



## **TERMS OF REFERENCE**

### **Ngqushwa Local Municipality**

**The Ngqushwa Local Municipality requests Expressions of Interest for the appropriate commercial use of four (4) facilities (Mthonjeni Artist Retreat, Music Academy, Mthombo Arts and Crafts Centre, and Environmental Centre) in Hamburg within the Ngqushwa Local**

**Municipality, a public private  
partnership (PPP) agreement.**

## **1. Important general notes**

1.1 Ngqushwa Local Municipality makes no guarantees about, and takes no responsibility for, the accuracy and completeness of this request for EOI and disclaims any liability for any interested party's use of the information.

1.1 This request for EOI is not intended to serve as the basis for an investment decision. Each recipient is expected to make an independent investigation and to obtain the necessary independent advice for submitting an EOI.

1.2 Ngqushwa Local Municipality may change or replace any information contained in this request for EOI at any time, without giving any prior notice or providing any reason.

## **2. The purpose and limits of the EOI process**

2.1. Ngqushwa Local Municipality is currently investigating the feasibility of a PPP opportunity in which it grants selected private party the right to appropriate commercial use of Mthonjeni Artist Retreat, Music Academy, Mthombo Arts and Crafts Centre, and Environmental Centre in Hamburg for a tourism PPP opportunity.

2.2. As part of establishing the feasibility of this PPP opportunity, particularly what scale and type of market interest there is in it, Ngqushwa Local Municipality invites prospective investors or operators to submit EOI following the format in paragraph 5 below.

2.3. Ngqushwa Local Municipality will assess the EOI and will use the information to complete its feasibility study. If the PPP opportunity is feasible, Ngqushwa Local Municipality will use the EOI information it received to compile bid documentation, and a competitive bid process will follow.

2.4. Ngqushwa Local Municipality reserves the right to ask any investor or operator that submits an EOI questions for clarity.

2.5. Submitting an EOI does not constitute a bid. No investor or operator will be bound by anything contained in their EOI submission. The information in the EOI will be used solely for Ngqushwa Local Municipality to complete its feasibility study and to prepare bid documentation if it decides to proceed with a PPP.

## **Terms of Reference**

### **Terms of Reference (TOR) for (Mthonjeni Artist Retreat, Music Academy, Mthombo Arts and Crafts Centre, and Environmental Centre) in Hamburg in Ngqushwa Local Municipality**

#### **A. Background**

The small seaside town of Hamburg is situated in a unique location at the mouth of the Keiskamma River, on the Sunshine Coast in the Eastern Cape. It is embedded in a unique environment, with a number of noteworthy natural resources, including the tranquil Keiskamma River estuary, the pristine natural beach and the Salt Marsh. During the Apartheid regime, Hamburg was located in the former homeland of the Ciskei. Today, the town still suffers from limited access to income generation opportunities, high levels of unemployment and a severe lack of social community facilities.

Hamburg is part of the R72 Corridor, which links Port Elizabeth with East London as an alternative route to the N2. Due to its unspoilt nature and close proximity to the coastline, the R72 has significant potential for further development in sustainable tourism with Hamburg to become an important node along the way. Although it is a small rural town, it is the second largest settlement in the Ngqushwa Local Municipality, with an estimated population of some 1,170 residents in Hamburg – including KwaNdlambe (2001).

Hamburg has limited economic opportunities, and there is a high dependence on social grants and remittances from family members working in the urban centres. The latent potential of the Hamburg economy lies predominantly in the tourism sector, especially in eco- and arts tourism. The settlement is home to a large artistic community, which has a massive positive impact on the economy and the dynamics of the town and surrounding villages. The Keiskamma Trust has done a lot to benefit the local economy, through the introduction of new income streams and the attraction of national and international experts to Hamburg. The launching of the Hamburg Artists Retreat in 2012/2013 intends to spur the economic well-being of the town, attract the national and international arts community to the Eastern Cape and open up new employment and business opportunities for the local population.

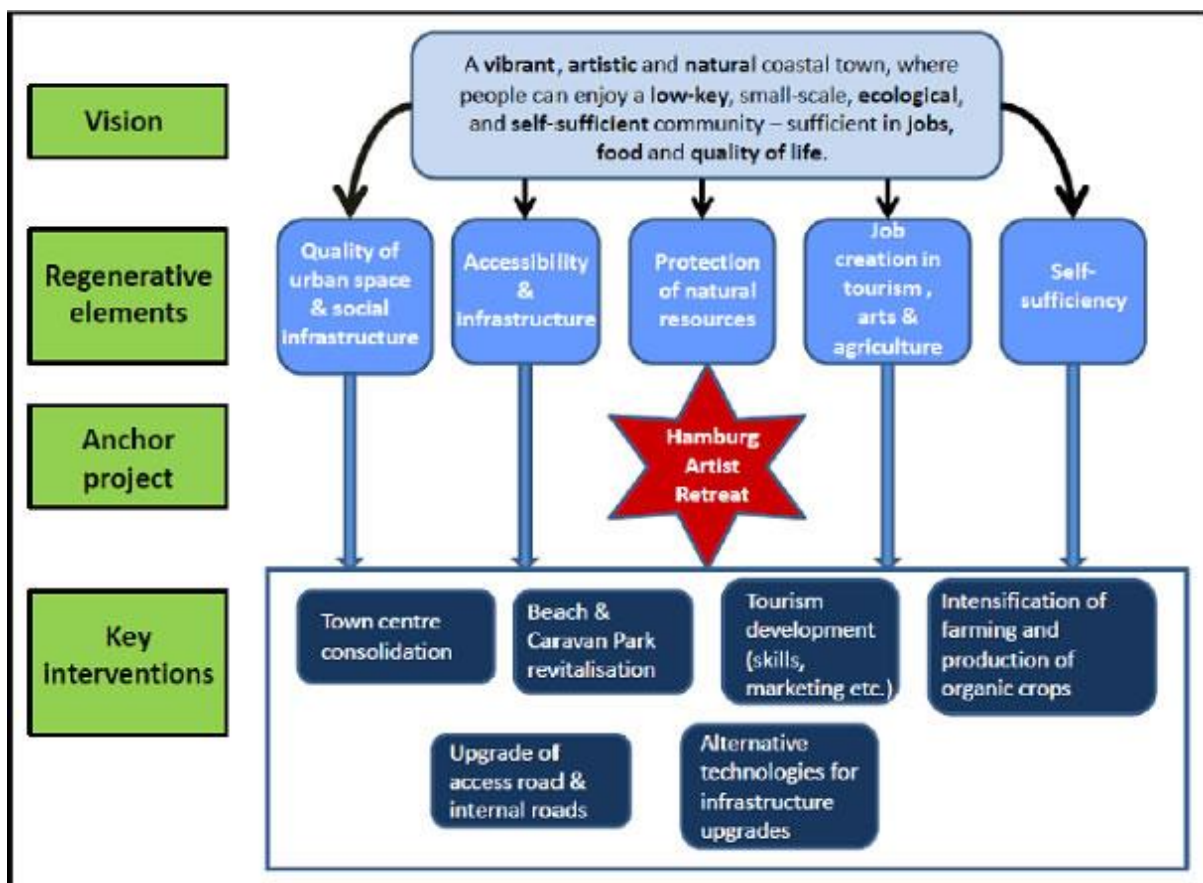
#### **A SMALL TOWN REGENERATION STRATEGY FOR HAMBURG**

The development vision that was compiled for Hamburg based on various stakeholder engagements, is for the town to become

"A vibrant, artistic and natural coastal town, where people can enjoy a low-key, small-scale, ecological, and self-sufficient community – sufficient in jobs, food and quality of life".

## The vision is based on five core regenerative elements:

- The quality of urban space & social infrastructure – which points to the need to develop Hamburg as a place which is attractive, spatially functional and provides the necessary social infrastructure for its population.
- Accessibility & infrastructure – highlighting the need to enhance the accessibility to sites (residential, business, social services, municipal administration, recreation, etc.), especially for pedestrians. This requires a focus on infrastructure upgrading and densification/consolidation of services and functions.
- The protection of natural resources – which are a significant resource to the Hamburg lifestyle and economy, as well as its future positioning as an ecologically sustainable coastal town;
- Job creation which focuses on tourism, the arts and agriculture; and
- Self-sufficiency, which promotes the possibility of Hamburg becoming self-sufficient in terms of local jobs, food production and overall quality of life.



## B. Objectives

The project aims to regenerate and stimulate economy of Hamburg town by:

- allowing the new management team currently being recruited to fit out the buildings drawing on local skills and suppliers to the maximum extent possible
- train a local workforce to operate and service the centre

- strengthen existing local service providers and encourage new local start-ups in such fields as food production, transport and cultural production
- Work alongside the ASPIRE Town Centre redevelopment team, Ngqushwa Local Municipality, Eastern Cape Tourism and Parks Agency, etc.
- provide a series of artists opportunities - local, provincial, national and international - to be 'Resident in Regeneration' of Emthonjeni Arts at the Residency, in the town centre and in the wider 'cultural catchment' of the residency programme which is seen as stretching up the Keskamma/Ixesi river to its sources in the Hogsback and at Keiskammahoek (a journey also mirrored by the R345 as it passes through Peddie, the Doubledrift nature reserve, Alice and the Tyhume Valley)

In line with the municipality's promotion of local business and skills development, the service provider will be expected to make use of local materials which have been quality assured by a recognised organization from the local co-operatives which are in partnership with the co-operative development centre and local labour during the implementation of the project.

### **Scope of Work**

1. Bidders are expected to submit property management proposals indicating the operational plan that will be implemented, including any other value addition issues around the development project. (Bids must be accompanied by sketches and artist impressions together with detailed descriptions that will enable lay people to understand the submission)
2. The successful bidder will be given the right to manage the properties and claw back the investment for the duration of the proposed developmental lease period and this will include the maintenance of the building to standards acceptable to the municipality. At the end of this period, the property will be handed over to the municipality with all the relevant information and records.
3. The successful bidder will be responsible for the tenant selection and contracting, which will take into account Small and Micro enterprise promotion. The bidder must indicate how they will cater for small and micro enterprises during the management of the building during the lease period.

### **INTEREST IN THIS PROJECT**

At a very high level please respond to the following:

- What sort of commercial operation would you establish with these properties?
- Describe the type of concept you would envisage for this Project?
- How do you see the project integrated into the surrounding area?
- What do you think is the expected revenue to be generated in the commercial operation?
- Describe how you will comply with the various legal requirements in respect of economic, social and environmental legislation?
- Describe envisaged partnerships in support of an integrated tourism development approach that would benefit the broader community.

- Describe the skills and expertise required for the Project and how this will be sourced e.g. full time, partnerships, permanent appointments, etc.
- Suggest how the local communities would or could be involved in this project?
- What type of project structure would you envisage for this Project?
- What type of financing model would you envisage for this Project?
- What are the risks you foresee with this Project?
- How would you mitigate against these risks
- What risks would you not be prepared to accept?
- How do you envisage marketing this tourist Project?
- What type of BEE financing structure and model would you envisage?
- What is the contract period you would expect for this Project?
- Clearly indicate which services and associated activities you envisage would fall within the ambit of the Project and which services and associated activities would not be included in it.

## **PROJECT DURATION**

The successful bidder will be expected to commence with the project within three months of the agreement being signed. The bidder will also indicate the proposed developmental lease period and the management plan of the properties during this period, indicating how the municipal will be involved and provided with regular reports on the maintenance of the building. Maintenance plans will be agreed upon as part of the lease agreement.

## **SUBMISSIONS**

### **Minimum details to be included in the proposal**

1. A detailed operational plan
2. The proposed development and value addition items, supported by draft plans and sketches
3. Contactable references and track record of successful property management projects
4. Confirmation of the availability of funding to undertake the project
5. Demonstrate the ability to assist Small and Medium Enterprises on leasing retail or office space
6. Demonstrate the ability to manage and maintain the property during the lease period

### **Compulsory documents to be submitted**

1. Valid tax clearance certificate
2. Certified copies of company registration documents with clear percentage of ownership
3. Detailed company profile with references of commercial property development projects successfully completed
4. Municipal clearance certificate certifying that no municipal rates and service charges are owed or in arrears more than three months by the bidder or any of its directors to the local municipality where their business operations or residences are located

5. Certified BBBEE certificates issued by a SANAS approved service provider (If the bidder is a Joint Venture, the JV must submit a consolidated BBBEE certificate).
6. Joint Ventures must submit a JV agreement signed by all parties

**Bidders must note the following:**

- A compulsory clarification meeting will be held on **Friday 27<sup>th</sup> July 2018**, 10:00 at Municipal Council Chamber in Peddie Town, and thereafter proceed to the properties which is a few kilo metres away. This will enable bidders to familiarize themselves with the properties and raise questions for clarity.
- Bidders are advised to make themselves familiar with the town of Hamburg in order to determine the best use for the proposed development in order to be able to secure tenants for the development.
- Registration with the Treasury Central Supplier Database will be required with the successful bidder within seven working days upon appointment.
- Complete proposals must be deposited in the tender box at the office of Ngqushwa Local Municipality, in a sealed envelope clearly marked with Bid No. and Description.
- Bids which are late and unsigned or submitted by facsimile or electronically will not be accepted.
- Proposals received after the published closing time will not be considered and will be immediately returned to the bidder unopened.
- All bids to be addressed to the Municipal Manager Ngqushwa Local Municipality, Erf 313 Main Road, Peddie 5640
  
- For further details, interested parties should kindly refer all enquiries via email to the Community Services – **Area Manager Hamburg: Mr. V. Mbangi, (vmbangi@ngqushwamun.gov.za)** during office hours (8:00 – 16:30) Monday to Friday.

**Extension of Contract**

1. Extension of contract duration may be granted by Ngqushwa Local Municipality in case of any necessary contract variation or additional work that would render the completion of the project as originally scheduled impossible, provided that the consultant is not at fault with respect to the circumstances causing the need for such contract extension. Any contract extension shall be at no cost to Ngqushwa Local Municipality.

2. Any request for extension of contract duration shall be made by the Consultant in writing including the full details of the circumstances underpinning the request as well as the justification/s for such extension. Ngqushwa Local Municipality, upon receipt of the Consultant's request, shall make a determination on the validity thereof, and shall agree with the Consultant on the appropriate amount of extension of contract duration should it find said request justifiable and meritorious.

3. No extension of contract time shall be granted the consultant due to inexcusable failure or negligence to provide the requirement.



4. No extension of contract time shall be granted when the reason given to support the request for extension was already considered in the determination of the contract time during the conduct of detailed preparation of the contract documents as agreed upon by the parties before contract perfection.

## **Notes on the General Conditions of Contract**

The GCC, SCC, and other documents listed therein, expressing all the rights and obligations of the parties, should be completed.

The GCC herein shall not be altered. Any changes and complementary information, which may be needed, shall be introduced only through the SCC in Section V.

## **TABLE OF CONTENTS**

1. Definitions
2. Headings
3. Location
4. Law governing contract and services
5. Language
6. Consultants and affiliates not to engage in certain activities
7. Authority of member in charge
8. Resident project manager
9. Entire agreement
10. Modification
11. Relationship of parties
12. Authorized representatives
13. Good faith
14. Operation of the contract
15. Notices
16. Warranty as to eligibility
17. Confidentiality
18. Payment
19. Currency of payment
20. Liability of the consultant
21. Insurance to be taken out by the consultant .
22. Effectivity of contract
23. Commencement of services
24. Expiration of contract
25. Force majeure
26. Suspension
27. Termination by the Ngqushwa local municipality
28. Termination by the consultant
29. Procedures for termination of contracts
30. Cessation of services
31. Payment upon termination
32. Disputes about events of termination
33. Cessation of rights and obligations
34. Dispute settlement
35. Documents prepared by the consultant and software developed to be the property of the Ngqushwa local municipality
36. Equipment and materials furnished by the Ngqushwa local municipality
37. Services, facilities and property of the Ngqushwa local municipality
38. Consultant's actions requiring Ngqushwa local municipality's prior approval
39. Personnel
40. Working hours, overtime, leave, etc.
41. Counterpart personnel
42. Performance security
43. Standard of performance
44. Consultant not to benefit from commissions, discounts, etc
45. Procurement by the consultant
46. Specifications and designs
47. Reports
48. Assistance by the Ngqushwa local municipality on government requirements

49. Access to land
50. Subcontract
51. Accounting, inspection and auditing
52. Lump sum contracts
53. Liquidated damages for delay..

## 1. Definitions

1.1 Unless the context otherwise requires, the following terms whenever used in this Contract have the following meanings:

(a) “Applicable Law” means the laws and any other instruments having the force of law in the South Africa as they may be issued and enforced from time to time.

(b) “Consultant” refers to the short listed consultant determined by the Ngqushwa Local Municipality.

(c) “Consulting Services” refer to services for properties management and other types of projects or activities that require adequate external technical and professional expertise that are beyond the capability and/or capacity of the Ngqushwa Local Municipality to undertake such as, but not limited to: (i) advisory and review services; (ii) pre-investment or feasibility studies; (iii) design; (iv) construction supervision; (v) management and related services; and (vi) other technical services or special studies.

(d) “Contract” means the agreement signed by the Parties, to which these General Conditions of Contract (GCC) and other sections of the Bidding Documents are attached.

(e) “Effective Date” means the date on which this Contract comes into full force and effect.

(f) “Foreign Currency” means any currency other than the currency of the South Africa.

(g) “Funding Source” means the entity indicated in the **SCC**.

(h) “GCC” means these General Conditions of Contract.

(i) “Government” means the Government of South Africa.

(j) “Local Currency” means the South African Rand (R).

(k) “Member,” in case the Consultant is a Joint Venture (JV) of two (2) or more entities, means any of these entities; and “Members” means all these entities.

(l) “Party” means the Ngqushwa Local Municipality or the Consultant, as the case may be, and “Parties” means both of them.

(m) "Personnel" means persons hired by the Consultant or by any Sub consultant as employees and assigned to the performance of the Services or any part thereof; "Foreign Personnel" means such persons who at the time of being so hired had their domicile outside the Government's country; "Local Personnel" means such persons who at the time of being so hired had their domicile inside the South Africa; and "Key Personnel" means the Personnel referred to in **GCC** Clause 39.

(o) "SCC" means the Special Conditions of Contract by which the GCC may be amended or supplemented.

(p) "Services" means the work to be performed by the Consultant pursuant to this Contract, as described in Appendix I.

(q) "Sub consultant" means any person or entity to whom/which the Consultant subcontracts any part of the Services in accordance with the provisions of **GCC** Clause 50.

(r) "Third Party" means any person or entity other than the Government, the Ngqushwa Local Municipality, the Consultant or a Sub consultant.

## **2. Headings**

The headings shall not limit, alter or affect the meaning of this Contract.

## **3. Law Governing Contract and Services**

3.1 This Contract, its meaning and interpretation, and the relation between the Parties shall be governed by the Applicable Law.

3.2 The Consultant shall perform the Services in accordance with the Applicable Law and shall take all practicable steps to ensure that any Sub consultant, as well as the Personnel of the Consultant and any Sub consultant, complies with the Applicable Law. The Ngqushwa Local Municipality shall notify the Consultant in writing of relevant local customs, and the Consultant shall, after such notification, respect such customs.

3.3 If, after the date of this Contract, there is any change in the Applicable Law with respect to taxes and duties which increases or decreases the cost incurred by the Consultant in performing the Services, then the remuneration and reimbursable

expenses otherwise payable to the Consultant under this Contract shall be increased or decreased on a no loss-no gain basis, and corresponding adjustments shall be made to the ceiling amounts specified in GCC Clause 52, provided that the cost is within the Approved Budget for the Contract (ABC).

#### **4. Language**

This Contract has been executed in the English language, which shall be the binding and controlling language for all matters relating to the meaning or interpretation of this Contract.

#### **5. Consultants and Affiliates Not to Engage in Certain Activities**

5.1 The Consultant agrees that, during the term of this Contract and after its termination, the Consultant and any entity affiliated with the Consultant, as well as any Subconsultant and any entity affiliated with such Subconsultant, shall be disqualified from providing goods, works, or consulting services for any project resulting from or closely related to this Contract other than the Services and any continuation thereof provided there is no current or future conflict.

5.2 The Consultant shall not engage, and shall cause their Personnel as well as their Subconsultants and their Personnel not to engage, either directly or indirectly, in any of the following activities:

(a) during the term of this Contract, any business or professional activities in the municipality which would conflict with the activities assigned to them under this Contract; and

(b) after the termination of this Contract, such other activities as may be specified in the **SCC**.

#### **6. Authority of Member in Charge**

In case the Consultant is a JV, the Members hereby authorize the entity specified in the **SCC** to act on their behalf in exercising all the Consultant's rights and obligations towards the Ngqushwa Local Municipality under this Contract, including without limitation the receiving of instructions from the Ngqushwa Local Municipality.

#### **8. Resident Project Manager**

If required by the **SCC**, the Consultant shall ensure that at all times during the Consultant's performance of the services, a resident project manager, acceptable to the Ngqushwa Local Municipality, shall take charge of the performance of such services.

## **9. Modification**

Unless otherwise specified in the **SCC**, no modification of the terms and conditions of this Contract, including any modification of the scope of the Services shall be allowed. Pursuant to **GCC** Clause 14 hereof, however, each Party shall give due consideration to any proposal for modification made by the other Party.

## **10. Relationship of Parties**

10.1 Nothing contained herein shall be construed as establishing a relation of employer and employee or of principal and agent as between the Ngqushwa Local Municipality and the Consultant. The Consultant, subject to this Contract, has complete charge of its Personnel and Subconsultants, if any, performing the Services and shall be fully responsible for the Services performed by them or on their behalf hereunder.

10.2 The Consultant shall during the performance of the Services be an independent contractor, retaining complete control over its Personnel, conforming to all statutory requirements with respect to all its employees, and providing all appropriate employee benefits.

## **11. Authorized Representatives**

Any action required or permitted to be taken, and any document required or permitted to be executed, under this Contract by the Ngqushwa Local Municipality or the Consultant may be taken or executed by the officials specified in the **SCC**.

## **12. Good Faith**

The Parties undertake to act in good faith with respect to each other's rights under this Contract and to adopt all reasonable measures to ensure the realization of the objectives of this Contract.



### **13. Operation of the Contract**

The Parties recognize that it is impractical for this Contract to provide for every contingency which may arise during the life of this Contract, and the Parties hereby agree that it is their intention that this Contract shall operate fairly as between them, and without detriment to the interest of either of them; and that, if during the term of this Contract either Party believes that this Contract is operating unfairly, the Parties shall use their best efforts to agree on such action as may be necessary to remove the cause or causes of such unfairness, but no failure to agree on any action pursuant to this Clause shall give rise to a dispute subject to arbitration in accordance with **GCC** Clause 34 hereof.

### **14. Notices**

14.1 Any notice, request or consent required or permitted to be given or made pursuant to this Contract shall be in writing. Any such notice, request or consent shall be deemed to have been given or made when received by the concerned party, either in person or through an authorized representative of the Party to whom the communication is addressed, or when sent by registered mail, telex, telegram or facsimile to such Party at the address specified in the **SCC**.

14.2 Notice shall be deemed to be effective as specified in the **SCC**.

14.3 A Party may change its address for notice hereunder by giving the other Party notice of such change pursuant to the provisions listed in the SCC with respect to **GCC** Clause 15.2.

### **15. Warranty as to Eligibility**

16.1 The Consultant represents, warrants, and confirms that it, as well as its Subconsultant, if any, is eligible, *i.e.*, has the legal personality to act as a consultant in accordance with Part I, Section II. Eligibility Documents issued for this project.

16.2 The Consultant shall fulfill its obligations under this Contract by using knowledge according to the best accepted professional standards. The Consultant shall exercise all reasonable skill, care and diligence in the discharge of duties agreed to be performed and shall work in the best interest of the GoP.

## **17. Confidentiality**

Except with the prior written consent of the Ngqushwa Local Municipality, the Consultant and the Personnel shall not at any time communicate to any person or entity any confidential information acquired in the course of the Services, nor shall the Consultant and the Personnel make public the recommendations formulated in the course of, or as a result of, the Services. For purposes of this clause, “confidential information” means any information or knowledge acquired by the Consultant and/or its Personnel arising out of, or in connection with, the performance of the Services under this Contract that is not otherwise available to the public.

## **20. Liability of the Consultant**

Subject to additional provisions, if any, set forth in the **SCC**, the Consultant’s liability under this Contract shall be as provided by the laws of the Republic of the South Africa.

## **21. Insurance to be Taken Out by the Consultant**

21.1 The Consultant, at its own cost, shall be responsible for taking out or maintaining any insurance policy against any risk related to the project.

21.2 The Ngqushwa Local Municipality undertakes no responsibility in respect of life, health, accident, travel or any other insurance coverage for the Personnel or for the dependents of any such Personnel.

## **22. Effectivity of Contract**

The contract effectivity date shall be the date of contract signing, provided that the effectiveness of the conditions, if any, listed in the **SCC** have been met.

## **23. Commencement of Services**

The Consultant shall begin carrying out the Services starting from the effectivity date of this Contract, as mentioned in **GCC** Clause 22.

## **24. Expiration of Contract**

Unless sooner terminated pursuant to **GCC** Clauses 27 or 28 hereof, this Contract shall terminate at the end of such time period after the effectivity date as shall be specified in the **SCC**.

## **25. Force Majeure**

25.1 For purposes of this Contract the terms “force majeure” and “fortuitous event” may be used interchangeably. In this regard, a fortuitous event or force majeure shall be interpreted to mean an event which the Consultant could not have foreseen, or which though foreseen, was inevitable. It shall not include ordinary unfavourable weather conditions; and any other cause the effects of which could have been avoided with the exercise of reasonable diligence by the Consultant.

25.2 The failure of a Party to fulfill any of its obligations hereunder shall not be considered to be a breach of, or default under, this Contract insofar as such inability arises from an event of force majeure, provided that the Party affected by such an event has taken all reasonable precautions, due care and reasonable alternative measures, all with the objective of carrying out the terms and conditions of this Contract.

25.3 Unless otherwise agreed herein, force majeure shall not include:

(a) any event which is caused by the negligence or intentional action of a Party or such Party's Sub consultants or agents or employees;

(b) any event which a diligent Party could reasonably have been expected to both take into account at the time of the conclusion of this Contract and avoid or overcome in the carrying out of its obligations hereunder;

(c) Insufficiency of funds or failure to make any payment required hereunder; or

(d) the Ngqushwa Local Municipality's failure to review, approve or reject the outputs of the Consultant beyond a reasonable time period.

25.4 A Party affected by an event of force majeure shall take all reasonable measures to remove such Party's inability to fulfill its obligations hereunder immediately or within a reasonable time.

25.5 A Party affected by an event of force majeure shall notify the other Party of such event as soon as possible, and in any event not later than fifteen (15) days following the occurrence of such event, providing evidence of the nature and cause of such event, and shall similarly give notice of the restoration of normal conditions as soon as possible.

25.6 The Parties shall take all reasonable measures to minimize the consequences of any event of force majeure.

25.7 Any period within which a Party shall, pursuant to this Contract, complete any action or task, shall be extended for a period equal to the time during which such Party was unable to perform such action as a direct and proximate result of force majeure.

25.8 During the period of their inability to perform the Services as a direct and proximate result of an event of force majeure, the Consultant shall be entitled to continue receiving payment under the terms of this Contract as well as to be reimbursed for additional costs reasonably and necessarily incurred by it during such period for the purposes of the Services and in reactivating the Services after the end of such period, provided that such costs are still within the total contract price. However, the foregoing provision shall not apply if the Ngqushwa Local Municipality suspends or terminates this Contract in writing, notice thereof duly received by the Consultant, pursuant to GCC Clauses 26 and 27 hereof with the exception of the direct and proximate result of force majeure.

25.9 Not later than fifteen (15) days after the Consultant, as the direct and proximate result of an event of force majeure, has become unable to perform a material portion of the Services, the Parties shall consult with each other with a view to agreeing on appropriate measures considering the circumstances.

25.10 In the case of disagreement between the parties as to the existence, or extent of force majeure, the matter shall be submitted to arbitration in accordance with GCC Clause 34 hereof.

## **26. Suspension**

26.1 The Ngqushwa Local Municipality shall, by written notice of suspension to the Consultant, suspend the contract hereunder if the Consultant fail to perform any of their obligations due to their own fault or due to force majeure or other circumstances beyond the control of either party (e.g. suspension of civil works being supervised by the consultant) under this Contract, including the carrying out of the Services, provided that such notice of suspension:

(a) shall specify the nature of the failure; and

(b) shall request the Consultant to remedy such failure within a period not exceeding thirty (30) days after receipt by the Consultant of such notice of suspension.

## **27. Termination by the Ngqushwa Local Municipality**

27.1 The Ngqushwa Local Municipality shall terminate this Contract when any of the following conditions attends its implementation:

(a) Outside of force majeure, the Consultant fails to deliver or perform the Outputs and Deliverables within the period(s) specified in the Contract, or within any extension thereof granted by the Ngqushwa Local Municipality pursuant to a request made by the Consultant prior to the delay;

(b) As a result of force majeure, the Consultant is unable to deliver or perform a material portion of the Outputs and Deliverables for a period of not less than sixty (60) calendar days after the Consultant's receipt of the notice from the

Ngqushwa Local Municipality stating that the circumstance of force majeure is deemed to have ceased;

(c) In whole or in part, at any time for its convenience, the Municipal Manager may terminate the Contract for its convenience if he has determined the existence of conditions that make Project Implementation economically, financially or technically impractical and/or unnecessary, such as, but not limited to, fortuitous event(s) or changes in law and National Government policies;

(d) If the Consultant is declared bankrupt or insolvent as determined with finality by a court of competent jurisdiction; in which event, termination will be without compensation to the Consultant, provided that such termination will not prejudice or affect any right of action or remedy which has accrued or will accrue thereafter to the Ngqushwa Local Municipality and/or the Consultant;

(e) In case it is determined prima facie that the Consultant has engaged, before or during the implementation of this Contract, in unlawful deeds and behaviors relative to contract acquisition and implementation, such as, but not limited to, the following: corrupt, fraudulent, collusive, coercive, and obstructive practices; drawing up or using forged documents; using adulterated materials, means or methods, or engaging in production contrary to rules of science or the trade; and any other act analogous to the foregoing. For purposes of this clause, corrupt, fraudulent, collusive, coercive, and obstructive practices shall have the same meaning as that provided in **ITB** Clause 3.1(a):

(f) The Consultant fails to remedy a failure in the performance of their obligations hereunder, as specified in a notice of suspension pursuant to GCC Clause 15.2 hereinabove, within thirty (30) days of receipt of such notice of suspension or within such further period as the Ngqushwa Local Municipality may have subsequently approved in writing;

(g) The Consultant's failure to comply with any final decision reached as a result of arbitration proceedings pursuant to GCC Clause 34 hereof; or

(h) The Consultant fails to perform any other obligation under the Contract.

27.2 In case of termination, written notice shall be understood to mean fifteen (15) days for short term contracts, *i.e.*, four (4) months or less, and thirty (30) days for long term contracts.

## **28. Termination by the Consultant**

The Consultant must serve a written notice to the Ngqushwa Local Municipality of its intention to terminate this Contract at least thirty (30) calendar days before its intended termination. This Contract is deemed terminated if no action has been taken by the Ngqushwa Local Municipality with regard to such written notice within thirty (30) calendar days after the receipt thereof by the Ngqushwa Local Municipality. The Consultant may terminate this Contract through any of the following events:

(a) The Ngqushwa Local Municipality is in material breach of its obligations pursuant to this Contract and has not remedied the same within sixty (60) calendar days following its receipt of the Consultant's notice specifying such breach;

(b) The Ngqushwa Local Municipality's failure to comply with any final decision reached as a result of arbitration pursuant to **GCC** Clause 34 hereof

(c) As the direct and proximate result of force majeure, the Consultant is unable to perform a material portion of the Services for a period of not less than sixty (60) days;  
or

## **29. Procedures for Termination of Contracts**

The following provisions shall govern the procedures for the termination of this Contract:

(a) Upon receipt of a written report of acts or causes which may constitute ground(s) for termination as aforementioned, or upon its own initiative, the Ngqushwa Local Municipality shall, within a period of seven (7) calendar days, verify the existence of

such ground(s) and cause the execution of a Verified Report, with all relevant evidence attached;

(b) Upon recommendation by the Ngqushwa Local Municipality Council, the Municipal Manager shall terminate this Contract only by a written notice to the Consultant conveying such termination. The notice shall state:

(i) that the contract is being terminated for any of the ground(s) afore-mentioned, and a statement of the acts that constitute the ground(s) constituting the same;

(ii) the extent of termination, whether in whole or in part;

(iii) an instruction to the Consultant to show cause as to why the contract should not be terminated; and

(iv) special instructions of the Ngqushwa Local Municipality, if any.

The Notice to Terminate shall be accompanied by a copy of the Verified Report;

(c) Within a period of seven (7) calendar days from receipt of the Notice of Termination, the Consultant shall submit to the Municipal Manager a verified position paper stating why this Contract should not be terminated. If the Consultant fails to show cause after the lapse of the seven (7) day period, either by inaction or by default, the Municipal Manager shall issue an order terminating this Contract;

(d) The Ngqushwa Local Municipality may, at anytime before receipt of the Consultant's verified position paper to withdraw the Notice to Terminate if it is determined that certain services subject of the notice had been completed or performed before the Consultant's receipt of the notice;

(e) Within a non-extendible period of ten (10) calendar days from receipt of the verified position paper, the Municipal Manager shall decide whether or not to terminate this Contract. It shall serve a written notice to the Consultant of its decision and, unless otherwise provided, this Contract is deemed terminated from receipt of the Consultant of the notice of decision. The termination shall only be based on the ground(s) stated in the Notice to Terminate; and



(f) The Municipal Manager may create a Contract Termination Review Committee (CTRC) to assist him in the discharge of this function. All decisions recommended by the CTRC shall be subject to the approval of the Municipal Manager.

### **30. Cessation of Services**

Upon termination of this Contract by notice of either Party to the other pursuant to **GCC** Clauses 27 or 28 hereof, the Consultant shall, immediately upon dispatch or receipt of such notice, take all necessary steps to bring the Services to a close in a prompt and orderly manner and shall make every reasonable effort to keep expenditures for this purpose to a minimum. With respect to documents prepared by the Consultant and equipment and materials furnished by the Ngqushwa Local Municipality, the Consultant shall proceed as provided, respectively, by **GCC** Clauses 35 or 36 hereof.

### **32. Disputes about Events of Termination**

If either Party disputes whether an event specified in **GCC** Clause 27.1 or in **GCC** Clause 28 hereof has occurred, such Party may refer the matter to arbitration pursuant to **GCC** Clause 34 hereof, and this Contract shall not be terminated on account of such event except in accordance with the terms of any resulting arbitral award.

### **33. Cessation of Rights and Obligations**

Upon termination of this Contract pursuant to **GCC** Clauses 27 or 28 hereof, or upon expiration of this Contract pursuant to **GCC** Clause 24, all rights and obligations of the Parties hereunder shall cease, except:

(a) such rights and obligations as may have accrued on the date of termination or expiration;

(b) the obligation of confidentiality set forth in **GCC** Clause 17 hereof; and

(c) the Consultant's obligation to permit inspection, copying and auditing of their accounts and records set forth in GCC Clauses 51(b) and 51(c) hereof, any right which a Party may have under the Applicable Law.

### **34. Dispute Settlement**

34.1 If any dispute or difference of any kind whatsoever shall arise between the Parties in connection with the implementation of this Contract, the Parties shall make every effort to resolve amicably such dispute or difference by mutual consultation.

34.2 Any and all disputes arising from the implementation of this Contract shall be submitted to arbitration in accordance with the rules of procedure specified in the **SCC**.

### **35. Documents Prepared by the Consultant and Software Developed to be the Property of the Ngqushwa Local Municipality**

35.1 All plans, drawings, specifications, designs, reports, other documents and software prepared by the Consultant for the Ngqushwa Local Municipality under this Contract shall become and remain the property of the Ngqushwa Local Municipality, and the Consultant shall, prior to termination or expiration of this Contract, deliver all such documents to the Ngqushwa Local Municipality, together with a detailed inventory thereof. The Consultant may retain a copy of such documents and software. The plans, drawings, specifications, designs, reports, other documents and software, including restrictions on future use of such documents and software, if any, shall be specified in the **SCC**.

35.2 All computer programs developed by the Consultant under this Contract shall be the sole and exclusive property of the Ngqushwa Local Municipality; provided, however, that the Consultant may use such programs for its own use with prior written approval of the Ngqushwa Local Municipality. If license agreements are necessary or appropriate between the Consultant and third parties for purposes of development of any such computer programs, the Consultant shall obtain the Ngqushwa Local

Municipality's prior written approval to such agreements. In such cases, the Ngqushwa Local Municipality shall be entitled at its discretion to require recovering the expenses related to the development of the program(s) concerned.

### **36. Equipment and Materials Furnished by the Ngqushwa Local Municipality**

Equipment and materials made available to the Consultant by the Ngqushwa Local Municipality, or purchased by the Consultant with funds provided by the Ngqushwa Local Municipality, shall be the property of the Ngqushwa Local Municipality and shall be marked accordingly. Upon termination or expiration of this Contract, the Consultant shall make available to the Ngqushwa Local Municipality an inventory of such equipment and materials and shall dispose of such equipment and materials in accordance with the Ngqushwa Local Municipality's instructions. While in possession of such equipment and materials, the Consultant, unless otherwise instructed by the Ngqushwa Local Municipality in writing, shall insure it at an amount equal to their full replacement value.

### **37. Services, Facilities and Property of the Ngqushwa Local Municipality**

The Ngqushwa Local Municipality shall make available to the Consultant and the Personnel, for the purposes of the Services and free of any charge, the services, facilities and property described in Appendix V at the terms and in the manner specified in said appendix, provided that if such services, facilities and property shall not be made available to the Consultant as and when so specified, the Parties shall agree on:

(a) any time extension that it may be appropriate to grant to the Consultant for the performance of the Services;

(b) the manner in which the Consultant shall procure any such services, facilities and property from other sources; and

(c) the additional payments, if any, to be made to the Consultant as a result thereof pursuant to **GCC** Clause 52 hereinafter which should be within the agreed contract ceiling.

### **38. Consultant's Actions Requiring Ngqushwa Local Municipality's Prior Approval**

The Consultant shall obtain the Ngqushwa Local Municipality's prior approval in writing before taking any of the following actions:

(a) appointing such members of the Personnel as are listed in Appendix III merely by title but not by name;

(b) entering into a subcontract for the performance of any part of the Services, it being understood that:

(i) the selection of the Subconsultant and the terms and conditions of the subcontract shall have been approved in writing by the Ngqushwa Local Municipality prior to the execution of the subcontract; and

(ii) the Consultant shall remain fully liable for the performance of the Services by the Subconsultant and its Personnel pursuant to this Contract;

(c) replacement, during the performance of the contract for any reason, of any Personnel as listed in Appendix III of this Contract requiring the Ngqushwa Local Municipality's prior approval; and

(d) any other action that may be specified in the **SCC**.

### **39. Personnel**

39.1 The Consultant shall employ and provide such qualified and experienced Personnel and Subconsultants as are required to carry out the Services.

39.2 The title, agreed job description, minimum qualification and estimated period of engagement in the carrying out of the Services of each of the Consultant's Key Personnel are described in Appendix III.

39.3 The Key Personnel and Subconsultants listed by title as well as by name in Appendix III are hereby approved by the Ngqushwa Local Municipality. In respect of other Key Personnel which the Consultant proposes to use in the carrying out of the

Services, the Consultant shall submit to the Ngqushwa Local Municipality for review and approval a copy of their biographical data and, in the case of Key Personnel to be assigned within the GoP, a copy of a satisfactory medical certificate attached as part of Appendix III. If the Ngqushwa Local Municipality does not object in writing; or if it objects in writing but fails to state the reasons for such objection, within twenty-one (21) calendar days from the date of receipt of such biographical data and, if applicable, such certificate, the Key Personnel concerned shall be deemed to have been approved by the Ngqushwa Local Municipality.

39.4 The Ngqushwa Local Municipality may request the Consultants to perform additional services not covered by the original scope of work but are determined by the Ngqushwa Local Municipality to be critical for the satisfactory completion of the Services, subject to **GCC** Clause 55.6.

39.5 No changes shall be made in the Key Personnel, except for justifiable reasons as may be determined by the Ngqushwa Local Municipality, as indicated in the **SCC**, and only upon prior approval of the Ngqushwa Local Municipality. If it becomes justifiable and necessary to replace any of the Personnel, the Consultant shall forthwith provide as a replacement a person of equivalent or better qualifications. If the Consultant introduces changes in Key Personnel for reasons other than those mentioned in the **SCC**, the Consultant shall be liable for the imposition of damages as described in the **SCC**.

39.6 Any of the Personnel provided as a replacement under **GCC** Clauses 39.5 and 39.7, the rate of remuneration applicable to such person as well as any reimbursable expenditures the Consultant may wish to claim as a result of such replacement, shall be subject to the prior written approval by the Ngqushwa Local Municipality. Except as the Ngqushwa Local Municipality may otherwise agree, the Consultant shall bear all additional travel and other costs arising out of or incidental to any removal and/or replacement, and the remuneration to be paid for any of the Personnel provided as a replacement shall not exceed the remuneration which would have been payable to the Personnel replaced.

39.7 If the Ngqushwa Local Municipality finds that any of the Personnel has committed serious misconduct or has been charged with having committed a criminal action as defined in the Applicable Law, or has reasonable cause to be dissatisfied with the performance of any of the Personnel, then the Consultant shall, at the Ngqushwa Local Municipality's written request specifying the grounds therefore, forthwith provide as a replacement a person with qualifications and experience acceptable to the Ngqushwa Local Municipality.

#### **40. Working Hours, Overtime, Leave, etc.**

40.1 Working hours and holidays for Key Personnel are set forth in Appendix III. Any travel time prior to and after contract implementation shall not be considered as part of the working hours.

40.2 The Key Personnel shall not be entitled to claim payment for overtime work, sick leave, or vacation leave from the Ngqushwa Local Municipality since these items are already covered by the Consultant's remuneration. All leaves to be allowed to the Personnel are included in the staff-months of service set forth in Appendix III. Taking of leave by any Personnel should not delay the progress and adequate supervision of the Services.

40.3 If required to comply with the provisions of **GCC** Clause 43.1 hereof, adjustments with respect to the estimated periods of engagement of Key Personnel set forth in Appendix III may be made by the Consultant by prior written notice to the Ngqushwa Local Municipality, provided that:

(a) such adjustments shall not alter the originally estimated period of engagement of any individual by more than ten percent (10%); and

(b) the aggregate of such adjustments shall not cause payments under this Contract to exceed the ceilings set forth in **GCC** Clause 52.1 of this Contract. Any other such adjustments shall only be made with the Ngqushwa Local Municipality's prior written approval.

## **41. Counterpart Personnel**

41.1 If so provided in Appendix III hereto, the Ngqushwa Local Municipality shall make available to the Consultant, as and when provided in such Appendix III, and free of charge, such Counterpart Personnel to be selected by the Ngqushwa Local Municipality, with the Consultant's advice, as shall be specified in such Appendix III. Counterpart Personnel shall work with the Consultant. If any member of the Counterpart Personnel fails to perform adequately any work assigned to such member by the Consultant which is consistent with the position occupied by such member, the Consultant may request the replacement of such member, and the Ngqushwa Local Municipality shall not unreasonably refuse to act upon such request.

41.2 The responsibilities of the Counterpart Personnel shall be specified in Appendix III, attached hereto, and the Counterpart Personnel shall not perform any work beyond the said responsibilities.

41.3 If Counterpart Personnel are not provided by the Ngqushwa Local Municipality to the Consultant as and when specified in Appendix III, and or if the Counterpart Personnel lack the necessary training, experience or authority to effectively undertake their responsibilities, the Ngqushwa Local Municipality and the Consultant shall agree on how the affected part of the Services shall be carried out, and the additional payments, if any, to be made by the Ngqushwa Local Municipality to the Consultant as a result thereof pursuant to **GCC** Clause 52 hereof.

## **42. Performance Security**

42.1 Unless otherwise specified in the **SCC**, within ten (10) calendar days from receipt of the Notice of Award from the Ngqushwa Local Municipality but in no case later than the signing of the contract by both parties, the Consultant shall furnish the performance security in any the forms prescribed in the **ITB** Clause 32.2.

42.2 The performance security posted in favor of the Ngqushwa Local Municipality shall be forfeited in the event it is established that the Consultant is in default in any of its obligations under the contract.

42.3 The performance security shall remain valid until issuance by the Ngqushwa Local Municipality of the Certificate of Final Acceptance.

42.4 The performance security may be released by the Ngqushwa Local Municipality and returned to the Consultant after the issuance of the Certificate of Final Acceptance subject to the following conditions:

- a) There are no pending claims against the Consultant or the surety company filed by the Ngqushwa Local Municipality;
- b) The Consultant has no pending claims for labor and materials filed against it; and
- c) Other terms specified in the **SCC**.

42.5 In case of a reduction of the contract value, the Ngqushwa Local Municipality shall allow a proportional reduction in the original performance security, provided that any such reduction is more than ten percent (10%) and that the aggregate of such reductions is not more than fifty percent (50%) of the original performance security.

### **43. Standard of Performance**

43.1 The Consultant shall perform the Services and carry out their obligations hereunder with all due diligence, efficiency and economy, in accordance with generally accepted professional techniques and practices, and shall observe sound management practices, and employ appropriate advanced technology and safe and effective equipment, machinery, materials and methods.

**43.2** The Consultant shall always act, in respect of any matter relating to this Contract or to the Services, as faithful advisers to the Ngqushwa Local Municipality, and shall



at all times support and safeguard the Ngqushwa Local Municipality's legitimate interests in any dealings with Subconsultants or third parties.

43.3 The Consultant shall furnish to the Ngqushwa Local Municipality such information related to the Services as the Ngqushwa Local Municipality may from time to time reasonably request.

43.4 The Consultant shall at all times cooperate and coordinate with the Ngqushwa Local Municipality with respect to the carrying out of its obligations under this Contract.

#### **45. Procurement by the Consultant**

If the Consultant, as part of the Services, has the responsibility of advising or procuring goods, works or services, for the Ngqushwa Local Municipality, the Consultant shall comply with any applicable procurement guidelines of the Funding Source, and shall at all times exercise such responsibility in the best interest of the Ngqushwa Local Municipality. Any discounts or advantages obtained by the Consultant in the exercise of such procurement responsibility shall be for the benefit of the Ngqushwa Local Municipality.

#### **47. Reports**

The Consultant shall submit to the Ngqushwa Local Municipality the reports, deliverables and documents in English, in the form, in the numbers, and within the time periods set forth in Appendix II.

#### **49. Access to Land**

The Ngqushwa Local Municipality warrants that the Consultant shall have, free of charge, unimpeded access to all lands in the property in respect of which access is required for the performance of the Services. The Ngqushwa Local Municipality shall

be responsible for any damage to such land or any property thereon resulting from such access and shall indemnify the Consultant and each of the Personnel in respect of liability for any such damage, unless such damage is caused by the default or negligence of the Consultant or any Subconsultant or the Personnel of either of them.

## **50. Subcontract**

50.1 Subcontracting of any portion of the Consulting Services, does not relieve the Consultant of any liability or obligation under this Contract. The Consultant will be responsible for the acts, defaults, and negligence of any subconsultant, its agents, servants or workmen as fully as if these were the Consultant's own acts, defaults, or negligence, or those of its agents, servants or workmen.

50.2 Subconsultants disclosed and identified during the bidding may be changed during the implementation of this Contract, subject to compliance with the required qualifications and the approval of the Ngqushwa Local Municipality.

## **51. Accounting, Inspection and Auditing**

51.1 The Consultant shall:

(a) keep accurate and systematic accounts and records in respect of the Services hereunder, in accordance with internationally accepted accounting principles and in such form and detail as shall clearly identify all relevant time changes and costs, and the bases thereof;

(b) permit the Ngqushwa Local Municipality or its designated representative and or the designated representative of the Funding Source at least once for short-term Contracts, and annually in the case of long-term Contracts, and up to one year from the expiration or termination of this Contract, to inspect the same and make copies thereof as well as to have them audited by auditors appointed by the Ngqushwa Local Municipality; and

(c) permit the Funding Source to inspect the Consultant's accounts and records relating to the performance of the Consultant and to have them audited by auditors approved by the Funding Source, if so required.

51.2 The basic purpose of this audit is to verify payments under this Contract and, in this process, to also verify representations made by the Consultant in relation to this Contract. The Consultant shall cooperate with and assist the Ngqushwa Local Municipality and its authorized representatives in making such audit. In the event the audit discloses that the Consultant has overcharged the Ngqushwa Local Municipality, the Consultant shall immediately reimburse the Ngqushwa Local Municipality an amount equivalent to the amount overpaid. If overpayment is a result of the Consultant having been engaged in what the Ngqushwa Local Municipality (or, as the case may be, the Funding Source) determines to constitute corrupt, fraudulent, or coercive practices, as defined in **GCC** Clause 27(e) and under the Applicable Law, the Ngqushwa Local Municipality shall, unless the Ngqushwa Local Municipality decides otherwise, terminate this Contract.

51.3 The determination that the Consultant has engaged in corrupt, fraudulent, coercive practices shall result in the Ngqushwa Local Municipality and/or the Funding Source seeking the imposition of the maximum administrative, civil and criminal penalties up to and including imprisonment.

## **52. Contract Cost**

52.1 Except as may be otherwise agreed under **GCC** Clause 10, payments under this Contract shall not exceed the ceiling specified in the **SCC**. The Consultant shall notify the Ngqushwa Local Municipality as soon as cumulative charges incurred for the Services have reached eighty percent (80%) of this ceiling.

52.2 Unless otherwise specified in the **SCC**, the cost of the Services shall be payable in Philippine Pesos and shall be set forth in the Appendix IV attached to this Contract.

## **56. Liquidated Damages for Delay**

If the Consultant fails to deliver any or all of the Services within the period(s) specified in this Contract, the Ngqushwa Local Municipality shall, without prejudice to its other remedies under this Contract and under the Applicable Law, deduct from the contract price, as liquidated damages, a sum equivalent to one-tenth of one percent of the price of the unperformed portion of the Services for each day of delay based on the approved contract schedule up to a maximum deduction of ten percent (10%) of the contract price. Once the maximum is reached, the Ngqushwa Local Municipality may consider termination of this Contract pursuant to **GCC** Clause 27.