

DATED _____ 20____

**NATIONAL HOUSING CORPORATION / STATE DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT
(NHC/SDHUD)**

and

**[INSERT NAME OF CONTRACTOR/DEVELOPER]
(the Contractor/Developer)**

DEVELOPMENT FRAMEWORK AGREEMENT

in respect of Development of [...]

This DEVELOPMENT FRAMEWORK AGREEMENT (this “Agreement”) is made this day of 20.....

BETWEEN:

(1) **NATIONAL HOUSING CORPORATION**, a statutory body established under the Housing Act (Chapter 117, Laws of Kenya), whose address is Post Office Box Number 30257-00100, Nairobi, Kenya (hereinafter called “**NHC**” which expression shall where the context so admits include its successors in title and assigns) of the one part;] OR

[**THE STATE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT**) a state department established under the Ministry of Transport, Infrastructure, Housing and Urban Development incorporated by and pursuant to, whose address is (“**SDHUD**” which expression shall where the context so admits include its successors in title and assigns) of the one part;]]

And

(2) [**CONTRACTOR/DEVELOPER**] whose address is (hereinafter called “**Contractor/Developer**” which expression shall where the context so admits include its successors in title and assigns) of the other part.

NHC/SDHUD and the Contractor/Developer are hereinafter collectively referred to as “**the Parties**” or individually as “**a Party**”.

WHEREAS:

(A) NHC/SDHUD has been tasked by the National Government to facilitate and implement mass housing development of affordable homes across the country as part of GoK’s Big Four agenda, by working in partnership with the County Governments, financial institutions, private developers, manufacturers of building materials and cooperatives. Towards this end, NHC/SDHUD intends to initiate various housing developments across the country.

(B) NHC/SDHUD invited bids for the design, build, finance, operation and transfer of affordable houses and associated common use facilities and/or infrastructure on Land Reference Number [●] (the **Project**) through tender number [*describe tender including date and reference number*].

(C) After evaluation of the bids received, NHC/SDHUD accepted the bid of the [*insert name of Contractor/Developer*] and following negotiations with [*insert name of Contractor/Developer*] as preferred bidder, declared it as the successful bidder and issued to it a letter of award Ref [*insert reference number*] dated [*insert date*].

(D) The Parties hereby agree to sign this Agreement with the common objective of subsequently negotiating and executing a comprehensive Project Agreement for the development of the Project. This Agreement is intended to outline the main terms and

conditions of the relationship between the Parties, full details of which shall be set out in the Project Agreement.

- (E) While this Agreement identifies many of the material issues, any possible transaction is complex and issues may arise during preparation and negotiation of definitive documentation that have not been discussed in this Agreement. Accordingly, legal obligations between the Parties will be as specified in the Project Agreement. Nonetheless, by executing this Agreement, each Party indicates its belief that this Agreement can form the basis for a transaction and the willingness to commence negotiation and preparation of the Project Agreement.

NOW THIS AGREEMENT WITNESSETH as follows:

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1. **Definitions and Interpretations**

1.1 **Definitions**

Authorisation means any approval, consent, licence, permit, authorisation or exemption, granted or to be granted by a Governmental Authority which is: (i) necessary for the validity or the exercise of rights or performance of obligations by a Party under this Agreement, the Project Agreement, the Project Documents or any sub-contracts entered into by any of the parties to the Project Documents; or (ii) required in connection with the Project.

Applicable Law means any statute, law, regulation, treaty, policy, guidelines or other legislation, or any decree, order or written directive of any Governmental Authority, in each case, having jurisdiction in respect of either Party, this Agreement, the Project Agreement, any Project Document, the Project or any party to any of the foregoing.

Audited Financial Model means the financial model for the Project approved by the Lenders immediately prior to Financial Close of the Project.

Change in Law has the meaning ascribed to it in Clause 20 of this Agreement.

COD or Commercial Operation Date means the date when all of the Works have been completed in accordance with the Project Agreement, being a date not later than two (2) years after the Effective Date (as may be amended from time to time in accordance with the Project Agreement]

Commitment Fee has the meaning ascribed to it in Clause 5.2 of this Agreement.

Contractor/Developer Event of Default has the meaning ascribed to it in Clause 25.1.1 of this Agreement

Contractor/Developer Representative means that person nominated by the Contractor/Developer as its authorised representative for the purposes of the Project.

Construction Bond means the performance bond to be provided by the Contractor/Developer during the Construction Period to secure the proper performance of the Works and which shall be in an amount set out in the Project Agreement.

Construction Period means that period from the Effective Date to COD, during which the Works must be completed.

CP Longstop Date means that date by which all conditions precedent are to be satisfied, such longstop date to be a date set out in the Project Agreement.

Cure Regime means the process set out in the Project Agreement by which a Party shall have the opportunity to cure a default prior to termination.

Delay Event means any of a Relief Event, Change in Law or a Force Majeure Event.

Dispute Resolution means the process for the resolution of disputes which are not subject to Expedited Dispute Resolution, as generally described in Clause 33 of this Agreement;

Effective Date has the meaning ascribed to it in Clause 2 below.

Environmental Management Plan means the plan to be prepared by the Contractor/Developer in relation to the management of the environment during the Term, in accordance with the requirements to be set out in the Project Agreement.

Escrow Agreement has the meaning ascribed to it in Clause 5.2 of this Agreement.

Execution Date has the meaning ascribed to it in Clause 2 below.

Expedited Dispute Resolution means the process for the expedited resolution of disputes under certain circumstances to be set out in the Project Agreement.

Expiry Date means date which shall be [five (5) years] from the Effective Date (subject to any extension in accordance with the terms of the Project Agreement).

Financial Close means the date on which the conditions precedent to the Financing Agreements are fulfilled or waived.

Financing Agreements means the Lenders Direct Agreement and any loan and security agreements entered into by the Contractor/Developer in connection with the financing or refinancing of the Project including all consents to and acknowledgements of assignments and direct agreements setting forth the Lenders' direct rights in respect of the documents assigned to them as security, intercreditor agreements, hedging agreements and other ancillary agreements entered into with any Lenders, as the same may be amended from time to time.

Force Majeure Event means those events set out in detail in Clause 22 of this Agreement.

Good Industry Practice means in connection with the carrying out and completion of the Works and Services, the exercise of that degree of skill, diligence, prudence and foresight which would reasonably and ordinarily be expected from a skilled and experienced contracting party seeking in good faith to comply with its contractual obligations, complying with all Applicable Laws and engaged in the same type of undertaking and under the same or similar circumstances and conditions.

GoK means the Government of the Republic of Kenya.

Governmental Authority means GoK, Parliament or any legislative organ (either national or of any part of the Republic of Kenya), any court, tribunal, any ministry (department or division thereof), any authority or division thereof (including County Governments and any other regional authorities and any implementing executive or other branches of government), parastatals, any authority or division thereof (including any regional, County and local authorities of Kenya) or any agency or entity or other body owned or controlled by GoK and having statutory competence to regulate or promulgate rules and regulations governing or touching and concerning matters, transactions and issues contained or relating to the Project Agreement, or any other Project Document, as the case may be, and having jurisdiction over all or any part of the Project.

Independent Engineer means the independent third party appointed pursuant to the Independent Engineer Agreement.

Independent Engineer Agreement means the agreement between NHC/SDHUD, the Contractor/Developer and the Independent Engineer appointing the Independent Engineer to undertake certain functions in relation to the Project.

Intellectual Property means any and all patents, trademarks, service marks, copyright, database rights, moral rights, rights in design, know-how, confidential information and all or any other intellectual or industrial property rights whether or not registered or capable of registration and whether subsisting in the Kenya or any other part of the world together with all the goodwill relating or attached thereto which is created, brought to existence, acquired, used or intended to be used by the Contractor/Developer or for the purposes of carrying out the Works and/or providing the Services and/or otherwise for the purposes of the Project.

Law(s) means all laws, national (or state) legislation, statutes, ordinances, orders, decrees, statutory instruments, secondary legislation, regulations, decisions and by-laws of any legally constituted public authority having the force of law in Kenya (including any judgment or order of a court of competent jurisdiction) which a Party is under lawful obligation to comply with.

Lender means, collectively, all of the persons providing financing or refinancing or credit support for such financing or refinancing or political risk insurance under the Financing Agreements or otherwise and any trustee or agent acting on those persons' behalf and their permitted successors and assigns.

Lenders' Direct Agreement means the direct agreement entered into between NHC/SDHUD, the Contractor/Developer and the Lenders, which shall set out the Lenders' rights in respect of the Project. **Longstop COD** means [six (6)] months after the scheduled COD.

NHC/SDHUD Event of Default has the meaning ascribed to it in Clause 25.2.1 of this Agreement

NHC/SDHUD Party means each of NHC/SDHUD and its officers, employees and agents and any contractor, sub-contractor or person employed or engaged by any of them (including NHC/SDHUD's Representative) but excluding the Contractor/Developer, any Contractor/Developer's Representative and the Independent Engineer.

NHC/SDHUD's Representative means the person identified to act as NHC/SDHUD's Representative in accordance with Clause 12.

OH&S Plan means the occupational health and safety plan to be prepared by the Contractor/Developer in accordance with the requirements to be set out in the Project Agreement.

O&M Period means that period commencing on the COD and ending on the earlier of the Expiry Date and the Termination Date.

O&M Plan means the plan to be prepared by the Contractor/Developer in accordance with the requirements of the Project Agreement and the Project Specifications for the routine and lifecycle maintenance to be carried out by the Contractor/Developer for the Project.

Project has the meaning ascribed to it in Recital B of this Agreement.

Project Agreement means the [Joint Venture Agreement] or [Design, Build, Finance, Operate and Transfer Concession Framework Agreement] to be made between the Contractor/Developer and NHC/SDHUD setting out in detail the terms and conditions for the development and delivery of the Project.

Project Cost means the total capital cost of the Project which includes the construction costs, consultants' professional fees, statutory approvals, financing costs, Project related disbursements, contingencies and VAT (where applicable) and which for the avoidance of doubt, shall not include the value of the land.

Project Documents means:

- (a) this Agreement;
- (b) the Project Agreement;
- (c) the Escrow Agreement;
- (d) the Offtake Agreement;
- (e) the Letter of Support;
- (f) the Commitment; and
- (g) any other material agreements entered into by the Contractor/Developer for the purposes of implementing the Project and designated by NHC/SDHUD as a "Project Document".

Project Plans shall be the various plans required to be prepared by the Contractor/Developer and which shall form part of the construction manual or the operation and maintenance manual, as applicable, and which shall include, without limitation, the OH&S Plan, the Safety Management System, the Quality Assurance System, the O&M Plan and the Environmental Management Plan.

Project Specifications has the meaning ascribed to it in Clause 11 of this Agreement.

Political Event means one or more of the following acts or events by or on behalf of any Governmental Authority:

- (a) nationalisation or expropriation of the Project by GoK (or any Governmental Authority) or any compulsory acquisition in the national interest or expropriation of all or substantially all of the Project or rights of the Contractor/Developer;
- (b) unlawful or unauthorised or unjustified revocation of, or refusal to renew or grant without valid cause, any Authorisation required by the Contractor/Developer to perform its obligations under the Project Agreement; provided that such delay, modification, denial, refusal or revocation did not result from the Contractor/Developer's (or any Subcontractor's inability) or failure to comply with

any condition relating to grant, maintenance or renewal of such clearance, licence, authorisation, no objection certificate, exemption, consent, approval or permit; and/or

- (c) a declared act of war, invasion, armed conflict or act of foreign enemy, blockade, riot, insurrection, terrorist or military action or sabotage.

Quality Assurance System means the quality assurance system to be implemented by the Contractor/Developer in accordance with relevant international standards and the requirements of the Project Agreement.

Subcontractor means any person appointed as a subcontractor for a part of the Works or Services.

Early Works shall mean the works earlier provided by a nominated Subcontractor, which shall consist of, but shall not be limited to, the following:

- (a) Demolition of all remaining structures above ground on the Site.
- (b) Clearing existing vegetation and debris from demolished buildings.
- (c) Provision of temporary Site security during Early Works.
- (d) Provision of temporary connection of statutory facilities such as power, water and sanitation on Site.
- (e) Application for Early Works Authorisations.
- (f) General setting out of roads and building positions based on overall master plan.
- (g) Setting up suitable Early Works site offices.
- (h) Drilling and testing a water borehole based on hydrogeological study.

Relief Events has the meaning ascribed to it in Clause 21 of this Agreement.

Required Insurances means the insurances identified as required to be taken out and maintained by the Contractor/Developer under the Project Agreement.

Rights of Way means the constructive possession of the Site together with all way leaves, easements, unrestricted access and other rights of way (howsoever described) necessary for the construction and operation of the Project.

Safety Management System means the system to be implemented by the Contractor/Developer for the safe management and operation of the Project in accordance with the requirements of the Project Agreement.

Services means the operation and maintenance of the Project in accordance with the terms of the Project Agreement.

Site means the prescribed area over which the Project will be undertaken, a plan of which shall be set out in the Project Agreement.

Subcontract means any contract entered into between the Contractor/Developer and a Subcontractor for a part of the Works or Services.

Term has the meaning ascribed to it in Clause 2 below.

Termination Date means the date when the Project Agreement shall be terminated in accordance with its terms.

Works means the design, construction, testing, completion and commissioning of the Project to be performed by the Contractor/Developer in accordance with the Project Agreement including the provision of all services, labor, materials, supplies, and equipment that is required or reasonably inferable to be executed by the Contractor/Developer to complete the Project in strict accordance with the requirements of the Project Agreement .

Special Purpose Vehicle means a vehicle (usually a limited company or a limited partnership) established solely for the purposes of a particular facility or project.

1.2 Interpretations

1.2.1 In this Agreement unless otherwise expressly provided or the context otherwise requires:

- (a) the table of contents, headings or sub-headings in this Agreement are for the purpose of convenience and reference only and shall not be used in the interpretation of nor modify nor amplify the terms of this Agreement nor any clause hereof;
- (b) unless a contrary intention clearly appears words importing:
 - i) any one gender include all genders; and
 - ii) the singular include the plural and vice versa,
- (c) reference to Laws of Kenya or Kenyan Law or Applicable Law or any regulation or statute having the force of law shall include the laws, acts, ordinances, rules, regulations, statutes, by-laws or notifications which have the force of law in the Republic of Kenya and as from time to time may be amended, replaced, modified, supplemented, extended or re-enacted;
- (d) references to a person and words denoting a natural person shall be construed as a reference to any individual, firm, company, corporation, society, trust, government, state or agency of a state or any association or partnership (whether or not having separate legal personality) of two or more of the above and shall include any successors, transferees and assigns;
- (e) the words **include** and **including** are to be construed without limitation and shall be deemed to be followed by "without limitation" or "but not limited to" whether or not they are followed by such phrases;
- (f) if any provision in a definition is a substantive provision conferring rights or imposing obligations on any party, notwithstanding that it is only in the definition

clause effect shall be given to it as if it were a substantive provision in the body of the Agreement;

- (g) any reference to **day** shall mean a reference to a calendar day;
- (h) references to a **Business Day** shall be construed as a reference to a day (other than weekends, public holidays and recognised or gazetted holidays in Kenya);
- (i) any reference to **month** shall mean a reference to a calendar month;
- (j) references to any date or period shall mean and include such date or period as may be extended pursuant to this Agreement;
- (k) when any number of days is prescribed in this Agreement, the same shall be reckoned exclusive of the first and inclusive of the last day unless the last day falls on a Saturday, Sunday or public holiday, in which case the last day shall be the next succeeding day which is not a Saturday Sunday or public holiday;
- (l) references to the **winding-up, dissolution, insolvency, or reorganisation** of a company or corporation shall be construed so as to include any equivalent or analogous proceedings under the law of the jurisdiction in which such company or corporation is incorporated or any jurisdiction in which such company or corporation carries on business including the seeking of liquidation, winding-up, reorganisation, dissolution, arrangement, protection or relief of debtors;
- (m) save and except as otherwise provided in this Agreement, any reference, at any time, to any agreement, deed, instrument, licence or document of any description shall be construed as reference to that agreement, deed, instrument, licence or other document as amended, varied, supplemented, modified or suspended at the time of such reference; and
- (n) where figures are referred to in numerals and in words, if there is any conflict between the two, the words shall prevail.

1.2.2 Where any term is defined within the context of any particular clause in this Agreement the term so defined, unless it is clear from the clause in question that the term so defined has limited application to the relevant clause, shall bear the meaning ascribed to it for all purposes in terms of this Agreement, notwithstanding that that term has not been defined in this Clause 1.

1.2.3 The expiration or termination of this Agreement shall not affect such of the provisions of this Agreement which expressly provide that they will operate after any such expiration or termination or which of necessity must continue to have effect after such expiration or termination, notwithstanding that the clauses themselves do not expressly provide for this.

1.2.4 The rule of construction that a contract shall be interpreted against the party responsible for the drafting or preparation of the Agreement, shall not apply.

2. **Term**

- 2.1 This Agreement shall come into effect upon execution by the last Party signing and continue in force until the Parties enter into the Project Agreement.
- 2.2 The Project Agreement will come into full force and effect on Financial Close (the **Effective Date**).
- 2.3 The Project Agreement will continue to be in force until the Expiry Date subject to extension and/or termination in accordance with its terms (the **Term**).

3. **Conditions Precedent**

- 3.1 The rights and obligations of the Parties under the Project Agreement shall be conditional upon the satisfaction of the following conditions precedent (the **Conditions Precedent**):
- a) the Contractor/Developer delivering to NHC/SDHUD:
- (i) evidence of having deposited the Commitment Fee in escrow together with the signed Escrow Agreement;
 - (ii) duly certified copies of the following corporate documents:
 - a) the memorandum and articles of association of the [Contractor/Developer];
 - b) all corporate authorisations necessary for the due execution and performance of the Project Documents, and any other documents in contemplation thereof, by the Contractor/Developer, including without limitation:
 - i) a resolution of the board of directors of the Contractor/Developer authorising the execution of the Project Documents; and
 - ii) the authorisations of the persons signing the Project Documents to sign them and to bind the Contractor/Developer thereby;
 - (iii) a legal opinion from its legal counsel with respect to the capacity and power of the Contractor/Developer to enter into the Project Agreement and the enforceability of the obligations assumed by it under the Project Agreement together with the necessary corporate authorisations under the Applicable Laws;
 - (iv) copies of all duly executed Project Documents;
 - (v) the Audited Financial Model;

- (vi) a copy of the Lenders Direct Agreement executed by all parties (other than the NHC/SDHUD);
 - (vii) confirmation that it has procured all the Authorisations (unconditionally or if subject to conditions then all such conditions required to be fulfilled by the date specified therein shall have been satisfied in full) necessary for the design and construction of the Works and maintenance and operation of the Project;
 - (viii) confirmation that all the Financing Agreements have been executed by the Lenders;
 - (ix) [the Construction Bond]; and
 - (x) evidence that the Required Insurances are in place.
- b) NHC/SDHUD delivering to the Contractor/Developer:
- (i) a copy of the Lenders Direct Agreement, duly executed by NHC/SDHUD; and
 - (ii) access to the Site and all Rights of Way necessary for the Project (where applicable).
- c) In the event that a Party does not satisfy its Conditions Precedent by the CP Longstop Date and the conditions precedent are not waived by the other Party, the Party that has not satisfied its Conditions Precedent will be in breach of the Project Agreement and the other Party shall have the right to terminate. The Project Agreement shall provide for various penalties for a termination prior to the Effective Date in favour of the non-defaulting Party. If the non-defaulting Party does not choose to terminate, the Parties may agree to meet to discuss with a view to resolving the outstanding Conditions Precedent to reach the Effective Date.

4. **Scope**

- 4.1 The Project Agreement will govern the relationship between NHC/SDHUD and the Contractor/Developer in respect of the Works and Services aimed at delivery of the Project.
- 4.2 The Contractor/Developer's scope will cover a combination of services to be carried out either through direct execution of the Works or through providing the infrastructure for Subcontractors to carry out such Works. This will not only include construction but also the project management of such Works.
- 4.3 NHC/SDHUD requires that the Contractor/Developer observes the highest standards of ethics during execution of the Project. The Contractor/Developer shall sign a declaration form that it has not and will not be involved in any corrupt and fraudulent practices.

5. **Operating Principles**

- 5.1 The Contractor/Developer shall execute the Works and, among other services, provide high level technical consultancy and project management services. When completed, the Works shall be fit for the purposes for which the Works are intended as defined in the Project Specifications.
- 5.2 The Contractor/Developer will put up [to] ten percent (10%) of the Project Cost as commitment fee (the **Commitment Fee**). The Commitment Fee shall be deposited into a designated escrow account within 30 days of signing the Project Agreement and shall be used exclusively for the development, operations and management of the Project. The operation of the escrow account shall be governed by an escrow agreement (the **Escrow Agreement**) to be entered into between NHC/SDHUD, the Contractor/Developer and the escrow agent.
- 5.3 The Commitment Fee will be applied in accordance with the Commitment/Early Works Agreement towards amongst other things:
- (a) funding the Early Works; and
 - (b) engaging professional services, which has been negotiated at approximately four decimal five percent (4.5%) of the Project Cost.
- 5.1. The Parties may also, in addition to the above, set up new entities in the form of Special Purpose Vehicles where required in order to execute the Works.
- 5.4 The Contractor/Developer shall take full responsibility for the care and execution of the Works. If any loss or damage happens during the execution of the Works, the Contractor/Developer shall be responsible and the Contractor/Developer shall rectify the loss or damage at the Contractor/Developer's risk and cost. The Contractor/Developer shall be liable for any loss or damage caused by any actions performed by the Contractor/Developer, their agents, employees or sub-contractors.
- 5.5 NHC/SDHUD's role shall include:
- (a) Provision of land to undertake the Project;
 - (b) Fast-tracking the approvals required to undertake the Project; and
 - (c) Provision of incentives and interventions where needed to ensure successful delivery of the Project.

6. **Project Output Specifications Required of the Contractor/Developer**

- 6.1 The Contractor/Developer shall undertake to complete the Works within two (2) years from the Effective Date.
- 6.2 The Contractor/Developer shall ensure that the Project shall integrate the following planning principles:

- (a) **Densification:** To ensure the highest and best use of land.
- (b) **Compact Development:** To optimize on land use, the Project is expected to adopt a vertical development approach.
- (c) **Mixed Income Groups:** The intended solution of the Project is to cater for different income groups.
- (d) **Self-Reliance:** The Project shall include support services such as playgrounds, schools or community halls.
- (e) **Human Centered Development:** The Project shall take into account the needs of the residents and the larger public and as such, the designs of the units shall adequately address those needs.
- (f) **Risk Management Plan:** This shall address the issue of affordability of the housing unitseven in extenuating circumstances, including through use of insurance, hedging, etc.

6.3 The Contractor/Developer shall utilize green technologies that promote the conservation of non-renewable resources, minimize environmental impact, and/or include building components that contribute to economic efficiency.

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7. Collaboration With Other Contractors/Developers (Sub-contractors)

- 7.1 The Contractor/Developer shall be liable for the performance of its obligations under the Project Agreement regardless of the fact that the Contractor/Developer may use Subcontractors for the performance of its obligations under that Agreement.
- 7.2 The Contractor/Developer shall ensure that each Subcontract contains provisions:
 - 7.2.1 entitling NHC/SDHUD to step into the relevant Subcontract in substitution of the Contractor/Developer in the event of termination or suspension;
 - 7.2.2 requiring the provision by the Subcontractors of reasonable performance security in respect of the obligations of the Subcontractors; and
 - 7.2.3 requiring the Subcontractors to implement a system for a reasonable level of monitoring of compliance with obligations and reporting of compliance therewith to NHC/SDHUD.
- 7.3 NHC/SDHUD shall reserve the right to require the Contractor/Developer to procure a collateral warranty from any Subcontractor so that NHC/SDHUD has a direct right to exercise the Contractor/Developer's rights.

8. Representations and Warranties of the Parties

The Contractor/Developer acknowledges and agrees that NHC/SDHUD will enter into the Project Agreement in reliance upon certain representations and warranties contained therein. The Contractor/Developer's representations and warranties shall repeat throughout the Term, including as a condition precedent to the Effective Date.

8.1 Contractor/Developer representations and warranties

- 8.2 The Contractor/Developer will represent and warrant to NHC/SDHUD on the Execution Date that:
 - 8.2.1 It has the power to enter into, and to deliver, the Project Agreement and to perform its obligations as contemplated by the Project Agreement;
 - 8.2.2 The execution and delivery of the Project Agreement and other documents contemplated in the Project Agreement, and the performance by it of its obligations thereunder, have been duly and validly authorized by all necessary statutory and corporate requirements;
 - 8.2.3 The Project Agreement has been duly executed by its duly authorised officers and constitutes legal, valid and binding obligations enforceable against it in accordance with the terms thereof;
 - 8.2.4 It is subject to the laws of Kenya, and thereby expressly and irrevocably waive any immunity in any jurisdiction in respect of the Project Agreement or matters arising thereunder including any obligation, liability or responsibility thereunder;
 - 8.2.5 Neither the making of the Project Agreement nor any of the Project Documents will conflict with, or result in a breach of, any of the terms, conditions or provisions of, or constitute a

default or require any consent under any law, agreement or other instrument or arrangement to which it is a party or by which it is bound, or will violate any of the terms or provisions of its constitutional or corporate documents, or any judgment, decree or order or any statute, treaty, rule or regulation applicable to it;

- 8.2.6 There is no pending or, to the best of its knowledge, information and belief, there is no threatened suit or administrative action against it which, if adversely decided, would prevent the consummation of the transactions contemplated thereby or have a material adverse effect;
- 8.2.7 It has complied with Applicable Laws in all material respects and has not been subject to any fines, penalties, injunctive relief or any other civil or criminal liabilities which in the aggregate have or may have a material adverse effect on its ability to perform its obligations under the Project Agreement and the Project Documents;
- 8.2.8 All its rights and interests in the Project are capable of passing to and vesting in NHC/SDHUD on the Termination Date free and clear of all liens, claims and encumbrances, without any further act or deed on its part or that of NHC/SDHUD;
- 8.2.9 No representation or warranty by it contained therein or in any other document furnished by it to NHC/SDHUD or to any Governmental Authority in relation to Authorisations contains or will contain any untrue or misleading statement of material fact or omits or will omit to state a material fact necessary to make such representation or warranty not misleading;
- 8.2.10 No sums, in cash or kind, have been paid or will be paid, by it or on its behalf, to any person by way of fees, commission or otherwise for securing the Project or entering into the Project Agreement or for influencing or attempting to influence any officer or employee of NHC/SDHUD or any Governmental Authority in connection therewith;
- 8.2.11 The copies of the Project Documents and the Financing Agreements handed over to NHC/SDHUD are true and complete copies of those documents and there shall have been no amendments to those documents or other documents replacing the Project Documents or the Financing Agreements or having material effect on the interpretation or application of any of the Project Documents or Financing Agreements; and
- 8.2.12 It has not taken any action nor have any steps been taken or legal proceedings been started or threatened against it for its winding up, dissolution or for the appointment of any insolvency officer and it is not unable to pay its debts under any Applicable Laws.

8.3 **NHC/SDHUD Representations and Warranties**

8.4 NHC/SDHUD will represent and warrant to the Contractor/Developer that:

- 8.4.1 it has full power and authority to execute, deliver and perform its obligations under the Project Agreement and the Project Documents and to carry out the transactions contemplated therein; and
- 8.4.2 it has taken all necessary actions under the Applicable Laws to authorise the execution, delivery and performance of the Project Agreement and the Project Documents.

8.5 Disclosure

In the event that any occurrence or circumstance comes to the attention of either Party that renders any of its aforesaid representations or warranties untrue or incorrect, such Party shall immediately notify the other Party. Such notification shall not have the effect of remedying any breach of the representation or warranty that has been found to be untrue or incorrect nor shall it adversely affect or waive any right, remedy or obligation of either Party under the Project Agreement.

8.6 Contractor/Developer Undertakings

The Contractor/Developer shall, among other things, undertake that during the Term of the Project Agreement:

- 8.6.1 it shall promptly inform NHC/SDHUD as soon as it becomes aware of any litigation, arbitration or administrative proceedings likely to adversely affect, to a material extent, its ability perform its obligations under the Project Documents and the Financing Agreements;
- 8.6.2 it will not without the prior written consent of NHC/SDHUD lease, transfer or otherwise dispose of its business or a part thereof or any of the assets which are involved in the performance of its obligations under the Project Documents; and
- 8.6.3 it shall take all steps necessary to ensure that the Works are performed so as to comply with all Applicable Laws.

8.7 Warranties and information provided by the NHC/SDHUD

- 8.7.1 Prior to the date of the Project Agreement, NHC/SDHUD will make available to the Contractor/Developer certain materials, documents and data related to the Project and the Site and other matters which are or may be relevant to the Project and the Site (the **Disclosed Data**).
- 8.7.2 The Contractor/Developer shall be responsible for verifying and interpreting all Disclosed Data. NHC/SDHUD does not warrant that the Disclosed Data shall be correct, complete or adequate as concerns its subject matter and NHC/SDHUD shall have no responsibility for the accuracy, sufficiency or completeness of the Disclosed Data.
- 8.7.3 The Contractor/Developer shall acknowledge and warrant to NHC/SDHUD that in accordance with Good Industry Practice, it shall examine, check and verify the correctness, completeness and adequacy of Disclosed Data for the performance by the Contractor/Developer of its obligations under the Project Agreement.

9. The Site

- 9.1 **NHC/SDHUD shall provide the Contractor/Developer with unencumbered and uninterrupted possession of the Site and Rights of Way from the Effective Date until the Expiry Date or Termination Date, whichever first occurs, for the purposes of carrying out the Project.**
- 9.2 The rights over the Site will be in the form of a [non-exclusive licence] and shall be subject to Applicable Laws relating to public land.

- 9.3 The details of the Site, including a plan, coordinates and boundaries of the Site shall be provided in a schedule to the Project Agreement.
- 9.4 The Contractor/Developer shall be responsible for access to the Site for itself and its Subcontractors.
- 9.5 The Contractor/Developer shall provide access to NHC/SDHUD and/or any of its appointed representatives upon reasonable notice to inspect the Site and progress of the Project.

10. **Site Conditions**

- 10.1 The Contractor/Developer shall be responsible for any existing structures on the Site, the ground conditions of the Site and the costs arising from the discovery of any human remains, fossils, antiquities, munitions and environmental contamination.
- 10.2 The Contractor/Developer shall notify NHC/SDHUD of any discoveries of monuments, antiquities or archaeological objects at the Site, which shall at all times remain the property of GoK. The Contractor/Developer shall examine and dispose of all such discoveries in accordance with the instructions provided by the representative of NHC/SDHUD and in compliance with any Applicable Laws and shall take all steps necessary to minimise any delay to the implementation of the Project. The Contractor/Developer shall use reasonable endeavours to ensure that no extension of the period for completion of the Works is necessary as a result of excavation work in relation to the discovery of monuments, antiquities or archaeological objects at the Site or any pre-existing environmental contamination which could not have reasonably been detected by the Contractor/Developer through its Site due diligence.
- 10.3 The Contractor/Developer shall be responsible for any required utility diversions on the Site and for liaising with the relevant Governmental Authorities in that regard. In the event any diversions are required, NHC/SDHUD shall provide reasonable assistance in dealing with the relevant Governmental Authorities, provided the Contractor/Developer has used all reasonable endeavours itself.
- 10.4 The Contractor/Developer shall provide security for the Site from the Effective Date and ensure no unauthorised third parties gain access.

11. **Project Specifications**

- 11.1 The Project Agreement shall include a technical scope of works and specifications document setting out NHC/SDHUD's technical requirements for the Project's construction, operation and maintenance (the **Project Specifications**).
- 11.2 In accordance with Clause 8.7 above, the Contractor/Developer shall be required to fully inform itself of all the detail in the Project Specifications. This will contain either preliminary designs [or detailed designs], but in either case, NHC/SDHUD shall provide no warranty in relation to same and the Contractor/Developer takes the risk that it can meet the Project Specifications.

12. **Nominated Representatives**

- 12.1 NHC/SDHUD shall be entitled to appoint an NHC/SDHUD Representative to represent NHC/SDHUD in the capacities prescribed under the Project Agreement.
- 12.2 Subject to the approval of NHC/SDHUD, the Contractor/Developer shall appoint a Contractor/Developer Representative. The Contractor/Developer Representative shall have full authority to act on behalf of, and bind, the Contractor/Developer and NHC/SDHUD shall be entitled to treat any act of the Contractor/Developer Representative as being expressly authorised by the Contractor/Developer.
- 12.3 Either Party shall be entitled to replace its nominated representative throughout the Term. The Contractor/Developer shall only replace the Contractor/Developer's Representative with persons of similar qualifications, skill and experience and shall obtain the approval of NHC/SDHUD prior to making any such replacement.
- 12.4 NHC/SDHUD may require the Contractor/Developer to remove (or cause to be removed) any person employed on the Site or Works, including the Contractor/Developer's Representative and any personnel, who persists in any misconduct or lack of care, carries out duties unsatisfactorily, incompetently or negligently or fails to conform with any provisions of the Project Agreement, among others.

13. **Early Works**

- 13.1 Prior to the Effective Date, the Contractor/Developer may be requested to begin the Early Works after the execution of the Project Agreement and before the achievement of the Effective Date in accordance with the [**Commitment Agreement**] provided that such Works will be undertaken at the cost of the Contractor/Developer. In the event that the Project Agreement is terminated before the Effective Date, the Contractor/Developer will be compensated for the value of the actual costs incurred (including mobilisation and demobilisation costs) in carrying out the Early Works, duly certified by the Independent Engineer.
- 13.2 The Early Works shall not commence until after the fulfilment of the following conditions precedent:
- (a) The Parties agreeing in writing on the scope and cost of the Early Works and the time within which the Early Works will be undertaken;
 - (b) NHC/SDHUD granting access and Rights of Way to such portion of the Site as is required for the Early Works to be undertaken;
 - (c) The Contractor/Developer obtaining all insurances, permits and authorisations required to undertake the Early Works;
 - (d) The appointment of the Independent Engineer in accordance with Clause 14 below; and
 - (e) The Contractor/Developer executing the Commitment/Early Works Agreement.

13.3 Once the conditions precedent set out above have been fulfilled, NHC/SDHUD shall give written notice of commencement to the Contractor/Developer indicating its consent for the commencement of the Early Works.

13.4 The design, construction and commissioning of the Early Works shall in all cases be in conformity with and in accordance with the provisions of the Project Agreement, the Commitment/Early Works Agreement, all Applicable Laws and Good Industry Practice so that the Works fully comply with and meet all the requirements of the Project Specifications.

14. **Independent Engineer**

14.1 The Parties shall appoint an Independent Engineer for the purposes of the Project Agreement. The Contractor/Developer shall nominate a suitable party who shall:

- (a) have appropriate qualifications and experience;
- (b) have no conflict of interest with the role of the Independent Engineer under the Project Agreement;
- (c) have indicated his willingness to execute the Independent Engineer Agreement;
- (d) have professional indemnity insurance in accordance with the requirements of the Independent Engineer Agreement; and
- (e) have provided details of the professional fees and charges for the performance of his obligations under the Independent Engineer Agreement.

14.2 The Parties will consider the nominee together and discuss any issues which relate to the nominee. However, NHC/SDHUD shall have the unilateral right to refuse a nominee in which case the Contractor/Developer shall nominate a different party that complies with the above and this process shall be repeated until an Independent Engineer is appointed.

14.3 The Independent Engineer shall:

- (a) exercise the power, duties and authority that are conferred upon the Independent Engineer by the Project Agreement and the Independent Engineer Agreement;
- (b) in performance of his obligations under the Independent Engineer Agreement, exercise the powers, duties and authorities vested in the Independent Engineer for the benefit of each of NHC/SDHUD and the Contractor/Developer;
- (c) exercise all powers, duties, discretions and authority as an Independent Engineer and not as an agent for NHC/SDHUD or the Contractor/Developer; and
- (d) in exercising the powers, duties and authority of the Independent Engineer, act honestly, reasonably and impartially.

14.4 The Independent Engineer shall have access to such parts of the Site as are required to perform its obligations under the Project Agreement and the Independent Engineer Agreement.

14.5 The costs of the Independent Engineer shall be borne equally by NHC/SDHUD and the Contractor/Developer.

15. General Obligations of the Contractor/Developer

15.1 Contractor/Developer Undertakings

15.1.1 The Contractor/Developer shall undertake to:

- (a) design, construct, complete and commission the Works in accordance with the Project Specifications;
- (b) [operate and maintain the Project during the O&M Period in accordance with the Project Specifications];
- (c) fully comply with and meet the technical requirements as set out in the Project Agreement and the Project Specifications;
- (d) finance the activities referred to in the Project Agreement;
- (e) procure that the design is carried out by or under the supervision of persons who are suitably qualified and experienced;
- (f) procure all Authorisations and thereafter maintain all Authorisations for the Works and Services;
- (g) comply with the requirements of NHC/SDHUD, NHC/SDHUD's Representative and relevant Governmental Authorities;
- (h) carry out all Works and Services at its own cost, in an efficient and safe manner, in compliance with Good Industry Practice and all Applicable Laws and environmental requirements and maintain all Authorisations;
- (i) ensure all Subcontractors carry out their obligations under the Project Documents;
- (j) not to terminate any Project Document once it is entered into without the prior approval of NHC/SDHUD;
- (k) not enter into any additional financing agreements (other than those agreed); and
- (l) address any complaints from third Parties received in connection with the Project.

15.1.2 The Contractor/Developer shall bear all costs, risks and liabilities associated with discharging the above obligations and its obligations under the Project Agreement.

15.2 Authorisations

15.2.1 The Contractor/Developer shall be responsible for obtaining all Authorisations (other than those which by their nature can only be obtained by NHC/SDHUD under any Applicable Law), and for arranging any necessary amendments to any Authorisations. The Contractor/Developer shall be responsible for applying for, obtaining, renewing and

complying with the conditions attaching to all Authorisations necessary for the undertaking of the Works or Services in relation to the Project.

- 15.2.2 NHC/SDHUD will provide the Contractor/Developer with reasonable assistance in obtaining any Authorisation. However, nothing in this Clause shall be deemed to be an undertaking by the NHC/SDHUD to ensure that any Authorisation will be obtained by the Contractor/Developer.

15.3 Project Documents

- 15.3.1 The Contractor/Developer shall execute all Project Documents to which it is a Party and shall not be in default of any Project Document.

- 15.3.2 The Contractor/Developer may not make any amendment to any Project Document which may have a material impact on the Project Agreement or the Contractor/Developer's ability to perform its obligations thereunder, without the consent of NHC/SDHUD.

15.4 Project Plans and Manuals

- 15.4.1 The Contractor/Developer shall prepare the Project Plans, which shall form part of the construction manual or the operations and maintenance manual as applicable and in accordance with the terms of the Project Agreement. Such manuals shall be reviewed by NHC/SDHUD in accordance with the review protocol set out in Clause 15.8 below.

- 15.4.2 The construction manual and operations and maintenance manual shall be updated by the Contractor/Developer on a regular basis throughout the Term. An update will be required where there is any material event (such as Force Majeure Event or Change in Law) which may impact the details set out in the manuals.

- 15.4.3 The Contractor/Developer shall comply with the construction manual and the operations and maintenance manuals.

15.5 Occupational Health and Safety

- 15.5.1 The Contractor/Developer shall be responsible for the health, safety and security of employees and users of the Project. The Contractor/Developer shall take measures to prevent trespassers on the Site.

- 15.5.2 The Contractor/Developer shall prepare and implement an OH&S Plan which shall be in effect for the Term and which shall cover both the Construction Period and the O&M Period. The Contractor/Developer shall take all risk in compliance with the OH&S Plan.

- 15.5.3 The Contractor/Developer shall implement, and keep updated, a Safety Management System.

15.6 Quality and Environmental Management

- 15.6.1 The Contractor/Developer shall ensure that the Project complies with all Applicable Laws in relation to the protection of the Environment, any environmental permits, conditions or requirements issued regarding the Works and Services as identified in any environmental

impact statement or in any Authorisation and shall seek to achieve the highest industry standards for environmental compliance.

15.6.2 The Contractor/Developer shall monitor the Environmental conditions on Site regularly during both the Construction Period and the O&M Period. The Contractor/Developer shall take all risk in relation to contamination on the Site.

15.6.3 The Contractor/Developer shall implement and maintain a Quality Assurance System which complies with the applicable ISO standard and international best practice.

15.7 Contractor/Developer Employees

15.7.1 The Contractor/Developer shall employ the required number of suitably qualified staff to carry out the Works and Services throughout the Term. The Contractor/Developer shall be liable for all taxes and associated costs of the employees and shall indemnify NHC/SDHUD against any losses or claims arising from any employee.

15.8 Review and Approval Process

15.8.1 NHC/SDHUD will review all plans, manuals and reports submitted in accordance with the review protocol. The review protocol shall generally provide that within 30 Business Days of receipt of any plan, manual or report required to be submitted under the Project Agreement, NHC/SDHUD will review and:

- (a) confirm in writing to the Contractor/Developer that it has no comments on the proposed plan, manual or report; or
- (b) reject the proposed plan, manual or report, providing the reasons for such rejection, where such plan or manual fails to comply with the requirements of the Project Agreement or NHC/SDHUD.

15.8.2 If NHC/SDHUD rejects the proposed plan, manual or report then the Contractor/Developer will review and revise the plan, manual or report and resubmit it to NHC/SDHUD and the above process will continue until such time that NHC/SDHUD confirms it has no comment on the plan, manual or report.

15.8.3 The Contractor/Developer is not entitled to make any claim in respect of any loss or otherwise for a failure by NHC/SDHUD to comment on a proposed plan, manual or report. If the time period for an NHC/SDHUD review expires without NHC/SDHUD providing any feedback, then the plan, manual or report shall be [deemed approved].

15.8.4 Any dispute in relation to this process shall be subject to the Expedited Dispute Resolution process.

16. Design and Construction

16.1 General Obligations

16.2 The Contractor/Developer shall prepare the detailed design in order to comply with the Project Specifications in the Project Agreement. In addition to the detailed design the

Contractor/Developer shall produce all further designs necessary for the carrying out and completion of the Works, and shall ensure that such designs are in compliance with relevant Authorisations

16.3 The Contractor/Developer shall warrant that it has used, and will continue to use, the degree of skill and care in the design of the Project that would reasonably be expected of a competent designer experienced in carrying out design activities of a similar nature, scope and complexity to those comprised in the Works.

16.3.1 The Contractor/Developer shall carry out and complete the Works in accordance with the provisions of the Project Agreement and all Applicable Laws, including all laws in Kenya requiring the use of local content in projects of a similar nature.

16.3.2 The Contractor/Developer shall be required to provide all amenities required at the Site, including all utilities required during the Construction Period.

16.3.3 The Contractor/Developer will make available to NHC/SDHUD and other persons acting on its behalf, on the Site, such reasonable facilities and equipment required by NHC/SDHUD to exercise its rights and obligations under the Project Agreement.

16.3.4 NHC/SDHUD will be liable for the costs of any NHC/SDHUD variations made to the design of the Project after the Effective Date.

16.4 **Construction Bond**

16.4.1 To secure the performance of the Contractor/Developer during the Construction Period, a Construction Bond for construction of the Works, equivalent to [●] will be submitted by the Contractor/Developer before the execution of the Project Agreement.

16.4.2 Such Construction Bond shall be in the form of an irrevocable and unconditional bank guarantee in favor of NHC/SDHUD from a bank licensed to operate in Kenya and shall be released in-part linked to construction milestones and defined in the Project Agreement.]

16.5 **Design Review**

16.5.1 The Project Agreement shall set out a design review process.

16.5.2 The Contractor/Developer shall take all the risk in the detailed design documentation. NHC/SDHUD shall review but shall be under no obligation to approve any design documentation. The Contractor/Developer shall warrant that the design, when constructed, shall meet the requirements of the Project Specifications.

16.5.3 For the avoidance of doubt, no review, comment, approval or failure to review shall relieve the Contractor/Developer from any responsibility or liability to perform its obligations under the Project Agreement in any manner nor shall NHC/SDHUD be liable for the same in any manner.

16.6 **Programme and Progress Reporting**

16.6.1 The Contractor/Developer shall develop and submit a detailed construction programme setting out the timetable for the Works to achieve the commercial operation date (**COD**). NHC/SDHUD will review the programme in accordance with the review protocol contained in the Project Agreement.

16.6.2 The Contractor/Developer will prepare and deliver to NHC/SDHUD progress reports setting out the progress of the Works at the end of each calendar month, and if requested by NHC/SDHUD at the date of such request.

16.7 **Date of Completion**

16.7.1 The Contractor/Developer will undertake to NHC/SDHUD that it will complete the Project by the scheduled COD.

16.7.2 If COD is not achieved by the Longstop COD as set out in the Project Agreement, NHC/SDHUD shall be entitled to terminate the Project Agreement. NHC/SDHUD shall not be entitled to terminate where the failure is on account of reasons solely attributable to a material breach by NHC/SDHUD or due to a Delay Event, provided that NHC/SDHUD may, upon the request of the Contractor/Developer, consider whether there are reasonable grounds to extend the time by which the COD should occur.

16.7.3 The Project Agreement shall set out the process for assessing a Delay Event claim.

16.8 **Completion**

16.8.1 The Contractor/Developer shall report on a monthly basis during the Construction Period on its progress against the construction programme. The Contractor/Developer shall update the construction programme on the reasonable request of NHC/SDHUD. When the Contractor/Developer is of the opinion that the Works are completed, the Independent Engineer shall assess the works and, when it is confirmed that they are complete, issue a provisional completion certificate and/or a completion certificate co-signed by each Party.

16.8.2 The Contractor/Developer will be responsible for ensuring the provisional completion certificate and/or completion certificate is awarded and the operation phase commences in accordance with the implementation schedule.

16.8.3 The Contractor/Developer shall ensure that NHC/SDHUD, its representatives and the Independent Engineer have unrestricted access to the Site for the purpose of inspection or investigation.

16.8.4 A provisional completion certificate shall be issued by the Independent Engineer upon achievement of [90%] of the requirements set out in the Project Agreement and receipt of all approvals from Governmental Authorities subject to approval of NHC/SDHUD. The provisional completion certificate shall have attached to it a list of all outstanding unfinished works and defects items to be completed prior to the issue of the completion certificate (**Punch List**).

16.8.5 A completion certificate shall be issued by the Independent Engineer upon successful completion of all the tests, rectification of all Punch List matters and receipt of all approvals

from Governmental Authorities, subject to approval of Independent Engineer / NHC/SDHUD in accordance with the Project Agreement.

16.8.6 Simultaneously with the issue of the completion certificate, the Contractor/Developer shall provide to NHC/SDHUD and the Independent Engineer a copy of the as-built building specification together with all drawings related to the Works as set out in the Project Agreement.

16.9 Third Party/Project Interfaces

16.9.1 The Contractor/Developer shall be responsible for integrating the Project with connected infrastructure, as set out in the Project Specifications.

16.9.2 If NHC/SDHUD requires the Contractor/Developer to discharge any other third party agreements, or to integrate the Project with any other third party projects or connecting infrastructure, this will be dealt with in accordance with the terms of the Project Agreement.

16.10 Defects Liability

16.10.1 The Contractor/Developer shall ensure that all defects in the Works are rectified for an agreed period after the commencement of operations. The Contractor/Developer shall ensure that its construction Subcontract provides such coverage.

16.10.2 The Contractor/Developer will remain liable for any decennial liability in accordance with the Laws of Kenya.

16.10.3 The Contractor/Developer shall be liable for latent defects in the Works which could not have been detected, acting reasonably on the Expiry Date or earlier on the Termination Date. The Parties shall agree on a commercial basis and appropriate time period for this liability to sit with the Contractor/Developer.

17. Variation Procedure

17.1 NHC/SDHUD shall be entitled to require a variation in relation to the design, construction or operation of the Project. NHC/SDHUD shall request a proposal from the Contractor/Developer for the price for the variation, any extension required to the COD and obligations necessary for the Contractor/Developer to implement the variation. If the Parties cannot agree the matters in the Contractor/Developer's proposal the dispute may be referred to the Dispute Resolution procedures under the Project Agreement.

17.2 Neither Party shall be permitted to reject a proposed variation if such variation is required due to requirements of Applicable Laws or regulations or due to health and safety reasons.

17.3 The Contractor/Developer may propose a variation, but NHC/SDHUD may accept or reject it in its discretion. The Contractor/Developer shall be liable for the costs of any variation it proposes unless it is required due to a Change in Law or a Force Majeure Event.

18. Modifications

18.1 The Parties may wish to carry out modifications to the Project during the Term.

18.2 Modifications to the Project may only be instigated by NHC/SDHUD. Certain representations and warranties will attach to any modification work which the Contractor/Developer carries out.

19. **[Development Split and Offtake**

19.1 The Contractor/Developer will be allocated up to thirty per cent (30%) of the Site for its own unrestricted development, so as to enable it achieve a reasonable rate of return for its investment in the Project.

19.2 GoK shall guarantee offtake of the housing units in accordance with the terms of the Offtake Agreement.]

20. **Change in Law**

20.1 **Change in Law** shall mean any one or more of the events referred to in sub-paragraphs (a) or (b) below of this definition occurring after the Effective Date, and which despite the exercise of Good Industry Practice by the Contractor/Developer: (i) results in an increase in the Project Cost incurred by the Contractor/Developer in performing its obligations under the Project Agreement or (ii) imposes requirements for the Works and/or Services that are materially more onerous than the requirements in effect as at the Effective Date, and that materially affect the Contractor/Developer's performance under the Project Agreement:

- (a) a change in, or in the interpretation (by a Governmental Authority), application or enforcement of, or the enactment or adoption of or promulgation, bringing into effect of, repeal, amendment of, any Applicable Laws; or
- (b) any change in any Authorisation required in connection with the Project Agreement or any additional requirements or conditions imposed by any Governmental Authority in connection with the issuance, extension, replacement, variation or renewal of any Authorisation required in connection with the Project Agreement provided that in respect of the issuance, extension, replacement, variation or renewal of any Authorisation required in connection with the Project Agreement, the Party requiring the relevant Authorisation has first diligently attempted to obtain such Authorisation and if the processes required by such duty of diligence have not been exhausted, such processes have been and are still being diligently pursued by that Party.

20.2 The Contractor/Developer shall be required to give notice to NHC/SDHUD and the Independent Engineer of the occurrence of a Change in Law specifying whether relief from compliance with obligations is required.

20.3 If as a result of a Change in Law, the Contractor/Developer is unable to carry out the Works or unable to comply with any of its other obligations arising from the Project Agreement, the Contractor/Developer shall be entitled to apply for relief in the form of:

- (a) a postponement of the scheduled COD;
- (b) amendment to the Project Agreement to take account of the Change in Law; and/or
- (c) relief from termination for Contractor/Developer Event of Default.

20.4 The Contractor/Developer shall only be entitled to relief where it has notified NHC/SDHUD and the Independent Engineer of its request to be provided with any such relief, and provided such other information as will be specified in the Project Agreement and the Independent Engineer has provided a written decision stating that Change in Law has occurred.

21. Relief Events

21.1 Relief Event shall mean any of the following:

- (a) fire or explosion or any unforeseeable extreme weather (having regard to the nature of the region and the prevailing climate conditions in the region), breakdowns and accidents on utility networks operated by a third party;
- (b) any blockade or embargo which does not constitute a Force Majeure Event;
- (c) any official or unofficial strike, lockout, go slow or other dispute to the extent that such events apply to the entire relevant sector or a significant part of it and not only to the Contractor/Developer or a Contractor/Developer Party;
- (d) any picketing, demonstration, blockade, embargo or other protester action (other than as a result of industrial action which affects only the employees of the Contractor/Developer or its Subcontractors or in respect of matters other than those arising from the Project Agreement or the Project to be constructed pursuant to the Project Agreement) taking place on the Site or directly affecting access to the Site; or
- (e) any civil commotion, boycott or political agitation,

unless any of the events listed in paragraphs (a) to (e) inclusive arise (directly or indirectly) as a result of any wilful default or wilful act of the Contractor/Developer (or any Contractor/Developer Party).

21.2 During a Relief Event the Contractor/Developer shall be entitled to apply for relief from its obligations under the Project Agreement to the extent its ability to perform them is adversely affected by the Relief Event. Such relief may be in form of:

- (a) a postponement of the scheduled COD appropriate to the delay suffered by the Contractor/Developer;
- (b) relief from its obligations whilst such Relief Event continues; and/or
- (c) relief from termination for Contractor/Developer Event of Default.

21.3 The Contractor/Developer shall be required to give notice to NHC/SDHUD and the Independent Engineer of the occurrence of the Relief Event, specifying the Relief Event and the required relief and other relevant information required in accordance with the Project Agreement. The Contractor/Developer shall only be entitled to relief upon the Independent Engineer providing written notice stating that a Relief Event has occurred.

22. Force Majeure

22.1 A **Force Majeure Event** shall mean an exceptional event or circumstance which occurs after the Effective Date:

- (a) which is beyond a Party's control;
- (b) which such Party could not reasonably have provided for before entering into the Project Agreement;
- (c) which, having arisen, such Party could not reasonably have avoided or overcome; and
- (d) which is not substantially attributable to the other Party,

and which may include, but is not limited to exceptional events or circumstances such as those listed below (provided that conditions (a) to (d) above are satisfied):

- (i) an act of God, epidemic, extreme adverse weather conditions, lightning, earthquake, landslide, cyclone, flood, volcanic eruption, chemical or radioactive contamination or ionising radiation, fire or explosion (to the extent of contamination or radiation or fire or explosion originating from a source external to the Site); or
- (ii) a Political Event

which directly cause either Party to be unable to comply with all or a material part of its obligations under the Project Agreement.

22.2 On the occurrence of a Force Majeure Event, the affected Party shall give notice to the other Party. The notification shall include details of the Force Majeure Event, including evidence of its effect on the obligations of the affected Party, and any action proposed to mitigate its effect.

22.3 As soon as practicable after such notification, the Parties shall consult with each other in good faith and use reasonable endeavours to agree appropriate terms to mitigate the effects of the Force Majeure Event and facilitate the continued performance of the Project Agreement

22.4 If as a result of a Force Majeure Event the Contractor/Developer is unable to carry out the Works or comply with any of its other obligations arising from the Project Agreement, the Contractor/Developer shall be entitled to apply for relief in the form of:

- (d) a postponement of the scheduled COD appropriate to the delay suffered by the Contractor/Developer;
- (e) relief from enforcing its obligations; and/or
- (f) relief from termination for Contractor/Developer Event of Default.

22.5 The Contractor/Developer shall only obtain such relief in circumstances where it has notified NHC/SDHUD and the Independent Engineer of the occurrence of the Force Majeure Event and the required relief and any other relevant information required in accordance with the

Project Agreement. The Contractor/Developer shall only be entitled to relief upon the Independent Engineer providing written notice stating that a Force Majeure Event has occurred.

22.6 The Parties shall recommence performance of the affected obligations as soon as is reasonably practicable after the Force Majeure Event ceases.

22.7 [If a Force Majeure Event has occurred and continued for a period of one hundred and eighty (180) days from the date of its occurrence, the Parties shall meet in good faith with a view to determining mutually acceptable terms for continuing the Project Agreement notwithstanding the effects of the event of Force Majeure provided that if at the end of ninety (90) days, no solution is found:

(a) where the event of Force Majeure constitutes a Political Event the Contractor/Developer may pursuant to the Letter of Comfort pursue discussion with GoK for it to: (i) remedy the Political Event and/or reimburse the Contractor/Developer directly for any costs incurred or lost income arising from the Political Event, or (ii) purchase the Project in accordance with the principles set out in the Letter of Comfort; or

(b) where the event of Force Majeure is not a Political Event, then either Party shall be entitled to serve upon the other Party sixty (60) days' notice to terminate the Project Agreement].

23. **Indemnities**

23.1 The Contractor/Developer shall undertake to indemnify and hold harmless NHC/SDHUD and all NHC/SDHUD Parties from and against all and any claim or loss which arises out of the Project or the performance of the Contractor/Developer's obligations under the Project Agreement to the extent that such claim or loss does not relate to:

(c) a breach or failure by NHC/SDHUD of its obligations under the Project Agreement; and /or

(d) the wilful misconduct or negligence of NHC/SDHUD or any NHC/SDHUD Party.

23.2 The Parties shall be obligated to mitigate any loss they suffer under the Project Agreement and each Party shall notify the other of any potential claim that it may be entitled to make under the Project Agreement.

24. **Insurance**

24.1 The Contractor/Developer shall be obligated to take out the Required Insurances, in accordance with the terms of the Project Agreement.

24.2 The Contractor/Developer shall, and shall procure that the Subcontractors shall take out and maintain all insurance required by Applicable Law.

24.3 The Contractor/Developer shall be responsible at its own expense for the payment of all premiums in respect of the Required Insurances and insurances required by Applicable Law

and the risks relating to deductibles and/or insufficiency of the insured amount shall be borne by the Contractor/Developer.

24.4 The Required Insurances shall, among other things:

- (a) be effected with reputable insurers of good standing, approved by NHC/SDHUD;
- (b) name NHC/SDHUD as co-insured with any other party maintaining the insurance;
- (c) indicate that the insurance proceeds shall be paid to an insurance proceeds account specified in the Project Agreement; and
- (d) provide for non-vitiation protection in respect of any claim made by NHC/SDHUD as co-insured.

24.5 The Contractor/Developer shall provide to NHC/SDHUD copies of all insurance policies and/or certificates relating to the Required Insurances and evidence that the premiums payable under all insurance policies relating to the Required Insurances have been paid punctually and the Required Insurances are in full force and effect.

25. **Early Termination**

25.1 **Contractor/Developer Event of Defaults**

25.1.1 Each of the following shall be a Contractor/Developer Event of Default:

- (a) the Contractor/Developer fails to satisfy its conditions precedent by the CP Longstop Date;
- (b) the Contractor/Developer fails to achieve COD by the Longstop COD;
- (c) the Contractor/Developer defaults in a material respect or in a persistent repeated manner in regards to its obligations under the Project Agreement, subject to a cure right which will require a remedy programme;
- (d) the Contractor/Developer or any associate of the Contractor/Developer engages in fraud, collusion, misleading or deceptive conduct in performing their obligations;
- (e) the Contractor/Developer becomes insolvent (or equivalent) or insolvency procedures are commenced against it;
- (f) a representation or warranty given by the Contractor/Developer under a Project Document is found to be materially incorrect or misleading, subject to a cure right which will require a remedy programme;
- (g) the obligation of a Lender to provide financing under the Financing Agreements is cancelled;
- (h) an Escrow Agreement default has occurred and the Contractor/Developer fails to cure the default; and/or

- (i) the Contractor/Developer breaches an obligation under the Project Agreement in relation to assignments, transfers or disposal of any of its obligations under the Project Agreement.

25.1.2 Certain of the above Contractor/Developer Events of Default will give rise to an automatic termination right. The balance will be subject to the Cure Regime.

25.2 **NHC/SDHUD Events of Default**

25.2.1 Each of the following shall be an NHC/SDHUD Event of Default:

- (a) NHC/SDHUD becoming insolvent (or equivalent) or if insolvency proceedings are commenced against it;
- (b) NHC/SDHUD committing a material default in complying with any of the provisions of the Project Agreement; and/or
- (c) the Project becoming illegal.

25.2.2 Certain of the above NHC/SDHUD Events of Default will give rise to an automatic termination right. The balance will be subject to the Cure Regime.

25.3 **Cure Regime**

Where the Cure Regime applies, the defaulting Party shall be given a reasonable period of time to remedy its default. Where the period of time provided for remedy is not, in the reasonable opinion of the defaulting Party, sufficient, it may apply to the non-defaulting Party to be allowed to implement a remedial action plan.

26. **Step-in rights**

26.1 NHC/SDHUD will have step-in rights where:

- (a) the Contractor/Developer fails to remedy a breach which is subject to the Cure Regime within the prescribed period;
- (b) NHC/SDHUD is required by Law to discharge a statutory power or duty, or for safety reasons or to protect the Project;
- (c) NHC/SDHUD serves notice of termination following a Contractor/Developer Event of Default; or
- (d) Project activities are suspended due to a Force Majeure Event or Change in Law.

26.2 NHC/SDHUD may either step-in itself or through the appointment of a third party. Any loss or costs by NHC/SDHUD arising in connection with it exercising its step-in rights shall be payable by the Contractor/Developer where due to the Contractor/Developer's breach or fault.

27. **Termination**

27.1 NHC/SDHUD shall be entitled to terminate the Project Agreement:

- (a) where the Contractor/Developer Event of Default is not a curable Contractor/Developer Event of Default;
- (b) where the Contractor/Developer Event of Default has not been cured in accordance with the Cure Regime;
- (c) for a prolonged Force Majeure Event;
- (d) for its convenience on the giving of an agreed notice period (such notice period to be set out in the Project Agreement); or
- (e) as otherwise provided for in the Project Agreement.

27.2 The Contractor/Developer shall be entitled to terminate the Project Agreement:

- (a) where the NHC/SDHUD Event of Default is not a curable NHC/SDHUD Event of Default;
- (b) where the NHC/SDHUD Event of Default has not been cured in accordance with the Cure Regime;
- (c) for prolonged Force Majeure Event; or
- (d) as otherwise provided for in the Project Agreement.

27.3 A process for the giving and receiving of termination notices shall be set out in the Project Agreement. Notice of termination by NHC/SDHUD shall also be copied to the Lenders of the Contractor/Developer who shall have a right to substitute the Contractor/Developer within [90 days] of issue of the notice of termination. The substitution shall have to be approved by NHC/SDHUD and the substitute shall have to meet minimum qualifications provided in the Project Agreement.

28. **[Compensation on Termination]**

Termination for Contractor/Developer Default: NHC/SDHUD shall be entitled to recover:

- (a) the increased costs incurred by NHC/SDHUD in employing a successor to the Contractor/Developer to carry out the Project and make good defects, if any (including costs of re-tendering); and
- (b) the costs incurred by NHC/SDHUD in rectifying any failures in the Contractor/Developer's performance of its obligations under the Project Agreement.

29. **Intellectual Property**

29.1 The Contractor/Developer shall be deemed (by signing the Project Agreement) to grant, and if it does not have such rights, shall undertake to procure (including from any Subcontractor) for NHC/SDHUD, an irrevocable, perpetual, transferable, non-exclusive, world-wide, royalty free licence to copy, use and communicate all Intellectual Property that is necessary to carry out the Works and operate the Project and provide the Works and Services. This licence shall:

- (a) not be affected by any termination of the Project Agreement;
- (b) entitle any person in lawful possession of the relevant part of the Works to copy, use and communicate the Contractor/Developer's Intellectual Property for any purpose whatsoever connected to the Project; and
- (c) in the case of Contractor/Developer's Intellectual Property which is in the form of computer programs and other software, permit its use on any computer on the Site and other places as envisaged by the Project Agreement.

29.2 The Contractor/Developer shall indemnify and hold NHC/SDHUD harmless against and from any other claim alleging infringement which arises out of or in relation to: (i) performance or breach by the Contractor/Developer of its obligations under the Project Agreement including the design, construction and/or execution of the Works and Services, (ii) the use of Contractor/Developer's equipment or documents, (iii) the proper use of the Works, or (iv) failure by the Contractor/Developer to have the necessary rights to grant the licence set out in this Clause

29.3 The Contractor/Developer will use its reasonable endeavours to procure for NHC/SDHUD a perpetual, transferable, non-exclusive, royalty-free licence (carrying the right to grant sub-licences) to use any Intellectual Property that is vested in a third party.

29.4 The Project Agreement provisions on Intellectual Property shall survive the termination of the Project Agreement, irrespective of the reason for the termination.

30. **Change in Control**

The Contractor/Developer may not change the composition of its shareholding without the consent of NHC/SDHUD, such consent to be granted or withheld at NHC/SDHUD's discretion.

31. **[Taxes**

All payments made by NHC/SDHUD under the Project Agreement shall be on a gross basis, but NHC/SDHUD may make any deduction or withholding on account of tax as is required by Applicable Law.]

32. **Assignment**

32.1 The Project Agreement shall be binding upon and inure to the benefit of the Parties and their respective successors and permitted assigns.

32.2 Except in circumstances expressly permitted under the Lenders Direct Agreement and pursuant to any security, the Contractor/Developer shall not be entitled to transfer, assign or, establish or otherwise dispose of its rights or obligations to a third party without the consent of NHC/SDHUD.

32.3 NHC/SDHUD shall be entitled to assign its rights and obligations under the Project Agreement, provided it assigns them to a Government assignee that possesses the legal capacity, power and authorisation to become party to and perform the obligations of

NHC/SDHUD under the Project Agreement and has equivalent financial standing as NHC/SDHUD.

33. **Dispute Resolution**

The dispute resolution process shall comprise of two mechanisms:

- (a) Expedited Dispute Resolution; and
- (b) Dispute Resolution

34.1 **Expedited Dispute Resolution**

34.1.1 To the extent there are disputes which require an expedited resolution, then these will in the first case be referred to a truncated process.

34.1.2 The Parties shall have a shortened period of time (5 Business Days) to try and resolve the dispute internally before an independent expert shall be appointed to determine the dispute.

34.1.3 Submissions should be made to the independent expert within [●] Business Days of appointment and the independent expert shall make its determination within a further [●] Business Days of these submissions. The determination of the independent expert shall be implemented by the Parties, subject to the Parties having the right to thereafter follow the Dispute Resolution process in Clause 34.2 below.

34.2 **Dispute Resolution**

34.2.1 Where, in the event of any dispute or difference of any kind between the Parties in connection with or arising out of this Agreement including the interpretation of this Agreement, its validity and any purported breach or termination, which dispute **MUST** be declared in writing ("**Dispute**"), the Parties shall within seven (7) days of a written request from one Party, meet in good faith in an effort to resolve the dispute.

34.2.2 If the dispute is not resolved at that meeting, the parties will refer the matter to mediation to a mutually acceptable Mediator within seven (7) days.

34.2.3 Failure to agree on such a nomination, the mediator will be nominated by the Chairperson of the Kenya Branch of the Chartered Institute of Arbitrators on the application of either party. The mediation shall take place in accordance with the Nairobi Centre for International Arbitration – Mediation Rules as in force. The place of mediation shall be Nairobi, Kenya. All negotiations and proceedings shall be confidential and shall be treated as compromise and settlement negotiations for purposes of applicable rules of evidence and any additional confidentiality protections.

34.2.4 If the dispute has not been settled pursuant to the mediation within (21) days from when the mediation was instituted, upon filing of a Request for Arbitration by any one party, it shall be referred to and finally determined by arbitration in accordance with the Kenya Arbitration Act, 1995 (as amended or varied from time to time) and the Rules of the Kenyan chapter of the Chartered Institute of Arbitrators which Rules are deemed to be incorporated by reference to this clause.

- 34.2.5 The matter shall be referred to a single Arbitrator to be agreed by the Parties. If the Parties fail to agree on the appointment of the Arbitrator within thirty (30) days, the Chairperson of the Kenyan chapter of the Chartered Institute of Arbitrators shall appoint an Arbitrator on the application of any Party to determine the dispute.
- 34.2.6 The seat of arbitration shall be Nairobi, Kenya and only the Parties and their legal and other representatives involved with the dispute shall be in attendance.
- 34.2.7 The location of the arbitration shall be Kenya.
- 34.2.8 The language to be used in the arbitral proceedings shall be English.
- 34.2.9 The award rendered shall apportion the costs of the arbitration.
- 34.2.10 The award shall be in writing and shall set forth in reasonable detail the facts of the Dispute and the reasons for the tribunal's decision.
- 34.2.11 The award in such arbitration shall be final and binding upon the parties to this Agreement and judgment thereon may be entered in any Court having jurisdiction for its enforcement; and the parties to this Agreement renounce any right of appeal from the decision of the tribunal insofar as such renunciation can validly be made.
- 34.2.12 Nothing in this clause shall prevent any Party from obtaining interim relief on an urgent basis from a court of competent jurisdiction pending the resolution of the dispute.
- 34.2.13 The Project Agreement and the rights and obligations of the Parties shall remain in full force and effect, pending the award in any arbitration proceedings thereunder.

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34.3 **Interlocutory and Injunctive Relief**

The dispute resolution process will not act to prevent a Party seeking urgent interlocutory or injunctive relief. A Party may also have the decision of the arbitrator reviewed where there is a manifest error of law made in the arbitral award.

34. **Miscellaneous**

The Project Agreement shall contain market standard boiler plate clauses including the following provisions:

- (a) confidentiality undertakings;
- (b) notices;
- (c) no agency;
- (d) entire agreement;
- (e) severability;
- (f) waiver;
- (g) survival provisions;
- (h) amendments;
- (i) costs;
- (j) counterparts; and
- (k) language.

35. **Relationship of the Parties**

Except as expressly provided otherwise in this Agreement, nothing in this Agreement, nor any actions taken by the Parties pursuant to this Agreement, shall create a partnership, joint venture or relationship of employer and employee or principal and agent between the Parties, or authorise either Party to make representations or enter into any commitments for or on behalf of any other Party.

36. **Good Faith**

36.1 Each Party shall use all reasonable efforts to promote the best interests of the engagements envisaged in this Agreement. Each Party shall act in good faith towards the other Party in order to give effect to the spirit of this Agreement and to promote the success thereof;

36.2 The Parties agree they will take any and all necessary steps, sign and execute any and all necessary documents, agreements or instruments which are required to implement or effectuate the terms and conditions of this Agreement; and

36.3 Each Party will refrain from taking any action, either expressly or impliedly, which would have the effect of prohibiting or hindering the performance of any other Party to this Agreement of its obligations herein.

37. **Conflict With Other Agreements**

The Parties hereby agree that if and to the extent that any other agreements entered into by the parties relating to the subject matter conflict with the express provisions of this Agreement, unless expressly stated in such other agreement, this Agreement shall prevail for so long as it is in force and that they will take all such further steps as may be necessary to ensure that the provisions of this Agreement shall prevail.

38. **Amendments**

No amendment, interpretation or waiver of any of the provisions of this Agreement shall be effective unless reduced to writing and signed by both Parties.

39. **Enforcement and Waiver**

The failure to enforce or to require the performance at any time of any of the provisions of this Agreement shall not be construed to be a waiver of such provision, and shall not affect either the validity of this Agreement or any part hereof or the right of any party to enforce the provisions of this Agreement.

40. **Counterparts**

This Agreement may be executed in any number of counterparts and this has the same effect as if the signatures on the counterparts were on a single copy of this Agreement.

41. **Entire Agreement**

This Agreement contains the entire agreement of the Parties with respect to the subject matter of this Agreement and supersedes all prior agreements between the Parties, whether written or oral, with respect to the subject matter of this Agreement.

42. **Severability**

In the event of any one or more of the provisions of this Agreement being held for any reason to be invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provision of this Agreement, and this Agreement shall be construed as if such invalid, illegal or unenforceable provision was not a part of this Agreement, and the agreement shall be carried out as nearly as possible in accordance with its original terms and intent.

43. **Assignment**

No party hereto shall assign or otherwise transfer any rights or obligations under this Agreement without the prior written consent of the other Party.

44. **Notices**

44.1 All communications between the Parties may be sent by e-mail, hand delivery or registered post to the addresses as set out in the heading of this Agreement or at such alternative addresses as they may specify, in writing from time to time. Each notice shall commence to run from the date of receipt by the addressee.

44.2 If any notice is to be sent by mail, it shall be sent by prepaid registered mail and shall then be deemed until and unless the contrary is proved, to have been received 7 (seven) days after the date of posting.

44.3 If any notice is sent by telefax, it will be deemed, until and unless the contrary is proved, to have been received on the first Business Day in Kenya following the date recorded on the transmission slip.

44.4 If any notice is delivered by hand, it will be deemed to have been received on proof of the date of delivery.

44.5 The relevant address of each Party for the purposes of this Agreement are:

44.6 In the case of NHC/SDHUD:

Name:

Address:

Tel/Fax Number:

E-mail:

Marked for the attention of:

44.7 In the case of the Contractor/Developer:

Name:

Address:

Tel/Fax Number:

E-mail:

Marked for the attention of:

45. **Governing Law**

The Parties hereto agree that this Agreement and their relationship arising there from shall be regulated entirely by the laws of Kenya and the courts in Kenya shall have exclusive jurisdiction over matters arising out of or relating to this Agreement.

IN WITNESS WHEREOF the Parties have duly executed this Agreement on the day and year first before written.

SEALED with the Common Seal of)
)
NHC/SDHUD)
in the presence of:)
)
)
Director)
)
)
Director/Secretary)

SEALED with the Common Seal of)
)
THE CONTRACTOR/DEVELOPER)
in the presence of:)
)
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Director)
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Director/Secretary)
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