2;
- 1.11 "Bus Acquisition Agreement" the agreement between the City and the Bus Manufacturing Company pursuant to which the City has ordered the Vehicles required for Phase 1B;
- 1.12 "Bus Maintenance Services" the bus maintenance services set out in **Part D** of this Agreement;
- 1.13 "Business Day" any day other than a Saturday, Sunday or an official public holiday within the meaning of the Public Holidays Act, 1994;
- 1.14 "Bus Operating Services" the bus operating services described in **Part C** of this Agreement to be rendered by the BOC without interruption or delay throughout the currency of this Agreement upon the terms and conditions set out therein, read together with other terms set out in this Agreement;
- 1.15 "Bus Schedule" the assignment of Vehicles and duties to Drivers on a daily basis produced by the BOC in accordance with the requirements of the City as stipulated in the Services Plan and furnished to the City at least one day in advance of the

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day to which it is applicable, including the identifying the Driver of each such Vehicle on each shift;

- 1.16 "Calculation Day" Thursday of each calendar week during the currency of this Agreement, and if in any particular week a Thursday is not a Business Day, then the Calculation Date shall be the next succeeding Business Day;
- 1.17 Calculation Period a period commencing on a Wednesday 00h00 and ending on the next Tuesday 23h59 immediately before the Calculation Date;
- 1.18 "Capacity" the maximum number of Users that may be carried in each Vehicle, including all seated and standing passengers but excluding the Driver, with reference to the carrying capacity of each individual type of Vehicle;
- 1.19 "the City" City of Johannesburg Metropolitan Municipality, a municipality as described in section 2 of the Local Government: Municipal Systems Act, 2000 and as contemplated in section 155 of the Constitution of the RSA, 1996 as a category A municipality, or the Assignee, if applicable;
- 1.20 "Commencement Date" the date determined by the City as the commencement date, after consultation with the BOC, by the issuance of a written notice to that effect, from which date the City will commence paying the BOC Service Fee to the BOC for rendering the BOC Bus Services to the City pursuant to the this Agreement, calculated on the basis of the formulae set out in **Schedule 4**;
- 1.21 "Complementary Routes" bus routes of Phase 1B which links Feeder Stops to Stations and which may overlap with Trunk Routes;
- 1.22 "Complementary" those Vehicles which have kerb level doors on the left hand side of the Vehicle as well as high-floor station level doors

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- Vehicles" on the right hand side of the Vehicle and are able to operate on the Complementary, Feeder and Trunk Routes **as prescribed by the City;**
- 1.23 "Control Centre" the central control centre to be operated and managed by the City, for the purpose of coordinating the Bus Operating Services;
- 1.24 "Depot" the one or more areas identified in **Schedule 1**, including any improvements thereon, as may be amended or substituted by the City from time to time, which are owned and/or leased by the City and which shall be leased to the BOC on a non-exclusive basis pursuant to the terms and conditions set out in **Part E**, to enable it to render the BOC Services;
- 1.25 "Depot Equipment" all equipment on the Depot and identified on **Schedule 1**,
- 1.25.1 including without limitation, the plant, equipment, compressor/s and generator/s, which shall be leased to the BOC on a non-exclusive basis pursuant to the terms and conditions set out in the Depot Lease Agreement to enable it to render the BOC Services; or
- 1.25.2 in the event of the depot equipment being leased from Piotrans as contemplated in this Agreement, those equipment that are used exclusively by the BOC;
- 1.26 "Depot Lease Agreement" the agreement of lease set out in **Part E** pursuant to which the City will lease the Depot and the Depot Equipment to the BOC for its non-exclusive use in relation to the BOC Services;
- 1.27 "Board of" the board of directors of the BOC appointed by the Affected



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- Directors” Operator Entities from time to time;
- 1.28 "Drivers" those drivers employed by the BOC to operate the Vehicles;
- 1.29 "Emergency" any situation which the City in its sole discretion regards as being beyond the reasonable control of the BOC, which may include, without being limited thereto, protected strikes, stayaways, riots, acts of God and *Force Majeure Event*, which makes the provision of the Bus Operating Services or any part thereof impossible or substantially impossible, provided that the institution of any proceedings by the BOC challenging the exercise of the City's discretion pursuant to this clause 1.29 shall not in any way detract from the obligations to be discharged by the BOC to the City pursuant to this Agreement, so as to ensure that the BOC renders the Bus Operating Services to the City in a continuous and uninterrupted manner as contemplated in 12.3 of this Agreement;
- 1.30 "Fare" the money to be collected from Users in exchange for the right to travel on the Vehicles;
- 1.31 "Feeder Routes" routes designed to transport Users to Trunk Routes;
- 1.32 "Feeder Stops" bus stops on the kerb side that allow Users to access Vehicles using the Feeder Routes and Complementary Routes;
- 1.33 "Feeder Vehicles" those Vehicles which have kerb level doors on the left hand side of the Vehicle, as well as high-floor exit doors on the right hand side of the Vehicle, and are able to operate on the Complementary Routes and Feeder Routes and stop at Feeder Stops and Stations;
- 1.34 "Fleet" in relation to the BOC, means all the Vehicles operated by the BOC in Phase 1B, including Additional Vehicles

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contemplated in 41;

1.35 "Material Adverse  
Effect"

1.35.1 an increase in the operating costs as a result of an instruction by the City to the BOC to change scope of the services not contemplated, excluding the operating costs contemplated in Schedule 3, which has or is likely to have, in the reasonable opinion of the City, an impact on the BOC's ability to discharge its obligations under this Agreement; and/or

1.35.2 an increase in the maintenance costs referred to in 15.4.3;

1.36 "Material Breach"

-

1.36.1 an inability on the part of the BOC to pay any material debt or all of its debts as and when they fall due and payable in the immediately ensuing six months; or

1.36.2 the BOC committing an act of insolvency as contemplated in the Insolvency Act; or

1.36.3 an inability to discharge any of its material obligations in terms of this Agreement, particularly but not to the exclusion of other obligations of the BOC those which are required to be rendered in an uninterrupted and timeous manner as is contemplated in 12 of this Agreement, other than pursuant to an Emergency and/or Force Majeure Event as defined; or

1.36.4 failure on the part of the BOC to adhere to and/or implement the provisions of the Plan, other than pursuant to an Emergency and/or Force Majeure Event as defined; or

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- 1.36.5 a breach as contemplated in Schedule 5, entitling the City to terminate this Agreement, other than pursuant to an Emergency and/or Force Majeure Event as defined;
- 1.37 "NLTA" the National Land Transport Act, 2009, as amended or substituted;
- 1.38 "Off-peak Period" the time intervals before and after Peak Periods;
- 1.39 "On-board APTMS Unit" that part of the APTMS that is located on-board all of the Vehicles making up the Fleet;
- 1.40 "On-board Fare Payment Subsystem" that part of the fare payment subsystem which is located on board all of the Complementary Vehicles and Feeder Vehicles making up the Fleet;
- 1.41 "Operating Licence" a new operating licence or permit as defined in the NLTA, which will be necessary to enable the BOC to provide the BOC Services in terms of this Agreement;
- 1.42 "Parties" the City and the BOC and "Party" means the City or the BOC, as the context may indicate;
- 1.43 "Peak Periods" those time intervals during which Phase 1B carries a higher than average number of Users on particular days as specified in the Service Plan;
- 1.44 "Performance Indicators" measurements to establish actual performance levels of the BOC for a specific period under review in accordance with the performance criteria as specified in **Schedule 5**, which performance indicators may be adjusted within the City's sole and absolute discretion taking into account best industry practice;
- 1.45 "Phase 1B" the routes of the second part of Phase 1 of the City's Rea Vaya BRT System, which are more fully set out in **Schedule 2**, and as amended from time to time by the

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Service Plan;

- 1.46 "Plan" the plan attached hereto as **Schedule 6**, whose purpose shall be to demonstrate to the City that the BOC has the necessary capacity to effectively manage and operate the BOC in such a manner as to be able to meet the Performance Indicators and satisfy all service level requirements contained in this Agreement;
- 1.47 "Quality Management System" the quality management system developed by the BOC based on the Quality Management System Guidelines attached hereto as **Schedule 7**, approved by the City within 3 months of the Commencement Date, comprising, *inter alia*, of the Driver instruction manual, management an standing operating procedures and Vehicle maintenance programme and audit procedures manual;
- 1.48 "Rea Vaya BRT System" the bus rapid transit system established by the City;
- 1.49 "Routes" the Feeder Routes, Complementary Routes and Trunk Routes designated to the BOC;
- 1.50 "RSA" the Republic of South Africa;
- 1.51 "Scheduled Trips" all trips that are scheduled for Vehicles in terms of the Bus Schedule, in accordance with the requirements of the Service Plan;
- 1.52 "Service Plan" the base plan produced by the Control Centre for the rendering of the Bus Operating Services on a daily basis and ad hoc event services, which can be amended at any time by the Control Centre and which incorporates detailed provisions regarding Routes, timetables or frequencies and operating hours for Business Days, Saturdays, Sundays and public holidays, designed to meet the transportation demands and requirements of the Users in a functional

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manner;

- 1.53 "Signature Date" the date upon which both Parties have signed this Agreement or in the event of their having signed the Agreement on different dates, the date of the last signature;
- 1.54 "Stations" the designated Rea Vaya BRT bus stations at which Users board and alight from Trunk Vehicles and Complementary Vehicles in Phase 1B;
- 1.55 "Tax" all value-added tax, sales tax, customs and excise, import and export duties and all other indirect taxes, levies or duties of a like or similar nature payable in any relevant jurisdiction in relation to this Agreement;
- 1.56 "Travel Pass" the physical document or device constituting the payment media, entitling the bearer thereof to travel for a period on Phase 1B in accordance with the Fare rules defined by the City from time to time;
- 1.57 "Trunk Lanes" the lanes constructed on public roads for the exclusive use of Phase 1B which may be operated on only by the Complementary Vehicles and Trunk Vehicles;
- 1.58 "Trunk Routes" the main bus routes of Phase 1B which are used exclusively by the Complementary Vehicles and Trunk Vehicles and are exclusively comprised of Trunk Lanes;
- 1.59 "Trunk Vehicles" those articulated Vehicles with a User carrying Capacity specified in the Vehicles, which have station level doors on the right hand side of the Vehicle only and which operate only on the Trunk Routes;
- 1.60 "Users" passengers using Phase 1B services;
- 1.61 "Vehicles" the Feeder Vehicles, Complementary Vehicles and Trunk Vehicles which shall be used by the BOC to provide the

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Bus Operating Services in accordance with the provisions of this Agreement;

1.62 "ZAR" or "Rand" the legal currency of the RSA.

## 2 PURPOSE OF THIS AGREEMENT

The purpose of this Agreement is to provide for:

- 2.1 the rendering by the BOC of the Bus Operating Services to the City upon and subject to the terms and conditions set out in **Part C** of this Agreement;
- 2.2 the rendering by the BOC of the Bus Maintenance Services upon and subject to the terms and conditions set out in **Part D** of this Agreement;
- 2.3 the lease of the Depot by the BOC, the obligation to maintain and ensure the upkeep by the BOC of the Depot upon and subject to the terms and conditions set out in **Part E** of this Agreement, and the maintenance of all Depot Equipment provided by the City at the Depot;
- 2.4 the monitoring, reporting, care and ensuring security of the On-board Fare Payment Subsystem and the On-board APTMS Units, including the management of those provisions in the contracts pertaining to the maintenance and repair of the On-board Fare Payment Subsystem and the On-board APTMS Units, upon and subject to the terms and conditions set out in **Part F** of this Agreement;
- 2.5 the City's breach management rights as set out in **Part G** of this Agreement;
- 2.6 to an extent requested to do so by the City, the procurement of the 134 Vehicles and/or Additional Vehicles, and the funding framework within which the BOC may acquire the 134 Vehicles and/or Additional Vehicles, all as specified in **Part H** of this Agreement,

it being agreed that each of **Parts B to H** (except for **Part G**) constitutes a separate and severable agreement between the Parties to that particular

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agreement and that the general provisions of this Agreement in **Part A, Part G** and **Parts J** and **K** shall apply, with the necessary changes, to each of the separate Parts of this Agreement.

**3 SUSPENSIVE CONDITIONS**

**3.1 Suspensive conditions**

3.1.1 Save for the provisions of this clause 3.1 as well as 1, 58, 63 to 64 (both inclusive), all of which shall come into force on the Signature Date, this Agreement is subject to fulfilment of the following suspensive conditions on or before **[insert]** or such later date as the Parties may in writing agree upon before that date, unless specifically indicated otherwise or as the Parties may otherwise agree, namely:

3.1.1.1 the obtaining of all approvals required by the City for entering into this Agreement pursuant to the Local Government: Municipal Finance Management Act, 2003 ("**the MFMA**"), and the Local Government: Municipal Systems Act, 2000 ("**the Systems Act**") in respect of the City's procurement and supply chain management policies;

3.1.1.2 approval by the City of the Plan attached hereto as **Schedule 6**, whose purpose shall be to demonstrate to the City that the BOC has the necessary capacity to effectively manage and operate the BOC in such a manner as to be able to satisfy all service level requirements contained in this Agreement;

3.1.1.3 the granting to the BOC of the necessary Operating Licences required pursuant to the NLTA, for the duration of this Agreement;

3.1.1.4 the relinquishing, to the reasonable satisfaction of the City, by each of the shareholders of the Affected Operator Entities

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of any licence or permit held by it which entitles it to provide a service in competition with the BOC, it being agreed that any such shareholder of an Affected Operator Entity who holds more than one licence or permit shall only be required to relinquish the relevant licence/s or permit/s in relation to the acquisition of its shareholding in the Affected Operator Entity; and

- 3.1.1.5 the signature by the Parties of the Agreed Fee per Kilometre Framework in the form of **Schedule 3**.
- 3.1.2 The BOC shall use its reasonable endeavours to procure fulfilment of the suspensive conditions in 3.1.1.3 and 3.1.1.4
- 3.1.3 The City shall use its reasonable endeavours to procure fulfilment of the suspensive conditions in 3.1.1.1 and 3.1.1.2.
- 3.1.4 The Parties shall use their reasonable endeavours to procure fulfilment of the suspensive condition in 3.1.1.5.
- 3.1.5 The suspensive conditions in 3.1.1.1, 3.1.1.2 and 3.1.1.3 are not capable of waiver in law.
- 3.2 If any of the suspensive conditions in 3.1 remains unfulfilled or has not been waived (if it is capable of waiver in law) in writing by the Party or Parties for the benefit of which such suspensive condition has been stipulated by the date stipulated in 3.1 or such later date as the Parties may agree in writing pursuant to 3.1, this Agreement shall not come into force or effect save for the provisions of 1, 58, 63 to 64 (both inclusive), which shall not be subject to the fulfilment or waiver of the suspensive conditions.
- 3.3 If any of the suspensive conditions is not fulfilled or waived by the date specified in 3.1 or such later date as the Parties may agree in writing pursuant to 3.1, neither Party shall have any claim against the other Party by virtue of the provisions of this Agreement.

## PART B: APPOINTMENT, DURATION AND BOC SERVICE FEES



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**4 APPOINTMENT OF THE BOC**

4.1 The City hereby appoints the BOC to render the BOC Services in consideration for the BOC Service Fees determined in accordance with provisions of 6 and for the period specified in 5 and the BOC hereby accepts such appointment upon and subject to

4.1.1 the general terms and conditions set out in **Part A** and **Part K**;

4.1.2 the duties and obligations set out in **Part C** in respect of the Bus Operating Services;

4.1.3 the duties and obligations set out in **Parts D** in respect of the maintenance of the Vehicles;

4.1.4 the lease of the Depot and Depot Equipment to the BOC on terms and conditions set out in **Part E**, including the BOC obligations in respect of the Depot and the Depot Equipment to maintain, secure and insure the Depot and Depot Equipment as contemplated in **Part E**;

4.1.5 the duties and obligations set out in **Part F** in respect of the monitoring, reporting, care and ensuring security of the On-board Fare Payment Subsystem and the On-board APTMS Units;

4.1.6 the monitoring and Material Breach Management Rights of the City as contemplated in **Part G**; and

4.1.7 the obligations of the BOC to acquire the 134 Vehicles and/or Additional Vehicles as contemplated in **Part H** of this Agreement.

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**5 COMMENCEMENT AND DURATION**

- 5.1 Subject to the suspensive conditions set out in 3, this Agreement shall come into force on the Commencement Date and shall continue for a period of 12 years.
- 5.2 At least 6 months prior to the end of the contract period referred to in 5.1, the City shall invite new tenders for the provision of the BOC Services in substantially the same service area, for a contract period commencing on the termination or cancellation of this Agreement.
- 5.3 If a subsequent tendered contract is awarded to a different operator, the BOC hereby undertakes to give its full co-operation in effecting the transition of the BOC Services to the new operator.

**6 FEES AND PAYMENT FOR BOC SERVICES**

**6.1 Definitions**

The following additional definitions shall apply for the purposes of this clause 6:

- 6.1.1 "Actual Variable Costs" the aggregate *variable costs* actually incurred by the BOC in rendering the BOC Services in respect of each of the following five components during any relevant Calculation Period or Calculation Periods, namely: fuel, lubricants, Add Blu additives tyres, and maintenance costs, based on the Kilometres Travelled, up to the levels and using the calculation methodology agreed to by the City and the BOC as set out in **Schedule 3**;
- 6.1.2 "BOC Service Fee" the gross weekly fee, before any adjustments, payable by the City to the BOC, with effect from the Commencement Date, for rendering the BOC Services during any particular Calculation Period,

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calculated in accordance with the Compensation Formula set out in Schedule 4 as Follows:

- 6.1.2.1 Scheduled Kilometres, less Own Volition Untravelled Kilometres for the applicable vehicles, multiplied by the applicable Fee per Kilometre for such vehicles
- 6.1.2.2 *deducting* the cash value of all penalties provided for in **Schedule 5**;
- 6.1.3 " Fee per Kilometre" the agreed fee per kilometre for Applicable Vehicles as set out in **Schedule 4**, which will be adjusted periodically in terms of the escalation formulae in **Schedule 4**
- 6.1.4 "Fixed Costs" all *fixed costs* to be incurred by the BOC in rendering the BOC Services as set out in Schedule 3;
- 6.2 "Guaranteed Kilometres" the kilometres contemplated in **Schedule 2**, being the kilometres that the City guarantees shall be procured from the BOC on an annual basis;
- 6.2.1 "Travelled Kilometres" Scheduled Kilometres less Own Volition Untravelled Kilometres
- 6.2.2 "Own Volition Untravelled Kilometres" the aggregate of all Scheduled Kilometres which the BOC fails to operate as a result of an instance initiated by the BOC irrespective of whether it was a wilful or negligent act or omission or the consequence of any protected or unprotected strike by any of its Drivers or other employees during any Calculation Period;

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6.2.3 “Projected Variable Costs” the aggregate *variable costs* projected to be incurred by the BOC in rendering the BOC Services in respect of the variable cost items as specified in Schedule 3 during any relevant Calculation Period, namely: fuel, lubricants, tyres and maintenance costs

6.2.4 "Scheduled Kilometres" the aggregate scheduled kilometres required to be travelled in terms of Scheduled Trips during any relevant Calculation Period provided for in the Bus Schedule, as may be amended from time to time by the City, it being agreed for avoidance of doubt that the term Scheduled Kilometres shall mean actual kilometres travelled in a Calculation Period;

6.3 *Calculation of the BOC Service Fee*

The City shall on each Calculation Day, calculate the BOC Service Fee and after having made the necessary adjustments, pay the BOC Service Fee, which shall be payable by the City in respect of the BOC Services rendered by the BOC during the Calculation Period.

6.4 *Payment of the BOC Service Fee*

The BOC Service Fee in respect of each Calculation Period shall be *due and payable* by the City to the BOC in accordance with **Schedule 5** on the Thursday following the Calculation Day.

6.5 *Monthly adjustments*

On the tenth calendar day (or the first Business Day thereafter if the tenth calendar day is not a Business Day) of every calendar month during the currency of this Agreement, the City shall calculate the Actual Variable Costs incurred by the BOC in rendering the BOC Services during the relevant monthly calculation period. If:

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6.5.1 the Actual Variable Costs for that period **exceed** the Projected Variable Costs for that period, then the excess shall be due and payable by the City to the BOC on the immediately following Thursday, together with the relevant BOC Service Fee; or

6.5.2 the Actual Variable Costs for that period are **less than** the Projected Variable Costs for that period, then the shortfall shall be deducted by the City from the next succeeding BOC Service Fee to be paid by the City to the BOC.

6.6 *Six-monthly reconciliation and obligation to pay for the Guaranteed Minimum Kilometres in certain circumstances*

On the first Business Day after each completed six-month period during the currency of this Agreement, the City shall reconcile the BOC Service Fees. If:

6.6.1 the Guaranteed Minimum Kilometres exceeded the Kilometres Travelled and paid for weekly and as a result the Guaranteed Kilometres for the 26 weekly period **exceed** the aggregate of the 26 weekly BOC Service Fees actually paid to the BOC during the six month period concerned, the City shall pay to the BOC, in the form of additional fees, an amount equal to such excess; or

6.6.2 the Kilometres Travelled were equal to or more than the Guaranteed Minimum Kilometres and as a result the Service Fees due in respect of the Guaranteed Kilometres for the 26 weekly period were equal to or less than the aggregate of the 26 weekly BOC Service Fees actually paid to the BOC during the six month period concerned, then no additional payment shall become due and payable to the BOC, no adjustment shall be required and the City shall not be obliged to pay any additional amount to the BOC.

**PART C: BUS OPERATING SERVICES**

**7 COMPLIANCE WITH THE SERVICE PLAN**

7.1 In providing the Bus Operating Services the BOC shall comply with the specific terms and conditions set out in the Service Plan, which will prescribe, inter alia, the following:

7.1.1 *Route:*

a description of the Route to be operated by the BOC. The BOC recognises and acknowledges that the routes and services assigned to it by the City to operate will not be for its exclusive use and may be varied by the City at any time, provided that such variation shall not prejudice the BOC's rights to payment of the BOC Service Fees in 6;

7.1.2 *Timetables and frequencies:*

the number of Vehicles per hour for each Route or part thereof, including the Stations and the Feeder Stops at which such Vehicles are required to stop in order to allow Users to disembark and embark and the procedure required for the Control Centre to communicate any variations in this regard to the BOC;

7.1.3 *Operating hours:*

the hours during which the BOC will render the Bus Operating Services on each relevant Route on any particular day, it being agreed that the BOC shall render the Bus Operating Services without interruption or delay during all operating hours, being 24 hours per day, seven days per week, including weekends and public holidays, except when an Emergency occurs.

**8 PLANNING, MANAGEMENT AND CONTROL OF PHASE 1B**

8.1 The City shall be responsible for:

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- 8.1.1 operating and managing the Control Centre;
- 8.1.2 determining the Routes to be operated by the BOC, as well as the volume and frequency of bus traffic on each such Route;
- 8.1.3 determining the operating hours on each calendar day, including Saturdays, Sundays and public holidays, from time to time; and
- 8.1.4 prescribing such other terms, conditions or operational rules in relation to any aspect of the BOC Services not dealt with in the Service Plan, in this Agreement nor in the Quality Management System approved by the City, and considered reasonably necessary or incidental to the effective commercial operation of the Rea Vaya BRT System, provided that such prescription shall not have a Material Adverse Effect. If the prescription does result in a Material Adverse Effect, the Parties shall meet in good faith to consider whether and if so agreed, to what extent and in what manner the City shall reasonably compensate the BOC for such costs.
- 8.2 The City shall furnish the Service Plan for each day of the immediately succeeding week (commencing Monday and ending Sunday) to the BOC on Thursday of each calendar week, or if Thursday of any particular calendar week does not fall on a Business Day, the Business Day preceding Thursday of that calendar week. The BOC will then develop the daily Bus Schedule in accordance with the Service Plan, containing details of Vehicles and Drivers and shall furnish this to the City for approval.
- 8.3 The BOC shall not be entitled to deviate from the Bus Schedules and hereby undertakes to do all such things or procure the doing of all such things as may be reasonably necessary or incidental to the rendering of the BOC Services in accordance with the Service Plan and to that end shall ensure at all relevant times that there are a suitable number of serviceable Vehicles and suitably trained Drivers, mechanics and security staff on standby to avoid any interruption or delay in the rendering of the BOC Services.

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- 8.4 In the case of an Emergency, and in the event of the City forming a view, within its discretion, such discretion to be reasonably exercised, that affording the BOC the right contemplated in 62.3 will negatively impact continuous and uninterrupted Bus Operating Services in a manner as contemplated in 12.3 of this Agreement, the BOC comply with all instructions of the City in this regard.

### 9 **AMENDMENT OF THE SERVICE PLAN**

In order to ensure the operation of the Rea Vaya BRT System in an efficient, effective and integrated manner, the Parties agree that the City may, in its absolute and sole discretion, if the City deems it necessary, amend the Service Plan, including without limitation the routes and timetables in a manner which would ensure the appropriate operation of the Rea Vaya BRT System, subject always to the provisions of 6, and the BOC shall be obliged to adhere to the amended Bus Schedules and/or Timetables, as the case may be.

### 10 **UNDERTAKING TO CO-OPERATE WITH OTHER BUS OPERATING COMPANIES**

- 10.1 The BOC acknowledges that the City has engaged the services of another bus operating company in respect of Phase 1A and will engage the services of other bus operating companies as and when other phases of the Rea Vaya BRT System (subsequent to Phase 1B) are implemented, and undertakes to co-operate with such other bus operating companies to the extent reasonably required by the City from time to time, to enable synchronised scheduling of the service across the Rea Vaya BRT System.

- 10.2 The City will reasonably endeavour to procure that such other bus operating companies cooperate with the BOC.

### 11 **TEMPORARY INTERRUPTIONS, DELAYS OR DEVIATION FROM SCHEDULED TRIPS**

- 11.1 The BOC hereby agrees that cancellation of Scheduled Trips by the BOC is only permitted if such cancellation is due to:



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- 11.1.1 unforeseen road closures, weather conditions (subject to prior agreement with the Control Room), or Emergencies;
- 11.1.2 immediate danger to life and/or personal injury and/or serious damage to property; or
- 11.1.3 strikes, stayaways or actions of a general nature which are not confined to the BOC's organisation and/or employees and/or recognised trade unions,

in which event, the City and the BOC shall meet in good faith on an urgent basis, in person or telephonically, followed by written confirmation from City, to agree upon the deviation from the Service Plan to be allowed and the expected date and/or time of recommencement of the Scheduled Trips, or if the Parties fail to reach agreement within one hour after having met for the first time, whether telephonically or otherwise, the City's reasonable decision shall be final and binding on the Parties.

- 11.2 Where the BOC is of the opinion that Scheduled Trips should be cancelled due to boycott action, either against the BOC or generally, the BOC must refer the matter to the City for its decision, which shall be final and binding on the BOC. If the BOC suffers any actual loss as a result of the final and binding decision of the City, the City shall be liable for actual loss suffered.

- 11.3 The Parties agree that:

- 11.3.1 If the City decides that such cancellation is justified, no penalty shall be imposed;

- 11.3.2 If on the other hand, the City decides that the cancellation is not justified and the BOC nevertheless fails to render the services for any period of time whilst the boycott action continues, the BOC shall be penalised in accordance with **Schedule 5** for not providing the services and no fee will be paid for any cancelled Scheduled Trips, and the kilometres in respect of such cancelled Schedule Trips shall constitute Own Volition Untravelled Kilometres.

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- 11.4 The BOC must inform the City immediately of any proposed cancellation of any Scheduled Trips pursuant to 11.1 and 11.2 and the City and the BOC shall meet on an urgent basis to agree upon the deviation to be allowed and the recommencement of the Scheduled Trips, or if they fail to reach agreement within one hour after having met for the first time, the City's reasonable decision shall be final and binding on the Parties.

## 12 OBLIGATIONS OF THE BOC

### 12.1 *Operating Licences*

- 12.1.1 The BOC shall obtain all Operating Licences and maintain them in force throughout the currency of this Agreement, pay all fees and levies and issue all notices as may be necessary for or connected with the operation of the BOC Services in accordance with the NLTA and such other applicable legislation. The City will assist the BOC as far as reasonably practicable in obtaining the Operating Licences.

- 12.1.2 The Operating Licences shall be conditional upon this Agreement remaining in force. Should this Agreement be cancelled or terminated, for any reason whatsoever, the Operating Licences shall be withdrawn from the BOC. The City shall be entitled to operate or procure the operation of the BOC Services for the period during which it is the holder of the Operating Licences. The BOC undertakes to provide its full assistance to the relevant regulatory entity and the City to achieve the objects of this clause.

### 12.2 *Provision of the Bus Operating Services*

- 12.2.1 The BOC must exercise the highest degree of skill, care and diligence in the provision of the Bus Operating Services strictly in accordance with the Service Plan, as well as the other relevant provisions of this Agreement, to the reasonable satisfaction of the City. The BOC must comply with and strictly adhere to the City's instructions and directions regarding the provision of the Bus

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Operating Services. The BOC hereby undertakes that it shall only take instructions and directions from the City in this regard.

12.2.2 The BOC shall have no cause to refuse to convey a person on a Scheduled Trip or part thereof unless

12.2.2.1 the User carrying Capacity of the Vehicle will be exceeded at the time in question;

12.2.2.2 the person wishing to be conveyed is violent, abusive or otherwise offensive;

12.2.2.3 on any grounds contemplated in the NLTA or such other applicable road traffic legislation; or

12.2.2.4 the person refuses to pay the prescribed Fare.

12.2.3 The BOC shall comply with the Quality Management System contemplated in 1.46.

12.3 *Uninterrupted service*

12.3.1 The BOC acknowledges and accepts that it is imperative for the success of the Rea Vaya BRT System that the Bus Operating Services be rendered without interruption or delay and undertakes to do or procure the doing of all things necessary to ensure such uninterrupted and timeous service, including without being limited to maintaining a reserve Fleet, which shall be available for immediate deployment if required, of at least 5%, rounded up to the nearest number of complete Vehicles of the number of Vehicles required for the Scheduled Trips on a fully operational basis at any given time.

12.3.2 The BOC hereby acknowledges and accepts that the 134 Vehicles constitutes a sufficient number of Vehicles required to operate the BOC Services, inclusive of the required reserve Fleet, without any disruption or delay.

12.4 *Insurance of Vehicles*

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The BOC shall at all times maintain insurance in respect of the Vehicles to cover physical damage occasioned by accidents, sabotage, political riot or insurrection, on terms based on industry norms, and shall provide the City with proof of such insurance.

### 12.5 *Corporate image*

12.5.1 The City shall determine the corporate image, logo and trademarks of the Rea Vaya BRT System which shall include the design and appearance of the Vehicles as well as the uniforms of Drivers and officials, with due regard to operational health and safety requirements. The BOC shall at all times comply with such specifications as may be reasonably prescribed by the City from time to time.

12.5.2 The City reserves the right to place advertisements on the interior and/or exterior of the Vehicles. The BOC may not place any advertisements on the interior and/or exterior of the Vehicles unless the City's express prior written consent has been obtained.

### 12.6 *Compliance with standard operating and control procedures and requirements*

The BOC shall at all times comply with any standard operating and control procedures and requirements for the day to day administration, monitoring, control and performance of this Agreement as may be reasonably determined by the City from time to time, and with due regard to the prevailing industry standards (international, to the extent adopted by the local bus operating industry, or local) in the bus operating industry and the specific circumstances under which the Rea Vaya BRT System operates from time to time, which will include the Quality Management System contemplated in 1.47.

### 12.7 *Compliance with the provisions of 34.1 and 34.2*

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The BOC shall, in providing the Bus Operating Services, at all times comply with the instructions for the operation and care of the AFC System and APTMS as contemplated in 34.1 and 34.2.

### 12.8 *No Sub-contracting of Bus Operating Services*

The BOC shall not sub-contract any aspect of the Bus Operating Services to any third party without the written consent of the City, such consent not to be unreasonably withheld.

## 13 SECURITY OF VEHICLES

The BOC shall, in providing the Bus Operating Services, and at all times during the currency of this Agreement, be responsible for the security of all Vehicles and to that end the BOC shall take all steps reasonably necessary to protect the Vehicles and other physical assets of the BOC against the risks of *inter alia* fire, flood, theft, sabotage, political riot or insurrection, accident and physical damage to or destruction of the Vehicles and other physical assets of the BOC;

## 14 SAFETY OF USERS

The BOC shall at all times during the currency of this Agreement be responsible for the security of the Users on board the Vehicles, between embarkation and disembarkation and to that end shall:

- 14.1 take all steps reasonably necessary to protect Users against the risks of personal injury or death and loss or damage to personal property whether by accident or otherwise howsoever;
- 14.2 obtain and maintain public liability insurance cover of R20 million per incident in relation to the Users of the nature referred to in 44 to the extent appropriate.

**PART D: MAINTENANCE OF VEHICLES**

**15 GENERAL**

15.1 The Parties hereby agree that, notwithstanding the ownership of the Vehicles being vested with the City, the BOC shall be responsible for the maintenance and upkeep of the Vehicles, which shall be in accordance with the terms and conditions set out in this **Part D**.

15.2 The City shall, pursuant to the Bus Acquisition Agreement, negotiate a full maintenance plan (including the chassis and the body of the bus) with the Bus Manufacturing Companies, in consultation with the BOC, which shall cover each Vehicle for a period of five years ("**the Maintenance Agreement**").

15.3 The BOC shall be obliged to enter into the Maintenance Agreement with the respective successful tenderers, and maintain such agreement for at least five years, and at all times comply with the terms and conditions of the said agreement.

15.4 After a period of five years from the commencement date of the Maintenance Agreement contemplated in 15.2, the BOC shall be entitled to

15.4.1 renegotiate a maintenance and repair agreement with a third party service provider, provided that such agreement shall be materially on the same or better terms and conditions as the Maintenance and Agreement, except in relation to maintenance costs; or

15.4.2 self-provide the maintenance and repair services, subject to the following terms:

15.4.2.1 the BOC shall provide the City with a full maintenance plan which will include, without limitation, adherence to all manufacturer's maintenance standards and requirements inspections, services, preventative maintenance including oil analyses-based preventative actions, a unit cost forecast (engine, gearbox and differential) for the remainder of the

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BOC contracted period, and capacity and staff deployment, for the City's approval;

- 15.4.2.2 the BOC demonstrating in the maintenance and repair plan that it has built up sufficient maintenance capacity and expertise and can provide the maintenance and repair services in house;
- 15.4.2.3 The BOC shall also at this time provide a body maintenance plan, which shall include minor refurbishing.
- 15.4.3 The Parties hereby agree that after the period of 5 years from the Commencement Date, the maintenance cost could be impacted by repairs becoming necessary on drive train units, which will include, the engines, gearboxes and rear axles, the Parties shall meet to consider any Material Adverse Effect that may reasonably arise at that time as a result of such increased costs.
- 15.4.4 The Parties hereby agree that in re-negotiating the impact on the Fee Per Kilometre, the two plans contemplated in 15.4.2.1 and 15.4.2.3 will be used as a basis to renegotiate the Fee Per Kilometre adjustment required in order to cover an acceptable level of increased maintenance expenditure.
- 15.5 The City shall be entitled, through a qualified person, to conduct random inspections of any or all Vehicles and to prohibit the use of a particular Vehicle should such inspection reveal a defect which, in the sole discretion of the City, renders the Vehicle unsuitable for use on the Rea Vaya BRT System. The approval or disapproval of any Vehicle by the City shall not in any way release the BOC from any of its obligations pursuant to this Agreement and the penalty regime shall be applicable.
- 15.6 The BOC shall at all times be required to maintain the Vehicles in accordance with the specifications of the Bus Manufacturing Company, as reasonably notified to the BOC from time to time.

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15.7 The BOC shall at all times comply with all reasonable directives that the City may issue to the BOC from time to time during the currency of this Agreement in connection with the maintenance of the Vehicles to the extent not otherwise prescribed by the Bus Manufacturing Company and with due regard to the prevailing industry standards (international to the extent adopted by the local bus operating industry and/or local) in the bus operating industry in relation to the subject matter of such directives, due regard being had to the specific circumstances under which the Rea Vaya BRT System operates from time to time. For avoidance of doubt the directives contemplated in this 15.7 shall not constitute a Material Adverse Effect.

15.8 The City shall issue a standard reporting form to be returned by the BOC at the required intervals demonstrating that the required standards of maintenance are being upheld.

**16 ACCIDENT REPAIR DAMAGE BELOW INSURANCE EXCESS**

The Parties hereby agree that in the event of the cost of repairing any damage to Vehicles where the cost of repair is less than the insurance excess, the BOC shall effect such repair at its own cost and such repair shall be done within 5 working days provided that minor body damage, specifically scratches and minor fibre repairs must be fixed within 48 hours. Failure to adhere to this requirement shall result in the imposition of the penalties contemplated in **Schedule 5**.

**17 ASSUMPTION OF REPAIR OBLIGATION ON VEHICLE BREAKDOWN**

17.1 The Parties hereby record that for the duration of the Maintenance Agreement contemplated in 15.2, any repair of Vehicles that have broken down en route, or the towing of Vehicles to the Depot in the event of the Vehicle not being capable of repair where stationed, the obligation to repair and all costs associated therewith shall be in accordance with the Maintenance Agreement.

17.2 It is hereby agreed that on the lapse of the Maintenance Agreement contemplated in 15.2 due to efflux of time, the obligation to repair and all costs associated therewith will be for the account of the BOC. For



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avoidance of doubt, assumption of this obligation shall not constitute a Material Adverse Effect.

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**PART E: DEPOT LEASE, MAINTENANCE AND SECURITY**

**18 LEASE OF DEPOT AND DEPOT EQUIPMENT**

18.1 The City lets and the BOC hires the Depot and the Depot Equipment set out in **Schedule 1**, on a non-exclusive basis, on the terms and conditions contained in this **Part E** ("the **Depot Lease Agreement**"), read together with **Part A, Parts I to Part K** (both parts inclusive).

18.2 The City warrants that the Depot and the Depot Equipment will, save for reasons beyond its reasonable control, be fit for the purpose for which it is to be used by the BOC, namely to provide a reasonable shelter for the Vehicles while not in use and to facilitate the cleaning, repair and maintenance of the Vehicles.

18.3 The Depot and the Depot Equipment shall be deemed, at the commencement of this Depot Lease Agreement, to be in good order and condition except to the extent that the BOC notifies the City in writing within 15 Business Days after having taken possession of the Depot and the Depot Equipment of the need for any repairs to or in the Depot and/or the Depot Equipment (as the case may be) or of the fact that any part of the Depot or the Depot Equipment, including any lock, key, door, window, appurtenance, fixture or fitting, is damaged, missing, or out of order.

**19 LEASE PERIOD**

This Depot Lease Agreement shall come into operation on the Commencement Date and shall terminate on the termination or cancellation of this Depot Lease Agreement or this Agreement for whatever reason, whichever is the earlier ("**the Lease Period**").

**20 RENTAL**

Rental payable by the BOC to the City in respect of the lease of the Depot and the Depot Equipment, shall be at R1,00 for the Lease Period and the full lease amount of R1,00 shall be due and payable in advance, on the day that the City effects payment of the first BOC Service Fees payment to the BOC, and shall be set-off against the said first BOC Service Fee.

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**21 BOC'S OBLIGATIONS IN RESPECT OF THE DEPOT AND DEPOT EQUIPMENT**

The BOC shall during the currency of this Depot Lease Agreement at its own expense and without recourse to the City:

- 21.1 with respect to the Depot
  - 21.1.1 maintain in good order and condition the Depot including the interior and exterior of the Depot and all parts thereof, including without being limited to all windows, doors, appurtenances, fixtures and fittings, electrical, data and plumbing installations in the Depot;
  - 21.1.2 promptly and properly repair or make good all damage occurring in the interior and exterior of the Depot, whatever the cause of such damage, and including damage to any part of the interior of the Depot or to any window, door, appurtenance, fixture, fitting, and replace all such items or parts thereof (as well as any keys) which have been broken, lost or destroyed (again regardless of cause);
- 21.2 with respect to the Depot Equipment
  - 21.2.1 maintain the Depot Equipment in good working order, fair wear and tear excepted;
  - 21.2.2 promptly and properly repair or make good all damage occurring to the Depot Equipment, whatever the cause of such damage;
  - 21.2.3 maintain insurance to cover replacement of any Depot Equipment damaged or lost;
- 21.3 supply and maintain sufficient safety and fire fighting equipment as is necessary given the operations on the Depot;
- 21.4 keep the Depot clean, tidy and commercially usable at all times;
- 21.5 not leave refuse or allow it to accumulate in or about the Depot except in the refuse bins or containers designated by law for the type of waste being handled; and the BOC hereby warrants that it shall deal with of all waste

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and effluent in accordance with the applicable South African environmental laws and by-laws;

- 21.6 not use the Depot and or the Depot Equipment or allow any of them to be used, in whole or part, for any purpose other than that of carrying on the business of the BOC in its ordinary and regular course;
- 21.7 not bring into the Depot any article which, by reason of its weight or other characteristics, is liable to cause damage to the Depot;
- 21.8 refrain from interfering with the electrical or plumbing serving the Depot and the Depot Equipment, except as may be strictly necessary to enable the BOC to carry out its obligations of maintenance and repair in terms of this Agreement;
- 21.9 provide at the BOC's own expense all electric, fluorescent and incandescent light bulbs required in the Depot from time to time; and
- 21.10 except as contemplated in 32 below, not allow for use of the Depot and/or the Lease Properties by one or more other bus operating companies.

**22 LIABILITY FOR ELECTRICITY, WATER AND RATES AND TAXES**

- 22.1 The BOC shall, from the Commencement Date, be liable for costs of all electricity and water consumed and rates and taxes in respect of the area in the Depot it occupies, and accordingly shall enter into conclude water and electricity supply agreements with the relevant department of the City.
- 22.2 The BOC shall timeously pay the cost of all electricity and water consumed at or on the Depot.

**23 LIABILITY FOR INCREASED PREMIUMS ON DEPOT INSURANCE**

- 23.1 The BOC recognises that the City may have insured the Depot and Depot Equipment, except for those agreed shall be insured by the BOC, against such risks, on such terms, for such amounts, and at such premiums as are for the time being usual in respect of similar buildings in similar locations.

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23.2 The BOC shall not keep or do in or about the Depot anything which is liable to increase any of the risks against which the Depot (or any part thereof) and/or the Depot Equipment is insured for the time being.

23.3 To the extent that

23.3.1 such insurance is rendered void or voidable or the premiums of such insurance are or become liable to be, increased, and without prejudice to any other right of action or remedy which the City may have arising out of a breach of the foregoing provision, the City may recover from the BOC on demand the full amount of any increase in insurance premiums in respect of the Depot attributable to such breach; and/or

23.3.2 any insurance claim by the City is repudiated for any reason whatsoever, the City may recover from the BOC on demand the full amount of the loss suffered by the City attributable to action by the BOC which resulted in the insurers repudiating any claim by the City.

**24 BOC INSURANCE OBLIGATIONS IN RESPECT OF DEPOT**

The BOC shall, in accordance with its obligations pursuant to 44, obtain and maintain contract works insurance and public liability insurance in relation to the Depot.

**25 ALTERATIONS, ADDITIONS AND IMPROVEMENTS**

25.1 The BOC shall not, without the prior written consent of the City, make any alterations or additions to the Depot and or the Depot Equipment, including electrical, data, and plumbing installations, which consent shall not be unreasonably withheld.

25.2 If the BOC does alter or add to the Depot and or the Depot Equipment in any way, in breach of 25.1, the BOC shall, if so required in writing by the City, restore the Depot and or the Depot Equipment (as the case may be) to the same condition as it was prior to such alteration or addition having

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been made. This clause shall not be construed as excluding any other or further remedy which the City may have in consequence of a breach by the BOC of 25.1.

**26 EXCLUSION OF LIABILITY FOR LOSS OR DAMAGE TO BOC PROPERTY**

26.1 The BOC shall have no claim against the City for any loss or damage suffered by the BOC by reason directly or indirectly of:

26.1.1 any failure or suspension of, or any interruption in, the supply of water, electricity, air-conditioning, heating, or any other amenity or service to the Depot, whatever the cause;

26.1.2 any breakdown of, or interruption or delay in the operation of, any Depot Equipment, and including (but without limiting the generality of the foregoing) any geyser, boiler, burglar alarm or security installation or system, regardless of cause;

26.1.3 any interruption of, or interference with, the enjoyment or beneficial occupation of the Depot or use of the Depot Equipment caused by any building operations or other works to or in the Depot or on the Depot Equipment, whether by the City or by anybody else; or

26.1.4 any other event or circumstance beyond the City's reasonable control occurring, or failing to occur, upon, in, or about the Depot, or in respect of the Depot Equipment, whether or not the City could otherwise have been held liable for such occurrence or failure,

and the BOC indemnifies the City and holds it harmless against any and all liability to any employee or agent of the BOC, its guests and other invitees, and all other persons who may occupy or be entitled to occupy the Depot or any parts thereof through or under the BOC, in consequence of any such matter as is referred to in this clause 26.1.

26.2 The City shall not, however, be excused from specific performance of any of the City's obligations under this Depot Lease Agreement, whether express or implied, and particularly (but not only) the City's obligations to

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afford the BOC occupation and enjoyment of the Depot and/or use of the Depot Equipment (as the case may be) as contemplated by this Agreement.

**27 CITY’S RIGHT OF ENTRY AND CARRYING OUT OF WORKS**

The City may at all reasonable times, without thereby giving rise to any claim or right of action on the part of the BOC or any other occupier of the Depot at the instance of the BOC, in which case the BOC hereby indemnifies the City against any claim from such other occupier:

- 27.1 enter the Depot in order to inspect it, to carry out any necessary repairs, replacements or other works, or to perform any other lawful function in the *bona fide* interests of the City; or
- 27.2 carry out on the Depot Equipment or the Depot (or any part thereof) any necessary repairs, replacements or other works,

provided that the City shall ensure that this right is exercised with due regard for, and a minimum of interference with, the beneficial enjoyment of the Depot and the Depot Equipment by the BOC.

**28 SPECIAL REMEDY FOR BREACH**

- 28.1 Should the BOC be in breach of any of the terms or conditions set out in this Depot Lease Agreement in any way whatsoever, and fail to remedy such breach within 14 (fourteen) Business Days after receiving a written demand that it be remedied, or such longer period as may reasonably be required in the circumstances and agreed upon in writing by the Parties, the City shall be entitled, without prejudice to any alternative or additional right of action or remedy available to the City under the circumstances, to cancel this Depot Lease Agreement with immediate effect, and the BOC shall be repossessed of the Depot and the Depot Equipment, and recover from the BOC such damages sustained as a result of the breach and the cancellation of this Depot Lease Agreement.

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28.2 Clause 28.1 shall not be construed as excluding the ordinary lawful consequences of a breach of this Depot Lease Agreement by either Party (save any such consequences as are expressly excluded by any of the other provisions of this Depot Lease Agreement) and in particular any right of cancellation of this Depot Lease Agreement on the ground of a material breach going to the root of this Depot Lease Agreement.

28.3 In the event of the City having cancelled this Depot Lease Agreement but the BOC remaining in occupation of the Depot, with or without disputing the cancellation, the BOC shall be liable of all obligations set out in this Depot Lease Agreement for so long as the BOC continues to occupy the Depot or any part thereof.

### 29 **DAMAGE TO OR DESTRUCTION OF DEPOT**

29.1 If the Depot is destroyed or so damaged that it can no longer be beneficially occupied, and the insurance proceeds (if any) are not sufficient to rebuild the Depot, this Depot Lease Agreement shall, unless the parties agree otherwise in writing, terminate.

29.2 If the Depot is damaged but can still be beneficially occupied, this Depot Lease Agreement shall remain in force and the City shall repair the damage without undue delay.

### 30 **OBLIGATION TO REPAIR ON TERMINATION**

30.1 The BOC shall, on the termination or cancellation of this Agreement or the Depot Lease Agreement (as the case may be), at its own expense and without recourse to the City, forthwith return the Depot and the Depot Equipment, and all such parts thereof (including all keys) to the City in good order, condition and repair, fair wear and tear excepted.

30.2 Upon receiving a notification of cancellation contemplated in 30.1 the BOC shall promptly cause the necessary repair or replacement to be effected to the Depot and the Depot Equipment at the BOC's own expense, failing which the City shall have the right to either claim specific performance



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and/or set-off any repair or replacement costs from any payment due to the BOC, within the City's sole discretion.

30.3 Save for any alteration or addition which is removed from the Depot and or Lease Properties as required by the City in terms of 25.2, all alterations or additions made to the Depot shall, on termination or cancellation of this Agreement or Depot Lease Agreement (as the case may be), become the property of the City and may not be removed from the Depot at any time. Subject to any prior written agreement to the contrary between the Parties, the BOC shall not, whatever the circumstances, have any claim against the City for compensation for any alterations or additions to the Depot.

30.4 Should the BOC fail to carry out any of its obligations as set out in 30.1 and 30.2, the City shall be entitled, without prejudice to any of the City's other rights or remedies, to effect the maintenance, repair or replacement to any of the Depot or the Depot Equipment (as the case may be) and to recover from the BOC on demand, all reasonable amounts incurred by the City in respect thereof.

**31 CESSION AND SUBLETTING**

The BOC shall not be entitled to cede all or any of its rights or delegate all or any of its obligations under this Depot Lease Agreement; sublet the Depot in whole or in part or give up possession and/or control of the Depot or the Depot Equipment to any third party, without the City's prior written consent.

**32 CO-SHARING OF LEASED AREA, FACILITIES AND EQUIPMENT**

32.1 The BOC hereby acknowledges that parts of the Depot and/or the Depot Equipment may already be leased by the City to another operator or be made available by the City to one or more additional operators from time to time.

32.2 In the event of such further lease or occupancy of portions of the Depot or the Depot Equipment to other bus operators, the City shall facilitate an agreement between the BOC and any other bus operating company for co-sharing of the Depot and Depot Equipment, and liabilities of each party in

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respect to, amongst other, maintenance, water, electricity and other consumables, including the basis on which the demarcation will be applied cover the period that the Depot facilities are to be shared.

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**PART F: MONITORING AND MANAGING MAINTENANCE FOR ON-BOARD UNITS**

**33 RIGHTS AND OBLIGATIONS OF THE CITY IN RESPECT OF ON BOARD UNITS**

The City shall:

- 33.1 notwithstanding the ownership of the Vehicles being vested with the BOC as contemplated 40 and 41, have the right to install or procure the installation of the On-board Fare Payment Subsystem and the On-board APTMS Units on board the Fleet;
- 33.2 have the right to replace and/or upgrade the On-board Fare Payment Subsystem and the On-board APTMS Units in accordance with the reasonable requirements of the City from time to time;
- 33.3 on expiry of this Agreement, and in the event of the BOC having acquired the Vehicles as contemplated in 40 and/or 41, as the case may be, the City and/or its agents or representatives shall be entitled to remove the On-board Fare Payment Subsystem and the On-board APTMS Units from all Vehicles at the City's cost and expense;
- 33.4 enter into a maintenance agreement for the maintenance of the AFC and APTMS on-board equipment with an independent supplier, which maintenance agreement will be managed and controlled by the BOC to ensure adherence to contract provisions in this regard; and
- 33.5 supply the BOC with a depot workstation on which operations can be viewed by the BOC in real time. No communication between Drivers and the BOC will be possible through this system.

**34 OBLIGATIONS OF THE BOC IN RESPECT OF ON BOARD EQUIPMENT**

The BOC shall:

- 34.1 at all times comply with the reasonable specifications and instructions for the operation, care and use of the On-board Fare Payment Subsystem

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and/or the On-board APTMS Units as prescribed by the City by notice in writing to the BOC from time to time;

- 34.2 not allow the On-board Fare Payment Subsystem and/or the On-board APTMS Units to be used for any purpose other than to fulfil its obligations in respect of the BOC Services as set out in this Agreement;
- 34.3 manage and control the maintenance and repair of all On-board Fare Payment Subsystem and the On-board APTMS Units on behalf of the City through existing maintenance contracts between the City and its contracted suppliers (“the **AFC and APTMS Maintenance Contractors**”), only as far as the maintenance and repair of On-board Fare Payment Subsystem and the On-board APTMS Units installed in the Vehicles is used by the BOC to render the Bus Operating Services;
- 34.4 keep detailed record of all defects and repairs effected by the AFC and APTMS Maintenance Contractors for inclusion in regular reports to the City as may be prescribed by the City from time to time;
- 34.5 bear the cost of repairs to the On-board Fare Payment Subsystem and the On-board APTMS Units should the damage be the result of abuse or negligence of any employee of the BOC. The BOC will have the right to inspect any equipment prior to a required repair being made that is deemed to have been caused by abuse or negligence of the BOC or its employees;
- 34.6 not permit any Vehicle to leave the Depot for the purpose of rendering the Bus Operating Services should there be any unrepaired defect in the On-board Fare Payment Subsystem or the On-board APTMS Units, unless the BOC has reported the defect to the Control Centre and the Control Centre has instructed the BOC in writing to utilise the relevant Vehicle on a specific Route;
- 34.7 ensure that all Drivers immediately report any malfunctioning and/or defects in any of the On-board Fare Payment Subsystem and/or the On-board APTMS Units detected during any trip to the Control Centre. Each such report must be made to the Control Centre by the relevant Driver by no later than the time of the relevant Vehicle’s arrival at the next Station or

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bus stop on the relevant Bus Schedule, and subsequently be included by the BOC in the prescribed reporting to the City. The BOC and the Driver must adhere to any instruction given by the Control Centre after reporting a defect;

- 34.8 afford the relevant AFC and APTMS Maintenance Contractors, authorised by the City, reasonable access to the Vehicles for purposes of maintenance and/or servicing of the On-board Fare Payment Subsystem and the On-board APTMS Units.

### **35 RISK AND OWNERSHIP OF THE ON BOARD UNITS**

- 35.1 Unless loss or damage is caused by the negligence and/or wilful misconduct of the employees or agents of the City and/or the AFC Maintenance Contractor and/or the APTMS Maintenance Contractor, the BOC shall bear the risk of any and all loss of or damage to the On-board Fare Payment Subsystem and the On-board APTMS Units for the duration of this Agreement from the relevant date of installation in respect of each such On-board Fare Payment Subsystem and On-board APTMS Unit.
- 35.2 The BOC shall insure against all such loss and/or damage and shall procure that the City is named as co-insured in terms of the relevant insurance policy.
- 35.3 Ownership of the On-board Fare Payment Subsystem and the On-board APTMS Units shall at all times remain vested in the City and the City shall be entitled forthwith on cancellation or termination of this Agreement, for whatever reasons, to remove the On-board Fare Payment Subsystem and the On-board APTMS Units from the possession or control of the BOC.
- 35.4 The BOC shall not be entitled to sell or otherwise dispose of or encumber in any way whatsoever, the On-board Fare Payment Subsystem and the On-board APTMS Units or any part thereof during the currency of this Agreement.

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**36 MANAGEMENT OF APTMS CONTRACT AND LIABILITY FOR LOSS TO CITY**

36.1 The BOC shall be responsible for the management of that part of the maintenance agreements between the City and the AFC and APTMS Maintenance Contractors that pertains to the maintenance and repair of all on-board AFC and APTMS equipment, and the BOC hereby warrants that it has read and understands the terms and conditions of the said maintenance agreement, including the role, responsibilities and duties of the City therein, which roles, responsibilities and duties the BOC hereby agrees to undertake for and on behalf of the City.

36.2 The BOC hereby indemnifies the City for any loss the City may suffer as a result of the BOC breaching any provision of the maintenance agreement contemplated in 36.1 or failing to carry out any obligation on the part of the City as set out in the said agreement, which failure results in the City losing any right it has under the said maintenance agreement or being held liable in any way whatsoever.

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**PART G: PRE BUSINESS RESCUE PROCEDURE AND BREACH MANAGEMENT RIGHTS**

**37 CIRCUMVENTION OF MATERIAL BREACH**

37.1 If at any time it appears to the City that there is a risk that, without any form of intervention, the BOC will :

37.1.1 reasonably be unlikely to pay any material debt or all of its debts as and when they fall due and payable in the immediately ensuing six months; or

37.1.2 reasonably likely become insolvent within the immediate ensuing six months;

37.1.3 reasonably be unlikely to discharge any of its material obligations in terms of this Agreement, particularly but not to the exclusion of other obligations of the BOC those which are required to be rendered in an uninterrupted and timeous manner as is contemplated in 12 of this Agreement; or

37.1.4 reasonably be unlikely to adhere to and/or implement the provisions of the Plan,

the City shall notify the BOC in writing of the act or omission on the part of the BOC which concerns the City and which may lead to a Material Breach by the BOC of any of its obligations pursuant to this Agreement, should such act or omission not be remedied.

37.2 Upon receipt of the notice contemplated in clause 37.1, the BOC shall within 48 hours submit to the City

37.2.1 a written remediation programme to remedy the considerations listed in 37.1.1 to 37.1.4 ("**Remedy Programme**"); and

37.2.2 the time period (the "**Remedial Period**") within which the BOC reasonably believes such act or omission should cease in all respects or be remedied through the implementation of the Remedy Programme.

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- 37.3 Upon receipt of the Remedy Programme, the City shall have 48 hours to advise the BOC whether it accepts the Remedy Programme, in which case the City shall permit the BOC to implement the Remedy Programme within the Remedial Period.
- 37.4 In the event that the City does not accept the Remedy Programme, the City shall, within 48 hours of receiving the Remedy Programme, issue a written notice to the BOC setting out
- 37.4.1 the remedial action ("**Remedial Action**") which the BOC must take in order to prevent the act or omission complained of from developing into a Material Breach of any of the provisions of this Agreement requiring the implementation of Necessary Action as defined in and pursuant to 38; and
- 37.4.2 the time period (the "**Remedial Period**") within which the City reasonably believes such act or omission should cease in all respects or be remedied through the implementation of the Remedial Action;
- 37.5 If the BOC fails to implement the Remedial Action or the Remedy Programme, as the case may be, to the reasonable satisfaction of the City within the Remedial Period, the City shall be entitled forthwith exercise its Material Breach Management Rights pursuant to 38.
- 37.6 No waiver or relaxation on the part of the City of any of its rights pursuant to this clause 37 or clause 38 and no leniency, extension of time or release which may be granted by it to the BOC in respect of any of the BOC's obligations to the City and no failure or omission on the part of the City to enforce any of the terms and conditions of this clause 37 or clause 38, shall in any way affect the validity or force of any of the remaining provisions thereof, nor prevent their enforcement in the future, all of which rights shall continue in full force and effect.
- 37.7 The City shall be entitled if it deems it necessary at any time during the currency of this Agreement, to require that the memorandum of



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incorporation of the BOC be amended to incorporate the provisions of this clause 37.

**38 THE CITY'S MATERIAL BREACH MANAGEMENT RIGHTS**

38.1 In view of the necessity on the part of the City to ensure a continuing and uninterrupted Phase 1B in the public interest pursuant to 8, 9 and 11 of this Agreement, the City shall be entitled at any time during the currency of this Agreement, if the BOC fails, to the reasonable satisfaction of the City, to implement any Remedial Action required to be implemented by the BOC pursuant to 37 of this Agreement within the Remedial Period and if such failure in the City's sole opinion will or is likely to materially affect the BOC's ability to discharge any and/or all of its material obligations pursuant to this Agreement, which are required to be rendered in an uninterrupted and timeous manner as is contemplated in 12.3 of this Agreement, to exercise any of its Material Breach Management Rights set out below.

38.2 If pursuant to 38.1 the City wishes to exercise its Material Breach Management Rights, it shall as soon as reasonably possible after reaching its determination to do so, notify the BOC in writing of:

38.2.1 the action the City wishes to take;

38.2.2 its reasons for taking such action;

38.2.3 the date when it wishes to commence such action;

38.2.4 the time period ("the "**Management Period**") which the City reasonably believes will be necessary for such action, which must be a fixed period, expressed in calendar days; and

38.2.5 to the extent practicable, the effect of such action on the BOC and the BOC's duty to discharge its obligations in terms of this Agreement during the Management Period.

38.3 Following the service of such notice, the City shall take such action as notified to the BOC under 38.2 and any ancillary action as it reasonably believes may be necessary (the "**Necessary Action**") and the BOC shall

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give all reasonable assistance to the City in the implementation of such Necessary Action.

38.4 If the BOC is not in breach of any of its obligations under this Agreement in respect of which the Necessary Action is proposed to be taken, then for so long as and to the extent that the Necessary Action is taken, and if the Necessary Action prevents the BOC from discharging any of its obligations pursuant to this Agreement:

38.4.1 the BOC shall be relieved from discharging such obligations; and

38.4.2 in respect of the time period over which such Necessary Action is implemented and provided that the BOC renders to the City such reasonable assistance as the City may require in the implementation of such Necessary Action (such assistance, however, to be at the expense of the City to the extent of any incremental costs), the BOC Service Fee due and payable by the City to the BOC shall equal the amount the BOC would have received if it were satisfying all its obligations affected by the Necessary Action in a proper and timeous manner over such period.

38.5 If the Necessary Action is taken as a result of a breach by the BOC of any of its obligations under this Agreement, then without prejudice to any of the City's remaining remedies pursuant to 55, for so long as and to the extent that such Necessary Action is taken and this prevents the BOC from performing any of its obligations in terms of this Agreement:

38.5.1 the BOC shall be relieved from such obligations for the duration of the period in which the City is taking such Necessary Action; and

38.5.2 in respect of the period in which the City is taking such Necessary Action, the BOC Service Fee due and payable from the City to the BOC shall equal the amount the BOC would have received if it were performing the obligations affected by the Necessary Action in full over such period, less any damages suffered by the City and any penalty deductions in respect of that breach as calculated in

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accordance with the payment mechanism which applies to the BOC Service Fee pursuant to this Agreement, and less an amount equal to the City's costs incurred in taking such Necessary Action.

and provided further that, if by the expiry of the Management Period, the BOC's breach still subsists and if it constitutes a Material Breach of the nature contemplated in 55.1 of this Agreement, then the City shall be entitled to serve a notice in terms of 55.1 requiring the BOC to remedy such default or to put forward a further Remedy Programme to the reasonable satisfaction of the City, failing which the City shall be entitled to enforce any of its remaining rights pursuant to 55.1.

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**PART H: THE BOC ACQUISITION AND FUNDING OF VEHICLES**

**39 GENERAL**

39.1 The Parties hereby recognise and acknowledge that it is the intention of the Parties that the BOC acquires ownership of the Vehicles, and in achieving the said objectives, the City may either require the BOC to purchase the 134 Vehicles from the City and/or acquire Additional Vehicles in order to provide uninterrupted public transport services to commuters within the city of Johannesburg and surrounding areas.

39.2 The purpose of this **Part H** is to set out the rights and obligations of each Party with respect to the acquisition of the 134 Vehicles and/or the acquisition of the Additional Vehicles, including the principles that shall form the basis of engagement between the Parties.

**40 MANDATORY ACQUISITION OF 134 BUSES**

40.1 The BOC hereby undertakes that, in the event of the City deciding to dispose of the 134 Vehicles, the BOC shall be obliged to purchase the 134 Vehicles from the City, which disposal shall be on the following terms:

40.1.1 the purchase price for the 134 Vehicles shall be a price determined by the City in its sole and absolute discretion, provided that the said purchase price shall not exceed the fair market value as defined in the Municipal Asset Transfer Regulations of the said 134 Vehicles;

40.1.2 to the extent permissible in law, the BOC shall pay the purchase price in weekly instalments and such weekly instalments shall be set-off against the weekly Service Fee payable to the BOC as contemplated in 6;

40.1.3 from the date of acquisition of the 134 Vehicles the Fee per Kilometre shall be adjusted in accordance with the following formulae

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40.1.3.1 **[the adjustment formulae to be inserted].**

40.1.4 In the event of the BOC acquiring the 134 Vehicles the BOC shall not be entitled to sell or otherwise dispose of or encumber any of the 134 Vehicles during the currency of this Agreement, unless the prior written consent of the City shall have been obtained.

40.2 The disposal of the Vehicles contemplated in 40.1 shall be subject to the following suspensive conditions:

40.2.1 Compliance by the City with the Municipal Finance Management Act: Municipal Asset Transfer Regulations applicable from time to time;

40.2.2 Compliance with any other applicable legislation; and

40.2.3 The City, pursuant to an audit to determine the extent to which the BOC has achieved all the targets set in the Plan attached hereto as **Schedule 6**, forming a view that the BOC has achieved all the set targets.

**41 BOC'S OBLIGATIONS TO ACQUIRE AND FUND ADDITIONAL VEHICLES**

41.1 The Parties hereby agree that should Additional Vehicles be required at any time during the currency of this Agreement the BOC shall be obliged to purchase the Additional Vehicles on written notice from the City, which Additional Vehicles shall be in accordance with the specifications determined by the City. Should the BOC fail to acquire Additional Vehicles, such failure shall constitute a Material Breach of this Agreement, entitling (but not obliging) the City to terminate the Agreement.

41.2 Subject to the provision of 42 below, the BOC shall fund the Additional Vehicles, on term and conditions determined in consultation with the City.

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**42 NO UNDERTAKING OR GUARANTEES BY THE CITY TO SUPPORT BUS PURCHASE LOANS**

The Parties hereby agree that the City shall not grant any undertakings and/or guarantees to the financiers in respect of the BOC's obligations to financiers to support the acquisition of the Additional Vehicles.

**43 ACQUISITION OF ADDITIONAL VEHICLES BY SUBSEQUENT OPERATOR**

43.1 The City hereby undertakes that in the event of the City instructing the BOC to acquire Additional Vehicles which comply with City standards and specifications, and the amortisation of such Additional Vehicles not being capable of being achieved over the remaining contract period from date of funding Additional Vehicles, except in the event of breach by the BOC of any funding agreements; then the City shall ensure that the successful bus operating company appointed pursuant to section 41 of the NLTA ("the **New Operator**") shall acquire the Additional Vehicles at the purchase price equal to the remaining loan balance projected at date of funding of the Additional Vehicles that would be outstanding on expiration of this Agreement due to efflux of time.

43.2 In the event of this Agreement being terminated by the City due to breach of this Agreement, then the purchase price shall be equal to the remaining balance on the loan for the Additional Vehicles that would have been owing by the BOC on date of termination of this Agreement, but for any default in payment on the part of the BOC. For avoidance of doubt, the BOC shall remain responsible for any arrear repayments and interest levied thereon.

43.3 The undertaking in 43.1 and 43.2 is subject to the proviso that in the event of the Additional Vehicles not complying with City standards and specifications, the BOC shall be responsible effect such rectification to ensure compliance with the said standards, at its own expense.

**PART I: GENERAL OBLIGATIONS OF THE BOC**

**44 PROVIDE PROOF OF INSURANCE**

44.1 The BOC shall, at all times during the currency of this Agreement obtain and maintain insurance cover contemplated in this Agreement from the Commencement Date, and will maintain such insurance (or where increased activity so dictates, increase such cover) for so long as this Agreement remains in force and effect.

44.2 The BOC shall be obliged to furnish the City with written proof of the existence of insurance cover of the nature contemplated in this clause 44 as well as proof of payment of all premiums as and when required by the City; provided that if the BOC for whatever reason, fails to take out or maintain the risks insurance cover policies referred to in this clause 44, the City shall be entitled to take out such policy and/or pay any premium due on such required policy on the BOC's behalf and to set such amount off against any amount due and payable by the City to the BOC in terms of this Agreement.

**45 SERVICES OUTSIDE THIS AGREEMENT**

45.1 The BOC shall not operate any service other than that provided for in this Agreement unless the prior written approval of the City shall have been obtained.

45.2 The BOC shall not use any assets, including without limitation, any information and know-how of the BOC for any purpose other than to discharge its obligations in respect of the BOC Services.

45.3 The BOC shall not use or deploy its employees, whether full time or part time employees, for any purpose other than to fulfil its obligations in respect of the BOC Services as provided for in this Agreement or as otherwise approved in writing by the City. In particular, the BOC shall not

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be entitled to use, deploy or allow the use or deployment of any of its full time employees in any business venture.

**46 MAINTAINING SHAREHOLDING OF TAXI AND SMALL BUS OPERATORS**

46.1 The Parties hereby agree that the City has, as part of its black economic empowerment initiatives, facilitated the participation of persons who are considered in terms of the B-BBEE legislation as historically previously disadvantaged (**Affected Taxi and Small Bus Operators**) in the BOC, and in order to preserve their continued participation BOC shall not, for a period of 7 years from the Commencement Date (“the **Lock-in Period**”) implement any of the transactions in clauses 46.1.1 to 46.1.2 below would result in the dilution of the effective cumulative shareholding of Affected Taxi and Small Bus Operators in the BOC:

46.1.1 the allotment or issue of any share or convertible debenture or debt security in the BOC without the prior written consent of the City, and provided that any veto rights held by Affected Taxi and Small Bus Operators does not get affected by such allotment and issuance of share, and/or

46.1.2 the encumbrance of any of the shares in the BOC without the prior written approval of the City.

46.2 The BOC shall ensure that each of the Affected Taxi and Small Operators Entities shall include suitable provisions in their respective memorandum of incorporation to the effect that the shareholders of each of the Affected Operator Entities shall comply in all respects with the provisions of 46.1, with the necessary changes, as if each of the shareholders in the Affected Operator Entity concerned were signatories to this Agreement from the date upon which it became a shareholder in the Affected Operator Entity concerned.

**47 NO SHARE ISSUANCE TO PAY DIVIDENDS**

47.1 If the BOC allots and issues any new shares or convertible debenture or debt security in the BOC as contemplated in 46.1, the BOC shall ensure



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that the subscription price for such shares shall be used solely for purposes of capital expenditure and/or working capital for the BOC.

47.2 For avoidance of doubt, the BOC shall not raise any funding to pay dividends.

**48 CHANGE IN CONTROL**

The BOC must notify the City as soon as reasonably possible prior to implementation of any change regarding ownership and/or control of the BOC (being any change in the ability to exercise control or to influence substantially the exercise of any financial or operating policies of the BOC) and complete a declaration to the reasonable satisfaction of the City in respect of any new person or entity contemplating such ownership and/or control.

**49 ACCESS TO AND DISCLOSURE OF INFORMATION**

49.1 The City and any person authorised by the City shall at all reasonable times have access to all information in the possession of the BOC for the purpose of monitoring compliance by the BOC with the provisions of this Agreement and the BOC must afford any person authorised by the City access to the information and render every assistance regarding such access or in obtaining the right thereto.

49.2 The City shall at all reasonable times on reasonable notice to the BOC have access to the financial statements and other relevant documentation of the BOC.

**50 ACCOUNTING MATTERS AND RIGHT TO ATTEND MEETINGS**

50.1 In view of the necessity on the part of the City to ensure continued and uninterrupted operations of Phase 1B scheduled services in the public interest pursuant to 8, 9 and 11 of this Agreement, the City, represented by two persons designated in writing by the City, or such persons' alternate ("**City Representatives**"), shall be entitled, for the duration of this Agreement, to exercise any of the following rights, upon written notice to the BOC:

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50.1.1 the right to attend, as observers only albeit with a right to speak, with no right to vote, any or all meetings (**the Meetings**) of shareholders, the Board of Directors, any committee with delegated responsibility to manage some or all of the day to day affairs of the BOC from time to time ("**the Management Committee**"), including the right to receive notices of all Meetings, agendas, minutes and any other information distributed to persons entitled to attend such Meetings; and

50.1.2 the right to receive copies of all monthly management accounts of the BOC, in respect of the immediately preceding calendar month, to be received on or before the 10<sup>th</sup> calendar day month such accounts to consist of at least a balance sheet, income statement and cashflow statement, including the right to call for any other information that the City Representatives shall deem necessary to enable them to effectively monitor the performance of the BOC in accordance with this Agreement,

provided, however, that the rights of the City pursuant to this clause 50.1 shall not apply in relation to any discussion which may take place at a Meeting relating to the nature of the BOC's rights and obligations which could reasonably be construed as an actual or potential conflict of interest between the City and the BOC, in which event the City Representatives shall recuse themselves from such meeting for so long as any such conflicted issue is being discussed.

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- 50.2 The BOC must cause its financial statement to be audited on an annually basis, within 6 months of its financial year.
- 50.3 The BOC must further annually, within six months of the end of the BOC's financial year, submit to the City copies of the audited financial statements.
- 50.4 All accounting records and waybills must be kept for a period of at least three years after termination or expiration of this Agreement.

**51 CESSION AND DELEGATION**

- 51.1 The BOC shall not cede its rights or delegate its obligations under this Agreement or any part thereof, or any benefit or interest therein, to another person, whether as security or otherwise, without the prior written consent of the City; it being agreed that it shall be in the City's sole and absolute discretion to grant or withhold such consent.
- 51.2 The City may at any time during the currency of this Agreement, cede its rights and delegate its obligations in terms hereof to the Assignee.

**PART J: SETTLEMENT OF DISPUTES**

**52 GENERAL**

In this clause, a

- 52.1 "AFSA" means The Arbitration Foundation of Southern Africa
- 52.2 "Arbitrator" means any person appointed by the Parties as contemplated in 54.1.1.3, who shall be, if the matter in dispute is principally:
  - 52.2.1 a legal matter, a practising advocate or attorney in Johannesburg of at least 10 (ten) years' standing;
  - 52.2.2 an accounting matter, a practising chartered accountant in Johannesburg of at least 10 (ten) years' standing;
  - 52.2.3 any other matter, any independent and suitably qualified person.

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- 52.3 “Dispute” means any dispute, disagreement or claim arising between the Parties in connection with:
- 52.3.1 the formation or existence of;
  - 52.3.2 the implementation of;
  - 52.3.3 the interpretation or application of the provisions of;
  - 52.3.4 the parties’ respective rights and obligations in terms of or arising out of, or the breach or termination of;
  - 52.3.5 the validity, enforceability, rectification, termination or cancellation, whether in whole or in part of;
  - 52.3.6 any documents furnished by the Parties pursuant to the provisions of,  
  
this Agreement, or which relates in any way to any matter affecting the interests of the Parties in terms of this Agreement.
- 52.4 “Mediator” means any person appointed by the Parties as contemplated in 53.2, who shall be, if the matter in dispute is principally:
- 52.4.1 a legal matter, a practising advocate or attorney in Johannesburg of at least 10 (ten) years’ standing;
  - 52.4.2 an accounting matter, a practising chartered accountant in Johannesburg of at least 10 (ten) years’ standing;
  - 52.4.3 any other matter, any independent and suitably qualified person.
- 52.5 Should any Dispute arise, the Parties shall first endeavour to resolve such Dispute on an informal basis within 7 days and as far as possible avoid any formal dispute resolution.
- 52.6 In the event that it is not possible to resolve the Dispute informally, the Dispute will be referred to the GE: Transportation and Infrastructure and

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the CEO of the BOC for such purpose in order to endeavour to settle the Dispute through bona fide negotiations within 10 days.

- 52.7 Where proceedings contemplated in 52 and 54 are deemed to be inappropriate by the Parties to the Dispute, nothing in this Agreement will prevent a Party from approaching a court for urgent relief. The parties specifically confirm and agree that the City shall be entitled to obtain such urgent relief in any appropriate High Court as may be necessary to procure transfer of the Vehicles to the City and/or to enforce any of the City's rights in and to any of the security instruments as may be in place, without first having to comply with any one or all of the proceedings provided for in 52 and 54.
- 52.8 The BOC must, notwithstanding any Dispute, difference or settlement procedure, continue to provide the BOC Services in accordance with this Agreement.
- 52.9 In the absence of the City having exercised its monitoring rights pursuant to 50.1 and/or its Material Breach Management Rights pursuant to 38, this clause shall survive the termination or cancellation of this Agreement.

### **53 MEDIATION**

- 53.1 Should the Parties still fail to reach any agreement as contemplated in 52.6 above, the Dispute shall be referred to AFSA for mediation by a registered mediator in accordance with their applicable rules for the mediation of disputes.
- 53.2 Mediation procedure may commenced by either Party giving the other written notification that the matter must proceed to mediation. Where such a notification is delivered:
- 53.2.1 the Parties must each in writing nominate a Mediator from a panel of mediators provided by AFSA within 7 days after the notice to proceed to mediation and if the Parties cannot agree on the identity of the Mediator to be appointed by them within a further 7 days, then AFSA shall be appoint a Mediator;

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- 53.2.2 the Parties hereby undertake to commit themselves in every respect to the speedy finalisation and a proposed solution of the mediation proceedings.
- 53.3 The Mediator must establish and regulate procedures for the mediation so long as the Parties continue to agree to participate in the mediation process.
- 53.4 Mediation will take place on a confidential and "without prejudice" basis.
- 53.5 The Parties undertake that they will never subpoena any person who is a party to or who is involved in the mediation, including the mediator, for the purpose of giving evidence as to what took place during mediation.
- 53.6 The Parties must pay the costs of the Mediator in equal shares, unless the Mediator orders one Party to pay a larger share or the full amount.
- 53.7 The signed settlement shall be final and binding on both Parties.
- 53.8 Any information, documentation and material disclosed or made available to the Mediator privately or in caucus, will remain confidential and will not be disclosed by it or any party without the prior consent of the Party who made available such information, documentation or material;
- 53.9 If the Parties are unable to reach a settlement within 14 days, the Mediator must certify this in writing and either Party may proceed to arbitration and follow the steps as described in 54.

## 54 **ARBITRATION.**

- 54.1 Referral of a Dispute for Arbitration
- 54.1.1 Either Party may demand that a Dispute be determined by arbitration, by written notice given to the other Party, after the steps in 53 have been completed, and the matter must proceed to urgent arbitration, as follows:

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- 54.1.1.1 arbitration proceedings shall be concluded in accordance with the arbitration laws of the RSA, and the AFSA Rules for arbitration;
- 54.1.1.2 arbitration proceedings must be conducted on an informal basis, it being the intention that a decision should be reached as expeditiously and inexpensively as possible, but in any event within 21 days after the Dispute was referred for arbitration, subject only to the due observance of the principles of justice;
- 54.1.1.3 the parties must each nominate an Arbitrator in writing within 4 days of receiving the notification of the Dispute pursuant to 54.1. If they fail to agree on an Arbitrator within 4 days thereafter, or a party fails to nominate an Arbitrator, the chairperson of the AFSA shall nominate an Arbitrator on an urgent basis and will be appointed in writing by the City.
- 54.1.2 Within 10 days after the Arbitrator is appointed, each Party must submit to the arbitrator a full written statement of its case in which must be set out all the evidence, sworn statements, facts, submissions and expert opinion as such Party deems necessary to support its contentions in regard to the matter(s) in Dispute and simultaneously serve a copy thereof on the other Party. The Arbitrator may, on good cause being shown, grant the Party an extension of not more than 5 days to submit such statement of case. If a Party fails to submit a statement of case within such time limits, the Arbitrator may proceed to make an award without it.
- 54.1.3 Within 7 days after receipt of the copy of the other Party's statement of case, either Party may submit a further supplementary statement to the Arbitrator, and must serve a copy thereof on the other Party;
- 54.1.4 If the Arbitrator considers that the matter cannot be decided on the papers before it, the Arbitrator may call for other evidence or for witnesses to testify at a place determined by the arbitrator.

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Witnesses must testify in the presence of both Parties, who may question such witnesses.

54.1.5 The Arbitrator may appoint a commissioner to take evidence of any person within or outside the Republic and forward it to the Arbitrator as if it were a commissioner appointed by the court.

54.2 Powers of the Arbitrator

54.2.1 subject to this clause 54.2.1, the arbitrator shall have discretion and all powers allowed by law to ensure the just, expeditious, economical and final determination of the Dispute, including the matter of costs, and without derogating from the generality of the foregoing, shall also have the power:

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

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

54.2.1.3 to make any ruling or give any direction necessary or advisable for the just, expeditious, economical and final determination of all Disputed matters raised in the statements of case, including the matter of costs;

54.2.1.4 to make rulings or give interim awards on matters of onus, admissibility of evidence and procedure, including ones of an interlocutory or interim nature and rulings or interim awards relating to costs and the implementation of interim or final awards;

54.2.2 The Arbitrator must at all times have regard to the intention of the Parties underlying this Agreement, and especially the need for passengers to be served by prompt and affordable public transport, and must resolve the Dispute in a summary manner. The arbitrator



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must do all in its power to make an award within 30 days after it was appointed, or as soon as possible thereafter.

54.3 Final and Binding Award

54.3.1 Any award made by the arbitrator:

54.3.1.1 shall be final and binding on the Parties;

54.3.1.2 shall be carried into effect forthwith by the Parties;

54.3.1.3 may be made an order of court by a Party only if the Party fails to heed the terms of the award; and

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

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

**PART K: GENERAL TERMS AND CONDITIONS**

**55 BREACH**

55.1 Should the BOC commit a Material Breach of any provision of this Agreement and fail to remedy such breach within 14 days or such longer period as may in the sole discretion of the City be reasonably be required to remedy such breach, due regard being had to the obligation of the BOC to render the bus operating services without interruption or delay on the basis contemplated in 12.3, from the date of written notice from the City calling upon it to do so, the City shall have the right to cancel this Agreement, and shall have the right:

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55.1.1 if the breach complained of can be fully remedied by the payment of money, to take whatever action may be necessary to obtain payment of the amounts required by the City to remedy such breach; or

55.1.2 if the breach complained of cannot be fully remedied by the payment of money, or, alternatively, if it can be so remedied and payment of any amounts claimed by the City in terms of 55.1.1 is not made to the City within 7 days of the date of determination through arbitration or legal process of the amount legally payable, to take whatever action may be necessary to enforce its rights under this Agreement,

and in the event to claim such damages as it may have suffered as a result of such breach of contract, and the BOC shall be liable for all costs and expenses (calculated on an attorney and own client scale) incurred as a result of or in connection with the default.

55.2 Should the City commit a breach of any provision of this Agreement and fail to remedy such breach within 14 days from the date of written notice from the BOC calling upon it to do so, the BOC shall not have the right to cancel this Agreement, but shall have the right, either:

55.2.1 if the breach complained of can be fully remedied by the payment of money, to take whatever action may be necessary to obtain payment of the amounts required by the BOC to remedy such breach; or

55.2.2 if the breach complained of cannot be fully remedied by the payment of money, or, alternatively, if it can be so remedied and payment of any amounts claimed by the BOC in terms of 55.2.1 is not made to the BOC within seven days of the date of determination through arbitration or legal process of the amount legally payable, to take whatever action may be necessary to enforce its rights under this agreement,

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and in the event to claim such damages as it may have suffered as a result of such breach of contract, and the City shall be liable for all costs and expenses (calculated on an attorney and own client scale) incurred as a result of or in connection with the default.

**56 INTERPRETATION**

56.1 In this Agreement, unless the context requires otherwise –

56.1.1 words importing any one gender shall include the other two genders;

56.1.2 the singular shall include the plural and *vice versa*;

56.1.3 A reference to natural persons shall include created entities (corporate or unincorporated) and *vice versa*.

56.2 In this Agreement, the headings have been inserted for convenience only and shall not be used for nor assist or affect its interpretation.

56.3 If anything in a definition is a substantive provision conferring rights or imposing obligations on anyone, effect shall be given to it as if it were a substantive provision in the body of this Agreement.

**57 CHOICE OF LAW**

The law of the RSA shall be applicable to this Agreement and any matter arising here from. The Parties shall abide by all applicable statutes, regulations, ordinances, by-laws and other laws and bind itself to accept the jurisdiction of the South Gauteng High Court, Johannesburg in respect of any matter arising out of this Agreement, subject to its obligation to submit to arbitration pursuant to 54.1.

**58 CONFIDENTIALITY AND PUBLIC ANNOUNCEMENTS**

58.1 For purposes of this clause 58, the term “Confidential Information” shall mean all information relating to the business conducted by either Party that can reasonably be regarded as confidential, being information not in the

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public domain, whether such information is oral or written, recorded or stored by electronic, magnetic, electro-magnetic or other form or process or otherwise in a machine readable form, translated from the original form, recompiled, made into a compilation, wholly or partially copied, modified, updated or otherwise altered, or originated or obtained by, or coming into the possession, custody, control or knowledge of a company, or any person or entity with which a company deals, including but without being limited to all technical data, research and development information, business records, information and notes, products, know-how, trade secrets, designs, specifications processes and formulae, planning procedures, techniques or information, marketing plans, strategies and forecasts, business and product development plans, financial statements, budgets, prices, costs and financial projections, accounting procedures or financial information, names and details of consumers, clients and agents, employee details and the like;

58.2 The Parties must keep confidential and not disclose without prior written consent of the other Party, any trade, business or Confidential Information supplied by either Party, or that is contained in the contract documents, being information contemplated in Chapter 4 of the Promotion of Access to Information Act, 2000, except where obliged to do so in terms of law.

58.3 The City undertakes to furnish the BOC, whether electronically or otherwise, with copies of all public announcements to be made by it to members of the public in relation to the operation of Phase 1B from time to time which, in the opinion of the City, will have impact on the discharge by the BOC of its obligations in terms hereof.

### 59 CONTRACT DOCUMENTS

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

59.2 The several documents constituting this Agreement are to be regarded as mutually explanatory. In the case of ambiguities or discrepancies in these

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documents, or in the case of uncertainty as to the meaning or intention of any part of these documents, the definitions in this Agreement shall prevail.

### 60 OWNERSHIP OF DOCUMENTS

All contract documents shall remain the property of the City and may not be sold or otherwise disposed of. All documents and data prepared by the BOC in connection with the BOC Services and which are lodged with the City shall be the property of the City.

### 61 INDEPENDENT CONTRACTOR

The BOC shall at all times during the currency of this Agreement act as an independent contractor and not as an employee or agent of the City and does not have the authority to bind the City contractually to any other party. The City shall not be liable to pay any retrenchment or severance benefits to the BOC or any of its employees on dismissal, retrenchment or expiry of the contract period of such employees, whether during the currency of this Agreement or on expiry or termination of this Agreement.

### 62 FORCE MAJEURE

62.1 Save for any payment obligations in terms of this Agreement (excluding the imposition of penalties pursuant to **Schedule 5**), neither Party shall have any claim of any nature whatever against the other for any failure to carry out any of its obligations under this Agreement as a result of *force majeure*, including but without being limited to:

62.1.1 act of God or government, lightning, explosion, flood, landslide, bush fire or earthquake;

62.1.2 act of public enemy, war (declared or undeclared), terrorism, sabotage, blockade, riot, insurrection, civil commotion;

62.1.3 power shortage or water shortage;

62.1.4 fuel shortages that directly affect the transportation industry;

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62.1.5 protected strikes undertaken by BOC employees or protected lockouts; and/or

62.1.6 protected secondary strikes,

("Force Majeure Event"),

the consequence of which is beyond the control of the Party seeking relief as a result of the Force Majeure Event and could not have been prevented, overcome or remedied by the exercise by that Party of a standard of care and diligence consistent with that of a prudent and competent person under the circumstances (including the expenditure of reasonable sums of money and the application of technology known to such prudent and competent person).

62.2 If either Party is prevented in whole or in part from discharging its obligations pursuant to this Agreement as a result of a Force Majeure Event, it must as soon as practicable notify the other Party accordingly. Each notice must:

62.2.1 specify the obligations which are affected and the extent to which the relevant Party cannot perform those obligations;

62.2.2 fully describe and provide documentary evidence of the Force Majeure Event;

62.2.3 estimate the time during which the Force Majeure Event will continue; and

62.2.4 Specify the measures proposed to be adopted to remedy or minimise the effects of the Force Majeure Event.

62.3 The Party that is prevented from discharging its obligations pursuant to this Agreement must:

62.3.1 use its reasonable commercial endeavours to remedy or minimise the effects of the Force Majeure Event to the extent reasonably practicable; and

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62.3.2 Take all action reasonably practicable to mitigate any loss suffered by the other Party or any Users as a result of that Party's failure to discharge its obligations pursuant to this Agreement. The Party is not required to test the validity or refrain from testing the validity of any Law.

62.4 The duration of this Agreement pursuant to 5 will not be extended by the period of a Force Majeure Event.

62.5 Should a Force Majeure Event endure for a continuous period of more than four months, either Party may terminate this Agreement with immediate effect by written notice to the other Party

**63 NOTICES**

63.1 Each Party chooses the physical, postal and email addresses set out opposite its name below as its *domicilium citandi et executandi* at which all notices, legal processes and other communications must be delivered for the purposes of this Agreement:

63.1.1 the City      Physical:      Attention: The Executive Director:  
Transport  
8<sup>th</sup> Floor, JRA Building  
66 Sauer Street  
Johannesburg

Postal:      PO Box 31923  
Braamfontein  
2017

Email:

BOC      Physical:

Postal:

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Email:

provided that all legal process in any court or arbitration forum shall be required to be delivered to a Party's chosen physical or postal addresses only, in compliance with the relevant rules of the court or arbitration forum concerned, unless such rules expressly provide or allow otherwise.

63.2 Any notice or communication required or permitted to be given in terms of this Agreement shall be valid and effective only if in writing, but it shall be competent to give notice by email.

63.3 Each Party may by written notice to the other Party change its chosen address to another physical and/or postal address and/or its chosen email address to another email address, provided that the change shall become effective on the fourteenth day after the receipt of the notice by the addressee concerned.

63.4 Any notice to a Party contained in a correctly addressed envelope and –

63.4.1 sent by prepaid registered post to it at its chosen postal address; or

63.4.2 delivered by hand to a responsible person during ordinary business hours at its chosen physical address,

shall be deemed to have been received, in the case of 63.4.1, on the seventh business day after posting (unless the contrary is proved) and, in the case of 63.4.2, on the day of delivery.

63.5 Any notice by email to a Party at its e-mail address shall be deemed, unless the contrary is proved, to have been received within 2 hours of transmission where it is electronically transmitted during normal business hours or within 2 hours of the opening of business on the first business day after it is electronically transmitted where it is transmitted outside those business hours.



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**64 GENERAL**

64.1 This document and the Schedules thereto contain the entire agreement between the Parties as to the subject matter hereof.

64.2 Neither Party shall have any claim or right of action arising from any undertaking, representation or warranty not included in this document.

64.3 No failure by either Party to enforce any provision of this Agreement shall constitute a waiver of such provision or affect in any way that Party's right to require performance of any such provision at any time in the future, nor shall the waiver of any subsequent breach nullify the effectiveness of the provision itself.

64.4 No agreement to vary, add to or cancel this Agreement shall be of any force or effect unless reduced to writing and signed by or on behalf of the Parties.

64.5 Each Party warrants that it is acting as a principal and not as an agent for an undisclosed principal.

64.6 The Parties hereby consent to the non-exclusive jurisdiction of the South Gauteng High Court, Johannesburg in connection with any action which either Party may institute in connection with this Agreement.

64.7 This Agreement may be signed in two counterparts, in which event the two originals together will constitute the entire agreement between the Parties.

**65 COSTS**

The City shall bear the costs to be incurred in connection with the drafting and negotiation of this Agreement.

**SIGNED** at \_\_\_\_\_ on \_\_\_\_\_ 2013

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**[Tracked 27<sup>th</sup> June 2013]**

For: **CITY OF JOHANNESBURG**

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Signatory:

Capacity:

Authority:

**SIGNED at**

on

2013

For: **BUS OPERATING COMPANY**

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Signatory:

Capacity:

Authority: